

## OPINION NO. 69-042

**Syllabus:**

1. The Board of Trustees of The Ohio State University has the requisite authority to adopt the proposed Rules for the University Faculty -- 55.00. Open Housing, a copy of which is attached to this Opinion as an Appendix, upon a determination by the Board that such rules reasonably and not arbitrarily advance the Board's valid interests in housing facilities and non-discrimination with respect to the students at the University.

2. The proposed rules are outside the legal parameters of State and Federal laws with respect to certain owner-occupied dwellings insofar as the proposed rules treat discrimination based on religion or national origin, but within such parameters insofar as they treat discrimination based on race.

3. The Board of Trustees of The Ohio State University, as such,

does not have authority to supplement authority given in the Ohio Civil Rights Act.

---

**To: The Board of Trustees, Ohio State University, Columbus, Ohio**  
**By: Paul W. Brown, Attorney General, May 2, 1969**

I have before me your request for my opinion, forwarded through Mr. Edward Q. Moulton, Secretary of the Board, regarding the proposed Rules for the University Faculty -- 55.00. Open Housing. You have enclosed with your request a copy of these proposed rules. For reference purposes and since my opinion is requested with respect to such rules, I am attaching a copy of the proposed rules to this Opinion as an Appendix.

Your request for my opinion contains three questions: (1) "whether the Board has the requisite authority to adopt the enclosed rules," (2) "whether said rules are within the legal parameters of existing State and Federal Laws and" (3) "whether the University Board of Trustees has the authority under the Constitution and Laws of the State to supplement the authority given in the Ohio Civil Rights Act."

The Ohio State University, originally named the Ohic Agricultural and Mechanical College, was created by the Legislature through an act passed on March 22, 1870. 67 Ohio Laws, 20. The pertinent provisions of this act relating to the powers of the Board of Trustees are as follows:

"\* \* \* \* \*"

"Sec. 2. The government of said college shall be vested in a board of trustees, \* \* \*

"\* \* \* \* \*"

"Sec. 5. The board of trustees shall have power to adopt by-laws, rules and regulations for the government of said college; \* \* \*

"\* \* \* \* \*"

The powers originally granted to the Board of Trustees have remained undiminished since the inception of the University. Sections 3335.02 and 3335.08, Revised Code, provide, respectively, that "[t]he government of the Ohio state university shall be vested in a board of nine trustees, \* \* \*" and that "[t]he board of trustees of the Ohio state university may adopt bylaws, rules, and regulations for the government of the university."

In Pyeatte v. Board of Regents of University of Oklahoma, et al., 102 F. Supp. 407 (1951), affirmed per curiam 342 U.S. 396, in sustaining a resolution of the Board of Regents of the University of Oklahoma requiring that all undergraduate students of that University,

with certain exceptions, be required to live in university-operated housing, the Court had occasion to consider an Oklahoma statute much like Section 3335.08, supra. At 102 F. Supp. 413, the Court stated:

"\* \* \* The term 'government' is very broad and necessarily includes the power to pass all rules and regulations which the Board of Regents considers to be for the benefit of the health, welfare, morals and education of the students, so long as such rules are not expressly or impliedly prohibited. Rheam v. Board of Regents of University of Oklahoma, 161 Okl. 268, 18 P. 2d 535.

"\* \* \* \* \* \* \* \*"

The powers of the Board of Trustees of The Ohio State University are no less broad than the powers of the board involved in the Pyeatte case, supra. As the Court stated in that case, at 102 F. Supp. 415:

"The state has a decided interest in the education, wellbeing, morals, health, safety and convenience of its youth."

In another case, which has bearing on the issues considered in this Opinion, it was recognized that the governing body of a state university "can validly impose a wide variety of regulations." Sigma Chi Fraternity v. Regents of the University of Colorado, 258 F. Supp. 515 (1966), at 526. In that case, a social fraternity was placed on probation, with loss of rushing and pledging privileges, because the national fraternity with which it was affiliated had suspended a Chapter on a different campus for pledging a Negro student. The Court in the Sigma Chi case, supra, upheld the action of the Regents of the University of Colorado in placing the local Chapter of the fraternity on probation.

The Court stressed the point that the interest of the Regents that was being advanced was not invalid and stated, at page 527:

"Indeed, the Supreme Court of the United States has in recent years recognized the importance of elimination of racial discrimination in educational institutions."

