[26]

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

GWENDOLYN A. LEE and ERNEST L. YOKELY v. WALNUT GARDEN APARTMENTS, INC., ROBERT E. SPAN, SR., MANAGER Appeal of COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA HUMAN RELATIONS COMMISSION	No. 136 March Term, 1977 Appeal from the Order of the Commonwealth Court filed October 3, 1974 at Nos. 1640 and 1665 C. D. 1973 modifying the Order of the Pennsylvania Human Relations Commission at Docket No. H-1654

OPINION OF THE COURT

PER CURIAM: FILED: JUN 5 1978

Appellant, Pennsylvania Human Relations Commission (Commission), appeals from a decision of the Commonwealth Court holding (1) the Commission has no power to award victims of unlawful discrimination damages for "embarrassment, humiliation and emotional upset," and (2) the Commission may not order a respondent to maintain records which designate the race of apartment applicants or the race of the apartment's former occupant because such a requirement violates

§ 5(h)(6) of the Pennsylvania Human Relations Act, 43 P. S. § 955(h)(6) (Supp. 1977-78). Span v. Pennsylvania Human Relations Commission, 15 Pa. Commonwealth Ct. 334 , 325 A.2d 678 (1974).

This Court has recently held that the Pennsylvania Human Relations Commission has no authority to award damages for injuries such as mental anguish and humiliation which allegedly result from unlawful discrimination. Pennsylvania Human Relations Commission v. Zamantakis, Pa. , A.2d (J-23 of 1978, filed , 1978); Pennsylvania Human Relations Commission v. Straw, Pa. , A.2d (J-23 of 1978, filed , 1978). Accordingly, we affirm that part of the Commonwealth Court's order denying the Commission the authority to award damages for embarrassment, humiliation, and emotional upset.

We do not agree with the Commonwealth Court's order that the Commission may not, as a remedial measure, order a respondent to maintain records of the racial identification of applicants for an apartment or the former occupants of a vacated apartment unit. The Commonwealth Court's order in the present case was entered before this Court's decision in Chester Housing Authority v. Pennsylvania Human Relations Commission, 458 Pa. 67, 327 A.2d 335 (1974), in which we upheld a nearly identical order requiring reports containing information

of racial composition. The Commission, statutorily empowered to "take such affirmative action...as, in the judgment of the Commission, will effectuate the purposes of [the Human Relations Act]," 43 P. S. § 959 (Supp. 1977-78), could have concluded that such a reporting requirement was necessary to effectuate the purposes of the Human Relations Act.

We therefore reverse that portion of the Commonwealth Court's decision invalidating the Commission's order which requires respondent's records to indicate the racial composition of applicants for apartments and the former occupants of apartments. We affirm the Commonwealth Court's order denying the Commission the authority to award the compensatory damages sought in this case.

It is so ordered.

Mr. Justice Manderino filed a concurring and dissenting opinion.

Mr. Justice Roberts filed a dissenting opinion in which Mr. Justice Nix joined.

[26]

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

GWENDOLYN A. LEE and ERNEST L. YOKELY	:	No. 136 March Term, 1977
v.	:	
WALNUT GARDEN APARTMENTS, INC., ROBERT E. SPAN, SR., MANAGER	:	Appeal from the Order of the Commonwealth Court filed October 3, 1974 at Nos. 1640 and 1675 C. D. 1973 modifying the Order of the Pennsylvania Human Relations Commission at Docket No. H-1654
Appeal of COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA HUMAN RELATIONS COMMISSION	:	

CONCURRING AND DISSENTING OPINION

JUSTICE MANDERINO

FILED: JUN 5 1978

I agree with the Court that the Human Relations Commission did not act improperly in requiring respondent to maintain reports which were to include information of the racial composition of applicants and former occupants. However, for the reasons fully set forth in my dissenting opinion in Pennsylvania Human Relations Commission v. Straw, Pa. , A.2d (1978) (J-23 of 1978, filed , 1978) (Manderino, J., dissenting), I dissent from the Court's holding that the Human Relations Commission has no statutory authority to award compensatory damages to persons genuinely injured by unlawful discrimination.

[26]

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

GWENDOLYN A. LEE and ERNEST L. YOKELY:

v.

WALNUT GARDEN APARTMENTS, INC., ROBERT E. SPAN, SR., MANAGER

Appeal of COMMONWEALTH OF PENNSYLVANIA PENNSYLVANIA HUMAN RELATIONS COMMISSION

: No. 136 March Term, 1977

: Appeal from the Order of the Commonwealth Court filed October 3, 1974 at Nos. 1640 and 1665 C.D. 1973, modifying the Order of the Pennsylvania Human Relations Commission at Docket No. H-165[illegible]

DISSENTING OPINION

ROBERTS, J.

FILED: JUN 5 1978

For the reasons set forth in the Opinion of the Court in Pennsylvania Human Relations Comm'n v. Alto-Reste Park Cemetery Ass'n, 453 Pa. 124, 306 A.2d 881 (1973), and in my dissenting opinions in Pennsylvania Human Relations Comm'n v. Zamantakis, ___ Pa. ___, ___ A.2d ___ (J.23, 1978, filed May 8, 1978)(Roberts, J., joined by Nix, J., dissenting), and Pennsylvania Human Relations Comm'n v. St. Joe Minerals Corp., ___ Pa. ___, 382 A.2d 731 (1978)(Roberts, J., joined by Nix, J., dissenting), I dissent from that portion of today's opinion holding that the PHRC is without statutory authority to award compensatory damages to victims of discrimination. Accordingly, I would reverse the order of the Commonwealth Court and reinstate the order of the PHRC.

Because, however, the majority affirms the order of the Commonwealth Court modifying the award of damages, the Court should remand the proceedings to the PHRC to allow it to enter an appropriate remedial order in light of today's decision.

Mr. Justice NIX joins in this dissenting opinion.

IN THE

SUPREME COURT OF PENNSYLVANIA

No. 136 March Term, 1977

COMMONWEALTH OF PENNSYLVANIA
HUMAN RELATIONS COMMISSION, Appellant

v.

ROBERT E. SPAN, SR., Manager
WALNUT GARDEN APARTMENTS, Appellee

BRIEF ON BEHALF OF APPELLANT

Appeal from the Order of the Commonwealth Court filed October 3, 1974 at No. 1675 C.D. 1973 modifying the Order of Pennsylvania Human Relations Commission at Docket No. H-1654

Sanford Kahn
General Counsel
Marc Kranson
Assistant General Counsel

ATTORNEYS FOR APPELLANT

PENNSYLVANIA HUMAN RELATIONS COMMISSION
Suite 1210 - 355 Fifth Avenue
Pittsburgh, Pennsylvania 15222

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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 3rd day of October, 1974 Per Curiam."

STATEMENT OF THE QUESTIONS INVOLVED

I. WHETHER THE PENNSYLVANIA HUMAN RELATIONS COMMISSION HAS THE AUTHORITY TO ORDER A RESPONDENT WHO HAS UNLAWFULLY DISCRIMINATED AGAINST A COMPLAINANT, TO COMPENSATE THAT COMPLAINANT FOR THE MENTAL ANGUISH, HUMILIATION, INCONVENIENCE AND DISRUPTION OF NORMAL FAMILY LIFE SUFFERED AS A DIRECT RESULT OF RESPONDENT'S UNLAWFUL ACT.
(Answered in the negative by the Court below.)

II. WHETHER A FINAL ORDER REQUIRING RESPONDENT TO MAINTAIN RECORDS SHOWING THE RACIAL INDENTIFICATION OF APPLICANTS FOR HOUSING AS A PART OF A PLAN TO REMEDY UNLAWFUL DISCRIMINATORY PRACTICES, VIOLATES THE PENNSYLVANIA HUMAN RELATIONS ACT.
(Answered in the affirmative by the Court below.)

HISTORY OF THE CASE

On February 2, 1972, Complainants, Gwendolyn A. Lee and Ernest L. Yokely, filed a complaint with the Pennsylvania Human Relations Commission wherein they alleged that on or about November 8, 1971, Appellees Walnut Garden Apartments, Inc. and Robert E. Span, Sr., Manager, refused to rent an apartment to them because of their race, Black. The Complainants cited Section 5 (h) (1) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. 955 (h).

Subsequent to an investigation by the Pennsylvania Human Relations Commission (hereafter "Commission"), a finding of probable cause, and attempts at conciliation, the Commission ordered a Public Hearing be held. Said hearing was held on August 29, 1973, before a panel of three Commissioners.

On November 4, 1971, Gwendolyn A. Lee, a Black female, after seeing an advertisement in the Beaver County Times offering apartments for rent, went to the Walnut Garden Apartments with the intention of viewing an apartment for possible tenancy.

Robert Span, Manager of Walnut Garden Apartments, met Ms. Lee at the door to his residence at the Apartments, which also served as the rental office. Speaking through the screen door, he informed Ms. Lee that there were no apartments available. Ms. Lee stated that she had seen some vacant apartments, but Mr. Span replied that they had been taken. Mr. Span did not admit Ms. Lee into the apartment.

Believing that she had been discriminated against because of her race, Ms. Lee returned to the Walnut Garden Apartments on or about November 8, 1971, with Ernest Yokely, a Black male, and Diane Eardling, a White female. Upon arriving at the apartments, Ms. Eardling went to Mr. Span's office alone. She was admitted inside where she told Mr. Span that she was interested in renting an apartment. Mr. Span replied there were vacancies and asked if she had any children. Ms. Eardling told him she had one child. Mr. Span replied that he did not like to rent to persons with children, but when he did he placed them on the first floor. He further stated that there were presently vacancies on the first floor. Arrangements were made for Ms. Eardling to return that evening with her husband and child to view the apartment.

While Ms. Eardling was speaking with Mr. Span, Ms. Lee and Mr. Yokely approached the office. Mr. Span met them at the door, told them there were no vacancies, and told them that he did not like to rent to persons with children. Ms. Lee asked for an application in case a vacancy would occur in the future, and was told it would not be necessary. Ms. Lee and Mr. Yokely then left and Mr. Span returned to Ms. Eardling to complete the arrangements for her visit that evening. Ms. Eardling had overheard the entire conversation between the Complainants and Mr. Span.

Following the Public Hearing, the Commission found that Appellees had violated violated Section 5 (h) (1) of the Pennsylvania

Human Relations Act in refusing to rent to the Complainants because of their race, Black.

The matter comes before this Honorable Court on the grant of a petition for allowance of appeal filed by the Commission, from the Order of the Commonwealth Court of Pennsylvania filed October 3, 1974. The matter was originally appealed by Appellees to the Commonwealth Court from the Final Order of the Pennsylvania Human Relations Commission.

SUMMARY OF ARGUMENT

This case concerns whether the Pennsylvania Human Relations Commission has the authority to order a Respondent who has unlawfully discriminated against a Complainant to compensate said Complainant for the mental anguish, humiliation, inconvenience and disruption of normal family life suffered as a result of Respondent's discriminatory act. Also, at issue is whether the Commission's Final Order requiring a Respondent to maintain records showing the racial identification of applicants for housing, as part of a plan to remedy unlawful discriminatory practices, violates the Pennsylvania Human Relations Act.

The Commonwealth Court upheld the Commission's determination that a violation of the Act had been committed and also upheld the major portion of the Commission's Final Order. However, the Commonwealth Court refused to uphold the portion of the Commission's Order, which required Respondent to pay the Complainant $1,000.00 for embarrassment, humiliation and emotional upset. Also, the portion of the Commission's Order requiring Respondent to maintain records to indicate the race of the applicants was set aside.

In setting aside the Commission's Order of monetary damages for pain and suffering, the Commonwealth Court stated that such an award would go beyond the authority of

the Commission. Moreover, the Court held that the requirement of maintaining records which designate the race of an applicant was in direct violation of Section 5(h) (6) of the Pennsylvania Human Relations Act.

It is Appellant's contention that the Court erred in setting aside the above-mentioned portions of the Commission's Final Order as said portions were designed specifically for purpose of carrying out the express purposes of the Pennsylvania Human Relations Act.

Read together, three sections of the Pennsylvania Human Relations Act--Section 9 which authorizes PHRC after a finding of unlawful discrimination to take affirmative action "including but not limited to" certain specified measures as in its judgment will effectuate the purposes of the Act; Section 2 which declares in the strongest terms the legislative purpose to eliminate the evils of discrimination; and Section 12(a) which directs that the provisions of the Act "shall be construed liberally for the accomplishment of the purposes thereof"--permit no other conclusion but that PHRC has the power to order a Respondent to pay to a Complainant compensatory damages, including damages for mental anguish caused by the Respondent's unlawful discriminatory conduct.

ARGUMENT

I. PHRC HAS THE AUTHORITY TO ORDER A RESPONDENT WHO HAS UNLAWFULLY DISCRIMINATED AGAINST A COMPLAINANT TO COMPENSATE THAT COMPLAINANT FOR THE MENTAL ANGUISH, HUMILIATION, INCONVENIENCE AND DISRUPTION OF NORMAL FAMILY LIFE SUFFERED AS A DIRECT RESULT OF RESPONDENT'S UNLAWFUL ACT.

Three sections of the Pennsylvania Human Relations Act, 43 P.S. §951, et.seq., are particularly relevant to this argument - Sections 2, 9 and 12 - and, it is submitted, when they are read together, they permit no other conclusion but that the Commission has the power herein at issue.

Section 9 in its pertinent part reads:

> "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 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 which 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."

The pertinent part of Section 12 reads:

> "(a) The provisions of this Act shall be construed liberally for the accomplishment of the purposes thereof. . ."

As for the purposes referred to in the preceding sections, they are reflected throughout the Act. But it is well that Section 2(a) should be reviewed in its entirety:

> "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 forments domestic strife and unrest, threatens the rights and privileges of the inhabitants of the Commonwealth, and undermines the foundations of a free democratic 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 sub-standard, 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."

Here, the Legislature set down in the strongest terms the scope of the problem and the sense of urgency it was conveying to the administrative agency it was creating to deal with it. Few would dispute that although 19 years have ensued, the problems the Commission was created to eliminate remain with us. In his dissent in the instant case, Judge Rogers saw and stated clearly the obviousness of the answer to the question now before this Court:

"I can conceive of no affirmative action which the Commission could order which would better effectuate the central purpose of the Act to end racial discrimination than that of directing the violator to pay damages to persons upon whom injuries have been inflicted."

It was believed that this question of PHRC's remedial powers was conclusively resolved by this Court in Alto-Reste, where the Court analyzed the identical language of Section 9, placing great weight on the phrase "as in the judgment of the Commission" in arriving at its conclusion that the "Legislature recognized that only an administrative agency with broad remedial power exercising particular expertise could cope effectively with the pervasive problem of unlawful discrimination. Accordingly, the Legislature vested in the Commission quite properly maximum flexibility to remedy and hopefully eradicate the 'Evils' of discrimination. . . The legislative mandate that the provisions of the Act be 'construed liberally' seems to reinforce this view." Pennsylvania Human Relations Commission vs. Alto-Reste Park Cemetery Association, 453 Pa. 124, 306 A.2d 881 (July 2, 1973).

This Court adopted as its own, the United States Supreme Court's statement in Fibreboard Paper Products Corp. v. N.L.R.B. et al., 379 U.S. 203, 216, 85 S. Ct. 398, 405-06 (1964) dealing with a provision of the Taft-Hartley 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 be said to effectuate the policies of the Act.'. . ."

The Court below took note of Alto-Reste but concluded it did not control the instant case. This conclusion can only be based on the Commonwealth Court's belief that compensatory damages including damages for the emotional distress suffered by violations of unlawful discrimination cannot fairly be said, in the judgment of the Commission, to effectuate the purposes of the Act. If this is indeed the Court's view, it does not fully grasp these purposes. As this Court observed in Alto-Reste:

> "It is beyond cavil that the Human Relations Act was intended, by the Legislature, to protect more than individuals unlawfully discriminated against - of equal importance is the Act's intent that the public generally be protected from such discrimination. . . Accordingly, it is . . . incumbent upon the Commission to not only fashion an effective remedy for the individual aggrieved, but also to guard against and deter the same discriminatory act from recurring, to the detriment of others within the same class."

