

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RIGHTS COMMISSION

EUGENE C. MILLER and LILLIAN A. MILLER,
Husband and wife, Complainants

VS.

: DOCKET NO.
H-468

RADNOR VALLEY BUILDERS, INCORPORATED
THOMAS H. KELLEY BUILDERS, INCORPORATED
THOMAS H. KELLEY, SR. AND
THOMAS H. KELLEY, JR., Respondents

BRIEF FOR RESPONDENTS

LAW OFFICES
McDERMOTT, QUINN & HIGGINS
1411 WALNUT STREET
PHILADELPHIA

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HISTORY OF THE CASE

The Complainants in this case are Mr. and Mrs. Eugene Miller. The Complainants are of the Negro Race and allege that the Respondents, as above captioned, refused to sell them a home because of the fact that they are Negroes. No other reason is admitted as possible by the Complainants or the counsel for the State's Commission on Human Relations.

While the notes of testimony reveal that the Millers were in the area concerned searching for a home prior to September 15, 1964, the first contact that is alleged between the parties was on the 2nd of September 1964 (N. T. 85) when Wilbur Whitney, a real estate broker and agent of the Millers, called and made inquiries of a person who he believed to be Mr. Kelley, Sr. He was told that the house was for sale

and a discussion of the commission apparently took place.

Mr. Whitney states that he was told what to submit on behalf of his principals in order to make a proper offer (N. T. 36).

On the 15th of September Mr. Whitney submitted via the mail what purported to be an Agreement of Sale and a check in the sum of THREE THOUSAND (\$3,000.00) DOLLARS (N. T. 87).

On the 18th of September 1964 Mr. Whitney relates that he received a letter from the Respondents that the property was sold (N. T. 68) Exhibit 2. There were other conversations that indicated that there was no other property that was available to Mr. Whitney's client.

On the 23rd of September 1964 the Millers filed a Complaint with this Commission. An Amended Complaint was filed on the 4th of November 1964.

On the 29th of October 1964 a pre-hearing conference was held pursuant to the regulations of the Human Relations Commission. The offers and counter-offers were of no avail and a public hearing was scheduled in Montgomery County. After objection by the attorney for the Respondents to the jurisdiction the hearing was finally set for 11 December 1964 in Media. Testimony was offered only on behalf of the Complainants and the hearing commissioners directed that briefs be submitted and oral argument take place on the 26th of February 1965.

ARGUMENT

I. THE RECORD DOES NOT CONTAIN ANY SUBSTANTIAL EVIDENCE THAT THE COMPLAINANTS WERE KNOWN TO BE MEMBERS OF THE NEGRO RACE PRIOR TO FILING A COMPLAINT.

The charge of discrimination by reason of race, creed or color raises an ugly question in our society.

It imputes to those so charged, a peculiarly mean and anarchistic valuation of fellow human beings.

It is not a charge to be lightly made, nor should it be a subterfuge to secure one's own purpose, to quiet buyer's competition, or seek preferential treatment in the mortgage or real estate market. When one resorts to it, they should at least be more than prepared to prove it.

It must not be a fantasy that sees the Ku Klux Klan lurking behind every sale sign, still up after a house is sold. First, they should at least be able to import knowledge of their color or creed to the alleged offenders.

The record is replete with the unquestioned, unalterable and uncontradicted fact, that the Complainants never saw, knew or talked with the Respondents. That outside of the emotional feelings of the Complainants, that they felt the Respondents knew they were Negroes, there is not a wisp of evidence that they in fact so knew.

Incredible as it may seem, there is absolutely no evidence whatsoever that the Respondents knew at any time prior to the Complaint to the Commission that the Complainants were Negroes.

They charged the Respondents with violation of law and could not prove the first requisite.

Their Complaint was fatuous, it was based on make believe.

Their broker, Wilbur Whitney, never saw or knew the Respondents prior to telephone conversation in September, 1964.

Both the Complainants and the Broker believed they were discriminated against. Beyond their belief, there was no competent evidence to support their contentions.

Both the Complainants and the Broker waive away a THREE THOUSAND NINE HUNDRED FIFTY (\$3,950.00) DOLLARS discrepancy in the Agreement of Sale as though only the Imperial Wizard of the Ku Klux Klan would have stooped to question them.

They revel in the concept that because they allegedly had the money, that they may impose such terms upon a seller as they choose.

They may demand a fifteen (15) day option. They may leave important and litigious sections of the Agreement blank. They may incorrectly describe the property, not ask

who the owners are, not have a face to face discussion of completion details, sell real estate by mail. They fortify their irresponsibilities by being unwilling or unable to correctly prepare an Agreement of Sale, right down to careless arithmetic.

The Broker had standards for selling properties, not violative of the law (See N. T. 115 et seq.). It apparently never occurred to him that so do the Respondents. He pictures them motivated solely by greed.

"to me, any builder who is selling homes is interested in selling houses as fast as possible, any time they don't accept the asking price with a qualified buyer, it has to be discrimination". (N. T. 106)

This about sums up Whitney and his testimony. One can easily see that his commission is the first law of his life, and the Human Relations Law the law that gets it for you.

Because they saw people in the driveway of the houses they wished to buy, because sale signs were not removed, they believed the law had been violated.

They rushed to take an oath of complaint without a scintilla of evidence.

The Commission representatives then took it upon themselves to abuse the Respondents and their reputations.

There is no evidence -

- (a) that Respondents knew the Complainants were Negroes.
- (b) that knowing that, they discriminated.
- (c) that because Complainants were Negroes was why they were refused the dwelling.

Therefore, under the evidence from the Complainants the Respondents demur and allege that their complaint must be dismissed because there is no evidence to support the fundamental and necessary contentions that the Respondents at any time prior to September 23, 1964 in fact knew that the Complainants or their Broker were Negroes.

II. THE COMPLAINANTS THROUGH THEIR COUNSEL UTILIZED PRIVILEGED COMMUNICATIONS TO THE DETRIMENT AND DEFAMATION OF THE RESPONDENTS.

On October 29, 1964, Respondents' representatives and Thomas Kelley, Jr. appeared before Commissioner McCloskey and Counsel Agran for a pre-hearing conference.