Based upon the lines of authority represented by Pyeatte, supra, and Sigma Chi, supra, it seems clear that the governing body of a state university has a valid and continuing interest in the issues of housing facilities for students and non-discrimination with respect to students. It follows that the Board of Trustees of The Ohio State University, under its specific rule-making authority (Section 3335.08, Revised Code), has the power and authority to adopt and promulgate rules advancing its interest in these issues, with

accompanying sanctions to be imposed against students who do not abide by such rules. See also, in this respect only, State, ex rel. Weaver v. Board of Trustees of Ohio State University, 126 Ohio St. 290 (1933).

Having arrived at the conclusion that it is within the authority of the Board to enact rules to advance the Board's substantial interest in housing facilities and non-discrimination and in order to answer your question, i.e., "authority to adopt the en-closed" Rules (See Appendix), it is necessary to determine the tests to be applied. The Weaver case, supra, referred to rules which are "reasonable" and "not arbitrary." The Court in the Sigma Chi case, supra, refers to action which is not "an excessive use of power." Perhaps the most explicit statement of the test was made by the Court in the Pyeatte case, supra, at page 415:

"If there is any state of facts which tends to support the regulatory measures and such measures are not clearly unreasonable or arbitrary, then the \* \* \* regulation will be upheld as being constitutional."

The answer to your question, based upon the foregoing, lies in the application of the above tests to the proposed rules. If the Board of Trustees determines that the proposed rules will advance the interests of the Board in housing facilities and non-discrimination with respect to students at the University and, in view of the degree of gravity and extent of the problem based upon their factual knowledge or factual knowledge available to them, determines that the proposed rules are reasonable and not arbitrary in dealing with the problem, then the Board has the requisite authority to adopt the proposed rules (as set out in the Appendix).

Although you have not asked my opinion regarding the application of the proposed rules, I feel compelled to add a caveat in respect to the application at this point. The proposed rules, with respect to its application to students provides only that (See 55.02. f., Appendix):

"Any charge that a student has violated this rule shall be subject to a hearing, in conformity with due process, by the appropriate tribunal charged with the adjudication of violations of University rules."

The most recent and governing court decisions on the rights of students whose right to remain in school is questioned have recognized the applicability of constitutional due process. The leading case in this area is St. John Dixon, et al. v. Alabama State Board of Education, et al., 294 F. 2d, 150 (1961). Since it is now recognized that students are entitled to the constitutional guarantee of due process, and since the above quoted portion of the proposed rules do not specify the steps necessary to protect that substantial guarantee, the Board of Trustees should consider the procedures to

be followed to insure that this fundamental right of students guaranteed by both the United States and Ohio Constitutions is adequately protected.

The rules appear to me to be extremely broad. Certainly the proposed rules are so much broader than the problem they seek to cure that I foresee difficulties in administration. These difficulties may lead to disappointment of the proponents of the rules when they later evaluate its results as opposed to their expectations.

The answer to your second question regarding whether or not the proposed rules are within the parameters of existing State and Federal laws presents a paradox in the present state of the law. Section 55.02. (a)(1) of the proposed rules (See Appendix) reads as follows:

"No student shall become a resident of any premises (whether registered or unregistered with the University) which is on the discriminatory housing list, as defined in subsection d. This section shall not apply to students living with their parents."

Section 4112.01, Revised Code, which is part of the Ohio Civil Rights Act, provides in pertinent part as follows:

\* \* \* \* \*

"(J) 'Housing accommodations' includes any building or structure or portion thereof which is used or occupied or is intended, arranged, or designed to be used or occupied as the home residence or sleeping place of one or more individuals, groups, or families whether or not living independently of each other; and any vacant land offered for sale or leased for commercial housing.

"(K) 'Commercial housing' means housing accommodations held or offered for sale or rent by a real estate broker, salesman, or agent, or by any other person pursuant to authorization of the owner, by the owner himself, or by legal representatives, but does not include any personal residence offered for sale or rent by the owner or by his broker, salesman, agent, or employee.

"(L) 'Personal residence' means a building or structure containing living quarters occupied or intended to be occupied by no more than two individuals, two groups, or two families living independently of each other and occupied by the owner thereof as a bona fide residence for himself and any members of his family forming his household. If a personal residence is vacated by the owner it shall continue to be considered

owner-occupied until occupied by someone other than the owner or until sold by the owner, whichever occurs first.

