

# FHCO AUDIT REVIEW REPORT

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Prepared after a review of the  
Fair Housing Council of Oregon  
City of Portland Audit

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## BACKGROUND

In April of 2010 the Fair Housing Council of Oregon (FHCO) proposed that the City of Portland (City) include an audit testing project as part of conducting its Analysis of Impediments to Fair Housing Choice (AI). FHCO originally proposed doing 85 tests, 55 over the phone and 30 on-site. FHCO proposed this project as a way of compiling more information to be used in guiding the City in identifying areas of discrimination that may currently exist but evade detection through the traditional method of analyzing complaint data. The City and FHCO ultimately agreed on a 50-test project with 25 to test race discrimination (African-American testers compared to white testers) and 25 to test national origin discrimination (Latino testers compared to White testers).

FHCO began testing in June of 2010 and concluded testing in December 2010. The results observed by FHCO showed that different treatment (of the protected-status tester as compared to the control tester) occurred in 15 of the race tests and 17 of the national origin tests. On February 25, 2011 FHCO submitted the results of the project to the City, and presented these results to the citizen committee that aided the City in conducting its Analysis of Impediments to Fair Housing.

## ASSIGNMENT

On September 3, 2011, FHCO contacted me to request that I conduct an independent evaluation of their 2010 audit testing project for the City of Portland. This report summarizes the results of my review; it is hereby submitted to the Board and staff of the FHCO.

I conducted a review of the rental testing conducted by the Fair Housing Council of Oregon for the City of Portland. I only reviewed the records for those tests in which FHCO identified evidence of potential discrimination; I did not review tests where FHCO found no evidence of different treatment. Specifically, I reviewed the records for test numbers:

POR 10001, POR 10003, POR 10008, POR 10011, POR 10012, POR 10013, POR 10015, POR 10018, POR 10019, POR 10020, POR 10021, POR 10022, POR 10023, POR 10024, POR 10025, POR 10026, POR 10031, POR 10032, POR 10033, POR 10035, POR 10036, POR 10037, POR 10039, POR 10043, POR 10046, POR 10051 and POR 10052.

I was asked by FHCO to thoroughly review and assess the process, record-keeping and protocol used to conduct the 2010 audit testing project for the City of Portland Housing Bureau. I also reviewed the analysis of the project by the Oregon Bureau of Labor & Industry (BOLI), the administrative agency responsible for enforcement of fair housing laws in Oregon.

## **QUALIFICATIONS**

I am an attorney and the Executive Director of HOPE Fair Housing Center in Wheaton, Illinois. My primary work is related to the provision of training and technical assistance on all aspects of the Fair Housing Act and other civil rights laws; overseeing investigations and enforcement related to the Fair Housing Act; and conducting education and outreach related to fair housing.

I have engaged in fair housing activities for over fifteen years, beginning with work as an investigator, test coordinator, trainer and attorney for HOPE Fair Housing Center. I also worked for the National Fair Housing Alliance (NFHA) as Director of Investigations & Enforcement.

With respect to the specific issues under consideration in this case, I have participated in both research-based and enforcement-based fair housing testing since 1996. From 1996 – 2001, I coordinated both enforcement- and compliance-based testing, which included test implementation, analysis and coordination with administrative agencies and attorneys in subsequent actions based on these tests. The tests included rental, real estate sales, mortgage lending and homeowners' insurance. My agency was involved in the 2000 HUD-funded "Housing Discrimination Study" that conducted sales and rental testing in a research-based project as the third national study of racial discrimination in the private market. After joining NFHA, I participated in the development of testing methodology for enforcement-based testing and oversaw testing for enforcement purposes of the rental and real estate sales entities that had been tested in the research project. Based on those enforcement results, NFHA filed more than ten administrative complaints in 2005 and 2006. Several of those complaints resulted in charges of discrimination filed by HUD, including one HUD Secretary-initiated complaint, and by the Michigan Department of Civil Rights.