Surely an order that a respondent pay a victim compensatory damages, both in terms of affording redress to the aggrieved individual and as a means of deterring future discrimination by making it expensive, has as much relevance to the purposes of the Act as the record-keeping of the advertising provision upheld in Alto-Reste.

One statement of the Court below is indicative of its approach in reviewing actions of PHRC, in other cases as well as the instant case, including Alto-Reste itself:

> "The missing link in the Commission's argument is the absence of any specific legislative authority to ascertain, and hence to award damages."

As Appellant stated in its petition for allowance of appeal, in addressing itself to the manner in which the Court below approaches PHRC cases:

> "At bottom, the problem here clearly is the apparent fundamental inability of the Commonwealth Court, based obviously upon a different judicial philosophy, to implement the legislative directive to construe this act liberally for the accomplishment of its purposes."

The New Jersey Court in Passaic Daily News v. Blair, 308 A.2d 649 (1973), set forth the general principles of construction that courts have applied to civil rights statues even in the absence of explicit instruction in the statute:

> "This Court has heretofor adopted a broadly sympathetic construction of the law against discrimination and has interpreted the provisions therefore pertaining to the remedial powers of the Division on Civil Rights . . . with that high degree of liberality which comports with the preeminent social significance of its purposes and objects . . . we are moreover warranted in placing considerable weight on the construction of the statute by the administrative agency charged by the statute with the responsibility of making it work. Griggs v. Duke Power 401 U.S. 424, 433-434 (1971)"

In Alto-Reste this Court quoted at length and with approval from the decisions of the New Jersey Supreme Court in Jackson v. Concord Company, 253 A.2d 793 (1969), and Zahorian v. Fitt Real Estate Agency, 301 A.2d 754 (1973). Zahorian, under a statute with enforcement provisions virtually identical to those in our Act, upheld the authority of the New Jersey Civil Rights Division to order a respondent to pay compensatory damages for humiliation, pain and suffering. Zahorian relied heavily on Jackson.

"Justice Hall [in Jackson] noted that the basic question was whether the Legislature intended to give such power to the director and that although it was not granted expressly [by the Act] it was fairly to be implied in the light of the "broad language of the section' and the 'overall design of the Act.'. . . He noted further that the term 'include' is to be dealt with as a word of 'enlargement and not of imitation' and that this was especially true where as in [the Act] it was followed by the phrase 'but not limited to the illustrations given. . . .

"Justice Hall's opinion in Jackson stressed the legislative intent to create an effective enforcement agency which would serve towards eradication of 'the cancer of discrimination' and whose remedial actions would serve not only the interest of the individual involved but also the public interest."

In Appellant's brief to the Court below it was pointed out that as far as it could be determined, the highest courts in four States had considered the authority of the State's civil rights agency to order a respondent to pay damages for mental anguish under statutes comparable to Pennsylvania's, and that all four had upheld such authority.[1]

The Court below acknowledged the New Jersey statute's similarity but summarily dismissed the results as "confusing and unacceptable under the Pennsylvania statute." The Court below dismissed the precedents of Massachusetts, New York and Oregon by declaring, without explaining, that in those States "there is some statutory authority for the human relations authorities to award damages."

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[1] The Supreme Court of Iowa, construing statutory language comparable to Pennsylvania's held that the Iowa agency did not have the power to award damages. Iron Workers Local 677 v. Hurt, 191 N.W. 2d 758 (1971). An important distinction between the Iowa and Pennsylvania statutes, however, is that the Iowa statute did not bar resort to the courts once the Iowa agency had been invoked. On this point, see infra.

The Pennsylvania statute and the other statues cited were more specific in enumerating the kinds of affirmative action their respective commissions could take "as, in the judgment of the Commission will effectuate the purposes of this Act." Whether the words are "effectuate the purposes of the Act" or "reasonably calculated to carry out the purposes of the Act", it is submitted that the thrust is the same.

As the Oregon Court explained in Joyce:

> "As shown above, other state courts have recognized mental anguish as one of the effects of racial discrimination. ORS 695.019(2) gives the Commissioner of Labor the right to issue an order which requires an individual to perform an act reasonably calculated to carry out the purposes of [the Act], one of which is to ensure human dignity, and to eliminate the effects of an unlawful practice found. . . . In the context of the statute, mental anguish as well as pecuniary loss can be an effect of racial discrimination. The award of damages to compensate for a victim's humiliation is an act reasonably calculated to eliminate the effects of discrimination."

In State Commission for Human Rights vs. Speer, 29 N.Y. 2d 555, 272 N.E. 2d 884, 324 N.Y.S. 2d 297, and State Division of Human Rights vs. Luppino, 29 N.Y. 2d 558, 272 N.E. 2d 885, 324 N.Y.S. 2d 298 (1971), the New York Court of Appeals upheld the authority of that State's Division of Human Rights to award damages for mental anguish. In so doing, the Court relied on the provision of the law granting the New York Commission power to issue:

> ". . .an order . . .requiring such respondent to cease and desist from such unlawful discriminatory practice; . . .take such affirmative action, including (but not limited to), reinstatement or upgrading of employees, . . . awarding of compensatory damages to the person aggrieved by such practice, as, in the division, will effectuate the purposes of this article. . ."N.Y. Executive Law,297(4) (c).

The Massachusetts statute relied upon by their Supreme Court in Massachusetts Commission Against Discrimination vs. Franzaroli, 357 Mass. 112, 256 N.E. 2d 311 (1970), in upholding an award by the Commission of $250.00 for the emotional distress suffered by the aggrieved complainant included the language,". . . damages not to exceed $1,000.00."

This clause was cited by Judge Kramer during oral argument as distinguishing it from the Pennsylvania statute. Again, it must be respectifully stated that the distinction does not appear to be valid. The $1,000.00 maximum indicated a legislative determination to limit the size of the award, a limitation the Pennsylvania Legislature did not elect to impose. This limitation is clearly not relevant to the very power of the agency to award damages for emotional suffering. That power was found by the Court in the "including but not limited to" provision in the Act, a clause identical to that in Pennsylvania's Act.

In Williams vs. Joyce, 479 P. 2d 513 (Or App. 1971), the language the Court relied upon to award $200.00 for humiliation, frustration and anxiety was not as close to Pennsylvania's as the others cited above but its thrust was clearly that of Pennsylvania's. The Oregon Act authorized its agency to require a respondent after a finding of discrimination to". . . perform an act . . . reasonably calculated to carry out the purposes of ORS 695,010 to 695,110, eliminate the effects of an unlawful practice found, and protect the rights of the complainant and other persons similarly situated. . ."

The scheme and basic language is virtually identical to our Section 9. The key words, stressed by those courts which have interpreted these provisions, are "including but not limited to." which follow the statutory directive to the agency to "take such affirmative action. . ."

The words "compensatory damages" are included in the remedial section of the New York Act, which otherwise closely parallels that section of the Pennsylvania and New Jersey statutes. It is submitted that the mere inclusion of the words compensatory damages is an invalid basis for dismissing the New York cases as precedent. The Zahorian court relied heavily on the New York decisions. Prior to Zahorian, the New Jersey Court in Jackson supra. interpreted its statute as providing for compensatory damages. The Court below, of course, has underpinned its holding on its conclusion that Appellant has no power to order compensatory damages of any kind.

The argument Appellant has made above on its authority to order damages for mental anguish applies with equal force to the authority to award damages of any kind. The underlying premise of the decision is stressed, however, to convey the drastic and utterly unrealistic implications of the Court Below's interpretation. Under that interpretation, even precisely measurable out-of-pocket losses such as the difference in rent a complainant was forced to pay because of the respondent's unlawful refusal to rent, or a fee paid to an employment agency by an unlawfully discharged complainant in order to obtain a new job, would not be remediable.

The Zahorian Court also relied heavily on another provision of the New Jersey Act which is virtually identical to Section 12(b) of the Pennsylvania Act, which reads in its pertinent part:

> ". . . but as to acts declared unlawful by section five of this act the procedure herein provided shall, when invoked, be exclusive and the final determination therein shall exclude any other action, civil or criminal, based on the same frievance of the complainant concerned. If such complainant institutes any action based on such grievance without resorting to the procedure provided in this act, he may not subsequently resort to the procedure herein. . ."

The Zahorian Court concluded that a complainant who invoked the provisions of the State anti-discrimination act "would be barred from recompense elsewhere and the [Jackson] Court suggested that it might fairly be inferred from this that the Legislature understood that the director had the power to award such recompense."

Clearly a court of this Commonwealth has the authority to award damages for mental anguish to a victim of unlawful discrimination. See e.f., Everett v. Harron, 380 Pa. 123 (1955). Indeed it is well settled that "the existence of a statutory right implies the existence of all necessary and appropriate remedies." Sullivan vs. Little Hunting Park, 366 U.S. 229, 239 (1969). By its holding the Court below would retain the statutory right but effectively deprive the complainant who goes to the Commission and is thus barred from State Court of a necessary remedy.

Can it reasonably be argued that the Legislature intended to discourage victims of discrimination from utilizing the machinery of the very agency it created by investing the agency with less than

complete remedial powers? Yet this would be the certain effect of a holding by this Court that Appellant has no authority to order complete relief; presumably only the victims who are unable to obtain the services of an attorney would go to PHRC. But this Court has emphasized the clear intent of the Legislature to create "an effective enforcement agnecy." See Pennsylvania Human Relations Commission vs. Chester School District, 427 Pa. 157 (1967).

Federal Courts routinely award substantial compensatory damages for mental anguish as well as substantial punitive damages to victims of unlawful discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 et seq., and Title VIII of the Fair Housing Act of 1968, 42 U.S.C. 3604, as well as the Civil Rights Act of 1866, 42 U.S.C. 1982. Appellant believes that neither a State legislature nor a State court can foreclose a complainant who had had his case determined by the State Commission which has less than the full remedial powers available in Federal Court from then going into Federal Court. But assuming the complainant could still go into Federal Court, this is hardly an answer to the destructive impact the Commonwealth Court's decision would have on PHRC's effectiveness. It would needlessly burden the respondent and the complainant by involving them in multiplicatous litigation as well as unnecessarily add to the federal case load as well as presumably its backlog, it would place the burden on a complainant to obtain an attorney to seek complete relief and undoubtedly many would resign themselves to the partial relief the Commonwealth Court would allow. And to the extent that respondents are not required to full compensate

victims of unlawful discrimination and are thus less deterred from continuing their unlawful conduct, to that extent the very fundamental purpose of the Act would be thwarted.

Finally, PHRC's conciliation program would be severely wounded if not crippled. The Commission could hardly recommend to a complainant that he or she enter into an agreement, signing a release from bringing any subsequent court action, for something substantially less than the complaint might in fact obtain from a court. And respondents too would, as many already have, be far less ready to conciliate in good faith with a greatly weakened agency than they would with one with strong enforcement powers.

Not only would the Commission be rendered drastically less than effective; presumably the Federal civil rights enforcement agencies, the Equal Employment Opportunity Commission and the Department of Housing and Urban Development, would as well. Where now they defer complaints to an existing state agency if it has equivalent powers,[2] they would presumably be forced to process complaints in Pennsylvania themselves. We can only speculate whether they would be given the additional resources to cope with this enormously increased case load.

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[2]Section 810(c) of the Civil Rights Act of 1968 provides:

> "Wherever a state or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this Title . . ." Emphasis provided.

EEOC's policy in this regard is set forth in a memorandum from Peter C. Robertson, Director of its Office of State and Community Affairs to the executive directors of state and local anti-discrimination agencies dated June 8, 1973. Paragraph 8 provides:

> "Standards for Designation: Basically the standards for designation as a "706 Agency" are simple. The law enforced by the agency must be comparable in scope both as to coverage remedies and enforceability to Title VII of the Civil Rights Act of 1964."

The federal enforcement agencies could not defer cases to an agency without the power to order compensatory damages. For as already noted, Federal Courts in ever increasing numbers recognize that the prime purpose of civil rights statutes, to end discrimination, "will be best served if all the injuries which are caused by discrimination are entitled to recognition." Humphrey v. Southwestern Portland Cement Company 5 EPD §8501 (W.D. Tex., February 1973). In Humphrey, the Court found a Black worker had been discriminated against in violation of Title VII of the 1964 Civil Rights Act. The remedial provision of the statute is very similar to that in the Pennsylvania Act and includes the same "affirmative action including but not limited to" scheme. It also contains the additional provision that the Court may order "any other equitable" relief which it deems appropriate. In ordering the employer to pay $1200.00 damages for mental anguish as well as $2500.00 for loss of a chance to learn and gain experience, the Court articulated its rationale in these powerful words:

> ". . . as the trial progressed it became apparent that the psychic harm which might accompany an act of discrimination might be greater than would first appear. For the loss of a job because of discrimination means more than the loss of just a wage. It means the loss of a sense of achievement and the loss of a chance to learn. Discrimination is a vicious act. It may destroy hope and any trace of self-respect. That, and not the loss of pay, is perhaps the injury which is felt the most and which is the greatest."

The Court in Bowe v. Colgate Palmolive, 416 F. 2d 711 (7th Cir. 1969), considering the above remedial provision of Title VII, said:

> This granting of authority [to order such affirmative action as may be appropriate] should be broadly read and applied so as to effectively terminate the practice and make its victims whole. The full remedial powers of the Court must be brought to bear and all appropriate releif given."

An express provision for compensatory damages and punitive damages up to a maximum of $1,000.00 is incorporated into the Fair Housing Act of 1968. The United States Supreme Court in Jones v. Mayer, 392 U.S. 409 (1968), held that the Civil Rights Act of 1866 bars all racial discrimination, private as well as public, in the sale or rental of property. Sullivan vs. Little Hunting Park, supra, established that compensatory damages may be awarded under the 1866 Act even though it contained no express provision for such compensation.

The Court in Cash vs. Swifton Land Corp., 434 F. 2d 569, 572 (6th Cir. 1970), points out why remedies short of compensatory damages would be inadequate to the task of effectively combatting discrimination in housing.:

> "Neither the settlement of the parties as to the rental of the apartment, nor the awarding of costs and waiver of fees and security moots the question damages. 42 U.S.C. §3612 (b) (1968). Indeed Section 3612, with its provision for actual damages and punitive damages up to a maximum of $1,000 per violation of the Fair Housing Act of 1968, is a strong congessional condemnation of unlawful discriminations in housing. Such a provision prevents a landlord from following a wilful pattern of discrimination or from resisting certain applicants and withdrawing his resistance when the applicant seeks relief by court litigation, without an accounting therefor."

In Allen v. Gifford, P.H. E.O.H. Rptr. ¶15,599 (E.D. Va. 1975), in a case brought under the 1866 Act, the Court awarded $3500.00 in mental anguish damages and $5,000.00 in punitive damages to a Black denied a house although he eventually obtained it. See also e.g., four cases awarding mental anguish damages: Franklin v. Agostinelli, P.H. E.O.H. Rptr. ¶13,555 (W.D. Wash. 1971); Peoples v. Doughtie, P.H. E.O.H. Rptr. ¶15,575 (M.D. Ala. 1971); Seaton v. Sky Realty Co., P.H. E.O.H. Rptr. ¶13,530 (N.D. Ill. 1972); and Steele v. Title Realty Corp., 478 F. 2d 344 (7th Cir. 1973).

It may be, in the light of this establishment without question in the Federal courts of the right to compensatory and punitive damages in civil rights cases, that neither the Court below nor even the Legislature could diminish the worth or the enforceability of those rights. In Gilliam v. City of Omaha, 331 Pa. F. Supp. 4 (Neb. 1971), the Court denied jurisdiction of a civil rights case on the basis of an adequate state remedy. The Court ordered the Nebraska State Commission to consider the facts of the case and if appropriate to award punitive damages enve though punitve damages were repugnant to public policy under Nebraska law:

> "If punitve damages are necessary to fully vindicate a Constitutional right, when that right is before a Federal court, then such damages are every bit as necessary when that right is before a state administrative commission or a state court. Basic Federal Constitutional rights cannot be watered down by state statutes or state cour opinions. Cf Kerr v. California, 374 U.S. 23 (1963)"

The Court below, after focusing on the absence of any specific authority under the Act to support the Commission's power to order a Respondent to pay compensatory damages, also deplored the failure of the Commission to publish or offer any standard or guidelines utilized in fixing the amount of the award. It also concluded that in Zamantakis v. Pennsylvania Human Relations Commission, 10 Pa. Commonwealth 107, 308 A. 2d 612 (1973), the record does not support the finding of fact that the Complainants did in fact suffer mental anguish as a result of the unlawful discrimination--the refusal to rent to the Complainants because they were Black.