" \* \* \* \* \* \* \* \* "

Title 42, United States Code, Section 3603, which is part of the Federal Civil Rights Act of 1968, provides in pertinent part as follows:

" \* \* \* \* \* \* \* \* "

"(b) Nothing in section 3604 of this title (other than subsection (c) shall apply to -

"(1) any single-family house sold or rented by an owner: Provided, That such private individual owner does not own more than three such single-family houses at any one time: Provided further, That in the case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period: Provided further, That such bona fide private individual owner does not own any interest in, or is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of, more than three such single-family houses at any one time: Provided further, That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this sub-chapter only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 3604 (c) of this title; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title, or

"(2) rooms or units in dwellings containing living quarters occupied or intended to be occu-

pied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

"(c) For the purposes of subsection (b) of this section, a person shall be deemed to be in the business of selling or renting dwellings if -

"(1) he has, within the preceding twelve months, participated as principal in three or more transactions involving the sale or rental of any dwelling or any interest therein, or

"(2) he has, within the preceding twelve months, participated as agent, other than in the sale of his own personal residence in providing sales or rental facilities or sales or rental services in two or more transactions involving the sale or rental of any dwelling or any interest therein, or

"(3) he is the owner of any dwelling designed or intended for occupancy by, or occupied by, five or more families."

It should be noted that the word "family," as used in the foregoing Federal statute, is defined by Section 3602(c) thereof to include a single individual.

As is evident, both the Federal and State statutes relating to fair housing exempt certain partially owner-occupied premises from their respective operations under stated conditions. The proposed rule, in effect, does not, and in that sense is outside the parameters of the statutes in question.

In 1968, however, the Supreme Court of the United States decided the case of Jones v. Mayer Co., 392 U.S. 409; 20 L. Ed. 2d, 1189. The case arose as a result of the refusal of the Mayer Co. to sell a home to petitioner Jones for the sole reason that petitioner Jones was a Negro. The Court, in deciding in favor of petitioner Jones, grounded its decision on an 1866 statute, 42 U.S.C., Sec. 1982, which reads as follows:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

(Emphasis supplied)

The Court went to great lengths to point out that Section 1982, supra, was not a comprehensive "open housing" law and distinguished its operation from the recently enacted Civil Rights Act of 1968, supra, on the grounds that Section 1982, supra, dealt only with racial

discrimination and not with discrimination on the grounds of religion or national origin. In addition, the Court pointed out that it did not deal "specifically" with discrimination in connection with the sale or rental of a dwelling. The Court did hold, however, at 20 L. Ed. 2d, 1192, as follows:

"We hold that §1982 bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment."  
(Emphasis by the Court)

Thus the paradox in answer to your second question. The proposed rule is beyond the parameters of Federal and State laws insofar as it treats discrimination on the basis of religion or national origin regarding certain owner-occupied dwellings, but within the parameters of Federal (and necessarily State) law insofar as it treats discrimination on the basis of race.

In addition to the paradox raised by your second question, I have serious concern over the application of the proposed rule to homeowners in the University area who are subject to its application. These citizens, like the students, are entitled to the full measure of protection of the constitutional guarantees of due process. The proposed rules contemplate charges brought by University officials or students to be investigated by the Special Assistant for Student Affairs, using student investigators, with charges, if any, being brought before a Panel consisting of six faculty members and five students. (See 55.03. and 55.04. Appendix).

It may be that such a procedure and such a Panel will not result in the protection of the fundamental rights of a homeowner against whom a complaint is lodged. No court has directly ruled on the issue with respect to a rule such as that proposed, however. I am constrained to point out that the State of Ohio, through its legislative branch, has established a Civil Rights Commission (Section 4112.03, Revised Code), with more than ample power and authority to carry out the investigative and hearing functions contemplated by the rules. There is little question as to protection of constitutionally guaranteed rights of individuals in the operation of the Commission. It is objective and not directly related to the University in its operation. The Commission and its operation have already been recognized as constitutional, at least sub silentio, by the courts of this State. See Gegner v. Graham, 1 Ohio App. 2d, 422 (1964). Finally, the orders of the Commission are, by law, subject to judicial review. Section 4112.06, Revised Code.

The lengths to which the State has gone to foster non-discrimination, while protecting the rights of all citizens, and the machinery established for accomplishing those aims should be considered by the Board before adopting the proposed rules, at least with respect to the methods established by such rules for investigating and hearing complaints. As previously stated, the rights of the individual homeowners subject to the proposed rules are no less important than those of the students at the University.

