In the Commonwealth Court of Pennsylvania

No. 363 C.D. 1972

ALTO-RESTE PARK CEMETERY ASSOCIATION,

Appellant

vs.

PENNSYLVANIA HUMAN RELATIONS COMMISSION,

Appellee

BRIEF FOR APPELLEE

Appeal From the Order of the Pennsylvania Human Relations Commission at Docket No. P-623, Dated March 20, 1972.

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Relations Commission
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COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Could the Pennsylvania Human Relations Commission delegate its responsibility for rendering or amending final orders after it conducts public hearings to its legal staff without reserving to itself the power to ratify or approve such orders?

2. Did General Counsel for the Pennsylvania Human Relations Commission have implied or apparent authority to bind the Commission to an agreement the latter never assented to and never authorized General Counsel to enter into?

3. Does the Commission's Amended Final Order exceed the authority granted to the Commission by the Pennsylvania Human Relations Act, Act of October 27, 1955, P. L. 744, 43 P.S. §951 et seq., as amended?

ARGUMENT

1. The Pennsylvania Human Relations Commission cannot delegate its responsibility for rendering or amending final orders to legal counsel without reserving to itself the power to ratify or approve the final product.

The Legislature in passing the Pennsylvania Human Relations Act, Act of October 27, 1955, P. L. 744, as amended (43 P.S. §951 et seq.), clearly identified and described the body charged with its administration. Section 6 of the Act (43 P.S. §956) specifies that the Pennsylvania Human Relations Commission is to administer the Act and further provides that:

> "Said Commission shall consist of eleven members, to be known as Commissioners, who shall be appointed by the Governor by and with the advice and consent of two-thirds of all the members of the Senate.
>
> Six members of the Commission shall constitute a quorum for transacting business, and a majority vote of those present at any meeting shall be sufficient for any official action taken by the Commission."

Generally, the Act prohibits various types of discrimination as delineated in §5 (43 P.S. §955) and provides a basis for informally resolving complaints alleging discrimination once a determination of probable cause has been made. 43 P.S. §959. Sections 7 and 9 of the Act (43 P.S. §§7, 9) discuss the duties and functions of the Commission in connection with the holding of public hearings in the event informal methods do not prove adequate in resolving the complaint.

43 P.S. §959 provides in part as follows: ". . . if, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent to cease and desist from such unlawful discriminatory practice, and to take such affirmative action including but not limited to . . . as, in the judgment of the Commission, will effectuate the purposes of this act. . . ."

Ordinarily, an administrative agency, board or commission must act as a body and no power or function granted to it may be legally exercised in the absence of a lawfully convened meeting. *Commonwealth ex rel. Maurer v. Burns,* 365 Pa. 596, 76 A. 2d 383 (1950). In the instant case the legislature has not only determined how the Commission is to transact business, but it has also determined the number of *Commissioners* needed for any official action by the Commission.

It is appellant's contention that the Pennsylvania Human Relations Commission is bound by the agreement of its General Counsel which significantly altered the original order of the Commission. However, that is precisely the type of action which the legisla-

ture has entrusted to the Commission and its purported exercise by General Counsel was invalid under *Burns*, supra.

The legislature has given the Commission the power to adjudicate cases and render final decisions. Such a power being quasi-judicial in nature, must be exercised by the Commission and cannot be delegated. *Florida Dry Cleaning and Laundry Board v. Economy Cash & Carry Cleaners, Inc.*, 143 Fla. 859, 197 So. 550 (1940); *Creed v. Tynan*, 151 Conn. 677, 202 A. 2d 239 (1964).

While ministerial duties may unquestionably be delegated by an administrative agency, discretionary acts which require the exercise of judgment may not. *State Tax Commission of Utah v. Kutsis*, 90 Utah 406, 62 P. 2d 120 (1936). *Levine v. Perry*, 204 Ga. 323, 49 S.E. 2d 186 (1948).

As the Supreme Court of Pennsylvania said in *Burns*, supra, quoting *P. & F. R. Rly. Co. v. Comm'rs. of Anderson Co.*, 16 Kan. 302, 309: "Whenever a matter calls for the exercise of deliberation and judgment, it is right that all parties and interests to be affected by the result should have the benefit of the counsel and judgment of all the persons to whom has been intrusted the decision."

In the instant case, the alteration of the Commission's original final order was a quasi-judicial act or an act involving the exercise of discretion and judgment. Such a power having been reposed by the legislature in the Commission, could not be delegated and its purported exercise by General Counsel was invalid.

2. General Counsel for the Pennsylvania Human Relations Commission did not have authority to bind the Commission to an agreement the latter never assented to and never authorized General Counsel to enter into.

Without attempting to show that General Counsel for the Pennsylvania Human Relations Commission had any actual authority from the Commission itself to bind it to a settlement, appellant cites certain sections of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, 71 P.S. §§1, et seq., as amended, which he argues furnishes this authority.

Of the three sections cited by appellant only one (71 P.S. §293) has any relevance at all to the issue of the authority of the Commission's counsel to bind it to an agreement. The other two sections (71 P.S. ~~§§512, 902~~), dealing as they do merely with the furnishing and acceptance of legal advice by departments of State Government, have no bearing on whether an agreement, discretionary in nature, entered into by counsel must be accepted by the Commission which employs him. The only section of the Administrative Code at all relevant to the issue is §903(b) (43 P.S. §293(b)) which provides as follows:

> "The Department of Justice shall have the power, and its duty shall be:
>
> "(b) To represent the Commonwealth, or any department, other than the Department of the Auditor General, board, commission, or officer thereof, in any litigation to which the Commonwealth or such department, board, commission,

> or officer, may be a party or in which the Commonwealth or such department, board, commission, or officer, is permitted or required by law to intervene or interplead."

This section, however, which only discusses the representation of the Commonwealth in litigation, does not authorize an attorney to compromise or settle such litigation without the consent of the particular governmental body he represents. In this respect 71 P.S. §293 gives an attorney representing the Commonwealth in litigation no greater authority than his private counterpart.

Under well established principles of law, an attorney employed for the purpose of litigation cannot, without special authorization from his client, compromise that client's claim: *McLaughlin v. Monaghan,* 138 A. 79, 290 Pa. 74 (1927); *In re Quest's Estate,* 188 A. 137, 324 Pa. 230 (1936); *Starling v. West Erie Avenue Bldg. & Loan Assoc.,* 3 A. 2d 387, 333 Pa. 124 (1939); *City of Philadelphia v. Schofield,* 101 A. 2d 625, 375 Pa. 554 (1954).