In her concurring opinion, Judge Blatt expressed her view that compensatory damages including possibly damages for mental anguish would appear to be a proper and effective way to effectuate the purposes of the Act and to remedy the "evils" of discrimination. She concurred in the majority Opinion, however, because of the absence of "the prior adoption of proper standards by the Commission and of substantial evidence that an injury had been suffered for which damages are appropriate."

Judge Rogers incisively disposed of these concerns:

> "As for the contention that the Commission may make excessive, arbitrary or inconsistent orders in this regard, the same possibility exists with respect to jury verdicts. The simple answer is that such orders of the Commission would be subject to judicial review both as to the sufficiency of the evidence or mental suffering and as to the reasonableness of the amount awarded."

None of the courts previously cited even addressed themselves to this issue of guidelines and standards. Presumably Judge Rogers' "simple answer" was taken for granted by them. In Rody v. Hollis, P.H. E.O.H. Rptr. ¶15,019 (August 3, 1972), the Supreme Court of Washinton, in denying the challenge to the power of the Washington State Commission to award damages up to $1,000.00 "for loss of the right to be free from discrimination," stated:

> "The Legislature must provide standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it."

Certainly, the Pennsylvania Legislature defined in general terms what is to be done by Pennsylvania Human Relations Commission, the instrumentality it established to accomplish it.

The Rody court continued:

> "We believe it is perfectly clear what the award is to be for; the only discretion left to the hearing tribunal is to determine the amount of the award. And where the purpose of the award is meade clear--to provide damages or loss of the right to be free from discrimination in housing transaction--it is clear by implication that the amount of the award is to be adjusted to accomplish these purposes. Standards to guide administrative action need not, and cannot, be perfectly specific. This is particularly so where the power which is exercised is quasi-judicial in nature, as in the instant case. Judicial power is traditionally and of necessity largely discretionary and standardless. The judicial process operates upon individuals and, in so doing, attempts to treat them as such. All that can, and should, be done is to define the conduct sought to be punished, or the injury to be compensated, set out the normally acceptable limits of punishment or compensation, and then allow the adjudicative body to determine the appropriate punishment or compensation by applying general principles of morality and traditional concepts of justice."

As to the necessity of a record of substantial evidence that an injury had been suffered for which damages are appropriate, it is submitted at the outset that the mere wilful deprivation of a civil right should, without, sustain an award of compensatory damages. Note the State of Washington Act: Damages up to $1,000.00 for the loss of the right to be free from discrimination. Whether it is termed damages for mental anguish or exemplary or punitive damages, it is well established under federal law that "in the eyes of the law this right [civil right, such as the right to vote] is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property or any other valuable thing." Wayne vs. Venable, 260 F. 64, 66 (8th Cir. 1919). Punitive damages have frequently been awarded in civil rights cases where no proof of actual damages was offered on the theory that damages are presumed as well as on the theory that this is necessary to protect the right. See e.g., Batista v. Weir, 310 F. 2d 74 (3rd Cir. 1965); Caperci v. Hootoon, 397 F. 2d 799 (1st Cir. 1968) cert. denied, 393 U.S. 940 (1968); Solomon v. Pennsylvania R.R., 96 F. Supp. 709 (S.D. N.Y. 1951); Washington v. Official Court Stenographer, 251 F. Supp. 945 (E.D. PA. 1966).

In Batista, supra, the following language of the Court although in the context of punitive damages is equally applicable to a consideration of damages for mental anguish.

> "But if it be once said that such additional damages [punitive] may be assessed against the wrongdoer and when assessed may be taken by the plaintiff--such is the settled state of the federal courts--there is neither sense nor reason in the proposition that such additional damages may be recovered by a plaintiff who is able to show that he has lost $10.00 and may not be recovered by some other plaintiff who has sustained, it may be, far greater injury but is unable to prove that he is poorer in thepocket by the wrong doing of the defendant."

Courts have recognized the enormous emotional harm inflicted upon victims of unlawful discrimination. Expert testimony has been submitted and is available to corroborate this. See e.g. Brown v. Board of Education, 347 U.S. 483 (1954); Simpson & Yingler, Racial and Cultural Minorities, page 217 (1958). The kind of discrimination herein involved, the denial of a place to live because of race, is a vicious and evil act. Courts, and administrative agencies, may project, without being reckless, the inevitable impact of such an ugly deed upon its victim. It is submitted that the bare testimony of the Complainant Gwendolyn Lee that she was"upset" over the refusal to rent is sufficient to sustain nominal award of $1,000.00.

Appellant's position is that the size of an order to pay emotional damages is a question of fact for the fact-finder to be determined by the facts and circumstances of each case subject, of course, to judicial review, as to whether there was an abuse of discretion.

In Zahorian, the New Jersey Court in upholding the award of $750.00 for mental anguish, confined the agency's authority to an award which "truly constituted only 'incidental relief'. . ." rather than ". . . where because of the severity of the consequential injury and the extensiveness of the claim, the item of damages has become primary and the other relief incidental."

The Court appears to suggest that where the complaint involves a claim of serious and permanent physical or mental disability which would "entail extensive adversary litigation, it might be better reserved to traditional court proceedings."

It may not be possible to categorize the issues and claims involved in a discrimination case neatly as involving either an incidental or a primary damage claim. In every case the Commission, in fashioning a remedy, looks to what must be done to eliminate the unlawful practice involved but also seeks, to the extent it is possible, to make an aggrieved Complainant whole. Nevertheless, it has no quarrel with leaving to the courts the rare case apparently contemplated by the Zahorian Court. Presumably that Court was referring to a case where the claim of serious and permanent physical or mental disability is manifestly attributable to the unlawful act in question and the injury is manifest and capable of being diagnosed and capable of being strongly confirmed by a physician.

Realistically, many Blacks who complain to the Commission may have been permanently emotionally scarred by an act of discrimination, but seldom is there manifested the direct injury flowing from the act and capable of being medically diagnosed and confirmed. There is no realistic possibility that the Commission would enter an award in a sum remotely commensurate to the damage which may in fact have been done.

Appellant urges that this Court affirm its power to order compensatory damages, including the kind herein in question, and to affirm it in those terms necessary for it to effectuate the central purpose of the Act of ending racial discrimination. Appellant is concerned that the impostiion of an arbitrary token ceiling on amounts which it can order a Respondent to pay would render the power ineffective as a deterrent to acts of unlawful discrimination. Where the facts of one case may appear to justify only a nominal award, those of another may justify one substantially higher, and it should be clearly impressed upon every potential Respondent that if he discriminates, he must take his victim as he finds him.

In Pennsylvania Human Relations Commission v. Straw, 10 Pa. Comwlth 99, 308 A.2d 619 (1973) Appellant's order was mos substantial $3500.00 to compensate the Complainant for the "mental anguish, humiliation, inconvenience and disruption of normal family life" which she experienced as a result of Respondent's refusal to rent to her because of her race (Record, Final Order, para. 3). Substantial evidence in support of the damages found by the Commission

was introduced in behalf of the Complainant (N.T. 31a-33a) and was reflected in the Findings of Fact (Record, Findings paras. 10-12). In Pennsylvania Human Relations Commission vs. St. Andrews Development Co., Inc., 10 Pa. Comwlth 123, 308 A.2d 623 (1973) on the same day by the Court below in which Pennsylvania Human Relations Commission's power to order compensatory damages was involved, the order was to pay the two Complainants $750.00 each for "mental anguish, humiliation and embarrassment". The Commission found that the Respondents had refused to rent an apartment to them and to the younger woman's son because of their race, Black. The finding of mental anguish was supported by strong testimony of the Complainant, Geraldine Cobb, including the following:

> "Q. Miss Cobb, getting back to the time you were rejected, could you relate to the Commissioners how you as a person felt?
>
> A. How I felt?
>
> Q. Yes.
>
> A. About us being rejected?
>
> Q. Yes.
>
> A. I was very hurt, myself. I was upset. Me and my mother both, we both wanted to live out in the Governor's Place, and my mother has a heart condition, I think this kind of weighed on her heart. Because she did worry about it a lot. . .
>
> Q. Did it affect your day to day conduct?
>
> A. I think both of us it affected. We were both irritable. And frustrated. We neglected my little brother. At the end of the day, she felt like she didn't want to be bothered. She just worried about the situation.
>
> Q. Were you very close to your mother?
>
> A. Very.

Q. And things that would have affected her, would they have affected you as well?

A. Very much so.

Q. And this did bother your mother?

A. Yes.

Q. What about Darian, the youngster? Your brother?

A. Well, usually, Darian goes to bed about 9:00. Around the time we was rejected, my mother seemed to spend this time with him. She would spend this time. I would say what is wrong. Why wasn't Darian in bed. She was worried about the apartment. Whether we would get it or not.

This weighed on both of us."

Clearly there was no basis for the Court below saying, as it did in footnote 4, that the records of the different cases "fail to disclose any distinction or basis for the disparity in the respective awards."

II. A FINAL ORDER REQUIRING RESPONDENT TO MAINTAIN RECORDS SHOWING THE RACIAL INDENTIFICATION OF APPLICANTS FOR HOUSING, AS PART OF A PLAN TO REMEDY UNLAWFUL DISCRIMINATORY PRACTICES, DOES NOT VIOLATE THE PENNSYLVANIA HUMAN RELATIONS ACT.

Paragraphs 7(d) and 7(e)[3] of the Commission's Final Order requires that Walnut Garden Apartments maintain a registry of all persons seeking housing, indicating their race. Walnut Garden contends that the Commission is prohibited from ordering the maintenance of records which include designations of race by Section 5(h)(6) of the of the Pennsylvania Human Relations Act.

That Section provides, inter alia:

> "It shal be . . . an unlawful discriminatory practice:
>
> * * *

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[3]Paragraphs 7(d) and 7(e) of the Commission's Final Order in this case provide as follows:

(d) The Respondent shall, for a period of two (2) years subsequent to the date of this Order, maintain a log of all applicants that apply for units managed by the Respondents. This log shall include name, address, and race of applicant, date of applicant, and unit sought, and in the case of rejections, the specific reason or reasons therefore. This provision is in accordance with an Affirmative Action Plan to eliminate discrimination and ensure compliance with the Pennsylvania Human Relations Act, and any use to a contrary purpose shall be deemed a violation of this Order.

(e) That effective on and from the date of this Order and continuing for a period of two (2) years, the Respondents shall maintain a file upon the vacation of each housing unit. This file shall indicate the size of the unit, date vacated, date occupied, race of former occupant and the location of the unit and its designation. This provision is in accordance with an Affirmative Action Plan to eliminate discrimination and ensure compliance with the Pennsylvania Human Relations Act, and any use to a contrary purpose shall be deemed a violation of this Order.

(h) for any person to:

* * *

(6) make any inquiry, elicit any information make or keep any record or use any form of application, containing questions or entries concerning race, color, religious creed, ancestry, sex or national origin in connection with the sale of lease of any commercial housing."

43 P.S. §955 (h)(6)

Appellee incorrectly relies on Span v. P.H.R.C., Walnut Garden Apts., Inc. v. P.H.R.C., 15 Pa.Cmwlth. 334, 325 A.2d 678, in which the Commonwealth Court held that the Commission did not have the authority to order a Respondent to maintain records which designate the race of an applicant or of a former occupant. In its December 4, 1974 decision in Midland Heights Homes v. P.H.R.C., 17 Pa.Cmwlth 563, 333 A.2d 516, the Commonwealth Court overturned its previous holding and upheld the Commission's authority to require a Respondent to record the racial indentification of applicants for housing as being within the Commission's broad discretionary remedial power. The Court was specifically following the opinion expressed by the Pennsylvania Supreme Court in P.H.R.C. v. Chester Housing Authority, supra, and P.H.R.C. v. Alto-Reste Park Cemetary Association, infra, which affirmed the Commission's ordering the maintenance of racial records.

It should be clear form Section 5 (h)(6) that no person may elicit information or maintain records of the race of applicants for housing, so as to enable that person to unlawfully discriminate on the basis of race. The Legislature recognized that such inquiries and records have been used to deny housing opportunities to certain classes of persons. Inquiries or records

used for such purposes are certainly illegal.

However, Section 5 (h)(6) was not intended and should not be construed so as to restrict the power of the Commission effectively to enforce the Act. Accordingly, Section 5 (h)(6) should be construed in a limited fashion. Application of the prohibition against record keeping should not interfere with the enforcement of the Act. Such an interpretation does not disregard the letter of the law, but specifies the breadth of its application to achieve a reasonable result in harmony with the general purpose and design of the Act.

Neither the Commission nor the Court is bound by a literal interpretation of the language of the statute as argued by Van Buren where such an interpretation is inconsistent with the Legislative design and is in direct conflict with other provisions of the Act.

Appellee mistakenly relies primarily on the "plain meaning" theory of statutory construction. However, in doing so, Walnut Garden ignores the fundamental principle of statutory construction that the Legislative intent controls. Accordingly, the provisions of Section 5 (h)(6) must be interpreted in conjunction with the broad remedial powers vested in the Commission. Consideration must be given to the purposes to be achieved and the consequences of the particular interpretation put forth. Where doubt or ambiguity appears the rules of statutory construction must be applied.

The Statutory Construction Act of 1972, Act of November 25, 1970 P.L. 707, No. 230 added December 6, 1972, No. 290, 1 P.S. §150, et seq. provides that "The object of all interpretation

and construction of statutes is to ascertain and effectuate the intention of the General Assembly . . . " 1 P.S. §1921(a). The presumptions to be applied in ascertaining the intention of the General Assembly are enumerated in Section 1922:

> (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.
>
> (2) That the General Assembly intends the entire statute to be effective and certain.
>
> (3) That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.
>
> (4) That when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.
>
> (5) That the General Assembly intends to favor the public interest as against any private interest.

Applying these presumptions to the Pennsylvania Human Relations Act, particularly Section 5 (h)(6), there is ample support for a narrow interpretation of the prohibition against record keeping.

If the Commission is prohibited from incorporating reporting requirements into a comprehensive remedial plan, then the effectiveness of the Commission's Final Order is substantially diminished. Indeed, the Commission would be precluded from enforcing its own order. The existence of written records as provided in Paragraphs 7(d) and 7(e), available for review upon reasonable notice, enables the Commission to confirm compliance or to expose violations upon simple examination of the list of applicants compared with the schedule of vacancies. Without such records,

enforcement of the Commission's order would entail visual indentification of each and every resident and each and every applicant for housing. To require extensive investigation for purposes of enforcement is not merely inconvenient, it is unreasonable and absurd.

Furthermore, a broad prohibition brings Section 5 (h)(6) into direct conflict with Section 9 of the Act which explicitly empowers the Commission to order a report on the manner of compliance must necessarily include designations as to race. To construe Section 5 (h)(6) otherwise would be to nullify the reporting requirement of Section 9.

There is no merit to Walnut Gardens contention that the Commission has no authority to waive Section 5 (h)(6). Such an assertion strongly suggests that Appellee misconstrues the legislative intent in enacting that section of the Act.

It is true that the Statutory Construction Act provides that "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 P.S. §1921(b). However, this section does not preclude consideration of the context and other terms and provisions in determining whether the words are used in their literal significance or in a limited sense. In Girard Trust Company v. Philadelphia, 369 Pa. 499, 87 A2d 277 (1952), the Pennsylvania Supreme Court construed the words "all mortgages" to mean "all indebtedness secured by mortgage," despite the literal words of the statute, and with specific reference to the above quoted section. The court sought to avoid an unreasonable result by limiting the broad wording of the statute.

> Thus, in Guessfeldt v. McGrath, Attorney General ____ US. ____ (Opinion handed down January 28, 1952), an act of Congress provided that "No country (Germany or Japan) . . . shall be returned to former owners thereof . . . " It was ruled notwithstanding the inclusiveness of the term "any national," that it should be held applicable only to some German "nationals," namely, those who were enemies. 369 Pa. 499, 506.