At that time we were emphatically given to understand that all said and done at the pre-hearing conference would be confidential and would not be disclosed at a public hearing.

Pursuant to this understanding and the prohibitions of the statute we waived our rights and privileges in an endeavor to cooperate and find an amicable solution.

We disclosed facts and positions in the easy atmosphere of confidence.

(a) We disclosed that one of the properties in dispute had been removed from the market. (See Mr. Black's testimony N.T. 145 and 146).

(b) We disclosed the name of Joseph Smith and Peter Mattimore as the purchasers of two of the properties. (See Mr. Black's testimony N.T. 145).

Notwithstanding any legal rights we had to refuse this and other information. We disclosed it under the emphatic understanding that it would not be disclosed in public hearing.

At the outset of the pre-hearing we moved the disqualification of Commissioner McCloskey (N. 1. 3) on the ground that he was privy to such confidential information, and for other reasons (N. T. 8). We were refused.

This supposedly inviolate chamber of conciliation was in fact a vehicle of preconception discovery. In direct violation of agreement counsel for the Human Relations Commission introduced these two facts as evidence in his case.

He subpoenaed Peter K. Mattimore whom he could not know was in any way involved except by our own admission.

He introduced the names of these parties to show that prior agreement had been "falsified" (N. T. 145) That they were "Bogus" (N. T. 29).

He introduced that one property had been removed from the market apparently to show that we sought to evade the Act.

These facts thus perniciously introduced hold the Respondents up to public ridicule and contempt, to say nothing of the poison spread on their reputation for integrity.

One might feel little sympathy for the Respondents were this the only subject matter of the pre-hearing discussions.

This pernicious disregard for the Respondents is an outrage and disgrace, because these facts were not the only subject of the pre-hearing discussion.

The Complainants through their attorney elected and selected isolated contexts from the entire pre-hearing discussion, selected the facts in an endeavor to poison the record against the Respondents.

Let us quote Mr. Agran's own observation -

"and as long as this record is clean of any reference as to what transpired in Mr. McCloskey's office on that day when he had a pre-hearing conference, the procedure is admittedly fair".

Adopting his own observation and the manifest violation of the context of the pre-hearing discussion, we demand that these charges be dismissed as unfounded, prejudicial and violative of the law with reference to the rights and

privileges of this Respondent.

These two facts disclosed in public hearing and substantiated by the records are not alone a gravamen of complaint of the leaking of pre-hearing information on the public record.

I make reference to page 29 of the notes of testimony where Mr. Miller introduced another concept that he could only have known as a result of information communicated to him by representatives of the Commission. This information could only have come into the possession of representatives of the Commission if it were in fact elicited at the pre-hearing discussion.

We quote the context of Mr. Miller's answer on page 29 of the notes of testimony:

"As I have stated, I submitted my second purchase agreement on the direction and advice of the Commission, who kept me informed of the developments in the case, to wit, that the investigator had asked if the houses were sold and he was shown Agreements of Sale, and these Agreements of Sale were found by the Commission to be bogus; and beyond that the Kelleys stated the reasons for not selling to me originally was that they found my purchase agreement which we made to be inept, and if I would submit another purchase agreement and If I did not move in within six months, it would be accepted".

You will note that in the concluding statement of Mr. Miller, he said that he was advised that if he submitted another purchase agreement and did not move in within six months that the Agreement of Sale would be accepted.

This is a poisonous concept, as it is introduced purposely to show that the Respondents were attempting to manipulate their duties with reference to the clear mandate of the Law.

We are constrained at this juncture by our given word to observe the restrictions of the Pre-Hearing Conference and take serious objection to this clear abuse of confidences reposed in the Pre-Hearing Conference.

For these reasons we respectfully request that this complaint be dismissed. We do so on the issues raised in the brief. In the interest of orderly procedure, at this juncture, we will reserve all other objections that we have in reference to the legality of these proceedings.

Fairness to Mr. Miller and justice for those discriminated against cannot be lastingly obtained by haphazard and wanton invasion of the rights of others. The underlying

concepts of Justice, Integrity and Honor that motivate this
Law cannot be subverted and twisted against even one in
this community if the fruits it is to bear are to be palatable
to all.



JAMES THOMAS McDERMOTT, ESQUIRE
Attorney for Respondents

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THOMAS H. KELLEY, JR., :
Respondents :

REPLY BRIEF IN BEHALF
OF COMPLAINANTS

NATHAN AGRAN, General Counsel
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Respondents :

ARGUMENT IN REPLY
TO ISSUES RAISED
BY RESPONDENTS

The respondents, in their brief, have made the following arguments:

1. That respondents could not have violated the Act because the record is barren of evidence to show discrimination on their part and the evidence does not show that the respondents knew complainants or complainants' broker to be Negroes;
2. That it was error to have permitted Commissioner Matthew H. McCloskey, III, to sit as a Hearing Commissioner since he conducted the Pre-Hearing Conference in this case; and
3. That the Hearing Commissioners erroneously admitted into the evidence testimony of certain facts which were revealed during the Pre-Hearing Conference.

I. THE EVIDENCE CONTAINS FACTS FROM WHICH THE COMMISSION SHOULD FIND THAT RESPONDENTS VIOLATED THE PENNSYLVANIA HUMAN RELATIONS ACT

The respondents have, in effect, demurred to the evidence produced at the public hearing. This is another way of saying that they urge the Commission to dismiss the complaint on the theory that there is nothing in the evidence upon which the Commission could properly make findings of discrimination against them.

The Commission's attention is directed to the following evidence upon which it should find that the respondents did violate the provisions of the Pennsylvania Human Relations Act:

1. The respondents unquestionably knew that Mr. Wilbur M. Whitney, broker, and his clients, Mr. and Mrs. Eugene C. Miller, were Negroes, at the time the first Agreement of Sale was submitted to them on September 15, 1964 and when they turned down the offer on September 18, 1964. Mr. Wilbur M. Whitney is the only Negro real estate broker on the Main Line (Notes of Testimony, page 103) and builders on the Main Line are all aware of this fact (N.T., pp. 133, 134).