As was stated by the court in *McLaughlin v. Monaghan,* supra:

> "An attorney as such cannot release a client's cause of action, or surrender his substantial rights in whole or in part, or compromise or settle his client's litigation without special authority so to do." (290 Pa. at 78.)

Appellant can point to no such special authority in the instant case and indeed none was present. On the contrary, as the attached affidavit of the Executive Director of the Pennsylvania Human Relations Commission points out, such authority to compromise claims or settle cases was expressly withheld by the Commissioners.

Administrative agencies are not bound by the unauthorized acts of their subordinates, *Gottesman v. Division of Employment Security,* 25 N.J. 145, 135 A. 2d 500 (1957), and they cannot be deprived of their statutory powers by agreements made by these subordinates. *Manhattan Transit Co. v. United States,* 24 F. Supp. 174 (D. Mass. 1938).

Appellant contends that the agreement entered into by General Counsel for the Commission "represented a reasonable and just final adjudication of this controversy" (Appellant's brief p. 13). To predicate counsel's authority to enter into an agreement or settlement on whether it turns out to be reasonable, is not, and cannot be a valid criterion to apply.

No authority for an attorney to make a compromise or settlement is to be derived from the fact that it is the wisest or most expedient course to pursue. *Seifert v. Gallet,* 159 Minn. 664, 198 N.W. 664. Such a determination must be left to the client.

Appellant further argues that from the totality of the circumstances in this case, the Commission placed counsel in a position where appellant was justified in believing that he had the authority to enter into the agreed upon order. Appellant in support of his position states that General Counsel conducted himself in a manner which indicated that he was speaking on behalf of the Commission and that General Counsel also used Commission stationery (Appellant's brief p. 18).

There is, however, no merit in this contention. As the Supreme Court of Pennsylvania stated in *Starling v. West Erie Avenue Bldg. & Loan Assoc.*, supra:

> "Anyone who deals with an attorney is bound to notice and to inquire into the authority he proposes to exercise." (333 Pa. at 127.)

The Court in *In re Quest's Estate,* supra, put it this way:

> "We have held repeatedly that an attorney cannot, without more, compromise a client's claim. There must be proof of authority beyond that implied by the relationship if the client is to be bound by the acts of his attorney not within the scope of his ordinary duties." (188 A. at 138.)

With respect to appellant's last contention that the Commission ratified General Counsel's agreement, the record simply fails to substantiate that claim. Ratification must, of course, be based on knowledge. *McLaughlin v. Monaghan,* supra.

As the attached affidavit of the Executive Director demonstrates, the proposed agreement first came before the Commissioners at the October 31-November 1, 1971 Commission Meeting when they unequivocably refused to ratify it and directed former General Counsel to prepare an amended final order in accordance with their wishes.

Finally, it is respectfully submitted that not only was appellant not justified in relying on former General Counsel's agreement under the law, but also under the facts the appellant's reliance on an agreement with the Pennsylvania Human Relations Commission was not justified particularly after its receipt of General Counsel's letter of September 15, 1971. This letter stated in part:

> "According to the agreement that we worked out, I am submitting to the Pennsylvania Human Relations Commission at its September 26th meeting, a new Order consistent with that agreement. Copies of the Order will be furnished you as quickly as possible." (Supplemental Record, p. 25b.)

When appellant heard nothing further from General Counsel after this letter and did not receive ratified copies of the Order it would have been just as reasonable for him to have concluded that the Commission had refused to ratify it.

Appellant's letter of Dec. 23, 1970 (Supplemental Record, p. 14b—Exhibit B) clearly shows that appellant was aware of the need for Commission ratification of the agreement. In *N.L.R.B. v. Bird Mach. Co.,* 174 F. 2d 404 (1st Cir. 1940), the respondent offered as a defense to an action by the National Labor Relations Board, an agreement that had been arrived at between the defendant and the Board's Chief Enforcement attorney. In rejecting the respondent's contention the court stated:

> ". . . on the face of respondent's memorandum it is apparent that such tentative agreement was subject to approval by the Board, and there is no showing that the Board ever approved the agreement." (174 F. 2d at 407.)

It is respectfully submitted that the same is equally true in the instant case.

3. The provisions of the Commission's Amended Final Order were not manifestly arbitrary or unreasonable but were devised pursuant to and within the Commission's broad discretionary authority to issue final orders which in its judgment will effectuate the purposes of the Act.

Appellant claims that the following five paragraphs of the Commission's Amended Final Order are arbitrary and beyond the authority granted to the Pennsylvania Human Relations Commission in the Human Relations Act:

> "3. It is hereby ordered that the Respondent, its officers, agents, salesmen and other persons connected therewith shall sign a statement of policy recognizing that they are a place of public accommodations as defined by the Pennsylvania Human Relations Act and agreeing that they shall, in the future, henceforth obey all the provisions of said law, including Section 4(1) and Section 5 (i) (1) and 5 (i) (2) thereof.
>
> "4. It is hereby ordered that the Respondents write to Mrs. George A. Walker, widow of the late Dr. George A. Walker, a formal public letter of apology for the grief she has suffered due to the refusal of the Respondents to bury the remains of her late husband in December, 1969. Said letter must meet with the approval of the Pennsylvania Human Relations Commission.
>
> "5. Respondent shall also agree to instruct its officers, managers and employees, in writing, to comply with the requirements of this order and that it is the policy of the Alto-Reste Cemetery Park Association to bury any person regardless of his race, creed, color national origin, ancestry or sex.
>
> "8. The Respondent shall also maintain such records, in writing, as will indicate whether any person is refused burial, and the reason thereof. A copy of said reasons for refusal of burial should be sent both to the family of the person refused and to the Pennsylvania Human Relations Commission.
>
> "10. Respondent shall advertise in the 'Altoona Mirror' that it does not discriminate on the basis of race in the sale of all of its cemetery plots. Such advertisement shall be submitted to the Executive Director of the Pennsylvania Human Relations Commission for his approval prior to its publication. Said advertisement shall be published no less than once each week for two consecutive weeks."

In examining Appellant's contention that the above paragraphs exceeded the Commission's authority under the Act, the language of the Act must first be looked to. Section 9 of the Pennsylvania Human Relations Act (43 P.S. §959) sets forth the Commission's authority in issuing final orders after the holding of a hearing. This section provides in relevant part as follows:

> "If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discrim-

> inatory practice . . . the Commission . . . shall issue and cause to be served on such respondent to cease and desist from such unlawful discriminatory practice *and to take such affirmative action including but not limited to* hiring, reinstatement or upgrading of employes with or without back pay, . . . as *in the judgment of the Commission, will effectuate the purpose of this Act.* . . ." (Emphasis added.)