Since 1996, I have reviewed and analyzed literally thousands of tests of all types of housing providers: rental agencies, real estate sales agents, lenders, and insurers. Those tests were conducted in a number of contexts. I often reviewed tests in my capacity both as NFHA's Director of Enforcement and HOPE's Director of Compliance because they were evidence in cases which I was evaluating after investigation to make a final recommendation on whether a case should be filed in federal court or with

an administrative agency. In some instances I reviewed tests before or during an investigation where there were issues that were national in scope or otherwise significant.

I have developed or participated in the development of testing methodologies for a number of different types of tests, including rental, sales, accessibility and insurance testing and testing for discrimination based on race, national origin, familial status, disability, sexual orientation and source of income. I have analyzed such tests and I have provided advice on whether or not an investigation should be conducted or litigation initiated based on those test results. I have trained test coordinators and hundreds of testers over the past 15 years.

At HUD's invitation, I spoke on testing issues at HUD's Regional Policy Conference in 2001. I have been an instructor at NFHA's Fair Housing Schools© for the past ten years. In addition, Professor Robert Schwemm wrote a report for the Urban Institute which was released in 1994. This report analyzed every fair housing case involving testing from 1968 – 1991. I have reviewed this report and the underlying cases. I also have reviewed every reported case that I have been able to identify which was based in whole or in part on fair housing testing from 1991 - 2009.

## SUMMARY OF EVALUATION

Upon review of the audit testing that was conducted by the FHCO, it is my expert opinion that:

1. The audit tests identified a significant number of instances of potential housing discrimination by identifying specific examples of differences in availability, terms and conditions of rental or treatment.
2. I concur with FHCO's assessment (as contained in the original audit report prepared for the City of Portland) that different treatment was evident in the tests for national origin discrimination. In the same report, FHCO identified tests for race discrimination showed different treatment; I concur.
3. The audit testing methodology utilized by FHCO for both phone and in-person testing is appropriate.
4. In general, FHCO's implementation, analysis and record-keeping methods were appropriate. However, FHCO made notable errors in summarizing the test results for POR10021 and POR10023. These errors were noted in BOLI's analysis of the audit results. I do not agree

with BOLI's assessment that these two tests should therefore be disregarded in their entirety; in spite of the noted errors, I found other indicators of different treatment contained within the test reports. However, these errors cause confusion and should have been avoidable. I recommend that FHCO enact additional review protocols to prevent such errors in the future.

5. I would have recommended follow-up testing in all of these cases to obtain more evidence and determine more conclusively whether the different treatment noted in these individual tests amounted to illegal discrimination. However, such follow-up was precluded by the public release of the landlords' names.
6. Fair housing audits are critical to measuring and ending housing discrimination, and I recommend that a new housing audit be conducted in Portland in 2012 (whether by FHCO or by another provider) to provide a new snapshot of the market and as a basis for further investigation and enforcement.

### **Definition and Purpose of Fair Housing Audit Testing**

Audit testing of housing practices to determine compliance with fair housing laws was pioneered by private fair housing organizations. Fair housing audit testing is a controlled method for measuring and documenting variations in the quality, quantity and content of information and services offered or given to various home seekers by housing or housing service providers. The result may reveal whether a housing provider is complying with fair housing laws.

For example, a test for racial discrimination in rental housing might involve sending both an African-American tester and a White tester, at about the same time, to an apartment building to inquire about the same or similar type of apartment. The two testers are generally matched on personal and home-seeking characteristics so that the only significant difference between them is their race. Upon completing his or her visit to the apartment building, each tester fills out a form and provides a detailed objective account of the test experience. Comparing the accounts of these test visits often makes it possible to identify and document differences in treatment, information and/or service that is being provided to each of the racially different home seekers.