Consequently, there is no authority or reason to adopt Walnut Garden's technical interpretation of Section 5 (h)(6) of the Act.

Notwithstanding the foregoing analysis, Walnut Garden insists that the opinion of the Court below is controlling. However, the Commission submits that said opinion is inapplicable as recognized by the Commonwealth Court in Midland, supra, in light of the Pennsylvania Supreme Court decisions in Alto-Reste, supra, and Chester Housing, supra.

In Alto-Reste, the Court ruled that the Commission has such maximum flexibility to remedy and hopefully eradicate the 'evils' of discrimination". The Court adopted as its own the United States Supreme Court statement in Fibreboard Paper Products Corp. v. N.L.R.B., et al., 379 U.S. 203, 216, 85 S.Ct. 398, 40506 (1964) dealing with a provision of the Taft-Hartly 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.'..."

More importantly, in Alto-Reste, supra, the Commission ordered a cemetary which was found to have illegally refused to bury a Black person because of his race, to keep records when persons are refused burial, and to send to the Commission a copy of the reasons for said refusal. In upholding the order, this Honorable Court stated:

> "It is beyond cavil that the Human Relations Act was intended, by the Legislature, to protect more than individuals unlawfully discriminated against -- of equal importance is the Act's intent that the public generally be protected from such discrimination. Accordingly, it is, and was here, incumbent upon the Commission to not only fashion an effective remedy for the individual aggrieved, but also to guard against and deter the same discriminatory action from recurring, to the detriment of others within the same class. Alto-Reste, supra at 888.
> (Citations omitted).

It has been the experience of the Commission that an order which does not include the indentification of the race of applicants is almost impossible to enforce. In such situations an investigator must personally check race by visual indentification of all persons not given units, a procedure which is quite time consuming, considering most applicants would have moved to a new address. Otherwise, to detect a violation, the Commission must await a complaint. However, unless a Black is aware of a vacancy which has been denied him or her, a complaint might very well not be filed. Therefore, the only truly effective method of enforcing orders is by means of the provision in question.

In the instant case, the requirement that Walnut Garden maintain a registry of applicants, indicating race, is one that, in the judgment of the Commission, will "effectuate the policies of the Act," by providing the Commission an effective and reasonable

method of reviewing Appellant's compliance with the Commission's Final Order and the Act itself. The existence of such records, available upon reasonable notice to the Commission staff, would discourage Appellants from discrimination.

A simple review of the applicants, compared with the schedule of vacancies, would lead to any possible violations.[2]

Furthermore, this Honorable Court has upheld another Final Order of the Commission which specifically requires record keeping by race. In Chester Housing Authority, supra, Paragraph 8 of the Commission's Final Order was upheld without discussion. Paragraph 8 required that Respondent:

> Shall report to the Pennsylvania Human Relations Commission at its Regional Office as above set forth, beginning one month from the effective date of this Order, and monthly thereafter until such time as the racial composition in each project, as set forth in items 2 and 3 above, is achieved. Such report is to contain information regarding the racial composition of each of its housing projects, as well as a list of all applicants, transfers, assignments and re-assignments of all units in all said projects under its supervision, and direction and control by racial indentification and reflecting the ratio of Negro and White tenant families as set forth in Paragraphs 2 and 3 above, family size and size of unit requested and assigned,

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[2]Section 9 of the Pennsylvania Human Relations Act, 43 P.S. §959, provided, inter alia,: "If upon all evidence at the hearing the Commission shall find that a Respondent was engaged in or is engaged 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 ... as, in the judgment of the Commission, will effectuate the purposed of this Act, and including a requirement for report of the manner of compliance. [emphasis added]

> list of cacancies in each project, and thereafter, shall for a further period of two years make such reports quarter-annually. Appendix C, pp. C2 and C3.

Thus, there is ample authority for limited application of the prohibition contained in Section 5(h)6) of the Act. So interpreted, that section does not restrict the authority of the Commission to enter a Final Order, such as in this case, reasonably designed to promote the purposes of the Act.

It has been the experience of the Commission, and also of those Courts which have had to fashion remedies in discrimination cases, that to end discrimination and reverse past effects of discrimination, one must be color-conscious rather than color blind. As stated by the Court in Associated General Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973):

> "It is by now well understood, however, that our society cannot be completely color blind in the short term if we are to have a color blind society in the long term."
>
> p. 16

This is the very essence of affirmative action plans prevalent in employment discrimination cases, but also applicable to housing situations. Although this case does not involve an affirmative action plan, a brief review of their treatment is appropriate at this point, since a requisite of any affirmative action plan is racial or sexual indentification of applicants.

In Contractor's Assn. of Eastern Pa. v. Secretary of Labor, 442 F. 2d S.Ct. 98, 30 L.Ed 2d 95 (1971), the United States Supreme Court refused certiorari in a case involving the so-called Philadelphia Plan. The plan was adopted by the Secretary of Labor

pursuant to regulations in an attempt to relieve the results of past discrimination in the Philadelphia trade unions.

Under the plan, contractors were required to formulate specific programs to utilize minority workers before qualifying for federal contracts. The contractors Association claimed that proper adherence to the Plan required them to list and classify employees by race, and give preference in some cases to non-whites, contrary to the express provisions of the Civil Rights Act. The Act provides:

> (a) It shall be an unlawful employment practice for an employer . . .
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> (42 U.S.C. §2000e-2 (a))

The court ruled that the Plan did not violate the Act, stating,

> "to read (the Act) in the manner suggested by the Plaintiffs we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils. We discern no such intention either from the language of the statute or from its legislative history."
>
> p. 172.3

Although the requirements of the Plan were, indeed, color conscious, the Plan was seen as a proper, reasonalbe approach to remedying the evils of past discrimination.

The aforementioned principles have been rigorously adhered to by this Honorable Court since 1967, when, in Pennsylvania Human Relations Commission v. Chester School District, 427, Pa. 157, 233 A.2d 290 (1967), it upheld the authority of the Commission to require school districts to submit plans for the desegregation of public schools.[3] Implicit in that ruling was the understanding that any such plan must of necessity, include a racial breakdown of present and future students. Certainly, the many desegregation plans adopted in the federal judicial system have included such racial indentification.

The importance of the inclusion of racial indentification in plans to remedy past discrimination, therefore, has been universally recognized by many jurisdictions, including our own, in various situations where a literal reading of the statute invilved would have rendered such plans unlawful.

A similar interpretation of the New Jersey Law against discrimination was upheld by the Supreme Court of New Jersey in New Jersey Builders, Owners, & Managers Assn. v. Blair, 60 N.J. 330, 288 A.2d 855 (1972). The New Jersey Division on Civil Rights attempted to promulgate a regulations called the Multiple Dwelling

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[3]See also P.H.R.C. v. Uniontown Area School District 455 Pa. 52 (1973), P.H.R.C. v. Norristown Area School District. 20 Pa. Cmwlth. 555, 342 A.2d 464 (1975)

Reporting Rule. The Rule required certain landlords to supply the Division at periodic intervals with information regarding, inter alia, the racial designation of tenants and applicants for housing.

The proposed Rule was attacked in Court as being contrary to the New Jersey Law Against Discrimination, which provides that:

> It shall be . . . an unlawful discrimination:
>
> * * *
>
> g. For the owner, lesee, sublessee, assignee, or managing agent of, or other person have the right of ownership of possession of or the right to sell, rent, lease, assign, or sublease any real property, or part of portion thereof, or any agent or employee of any of these:
>
> * * *
>
> (3) To . . . make any record or inquiry in connection with the prospective purchase, rental, lease, assignment, or sublease of any real property, or part or portion thereof which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, ancestry, marital status or sex or any intent to make any such limitation, specification or discrimination . . . (N.J.S.A. 10:512)

The New Jersey Court held that the statutory language of the Act did not prohibit the Division from adopting reasonable regulations which constitute a rational approach toward fulfilling its responsibilities, stating,

> "If there is any internal inconsistency in the statutory scheme, either appearing the words of the enactment or emerging upon its implementation by the agency - as is perhaps here the case - reference to fundamental purpose of the Act will provide the touchstoen to resolve the dilema."
>
> 288 A.2d at 857.

> "In reading and interpreting a statute, primary regard must be given to the fundamental prupose for which the legislation was enacted. Where a literal rendering will lead to a result not in accord with the essential purpose and design of the Act, the spirit of the law will control the letter . . . "
>
> 288 A.2d at 859

In addition, the public interest as set forth in the Human Relations Act, Findings and Declaration of Policy is promoted by an interpretation which supports and maintains the Commission as an effective enforcement agency.

Section 12(a) of the Pennsylvania Human Relations Act states, "the provisions of this Act shall be construed liberally for the accomplishment of the purposes thereof . . "

The purposes spoken of in Section 9 and 12 are reflected throughout the Act. However, Section 2(a) of the Act reflects the findings of the Legislature, and should be regarded as the basis for the remainder of the provisions of the Act. It reads:

> (a) 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, 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 democratic 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 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 sub-standard, 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.

Thus, it is clear that the Legislature intended a strong administrative agency with maximum flexibility to deal with the very serious problems of discrimination. Certainly, the need for effecrive enforcement of the Act is as much evident today as it was nineteen years ago. It is therefore, the policy of the Commission to attempt to frame orders in a manner that will best assure compliance with the spirit, as well as the letter, of the law. That the Commission has such flexibility and broad remedial powers has been affirmed by the Pennsylvania Supreme Court in Pennsylvania Human Relations Commission v. Alto-Rest Park Cemetary Ass'n., supra.

The Commission could not agree more that the practice of labelling applicants and leases by race is "disgusting and degrading' as maintained in Walnut Garden's Brief. However, the Commission submits that Walnut Garden itself is responsible for something even more offensive than that which it now objects to as illegal. As appropriately stated by the Court in Norwalk Redevelopment Agency, 395 F.2d 920 (2nd Cir., 1968) at 931.

> "What we have said may require classification by race. That is something which the constitution usually forbids, not because it is inevitable an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial enequality. Where it is drawn for the purposes of achieving equality, it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required."

Given the strong legislative language of the Pennsylvania Human Relations Act, and the broad language of this Honorable Court in the cases cited above the Commission submits the Act does not restrict it from requiring Respondents to identify applicants by race, where such indentification is designed and intended to enforce the provisions of the Act. It is therefore submitted, and the Commission respectufully requests that this Honorable Court uphold and affirm Paragraphs 7(d) and 7(e) of the instant Final Order.

CONCLUSION

WHEREFORE, the Pennsylvania Human Relations Commission prays this Honorable Court uphold its Final Order in this Case.

Respectfully submitted,

S/ Sanford Kahn

Sanford Kahn, General Counsel

Marc Kranson

Marc Kranson
Assistant General Counsel

Attorneys for Appellant

PAPER BOOKS

Robert E. Span, Sr., Manager, Walnut Garden Apartments, Inc., Appellant, v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission, Appellee.

Walnut Garden Apartments, Inc., Appellant, v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission, Appellee.

Human relations—Racial discrimination—Scope of appellate review—Findings of fact—Substantial evidence—Pennsylvania Human Relations Act, Act 1955, October 27, P. L. 744—Power of Pennsylvania Human Relations Commission—Discriminatory practices—Advertising—Record keeping—Damages—Humiliation.

1. The Commonwealth Court of Pennsylvania will not disturb findings of the Pennsylvania Human Relations Commission which are supported by substantial evidence. [336]

2. Under provisions of the Pennsylvania Human Relations Act, Act 1955, October 27, P. L. 744, the Pennsylvania Human Relations Commission, having found that a discriminatory practice has occurred, may frame an order which provides an effective remedy for the aggrieved party and which also guards against the repetition of such practice which would be detrimental to others of the same class. [336]

3. The Pennsylvania Human Relations Commission may not require that a party with apartments to lease advertise only in general circulation newspapers. [337]

4. An order of the Pennsylvania Human Relations Commission, requiring a party to maintain records indicating the race of applicants for or occupants of apartments, is violative of provisions of the Pennsylvania Human Relations Act, Act 1955, October 27, P. L. 744, which prohibit the keeping of such records relating to race. [337-8]

5. It is beyond the authority of the Pennsylvania Human Relations Commission to award damages for embarrassment, humiliation and emotional upset resulting from discriminatory actions. [338]

Judge ROGERS filed a dissenting opinion which was substantially as follows:

1. The Pennsylvania Human Relations Commission may award reasonable damages to victims of discriminatory practices. [339]

Argued September 4, 1974, before President Judge BOWMAN and Judges CRUMLISH, JR., KRAMER, WILKINSON, JR., MENCER, ROGERS and BLATT.

Appeals, Nos. 1665 and 1640 C.D. 1973, from the Order of the Pennsylvania Human Relations Commission in case of Gwendolyn A. Lee and Ernest L. Yokely v. Walnut Garden Apartments, Inc., Robert E. Span, Sr., Manager, No. H-1654.

Complaint of discriminatory practice with Pennsylvania Human Relations Commission. Violation found and order issued. Respondents appealed to the Commonwealth Court of Pennsylvania. Held: Affirmed in part and reversed in part.

Gilbert E. Morcroft, for appellants.

Sanford Kahn, with him *Mark A. Senick,* for appellee.

OPINION BY JUDGE WILKINSON, October 3, 1974:

Complainants filed a complaint with the Pennsylvania Human Relations Commission charging the appellants with refusing to rent an apartment to them because of their race, Black, in violation of Section 5(h) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P. L. 744, *as amended,* 43 P.S. §955(h) (Supp. 1974-1975). Appellants filed an answer denying the charges and alleging that if complainants did request to rent an apartment, the request was denied either because the apartment was to be occupied by more than two persons, which was contrary to appellants' policy, or because no vacancy existed.

The matter came on for hearing and testimony was offered by complainants, as well as by a white woman who accompanied them and an employe of the Pennsylvania Human Relations Commission. Appellants of-

fered one witness, the wife of appellant, Span. The testimony was contradictory both as to whether there was an apartment available and as to whether appellants had in fact a policy against renting to anyone who would have the apartment occupied by more than two people. The evidence of the complainants, if believed, clearly supports the charges. The Commission chose to believe the complainants and their witnesses and determined that appellants had engaged in unlawful discriminatory practices as charged.

The law is quite clear that if there is substantial evidence to support the Commission's findings, this Court cannot disturb them. *Straw v. Pennsylvania Human Relations Commission,* 10 Pa. Commonwealth Ct. 99, 308 A. 2d 619 (1973). If believed, which it was by the Commission here, the testimony of complainants and their witnesses clearly establishes that an apartment was available and that a white applicant was told that it was available and was invited back to see it that evening with her husband and child. On the other hand, the Black applicants were told that there was no apartment available.

Having found that discriminatory practices had taken place, the Commission entered an order to which the appellants except as being beyond the Commission's authority. We must agree with the appellants with regard to some portions of the order.

We are not unmindful of the decision of our Supreme Court in *Pennsylvania Human Relations Commission v. Alto-Reste Park Cemetery Association,* 453 Pa. 124, 306 A. 2d 881 (1973), wherein Justice ROBERTS sets forth the broad powers of the Commission to frame an order that not only provides "an effective remedy for the individual aggrieved, but also to guard against and deter the same discriminatory action from recurring, to the detriment of others within the same class." 453 Pa. at 135-36, 306 A. 2d at 888. However, even mindful of

those broad powers, we cannot justify and approve the following portions of the order: "5(b) Advertise only in general circulation newspapers."

Our Supreme Court specifically authorized the requirement of advertising, but in no way did it provide that the Commission could limit advertising to newspapers and then only in newspapers of general circulation.

"7(d) The Respondents shall, for a period of two (2) years subsequent to the date of this Order, maintain a log of all applicants that apply for units managed by the Respondents. This log shall include name, address and *race of applicant,* date of application, and unit sought, and in the case of rejections, the specific reason or reasons therefor. This provision is in accordance with an Affirmative Action Plan to eliminate discrimination and ensure compliance with the Pennsylvania Human Relations Act, and any use to a contrary purpose shall be deemed a violation of this Order." (Emphasis supplied.)