The Supreme Court of the United States has had occasion to discuss standards of review applicable to an administrative board with almost identical powers.

In *Fibreboard Paper Products Corporation v. N.L.R.B. et al.*, 379 U.S. 203 (1964), a manufacturing company determined that it could effect substantial saving by contracting out maintenance work which had theretofore been performed by its own unionized employees. At the expiration of its collective bargaining agreement, the company informed the bargaining unit of maintenance employees that it would no longer require their services. The company then closed its maintenance operations and contracted the work out to an independent contractor.

After an investigation and hearing of unfair labor practice charges filed by the union, the National Labor Relations Board found that the company had, in fact, engaged in an unfair labor practice by refusing to bargain in good faith with representatives of its employees. The National Labor Relations Board ordered the company to resume the operations which it had discontinued, even though they had been discontinued for legitimate business reasons, and to reinstate with back pay the individuals formerly employed therein.

The Supreme Court of the United States held that the Board was empowered to take such action even though the applicable statute did not expressly provide that it could order a company to resume operations which had been closed down.

The National Labor Relations Act in language very similar to that employed by the Pennsylvania Human Relations Act provided that the Board, upon determining that an unfair labor practice has been committed, "shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . ." (379 U.S. at 215, quoting from section 10c of the Taft-Hartley Act.)

It was argued by the Company that the Board's order was unreasonable, that it exceeded the Board's authority under the Act, and that it would impose an undue or unfair burden upon the company. The Supreme Court rejected all of these arguments. In the course of its discussion of the Board's authority under Section 10c of the Taft-Hartley Act, the Court had this to say:

> "That section [10c] 'charges the Board with the task of devising remedies to effectuate the policies of the Act.' [citation omitted] The Board's power is a broad discretionary one, subject to limited judicial review. 'The relation of remedy to policy is peculiarly a matter for administrative competence.' [citation omitted] 'In fashioning remedies to undo the effects of viola-

tion of the Act, the Board must draw an enlightenment gained from experience.' [citation omitted] The Board's order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' . . ." (379 U.S. at 216.)

It is respectfully submitted that the above standards of review are equally applicable here. As this Court had occasion to say in *Travis v. Department of Public Welfare,* 2 Pa. Commonwealth 110, 116, 277 A. 2d 171, 174 (1971):

> "The scope of review of the action of an administrative agency is limited to the determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's rules or functions."

Appellant relies on the case of *Pennsylvania Human Relations Commission v. Brucker,* 93 Dauph. 8 (1970), as authority for setting aside the Commission's order in the instant case. *Brucker,* however, is distinguishable on its facts from the instant case; and certainly the final order in the *Brucker* case is materially different from the order here. The final order of the Commission in the instant case is much more similar to the order upheld in *State Commission Against Discrimination v. Holland,* 307 N.Y. 38, 119 N.E. 2d 581 (1954), than it is to the one struck down in *Brucker.*

In *Holland,* supra, the New York Commission Against Discrimination issued a broad final order against the proprietress of a private employment agency after it had been established at a hearing that she had made certain unlawful inquiries of a job applicant. The New York Commission in addition to a cease and desist order required the proprietress to:

> "maintain and make available to the Commission, for a period of one year, records of the action taken on all employment applications and employers' job orders, and to make available to the Commission all other records relating to her business, until such time as the Commission should determine that she was complying with the statute." (119 N.E. 2d at 583.)

The New York Commission, like the Pennsylvania Commission, was empowered under its Act to take such affirmative action as, in its judgment, would effectuate the purposes of its act. New York's highest court found the order of the Commission valid. Judge Fuld, speaking for the Court, declared:

> "The Commission—as in the case of other agencies under comparable statutes—'has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices' in question, 'and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.' [citations omitted.]" (119 N.E. 2d at 585.)

In the instant case, the Pennsylvania Human Relations Commission had good reason for believing that only a broad order which involved some continuing review of Alto-Reste would suffice to make certain that appellant would not continue its past discriminatory practices.

In its answer to the complaint, the Appellant not only admitted its refusal to bury Dr. George Walker solely because of his race, but also admitted in paragraph 5 that it had "at all times up to and including the present time [January 27, 1970] included in agreements, deeds or other written documents pertaining to the sale of burial rites or cemetery lots in its said cemetery, language to the effect that no bodies except those of the Caucasian race may be interred in its said cemetery." (R. 3a) The Commission was also aware that the refusal on the part of appellant to bury Dr. George Walker was not the first time a Black person had been denied burial at the Alto-Reste Park Cemetery Association. (See paragraph 8 of Answer, R. 3a, 4a.)

The case, centering around appellant's refusal to bury Dr. Walker strictly for racial reasons, had generated a good deal of publicity in Blair County as did appellant's obstinate refusal to acknowledge any culpability or wrongdoing and its disregard of and failure to attend the public hearing. The Commissioners apparently felt that only a public letter of apology and some advertising by Alto-Reste could serve to erase or dispel some of the present effects of appellant's discriminatory policies.

Nor was it unreasonable for the Commissioners not to conclude that the amendment to the Pennsylvania Human Relations Act in December of 1970, specifically including cemeteries within the definition of "place of public accommodation", rendered the case moot. After all, even before this amendment it seemed clear that cemeteries certainly did fall within the broad definition of "place of public accommodation" —a point which appellant apparently here concedes.

Even beyond that, however, it was clear that appellant's activities had been in clear violation of federal law. Although appellant contended in its Answer that the reason it did not bury Dr. Walker was because of its "Caucasian only" covenant with prior purchasers (R. 3a), the United States Supreme Court as long ago as 1948 held such covenants unenforceable. *Shelly v. Kraemer,* 334 U.S. 1 (1948); *Hurd v. Hodge,* 334 U.S. 24 (1948).

Then, in the landmark decision of *Jones v. Mayer Co.,* 392 U.S. 409 (1968), the Supreme Court held in clear and unmistakable language that federal law prohibited private parties from discriminating on the basis of race in the purchase, sale or conveyancing of real or personal property. In the course of its opinion the Court stated at 443:

> "Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom —freedom to 'go and come at pleasure' and to 'buy and sell when they please'—would be left with 'a mere paper guarantee' if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man includes at least this much, then the Thirteenth Amendment made a promise the nation cannot keep."