Prior to September 12, 1964, noone in the neighborhood could have known that Negroes were desirous of purchasing a home on Robinhood Road. It was not until September 12, 1964, that for the first time the complainants, accompanied by Mr. Yarborough, a Negro salesman from Mr. Whitney's office, parked their car near 786 Robinhood Road and entered the house to inspect it. Before then, only Mr. Miller, the complainant, had been driven past the house in an automobile (N.T., pp. 107, 108). The Commission, thoroughly familiar with this kind of case, could easily find that the entire area, certainly the owners and sellers of the house in question, knew that Negroes were examining and attempting to buy this house on

September 15, 1964 and on September 18, 1964, when respondents refused to sell the house or any other house to the complainants.

2. The evidence is undisputed that on September 2, 1964, Mr. Whitney, as complainants' broker, called Mr. Kelley, Sr., and talked with him about the 5-bedroom house on Robinhood Road which complainants later decided to buy. On that date, respondent, Mr. Kelley, Sr., welcomed the chance to sell the property at the asking price of \$34,750, advised Mr. Whitney that he will be entitled to a commission and suggested submission of a "suburban agreement of sale" form (N.T., p. 85). On September 15, 1964, a written Agreement of Sale signed by complainants and prepared by their broker, Mr. Whitney, together with a check as a deposit in the sum of \$3,000.00, offering to purchase the said property on Robinhood Road for the asking price of \$34,750.00 was forwarded to respondents. On September 18, 1964, Mr. Kelley, Sr., called Mr. Whitney to tell him that the house in question, the 5-bedroom house on Robinhood Road, had been sold and when asked by Mr. Whitney whether any of the other unsold houses were available, whether 4-bedroom or 5-bedroom houses, Mr. Kelley said they had all been sold (N.T., pp. 87, 89). On that same day, September 18, 1964, the Agreement of Sale and check was returned by mail to Mr. Whitney (N.T., p. 88), with covering letter from Mr. Kelley, Sr., saying, "Confirming telephone conversation today, I return herewith the Agreement of Sale, together with check for \$3,000.00, as this property has been sold." (Complainant's Exhibit No. 2)

In fact, neither this property nor the other two properties had been sold at that time. This was admitted by a subsequent letter from respondents which was introduced as Complainant's Exhibit No. 3 (N.T., pp. 93 , 196) and was determined during the investigation of the case (N.T., pp. 144, 145).

Again, it is submitted that the Commission should find that this is typically

the behavior of a respondent who will not sell to Negroes and who attempts to avoid dealing with them by saying that there are no more properties available for sale.

3. Despite the fact that the properties were still available for sale, the respondents removed the "For Sale" signs, but continued to show prospective purchasers through the houses. This was observed by the complainant, Mr. Miller, on several occasions after receipt of the information from respondents that the houses had been sold. He observed cars in the driveways and persons being shown through the houses, and that the "For Sale" signs had been removed. (N.T., p. 26)

4. When the offer for the house in question was again submitted by Mr. Whitney to respondents for the full asking price, accompanied by a deposit of \$3500.00, on October 16, 1964, the offer was again turned down by respondents by letter dated October 21, 1964 (Complainant's Exhibit No. 3), for reasons, one of which is illegal under the terms of the Human Relations Act, and the other of which is not valid. The first reason given was that a complaint had been filed with this Commission. The Act itself provides, in Section 5 that it is an unlawful discriminatory practice for a person to discriminate because of the filing of a complaint with this Commission. The second reason given was that the Agreement of Sale submitted by Mr. Whitney in the complainants' behalf was incorrectly drawn. This, it is submitted, having been met previously in other housing cases, is merely an excuse or reason by a respondent for refusing to deal with Negroes. It is common knowledge, and the evidence in this very case, shows that in the usual instance where an Agreement must be altered or amended, rather than lose the sale, a seller will always call the broker, discuss the proposed errors or changes, and will usually himself make the corrections (N.T., p. 101).

One of the alleged discrepancies was that only \$3,000 was given as a deposit instead of \$3,475, or ten (10%) percent of the purchase price in the first Agreement of Sale. First of all, there is no law which requires a deposit of ten percent. Secondly, a deposit of \$3500 was made with the second offer, yet it was declined. Thirdly, the alleged sale to Joseph F. Smith and his wife of 771 Robinhood Road (Complainant's Exhibit No. 6) shows acceptance of a deposit of \$100.00.

Another alleged discrepancy was that the property in question was not sufficiently identified and was referred to as No. 782 Robinhood Road and not 786 Robinhood Road. The Agreement did refer to a 5-bedroom house on Robinhood Road and the only such house selling at \$34,750, the amount of the offer, was the property later identified by numbers as No. 786 Robinhood Road. At the time the offer was made, no numbers appeared on these houses. The Commission may, if it desires, find that such excuses and such treatment would not possibly have been afforded to any bona fide purchaser who was white, and that it was only the fact that these complainants were Negroes that caused respondents to resort to such invalid and unlikely excuses.

5. The complaint was filed September 22, 1964 and the Commission's Human Relations Representative in charge of this case, met with respondent, Mr. Kelley, Jr., the following day, September 23, 1964, to investigate the facts in accordance with the Act (N.T., p. 135). Mr. Kelley, Jr. then advised the Commission through its representative that all three of the houses which had been up for sale -- viz., premises Nos. 771, 782 and 786 Robinhood Road --- had been sold. He produced forged or false agreements of sale for each property, one dated September 12, 1964, to Mr. and Mrs. John T. Quinn for 786 Robinhood Road, one dated September 15, 1964,

to Arthur T. Cummings for the 4-bedroom house at No. 782 Robinhood Road, and one dated September 15, 1964, to Joseph F. Smith and his wife (son-in-law of Thomas H. Kelley, Sr.) for the 5-bedroom house at No. 771 Robinhood Road, for \$33,000. (N.T., pp. 143, 144)

The investigation by Mr. Black, the Commission's investigator, disclosed all three of these agreements were not bona fide "and that they were falsified agreements of sale." (N.T., pp. 144, 145)

Surely, this is not the conduct of a person who does not like to deal with a broker because his Agreement of Sale is improperly drawn ! Common sense, and previous experiences of this Commission in other similar cases, leads to the inescapable conclusion that this is typically conduct of a respondent who goes to all extremes in order to avoid dealing with Negroes.