Private fair housing organizations have been conducting tests of housing providers to determine compliance with the Fair Housing Act since the 1960s. As noted by the Department of Housing & Urban Development (HUD), the government agency charged with enforcement of the Fair

Housing Act, testing “is the most effective fair housing enforcement tool currently available and private fair housing organizations are best qualified to undertake testing.”<sup>1</sup> Fair housing testing evidence has routinely been accepted by courts of law, and paired testing is an accepted methodology that has been utilized for enforcement and research purposes for decades.<sup>2</sup>

An audit such as the one conducted by FHCO is generally the first step in an enforcement process, and in many cases, unless there is clear evidence of discrimination, additional investigation is generally required to determine whether different treatment amounts to discriminatory behavior.

It should be noted that, although scientific measures of the *level* of discrimination are not part of an audit such as that conducted by FHCO, distinct and observable *patterns* of behavior emerge from the numerous tests conducted. It is thus possible for FHCO to comment on the patterns of discriminatory behavior found across housing providers and geographic locations.<sup>3</sup> These patterns were distilled and identified in the FHCO report. Any specific follow-up testing or investigation FHCO might have done of housing providers, to develop additional evidence, was proscribed by the release of the identities of housing providers who might have been the subject of investigation.

## Review of the Tests

As noted above, I reviewed all of the tests FHCO conducted in which it found evidence of potential fair housing law violations. The methodology utilized by FHCO is appropriate for the audit rental testing conducted and meets industry standards. I conducted my own independent analysis of the tests

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<sup>1</sup>HUD Office of Policy Development & Research: “An Evaluation of the FHIP Private Enforcement Initiative Testing Demonstration” 1994, available through [www.hud.gov](http://www.hud.gov).

<sup>2</sup> The use of fair housing testing evidence has uniformly been accepted by the courts, including the US Supreme Court. See e.g. *Havens Realty Corp v. Coleman*, 455 U.S. 363, 373-374 (1982); *Wharton v. Knefel*, 562 F.2d 550, 554 (8th Cir. 1977) (stating the use of testers was commonplace); *United States v. Balistreri*, 981 F.2d 916, 924-25, 928-30 (7th Cir. 1992), *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1420-21 (11th Cir.); *Pollitt v. Bramel*, 669 F. Supp. 172, 174 (S.D. Ohio 1987); *Davis v. Mansards*, 597 F. Supp. 334, 338-42 (N.D. Ind. 1984); *Hobson v. George Humphreys, Inc.*, 563 F. Supp. 344, 348-50 (W.D. Tenn 1982); *United States v. Youritan Construction Co.*, 370 F. Supp. 643, 647, 656 (N.D. Cal 1973), aff’d as modified, 509 F.2d 623 (9th Cir. 1975).

<sup>3</sup> The audit conducted by FHCO is comparable to audits conducted by other fair housing organizations. Recent publicized audit results include a rental audit by the North Texas Fair Housing Center (see e.g. [http://www.northtexasfairhousing.org/north-texas-fair-housing-center\\_April-21st-press-event-and-open.blog](http://www.northtexasfairhousing.org/north-texas-fair-housing-center_April-21st-press-event-and-open.blog)), a telephone testing audit conducted by Fair Housing of Marin (see e.g. [http://www.marinij.com/sanrafael/ci\\_10540065](http://www.marinij.com/sanrafael/ci_10540065)), and a post-Katrina audit conducted by the National Fair Housing Alliance (see e.g. “No Home for the Holidays” <http://www.nationalfairhousing.org/FairHousingResources/ReportsandResearch/tabid/3917/Default.aspx>).

and am in substantial agreement with FHCO that these tests showed evidence of differences in availability, terms and conditions and/or service.<sup>4</sup>

While a few of the tests revealed facially discriminatory statements by housing providers (e.g. POR10035, POR10052) or differences in access or availability (e.g. POR 10013, POR10019, POR10021, POR10022, POR10025, POR10036), many of the tests had differences that are more subtle. For example, in test POR10032, the Latino tester was told that three different couples had already seen the unit. The White tester, who visited the unit after the Latino tester, was told that only one other person had looked at the unit. (A similar situation occurred with test POR10021.) Follow-up visits and/or additional tests might determine that the landlord was in fact *encouraging* the Latino tester to apply or *discouraging* the Latino tester by saying that another visitor had applied.<sup>5</sup>