Your third question refers to the authority of the Board of Trustees to "supplement the authority given in the Ohio Civil Rights Act." The only "authority given" in the Ohio Civil Rights Act (Sections 4112.01 to 4112.99, Revised Code,) is given to the Ohio Civil Rights Commission (Sections 4112.04, et seq., Revised Code,) with respect to enforcing the Act, and to common pleas courts. (Section 4112.06, Revised Code,) with respect to judicial review of orders of the Commission. Since no authority is given to the Board of Trustees of The Ohio State University, as such, under the Ohio Civil Rights Act, it follows that the Board has no authority to "supplement the authority given." In addition, any such supplementation would be a matter for the General Assembly, in whom the legislative power of the State of Ohio is vested. Article II, Section 1, Constitution of Ohio.

Accordingly, it is my opinion and you are hereby advised:

1. The Board of Trustees of The Ohio State University has the requisite authority to adopt the proposed Rules for the University Faculty -- 55.00. Open Housing, a copy of which is attached to this Opinion as an Appendix, upon a determination by the Board that such rules reasonably and not arbitrarily advance the Board's valid interests in housing facilities and non-discrimination with respect to the students at the University.

2. The proposed rules are outside the legal parameters of State and Federal laws with respect to certain owner-occupied dwellings insofar as the proposed rules treat discrimination based on religion or national origin, but within such parameters insofar as they treat discrimination based on race.

3. The Board of Trustees of The Ohio State University, as such, does not have authority to supplement authority given in the Ohio Civil Rights Act.

#### APPENDIX

##### Rules for the University Faculty

The Faculty Council on March 11, 1969, approved the following proposed new section to the Rules for the University Faculty--55.00. Open Housing, upon the recommendation of the Committee on Rules. These rules will be included in the reprinted copy of the Rules for the University Faculty upon approval by the Board of Trustees.

##### 55.00. Open Housing

###### 55.01. The Open Housing Policy.

It is the policy of The Ohio State University that rental housing be available to all of the University's students on equal terms without regard to race, religion, color, or national origin.

## 55.02. The Open Housing Rule.

- a. (1) No student shall become a resident of any premises (whether registered or unregistered with the University) which is on the discriminatory housing list, as defined in subsection d. This section shall not apply to students living with their parents.
- (2) Upon a finding by the appropriate tribunal that a student has violated this subsection, with knowledge that the premises are on the discriminatory housing list, he shall be liable to recorded probation or suspension.
- b. (1) If a student becomes a resident of any premises (whether registered or unregistered with the University) which is on the discriminatory housing list without knowledge of that fact he shall not continue his residence therein for more than thirty days after he received notice to vacate from the Office of the Vice President for Student Affairs unless he is bound by a lease for a longer time, in which case he shall not continue his residence therein beyond the term required by such lease. The prohibition of this subsection does not apply to a student who resides in the premises at the time of the finding of discrimination, and who remains in the same unit.
- (2) Upon a finding by the appropriate tribunal that a student has violated this subsection, he shall be liable to recorded probation or suspension.
- c. (1) No student shall enter into any arrangement to become a resident of any premises (whether registered or unregistered with the University) which is on the discriminatory housing list.
- (2) Upon a finding by the appropriate tribunal that a student has violated this subsection, with knowledge that the premises are on the discriminatory housing list, he shall be liable to recorded probation or suspension.
- d. The discriminatory housing list shall consist of those premises which the Open Housing Panel has ordered to be placed on such list for the periods prescribed pursuant to Rule 55.06.
- e. A student is a person who is registered for course credit toward a University degree or who is seeking housing in preparation for registration and candidacy.
- f. Any charge that a student has violated this rule shall

be subject to a hearing, in conformity with due process, by the appropriate tribunal charged with the adjudication of violations of University rules.

55.03. The Open Housing Panel.

The Open Housing Panel shall consist of:

Six faculty members selected by vote of the Faculty Council, at least one of whom shall be a member of the Faculty Council;

Three undergraduate student members selected by vote of the Student Assembly;

One graduate student member selected by vote of the Council of Graduate Students;

One professional student member selected by vote of the Professional College Council.

Faculty members of the Open Housing Panel shall be designated for a term of two years. The initial Panel shall decide by lot which three faculty members shall serve for a one-year term so that three positions will become vacant each year. Student members of the Panel shall serve for a term of one year. Faculty and student members may serve successive terms.

Vacancies shall be filled in the same manner that the position which has become vacant was filled; those appointed to fill vacancies shall serve out the term of the member they are replacing.

The Open Housing Panel shall elect its own chairman and such other officers as the members deem appropriate. The Panel shall keep a record of each case consisting of a brief description of the facts, the decision (including any concurring or dissenting opinion), and the vote of each member. These case records shall be filed with the Vice President for Student Affairs, who shall maintain them, and make them available to the Panel, parties, and the public at reasonable times in accordance with a published schedule.