The following year, shortly before the incident giving rise to the present case, the Supreme Court in *Sullivan v. Little Hunting Park,* 396 U.S. 229 (1969), reaffirmed its holding in *Jones v. Mayer,* supra, and permitted an aggrieved individual to maintain an action for damages after he had been discriminated against pursuant to a "Caucasian only" covenant.

The holdings in *Jones* and *Sullivan* left no doubt that cemeteries such as Alto-Reste were prohibited by federal law from continuing racial discrimination. Alto-Reste chose to ignore these decisions. Even after the highly publicized case of *Terry v. Elmwood Cemetery,* 307 F. Supp. (N.D. Ala., decided December 22, 1969), involving a cemetery's refusal to bury a soldier killed in Viet Nam because he was Black, Alto-Reste had still not stricken its "Caucasian only" covenants, it made no attempt to acknowledge or apologize for its wrongful conduct in refusing to bury Dr. Walker, and did not even appear at the public hearing called by the Pennsylvania Human Relations Commission.

In these circumstances it can by no means be said that the provisions of the Amended Final Order constituted an abuse of the Commission's discretion.

Respectfully submitted,
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Attorney General
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APPENDIX

THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 363 C.D. 1972

Alto-Reste Park Cemetery Association,
Appellant
v.
Pennsylvania Human Relations Commission,
Appellee

AFFIDAVIT OF EXECUTIVE DIRECTOR OF PENNSYLVANIA HUMAN RELATIONS COMMISSION

I, Homer Floyd, am the Executive Director of the Pennsylvania Human Relations Commission and have been so employed by the Commission since February 16, 1970. In my capacity as Executive Director I am in full and complete charge of the day to day operations of the Commission. I am also familiar with the policies and mandates of the Commissioners as expressed by them at regular monthly meetings of the Commission.

For the entire period during which I have been the Executive Director of the Pennsylvania Human Rela-

tions Commission it has been the policy of the Commissioners to retain full and complete authority to approve or disapprove the actions of the entire staff of the Pennsylvania Human Relations Commission relating to all cases instituted by or before the Commission. To this end all case closings in all categories (e.g., closings on the basis of lack of jurisdiction, lack of probable cause, satisfactorily adjusted cases, etc.) are presented by staff for ratification by the Commissioners at regular Commission meetings.

Staff of the Commission at all levels, including Assistant Counsel and General Counsel, have been instructed by the Commissioners to always expressly reserve for final Commission ratification any agreements, stipulations, or adjustments which have been proposed in efforts to settle or close any particular case.

To the best of my knowledge this policy has been uniformly acknowledged and adhered to by the staff of the Commission with the exception of the instant case, *Pennsylvania Human Relations Commission v. Alto-Reste Cemetery Association,* Docket No. P-623. In this instance an agreement was apparently entered into by the former General Counsel of this Commission, S. Asher Winikoff, in which he agreed to alter a Final Order of the Commission entered after a public hearing had been conducted in order to settle this matter.

When the proposed agreement was first brought to the attention of the Commissioners at the Commission meeting held October 31-November 1, 1971, the Commissioners refused to ratify it because they did not believe it sufficient to correct the past discrimination

nor to insure against future discrimination on the part of Alto-Reste Park Cemetery. At this meeting the Commissioners directed former General Counsel to prepare an Amended Final Order which would leave intact all of the provisions of the Commission's original Final Order with the exception of Paragraph 10, which the Commissioners desired to make less broad and more definite.

Mr. Winikoff resigned his position as General Counsel of the Commission in January of 1972 without completing this task and it was thereafter carried through by another member of the legal staff. The Amended Final Order was ratified by the Commissioners at the Commission meeting of March 19-March 20, 1972.

Homer C. Floyd,
Executive Director, Pennsylvania Human Relations Commission

Commonwealth of Pennsylvania
Dauphin County, ss:

Homer C. Floyd being duly sworn states that the facts set forth in the above statement are true and correct to the best of his knowledge, information and belief.

Sworn to before me this 25th day of August, 1972.

Maryann Bach,
Notary Public

My Commission Expires May 13, 1974. Harrisburg, Pa., Dauphin County.

In the Supreme Court of Pennsylvania

Middle District

No. 1 May Term, 1974

ALTO-RESTE PARK CEMETERY ASSOCIATION,

Appellee

vs.

PENNSYLVANIA HUMAN RELATIONS COMMISSION,

Appellant

BRIEF FOR APPELLANT

Appeal From the Decision of the Commonwealth Court of Pennsylvania at No. 363 *C.D.* 1972 *Modifying the Order of the Pennsylvania Human Relations Commission Dated March* 20, 1972 *at Docket No. P-*623.

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STATUTES:

Pennsylvania Human Relations Act, Act of October 27, 1955, P. L. 744, as amended, 43 P.S. Sec. 951 et seq. 3, 7, 12, 14, 25

Taft-Hartley Act, Section 10c 11

42 U.S.C.A. Sec. 2000a et seq. 19

42 U.S.C.A. Sec. 2000e et seq. 19

42 U.S.C.A. Sec. 3601 et seq. 19

STATEMENT OF JURISDICTION

Jurisdiction is based upon Section 204(a) of the Appellate Court Jurisdiction Act of 1970, Act of July 31, 1970, P. L. 223, 17 P.S. §211.204(a), which provides for discretionary allowance of appeals from final orders of the Commonwealth Court, and upon the following order entered by the Supreme Court of Pennsylvania on Appellant's petition for allowance of appeal: "Petition granted this 15th day of February, 1973 Per Curiam."

STATEMENT OF THE QUESTIONS INVOLVED

I. May the Pennsylvania Human Relations Commission require one who has engaged in a continuous pattern of unlawful discrimination to maintain records which will enable the Commission to effectively monitor that person's activity in order to insure his future compliance with the Act?

(Answered in the negative by Commonwealth Court.)

II. May the Pennsylvania Human Relations Commission in an effort to undo the effects of the Respondent's past pattern of discrimination require that person to advertise on two separate occasions in his local newspaper the fact that his goods or services are available on a nondiscriminatory basis?

(Answered in the negative by Commonwealth Court.)

III. May the Pennsylvania Human Relations Commission order one who commits an unlawful discriminatory practice to write a public letter of apology to the victim who is subjected to this treatment?

(Answered in the negative by Commonwealth Court.)