6. One of the properties -- viz., No. 782 Robinhood Road -- the only one not sold by respondents to white purchasers after the offer of complainants, has been taken off the market by respondents. This, too, it is submitted, is typical of conduct by a respondent who will not sell to Negroes under any circumstances. (N.T., p. 145)

II. A COMMISSIONER CONDUCTING A PRE-HEARING CONFERENCE MAY PROPERLY PARTICIPATE AT THE PUBLIC HEARING

There is nothing in the Act or in the Regulations which forbids a Commissioner who conducts a Pre-Hearing Conference from later participating in the public hearing of the case. As the evidence will show, at page 4, this legal question is not new to the Commission, has been carefully considered before, and the Commission has ruled heretofore, with the advice of the Attorney General, that it is not improper for a Commissioner to attempt to adjust a case through a Pre-Hearing Con-

ference and later, in the event adjustment cannot be achieved, sit as one of the Commissioners at the public hearing.

The Commission's attention is particularly directed to the fact that our judges in courts attempt such adjustment daily, and failing therein, proceed with the trial of the case.

In the recent case involving the Chester School District, members of the Commission tried on several occasions to have the School Board conciliate all issues and adjust the controversies, and when such efforts failed to materialize, the Commission as a body sat at eight days of public hearings and eventually issued an appropriate order.

III. FACTS, AS DISTINGUISHED FROM
PROPOSED ADJUSTMENTS AND EFFORTS
TO ADJUST, DISCLOSED AT PRE-
HEARING CONFERENCES, MAY BE
REVEALED AT PUBLIC HEARINGS

Similar to most fair practices laws, the Pennsylvania Act, in Section 9, contains the usual provision that "The members of the Commission and its staff shall not disclose what has transpired in the course of such endeavors (adjustment endeavors)".

Although there are no Court decisions on the subject, the matter has been discussed on many occasions among counsel representing the many state commissions and it is the uniform practice of all commissions to apply such language to the proposed terms of adjustment only --- not to essential facts revealed during such adjustment efforts .

One must look to the purpose for the provision in the law to determine the legislative intent and the meaning of the language. The New York Law was the first, in 1945, to have included such language and Henry Spitz, Esq., General Counsel for

that Commission since its inception, advised within the past several days, that the New York Commission permits any essential fact revealed at an adjustment conference to be made part of ~~the~~ record in the public hearing, but bars from such record any reference whatsoever to the actual efforts to adjust or proposed terms of adjustment of the case. The language of the New York statute is exactly the same as that of the Pennsylvania Human Relations Act.

Not one word of the efforts to adjust or proposed terms of adjustment or offers or counter-offers at the Pre-Hearing Conference was introduced into the evidence at the public hearing of the instant case. It is true that the facts made known by respondent dealing with alienation of two of the three properties involved, and dealing with the removal from the market of the third property, were testified to by Mr. Black, the Commission's representative, who unquestionably learned such facts from a Memorandum in the file prepared by General Counsel.

Counsel must take exception to the comments in the brief to the effect that at the time of the Pre-Hearing Conference he and his client "were emphatically given to understand that all said and done at the pre-hearing conference would be confidential and would not be disclosed at a public hearing." There was no discussion of facts at a public hearing. Furthermore, as explained at the public hearing, when this same objection was made by attorneys for the respondents, at the time it became known during the Pre-Hearing Conference that two properties had just been sold and a third had been taken off the market, General Counsel immediately advised respondent and the attorneys that such facts will have to be investigated, whereupon the attorney for the respondent, Mr. McDermott, urged that during such investigation of these facts, the Commission representatives should not unduly frighten the purchasers. General Counsel agreed to so advise the Commission's representatives who would be looking into such facts, and this admonition was made part of the file memorandum

dictated that day by General Counsel.

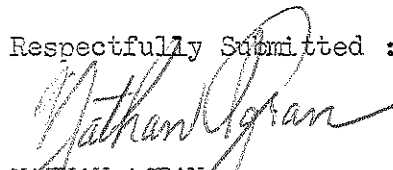
It is submitted that what is intended to be protected as confidential in these cases is the actual proposed adjustment, the offers and counter-offers by which a case might be closed as conciliated and adjusted. The Legislature desired such efforts to adjust to be held confidential, so that respondents in all cases could feel free to try to reach an amicable adjustment of the complaint without further proceedings being taken. The prime emphasis in these cases is "adjustment" and the Legislature meant to keep such adjustment terms confidential. It could not have meant essential facts pertaining to the case.

As further evidence of this meaning of the Law, the Commission should know that the respondents were actually subpoenaed to produce such evidence at the Pre-Hearing Conference. They were obliged by Law to give these facts, so essential to the case. At the same time, the conversations and efforts pertaining to possible adjustment were kept confidential and were never made part of the record at the public hearing.

IV. CONCLUSION

The Commission is urged to dismiss the preliminary objections being urged by respondents in this case, and to enter an Order against the respondents, requiring them to cease and desist from refusing to deal with Negroes in the sale of the homes being built by them, and requiring them to make available to complainants premises No. 782 Robinhood Road, the 4-bedroom property taken off the market by respondents.

Respectfully Submitted :


NATHAN AGRAN
General Counsel

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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Respondents

OPINION, INCLUDING FINDINGS OF FACT,
CONCLUSIONS OF LAW, COMMISSION'S
DECISION AND FINAL ORDER

The complainants in this case are Negroes, Mr. and Mrs. Eugene C. Miller, who allege that the respondents, builders and sellers of homes in a new housing development on Robinhood Road, Rosemont, Delaware County, Pennsylvania, have refused to sell one of those homes to them because of their race.

The original complaint in this case was filed by Mr. Miller alone, naming the two individual respondents, Thomas H. Kelley, Sr. and Thomas H. Kelley, Jr. That complaint was lodged with the Commission on September 22, 1964. An amended complaint, executed by Mr. and Mrs. Miller and naming the two corporate respondents in addition to the two individual respondents, was filed with the Commission on November 4, 1964.

There was a finding of probable cause to credit the allegations of the Complaint, whereupon efforts were made by the staff and also by the Commission to resolve the complaint by conciliation and persuasion. When such efforts failed, t

Commission voted to conduct a public hearing in the case.