The Open Housing Panel shall adopt its own rules of procedure not inconsistent with these provisions.

55.04. Complaints.

- a. Any student, the Vice President for Student Affairs, or the Director of Housing may lodge a complaint that an owner, landlord or the authorized agent of either has discriminated in the rental of housing to students on the grounds of race, religion, color or national origin with the Office of the Special Assistant for Student Affairs within six months of the alleged act of discrimination.

- b. The complaint shall contain a statement of the acts alleged to constitute the discrimination.
- c. The Special Assistant shall use student investigators for the purpose of determining whether owners, landlords, or their authorized agents discriminate on the grounds of race, religion, color, or national origin in the rental of housing.

55.05. The Hearing.

- a. Upon receipt of a complaint, the Special Assistant shall:
  - (1) Request the Open Housing Panel to convene a public hearing to determine whether the named owner, landlord, or an agent of either, discriminated against the University's students in the rental of housing on the basis of race, religion, color, or national origin.
  - (2) Serve by registered mail upon the landlord, owner, or authorized agent in charge of the premises a copy of the complaint and of this rule.
- b. The Special Assistant or the complainant may present evidence material to a determination of the charges and cross-examine witnesses, with or without the aid of counsel, at a hearing convened for the purpose by the Panel.
- c. The Open Housing Panel shall, on the written request of the Special Assistant, conduct a public hearing no earlier than ten days after the making of the complaint and its notice of hearing to the Special Assistant, the complainant, and the party charged with discrimination, who shall be advised of his right to appear, to be represented by counsel, to present witnesses, and to cross-examine witnesses who testify.

55.06. Findings.

After considering only the evidence admitted at the hearing, the Open Housing Panel shall determine whether the owner, landlord, or the authorized agent of either of them has refused to rent on equal terms without regard to race, religion, color, or national origin to all of the University's students. A refusal to rent shall include those situations where the owner, landlord, or authorized agent refuses to rent premises to a student who is gathering evidence to determine whether the owner, landlord, or authorized agent discriminates within the meaning of this rule.

If the Open Housing Panel finds by a preponderance of the evidence that there has been such a discriminatory refusal to rent, it shall enter a determination that the premises be placed on the discriminatory housing list.

Any premises placed on the discriminatory housing list shall remain on the list for the period prescribed by the Open Housing Panel, but it shall not be less than one year nor more than three years. However, in extreme circumstances, the Panel may prescribe a period of less than one year provided that its reasons are included in the record provided for in Rule 55.03. No premises shall be removed from the discriminatory housing list until:

- (a) the period prescribed by the Open Housing Panel has ended,
- (b) a written pledge of compliance with this rule has been received from the landlord or owner of the premises, and (c) with reference to premises which are rented through an agent, (i) the owner or landlord has given the agent written instructions to comply with this rule, (ii) has submitted a copy of said instructions to the Open Housing Panel, (iii) has received the Open Housing Panel's approval of such instructions, and (iv) has pledged in writing to give such approved written instructions to all future agents.

If the Panel finds that the landlord or owner has breached a pledge previously given under this section the premises shall be placed on the discriminatory housing list for a period of not less than three years.

#### 55.07. The Discriminatory Housing List.

The Vice President for Student Affairs, upon receipt of a decision of discrimination by the Open Housing Panel shall place the premises wherein the discrimination took place on the discriminatory housing list. He shall also notify the owner or landlord of the premises that none of the University's students will be permitted to become residents of or make any arrangement to become a resident of the building for the period of time determined by the Open Housing Panel.

Any owner or landlord, or authorized agent who knowingly rents or enters into any arrangement to rent housing to a student in premises which he has been notified are on the discriminatory housing list shall, after a hearing establishing this fact, have the term of listing extended for three additional years. A complaint of violation of this section shall be processed in accordance with Rules 55.04, and 55.05.

#### 55.08. Notice.

The discriminatory housing list, divided by geographical area, shall be published periodically in the Lantern, and shall be included in the registration materials of every student together with a copy of this rule.

A copy of this rule shall be conspicuously published in a newspaper of general circulation at least five times during the month preceding the commencement of each quarter. A copy of this rule shall also be sent or delivered to each landlord who is known to the University to have student tenants in Franklin County.

The Lantern shall not accept or print any advertisement for rental of any building on the discriminatory housing list.