COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JANICE HOFFMAN, Complainant	:	
vs.	:	DOCKET NO. S-181
CHESTER UPLAND SCHOOL DISTRICT, Respondent	:	

HISTORY OF THE CASE,
FINDINGS OF FACT,
CONCLUSIONS OF LAW, OPINION,
RECOMMENDATION OF HEARING COMMISSIONERS,
COMMISSION'S DECISION AND FINAL ORDER

HISTORY OF THE CASE

This matter involves Complaints filed with the Pennsylvania Human Relations Commission ("Commission") by Janice Hoffman ("Complainant") on April 19, 1976, as amended on July 30, 1976 and again amended on November 1, 1978, against the Chester Upland School District; Earl Foster, a member of the Board of the School District, and Dr. John J. Vaul, Superintendent of Schools ("Respondents"). The second amended complaint, upon which the case was prosecuted, alleged in pertinent part that Respondents:

1. Transferred Complainant to a less desirable job with less desirable duties;

2. Caused her to be terminated from her position as a part-time consultant at the Alternative School;

3. Suspended her from her position as a Home and School Visitor ("HSV"); and

4. Refused to reinstate her into any position for which she was qualified and to which she was entitled in accordance with the Public School Code;

in retaliation for Complainant's having opposed what she believed to be Respondents' unlawful, racially discriminatory practices, in violation of Section 5(d) of the Pennsylvania Human Relations Act ("Act"), 43 P.S. 955(d).

An investigation into the allegations of the Complaint was made by representatives of the Commission and a determination was made that probable cause existed to credit the allegations. Thereupon, the Commission endeavored to eliminate the acts complained of by conference, conciliation and persuasion. These endeavors were unsuccessful, and the Commission subsequently approved this case for Public Hearing. The Panel named to hear the case included: E. E. Smith, Chairperson of the Panel, Alvin Echols, Jr., Esq., Hearing Commissioner and Raquel Otero-de-Yiengst, Hearing Commissioner. Robert S. Mirin, General Counsel, served as Legal Advisor to the Hearing

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Panel. Benjamin G. Lipman, Assistant General Counsel to the Commission, presented the case on behalf of the Complainant. Leo A. Hackett, Esq., represented the Respondents.

Public Hearings were held in the Administrative Building of the Chester Upland School District in Chester, Pennsylvania on November 15, 16 and 17, 1978. The hearings were conducted at all times before the three duly appointed Hearing Commissioners pursuant to Section 9 of the Act (43 P.S. 959).

FINDINGS OF FACT

I. JURISDICTION

1. Complainant, Janice Hoffman, is a Black female natural person, residing at 524 West Marshall Street, West Chester, Pennsylvania (Amended Complaint, Second Amended Complaint, S-181; N.T. 36).

2. Respondent Chester-Upland School District is a School District of the Commonwealth of Pennsylvania, organized and existing pursuant to the laws thereof, with its principal offices at Melrose Avenue and 18th Street, Chester, Pennsylvania 19013. (Complaints as amended, S-181; N.T. 36).

3. Respondent John Vaul is, and was at all times material to this action, Superintendent of Schools of the Chester Upland School District. (Complaints as amended S-181; N.T. 36).

4. Respondent Earl Foster is and was at all times material to this action Vice-President of the School Board of the Chester Upland School District. (Complaints as amended S-181; N.T. 36).

5. The Commission and the parties to this action fully complied with all of the procedural pre-requisites to Public Hearing, in accordance with Section 9 of the Act (43 P.S. 959). (N.T. 36, 37).

II. PROCEDURAL ISSUES

A. Amendment of the Complaint

6. Janice Hoffman filed a complaint at Docket No. S-181 with the Pennsylvania Human Relations Commission on April 19, 1976. (C-1).

7. This complaint alleged that Respondents demoted Complainant, and failed to reappoint her to her former position, because of her opposition to Respondents' policies which she believed to be racially discriminatory, and because of her race (Black) and sex (female), in violation of Sections 5(a) and 5(d) of the Act (43 P.S. 955 (a) and (d). (C-1).

8. An amended complaint was filed on July 30, 1976, alleging that Respondents demoted her, failed to reappoint her to her former position, denied her an internship as a Psychologist and threatened to lay her off, because of her opposition to Respondents' policies which she believed to be discriminatory, and because of her race (Black), in violation of Sections 5(a) and (d) of the Act (43 P.S. 955 (a) and (d)). (C-2).

9. The amended Complaint was served upon Respondents on August 16, 1976. (C-2).

10. A second amendment of the complaint was executed by Complainant on November 1, 1978, subsequent to the approval of Public Hearing in this case (C-3).

