

COOK COUNTY COMMISSION ON HUMAN RIGHTS
69 West Washington, Suite 3040
Chicago, Illinois 60602

Juan and Sara MIRANDA, Complainants)	
)	
)	Case No. 2014H001
v.)	
)	
Aneta PESCATORE and Iryna HUTNYK,)	Entered: February 18, 2015
Respondents)	
)	
)	

ORDER DENYING REQUEST FOR RECONSIDERATION

After investigating their claim, the Cook County Commission on Human Rights (“Commission”) dismissed a complaint filed by Juan and Sara Miranda (“the Mirandas”) for lack of substantial evidence of a violation of the Cook County Human Rights Ordinance (“Human Rights Ordinance”) on October 16, 2014. The Mirandas had alleged source-of-income discrimination by Respondent Aneta Pescatore (“Pescatore”), the seller of a house that the Mirandas had tried (and failed) to purchase with an offer financed by a Veterans Administration-guaranteed home loan (“VA-Guaranteed Loan”). The Mirandas also alleged that Respondent Iryna Hutnyk (“Hutnyk”), Pescatore’s realtor (collectively with Pescatore, “Respondents”), unlawfully aided and abetted Pescatore’s violation of the Human Rights Ordinance.

The Commission’s investigation found that Hutnyk had aggressively attempted to get the Mirandas to increase their offer, but that Pescatore ultimately accepted a competing offer on the house that put more money in her pocket. *Miranda v. Pescatore, et al.*, 2014H001, *2-3 (CCHRC Oct. 16, 2014) (“Dismissal Op.”).¹ In dismissing the Mirandas’ complaint, the Commission reasoned that Pescatore’s proffered motivation for not selling to the Mirandas – maximizing her financial gains, minimizing her costs, and maximizing the certainty of closing quickly – was un rebutted, and the evidence to support an unlawfully discriminatory basis for her decision was insufficient. *See id.* at *4-5. Further, the Commission determined that the characteristics of a VA-Guaranteed Loan rendered it outside the category of protectable “sources of income,” as that phrase is used in the Human Rights Ordinance. *See id.* at *5-8.

In bringing this motion for reconsideration on November 12, 2014, the Mirandas primarily attacked the Commission’s alternative holding.² Specifically, the Mirandas criticize the Commission’s examination of the term “income” in determining what the County Board of

¹ A full recitation of the facts and allegations is set forth in the Dismissal Opinion.

² The Mirandas request for reconsideration is timely. *See* CCHRC Pro. R. 480.100(A). According to the certificate of service for the Mirandas’ motion, counsel for Respondents was served but did not respond within 21 days nor, to this date, ever requested an extension of time to submit responsive briefing. By rendering this order, the Commission has determined that Respondents have forfeited their right to respond to the Mirandas’ motion.

Commissioners meant to include (or exclude) from the protected category called “source of income.” Motion to Reconsider (“Req.”), pp. 1-6. However, the Mirandas offer no reason to reconsider the Commission’s primary factual finding that Pescatore’s decision not to sell the house to the Mirandas was based on the economics of the four competing offers that Pescatore had received on the house. *Id.* at p. 8. Instead, the Mirandas now stake their entire claim of unlawful housing discrimination on Hutnyk’s September 18, 2013 suggestion that the Mirandas should have increased their offer because their financing was from a VA-Guaranteed Loan – claiming that this statement alone was a violation, even though Pescatore ultimately had a non-discriminatory reason for rejecting their offer. *Id.* at pp. 6-8. After considering each of the Mirandas’ arguments below, the Commission now denies their request for reconsideration and reaffirms its order of dismissal in this matter.

DISCUSSION

1. A VA-Guaranteed Loan is Not a “Source of Income”

Prior to this case, the Commission had never been asked to determine whether any type of loan, let alone a VA-Guaranteed Loan, was a “source of income” within the meaning of the Human Rights Ordinance. In this case of first impression, the Commission included in its analysis a review of how a wide range of legal sources describe “income.” This analysis identified two consistently recognized characteristics, and so the Commission opined that sources of income protected against unlawful discrimination by the Human Rights Ordinance must consist of: “(1) payments, typically to the person claiming such payments as income, (2) of a non-temporary nature (*i.e.* once given, the payments permanently belong to the recipient).” Dismissal Op., *5. The Commission concluded that “[a] loan that must be repaid, whether conventional or VA-Guaranteed, lacks these indicia of income and is more properly characterized as a debt than a source of income.” *Id.* The Commission then explained how VA-Guaranteed Loans are different from the most relevant precedent, several source-of-income decisions by the City of Chicago’s Commission on Human Relations (“the Chicago Commission”) interpreting the Chicago Fair Housing Ordinance, an ordinance that contains a definition of “source of income” that is identical to that used in the County ordinance. *Id.* at *6-8 (analyzing precedent cited by Mirandas).