"7(e) That effective on and from the date of this Order and continuing for a period of two (2) years, the Respondents shall maintain a file upon the vacation of each housing unit. This file shall indicate the size of the unit, date vacated, date occupied, *race of former occupant* and the location of the unit and its designation. This provision is in accordance with an Affirmative Action Plan to eliminate discrimination and ensure compliance with the Pennsylvania Human Relations Act, and any use to a contrary purpose shall be deemed a violation of this Order." (Emphasis supplied.)

The requirement of the order that the appellants maintain records which designate the race of an applicant or of a former occupant is in direct violation of Section 5(h)(6) of the Pennsylvania Human Relations Act, 43 P.S. §955(h)(6), which provides that no person shall: "Make any inquiry, elicit any information, make

or keep any record or use any form of application, containing questions or entries concerning *race,* color, religious creed, ancestry, sex or national origin in connection with the sale or lease of any commercial housing or loan of any money, whether or not secured by mortgage or otherwise for the acquisition, construction, rehabilitation, repair or maintenance of commercial housing, or to make any inquiry, elicit any information, make or keep any record or use any form of application, containing questions or entries concerning the use of a guide dog because of the blindness of the user, in connection with the lease of any commercial housing." (Emphasis supplied.)

Finally, the Commission has included a final paragraph in the order which provides for the payment of compensatory damages: "12. That the Respondents shall pay the Complainant Gwendolyn Lee the sum of One Thousand Dollars ($1,000.00) for embarrassment, humiliation and emotional upset as a result of their discriminatory actions. The execution of this provision of the Order shall be held in abeyance until the Supreme Court of Pennsylvania issues an opinion on the power of the Commission to make such awards." The inclusion in the order of a provision for compensatory damages for embarrassment, humiliation and emotional upset as a result of discriminatory actions has been declared by this Court to be beyond the authority of the Commission. *Straw, supra; Zamantakis et al. v. Pennsylvania Human Relations Commission,* 10 Pa. Commonwealth Ct. 107, 308 A. 2d 612 (1973). *See also St. Andrew Development Co., Inc. et al. v. Pennsylvania Human Relations Commission,* 10 Pa. Commonwealth Ct. 123, 308 A. 2d 623 (1973).

Accordingly, we enter the following

ORDER

Now, October 3, 1974, the order of the Pennsylvania Human Relations Commission, dated November 28, 1973, is affirmed with the exception of paragraphs 5(b) and 12 and that provision of paragraphs 7(d) and (e) which requires the records to indicate the race of the applicant or of the former occupant, which paragraphs and parts of paragraphs are set aside and stricken.

DISSENTING OPINION BY JUDGE ROGERS:

As I did in the cases last cited by Judge WILKINSON for the majority, I am impelled to dissent from its holding that the Commission has no power to award reasonable damages to victims of discriminatory practices.

Joseph Ricciardi, Appellant, *v.* Workmen's Compensation Appeal Board, Fleming Company and Aetna Insurance Company, Insurance Carrier, Appellees.

Workmen's compensation — Remand — Interlocutory order — Appealable order—Assignment to particular referee—Bias or prejudice.

1. An order of the Workmen's Compensation Appeal Board setting aside a determination of a referee in a workmen's compensation case and remanding the matter for rehearing is ordinarily interlocutory and unappealable. [341]

2. When the Workmen's Compensation Appeal Board remands a case for rehearing, an appeal may not be taken from that portion of the order which assigns the case to a particular referee, and evidence of alleged bias and prejudice of such referee can be first raised below at rehearing or before the Board and be subject to judicial review thereafter. [341]

Argued September 10, 1974, before Judges CRUMLISH, JR., WILKINSON, JR. and ROGERS, sitting as a panel of three.

Appeal, No. 970 C.D. 1973, from the Order of the Workmen's Compensation Appeal Board in case of Joseph Ricciardi v. Fleming Company, No. A-65805.

Original — Uncorrected

IN THE

SUPREME COURT OF PENNSYLVANIA

No. 136 March Term, 1977

COMMONWEALTH OF PENNSYLVANIA
HUMAN RELATIONS COMMISSION, Appellant

v.

ROBERT E. SPAN, SR., Manager
WALNUT GARDEN APARTMENTS, Appellee

BRIEF ON BEHALF OF APPELLANT

Appeal from the Order of the Commonwealth Court filed October 3, 1974 at No. 1675 C.D. 1973 modifying the Order of the Pennsylvania Human Relations Commission at Docket No. H-1654

SANFORD KAHN
CHERYL L. ALLEN
MARC KRANSON
Attorneys for Appellant

355 Fifth Avenue
Suite 1210
Pittsburgh, PA 15222

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MISCELLANEOUS:

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 3rd day of October, 1974 Per Curiam."

STATEMENT OF THE QUESTIONS INVOLVED

I. WHETHER THE PENNSYLVANIA HUMAN RELATIONS COMMISSION HAS THE AUTHORITY TO ORDER A RESPONDENT WHO HAS UNLAWFULLY DISCRIMINATED AGAINST A COMPLAINANT, TO COMPENSATE THAT COMPLAINANT FOR THE MENTAL ANGUISH, HUMILIATION, INCONVENIENCE AND DISRUPTION OF NORMAL FAMILY LIFE SUFFERED AS A DIRECT RESULT OF RESPONDENT'S UNLAWFUL ACT.
(Answered in the negative by the Court below.)

II. WHETHER A FINAL ORDER REQUIRING RESPONDENT TO MAINTAIN RECORDS SHOWING THE RACIAL IDENTIFICATION OF APPLICANTS FOR HOUSING AS A PART OF A PLAN TO REMEDY UNLAWFUL DISCRIMINATORY PRACTICES, VIOLATES THE PENNSYLVANIA HUMAN RELATIONS ACT.
(Answered in the negative by the Court below.)

HISTORY OF THE CASE

On February 2, 1972, Complainants, Gwendolyn A. Lee and Ernest L. Yokely, filed a complaint with the Pennsylvania Human Relations Commission wherein they alleged that on or about November 8, 1971, Appellees Walnut Garden Apartments, Inc. and Robert E. Span, Sr., Manager, refused to rent an apartment to them because of their race, Black. The Complainants cited Section 5 (h) (1) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. 955 (h).

Subsequent to an investigation by the Pennsylvania Human Relations Commission (hereafter "Commission"), a finding of probable cause, and attempts at conciliation, the Commission ordered a Public Hearing be held. Said hearing was held on August 29, 1973, before a panel of three Commissioners.

On November 4, 1971, Gwendolyn A. Lee, a Black female, after seeing an advertisement in the Beaver County Times offering apartments for rent, went to the Walnut Garden Apartments with the intention of viewing an apartment for possible tenancy.

Robert Span, Manager of Walnut Garden Apartments, met Ms. Lee at the door to his residence at the Apartments, which also served as the rental office. Speaking through the screen door, he informed Ms. Lee that there were no apartments available. Ms. Lee stated that she had seen some vacant apartments, but Mr. Span replied that they had been taken. Mr. Span did not admit Ms. Lee into the apartment.

Believing that she had been discriminated against because of her race, Ms. Lee returned to the Walnut Garden Apartments on or about November 8, 1971, with Ernest Yokely, a Black male, and Diane Eardling, a White female. Upon arriving at the apartments, Ms. Eardling went to Mr. Span's office alone. She was admitted inside where she told Mr. Span that she was interested in renting an apartment. Mr. Span replied there were vacancies and asked if she had any children. Ms. Eardling told him she had one child. Mr. Span replied that he did not like to rent to persons with children, but when he did he placed them on the first floor. He further stated that there were presently vacancies on the first floor. Arrangements were made for Ms. Eardling to return that evening with her husband and child to view the apartment.

While Ms. Eardling was speaking with Mr. Span, Ms. Lee and Mr. Yokely approached the office. Mr. Span met them at the door, told them there were no vacancies, and told them that he did not like to rent to persons with children. Ms. Lee asked for an application in case a vacancy would occur in the future, and was told it would not be necessary. Ms. Lee and Mr. Yokely then left and Mr. Span returned to Ms. Eardling to complete the arrangements for her visit that evening. Ms. Eardling had overheard the entire conversation between the Complainants and Mr. Span.

Following the Public Hearing, the Commission found that Appellees had violated violated Section 5 (h) (1) of the Pennsylvania

Human Relations Act in refusing to rent to the Complainants because of their race, Black.

The matter comes before this Honorable Court on the grant of a petition for allowance of appeal filed by the Commission, from the Order of the Commonwealth Court of Pennsylvania filed October 3, 1974. The matter was originally appealed by Appellees to the Commonwealth Court from the Final Order of the Pennsylvania Human Relations Commission.

SUMMARY OF ARGUMENT

This case concerns whether the Pennsylvania Human Relations Commission has the authority to order a Respondent who has unlawfully discriminated against a Complainant to compensate said Complainant for the mental anguish, humiliation, inconvenience and disruption of normal family life suffered as a result of Respondent's discriminatory act. Also, at issue is whether the Commission's Final Order requiring a Respondent to maintain records showing the racial identification of applicants for housing, as part of a plan to remedy unlawful discriminatory practices, violates the Pennsylvania Human Relations Act.

The Commonwealth Court upheld the Commission's determination that a violation of the Act had been committed and also upheld the major portion of the Commission's Final Order. However, the Commonwealth Court refused to uphold the portion of the Commission's Order, which required Respondent to pay the Complainant $1,000.00 for embarrassment, humiliation and emotional upset. Also, the portion of the Commission's Order requiring Respondent to maintain records to indicate the race of the applicants was set aside.

In setting aside the Commission's Order of monetary damages for pain and suffering, the Commonwealth Court stated that such an award would go beyond the authority of

the Commission. Moreover, the Court held that the requirement of maintaining records which designate the race of an applicant was in direct violation of Section 5(h) (6) of the Pennsylvania Human Relations Act.

It is Appellant's contention that the Court erred in setting aside the above-mentioned portions of the Commission's Final Order as said portions were designed specifically for purpose of carrying out the express purposes of the Pennsylvania Human Relations Act.

Read together, three sections of the Pennsylvania Human Relations Act--Section 9 which authorizes PHRC after a finding of unlawful discrimination to take affirmative action "including but not limited to" certain specified measures as in its judgment will effectuate the purposes of the Act; Section 2 which declares in the strongest terms the legislative purpose to eliminate the evils of discrimination; and Section 12(a) which directs that the provisions of the Act "shall be construed liberally for the accomplishment of the purposes thereof"--permit no other conclusion but that PHRC has the power to order a Respondent to pay to a Complainant compensatory damages, including damages for mental anguish caused by the Respondent's unlawful discriminatory conduct.

ARGUMENT

I. PHRC HAS THE AUTHORITY TO ORDER A RESPONDENT WHO HAS UNLAWFULLY DISCRIMINATED AGAINST A COMPLAINANT TO COMPENSATE THAT COMPLAINANT FOR THE MENTAL ANGUISH, HUMILIATION, INCONVENIENCE AND DISRUPTION OF NORMAL FAMILY LIFE SUFFERED AS A DIRECT RESULT OF RESPONDENT'S UNLAWFUL ACT.

Three sections of the Pennsylvania Human Relations Act, 43 P.S. §951, et.seq., are particularly relevant to this argument - Sections 2, 9 and 12 - and, it is submitted, when they are read together, they permit no other conclusion but that the Commission has the power herein at issue.

Section 9 in its pertinent part reads:

> "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 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 which 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."

The pertinent part of Section 12 reads:

> "(a) The provisions of this Act shall be construed liberally for the accomplishment of the purposes thereof. . ."

As for the purposes referred to in the preceding sections, they are reflected throughout the Act. But it is well that Section 2(a) should be reviewed in its entirety:

> "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 forments domestic strife and unrest, threatens the rights and privileges of the inhabitants of the Commonwealth, and undermines the foundations of a free democratic 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 sub-standard, 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."

Here, the Legislature set down in the strongest terms the scope of the problem and the sense of urgency it was conveying to the administrative agency it was creating to deal with it. Few would dispute that although 19 years have ensued, the problems the Commission was created to eliminate remain with us. In his dissent in the instant case, Judge Rogers saw and stated clearly the obviousness of the answer to the question now before this Court:

"I can conceive of no affirmative action which the Commission could order which would better effectuate the central purpose of the Act to end racial discrimination than that of directing the violator to pay damages to persons upon whom injuries have been inflicted."

It was believed that this question of PHRC's remedial powers was conclusively resolved by this Court in Alto-Reste, where the Court analyzed the identical language of Section 9, placing great weight on the phrase "as in the judgment of the Commission" in arriving at its conclusion that the "Legislature recognized that only an administrative agency with broad remedial power exercising particular expertise could cope effectively with the pervasive problem of unlawful discrimination. Accordingly, the Legislature vested in the Commission quite properly maximum flexibility to remedy and hopefully eradicate the 'Evils' of discrimination. . . The legislative mandate that the provisions of the Act be 'construed liberally' seems to reinforce this view." Pennsylvania Human Relations Commission vs. Alto-Reste Park Cemetery Association, 453 Pa. 124, 306 A.2d 881 (July 2, 1973).

This Court adopted as its own, the United States Supreme Court's statement in Fibreboard Paper Products Corp. v. N.L.R.B. et al., 379 U.S. 203, 216, 85 S. Ct. 398, 405-06 (1964) dealing with a provision of the Taft-Hartley 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 be said to effectuate the policies of the Act.'. . ."

The Court below took note of Alto-Reste but concluded it did not control the instant case. This conclusion can only be based on the Commonwealth Court's belief that compensatory damages including damages for the emotional distress suffered by violations of unlawful discrimination cannot fairly be said, in the judgment of the Commission, to effectuate the purposes of the Act. If this is indeed the Court's view, it does not fully grasp these purposes. As this Court observed in Alto-Reste:

> "It is beyond cavil that the Human Relations Act was intended, by the Legislature, to protect more than individuals unlawfully discriminated against - of equal importance is the Act's intent that the public generally be protected from such discrimination. . . Accordingly, it is . . . incumbent upon the Commission to not only fashion an effective remedy for the individual aggrieved, but also to guard against and deter the same discriminatory act from recurring, to the detriment of others within the same class."

Surely an order that a respondent pay a victim compensatory damages, both in terms of affording redress to the aggrieved individual and as a means of deterring future discrimination by making it expensive, has as much relevance to the purposes of the Act as the record-keeping of the advertising provision upheld in Alto-Reste.

One statement of the Court below is indicative of its approach in reviewing actions of PHRC, in other cases as well as the instant case, including Alto-Reste itself:

> "The missing link in the Commission's argument is the absence of any specific legislative authority to ascertain, and hence to award damages."

As Appellant stated in its petition for allowance of appeal, in addressing itself to the manner in which the Court below approaches PHRC cases:

> "At bottom, the problem here clearly is the apparent fundamental inability of the Commonwealth Court, based obviously upon a different judicial philosophy, to implement the legislative directive to construe this act liberally for the accomplishment of its purposes."

The New Jersey Court in Passaic Daily News v. Blair, 308 A.2d 649 (1973), set forth the general principles of construction that courts have applied to civil rights statues even in the absence of explicit instruction in the statute:

> "This Court has heretofor adopted a broadly sympathetic construction of the law against discrimination and has interpreted the provisions therefore pertaining to the remedial powers of the Division on Civil Rights . . . with that high degree of liberality which comports with the preeminent social significance of its purposes and objects . . . we are moreover warranted in placing considerable weight on the construction of the statute by the administrative agency charged by the statute with the responsibility of making it work. Griggs v. Duke Power 401 U.S. 424, 433-434 (1971)"

In Alto-Reste this Court quoted at length and with approval from the decisions of the New Jersey Supreme Court in Jackson v. Concord Company, 253 A.2d 793 (1969), and Zahorian v. Fitt Real Estate Agency, 301 A.2d 754 (1973). Zahorian, under a statute with enforcement provisions virtually identical to those in our Act, upheld the authority of the New Jersey Civil Rights Division to order a respondent to pay compensatory damages for humiliation, pain and suffering. Zahorian relied heavily on Jackson.