Notices of the public hearing, together with copies of the Amended Complaint, were given to all parties and also to the respondents' attorney, James Thomas McDermott, Esq., in accordance with the Commission's Regulations.

The public hearing was held in the Borough Building, Media, Delaware County, Pennsylvania, on December 11, 1964, at 10:00 o'clock A.M., before a Hearing Panel consisting of Chairman Harry Boyer, presiding, Commissioner Edward M. Green and Commissioner Matthew H. McCloskey, III. The case in support of the Complaint was presented by Nathan Agran, Esq., General Counsel for the Commission, and the respondents were present and were represented by their attorney, James Thomas McDermott, Esq.

Six witnesses testified in support of the Amended Complaint. Also called to the stand as of cross-examination were both individual respondents, Thomas H. Kelle Sr. and Thomas H. Kelley, Jr., both of whom refused to testify upon the advice of their counsel, Mr. McDermott.

At the conclusion of the testimony, counsel for the respondents requested an opportunity to file a brief and argue points of law raised by him during the hearing. He filed such brief on or about February 16, 1965; a reply brief was filed by General Counsel for the Commission on February 20, 1965; and oral argument before the full Commission took place thereon February 23, 1965.

The Hearing Commissioners recommend that, on all of the evidence at the public hearing, the Commission find that the respondents have committed unlawful discriminatory practices in violation of the provisions of the Pennsylvania Human Relations Act; that they be ordered to cease and desist from engaging in such unlawful discriminatory practices; and that they be required to make available for immediate sale to the complainants the property located at No. 782 Robinhood Road, Rosemont, Delaware County, Pennsylvania.

The Hearing Commissioners make the following findings of fact and conclusions of law :

FINDINGS OF FACT

1. At all times herein mentioned, the complainant, Eugene C. Miller, Negro, was an employe of General Electric Company, who was temporarily residing at the Y.M.C.A. building in Norristown, Pennsylvania, and whose wife, the other complainar herein, and whose children resided in Baltimore, Maryland, while he was seeking a home near his place of employment for himself and his family.

2. The respondent, Radnor Valley Builders, Inc., is a Pennsylvania corporation with principal place of business at No. 1417 City Line Avenue, Overbrook Hills Philadelphia, Pennsylvania, which, at the times of the events herein referred to, was the registered owner of premises No. 771 (Lot 17) Robinhood Road, Rosemont, Delaware County, Pennsylvania (hereinafter referred to as "771 Robinhood Road"); premises No. 782 (Lot 48) Robinhood Road, Rosemont, Delaware County, Pennsylvania (hereinafter referred to as "782 Robinhood Road"); and premises No. 786 (Lot 49) Robinhood Road, Rosemont, Delaware County, Pennsylvania (hereinafter referred to as "786 Robinhood Road").

3. The respondent, Thomas H. Kelley Builders, Inc., is a Pennsylvania corporation with principal place of business at No. 1417 City Line Avenue, Overbrook Hill Philadelphia, Pennsylvania, which, at the time of the events herein referred to, wa in the business of building and selling new housing accomadations or dwellings in and near the County of Delaware, in particular, dwellings located at 771 Robinhood Road, 782 Robinhood Road and 786 Robinhood Road, and other dwellings located on the said Robinhood Road, Rosemont, Delaware County, Pennsylvania.

4. The respondents, Thomas H. Kelley, Sr. and Thomas H. Kelley Jr., are jointly engaged in business at No. 1417 City Line Avenue, Overbrook Hills, Philadelphia, Pennsylvania, as officers and agents of the said corporations,

Radnor Valley Builders, Inc. and Thomas H. Kelley Builders, Inc., and as such, are builders and sellers of housing accommodations located on Robinhood Road, Rosemont, Delaware County, Pennsylvania, in particular the premises known as 771 Robinhood Road, 782 Robinhood Road and 786 Robinhood Road.

5. On or about September 15, 1964 and for some time prior thereto, the respondents offered for sale to the general public and placed "For Sale" signs upon the new housing accommodations known as 771 Robinhood Road, 782 Robinhood Road and 786 Robinhood Road.

6. On September 2, 1964 and for a long time thereafter, premises 771 Robinhood Road, 782 Robinhood Road and 786 Robinhood Road were unoccupied new dwellings, each of which was intended to be occupied by one family for residence purposes.

7. At the times of the events complained of, 771 Robinhood Road and 786 Robinhood Road were five-bedroom dwellings for which the respondents were asking a price of \$34,750.00, and 782 Robinhood Road was a four-bedroom dwelling for which the respondents were asking a price of \$33,750.00.

8. At the times referred to herein, the respondents controlled the sales of 771 Robinhood Road, 782 Robinhood Road and 786 Robinhood Road.

9. On September 2, 1964, one Wilbur M. Whitney, Negro real estate broker, acting in behalf of complainants, spoke by telephone with the respondent, Thomas H. Kelley, Sr., advising that he had a prospective purchaser for 786 Robinhood Road, and was advised by Thomas H. Kelley, Sr. that said property was for sale for the sum of \$34,750.00 and that the usual commission would be paid to Mr. Whitney in the event of a sale of said property to Mr. Whitney's client.

10. The said Wilbur M. Whitney, broker and agent for complainants, is the only Negro real estate broker maintaining an office in the Ardmore-Bryn Mawr area known as the Main Line, and most builders on the Main Line are aware of this fact.

11. On September 12, 1964, the complainants, accompanied by a Negro real estate salesman, for the first time visited 786 Robinhood Road for the purpose of examining said premises.

12. On the same day, to wit, September 12, 1964, complainants executed an Agreement of Sale prepared by their broker, the said Wilbur M. Whitney, by which Agreement of Sale the complainants offered to the respondents the full purchase price being asked, in the amount of \$34,750.00, for 786 Robinhood Road.

13. On September 15, 1964, complainants' broker, Wilbur M. Whitney, submitted said Agreement of Sale, together with a check in the sum of \$3,000.00, as a deposit to the respondents.

14. Despite certain errors in the said Agreement of Sale thus submitted to the respondents on September 15, 1964, the respondents well knew that complainants were offering \$34,750.00 therefor, the full purchase price being asked by respondents, and likewise well knew that the said offer was for the five-bedroom dwelling on the even-numbered side of Robinhood Road, later identified by respondents as No. 786 Robinhood Road.