11. The second amended complaint alleged that Respondents transferred her to a less desirable job, terminated her from her job as a consultant, suspended her from her position, and refused to reinstate her, because of her opposition to

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Respondents' policies which she believed to be racially discriminatory, in violation of Section 5(d) of the Act (43 P.S. 955 (d)). (C-3).

12. The second amended Complaint was transmitted to Respondents on November 13, 1978. (N.T. 33)

13. Leave of the Hearing Panel was requested and obtained for execution of the second amended complaint. (N.T. 35).

14. Respondents' counsel was invited by the Panel to request a continuance to prepare elements of his case pertaining to allegations in the second amended complaint, should he need additional time to do so, but at no time requested such a continuance. (N. T. 35-6).

B. ROLE OF COMMISSION COUNSEL

15. Robert S. Mirin, General Counsel of the Commission, served as Legal Advisor to the Hearing Panel in this case. (N.T. 15).

16. Benjamin G. Lipman, Assistant General Counsel of the Commission, presented the case on behalf of the Complainant. (N.T. 3).

17. Mr. Mirin was at all times relevant to this proceeding Mr. Lipman's supervisor. (N.T. 15).

18. Mr. Mirin and Mr. Lipman at no time prior to Public Hearing discussed any aspect of this case, other than the necessary communications as to purely adminstrative matters such as scheduling of the hearings. (N.T. 15, 16 & 17).

19. Neither Mr. Mirin nor Mr. Lipman took part in any way in the decision of this case. (N.T. 17).

II. LIABILITY

20. The Complainant commenced employment as a Home and School Visitor (hereinafter "HSV") with the federally-funded Title I program for the Respondent in September 1971. (N.T. 38, 39).

21. In November, 1972, Complainant's federally-funded position was absorbed into Respondents' regular payroll; Complainant was thereafter a HSV attached to Respondents' Pupil Services Division. (N.T. 38, 64).

22. Respondent Earl Foster was Vice-President of Respondent School District in July, 1975. (N.T. 46)

23. Around July 1, 1975, Complainant telephoned Earl Foster to advise him of her concerns about problems which she perceived within the District. (N.T. 46, 2.80, 3.201).

24. In that conversation Mr. Foster advised Complainant to send her concerns to him in writing. (T. T. 46, 3.201).

25. Subsequently, Complainant sent a seven page, unsigned letter, dated July 17, 1975, to Earl Foster, detailing many of her concerns, including what she believed to be inadequate delivery of educational services to Black children and racially discriminatory practices by Respondent School District. (N.T. 47-51, 2.80-2.86, 2.89-2.92, 3.202, Exh. C-5).

26. Mr. Foster shared the contents of Complainant's July, 1975 letter with several other District officials. (N.T. 52, 2.117, 3.16, 3.7, 3.14, 3.15, 3.202, 3.203).

27. A meeting of Respondent officials was held in the autumn of 1975 to discuss the contents of Complainant's July 1975 letter. (N.T. 3.15, 3.16, 3.79, 3.80, 3.81, 3.118, 3.119, 3.150, 3.203, 3.226).

28. Complainant took medical leave of absence from November 5 to December 22, 1975. (N.T. 56, 3.108).

29. During this leave Complainant received a letter dated December 18, 1975, from Dr. John Vaul, Respondent Superintendent, advising her to report to his office on December 22, 1975, instead of reporting to her usual assignment. (N.T. 57, 3.119, Exh. C-6).

30. On December 22, 1975, Complainant reported to Dr. Vaul's office as instructed; her job assignment, salary, and certification were discussed. (N.T. 58, 59, 3.119).

31. At the December 22, 1975 meeting, Complainant was advised that her job description had been revised and her salary frozen. (N.T. 58, 59, 61, 63, 3.33, 3.43, 3.119, Exh. C-7).

32. At one o'clock on the afternoon of December 22, 1975, Complainant met with Mr. Spain and Mr. Lombardi. She was told that her workplace was from thenceforth to be Chester High School. (N.T. 69 70).

33. When Complainant reported to work at Chester High School on January 5, 1976, she was directed to investigate the attendance problems of some five hundred students; she was

given a handwritten list of the students' names, with no other identifying data. (N.T. 71, 74).

34. Complainant's assigned work place at Chester High School was in a hallway, at a desk facing a wall, near the principal's office. (N.T. 74, 75, 2.37, 3.193).

35. Subsequently, Complainant's work place was shifted to a windowless room which was and continued to be used as an art supply room. (N.T. 75, 76, 3.194, 3.282, 3.283.).

36. In September, 1975, Complainant was hired as a part-time Consultant at the Alternative School Program. (N.T. 89, 2.45, 2.154).

