In the Commonwealth Court of Pennsylvania

No. 998 C.D. 1973

GORCHOV BROTHERS REAL ESTATE,
Appellant

v.

PENNSYLVANIA HUMAN RELATIONS COMMISSION,
Appellee

BRIEF FOR APPELLEE

Appeal From the Decision and Final Order of the Pennsylvania Human Relations Commission at Docket No. H-1701.

FRANK FINCH, III
Assistant General Counsel
Pennsylvania Human Relations Commission
SANFORD KAHN
General Counsel
Pennsylvania Human Relations Commission
Attorneys for Appellee

711 State Office Building
1400 Spring Garden Street
Philadelphia, Pennsylvania 19130
(215) 238-7205

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

INDEX TO BRIEF

TABLE OF CITATIONS

CASES:

pp. 15,026 to 15,035

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

1. Are the findings and decision of the Pennsylvania Human Relations Commission consistent with the relevant evidence adduced at the public hearing and reflective of a valid exercise of discretion on matters of credibility?

2. Are paragraphs 2e and 2f of the final order of the Pennsylvania Human Relations Commission reasonably designed to effectuate the policies and purposes of the Human Relations Act?

COUNTER-HISTORY OF THE CASE

Field Representatives of the Pennsylvania Human Relations Commission (Commission) Gerald Rugel, race white, and Margaret Mitchell, race black, testified at a public hearing on December 28, 1972 that on or about February 2, 1972 they individually sought information concerning the availability of rental units leased through the agency of Gorchov Brothers Real Estate in Bala Cynwyd, Pennsylvania. Mitchell testified that she entered the Gorchov's office at 284 Montgomery Avenue, Bala Cynwyd ten minutes after Rugel departed and was told by bookkeeper-agent Mildred Gorchov that no apartments were available. There is no testimony that she presented herself in a manner or gave information about herself that would in any way distinguish her from Rugel, except for the obvious fact that she is a black female. Yet Rugel testified that in response to his inquiry, which was similar to Mitchell's, he was told of a two-bedroom apartment available in Philadelphia that Gorchov was prepared to rent to him. Rugel and Mitchell thereafter filed their sworn reports with the Commission.

After checking the validity of these reports the Commission determined that there existed probable cause to believe that an unlawful discriminatory act had occurred. Whereupon the Commission served the respondent with a Human Relations Commission initiated complaint, pursuant to section 9 of the Pennsylvania Human Relations Act, Act of October 27, 1955, P. L. 744, as amended, 43 P.S. §959. Said complaint alleged violation of §955(h) of the Human Relations Act.

After unsuccessfully attempting to eliminate or prevent future unlawful discriminatory practices by conference, conciliation and persuasion a public hearing was convened pursuant to section 959.

Mrs. Gorchov testified that she could not remember Rugel or Mitchell and she and her husband testified that they had rented the apartment in question to one Craig Ellis before the inquiries of Rugel and Mitchell. They also alleged that Ellis was of the black race.

Faced with these credibility questions the Commissioners resolved them in favor of Rugel and Mitchell. Thereupon the Commissioners found that the appellants had violated §955(h). The findings and order issued pursuant thereto are the subject of the instant appeal.

ARGUMENT

I. The Commission's Decision Is Supported by the Weight of the Evidence and Reflects a Valid Exercise of Discretion on Matters of Credibility

The Appellee is at a loss to determine exactly what the appellant means in the index and on page 4 of its brief where it asserts that the Commission's decision must be "reserved." Being unfamiliar with such nomenclature used in this context the appellee is not particularly sure what it is this Court is being asked to do. It is hoped that this is a mere typographical error and if not then we would like to address the issue of whether the Commission's decision should be "reserved" by supplemental brief or memo to the Court. Assuming that the appellant intended to assert that the Commission's decision and/or order should be "reversed" then the appellee is similarly at a loss to determine how the appellant can challenge on appeal the findings of fact-finders on issues which are clearly matters of credibility.

Section 1710.44 of the Administrative Agency Law of June 4, 1945, P. L. 1388, §44, 71 P.S. §1710.44, states that the court must affirm the agency's adjudication unless it violates constitutional rights, the Administrative Agency Law or other laws, or if "any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence." Nowhere does the appellant make any of these assertions. In fact the appellant does not even cite the Administrative Agency Law in its brief.

We must therefore either assume that the appellant is conceding that the adjudication complained of comports with §1710.44 or that it does not in that it does not meet the substantial evidence test. Again the appellee is in the position of having to surmise and guess as to the legal categories into which the appellant intended to fit its argument.

The Commission's findings and order are not based on a mere scintilla of evidence. There can be no more substantial evidence of discrimination, on an individual basis, than the fact that a black person was given different information as to the availability of rental units than a white person who inquired ten minutes earlier. The weight to be given any testimony that during that ten-minute interim Mrs. Gorchov was suddenly enlightened by her husband as to whether a unit was actually available is certainly a matter for the hearing panel to decide, not the appellate court. The Court cannot substitute its judgment for that of the Commission; nor can it weigh the evidence or pass on the credibility of witnesses. *Pennsylvania Human Relations Commission v. Brucker,* 51 D. & C. 2d 369, 93 Dauph. 8 (C.P. Dauphin Co. 1970).