IV. May Appellee raise on appeal the question of whether its cemetery was a place of public accommodation prior to December of 1970 when it failed to raise this question before the Commonwealth Court below?

(Not discussed by the Commonwealth Court.)

HISTORY OF THE CASE

On January 27, 1970, the Pennsylvania Human Relations Commission (hereinafter "Commission") filed a complaint against the Alto-Reste Park Cemetery Association (hereinafter Appellee), as of Docket No. P-623, alleging a violation of Section 5 (i) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P. L. 744, as amended (43 P.S. §955 (i)). This complaint was based upon Appellee's refusal to bury the remains of the late Dr. George Walker, solely because of Dr. Walker's race, Black. After efforts of conciliation proved unsuccessful, the Commission scheduled a public hearing in Altoona, Pennsylvania, for April 16, 1970 which Appellee failed to attend.

At this hearing the admissions of fact contained in Appellee's answer to the complaint were read into the record. The answer not only admitted that the refusal to bury Dr. Walker was racially motivated but also admitted that Appellee had "at all times up to and including the present time (January 27, 1970) including in agreements, deeds or other written documents pertaining to the sale of burial rites or burial lots in its said cemetery, language to the effect that no bodies except those of the Caucasian race may be interred in its said cemetery".

The controversy surrounding Appellee's refusal to bury Dr. Walker strictly for racial reasons had generated a great deal of publicity in Blair County.

Appellee asserted its "Caucasian only" covenants with prior purchasers as justification for its present refusal to bury Blacks.

It was in this context that the Commission issued a final order dated April 27, 1970 which found Appellee in violation of the Pennsylvania Human Relations Act and which directed Appellee to take specific steps to remedy the situation.

Appellee then filed an appeal from that order and during its pendency in Commonwealth Court, counsel for the Commission and for Appellee reached an agreement resulting in the discontinuance of said appeal by Appellee. The Commission, however, found this agreement unsatisfactory and issued an amended final order containing substantially the same provisions as were contained in its original final order.

It is this amended final order, dated March 20, 1972, which Appellee appealed to Commonwealth Court as of Docket No. 363 C.D. 1972, which forms the basis of the instant controversy. The Commonwealth Court in an opinion dated December 11, 1972, struck down three separate provisions of the Commission's order while affirming the remainder. The provisions of the Commission's order struck down by Commonwealth Court had directed the Appellee (Respondent) to take the following affirmative steps:

> "4. It is hereby ordered that the Respondents write to Mrs. George A. Walker, widow of the late Dr. George A. Walker, a formal public letter of apology for the grief she has suffered due to the refusal of the Respondents to bury the remains of her late husband in December, 1969. Said letter must meet with the approval of the Pennsylvania Human Relations Commission.
>
> "8. The Respondent shall also maintain such records, in writing, as will indicate whether any person is refused burial, and the reason thereof. A copy of said reasons for refusal of burial should be sent both to the family of the person refused and to the Pennsylvania Human Relations Commission.
>
> "10. Respondent shall advertise in the 'Altoona Mirror' that it does not discriminate on the basis of race in the sale of all of its cemetery plots. Such advertisement shall be submitted to the Executive Director of the Pennsylvania Human Relations Commission for his approval prior to its publication. Said advertisement shall be published no less than once each week for two consecutive weeks."

It is these directives which the Commission had fashioned in good faith to effectuate the purposes of the Human Relations Act but which the Commonwealth Court invalidated, that the Commission seeks to have reviewed by your Honorable Court.

SUMMARY OF ARGUMENT

In creating the Pennsylvania Human Relations Commission to administer the provisions of the Pennsylvania Human Relations Act, the Legislature clearly manifested its intent to confer upon that agency the authority to deal effectively with the difficult problems of discrimination. The broad statutory mandate conferred upon the Commission, after an adjudication of discrimination, to "take such affirmative action . . . as in the judgment of the Commission, will effectuate the purposes of the act . . ." reposes in that body broad discretion in fashioning remedies which will insure future compliance with the act. The Commission's judgment in this respect ought not be interfered with judicially unless the remedy selected bears no rational relationship to the unlawful practices found to exist.

Pursuant to this authority the Commission may lawfully require one who has engaged in a pattern and practice of unlawful discrimination to:

1. maintain and furnish records to the Commission which will enable it to effectively monitor that person's activity in order to insure his future compliance with the Act,
2. reasonably advertise his policy of nondiscrimination in order to undo the present effects of his past actions; and
3. write a public letter of apology to the victim who is subjected to his discriminatory treatment.

ARGUMENT

I The Pennsylvania Human Relations Commission may require one who has engaged in a continuous pattern of unlawful discrimination to maintain records which will enable the Commission to effectively monitor that person's activity to insure his future compliance with the Act.

A) Applicable Standards of Review

It would appear evident from the Pennsylvania Human Relations Act, Act of October 27, 1955, P. L. 744, as amended, 43 P.S. §951 et seq. that the Legislature intended to deal with basic and fundamental problems of discrimination in an effective manner. The Legislature in Section 6 of the Act, 43 P.S. §956 created the Pennsylvania Human Relations Commission to administer this Act and conferred upon that body in Section 9 of the Act, 43 P.S. §959, the following authority to issue final orders after the holding of a hearing:

> "If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent to cease and desist from such unlaw-

ful discriminatory practice *and to take such affirmative action including but not limited to* hiring, reinstatement or upgrading of employes, with or without back pay, admission or restoration to membership in any respondent labor organization, or selling or leasing specified commercial housing upon such equal terms and conditions and with such equal facilities, services and privileges or lending money, whether or not secured by mortgage or otherwise for the acquisition, construction, rehabilitation, repair, or maintenance of commercial housing, upon such equal terms and conditions to any person discriminated against or all persons *as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance.*" (Emphasis added.)

It is this language establishing the enforcement powers of the Commission that lies at the heart of the instant appeal.

The Commonwealth Court in striking down paragraphs 4, 8 and 10 of the Commission's order applied that language in a narrow and restrictive sense and in a manner totally at odds with the legislative intent and purpose.