37. The Alternative School is a part of, and is funded by, Respondent School District. (N.T. 88, 2.93, 2.154, 2.194).

38. On December 22, 1975, Complainant was relieved of her duties as Consultant at the Alternative School. (N.T. 93, 94, 95).

39. On June 1, 1976, Dr. Vaul proposed to the Board of Respondent School District that all employees in fourteen job classifications; including HSV, be suspended. (N.T. 114, Exh. C-11).

40. By letter dated June 11, 1976, Complainant was advised that her suspension would become effective on July 1, 1976. (N.T. 115, Exh. C-12).

41. Complainant was never recalled to her former position or to any other for which she might have been qualified. (N.T. 118-140).

42. Two passages of Complainant's seven page letter of July, 1975, referred to matters of racial concern. (Exh. C-5).

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43. None of the ten suggestions with which Complainant's July, 1975 letter concludes makes any mention of matters of racial concern. (Exh. C-5).

CONCLUSIONS OF LAW

I. JURISDICTION

1. The Pennsylvania Human Relations Commission properly has jurisdiction over the parties and subject matter of the Complaint in this action at Docket No. S-181, pursuant to Sections 4 and 5 of the Act (43 P.S. §954, 955).

2. The Pennsylvania Human Relations Commission and the parties have fully complied with all of the procedural pre-requisites to a Public Hearing in accordance with Section 9 of the Act (43 P.S. 959).

3. The execution of the Second Amended Complaint was accomplished and approved in accordance with the requirements of the Act and of due process of law, and no prejudice to Respondents resulted from the amendment.

4. No prejudice to Respondents resulted from the assignments of, respectively, Robert S. Mirin, Pennsylvania Human Relations Commission General Counsel, as Panel Advisor and Benjamin G. Lipman, Pennsylvania Human Relations Commission, Assistant General Counsel, as prosecutor of the Complainant's case.

5. Complainant, as a matter of law, has failed to establish that her opposition was to hiring practices of Respondent which were racially discriminatory (and hence violative of the Act,) and therefore entitled to protection under the Act, sufficient to prove a violation of Section 5(d) (43 P.S. 955(d)).

6. Complainant failed to establish that Respondent discriminated against her in any manner because she had opposed any practice forbidden by the Pennsylvania Human Relations Act.

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JANICE HOFFMAN, Complainant	:	
	:	DOCKET NO. S-181
vs.	:	
CHESTER UPLAND SCHOOL DISTRICT, Respondent	:	

OPINION

I. STATEMENT OF CASE

This matter arises on the Complaint of Janice Hoffman, as amended, filed with the Pennsylvania Human Relations Commission, alleging that her employer, the Chester Upland School District, retaliated against her for her opposition to what she believed to be the District's unlawful racially discriminatory practices. This is a case of first impression with respect to the interpretation of that portion of Section 5(d) of the Act which makes it an unlawful practice to: "... discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act ..." (43 P.S. 455 (d)).

In addition, the case raises two procedural issues: first whether the timing of the second amendment of Ms. Hoffman's complaint resulted in prejudice to Respondents; and,

second, whether the Commission improperly commingled prosecutorical and adjudicative functions in its assignment of two members of its legal staff to function as, respectively, Advisor to the Hearing Panel and prosecutor of the Complainant's case.

II. BACKGROUND OF THE CASE

Complainant commenced employment with Respondent School District as a Home and School Visitor, under a federally funded Title I Program, in September of 1971. The following year her federally funded position was absorbed into Respondents' regular payroll, and she became a Home and School Visitor attached to Respondents' Pupil Service Division.

On or about July 1, 1975, Complainant telephoned Respondent Earl Foster, a member of the School Board, to advise him of her concerns about numerous issues within the District.

Subsequently and at Mr. Foster's request, Complainant sent him a letter detailing her concerns. These included matters of racial sensitivity within the District; allegations were made of racially discriminatory hiring practices and racially biased attitudes of District employees. Un-known to Complainant, this letter was shared by Mr. Foster with many other District officials, and a meeting held to discuss its contents.

Complainant fulfilled her regular duties until November of 1975; at that time she took medical leave of absence. Prior to her return from this leave she received a letter from Respondent Superintendent Vaul, advising her to report to a meeting in his office on December 22, 1975, her first scheduled day back at work.

At this meeting, Complainant was informed that her job assignment was to be changed, her job description altered, and her salary frozen. Later on the same day, she was relieved of her part-time consulting duties at the Alternative School, a program funded by Respondent and serving socially and emotionally disturbed students.

Complainant's new assignment was to investigate attendance problems at Chester High School. Upon reporting to her new workplace, the Chester High School building, she was assigned the task of investigating students with attendance problems. She was given a desk in the hallway at which to work. Three weeks later, her work place was again changed, this time to a room which was and continued to be used as an art supply room. Here she remained for several months.