15. On September 18, 1964, the respondent, Thomas H. Kelley, Sr., called complainants' broker, Wilbur M. Whitney, by telephone, and advised him that the property desired by his clients had been sold.

16. In the said September 18, 1964 telephone conversation, Wilbur M. Whitney in behalf of complainants, offered to purchase 771 Robinhood Road, 782 Robinhood Road or any other four-bedroom or five-bedroom house on Robinhood Road but was told by the respondent, Thomas H. Kelley, Sr., that all properties in that area has been sold.

17. On September 18, 1964, respondents returned the Agreement of Sale submitted to them on September 15, 1964, and also returned the \$3,000.00 deposit check with a covering letter stating that "this property has been sold."

18. On September 18, 1964, when the respondents, acting through Thomas H. Kelley, Sr., advised complainants' broker that all properties on Robinhood Road had been sold and were not available for sale, they well knew that 771 Robinhood Road, 782 Robinhood Road and 786 Robinhood Road had not been sold and were still available for sale to the general public.

19. On or about September 18, 1964, the respondents removed the "For Sale" signs which they had previously placed upon 771 Robinhood Road, 782 Robinhood Road and 786 Robinhood Road, despite the fact that these premises had not been sold and were still available for sale; and the respondents did, thereafter, exhibit said dwellings to prospective white purchasers.

20. On September 22, 1964, the complainant, Eugene C. Miller, filed a complaint with the Pennsylvania Human Relations Commission, alleging that Thomas H. Kelley, Sr. and Thomas H. Kelley, Jr. had refused to sell a new dwelling to him because of his race.

21. On September 23, 1964, the Human Relations Representative of the Pennsylvania Human Relations Commission to whom said complaint was assigned for investigation met with Thomas H. Kelley, Jr. in the office of the respondents, advised him of the nature of the complaint, and was advised by the said Thomas H. Kelley, Jr., that all three properties on Robinhood Road --- viz., 771 Robinhood Road, 782 Robinhood Road and 786 Robinhood Road --- had been sold and were not available for sale and that this was why respondents had been unable to accept the complainant's offer to purchase 786 Robinhood Road. At the same time, the said respondent exhibited to the Commission's representative three copies of alleged agreements of sale indicating that said three properties on Robinhood Road had in fact been sold to persons other than the complainant.

22. When the respondents, on September 23, 1964, acting through Thomas H. Kelley, Jr., exhibited alleged agreements of sale to the Commission's

representative and advised him that 771 Robinhood Road, 782 Robinhood Road and 786 Robinhood Road had been sold and were no longer available for sale, the said properties had not, in fact, been sold and the said agreements of sale thus exhibited were false and had been exhibited to the Commission's representative for the express purpose of attempting to convince the Commission that said properties were not available for sale to the complainant, the respondents well knowing that, in fact, said three properties had not been sold and were still available for sale.

23. On September 18, 1964, when the complainants' offer to purchase 786 Robinhood Road was refused by respondents and when respondents returned complainants' Agreement of Sale and deposit check, the respondents knew that the complainants were Negroes, and such refusal to sell 786 Robinhood Road to complainants at that time was because of the race of the complainants, they being Negroes.

24. On October 14, 1964, the complainants again submitted an offer of \$34,750 for purchase of premises 786 Robinhood Road. Said offer was transmitted personally by the broker of complainants, Wilbur M. Whitney, to the respondents, by delivery to the respondents of a written Agreement of Sale together with a \$3500.00 deposit check.

25. On October 21, 1964, the respondents advised Wilbur M. Whitney, broker for complainants, that complainants' offer of October 14, 1964, was refused, and on that same day, the respondents returned the Agreement of Sale and \$3,500.00 deposit check submitted to them on October 14, 1964.

26. The refusal of the respondents to accept the offer of the complainants on October 14, 1964 was because of the race of the complainants, they being Negroes.

27. After the complainants made bona fide offers to purchase from the respondents 771 Robinhood Road, 782 Robinhood Road or 786 Robinhood Road, the respondents sold 771 Robinhood Road and 786 Robinhood Road to white purchasers and

removed from the market 782 Robinhood Road, the remaining unsold property.

28. Premises 782 Robinhood Road was thus removed from the market by the respondents because respondents refused to sell said property to the complainants, they being Negroes.

29. The complainant, Eugene C. Miller, is an engineer employed by the Missile and Space Division of General Electric Company at a base salary of \$14,000 who is well able to afford to purchase any of the properties which he desires to buy from the respondents.

30. The respondents had no reasonable explanation for refusing the bona fide offers of \$34,750.00 from the complainants on September 15, 1964 and on October 14, 1964, and for thereafter accepting offers for said properties from white purchasers

31. On September 15, 1964, on October 14, 1964 and at all times herein mentioned, the respondents refused and still refuse to sell housing accommodations to the complainants because of their race, they being Negroes.

32. At all times herein mentioned, the respondents maintained and still maintain a policy of refusing to sell housing accommodations to Negroes because of their race.

CONCLUSIONS OF LAW

1. At the times herein mentioned, the respondents built, owned and otherwise controlled the sale of 771 Robinhood Road, 782 Robinhood Road and 786 Robinhood Road.

2. At the times herein set forth, 771 Robinhood Road, 782 Robinhood Road and 786 Robinhood Road were unoccupied new dwellings intended to be occupied by one family each, for residence purposes, and were therefore "commercial housing" as defined in the Pennsylvania Human Relations Act.

3. At all times herein mentioned the Commission had and still has jurisdiction over the respondents.

4. At all times herein mentioned the Commission had and still has jurisdiction over the subject matter of this proceeding and over the complaint.

5. On September 15, 1964, on October 14, 1964 and thereafter, the respondents committed unlawful discriminatory practices under Section 5 (h)(1) of the Pennsylvania Human Relations Act in that respondents refused to sell commercial housing to complainants, Eugene C. Miller and Lillian A. Miller, his wife, because of their race and denied and withheld commercial housing from the complainants, Eugene C. Miller and Lillian A. Miller, his wife, because of their race.