There were other examples of differences that could have been followed up with additional visits or tests. Differences such as these, which may appear minor to those not involved in fair housing investigation, should be re-tested to confirm or rebut the differences that occurred in the first test. *Based on the number of tests where there were subtle differences, I would recommend that the City of Portland structure future audits to allow for follow-up visits, tests and/or full application tests.*

## **Issues Identified in Portland 2010 Audit**

### **1. Errors in Analysis**

FHCO's summaries of the tests did not always correctly identify the type of difference found in the underlying test documents. For example, the analysis for Test POR10023 indicates that the Latino tester was not offered a rent special, where the test narrative indicates that he was. However, the testing data indicate that the White tester was offered an additional rent special for a shorter lease and there were differences in the numbers of units available for the African-American, Latino and White testers. Because the underlying tests do document differences, the error in the analysis is not significant. I would recommend that FHCO have a second reviewer proof

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<sup>4</sup> While there were some errors in the analysis by FHCO (for example, for POR10023 the analysis indicates that the Latino tester was not offered a rent special while the test report and narrative indicates that he was), this is not relevant because there were other differences noted by me in my review and by FHCO. I would recommend that in future documentation, FHCO pay close attention to the details of the analysis.

<sup>5</sup>For example, in a similar test scenario from a case from HOPE Fair Housing Center, the protected class tester (an African-American female in this instance) followed up with a second visit expressing interest in applying. She was told the unit had been rented. When the White tester visited a short time later, she was told that the unit was still available. Only a follow-up visit elicited this additional evidence.

read its analyses and summaries in the future to ensure that this type of error doesn't occur.

## 2. Preclusion of Follow-Up Testing

Based on the preliminary test reports, for many of the tests, I would have recommended a follow-up visit or an additional test to provide additional evidence for a potential complaint. Similarly, in its preliminary review of the audit testing documents, BOLI notes that although none of the tests merited a commissioner-initiated complaint, several of the cases contained evidence of possible differential treatment that could be clarified through additional investigation<sup>6</sup> Unfortunately, the public release of the names of the housing providers makes such follow-up impossible.

Testing is designed to capture the normal business practices of housing provider. When housing providers are notified that they are the subject of an investigation, it is doubtful that they engage in their normal business practices. If the police department were doing a heightened enforcement of speeding, announcing the location of the heightened enforcement in advance and advertising it with neon flashing lights would presumably result in non-typical driver behavior. Many of the differences noted by FHCO were subtle and I would recommend that future testing projects allow for second visits by testers, follow-up testing and/or full application testing. I would also recommend that Portland follow up this audit with a program that is designed to conduct more in-depth testing and appropriate follow-up enforcement actions.

## 3. Insufficient Review of Underlying Test Evidence

The Oregon Bureau of Labor & Industry (BOLI), the State agency charged with enforcement of fair housing laws, also reviewed these tests. BOLI reviewed the tests to determine whether these tests met the standard of evidence required for agency-initiated complaints.

Because BOLI reviewed the tests from the standard of fact-based evidence to support a complaint, BOLI's analysis and determination not to pursue complaints based on a number of these tests is consistent with both the analysis conducted by FHCO and my own analysis. That is to say, although both FHCO and I noted differences in these tests, industry standards would dictate not filing administrative or court complaints based solely on the subtle evidence of differences noted in these particular pairs of tests, with

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<sup>6</sup>These tests are POR10019, POR10020 and POR10025. The BOLI report also identifies that POR10035 likely had sufficient evidence to merit a complaint without further investigation, and noted that a Commissioner complaint was not necessary because the City and FHCO were still within their statute of limitations to file a complaint themselves.

the exception of the tests where the housing providers made facially discriminatory statements (POR10035 and POR10052).