On June 1, 1976, Respondent Vaul proposed to the School Board that all employees in fourteen different job classifications, including Home and School Visitor, be suspended. By letter of June 11, 1976, Complainant was advised that her suspension would become effective July 1, 1976. She was furloughed on that date, and not subsequently recalled to either her former position or any other position.

III. THE DUE PROCESS ISSUES

Prior to the introduction of any testimony on the record of this case, counsel for Respondents raised two preliminary objections in the nature of motions to quash all or substantially all of the impending proceedings, based on Respondents' claims of denial of due process. These due process claims were again raised by Respondent in their brief filed after the hearing. This Commission finds that both motions were correctly denied by the Hearing Panel, and that no prejudice to Respondent resulted from either the second amendment of the complaint or the roles fulfilled by Commission counsel at the Public Hearing.

A. Amendment of the Complaint

Ms. Hoffman's original complaint was filed with the Commission on April 19, 1976, and was served upon respondent in a timely fashion. The complaint was amended on July 30, 1976, and was similarly served in a timely manner. A second amended complaint was executed on November 1, 1978, and was served upon Respondents' counsel on November 13, 1978, two days prior to commencement of the Public Hearing. As required by §42.35 of the Commission's Special Rules of Practice and Procedure (16 Pa. Code 42.1 et seq.), leave of the Hearing Panel was obtained for the final amendment to the complaint. Only the second amended complaint is challenged by Respondents.

The amended complaint alleged that Respondent demoted Complainant, denied her an internship, failed to reappoint her to her prior position, and threatened her with layoff, because of her race, Black, and because of her opposition to what she believed to be racially discriminatory policies within the school district. Violations of Section 5(a) and 5(d) of the Act were claimed.

The second amended complaint, which involved virtually the same conduct and issues, alleged that Respondents transferred her to a less desirable position, terminated her as consultant in the alternative school, suspended her from her position as HSV, and refused to reinstate her into any position for which she was qualified, because of her opposition to practices of the school district which she believed to be racially discriminatory.

In short, the second amendment to the Complaint deleted allegations of racial discrimination against Complainant and of discriminatory denial of an internship. A new but clearly related allegation was added:

> That Respondents had indeed suspended Complainant from her position as HSV, and refused to reinstate her to any position for which she was qualified.

Only Section 5(d) of the Act was cited as having been violated by these actions.

Respondents argued at Public Hearing, and again in their brief, that allowing the complaint to be amended on the first day of public hearing denied them due process of law. Specifically, they object to the deletion of the Section 5(a)

claim and the addition of allegations of layoff and refusal to recall, claiming that these changes were prejudicial to their legal rights and left them in a position of confusion as to what the charges against them actually were. Respondents' brief also challenges, for the first time, the timeliness of the original complaint, which was filed on April 19, 1976. It alleged violations occurring on or about January 29, 1976. Respondents now claim that the acts stated by Complainant to have occurred on January 29, 1976, actually occurred on December 22, 1975, more than ninety (90) days prior to April 19, 1976. Thus, in addition to claiming that the second amended complaint for the first time notified Respondents that they were charged with violations by way of events occurring after January 29, 1976, it is claimed that the original Complaint (April 19, 1976) was not timely filed.

Both of Respondents' arguments must fail.

As to their claim of untimeliness of the original complaint, it should be notified that prior to the introduction of evidence at Public Hearing, Complainant and Respondent stipulated to the fact that the Commission has jurisdiction over the parties and subject matter of the case.

Fundamentally, Respondents' claim of untimeliness is not born out by close examination of the three complaints. The original complaint tolled the Act's statute of limitations, and was not untimely on its face. Thus, any discriminatory act occurring within a ninety-day period prior to April 19,

1976, was fairly encompassed by the original charge. While Respondents correctly point out that Complainant was first notified of her reassignment on December 22, 1975, the acts which she complained about continued well past that date and occurred within the 90 day period preceeding the filing of the charge.

The first amended complaint, executed July 30, 1976, eliminates any doubt that might have existed as to this issue. Complainant there again alleges demotion, clearly a continuing violation, and adds the new factual element of threatened layoff. Thus, both the original and the first amended complaint, the latter executed and served more than two years prior to Public Hearing, allege violations occurring within the 90 day statutory period after January 29, 1976.

Respondents' claim of surprise at Public Hearing is simply without merit.

Nor can Respondents claim to have been surprised or prejudiced by the modification of the Section 5(d) claim reflected in the second amended complaint. Each complaint (including the original) mentions Section 5(d); each complaint alleges that Respondents acted to penalize Complainant because of her expressed opposition to School District policies which she believed to have been discriminatory. The first amended complaint mentioned threatened layoff; the second merely clarified that the layoff had become a fact, and added an allegation of continuing failure to recall. The allegation of race discrimination was eliminated in the second amended complaint.