"Justice Hall [in Jackson] noted that the basic question was whether the Legislature intended to give such power to the director and that although it was not granted expressly [by the Act] it was fairly to be implied in the light of the "broad language of the section' and the 'overall design of the Act.'. . . He noted further that the term 'include' is to be dealt with as a word of 'enlargement and not of imitation' and that this was especially true where as in [the Act] it was followed by the phrase 'but not limited to the illustrations given. . . .

"Justice Hall's opinion in Jackson stressed the legislative intent to create an effective enforcement agency which would serve towards eradication of 'the cancer of discrimination' and whose remedial actions would serve not only the interest of the individual involved but also the public interest."

In Appellant's brief to the Court below it was pointed out that as far as it could be determined, the highest courts in four States had considered the authority of the State's civil rights agency to order a respondent to pay damages for mental anguish under statutes comparable to Pennsylvania's, and that all four had upheld such authority.[1]

The Court below acknowledged the New Jersey statute's similarity but summarily dismissed the results as "confusing and unacceptable under the Pennsylvania statute." The Court below dismissed the precedents of Massachusetts, New York and Oregon by declaring, without explaining, that in those States "there is some statutory authority for the human relations authorities to award damages."

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[1]The Supreme Court of Iowa, construing statutory language comparable to Pennsylvania's held that the Iowa agency did not have the power to award damages. Iron Workers Local 677 v. Hurt, 191 N.W. 2d 758 (1971). An important distinction between the Iowa and Pennsylvania statutes, however, is that the Iowa statute did not bar resort to the courts once the Iowa agency had been invoked. On this point, see infra.

The Pennsylvania statute and the other statues cited were more specific in enumerating the kinds of affirmative action their respective commissions could take "as, in the judgment of the Commission will effectuate the purposes of this Act." Whether the words are "effectuate the purposes of the Act" or "reasonably calculated to carry out the purposes of the Act", it is submitted that the thrust is the same.

As the Oregon Court explained in Joyce:

> "As shown above, other state courts have recognized mental anguish as one of the effects of racial discrimination. ORS 695.019(2) gives the Commissioner of Labor the right to issue an order which requires an individual to perform an act reasonably calculated to carry out the purposes of [the Act], one of which is to ensure human dignity, and to eliminate the effects of an unlawful practice found. . . . In the context of the statute, mental anguish as well as pecuniary loss can be an effect of racial discrimination. The award of damages to compensate for a victim's humiliation is an act reasonably calculated to eliminate the effects of discrimination."

In State Commission for Human Rights vs. Speer, 29 N.Y. 2d 555, 272 N.E. 2d 884, 324 N.Y.S. 2d 297, and State Division of Human Rights vs. Luppino, 29 N.Y. 2d 558, 272 N.E. 2d 885, 324 N.Y.S. 2d 298 (1971), the New York Court of Appeals upheld the authority of that State's Division of Human Rights to award damages for mental anguish. In so doing, the Court relied on the provision of the law granting the New York Commission power to issue:

> ". . .an order . . .requiring such respondent to cease and desist from such unlawful discriminatory practice; . . .take such affirmative action, including (but not limited to), reinstatement or upgrading of employees, . . . awarding of compensatory damages to the person aggrieved by such practice, as, in the division, will effectuate the purposes of this article. . ."N.Y. Executive Law,297(4) (c).

The Massachusetts statute relied upon by their Supreme Court in Massachusetts Commission Against Discrimination vs. Franzaroli, 357 Mass. 112, 256 N.E. 2d 311 (1970), in upholding an award by the Commission of $250.00 for the emotional distress suffered by the aggrieved complainant included the language,". . . damages not to exceed $1,000.00."

This clause was cited by Judge Kramer during oral argument as distinguishing it from the Pennsylvania statute. Again, it must be respectifully stated that the distinction does not appear to be valid. The $1,000.00 maximum indicated a legislative determination to limit the size of the award, a limitation the Pennsylvania Legislature did not elect to impose. This limitation is clearly not relevant to the very power of the agency to award damages for emotional suffering. That power was found by the Court in the "including but not limited to" provision in the Act, a clause identical to that in Pennsylvania's Act.

In Williams vs. Joyce, 479 P. 2d 513 (Or App. 1971), the language the Court relied upon to award $200.00 for humiliation, frustration and anxiety was not as close to Pennsylvania's as the others cited above but its thrust was clearly that of Pennsylvania's. The Oregon Act authorized its agency to require a respondent after a finding of discrimination to". . . perform an act . . . reasonably calculated to carry out the purposes of ORS 695,010 to 695,110, eliminate the effects of an unlawful practice found, and protect the rights of the complainant and other persons similarly situated. . ."

The scheme and basic language is virtually identical to our Section 9. The key words, stressed by those courts which have interpreted these provisions, are "including but not limited to." which follow the statutory directive to the agency to "take such affirmative action. . ."

The words "compensatory damages" are included in the remedial section of the New York Act, which otherwise closely parallels that section of the Pennsylvania and New Jersey statutes. It is submitted that the mere inclusion of the words compensatory damages is an invalid basis for dismissing the New York cases as precedent. The Zahorian court relied heavily on the New York decisions. Prior to Zahorian, the New Jersey Court in Jackson supra. interpreted its statute as providing for compensatory damages. The Court below, of course, has underpinned its holding on its conclusion that Appellant has no power to order compensatory damages of any kind.

The argument Appellant has made above on its authority to order damages for mental anguish applies with equal force to the authority to award damages of any kind. The underlying premise of the decision is stressed, however, to convey the drastic and utterly unrealistic implications of the Court Below's interpretation. Under that interpretation, even precisely measurable out-of-pocket losses such as the difference in rent a complainant was forced to pay because of the respondent's unlawful refusal to rent, or a fee paid to an employment agency by an unlawfully discharged complainant in order to obtain a new job, would not be remediable.

The Zahorian Court also relied heavily on another provision of the New Jersey Act which is virtually identical to Section 12(b) of the Pennsylvania Act, which reads in its pertinent part:

> ". . . but as to acts declared unlawful by section five of this act the procedure herein provided shall, when invoked, be exclusive and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the complainant concerned. If such complainant institutes any action based on such grievance without resorting to the procedure provided in this act, he may not subsequently resort to the procedure herein. . ."

The Zahorian Court concluded that a complainant who invoked the provisions of the State anti-discrimination act "would be barred from recompense elsewhere and the [Jackson] Court suggested that it might fairly be inferred from this that the Legislature understood that the director had the power to award such recompense."

Clearly a court of this Commonwealth has the authority to award damages for mental anguish to a victim of unlawful discrimination. See e.f., Everett v. Harron, 380 Pa. 123 (1955). Indeed it is well settled that "the existence of a statutory right implies the existence of all necessary and appropriate remedies." Sullivan vs. Little Hunting Park, 366 U.S. 229, 239 (1969). By its holding the Court below would retain the statutory right but effectively deprive the complainant who goes to the Commission and is thus barred from State Court of a necessary remedy.

Can it reasonably be argued that the Legislature intended to discourage victims of discrimination from utilizing the machinery of the very agency it created by investing the agency with less than

complete remedial powers? Yet this would be the certain effect of a holding by this Court that Appellant has no authority to order complete relief; presumably only the victims who are unable to obtain the services of an attorney would go to PHRC. But this Court has emphasized the clear intent of the Legislature to create "an effective enforcement agnecy." See Pennsylvania Human Relations Commission vs. Chester School District, 427 Pa. 157 (1967).

Federal Courts routinely award substantial compensatory damages for mental anguish as well as substantial punitive damages to victims of unlawful discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 et seq., and Title VIII of the Fair Housing Act of 1968, 42 U.S.C. 3604, as well as the Civil Rights Act of 1866, 42 U.S.C. 1982. Appellant believes that neither a State legislature nor a State court can foreclose a complainant who had had his case determined by the State Commission which has less than the full remedial powers available in Federal Court from then going into Federal Court. But assuming the complainant could still go into Federal Court, this is hardly an answer to the destructive impact the Commonwealth Court's decision would have on PHRC's effectiveness. It would needlessly burden the respondent and the complainant by involving them in multiplicatous litigation as well as unnecessarily add to the federal case load as well as presumably its backlog, it would place the burden on a complainant to obtain an attorney to seek complete relief and undoubtedly many would resign themselves to the partial relief the Commonwealth Court would allow. And to the extent that respondents are not required to full compensate

victims of unlawful discrimination and are thus less deterred from continuing their unlawful conduct, to that extent the very fundamental purpose of the Act would be thwarted.

Finally, PHRC's conciliation program would be severely wounded if not crippled. The Commission could hardly recommend to a complainant that he or she enter into an agreement, signing a release from bringing any subsequent court action, for something substantially less than the complaint might in fact obtain from a court. And respondents too would, as many already have, be far less ready to conciliate in good faith with a greatly weakened agency than they would with one with strong enforcement powers.

Not only would the Commission be rendered drastically less than effective; presumably the Federal civil rights enforcement agencies, the Equal Employment Opportunity Commission and the Department of Housing and Urban Development, would as well. Where now they defer complaints to an existing state agency if it has equivalent powers,[2] they would presumably be forced to process complaints in Pennsylvania themselves. We can only speculate whether they would be given the additional resources to cope with this enormously increased case load.

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[2]Section 810(c) of the Civil Rights Act of 1968 provides:

> "Wherever a state or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this Title . . ." Emphasis provided.

EEOC's policy in this regard is set forth in a memorandum from Peter C. Robertson, Director of its Office of State and Community Affairs to the executive directors of state and local anti-discrimination agencies dated June 8, 1973. Paragraph 8 provides:

> "Standards for Designation: Basically the standards for designation as a "706 Agency" are simple. The law enforced by the agency must be comparable in scope both as to coverage remedies and enforceability to Title VII of the Civil Rights Act of 1964."

The federal enforcement agencies could not defer cases to an agency without the power to order compensatory damages. For as already noted, Federal Courts in ever increasing numbers recognize that the prime purpose of civil rights statutes, to end discrimination, "will be best served if all the injuries which are caused by discrimination are entitled to recognition." Humphrey v. Southwestern Portland Cement Company 5 EPD §8501 (W.D. Tex., February 1973). In Humphrey, the Court found a Black worker had been discriminated against in violation of Title VII of the 1964 Civil Rights Act. The remedial provision of the statute is very similar to that in the Pennsylvania Act and includes the same "affirmative action including but not limited to" scheme. It also contains the additional provision that the Court may order "any other equitable" relief which it deems appropriate. In ordering the employer to pay $1200.00 damages for mental anguish as well as $2500.00 for loss of a chance to learn and gain experience, the Court articulated its rationale in these powerful words:

> ". . . as the trial progressed it became apparent that the psychic harm which might accompany an act of discrimination might be greater than would first appear. For the loss of a job because of discrimination means more than the loss of just a wage. It means the loss of a sense of achievement and the loss of a chance to learn. Discrimination is a vicious act. It may destroy hope and any trace of self-respect. That, and not the loss of pay, is perhaps the injury which is felt the most and which is the greatest."

The Court in Bowe v. Colgate Palmolive, 416 F. 2d 711 (7th Cir. 1969), considering the above remedial provision of Title VII, said:

> This granting of authority [to order such affirmative action as may be appropriate] should be broadly read and applied so as to effectively terminate the practice and make its victims whole. The full remedial powers of the Court must be brought to bear and all appropriate releif given."

An express provision for compensatory damages and punitive damages up to a maximum of $1,000.00 is incorporated into the Fair Housing Act of 1968. The United States Supreme Court in Jones v. Mayer, 392 U.S. 409 (1968), held that the Civil Rights Act of 1866 bars all racial discrimination, private as well as public, in the sale or rental of property. Sullivan vs. Little Hunting Park, supra, established that compensatory damages may be awarded under the 1866 Act even though it contained no express provision for such compensation.

The Court in Cash vs. Swifton Land Corp., 434 F. 2d 569, 572 (6th Cir. 1970), points out why remedies short of compensatory damages would be inadequate to the task of effectively combatting discrimination in housing.:

> "Neither the settlement of the parties as to the rental of the apartment, nor the awarding of costs and waiver of fees and security moots the question damages. 42 U.S.C. §3612 (b) (1968). Indeed Section 3612, with its provision for actual damages and punitive damages up to a maximum of $1,000 per violation of the Fair Housing Act of 1968, is a strong congessional condemnation of unlawful discriminations in housing. Such a provision prevents a landlord from following a wilful pattern of discrimination or from resisting certain applicants and withdrawing his resistance when the applicant seeks relief by court litigation, without an accounting therefor."

In Allen v. Gifford, P.H. E.O.H. Rptr. ¶15,599 (E.D. Va. 1975), in a case brought under the 1866 Act, the Court awarded $3500.00 in mental anguish damages and $5,000.00 in punitive damages to a Black denied a house although he eventually obtained it. See also e.g., four cases awarding mental anguish damages: Franklin v. Agostinelli, P.H. E.O.H. Rptr. ¶13,555 (W.D. Wash. 1971); Peoples v. Doughtie, P.H. E.O.H. Rptr. ¶15,575 (M.D. Ala. 1971); Seaton v. Sky Realty Co., P.H. E.O.H. Rptr. ¶13,530 (N.D. Ill. 1972); and Steele v. Title Realty Corp., 478 F. 2d 344 (7th Cir. 1973).

It may be, in the light of this establishment without question in the Federal courts of the right to compensatory and punitive damages in civil rights cases, that neither the Court below nor even the Legislature could diminish the worth or the enforceability of those rights. In Gilliam v. City of Omaha, 331 Pa. F. Supp. 4 (Neb. 1971), the Court denied jurisdiction of a civil rights case on the basis of an adequate state remedy. The Court ordered the Nebraska State Commission to consider the facts of the case and if appropriate to award punitive damages enve though punitve damages were repugnant to public policy under Nebraska law:

> "If punitve damages are necessary to fully vindicate a Constitutional right, when that right is before a Federal court, then such damages are every bit as necessary when that right is before a state administrative commission or a state court. Basic Federal Constitutional rights cannot be watered down by state statutes or state cour opinions. Cf Kerr v. California, 374 U.S. 23 (1963)"

The Court below, after focusing on the absence of any specific authority under the Act to support the Commission's power to order a Respondent to pay compensatory damages, also deplored the failure of the Commission to publish or offer any standard or guidelines utilized in fixing the amount of the award. It also concluded that in Zamantakis v. Pennsylvania Human Relations Commission, 10 Pa. Commonwealth 107, 308 A. 2d 612 (1973), the record does not support the finding of fact that the Complainants did in fact suffer mental anguish as a result of the unlawful discrimination--the refusal to rent to the Complainants because they were Black.

In her concurring opinion, Judge Blatt expressed her view that compensatory damages including possibly damages for mental anguish would appear to be a proper and effective way to effectuate the purposes of the Act and to remedy the "evils" of discrimination. She concurred in the majority Opinion, however, because of the absence of "the prior adoption of proper standards by the Commission and of substantial evidence that an injury had been suffered for which damages are appropriate."

Judge Rogers incisively disposed of these concerns:

> "As for the contention that the Commission may make excessive, arbitrary or inconsistent orders in this regard, the same possibility exists with respect to jury verdicts. The simple answer is that such orders of the Commission would be subject to judicial review both as to the sufficiency of the evidence or mental suffering and as to the reasonableness of the amount awarded."

None of the courts previously cited even addressed themselves to this issue of guidelines and standards. Presumably Judge Rogers' "simple answer" was taken for granted by them. In Rody v. Hollis, P.H. E.O.H. Rptr. ¶15,019 (August 3, 1972), the Supreme Court of Washinton, in denying the challenge to the power of the Washington State Commission to award damages up to $1,000.00 "for loss of the right to be free from discrimination," stated:

> "The Legislature must provide standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it."

Certainly, the Pennsylvania Legislature defined in general terms what is to be done by Pennsylvania Human Relations Commission, the instrumentality it established to accomplish it.