From even a cursory reading of Section 9 it is evident that the Legislature intended to grant the Commission a broad mandate to combat what it termed in Section 2 of the Act as the "evils" of discrimination. In its findings and declaration of policy which formed the basis of the Act the Legislature declared:

"The practice or policy of discrimination against individuals or groups by reason of their race, color, religious creed, ancestry, use of guide dogs because of blindness of the user, age, sex or national origin is a matter of concern to the Commonwealth. Such discrimination foments domestic strife and unrest, threatens the rights and privileges of the inhabitants of the Commonwealth, and undermines the foundations of a free domestic state. The denial of equal employment, housing and public accommodation opportunities because of such discrimination, and the consequent failure to utilize the productive capacities of individuals to their fullest extent, deprives large segments of the population of the Commonwealth of earnings necessary to maintain decent standards of living, necessitates their resort to public relief and intensifies group conflicts, thereby resulting in grave injury to the public health and welfare, compels many individuals to live in dwellings which are substandard, unhealthful and overcrowded, resulting in racial segregation in public schools and other community facilities, juvenile delinquency and other evils, thereby threatening the peace, health, safety and general welfare of the Commonwealth and its inhabitants." 43 P.S. §952(a)

The Legislature recognized that only an administrative body with broad remedial powers could begin to cope with the pervasive problems set forth above. It was with these considerations in mind that the Legislature granted the Commission in Section 9 of the

Act maximum flexibility to remedy and eliminate discrimination.

So that there would be no mistake as to its application, the Legislature in Section 12 (a) mandated that "the provisions of this Act shall be construed liberally for the accomplishment of the purposes thereof."

In analyzing the standards to be used in determining whether the Commission properly exercised its authority under §9 of the Pennsylvania Human Relations Act, it is instructive to examine what the Supreme Court of the United States has said concerning the powers of an administrative board whose authority is couched in terms almost identical to those of the Commission.

In *Fibreboard Paper Products Corporation v. N.L.R.B. et al.*, 379 U.S. 203 (1964), a manufacturing company determined that it could effect substantial saving by contracting out maintenance work which had theretofore been performed by its own unionized employees at the expiration of its collective bargaining agreement, the company informed the bargaining unit of maintenance employees that it would no longer require their services. The company then closed its maintenance operations and contracted the work out to an independent contractor.

Based on the above facts, the union filed a complaint with the National Labor Relations Board alleging that the company had refused to bargain with it in good faith. After an investigation and hearing on the matter, the National Labor Relations Board found that the company had, in fact, engaged in an unfair labor practice in refusing to bargain in good

faith with representatives of its employees. The National Labor Relations Board ordered the company to resume the operations which it had discontinued, even though they had been discontinued for legitimate business reasons, and to reinstate with back pay the individuals formerly employed therein.

The Supreme Court of the United States held that the Board was empowered to take such action even though the applicable statute did not expressly provide that it could order a company to resume operations which had been closed down.

The National Labor Relations Act in language very similar to that employed by the Pennsylvania Human Relations Act provided that the Board, upon determining that an unfair labor practice has been committed, "shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . ." (379 U.S. at 215, quoting from Section 10c of the Taft-Hartley Act.)

It was argued by the Company that the Board's order was unreasonable, that it exceeded the Board's authority under the Act, and that it would impose an undue or unfair burden upon the company. The Supreme Court rejected all of these arguments. In the course of its discussion of the Board's authority under Section 10c of the Taft-Hartley Act, the Court had this to say:

> "That section [10c] 'charges the Board with the task of devising remedies to effectuate the

> policies of the Act.' . . . The Board's power is a broad discretionary one, subject to limited judicial review. 'The relation of remedy to policy is peculiarly a matter for administrative competence' . . . 'In fashioning remedies to undo the effects of violation of the Act, the Board must draw on enlightenment gained from experience.' . . . The Board's order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' . . ." (379 U.S. at 216.) (Citations omitted.)

Because of the strong public policy in this Commonwealth against discrimination and the overall design of the Pennsylvania Human Relations Act vesting broad authority in the Commission as previously discussed, it is submitted that the above standards enunciated by the Supreme Court should be equally applicable here.

Strong support for such an interpretation of §9 of the Pennsylvania Human Relations Act can be found in numerous court decisions construing similar or identical provisions of anti-discrimination laws in other states. See, e.g., *State Commission Against Discrimination v. Holland,* 307 N.Y. 38, 119 N.E. 2d 581 (1954); *Jackson v. Concord Company,* 54 N.J. 113, 253 A. 2d 793 (1969).

In *State Commission Against Discrimination v. Holland,* supra, the New York Commission like the Pennsylvania Commission was empowered under its Act to take such affirmative action as, in its judgment

would effectuate the purposes of its Act. Judge Fuld, speaking for New York's highest court in interpreting this provision declared:

> "The Commission—as in the case of other agencies under comparable statutes—'has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices' in question, 'and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist'. . ." (119 N.E. 2d at 585) (Citations omitted.)

Decisions rendered by the Supreme Court of Pennsylvania also support the principle of permitting administrative bodies or officials to exercise wide discretion under appropriate legislation. *Hayes v. Scranton,* 354 Pa. 477, 47 A. 2d 798 (1946); *Harrington v. Tate,* 435 Pa. 176, 254 A. 2d 622 (1969).

> "Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other departments of government." *Hayes v. Scranton,* supra, 354 Pa. at 482, 47 A. 2d at 801.

Under these authorities and because of the Legislature's obvious intention to clothe the Commission with broad remedial powers, it is submitted that the courts should not interfere with the Commission's choice of remedy unless it bears no reasonable relation to the goals sought to be achieved.

B) Application of These Standards to Record Keeping Provision

In applying the standards set forth above to paragraph 9 of the Commission's order, it becomes apparent that the Commission did not abuse its discretion in requiring the Alto-Reste Park Cemetery Association, which was engaged in a continuous pattern of unlawful discrimination, to maintain and furnish records indicating the identity of any person who is subsequently refused burial.

The purpose of this requirement was to enable the Commission to monitor Appellee's future conduct in order to make certain that there would be no future recurrences of racial discrimination at Appellee's facilities. Appellee's conduct, as the record amply demonstrates, certainly warranted the Commission's conclusion that such future supervision was necessary.

It is important to bear in mind that the Human Relations Act was enacted for the protection of the public [1] as well as for the protection of individuals who may file complaints with the Commission. As such, it behooves the Commission once it finds an unlawful discriminatory act to have occurred, to recognize the act for what it is—an act directed against an individual because of the class he represents—and to treat it accordingly. It is, therefore,

[1] Section 2(e) of the Act, 43 P.S. P952(e) declares that: "This act shall be deemed an exercise of the police power of the Commonwealth for the protection of the public welfare, prosperity, health and peace of the people of the Commonwealth of Pennsylvania."

incumbent upon the Commission not only to fashion an effective remedy for the individual aggrieved but also to discourage and prevent insofar as possible the same activity from again recurring to the detriment of others within the same class.