6. On September 15, 1964, on October 14, 1964 and thereafter, the respondents committed unlawful discriminatory practices under Section 5 (h)(1) of the Pennsylvania Human Relations Act in that respondents maintained and still maintain a policy of refusing to sell commercial housing to Negroes because of their race.

7. Complainants are individuals claiming to be aggrieved by unlawful discriminatory practices within the meaning of Section 9 of the Pennsylvania Human Relations Act.

8. The Complaint was properly made, signed and filed in accordance with Section 9 of the Pennsylvania Human Relations Act.

9. The Complaint was properly amended in accordance with Section 9 of the Pennsylvania Human Relations Act.

The Hearing Commissioners unanimously recommend that the Commission enter a cease and desist order against the respondents in this case. As indicated by their findings of fact, the Hearing Commissioners, having observed all witnesses

and having given careful consideration to all of the testimony in the case, must conclude that the sole reason, in fact, for the refusal to sell one of the three houses on Robinhood Road, Rosemont, Delaware County, Pennsylvania, to the complainants, is because the complainants are Negroes.

Although the record is barren of any direct admission on the part of any of the respondents that they refused to sell one of these homes to the complainant because the complainants are Negroes, the actions of the respondents speak louder than words. It is the rare case where a respondent frankly admits his real reason for refusing to sell a new home in a new development.

The individual respondents refused to testify at the hearing, although they were called to the stand and given an opportunity to explain their real reasons for refusing to sell one of the homes to Mr. and Mrs. Miller, and for taking off of the market the one new home still remaining unsold in that development.

The Hearing Commissioners can only surmise why the respondents claim that they refused to sell a home to the complainants from the nature of the questions asked by counsel for the respondents, from his objections to certain testimony at the hearing and from the reasons given by the respondents during the investigation of the case.

Such alleged defenses may be summarized somewhat as follows:

1. The Agreement of Sale submitted by the complainants' broker, Wilbur M. Whitney, was erroneously drawn, did not sufficiently identify the property, and showed an erroneous amount of money to be paid at the time of settlement.

The Hearing Commissioners cannot conceive that any builder or seller will refuse a sale of a new house in a new development because a few errors appear in the Agreement of Sale submitted to him. Furthermore, there is no doubt that the respondents well knew that the property desired by complainants was the five-bedro

house on the even-numbered side of the street which respondents later identified as No. 786 Robinhood Road. There was no other five-bedroom property available for sale on that side of the street; furthermore, it was the only property discussed by telephone on September 2, 1964, when the broker, Mr. Whitney, spoke with one of the respondents, Thomas H. Kelley, Sr.

The offer on the face of the written Agreement of Sale was clearly the sum of \$34,750.00, the full amount of the price being asked by the respondent for their five-bedroom houses. The error in addition, showing a lesser sum to be due at settlement, could easily be corrected and, as testified by Mr. Whitney, is always corrected by a telephone call from the seller to the broker. The Hearing Commissioners do not believe that a seller will refuse to sell one of the houses in his development simply because of a few errors appearing in the Agreement of Sale submitted to him. In the instant case, it is believed that such errors in the Agreement of Sale were used by the respondents as a reason for refusing to sell to the complainants when in fact their true and real reason was their refusal to sell to Negroes.

2. Respondents have indicated that their refusal to sell to the complainants was because they filed a complaint with this Commission and not because they are Negroes.

This reason, too, cannot be accepted as valid. First of all, the initial refusal occurred on September 18, 1964 and the complaint was not filed until four days later on September 22, 1964. Secondly, the reason given on September 18, 1964, both orally and in writing, was that all homes on Robinhood Road had been sold, whereas in fact they had not been sold. Thirdly and most important, the refusal to sell a property because a complaint has been filed is in itself an unlawful

discriminatory practice.

3. Respondents indicate that they did not know that complainants were Negroes and that therefore they could not possibly have discriminated against them because of their race.

Here too the Hearing Commissioners, from all of the facts, were obliged to conclude that the respondents did, in fact, know that the complainants were Negroes. The evidence shows that complainants' broker, Mr. Whitney, is the only Negro broker maintaining an office in that area and that most builders know that he is a Negro real estate broker. Furthermore, the first time that the complainants and their Negro real estate salesman, actually entered the premises 786 Robinhood Road, Rosemont, Pennsylvania, was on September 12, 1964. If the experience of this Commission are a guide in such cases, it is logical to assume that the entire area and certainly the respondents well knew within hours after that visit that Negroes were desirous of buying the vacant property at 786 Robinhood Road.

It should also be pointed out that a day following the filing of the complaint on September 22, 1964, the Commission's representative visited with the respondents and made the nature of the complaint fully known, including the fact that the complainants are Negroes. Even if respondents did not know the race of the complainants when the offer was first refused on September 18, 1964, they certainly cannot deny that they knew the complainants' race as of September 23, 1964, when the Commission's Human Relations Representative, Mr. Black, entered their offices and discussed the case with them. All properties were available at that time for sale and for a long time thereafter, and one of them is still available for sale.

Finally, when the offer was again submitted in writing on October 14, 1964, the properties were available for sale and the respondents certainly knew that the

complainants were Negroes at that time, but nevertheless refused to sell one of the properties to them.

4. The respondents have also defended this action on several legal grounds to the effect that Commissioner Matthew H. McCloskey, III, should not have sat as one of the Hearing Commissioners since he conducted the Pre-Hearing Conference, and also that certain facts revealed at the Pre-Hearing Conference should not have been admitted into the evidence.

On the first of these two legal defenses, the Commission believes it proper and advisable for the Commissioner who handles the Pre-Hearing Conference to sit later as one of the Hearing Commissioners in the event the matter cannot be amicably adjusted.

With reference to the second legal defense, this Commission has always treated as strictly confidential any offer or counter-offer of proposed adjustment of a complaint because the Human Relations Act requires such confidentiality, so that any respondent may feel free to discuss freely any proposed terms of adjustment without fear that such terms of adjustment will in any way be revealed publicly. Such confidentiality is observed whether the proposed terms of adjustment are discussed by a respondent with staff members or with one of the Commissioners at a Pre-Hearing Conference. However, facts pertaining to the case can never be hidden or kept confidential and the Act, in our opinion, does not so provide. Applying these basic principles to the case at hand, nothing whatever was revealed publicly at the hearing of this case pertaining to the proposed terms of adjustment of the case as discussed at the Pre-Hearing Conference. On the other hand, a subpoena had been issued for evidence to be produced at the Pre-Hearing Conference pertaining to the very essential facts of the present status of 771 Robinhood Road, and 786 Robinhood Road. It was learned at the Pre-Hearing
782 Robinhood Road

Conference that two of these three properties had been sold by respondents to white purchasers and that one of them, No. 782 Robinhood Road, had been removed from the market by the respondents. These facts were introduced into the evidence and properly so.