The Rody court continued:

> "We believe it is perfectly clear what the award is to be for; the only discretion left to the hearing tribunal is to determine the amount of the award. And where the purpose of the award is meade clear--to provide damages or loss of the right to be free from discrimination in housing transaction--it is clear by implication that the amount of the award is to be adjusted to accomplish these purposes. Standards to guide administrative action need not, and cannot, be perfectly specific. This is particularly so where the power which is exercised is quasi-judicial in nature, as in the instant case. Judicial power is traditionally and of necessity largely discretionary and standardless. The judicial process operates upon individuals and, in so doing, attempts to treat them as such. All that can, and should, be done is to define the conduct sought to be punished, or the injury to be compensated, set out the normally acceptable limits of punishment or compensation, and then allow the adjudicative body to determine the appropriate punishment or compensation by applying general principles of morality and traditional concepts of justice."

As to the necessity of a record of substantial evidence that an injury had been suffered for which damages are appropriate, it is submitted at the outset that the mere wilful deprivation of a civil right should, without, sustain an award of compensatory damages. Note the State of Washington Act: Damages up to $1,000.00 for the loss of the right to be free from discrimination. Whether it is termed damages for mental anguish or exemplary or punitive damages, it is well established under federal law that "in the eyes of the law this right [civil right, such as the right to vote] is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property or any other valuable thing." Wayne vs. Venable, 260 F. 64, 66 (8th Cir. 1919). Punitive damages have frequently been awarded in civil rights cases where no proof of actual damages was offered on the theory that damages are presumed as well as on the theory that this is necessary to protect the right. See e.g., Batista v. Weir, 310 F. 2d 74 (3rd Cir. 1965); Caperci v. Hootoon, 397 F. 2d 799 (1st Cir. 1968) cert. denied, 393 U.S. 940 (1968); Solomon v. Pennsylvania R.R., 96 F. Supp. 709 (S.D. N.Y. 1951); Washington v. Official Court Stenographer, 251 F. Supp. 945 (E.D. PA. 1966).

In Batista, supra, the following language of the Court although in the context of punitive damages is equally applicable to a consideration of damages for mental anguish.

> "But if it be once said that such additional damages [punitive] may be assessed against the wrongdoer and when assessed may be taken by the plaintiff--such is the settled state of the federal courts--there is neither sense nor reason in the proposition that such additional damages may be recovered by a plaintiff who is able to show that he has lost $10.00 and may not be recovered by some other plaintiff who has sustained, it may be, far greater injury but is unable to prove that he is poorer in thepocket by the wrong doing of the defendant."

Courts have recognized the enormous emotional harm inflicted upon victims of unlawful discrimination. Expert testimony has been submitted and is available to corroborate this. See e.g. Brown v. Board of Education, 347 U.S. 483 (1954); Simpson & Yingler, Racial and Cultural Minorities, page 217 (1958). The kind of discrimination herein involved, the denial of a place to live because of race, is a vicious and evil act. Courts, and administrative agencies, may project, without being reckless, the inevitable impact of such an ugly deed upon its victim. It is submitted that the bare testimony of the Complainant Gwendolyn Lee that she was"upset" over the refusal to rent is sufficient to sustain nominal award of $1,000.00.

Appellant's position is that the size of an order to pay emotional damages is a question of fact for the fact-finder to be determined by the facts and circumstances of each case subject, of course, to judicial review, as to whether there was an abuse of discretion.

In Zahorian, the New Jersey Court in upholding the award of $750.00 for mental anguish, confined the agency's authority to an award which "truly constituted only 'incidental relief'. . ." rather than ". . . where because of the severity of the consequential injury and the extensiveness of the claim, the item of damages has become primary and the other relief incidental."

The Court appears to suggest that where the complaint involves a claim of serious and permanent physical or mental disability which would "entail extensive adversary litigation, it might be better reserved to traditional court proceedings."

It may not be possible to categorize the issues and claims involved in a discrimination case neatly as involving either an incidental or a primary damage claim. In every case the Commission, in fashioning a remedy, looks to what must be done to eliminate the unlawful practice involved but also seeks, to the extent it is possible, to make an aggrieved Complainant whole. Nevertheless, it has no quarrel with leaving to the courts the rare case apparently contemplated by the Zahorian Court. Presumably that Court was referring to a case where the claim of serious and permanent physical or mental disability is manifestly attributable to the unlawful act in question and the injury is manifest and capable of being diagnosed and capable of being strongly confirmed by a physician.

Realistically, many Blacks who complain to the Commission may have been permanently emotionally scarred by an act of discrimination, but seldom is there manifested the direct injury flowing from the act and capable of being medically diagnosed and confirmed. There is no realistic possibility that the Commission would enter an award in a sum remotely commensurate to the damage which may in fact have been done.

Appellant urges that this Court affirm its power to order compensatory damages, including the kind herein in question, and to affirm it in those terms necessary for it to effectuate the central purpose of the Act of ending racial discrimination. Appellant is concerned that the impostiion of an arbitrary token ceiling on amounts which it can order a Respondent to pay would render the power ineffective as a deterrent to acts of unlawful discrimination. Where the facts of one case may appear to justify only a nominal award, those of another may justify one substantially higher, and it should be clearly impressed upon every potential Respondent that if he discriminates, he must take his victim as he finds him.

In Pennsylvania Human Relations Commission v. Straw, 10 Pa. Comwlth 99, 308 A.2d 619 (1973) Appellant's order was mos substantial $3500.00 to compensate the Complainant for the "mental anguish, humiliation, inconvenience and disruption of normal family life" which she experienced as a result of Respondent's refusal to rent to her because of her race (Record, Final Order, para. 3). Substantial evidence in support of the damages found by the Commission

was introduced in behalf of the Complainant (N.T. 31a-33a) and was reflected in the Findings of Fact (Record, Findings paras. 10-12). In Pennsylvania Human Relations Commission vs. St. Andrews Development Co., Inc., 10 Pa. Comwlth 123, 308 A.2d 623 (1973) on the same day by the Court below in which Pennsylvania Human Relations Commission's power to order compensatory damages was involved, the order was to pay the two Complainants $750.00 each for "mental anguish, humiliation and embarrassment". The Commission found that the Respondents had refused to rent an apartment to them and to the younger woman's son because of their race, Black. The finding of mental anguish was supported by strong testimony of the Complainant, Geraldine Cobb, including the following:

> "Q. Miss Cobb, getting back to the time you were rejected, could you relate to the Commissioners how you as a person felt?
>
> A. How I felt?
>
> Q. Yes.
>
> A. About us being rejected?
>
> Q. Yes.
>
> A. I was very hurt, myself. I was upset. Me and my mother both, we both wanted to live out in the Governor's Place, and my mother has a heart condition, I think this kind of weighed on her heart. Because she did worry about it a lot. . .
>
> Q. Did it affect your day to day conduct?
>
> A. I think both of us it affected. We were both irritable. And frustrated. We neglected my little brother. At the end of the day, she felt like she didn't want to be bothered. She just worried about the situation.
>
> Q. Were you very close to your mother?
>
> A. Very.

Q. And things that would have affected her, would they have affected you as well?

A. Very much so.

Q. And this did bother your mother?

A. Yes.

Q. What about Darian, the youngster? Your brother?

A. Well, usually, Darian goes to bed about 9:00. Around the time we was rejected, my mother seemed to spend this time with him. She would spend this time. I would say what is wrong. Why wasn't Darian in bed. She was worried about the apartment. Whether we would get it or not.

This weighed on both of us."

Clearly there was no basis for the Court below saying, as it did in footnote 4, that the records of the different cases "fail to disclose any distinction or basis for the disparity in the respective awards."

II. A FINAL ORDER REQUIRING RESPONDENT TO MAINTAIN RECORDS SHOWING THE RACIAL IDENTIFICATION OF APPLICANTS FOR HOUSING, AS PART OF A PLAN TO REMEDY UNLAWFUL DISCRIMINATORY PRACTICES, DOES NOT VIOLATE THE PENNSYLVANIA HUMAN RELATIONS ACT.

Paragraphs 18 and 19 of the Commission's Final Order requires that Van Buren maintain a registry of all persons seeking housing, indicating their race. Van Buren contends that the Commission is prohibited from ordering the maintenance of records which include designations of race by Section 5 (h)(6) of the Pennsylvania Human Relations Act. That Section provides, inter alia:

> "It shall be . . . an unlawful discriminatory practice:
>
> * * *
>
> (h) for any person to:
>
> * * *
>
> (6) make any inquiry, elicit any information, make or keep any record or use any form of application, containing questions or entries concerning race, color, religious creed, ancestry, sex or national origin in connection with the sale or lease of any commercial housing."
>
> 43 P.S. §955 (h)(6)

Appellant incorrectly relies on Span v. P.H.R.C., Walnut Garden Apts., Inc. v. P.H.R.C., 15 Pa.Cmwlth. 334, 325 A.2d 678, in which the Commonwealth Court held that the Commission did not have the authority to order a Respondent to maintain records which designate the race of an applicant or of a

former occupant. However, in its December 4, 1974 decision in Midland Heights Homes v. P.H.R.C., 17 Pa.Cmwlth 563, 333 A.2d 516, the Commonwealth Court overturned to previous holding and upheld the Commission's authority to require a Respondent to record the racial identification of applicants for housing as being within the Commission's broad discretionary remedial power. The Court was specifically following the opinion expressed by the Pennsylvania Supreme Court in P.H.R.C. v. Chester Housing Authority, supra, and P.H.R.C. v. Alto-Reste Park Cemetary Association, infra, which affirmed the Commission's ordering the maintenance of racial records.

It should be clear from Section 5 (h)(6) that no person may elicit information or maintain records of the race of applicants for housing, so as to enable that person to unlawfully discriminate on the basis of race. The Legislature recognized that such inquiries and records have been used to deny housing opportunities to certain classes of persons. Inquiries or records used for such purposes are certainly illegal.

However, Section 5 (h)(6) was not intended and should not be construed so as to restrict the power of the Commission effectively to enforce the Act. Accordingly, Section 5 (h)(6) should be construed in a limited fashion. Application of the prohibition against record keeping should not interfere with the enforcement of the Act. Such an interpretation does not disregard the letter of the law, but specifies the breadth of its application to achieve a reasonable result in harmony with the general purpose and design of the Act.

Neither the Commission nor the Court is bound by a literal interpretation of the language of the statute as argued by Van Buren where such an interpretation is inconsistent with the Legislative design and is in direct conflict with other provisions of the Act.

Appellant mistakenly relies primarily on the "plain meaning" theory of statutory construction. However, in doing so, Van Buren ignores the fundamental principle of statutory construction that the Legislative intent controls. Accordingly, the provisions of Section 5 (h)(6) must be interpreted in conjunction with the broad remedial powers vested in the Commission. Consideration must be given to the purposes to be achieved and the consequences of the particular interpretation put forth. Where doubt or ambiguity appears the rules of statutory construction must be applied.

The Statutory Construction Act of 1972, Act of November 25, 1970 P.L. 707, No. 230 added December 6, 1972, No. 290, 1 P.S. §150, et seq. provides that "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly . . . " 1 P.S. §1921(a). The presumptions to be applied in ascertaining the intention of the General Assembly are enumerated in Section 1922:

(1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.

(2) That the General Assembly intends the entire statute to be effective and certain.

(3) That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.

(4) That when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.

(5) That the General Assembly intends to favor the public interest as against any private interest.

Applying these presumptions to the Pennsylvania Human Relations Act, particularly Section 5 (h)(6), there is ample support for a narrow interpretation of the prohibition against record keeping.

If the Commission is prohibited from incorporating reporting requirements into a comprehensive remedial plan, then the effectiveness of the Commission's Final Order is substantially diminished. Indeed, the Commission would be precluded from enforcing its own order. The existence of written records as provided in Paragraphs 18 and 19, available for review upon reasonable notice, enables the Commission to confirm compliance or to expose violations upon simple examination of the list of applicants compared with the schedule of vacancies. Without such records, enforcement of the Commission's order would entail visual identification of each and every resident and each and every applicant for housing. To require extensive investigation for purposes

of enforcement is not merely inconvenient, it is unreasonable and absurd.

Furthermore, a broad prohibition brings Section 5 (h)(6) into direct conflict with Section 9 of the Act which explicitly empowers the Commission to order a report on the manner of compliance. Where discrimination on the basis of race has been found, a report on the manner of compliance must necessarily include designations as to race. To construe Section 5 (h)(6) otherwise would be to nullify the reporting requirement of Section 9.

There is no merit to Van Buren's contention that the Commission has no authority to waive Section 5 (h)(6). Such an assertion strongly suggests that Respondent misconstrues the legislative intent in enacting that section of the Act.

It is true that the Statutory Construction Act provides that "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 P.S. §1921(b). However, this section does not preclude consideration of the context and other terms and provisions in determining whether the words are used in their literal significance or in a limited sense. In Girard Trust Company v. Philadelphia, 369 Pa. 499, 87 A.2d 277 (1952), the Pennsylvania Supreme Court construed the words "all mortgages" to mean "all indebtedness secured by mortgage,"

despite the literal words of the statute, and with specific reference to the above quoted section. The court sought to avoid an unreasonable result by limiting the broad wording of the statute.

> Thus, in Guessfeldt v. McGrath, Attorney General ____ U.S. ____ (Opinion handed down January 28, 1952), an act of Congress provided that "No property . . . of . . . any national of either country (Germany of Japan) . . . shall be returned to former owners thereof . . . " It was ruled notwithstanding the inclusiveness of the term "any national," that it should be held applicable only to some German "nationals," namely, those who were enemies. 369 Pa.499, 506.

Consequently, there is no authority or reason to adopt Van Buren's technical interpretation of Section 5 (h)(6) of the Act.

Notwithstanding the foregoing analysis, Van Buren insists that Span, supra, is controlling. However, the Commission submits that Span is inapplicable as recognized by the Commonwealth Court in Midland, supra, in light of the Pennsylvania Supreme Court decisions in Alto-Reste, supra, and Chester Housing, supra.

In Alto-Reste, the Court ruled that the Commission has such maximum flexibility to remedy and hopefully eradicate the 'evils' of discrimination". The Court adopted as its own the United States Supreme Court statement in Fibreboard Paper Products Corp. v. N.L.R.B., et al., 379 U.S. 203, 216, 85 S.Ct. 398, 40506 (1964) dealing with a provision of the Taft-Hartley 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.' ..."

More importantly, In Alto-Reste, supra, the Commission ordered a cemetary which was found to have illegally refused to bury a Black person because of his race, to keep records when persons are refused burial, and to send to the Commission a copy of the reasons for said refusal. In upholding the order, this Honorable Court stated:

> "It is beyond cavil that the Human Relations Act was intended, by the Legislature, to protect more than individuals unlawfully discriminated against -- of equal importance is the Act's intent that the public generally be protected from such discrimination. Accordngly, it is, and was here, incumbent upon the Commission to not only fashion an effective remedy for the individual aggrieved, but also to guard against and deter the same discriminatory action from recurring, to the detriment of others within the same class. Alto-Reste, supra at 888. (Citations omitted).

It has been the experience of the Commission that an order which does not include the identification of the race of applicants is almost impossible to enforce. In such situations an investigator must personally check race by visual identification of all persons not given units, a procedure which is quite time consuming, considering most applicants

would have moved to a new address. Otherwise, to detect a violation, the Commission must await a complaint. However, unless a Black is aware of a vacancy which has been denied him or her, a complaint might very well not be filed. Therefore, the only truly effective method of enforcing orders is by means of the provision in question.

In the instant case, the requirement that Appellants maintain a registry of applicants, indicating race, is one that, in the judgment of the Commission, will "effectuate the policies of the Act," by providing the Commission an effective and reasonable method of reviewing Appellant's compliance with the Commission's Final Order and the Act itself. The existence of such records, available upon reasonable notice to the Commission staff, would discourage Appellants from discrimination.

A simple review of the applicants, compared with the schedule of vacancies, would lead to any possible violations.[2]

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[2]Section 9 of the Pennsylvania Human Relations Act, 43 P.S. §959, provided, inter alia,: "If upon all evidence at the hearing the Commission shall find that a Respondent was engaged in or is engaged 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 ... 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]

Furthermore, this Honorable Court has upheld another Final Order of the Commission which specifically requires record keeping by race. In Chester Housing Authority, supra, Paragraph 8 of the Commission's Final Order was upheld without discussion. Paragraph 8 required that Respondent:

> Shall report to the Pennsylvania Human Relations Commission at its Regional Office as above set forth, beginning one month from the effective date of this Order, and monthly thereafter until such time as the racial composition in each project, as set forth in items 2 and 3 above, is achieved. Such report is to contain information regarding the racial composition of each of its housing projects, as well as a list of all applicants, transfers, assignments and re-assignments of all units in all said projects under its supervision, and direction and control by racial identification and reflecting the ratio of Negro and White tenant families as set forth in Paragraphs 2 and 3 above, family size and size of unit requested and assigned, list of vacancies in each project, and thereafter, shall for a further period of two years make such reports quarter-annually. Appendix C, pp. C2 and C3.