It is this public function that the Commonwealth Court overlooked when it invalidated paragraph 8 as well as paragraphs 4 and 10 of the Commission's order as unnecessary to redress what it termed as "the violation involved."

Decisions rendered by the highest courts in jurisdictions with statutes comparable to the Pennsylvania Human Relations Act as well as decisions rendered by federal courts under analogous federal law fully support the validity of the Commission's record keeping requirements in the instant case.

In *Jackson v. Concord Company*, supra, the New Jersey Division on Civil Rights found that the respondents (the corporate property owner together with its named individual representatives) discriminated against one Charles Jackson in refusing to rent to him because of his race. The Director of New Jersey's Division on Civil Rights ordered the respondents to cease discriminating against all persons because of race with respect to rentals at the apartment complex in question. In addition to directing other remedial actions such as the issuing of written instructions to agents and employes, the posting for one year of copies of the Division's final order and the Division's official housing poster, the Director also required the respondent to:

> ". . . make available to the Division for inspection for the same period all records and ap-

plications concerning vacancies at Hartford Arms and the dispositions of such vacancies, as well as copies of the rental or lease arrangement made for each." 253 A. 2d at 797.

The Supreme Court of New Jersey upheld these orders under statutory language almost identical to that contained in the Pennsylvania Human Relations Act.[2] In so doing the court declared:

"From all of this it is patently clear that the Legislature intended to create an effective en-

[2] The New Jersey Act (N.J.S.A. 10:5-17) gave the Director of the New Jersey Division on Civil Rights the following authority:

"If, upon all evidence at the hearing the Director shall find that the respondent has engaged in any unlawful employment practice or unlawful discrimination as defined in this act, the director shall state his findings of fact and conclusions of law and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful employment practice or unlawful discrimination and to take such affirmative action, including, but not limited to, hiring, reinstatement or upgrading of employes, with or without back pay, or restoration to membership, in any respondent labor organization, or extending full and equal accommodations, advantages, facilities, and privileges to all persons, as, in the judgment of the director, will effectuate the purpose of this act, and including a requirement for report of the manner of compliance. The Director shall have the power to use reasonable certain bases, including but not limited to list, catalogue or market prices or values, or contract or advertised terms and conditions, in order to determine particulars or performance in giving appropriate remedy." 253 A. 2d at 799.

forcement agency in order to eradicate the cancer of discrimination. Even in the case of an individual complainant, it is plain that the public interest is also involved. Discrimination, by its very nature, is directed against an entire class in the particular circumstances and wrongful conduct against a complaining individual is indicative of such a state of mind in the wrongdoer against the class. Common knowledge and experience dictate the conclusion, for example, that an apartment owner found to have discriminated because of race in one instance may well have discriminated, and proposes to discriminate, against all others of the class seeking to rent his accommodations. . . So the law seeks not only to give redress to the individual who complains but moreover to eliminate and prevent all such future conduct on the part of the landlord by enjoining further discriminatory practices as to all persons, as well as to deter others similarly situated from engaging or continuing to engage in such courses of conduct. . . Posting requirements are needed to inform and protect future rental applicants, and record inspection provisions are necessary to enable ready check of compliance with the public future aspects of a remedial order. Efforts to remain free to discriminate or to hinder the enforcement of the law cannot be tolerated any more than attempted subtle evasions." 253 A. 2d at 799.

In *State Commission Against Discrimination v. Holland,* supra, the New York Commission after a

hearing found that the proprietress of a private employment agency had made certain unlawful discriminatory inquiries of a job applicant. The New York Court of Appeals, construing an act similar to the Pennsylvania Act, upheld that Commission's order which required the proprietress to:

> ". . . maintain and make available to the Commission, for a period of one year, records of action taken on all employment applications and employers' job orders, and to make available to the Commission all other records relating to her business, until such time as the Commission should determine that she was complying with the statute." (119 N.E. 2d at 583.)

Recently, in a well written, and carefully researched opinion, the Supreme Court of New Jersey in *Zahorian vs. Russell Fitt Real Estate Agency et al.*, No. A-25 September Term, 1972, N.J. , A. 2d (filed March 19, 1973), upheld an administrative order made pursuant to a finding of unlawful discrimination in housing which required the owners to, inter alia,

> ". . . submit to the Division (New Jersey Division on Civil Rights) a list of vacancies every thirty days for two years, advise the Division of the names, addresses, ages, sex and marital status of prospective applicants for rentals every thirty days for two years, and post a copy of the order and written instructions for compliance for a period of two years." (Slip opinion at 9.)

Placing heavy reliance on the broad discretion conferred upon the Director by the New Jersey statute [3] the Court stated:

> "But the evidence adequately supported the Division's finding that there had been such conduct [unlawful discrimination] and the remedial steps which would be required to terminate it and to insure future compliance were matters largely within the Director's discretion. . . His conscientious determination that the requirements for posting and the submission of lists of vacancies and records of applicants were necessary and appropriate should not be interfered with judicially in the absence of a showing of illegality, arbitrariness or the like; here there was no such showing and accordingly the Appellate Division should not have stricken his requirements." (Slip opinion at 13.)

Under federal statutes comparable to the Human Relations Act the federal courts have consistently exercised their powers in sweeping fashion to eliminate discrimination in such areas as employment (42 U.S.C.A. §2000e et seq.), housing (42 U.S.C.A. §3601 et seq.) and public accommodations (42 U.S.C.A. §2000a et seq.) In so doing, they have recognized the necessity and appropriateness of record keeping provisions to insure future compliance. See e.g. *United States v. Real Estate Development Corporation*, 347 F. Supp. 776 (N.D. Miss., 1972); *United States v. West Peachtree Tenth Corp.*, 437 F. 2d 221 (5th Cir. 1971).

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[3] Id.

In *United States v. West Peachtree Tenth Corp.*, supra at 229 et seq., the Fifth Circuit Court of Appeals fashioned a broad remedial order which has since been described as a "model" decree [4] for combating racial discrimination. Part of the decree in *Peachtree*, a case involving a pattern and practice of discrimination in housing, provided:

> "It is further ordered that ninety days after the entry of this decree, and at three-month intervals thereafter, for a period of two years following the entry of this decree, the defendants shall file with this Court, and serve on counsel for the plaintiff, a report containing the following information for the One Tenth Street Apartments:
>
> (a) The name, address and race of each person making inquiry about the availability or terms of rental of an apartment during the preceding three-month period, and whether such person:
>
> 1. Made inquiry.
>
> . . .
>
> 3. Filled out an application.
>
> . . .
>
> 8. Was accepted for occupancy.
>
> 9. Was rejected, and if rejected, the reason or reasons therefor, and the specific objective criterion which the applicant failed to meet.
>
> . . .