As to the elimination of the allegation of racial discrimination, Respondents can not validly claim to have been prejudiced by this amendment which did not change the nature of any relevant defense. Complainant alleged that her treatment was based on unlawful consideration. (i.e. Whether these were her race and her opposition to alleged discriminatory practices, as initially alleged, or only opposition to alleged discriminatory practices as alleged in the second amended complaint, Respondents' burden was the same: to rebut any prima facie case of discrimination with proof that non-discriminatory considerations prompted their treatment of her.)

Likewise, no prejudice to Respondents resulted from the addition of allegations of failure to properly recall. During investigation Commission staff notified Respondents well before Public Hearing that failure to recall was within the scope of the complaint. Further, on the first day of Public Hearing, Respondents' counsel was informed by the Hearing Panel that his request for a continuance, should he need one to prepare any element of his case, because of the late amendment, would be favorably viewed. No such request was made. Further, Respondents in their brief fail to describe with any particularlity the prejudice which they claim to have suffered as a result of the "failure to recall" amendment to the charge.

Case law supports the decision of the Hearing Panel to permit the second complaint.

Section 9 of the Act sets the standard for amendment: "The Commission or the Complainant shall have the power reasonably and fairly to amend any complaint..." (43 P.S. 459).

Reasonableness and fairness require that Respondents have reasonably certainty of the charges against them, timely notice thereof, and opportunity to defend against the charges. See Pittsburgh Press Company vs. Pittsburgh Commission on Human Relations, et al. 4 Pa. Cmwlth. 448, 457, 287 A.2d 161, 166 (1972), aff'd 413 U.S. 376, 93 S. Ct. 2553 (1973), reh. denied 414 U.S. 881, 94 S. Ct. 30 (1973); Speare vs. Pennsylvania Human Relations Commission, 16 Pa. Cmwlth. 502, 328 A.2d 570 (1974); Straw vs. PHRC, 10 Pa. Cmwlth. 99, 308 A.2d 619 (1973). It is noteworthy that in Speare and Straw, amendments made respectively, on the day of Public Hearing and two days prior to Public Hearing were found to comport with due process. See also Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission vs. Freeport Area School District, 467 Pa. 522, 359 A.2d 724 (1976); Swift and Company vs. United States, 393 F.2d (7th Cir. 1968); L.G. Balfour Co. vs. Federal Trade Commission, 442 F.2d 1 (7th Cir. 1971); Golden Grain Macaroni Co., vs. Federal Trade Commission, 472 F.2d 882 (9th Cir. 1972).

Thus, in the absence of specific instances of prejudice, and given this Commission's finding that Respondents had adequate notice of the charges against them and a meaningful opportunity to defend, Respondents' first procedural claim must fail.

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B. UNDUE COMMINGLING OF PROSECUTORIAL AND ADJUDICATIVE FUNCTIONS

Respondents' second procedural claim, as noted above, argued that the Commission improperly commingled prosecutorial and adjudicative functions in its utilization of Commission counsel at Public Hearing, specifically in the assignment of Robert S. Mirin, General Counsel of the Commission, as Legal Advisor to the Hearing Panel, and of Benjamin G. Lipman, Assistant General Counsel of the Commission, as prosecutor of the Complainant's case. Respondents urge in particular that prejudice resulted in light of the disputed factual situation, the disputed reasons for Complainant's treatment by Respondents, and the leave granted Complainant to amend the Complaint on the first day of Public Hearing.

Respondents' first two cited areas of prejudice do not in fact distinguish this Public Hearing from any other; Public Hearings as a general rule do involve disputes as to facts, motives of the respective parties, or both. Respondents' general objection may therefore be answered in a general fashion.

The Fourteenth Amendment to the United States Constitution provides that no "... State (shall) deprive any person of life, liberty, or property, without due process of law." The essence of the requirement of due process is that each party be afforded a fair opportunity to present its case. Quoting

In re Murchinson, 349 U.S. 133, 75 S. Ct. 623 (1955), Pennsylvania's Commonwealth Court observed in Commonwealth of Pennsylvania, PHRC vs. Thorp, Reed and Armstrong, 25 Pa. Cmwlth. 295, 302, 361 A.2d 497, 501 (1976), that "...a fair trial in a fair tribunal is the basic requirement of due process ..." A long line of Pennsylvania cases establishes that the required fair trial is not denied when the same agency serves as both prosecutor and judge, so long as these functions are not commingled in the same person.