The Hearing Commissioners reached their conclusions because of other significant facts appearing in the record, as follows:

1. On September 18, 1964, the respondents removed all three "For Sale" signs appearing in front of the three un-sold properties, Nos. 771, 782 and 786 Robinhood Road, and continued to show prospective buyers through these houses nevertheless.

2. On September 18, 1964, the respondents advised complainants' broker orally and in writing that 786 Robinhood Road had been sold and that 771 Robinhood Road and 782 Robinhood Road had also been sold and were not available for sale to complainants, when in fact such properties had not been sold and were still available for sale.

3. On September 23, 1964, the respondents again claimed to the Commission's investigator that all said properties had been sold and even produced three falsified agreements of sale to attempt to convince the Commission of such facts, when they knew that the properties had not been sold and were still available for sale.

4. The properties in question were sold to white purchasers after the offers had been made by the complainants, or were removed from the market after such offers.

Because 786 Robinhood Road and 771 Robinhood Road have been sold by the respondents to third parties, the Commission may not issue any order directing the respondents to convey title thereto to the complainants. However, the Hearing

Commissioners recommend that the Commission order the respondents to convey 782 Robinhood Road to the complainants for the full purchase price of \$33,750.00 asked therefor by the respondents.

It is also recommended that the Commission issue a cease and desist order against the respondents requiring them to sell or rent housing accommodations within their control to all applicants, without regard to the race, religion or national origin of such applicants.

The Hearing Commissioners also recommend that copies of the Commission's Final Order in this case be made available for appropriate action to those Federal housing agencies, particularly Federal Housing Administration (FHA) and Veterans Administration (VA), with which agreements have heretofore been reached.

/s/ Harry Boyer
Harry Boyer, Presiding Hearing Commissioner

/s/ Edward M. Green
Edward M. Green, Hearing Commissioner

/s/ Matthew H. McCloskey, III
Matthew H. McCloskey, III
Hearing Commissioner

COMMISSION'S DECISION

AND NOW, this 18th day of March, A.D. 1965, upon recommendation of the Hearing Commissioners, having considered carefully all of the oral arguments and written arguments submitted by the respondents, upon all of the evidence at the public hearing of this case, and in consideration of the findings of fact and conclusions of law by the Hearing Commissioners, the Pennsylvania Human Relations Commission, by a unanimous decision, finds and determines that the respondents

committed unlawful discriminatory practices under Section 5 (h) (1) of the Pennsylvania Human Relations Act in that the respondents refused to sell commercial housing to the complainants because of the race of the complainants, and in that the respondents maintained and still maintain a policy of refusing to sell commercial housing to Negroes because of their race.

F I N A L O R D E R

AND NOW, this 18th day of March, A. D. 1965, upon consideration of the foregoing Findings of Fact, Conclusions of Law and Commission's Decision, and pursuant to Section 9 of the Pennsylvania Human Relations Act, it is hereby

ORDERED, by the Pennsylvania Human Relations Commission

1. That the respondents, Radnor Valley Builders, Inc., Thomas H. Kelley Builders, Inc., Thomas H. Kelley, Sr., and Thomas H. Kelley, Jr., their agents, representatives and employers, shall cease and desist from:

a. Refusing to sell to the complainants, Eugene C. Miller and Lillian A. Miller, his wife, because of their race, housing accommodations now or hereafter owned, built or controlled by the respondents; and

b. Maintaining a policy of refusing to sell to Negroes, because of their race, housing accommodations now or hereafter owned, built or controlled by the respondents.

2. That the respondents, Radnor Valley Builders, Inc., Thomas H. Kelley Builders, Inc., Thomas H. Kelley, Sr., Thomas H. Kelley, Jr., their agents, representatives and employes, shall take the following affirmative action which, in the judgment of the Commission, will effectuate the purposes of the Pennsylvania Human Relations Act :

a. Offer forthwith to sell to the complainants, Eugene C. Miller and Lillian A. Miller, his wife, premises No. 782 Robinhood Road, Rosemont,

Delaware County, Pennsylvania, for the full purchase price of \$ 33,750.00 asked by the respondents for four-bedroom dwellings on Robinhood Road;

b. Apply the same standards, terms, conditions and privileges in the sale of housing accommodations subject to the Pennsylvania Human Relations Act located in the Commonwealth of Pennsylvania, now or hereafter owned, built or controlled by the respondents to all applicants for such housing, regardless of their race, color, religious creed, ancestry or national origin;

c. Issue to all agents, representatives and employes of the respondents and to all persons now employed or who may hereafter be employed within one year of the date of this Final Order by the respondents, written instructions, previously approved by the Commission, explaining the requirements and the objectives of the Pennsylvania Human Relations Act and advising each such person of his individual responsibility for compliance with that Act and his obligation to make such compliance meaningful and effective. Copies of such instructions signed by the said persons individually and acknowledging receipt and understanding thereof shall be transmitted to the Commission by the respondents;

d. Post in every office now or hereafter maintained by the respondents copies of the Commission's Fair Housing posters conspicuously, in accessible and well-lighted places where they may be readily observed by those seeking housing accommodations;

e. Transmit to the Commission forthwith a statement signed by the respondents stating that the respondents will not, at any future time, either directly or indirectly, violate the fair housing provisions of the Pennsylvania Human Relations Act; and

f. Notify the Pennsylvania Human Relations Commission at its office at No. 1401 Labor and Industry Building, Harrisburg, Pennsylvania, 17120, in

writing within fifteen (15) days of the date of service of this Final Order as to the steps the respondent has taken to comply with each ordered provision of this Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

/s/ Harry Boyer
HARRY BOYER
Chairman

ATTEST:

/s/ Edward M. Green
EDWARD M. GREEN
Secretary