The Mirandas contend on reconsideration that the Commission fundamentally misconstrued the definition of “source of income” in the Human Rights Ordinance, *i.e.* “the lawful manner by which an individual supports himself or herself and his or her dependents.” Req., p. 1 (quoting County Code, § 42-38(a)). Specifically, the Mirandas claim that the Commission erred by considering the legal meaning of “income” because the word “income” does not appear in the Ordinance’s definition of “source of income.” Req., pp.1-3. Quoting from statutes and ordinances that do use the term “income” or “payments” when defining “source of income,” the Mirandas argue that if the Cook County Board of Commissioners had wanted to define the phrase to incorporate the meaning of income, it could have done so. *Id.* at pp. 2-3 (citations omitted).

The Mirandas’ argument, though admirably lawyerly, is founded on the inaccurate assumption that the terms “income” and “lawful manner of support” express two clearly distinguishable and unrelated concepts. This is not so. In common usage, the word “support” is

used to describe the same non-temporary payments that the Commission recognizes as “income.” To give just two examples, “spousal support” is money paid irrevocably by one ex-spouse to the other and taxable as income by the recipient. *See, e.g., In re Marriage of Sharp*, 369 Ill. App. 3d 271, 280-81 (2d Dist. 2006). Further, “support” also describes welfare payments made by the government without the expectation of repayment. *See, e.g., McCutcheon v. Robinson*, No. 95-H-84 (Chicago Commission May 20, 1998) (public aid income).

While it is true that something may be a “lawful manner of support” without being “income,” this does not render the Commission’s interpretation of the phrase “source of income” in the Human Rights Ordinance to exclude loans arbitrary and capricious. To illustrate, there is no law against trading goods and services for one another without the exchange of currency, and so barter is arguably a lawful manner by which an individual could support him or herself. *See, e.g., Eric Spitznagel, “Rise of the Barter Economy,” Business Week* (Apr. 26, 2012), online at <http://www.bloomberg.com/bw/articles/2012-04-26/rise-of-the-barter-economy> (visited Jan. 20, 2015) (estimating the barter economy at \$12 billion). Similarly, there is a growing category of individuals right here in Cook County who trade with one another using alternative currencies. *See Juan Perez, Jr., “Bitcoin? There’s an ATM For That,” Chicago Tribune* (July 28, 2014), online at <http://my.chicagotribune.com/#section/-1/article/p2p-80926134/> (visited Jan. 20, 2015). Nonetheless, it would be unreasonable for the Commission to interpret the source of income protection in the Human Rights Ordinance as intended to require Cook County home sellers to accept juggling lessons and bitcoins on the same terms and conditions as U.S. dollars in residential real estate transactions.

The Commission must look at the ambiguous phrase “lawful manner of support” and give those words sufficiently specific meaning to decide the cases before it. The Mirandas’ argument that the Commission cannot look to the more specific term “income” to assist in that interpretative task turns the ordinary rules of statutory interpretation on their head. While it is true that if an ordinance provides specific terms, those specifics provide the contours of an agency’s decision-making authority, it does not follow that where an ordinance uses broad terms that an agency cannot provide criteria to guide future interpretations and decide that individual cases fall outside of that inchoate written definition.