See also Withrow vs. Larkin, 421 U.S. 35, 95 S. Ct. 1456 (1975); Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission vs. Stuart R. Feeser, Jr., et al. 469 Pa. 173, 364 A.2d 1324 (1976); Commonwealth of Pennsylvania, Department of Insurance, et al. vs. American Bankers Insurance Company of Florida, 478 Pa. 532, 387 A.2d 449 (1978); Dussia vs. Barger, 466 Pa. 152, 351 A.2d 667 (1975); State Dental Council and Examinating Board vs. Pollack, 457 Pa. 264, 318 A.2d 910 (1974).

Thorp, Reed is particularly instructive. The court there sanctioned the precise situation challenged here: the Commission's General Counsel served as legal advisor to the Hearing Panel, while an Assistant General Counsel presented the Complainant's case. The court observed "... that the most critical function in the prosecution and adjudication of administrative cases is the resolution of disputed facts ... The fact finding process, therefore, must be afforded the broadest dimensions of constitutional protection." (25 Pa. Cmwlth. at 302, 361 A.2d at 501).

A careful review of the instant proceedings reveals that the necessary protection was scrupulously provided.

The record establishes, and this Commission has found as a fact, that attorneys Lipman and Mirin at no time prior to Public Hearing discussed the case, other than in necessary communications as to the scheduling of the Hearing and related purely administrative matters. During the Hearing itself, Mr. Mirin's role was limited to that of offering technical assistance to the Panel; Mr. Lipman's to that of presenting the Complainant's case.

Most important under the standard enunciated in Thorp, Reed, neither Mr. Lipman nor Mr. Mirin participated in any improper way in formulating the decision of this case.[1/] Following the Commission's established procedure, a preliminary recommendation was made by the Hearing Panel to the full Commission, and was subsequently reviewed and adopted by the Full Commission. Neither attorney participated in either the Panel's initial recommendation or the final ruling by the Commission.

1/ Mr. Lipman's communications to the panel are limited to those made on the the record (i.e. His oral advocacy and his brief to the panel). Mr. Mirin, as Panel Advisor supplied only technical assistance to the Commissioners and did not in any way participate in their substantive deliberations on this case.

Respondents further urge the significance of the fact that Mr. Mirin is, and was at all times relevant to this proceeding, Mr. Lipman's supervisor. This fact is, of course, uncontroverted. However, as previously noted, at no time did Mr. Mirin either communicate with or exercise supervisory authority over Mr. Lipman's presentation of this case. Further, it must be noted that both attorneys were hired by, and serve at the pleasure of, this Commission. (See Section 7(c) of the Act, 43 P.S. 457 (c)).

Respondents' specific claim that prejudice to them resulted from the second amendment of the complaint has already been decided, see A., supra. Respondents raise this issue in relation to their second procedural claim. Apparently, they attribute the Panel's decision to permit the amendment, a decision which was favorable to Complainant, to the influence of Mr. Mirin exercised in favor of Mr. Lipman.

Respondents misperceive the nature of the questioned decision. As in Feeser, the decision to allow amendment was made in the first instance by the Hearing Panel. The record reveals no participation by Mr. Mirin in the decision. Even if Mr. Mirin had so participated, this Commission in Section A supra has fully reviewed the matter of the amendment, and has specifically found that allowing the amendment resulted in no prejudice to Respondent. The roles played by Commission counsel in no way influenced this Commission in reaching its decision on this or any other issue of this case.

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For all of these reasons, Respondents' claim that the conduct of the hearing denied them due process of law must fail.

IV. LIABILITY

Section 5(d) of the Act provides that:

> It shall be an unlawful discriminatory practice ... for any employer, employment agency or labor organization to discriminate in any manner against any individual because such individuals has opposed any practice forbidden by this act, or because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this Act. 43 P.S. 955(d) (Emphasis added)

Only one decided case has construed Section 5(d). In Thorp, Reed, cited supra, the Commission dealt with discrimination resulting from the filing of a charge with the Commission. Thus, no case has yet construed that part of Section 5(d) which forbids discrimination on the basis of opposition to practices forbidden by the Act.

Numerous cases have been decided under the parallel provision of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000 e et seq.,), however, and analysis of them is instructive. Title VII's "retaliation" section (Section 704(a)), like Section 5(d) of the Act forbids discrimination as a result either of the charging party's participation in another Title VII complaint or of the charging party's opposition to practices forbidden by Title VII. (42 U.S.C. 2000 e et seq.)

The necessary elements of a violation have been summarized by authorities in the area as follows:

> In order to establish a violation of Section 704(a), be it the opposition or participation clause, the plaintiff must establish, first, the basis, which is to say that there was statutorily protected participation or opposition; second, the issue, an adverse employment action, such as discharge or other form of discrimination and finally, a causal connection between the participation/opposition (basis) and the adverse employment action (issue). (Schlei and Grossman, Employment Discrimination Law, at 417, 1976).