[4] *United States v. Real Estate Development Corporation*, supra at 785.

> The reports filed pursuant to this Order shall also include a description of all affirmative steps taken during each preceding reporting period in compliance with this decree, including copies of letters to Negro applicants, copies of all signs posted in accordance with this Decree, copies of all advertisements and brochures used by the defendants (or sample copies of advertisements, together with the dates and media in which they were published), and written documentation to the effect that each employee has received a copy of this Order and has been advised of its terms." 437 F. 2d at 230-231.

II. The Pennsylvania Human Relations Commission May Require One Who Has Engaged in a Pattern and Practice of Unlawful Discrimination To Advertise on Two Separate Occasions in His Local Newspaper That His Goods or Services Are Available on a Non-discriminatory Basis

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In the instant proceeding, Appellee's answer, in effect, admitted to openly carrying out a pattern and practice of racial discrimination through its use of "Caucasian only" provisions in deeds, agreements and other documents used at its cemetery. This policy was obviously widely known in the community, particularly because of the great amount of publicity that Appellee's refusal to bury Dr. Walker had generated.

Under these circumstances, the Commission was justifiably concerned with the continuing effects that

Appellee's conduct was likely to have in the community. Appellee's conduct had, of course, implicitly informed all Blacks that their patronage would not be accepted or welcomed. Only affirmative statements to the contrary made by Appellee to the public would help to dispel such notions.

It was no abuse of discretion, therefore, for the Commission to order Appellee to publish on two occasions in the local paper that its facilities were available to everyone on a nondiscriminatory basis. Such nondiscriminatory advertising as well as directives to affirmatively recruit Blacks are commonly used in remedial orders by federal courts where discrimination has been found.

For example, in *United States v. Local 212, International Brotherhood of Electrical Workers, et al.*, No. 6473, 5 FEP Cases 468 (S.D. Ohio, 1972), aff'd. 5 FEP Cases 478, 427 F. 2d 634 (6th Cir., 1973), a union which had engaged in a pattern of racial discrimination was ordered to become a signatory to a minority group recruitment and training program, and to actively participate in its implementation.

In *United States v. Sheet Metal Workers*, 416 F. 2d 123 (8th Cir. 1968), the Court was quite concerned with the continuing effects of the defendant union's discriminatory policies and practices. It, therefore, directed the district court to require the union to institute a public information program in order to effectively inform the Negro community that admission to the union and related benefits were opened to all persons.

The model decree in *United States v. West Peachtree Tenth Corp.*, supra, 437 F. 2d at 229, also included a provision for nondiscriminatory advertising.

III. The Pennsylvania Human Relations Commission May Order One Who Commits an Unlawful Discriminatory Practice To Write a Public Letter of Apology to the Victim Who Is Subjected to This Treatment

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Under the applicable standards previously discussed, it is contended that the Commission did not abuse its discretion when it directed Appellee to issue a formal public letter of apology to the widow of the late Dr. George Walker. Appellee's refusal to bury Dr. Walker was part of a pattern and practice of discriminatory conduct by Appellee.

This provision of the Commission's order, together with the provision directing Appellee to advertise its nondiscriminatory policy on two occasions, was designed to help undo the effects of Appellee's long standing discriminatory policies on the community. This provision was also intended to give at least limited redress to the person directly affected by Appellee's latest act of discrimination.

The Commission also apparently felt that decency and humanity dictated the issuance of a public apology for such an outrageous act.

IV. Appellee May Not Raise on Appeal the Question of Whether Its Cemetery Was a "Place of Public Accommodation" Prior to December of 1970 When It Failed To Raise This Question Below

In its "Answer to Petition for Allowance of Appeal", Appellee states: "The question thus raised on appeal was and remains now in issue—Was the Cemetery Association subject to the Act when this case arose?"

It is submitted that that question was not, in fact, raised on appeal and is, therefore, not properly an issue before Your Honorable Court. The appeal before the Commonwealth Court was limited to two questions:

> (1) Whether the Commission was bound by an agreement entered into by its General Counsel; and
>
> (2) Whether the Commission's order exceeded its statutory authority.
>
> (See exceptions filed before Commonwealth Court as of Docket No. 363 C.D. 1972. See also Appellee's own brief filed before the Commonwealth Court.)

In fact, at a conference held before the Presiding Judge of the Commonwealth Court and attended by counsel for the Commission and counsel for Alto-Reste Park Cemetery Association on the latter's petition to supplement the record, the Court specifically inquired and counsel for Alto-Reste specifically stated

that the December, 1970 amendment to the Human Relations Act was not raised as an issue in his brief and would not be argued before the Commonwealth Court.

It is acknowledged that this question was initially raised by Alto-Reste's exceptions to the Commission's initial order. However, after that appeal was discontinued, the question was never raised by Appellee. Since that question was not raised, argued, or decided in the Court below, it is submitted that it is not properly before Your Honorable Court now. *Smith v. Yellow Cab Co.*, 288 Pa. 85, 135 A. 858 (1927); *Altman v. Ryan*, 435 Pa. 401, 257 A. 2d 583 (1969).

Assuming that the question has been properly raised, it is the Commission's contention that even before the 1970 amendment to the Human Relations Act, cemeteries such as that maintained by Appellee were places of public accommodation as that term was defined in Section 4(1) of the Act, 43 P.S. §954(1).

That section declared in relevant part that "The term 'place of public accommodation, resort or amusement' means any place which is open to, accepts or solicits the patronage of the general public . . . but shall not include any accommodations which are in their nature distinctly private."

The list of places mentioned in 43 P.S. §954(1) was never intended to be exclusive and, in fact, was prefaced by the words "including but not limited to". Appellee's cemetery was open to and did accept the patronage of the public. It was not distinctly

private. Hence, it fell squarely within the definition of the term "place of public accommodation." See *Commonwealth, Human Relations Commission v. Loyal Order of Moose,* 448 Pa. 451, 294 A. 2d 594 (1972); *Everett v. Harron,* 380 Pa. 123, 110 A. 2d 383 (1955).

Respectfully submitted,

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