The interpretation that the Commission settled on in this matter – that a protectable source of income is a payment of a non-temporary nature, which excludes conventional and VA-Guaranteed loans – fits the precedent presented to the Commission. This includes two Chicago Commission cases relied on by the Mirandas: *Pierce v. New Jerusalem Christian Devel. Corp.*, CCHR No. 07-H-12/13 (Feb. 16, 2011), and *Small v. Univ. Village et. al.*, CCHR No. 03-H-4 (Aug. 21, 2003). The government home-purchase programs at issue in those cases could meet the Commission’s definition of source of income. Both cases involved payments that were, in effect, non-temporary in nature.³ *See Dismissal Op.*, pp. 6-8 (distinguishing home-purchase

³ The additional case presented in the Mirandas’ Request for Reconsideration is one that Complainants’ characterize as atypical. *Req.*, pp. 4-5. But *Adams v. Chicago Fire Dept.*, 92-E-72 (Chicago Commission Oct. 14, 1993), simply recognized that a fireman’s second job, consisting of non-temporary paychecks, is a “source of income.” While the specific facts of that case are unusual, the holding, and the kind of “income” at issue, are not. Nor, however, is a case about ordinary earned income helpful in persuading the Commission to treat a conventional or VA-Guaranteed loan as a protected source of income.

vouchers (*Price*) and purchase price assistance in the form of a fully-forgivable loan (*Small*) from VA-Guaranteed Loans). In contrast, VA-Guaranteed Loans do not include any payments to the veteran-borrower (payments are made only to lenders, and only in the rare case of a default and foreclosure) and do require repayment in full and with interest. The Mirandas were unable to produce a single case, from any court or agency in the country, stating that VA-Guaranteed Loans should be treated as a protected source of income.

Instead, the Mirandas rely heavily on *Godinez v. Sullivan-Lackey*, 352 Ill. App. 3d 87 (1st Dist. 2001) (upholding the Chicago Commission’s decision that Section 8 housing vouchers are a “source of income” under the City Ordinance’s identical definition for “source of income”). Req., pp. 3-4. The Mirandas emphasize that the *Godinez* court did not examine the definition of “income,” but instead recognized that the definition of “source of income” is broadly inclusive because it “does not elaborate on *what means* are included within the lawful manner of support.” *Id.* at p. 4 (quoting *Godinez*, 352 Ill. App. 3d at 91) (emphasis supplied in the Request). But rather than forcing the Commission to reconsider its order of dismissal, *Godinez* actually supports the Commission’s original decision in this matter. In *Godinez*, the Illinois appellate court reversed the trial court, criticizing the trial court for “discount[ing] the [Chicago] Commission’s interpretation” of the Chicago Human Relations Ordinance. Rather than being a case about what an administrative agency must do in the face of an ordinance definition, *Godinez* is a warning to reviewing courts to “defer to an agency’s interpretation of the statute that it is charged to enforce.” 352 Ill. App. 3d at 91 (internal quotation marks and citation omitted). *Godinez* does not require that this Commission extend the protection of the Human Rights Ordinance to sources of financing. Rather, it supports the sound discretion of a local human rights agency to determine what cases are within and without the ambit of the ordinance that those agencies were created to interpret and enforce.

One of the many sound reasons for deference to an administrative agency’s interpretation of the ordinance it enforces is implicated here: the agency is best situated to evaluate how a novel interpretation of one provision will impact the effectiveness of the ordinance as a whole. As explicated in the Dismissal Opinion, excluding loans from the protected class of “source of income” is fully supported by law and logic, without more. But the Commission’s decision here is also compelled by consideration of how the interpretation advocated by the Mirandas would impact cases brought under all provisions of the Human Rights Ordinance. In addition to prohibiting employment, housing and public accommodations discrimination on the basis of source of income, the Human Rights Ordinance also prohibits unlawful discrimination in credit transactions. See County Code, § 42-36(a) (“No person shall discriminate in Cook County against any individual in any aspect of a credit transaction or in any term or condition of bonding on the basis of unlawful discrimination.”). Section 42-36 makes it illegal to base credit decisions on an applicant’s membership in a protected class, including source of income. Prototypical violations include assessing a black loan applicant’s credit worthiness more strictly than a white applicant’s because of her race, or offering a male customer more favorable loan terms than a female customer based on his gender.

The Commission can appreciate why the Mirandas would like to have loans treated as a protected source of income for the purpose of advancing their housing discrimination claim, but the Commission must consider the negative consequences the proposed interpretation would have on the operation of provisions such as § 42-36. For example, as the Mirandas are no doubt

aware, all other things being equal, banks are willing to give more favorable mortgage rates to individuals who have more assets available to cover the debt in the event of a default. But, if loans themselves were also a protected source of income, then a bank would violate the Human Rights Ordinance by treating a person whose mortgage application was backed by saved earnings more favorably than someone who had no income, but who had borrowed the same amount of money from another source. The Mirandas' interpretation of "source of income" would place banks in Cook County in the untenable position of having to extend more credit to people who were already deeply indebted to third parties, and to do so on the same terms as more credit worthy borrowers. This cannot be the result that the Cook County Board of Commissioners intended when it used the phrase "source of income" throughout the Human Rights Ordinance. The Commission's interpretation of "source of income" to exclude loans avoids this bizarre outcome.