My review differs from BOLI's in that where BOLI found an error in the analysis, BOLI does not appear to have conducted further review of the underlying tests to determine whether additional differential treatment occurred. I reviewed the tests first and then compared my review to the FHCO analysis. In the two instances where FHCO made errors in the analysis, I agree with FHCO that the tests that they identified as evidencing differences did in fact evidence such differences, even if portions of the test were inaccurately summarized in FHCO's staff analysis. I disagree with BOLI that the error in the analysis should preclude a review of the underlying testing evidence.

### **Discussion: Same Agent Testing**

BOLI's assessment of the FHCO audit consistently asserts that, in tests where testers met with different agents, it is not reasonable to conclude that the difference in treatment was based upon a protected class. I disagree with this assessment.

The specific issue of same agent testing was addressed in the Urban Institute's 1992 publication, *Fair Housing Cases Involving Testing: A Legal Review of Reported Federal Court Decisions 1968 -1991*.<sup>7</sup> Under initial funding for the Fair Housing Initiatives Program (FHIP), HUD promulgated guidelines in the early 1990s that would have required same agent testing. That provision was subsequently removed from HUD's FHIP guidelines. The reported cases demonstrated only one instance where a judge expressed skepticism because the testers had not seen the same agent, *U.S. v. Mitchell*, 2 EOCH ¶ 13,766 (N.D. Tex. 1976), *aff'd* 580 F.2d 789 (5<sup>th</sup> Cir. 1978), but ultimately found for the Plaintiff. In addition to this article, I have reviewed all publicly available fair housing testing cases from 1991 – 2009, and all publicized 2010 and 2011 testing decisions, and am unaware of any case decisions that have required same agent testing. In fact, HUD does not require same agent testing in its research tests.

Ultimately, whether a unit is available for rent, the terms and conditions for rental and the application process and requirements should not change dependent upon which agent a potential renter sees. When different rental availability and/or terms and conditions are offered or provided by the

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<sup>7</sup> This publication is available upon request from the Urban Institute, [www.urban.org](http://www.urban.org), and the National Fair Housing Alliance is seeking permission to publish it on its website, [www.nationalfairhousing.org](http://www.nationalfairhousing.org).

landlord, or on behalf of a landlord, based upon race, color, religion, sex, national origin, disability or familial status, the Fair Housing Act is violated.

### **Discussion: Phone Testing**

FHCO conducted some of the tests in the 2010 audit by phone. This is consistent with fair housing audit testing methodology.

Federal Court and Administrative Law Judges have found evidence of fair housing act violations based upon transactions that occurred over the telephone.<sup>8</sup>

Almost all housing transactions these days begin with a phone call. Many people never even have an opportunity to see an apartment or house because some housing providers identify persons by race or ethnicity over the phone and refuse to do business with the callers. The methodology used by FHCO in its rental audit tests incorporated this behavior of “linguistic profiling” and utilized the research of linguistics expert John Baugh.<sup>9</sup> FHCO followed an appropriate methodology to capture evidence of differences in treatment based on race or national origin via the telephone.

### **Discussion: Fair Housing Audits as a Basis for Enforcement Action**

As noted by the Department of Justice (Justice) in an amicus brief filed in a Missouri federal district court case (*EHOC v. Gundaker*):

“Fair housing testing refers to the use of individuals who, without a bona fide intent to rent or purchase a home, apartment, or other dwelling, pose as prospective renters or purchasers for the purpose of gathering information which may indicate whether a housing provider is complying with fair housing laws. Testing is a simulation of a housing transaction for the purpose of comparing the responses given