If the appellant is relying on the substantial evidence test it is its burden to demonstrate the lack of such evidence. This burden is not discharged simply

by reviewing the record and extracting testimony which, if believed, might explain or mitigate harmful testimony or detrimental evidence. Instead the appellant must concentrate on the findings and isolate those which are not supported by substantial evidence.

Section 1710.44 indicates that following this isolation process the second step is to show how or wherein each such finding of the agency is "necessary to support its adjudication." The appellant's brief falls far short of discharging its burden on appeal as set forth in the Administrative Agency Law. Hence it is respectfully submitted that even if there is merit to the appeal this Court cannot reach it since the appellant has not put the appellee or the Court on notice as to the findings to which it takes exception and the specific reasons therefor. The Administrative Agency Law has been willfully ignored.

The appellant apparently admits on page 4 of its brief that the testimony of Rugel and Mitchell is accurate. The appellant states that "Martin Gorchov's failure to communicate timely with his wife *innocently* resulted in mistaken information being conveyed to the public" (emphasis added). Yet in the second part of its brief the appellee seems to reject portions of the Commission's order designed to prevent such office mixups. Moreover, the Human Relations Act as well as federal anti-discrimination laws do not require proof of scienter or intent, as the use of the word "innocently" seems to imply. Again in its conclusion, page 9, the appellant states that there was no "conscious withholding" of facts. The Commission need not make such a finding to support its adjudication.

This Court's decision in *Marhoefer et al. v. Pennsylvania Human Relations Commission,* 4 Pa. Commonwealth Ct. 242, 285 A. 2d 547 (1971), certainly does not, as the appellant implies, require the Commission to find a conscious withholding of facts.

In fact the turning point of the *Marhoefer* case was that there was nothing of record to indicate that the two prospective tenants received different information. This Court made it quite clear that as it read the transcript the first (white) tester testified that she was told that there was an apartment with a "hold" on it, 285 A. 2d at 549). The black tester was told nothing was available. The Court concluded that the two received substantially the same information and were asked to do the same things. That is a far cry from the instant case where the white tester was told of an available unit (R. 11a) and ten minutes later the back tester is told to leave and consult a newspaper (R. 14a).

Great weight must be accorded the testimony of the testers because the appellant admits the facts. In fact counsel for the Respondent at the hearing elected not to cross-examine the black tester (R. 14a). Instead the appellant sought to explain the incidents. But that essentially avoids the issue. As the Commission's findings (R. 45a and 46a) indicate, the main issue is whether Rugel and Mitchell received the same information. Even if the Commission considered the excuses put forth is it not free to con-

clude that if such a mixup resulted in incorrect information being given to a black tester it might well happen again to the detriment of a future black inquirer? And does it not follow that an agency charged with the duty of striking out against and preventing circumstances which have adverse impacts on minorities can order a party that failed the test to implement procedures designed to ensure uniform treatment to all regardless of race?

Furthermore the Commission is not bound to believe the testimony of the Gorchovs. Indeed there are inconsistencies. To say, as does the appellant at page 2 of its brief, that Gorchov's testimony stands "uncontradicted in the record" is a misplaced interpretation. First of all Mr. Gorchov's testimony as to what occurred that day was certainly challenged on cross-examination (R. 41a to 43a). Secondly it is for the fact-finder to determine whether the challenge was sufficient to cast doubt upon the testimony. And finally there is no finding (R. 45a and 46a) that Gorchov had *not* rented to Ellis or that his wife was *not* under a mistaken impression, indicating that the Commission determined such findings to be unnecessary to support its adjudication. The issue as to whether Mrs. Gorchov was suddenly enlightened by her husband is irrelevant. Also irrelevant is whether minorities were rented apartments in the past since the appellant possibly sets quotas.

What is relevant is whether the test was conducted and whether the occurrences were as the testers indicated. Again, the testimony is substantially admitted. Mrs. Gorchov testified that she could not

remember ever having seen the testers (R. 15a). Yet she remembered many other circumstances as they existed that day. She testified that she came in at 9:00 a.m. (R. 16a) and that as far as she knew the apartment recently vacated by one Mr. Cane was still vacant (R. 17a). She further testified that she overheard her husband talking in an adjoining office during mid-morning (R. 28a and 33a) and that he failed to tell her of a phone call he received the night before from one Craig Ellis (R. 28a). Later her husband allegedly told her that an available unit at the complex in question had been rented (R. 33a).

Her recall wasn't so bad after all and if the Commission determined these alleged events to be relevant it certainly could have validly chosen to doubt her inability to recall that at 10:30 that morning she offered the apartment to Rugel.