2. Respondents' Statements Do Not Violate § 42-38(b)(1) of the Human Rights Ordinance

In their reconsideration request, the Mirandas concede that accepting an economically better offer is a non-discriminatory reason to not enter into a real estate transaction with someone and does not violate the Human Rights Ordinance. Req., p. 7. Specifically, they acknowledge that Pescatore could reject their offer without violating the prohibition against discriminating "by making a decision not to engage in a real estate transaction." *Id.* (quoting County Code, § 42-38(b)(1)).⁴

The Mirandas now argue that it was Pescatore's statements (via her real estate agent Hutnyk) during the negotiations that violated the Human Rights Ordinance by "'mak[ing] any distinction [or] discrimination. . . in the price, terms [or] conditions. . . of any real estate transaction. . . on the basis of unlawful discrimination.'" *Id.* (emphasis supplied in the Request). The basis of their claim is the email statement sent by Pescatore's realtor, Respondent Hutnyk that "the seller feels that since this is a *VA loan* for full financing rather than a conventional loan that it might take longer to close. *In order for her to seriously consider it* [Complainants' offer], she would like it to be closer to the asking price." *Id.* (quoting Compl. ¶ H) (emphasis supplied in Request). The Mirandas argue that requesting a higher offer – and saying this was because they were using a "VA Loan" – was prohibited price discrimination, and that treating their offer less seriously unless they complied with that request was "a clear distinction and discrimination in terms and conditions." *Id.* at p. 8.

The Commission declines the invitation to re-open a closed investigation to address this claim. As explained above, there can be no actionable claim because a VA-Guaranteed Loan is not a protected source of income under the Human Rights Ordinance. And even if it was, the Mirandas have accepted the Commission's conclusion that Pescatore's rejection of their offer does not state a claim for unlawful discrimination where she did so in order to accept the offer that put the most cash in her pocket at the end of the transaction. As a result, the Mirandas' sole

⁴ The Mirandas cushion their admission with the caveat: "if it was the least financially attractive." Req., p. 8. But in the absence of the presentation of new evidence that was not available during the course of its investigation, the Commission will not revisit the factual finding (*see* Dismissal Op., *4) of which offers were most or least financially attractive here.

remaining contention is that Respondents' words, standing alone, violate the Human Rights Ordinance.

This argument is unpersuasive to the Commission. The specific words at issue came from a seller's real estate agent, while fielding multiple offers for a property, and are not atypical of the customary puffing and posturing that agents engage in to obtain the most financially attractive offer for a client. *See* W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts*, § 109 at 757 (5th ed. 1984) (characterizing "puffing" as sales talk that the buyer should discount when making a transaction because it is unreasonable to rely on such subjective and motivated statements when contemplating a purchase). Moreover, if the Mirandas had followed Hutnyk's suggestion to increase their offer, their chances of getting the house by making the most financially attractive offer would have improved. Under the facts of this case, where the Mirandas' offer was the least financially attractive offer that Pescatore received, the offending statements are not the equivalent of requiring that a person in a protected class pay more than others who are outside that class before the seller will accept his or her offer. The Mirandas' frank admission that Pescatore could have simply rejected their low offer without ever sending her agent to encourage them to make a higher bid is an admission that they have no recoverable damages from Hutnyk's offending email. As these concessions make clear, the quoted email statements, standing alone, do not provide sufficient substantial evidence of a violation of Section 42-38(b)(1) so as to justify reconsideration of the Commission's original order to dismiss.

CONCLUSION

For the foregoing reasons, the Commission DENIES Complainants' REQUEST FOR RECONSIDERATION of its Dismissal of Complaint No. 2014H001 for Lack of Substantial Evidence. In accordance with CCHR Pro. R. 480.115, Complainants may seek administrative review of this decision by petitioning the Chancery Division of the Circuit Court of Cook County for a writ of certiorari.

February 18, 2015

By delegation:



Ranjit Hakim
Executive Director of the Cook County
Commission on Human Rights