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<sup>8</sup> See e.g. *City of Chicago v. Matchmaker Real Estate Sales Ctr*, 982 F.2d 1086 (7<sup>th</sup> Cir 1992)(finding that “the four agents treated the black testers worse than the white testers,” *id.* at 1096, based in part on the finding of the magistrate judge that the tester’s accent “as heard at trial, as well as her name, probably identified her as a black person.” *Id.* at 1092); *Heights Community Cong. V. Hilltop Realty, Inc.*, 774 F.2d 135 (6<sup>th</sup> Cir. 1985)(where the 6<sup>th</sup> Circuit affirmed, without discussing, the district court’s finding of another violation of the “otherwise make unavailable” provision based on an agent’s failure to return a black tester’s telephone call. *Id.* at 141 [the district court’s finding on this point is at 629 F.Supp. 1232, 1254 (N.D. Ohio 1983)]. *HUD v. Ross* (01-92-0466-8), decided 1994. In that case, the ALJ noted that the complainant and a Hispanic tester were indisputably Hispanic and that “their distinctive Hispanic accents clearly revealed their national origin to [Respondent].” A judge from the Northern District of Illinois Federal Court stated that the issue of whether or not the defendant could and did identify the race of the plaintiff over the phone is a fact question and he will leave it up to the trier of fact. *WILSON v. SOUCHET*, (No. 98 C 5948) 168 F. Supp. 2d 860;2001 U.S. Dist. LEXIS 4553 (N.D. IL).

<sup>9</sup>See e.g. Baugh, John, "Perceptual and Phonetic Experiments on American English Dialect Identification," (with Thomas Purnell and William Idsardi). *Journal of Language and Social Psychology*, Vol. 18 No. 1, pp. 10-30 (1999).

by housing providers to different types of homeseekers in order to determine whether unlawful discrimination is occurring. Since it is not always obvious to actual renters or home purchasers that they have been subjected to a discriminatory housing practice, such as being lied to as to the availability of housing, testing has become an important investigative tool in the enforcement of fair housing laws.

Fair housing testing evidence can be presented to the factfinder in many forms. Testers may testify about their recollections of their interaction with the agent or owner. Testing evidence can also be presented in the form of tape recordings of the conversation between a tester and an agent or owner, forms completed by the tester setting forth the facts of what happened during the test, and testimony from the testing coordinator explaining how the test was conducted. The testers do not provide expert testimony and do not offer their opinion. They merely provide an account of what occurred on the test and are no different than an eyewitness testifying about what they observed.

In this respect testers are no different than an undercover law enforcement agent or informant who poses as a participant in a transaction and provides testimony about their conversation and experience with a defendant.”<sup>10</sup>

Because testing is fact-based evidence admitted under evidentiary rules, testing may be considered admissible and more probative or less probative. As fact evidence, it is admissible unless to do so would violate Federal Rules of Evidence 402 and/or 403. The finder of fact in any case where testing evidence is offered may find testing evidence more credible or less credible, but a fact finder does not determine whether testing is “consistent” or whether the testing methodology followed “proper and consistent procedures for structuring” a test. The factfinder ultimately has the responsibility for determining whether there were differences in treatment, whether there is any explanation for the differences other than race or other protected-class status, and whether a defendant's non-discriminatory reasons for the differences are credible.

For purposes of enforcement testing, there may be one test or several tests, depending on the results of the testing. There is no minimum or maximum number of tests needed to establish a violation of the Fair Housing Act and no minimum or maximum number of tests that are required to establish some statistical notion of the incidence of discrimination. Instead, enforcement testing may be used to establish one or more elements of a

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<sup>10</sup> This amicus brief can be obtained at <http://www.justice.gov/crt/about/hce/documents/gundaker1.php>.

prima facie case of a violation, including establishment of an incident of discriminatory statement, or to show unequal treatment, to show that a defense offered by a defendant is pretextual, or to show the existence of a policy or practice that has a disparate impact on a protected class.

In essence, enforcement testing provides to observers a snapshot of the actual experience of applicants through the experience of persons who pose as homeseekers. The important focus is on the evidence that is collected through the testing experience.