Moreover, the appellant chose not to challenge Mitchell's testimony that Mrs. Gorchov told her that there had not been any vacancies "for quite some time" (R. 13a). It should have challenged that testimony if it knew that Mrs. Gorchov would testify on direct examination that the apartment in question "had not been vacant too long . . . maybe it was a matter of days" (R. 17a).

The testimony to the effect that the misinformation given to Mitchell resulted from Mrs. Gorchov's ignorance of the renting of the unit to one Craig Ellis, a black person, is also a credibility matter and one of questionable relevance. First of all, who knows whether Ellis is black as alleged? He was not pres-

ent. Secondly, the only indication that anyone by that name ever made an inquiry to the Gorchovs is a letter the introduction of which was not preceded by the laying of a proper foundation for documentary evidence (R. 19a) and which is of questionable admissibility. There is no authentication and a rather shallow demonstration of relevance (R. 20a and 22a). The only indication that anyone by that name ever leased the apartment is a lease executed *February 4th* to begin *February 10th*. The inquiries of Rugel and Mitchell were made on February 2nd (R. 9a and 12a).

In sum, to the extent that there were relevant facts and issues in addition to the circumstances surrounding the Rugel-Mitchell inquiries themselves, the Commission weighed the evidence, passed on the credibility of the witnesses and their testimony and issued its findings. The appellant has not indicated in its brief the exact findings to which it takes exception. The appellant certainly cannot now be heard to seek reversal based on facts or issues it thinks are relevant.

II. It Is Within the Authority of the Commission To Order Appellant To Furnish and Maintain Records Which Effectuate the Purposes of the Human Relations Act

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It is common knowledge and certainly the appellant should know that its own professional associations have endorsed procedures such as those required by paragraphs 2e and 2f of the Commission's order

as a way of ensuring uniform treatment to all, regardless of race or sex. The Pennsylvania Realtors Association, with which the appellant is affiliated, has approved such procedures. So has the Philadelphia Board of Realtors as well as several other local Boards throughout the Commonwealth.

Furthermore, a requirement of record keeping and the furnishing of notices to the Human Relations Commission was recently upheld by the Pennsylvania Supreme Court in *Pennsylvania Human Relations Commission v. Alto-Reste Park Cemetery Association,* 453 Pa. 124, 306 A. 2d 881 (1973).

The Pennsylvania Human Relations Act, Act of October 27, 1955, P. L. 744 as amended, 43 P.S. 951, et seq. provides that the Commission may, upon the finding of a discriminatory act, order a respondent to "take such affirmative action . . . 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." 43 P.S. 959. It is submitted that the requirements of paragraphs 2e and 2f are not onerous or unduly burdensome. Nor are they outside of the Commission's authority. Referring to the above—cited section the Court in *Alto-Reste* stated:

> ". . . The words 'as in the judgment of the Commission' indicate to us, that the Legislature recognized that only an administrative agency with broad remedial powers, exercising particular expertise, could cope effectively with the pervasive problem of unlawful discrimination. Accordingly, the Legislature vested in the Com-

mission, quite properly, maximum flexibility to remedy and hopefully eradicate the 'evils' of discrimination. . . ." *Alto-Reste,* 305 A. 2d 881, 887.

Requirements such as are included in paragraphs 2d, 2e, 2f and 2g are not new to the federal courts either and have been included in the same order in cases where the testimony of housing "testers" was used. *U.S. v. Youritan Construction* Co., P-H Eq. Opp. Housing, ¶13,582 (D.C.N.D. Cal., Feb. 8, 1973) (see pp. 13,833 to 13,836). The federal courts, in interpreting provisions of federal housing laws similar or analagous to §955(h) of the Pennsylvania Human Relations Act, have taken the position that "(a)ny course of conduct or way of doing business which *actually* or *predictably* results in different treatment of whites and blacks is a discriminatory pattern or practice, irrespective of motivation (emphasis added)." *U. S. v. Grooms et al.,* P-H Eq. Opp. Housing, ¶13,571 (D.C.M.D. Fla., July 28, 1972).

Moreover, other state courts have upheld similar and more stringent orders issued by state civil rights agencies. *Miller Properties, Inc., et al. v. Ohio Civil Rights Commission,* P-H Eq. Opp. Housing, ¶15,016 (C.P., Franklin Co., Ohio, April 21, 1972). The Court in *Miller,* as the Supreme Court in *Alto-Reste,* similarly stressed the broad remedial powers of the Ohio Commission.

In short the appellant's contention that the provisions of the Commission's order, individually or combined, are outside of its authority or too burdensome is completely without merit. They constitute a valid

discharge of the Commission's obligation to ensure that those who sell or lease property, and are caught in acts of unlawful discrimination, undertake procedures which will result in uniform treatment of all. Surely the Commission would be partially at fault if, because of its failure to require such procedures, the appellant is found unlawfully denying housing in the future.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the findings of fact, conclusions of law, decision and order of the Pennsylvania Human Relations Commission should be affirmed.

Respectfully submitted,

FRANK FINCH, III
Assistant General Counsel
Pennsylvania Human Relations Commission
Attorney for Appellee.