Thus, Complainant must here establish:

1. That she opposed practices of Respondents or which were in fact, violative of the Act, and that this opposition was made known to Respondent;

2. That employment action(s) adverse to Complainant were initiated by Respondents subsequent to their becoming aware of her opposition;

3. That the adverse actions of Respondents were caused by Complainant's expression of statutorily protected opposition to their practices or policies.

As previously noted, this is a case of first impression with regard to the "opposition" portion of Section 5(d) of the Act. Reference to cases decided under the comparable section of Title VII reveals a split of authority as to the exact nature of opposition which is entitled to protection. Some cases have held that the protected opposition must be to practices which are in fact violations of Title VII. See, e.g. EEOC vs. C & D Sportswear Corp., 398 F. Supp. 300, 306, 10 FEP 1131, 1135 (MD. Ga. 1975). The alternative position is that only a reasonable good faith belief is required. This view extends the statute's protection to opposition to practices

which the one oppositing them reasonably and in good faith believed to be unlawful discrimination employment practices. See EEOC Dec. CCH 9-140, CCH Employment Practices Guide ¶6075 (June 11, 1975): Spurlock, Proscribing Retaliation Under Title VII, 8 Inc. L. Rev. 453 (1975): Annotation, Construction and Application of §704(a) of Civil Rights Act of 1964, 11 A.L.R. Fed 316, 314 (1972).

For the reasons which follow, this Commission believes that the protection of the Act should be extended only to opposition to practices which are in fact violations of the Act. As Complainant has not here established that she opposed practices which were violations of the Human Relations Act, her expression of opposition is not entitled to statutory protection, and this case must be dismissed.

Recourse of Section 5(d) itself is enlightening. The section forbids retaliation "... against any individual because such individual has opposed any practice forbidden by this act ..." (43).S. 955(d), (emphasis added). The underscored language is unequivocal in its reference to unlawful discriminatory practices described elsewhere in the Act. No mention of good faith or reasonable belief appears. In the absence of evidence of legislative intent to the contrary, we are reluctant to attribute to the General Assembly an intent to afford protection broader than that evinced by the clear language of the section.

Policy considerations support this interpretation as well. While broad protection must be afforded any persons who actually file complaints with the Commission, if the Act itself is to

have any meaning, the very availability of the Commission's complaint procedure counsels that the opposition clause should be limited in its application, As stated by the Court in EEOC vs. C & D Sportswear, cited supra:

> Certainly, access to the EEOC must be protected. On the other hand, accusations of racism ought not to be made lightly. Unfounded accusations might well incite racism where none had previously existed. Were employees free to make unfounded accusations of racism against their employers and fellow employees, racial discord, disruption, and disharmony would likely ensue. This would be wholly contrary to Congress' intention that race be removed, as far as possible, as an issue in employment.
>
> Accordingly, the only reasonable interpretation to be placed on Section 704(a) is that where accusations are made in the context of charges before the EEOC, the truth or falsity of that accusation is a matter to be determined by the EEOC, and thereafter by the courts. However, where accusations are made outside the procedures set forth by Congress that accusation is made at the accuser's peril. In order to be protected, it must be established that the accusation is well-founded. (398 F. Supp. at 305, 306).

Complainant's expression of opposition must be examined in light of this standard. Whether the opposition was to practices which are in fact forbidden by the Human Relations Act.

By testimony and documentary evidence, Complainant has firmly established that she did express opposition to many aspects of Respondent's operations, some of them relating to areas where she perceived racial discrimination, in her July 17, 1975 letter to Earl Foster. It is uncontroverted that Foster knew that the letter came from Complainant, and that he shared both the contents of the letter and the identity of its author with

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many other Respondent officials. Thus both the fact of her opposition and the knowledge that Respondents had of that opposition have been proven.

However, examination of Complainant's July 17, 1975 letter reveals that only two relatively brief passages of the entire seven page letter relate in any way to allegations of racially discriminatory conduct or practices. On its fourth page, the letter quotes a remark attributed to a social worker employed by Respondents to the effect that since she was pregnant, she did not wish to make home visits because she could "... catch anything from (the children) in these homes ..."

The social worker who allegedly made the remark did not testify at Public Hearing. If in fact made, the remark only arguably reflects racial bias. More significantly, however, no allegation was made that the remark was attributable to the Respondents, or reflected in any way their official or condoned policy; nor was evidence to this effect introduced at Public Hearing.

In a similar situation, the Ninth Circuit Court of Appeals declined to extend Title VII protection to a discharged employee who claimed retaliation for her opposition to a racial slur made by a co-worker. The Court emphasized that the remark there made by the co-worker was unauthorized, and could not be imputed to the employer absent a showing of both knowledge by the employer of the discriminatory conduct and subsequent failure of the employer to take remedial action. Silver vs. KCA, Inc., 586 F.2d 138, 18 FEP 1200, 9th Cir. 1978, citing Howard vs. National Cash Register Co., 388 F. Supp. 603, 15 FEP 341 (S.D. Ohio 1975)).

In addition, Complainant's main concern in her letter's discussion of the social worker was seemingly with the allegation that the social worker had billed the school district for hours which she had not actually worked. Far more space is devoted to this matter than to the quoted remark. This practice is clearly not within the contemplation of the Act.

Likewise, on its sixth page Complainant's letter refers to her "superior", unidentified, who had allegedly failed to hire a single Black School Psychologist and had allegedly been reluctant to interview Blacks for social work positions. Insufficient evidence was adduced at Public Hearing to establish these allegations of discrimination under the Act.

Specifically, it was not established that qualified Blacks had applied and been rejected for these positions, and that less well qualified White applicants had subsequently been hired.

Review of Respondent's DEAS forms [1/] for the 1974-75 school year reveals that 40% of its total "professional" [2/] workforce was

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1/ Forms submitted yearly by Respondent to the Pennsylvania Department of Education, Division of Educational Statistics, showing the racial composition of the students and employees in each school within the district.

2/ The Department of Education required school districts in 1974-75 to report the racial composition of Full Time Equivalent Staff, using the DEAS 1059 form. FTE Staff was defined by the Department in that year as including teachers, principals, consultants, librarians, and guidance and psychological personnel. (These forms were submitted for inclusion as a part of the record, at the request of the Commission's hearing panel. See C-23; R3.314)

Black. While this data could not rebut a positive showing of discriminatory refusal to hire even one qualified Black, in the absence of such proof it is at least probative of Respondents' non-discriminatory hiring practices. See Furnco Construction Corp. vs. Waters, ____ U.S. ____, 17 FEP 1062 (1978).

Thus, only two isolated paragraphs of the seven page letter deal with racial concerns. It is particularly significant that the letter's concluding ten (10) suggestions are devoted exclusively to matters of personnel assignments and salaries. Nowhere in the list is a suggestion made that more Blacks be hired by the School District. Nowhere is mention made of racially-biased attitudes of present employees or management. The only concern expressed in the concluding suggestions, and the overwhelmingly predominant concern of the rest of the letter, is with what Complainant perceived to be generic mismanagement and personnel abuses within the district.

Complainant therefore seeks protection for an expression of opposition which was at best expressed only de minimus concern with racial matters, and which in its focus on these matters did not point to practices which were shown to constitute violations of the Human Relations Act. For the reasons already articulated, this Commission will not extend the Act's protection so far, and directs that the following Final Order be entered in this case.

Based upon the record as a whole, we are conviced that regardless of Complainant's letter and isolated "racial" protests that the employment related actions taken by Respondent would have occurred.

RECOMMENDATION OF HEARING COMMISSIONERS

AND NOW, this day of , 1979, in consideration of the entire record in this matter; including the Complaints, Stipulations of Fact, Exhibits, Record of the Hearing, and briefs filed on behalf of Complainant and Respondents, the Hearing Commissioners hereby adopt the attached as their proposed History of the Case, Findings of Fact, Conclusions of Law, Opinion and Final Order and hereby recommend that the same be finally adopted and issued by the Pennsylvania Human Relations Commission.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Everett E. Smith
EVERETT E. SMITH, Chairperson
Hearing Panel

BY: _____
ALVIN ECHOLS, JR., Esq.
Hearing Commissioner

BY: Raquel Otero de Yiengst
RAQUEL OTERO-de-YIENGST
Hearing Commissioner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JANICE HOFFMAN, Complainant	:	
vs.	:	DOCKET #S-181
CHESTER UPLAND SCHOOL DISTRICT, Respondents	:	

COMMISSION'S DECISION AND FINAL ORDER

AND NOW, this day of , 1979, upon consideration of the full record in this case and of the foregoing Recommendation of the Hearing Commissioners, and pursuant to the provisions of Section 9 of the Human Relations Act, Act of October 27, 1955, P.L. 744 as amended, 43 P.S. §951 et seq., the Pennsylvania Human Relations Commission hereby adopts the foregoing History of the Case, Findings of Fact, Conclusions of Law, and Opinion and orders that this case be, and the same hereby is, dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____
JOSEPH M. YAFFE, Chairperson

ATTEST:

By: _____
ELIZABETH M. SCOTT, Secretary

_____
JOHN P. WISNIEWSKI, Assistant Secretary

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