Thus, there is ample authority for limited application of the prohibition contained in Section 5(h)(6) of the Act. So interpreted, that section does not restrict the authority of the Commission to enter a Final Order, such as in this case, reasonably designed to promote the purposes of the Act.

It has been the experience of the Commission, and also of those Courts which have had to fashion remedies in discrimination cases, that to end discrimination and reverse past effects of discrimination, one must be color-conscious

rather than color blind. As stated by the Court in Associated General Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973):

> "It is by now well understood, however, that our society cannot be completely color blind in the short term if we are to have a color blind society in the long term."
>
> p. 16

This is the very essence of affirmative action plans prevalent in employment discrimination cases, but also applicable to housing situations. Although this case does not involve an affirmative action plan, a brief review of their treatment is appropriate at this point, since a requisite of any affirmative action plan is racial or sexual identification of applicants.

In Contractor's Assn. of Eastern Pa. v. Secretary of Labor. 442 F.2d 159 (3rd Cir. 1971), cert. den., 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed 2d 95 (1971), the United States Supreme Court refused certiorari in a case involving the so-called Philadelphia Plan. The Plan was adopted by the Secretary of Labor pursuant to regulations in an attempt to relieve the results of past discrimination in the Philadelphia trade unions.

Under the plan, contractors were required to formulate specific programs to utilize minority workers before qualifying for federal contracts. The contractors Association claimed that proper adherence to the Plan required them to list and classify employees by race, and give preference

in some cases to nonwhites, contrary to the express provisions of the Civil Rights Act. The Act provides:

> (a) It shall be an unlawful employment practice for an employer . . .
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> (42 U.S.C. §2000e-2 (a))

The court ruled that the Plan did not violate the Act, stating,

> "To read (the Act) in the manner suggested by the Plaintiffs we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils. We discern no such intention either from the language of the statute or from its legislative history."
>
> p. 172.3.

Although the requirements of the Plan were, indeed, color conscious, the Plan was seen as a proper, reasonable approach to remedying the evils of past discrimination.

The aforementioned principles have been rigorously adhered to by this Honorable Court since 1967, when, in Pennsylvania Human Relations Commission v. Chester School District, 427, Pa. 157, 233 A.2d 290 (1967), it upheld the authority of the Commission to require school districts to

submit plans for the desegregation of public schools.[3] Implicit in that ruling was the understanding that any such plan must of necessity, include a racial breakdown of present and future students. Certainly, the many desegregation plans adopted in the federal judicial system have included such racial identification.

The importance of the inclusion of racial identification in plans to remedy past discrimination, therefore, has been universally recognized by many jurisdictions, including our own, in various situations where a literal reading of the statute involved would have rendered such plans unlawful.

A similar interpretation of the New Jersey Law against discrimination was upheld by the Supreme Court of New Jersey in New Jersey Builders, Owners, & Managers Assn. v. Blair, 60 N.J. 330, 288 A.2d 855 (1972). The New Jersey Division on Civil Rights attempted to promulgate a regulations called the Multiple Dwelling Reporting Rule. The Rule required certain landlords to supply the Division at periodic intervals with information regarding, inter alia, the racial designation of tenants and applicants for housing.

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[3]See also P.H.R.C. v. Uniontown Area School District 455 Pa. 52 (1973), P.H.R.C. v. Norristown Area School District. 20 Pa. Cmwlth. 555, 342 A.2d 464 (1975)

The proposed Rule was attacked in Court as being contrary to the New Jersey Law Against Discrimination, which provides that:

> It shall be . . . an unlawful discrimination:
>
> * * *
>
> g. For the owner, lessee, sublessee, assignee, or managing agent of, or other person have the right of ownership of possession of or the right to sell, rent, lease, assign, or sublease any real property, or part of portion thereof, or any agent or employee of any of these:
>
> * * *
>
> (3) To . . . make any record or inquiry in connection with the prospective purchase, rental, lease, assignment, or sublease of any real property, or part or portion thereof which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, ancestry, marital status or sex or any intent to make any such limitation, specification or discrimination . . . (N.J.S.A. 10:512)

The New Jersey Court held that the statutory language of the Act did not prohibit the Division from adopting reasonable regulations which constitute a rational approach toward fulfilling its responsibilities, stating,

> "If there is any internal inconsistency in the statutory scheme, either appearing in the words of the enactment or emerging upon its implementation by the agency - as is perhaps here the case - reference to the fundamental purpose of the Act will provide the touchstone to resolve the dilemma."
>
> 288 A.2d at 857.

> "In reading and interpreting a statute, primary regard must be given to the fundamental purpose for which the legislation was enacted. Where a literal rendering will lead to a result

> 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.

Thus, it is clear that the Legislature intended a strong administrative agency with maximum flexibility to deal with the very serious problems of discrimination. Certainly, the need for effective enforcement of the Act is as much evident today as it was nineteen years ago. It is therefore, the policy of the Commission to attempt to frame orders in a manner that will best assure compliance with the spirit, as well as the letter, of the law. That the Commission has such flexibility and broad remedial powers has been affirmed by the Pennsylvania Supreme Court in Pennsylvania Human Relations Commission v. Alto-Rest Park Cemetary Ass'n., supra.

The Commission could not agree more that the practice of labelling applicants and leases by race is "disgusting and degrading" as maintained in Van Buren's Brief. However, the Commission submits that Van Buren Homes itself is responsible for something even more offensive than that which it now objects to as illegal. As appropriately stated by the Court in Norwalk Redevelopment Agency, 395 F.2d 920 (2nd Cir., 1968) at 931.

> "What we have said may require classification by race. That is something which the constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been

> drawn for the purpose of maintaining racial inequality. Where it is drawn for the purposes of achieving equality, it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required."

Given the strong legislative language of the Pennsylvania Human Relations Act, and the broad language of this Honorable Court in the cases cited above the Commission submits the Act does not restrict it from requiring Respondents to identify applicants by race, where such identification is designed and intended to enforce the provisions of the Act. It is therefore submitted, and the Commission respectfully requests that this Honorable Court uphold and affirm Paragraphs 18 and 19 of the instant Final Order.

CONCLUSION

WHEREFORE, the Pennsylvania Human Relations Commission prays this Honorable Court uphold its Final Order in this Case.

Respectfully submitted,

Sanford Kahn, General Counsel

Cheryl L. Allen
Assistant General Counsel

Cheryl L. Allen

Marc Kranson
Assistant General Counsel

Marc Kranson

Attorneys for Appellant

IN THE

SUPREME COURT OF
PENNSYLVANIA

WESTERN DISTRICT

No. 137 March Term, 1977

STEPHEN SPEARE and
VAN BUREN HOMES,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION,

Appellee

BRIEF FOR THE APPELLEE

Appeal from the Decision and Order of the
Commonwealth Court of Pennsylvania at
No. 1639 C.D. 1973, Affirming the
Final Order of the Pennsylvania
Human Relations Commission at
Docket No. H-1315.

Sanford Kahn,
General Counsel
Marc Kranson,
Assistant General Counsel
Attorneys for the
Appellee

Pennsylvania Human Relations Commission
Suite 1210, 355 Fifth Avenue
Pittsburgh, Pennsylvania 15222

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STATEMENT OF JURISDICTION

This court has jurisdiction over the instant appeal under the Appellate Court Jurisdiction Act, Act of July 31, 1970, P.L. 673 §204(a), 17 P.S. §211.204(a). Pursuant to said provision, this Court granted Stephen Speare and Van Buren Homes' petition for allowance of appeal by Order dated Apri 5, 1977.

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

I. WHETHER THE PENNSYLVANIA HUMAN RELATIONS COMMISSION DID NOT ABUSE ITS AUTHORITY NOR OTHERWISE ERR BY AMENDING THE INSTANT COMPLAINT FROM "NON-WHITE" TO "BLACK".

(Answered in the negative by the Court below)

II. WHETHER THERE IS SUFFICIENT EVIDENCE ON THE RECORD TO SUPPORT THE COMMISSION'S FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Answered in the affirmative by the Court below)

III. WHETHER THE FINAL ORDER OF THE PENNSYLVANIA HUMAN RELATIONS COMMISSION IS DESIGNED TO EFFECTUATE THE PURPOSES OF THE PENNSYLVANIA HUMAN RELATIONS ACT.

(Answered in the affirmative by the Court below)

IV. WHETHER A FINAL ORDER REQUIRING RESPONDENT TO MAINTAIN RECORDS SHOWING THE RACIAL IDENTIFICATION OF APPLICANTS FOR HOUSING, AS PART OF A PLAN TO REMEDY UNLAWFUL DISCRIMINATORY PRACTICES, DOES NOT VIOLATE THE PENNSYLVANIA HUMAN RELATIONS ACT.

(Answered in the negative by the Court below)

V. WHETHER THE PENNSYLVANIA HUMAN RELATIONS COMMISSION HAS JURISDICTION OVER THE RENTAL POLICIES AND PRACTICES OF VAN BUREN HOMES, INC.

(Answered in the affirmative by the Court below)

II. COUNTER-STATEMENT OF THE CASE

On November 5, 1969, the Pennsylvania Human Relations Commission filed a Complaint at Docket No. H-1315, against Van Buren Homes, Inc., its President and its Manager, alleging that Respondent Van Buren Homes, Inc., maintained a practice of limiting "non-white" housing applicants to only two streets, "L" and "M" located in the Van Buren Homes housing complex, in violation of Section 5 (h)(1) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951 et seq. The Complaint further averred that the discriminatory practice referred to was of a continuing nature. The Complaint was later amended to include the current President of Van Buren Homes, deleting the former President and Manager. Van Buren Homes answered the amended complaint by denying any discriminatory practices. The matter proceeded to a public hearing on November 12, 1971, at which time counsel for the Commission asked Van Buren to supply certain records which were requested by duly issued Commission subpoenas. Before any evidence was adduced, the hearing was recessed in order for the Commission to initiate legal process to compel compliance with its subpoenas. Adjudication of the subpoena question was resolved in favor of the Commission, and the public hearing was re-convened on June 18, 1973.

At that time, the Commissioners upon motion of counsel for the Commission, permitted the Complaint to be amended so that it then alleged that Van Buren Homes limited the housing opportunities of "Blacks", as opposed to "non-whites", by restricting them to only two streets in the Van Buren Homes housing complex.

At the hearing conducted on June 18, 1973, Mr. Stephen Speare, President of Van Buren Homes, and a resident of that complex since 1947, testified that "L" and "M" Streets are physically separated from the other portion of the housing complex by a stream. (R. 63a) In addition, Mr. Speare asserted that to the best of his knowledge, no Blacks had ever lived on Streets other than "L" and "M". (R. 68a)

Mattie Crouch, a Black resident of "L" Street since 1955, testified that no Blacks lived on the other side of the stream as long as she had lived there. (R. 72a) Her testimony was corroborated by William Sallis, another Black resident of "L" Street. He testified that he lived in two different units since 1968, that he was never offered an apartment on other than "L" or "M" Streets, (R. 76a) and that as a part-time employee of Van Buren he painted apartments throughout the complex and no Blacks lived on any streets except "L" and "M". (R. 77a) Mr. Sallis also stated that Stephen Speare, in speaking to him about restricting Blacks to "L" and "M" Streets admitted "that the majority of people wanted it that way . . . that's the way it is and that's the way it's going to stay." (R. 79a)

Mrs. Shirley Moxley, another Black resident of "L" Street testified that when she applied to Van Buren in 1966 for an apartment and checked to see the status of her application, Van Buren's agent asked her race and, in response to her answer of "Negro", stated . . . "you're restricted to two streets, 'L' and 'M' Street . . . and at the present time we have no openings." (R. 96a) She further testified that when she was finally offered an apartment, she was informed by Van Buren's

agent that there were no apartments available other than on "L" and "M" Streets; but that she personally observed six empty apartments in other areas of the complex although the agent maintained these units were being used for storage. (R. 100a)

Finally, Mr. David Dorsey, Jr., an investigator for the Commission, substantiated Mrs. Moxley's testimony by testifying that Tilford Carpenter, Van Buren's agent, admitted to him that "insofar as Negroes are concerned . . . we put people where we think they'll fit in . . . if we put Negroes on any street other than 'L' Street and 'M' Street, White occupants would move out." (R. 103a)

Van Buren Homes, Inc. presented no witnesses or other evidence in its behalf.

On November 8, 1973, the Commission entered its Findings of Fact, Conclusions of Law and Final Order holding that Appellant had violated Section 5 (h)(1) of the Pennsylvania Human Relations Act by their practice of limiting Black residents and applicants solely to residences on "L" Street and "M" Street in the housing complex. The Commission also implemented a plan for eliminating discrimination and ensuring compliance with the Pennsylvania Human Realtions Act.

Van Buren Homes, Inc. appealed the Final Order of the Commission, which the Commonwealth Court, in an opinion written by Judge Mencer, unanimously affirmed on December 4, 1974. 16 Pa.Cmwlth. 502, 328 A.2d 570. Van Buren's Petition for Reargument before the Commonwealth Court was denied on January 7, 1975, and this Honorable Court granted allowance of appeal in an order dated April 5, 1977.

SUMMARY OF ARGUMENT

This case involves the interpretation and application of the Pennsylvania Human Relations Act's prohibition against discrimination on the basis of race in commercial housing. Also at issue is the scope of the Pennsylvania Human Relations Commission's authority to remedy unlawful discriminatory practices.

The Commission originally charged that Van Buren Homes committed an unlawful discriminatory practice by limiting "non-white" applicants to only two streets in its housing development. At the public hearing, the complaint was amended by substituting the word "black" for "non-whites." The Commonwealth Court correctly held that this amendment was not offensive to the requirements of due process of law because it narrowed the charge asserted in the original complaint.

The lower Court also properly sustained the Commission's Findings of Fact and Conclusions of Law because they were supported by sufficient substantial evidence of record. These Findings and Conclusions indicated that Van Buren Homes maintained a racially segregated housing development, which is unlawful under prior decisional law.

After establishing the aforementioned fact, the Commission designed a reasonable order to end unlawful discriminatory practices at Van Buren Homes and prevent their reoccurrence in the future. The Commission's Final Order directed Van Buren Homes to implement a voluntary tenant transfer plan designed to desegregate the development.

The Order also included certain record-keeping requirements, and provisions which would permit the Commission to monitor compliance with its Order. The Commonwealth Court, applying legal standards already established by case precedent, held that the remedy fasioned by the Commission was designed to effectuate the purposes of the Act and was not unreasonable or burdensome.

Also, the Commonwealth Court decided that the Commission correctly asserted jurisdiction over the rental policies and practices of Van Buren Homes. This decision was based on the definitional section of the Pennsylvania Human Relations Act.

III. ARGUMENT

I. THE PENNSYLVANIA HUMAN RELATIONS COMMISSION DID NOT ABUSE ITS AUTHORITY NOR OTHERWISE ERR BY AMENDING THE INSTANT COMPLAINT FROM "NON-WHITE" TO "BLACK".

Due process of law is as applicable to an administrative agency as it is to a court of law. Pittsburgh Press Employment Advertising Discrimination Appeal, 4 Pa.Cmwlth. 448, 287 A.2d 161 (1972), aff'd. 413 U.S. 376, 93 S.Ct. 2553 (1972), rehearing denied 414 U.S. 881, 94 S.Ct. 30 (1973).

More importantly, the Pennsylvania Courts have specifically delineated the requirements necessary for administrative agencies to comply with due process of law. In Speare v. P.H.R.C., supra at 505 citing Pittsburgh Press, supra, the Commonwealth Court stated:

> "due process of law is afforded when (1) the accused is informed with reasonable certainty of the nature of the accusation lodged against him, (2) he has timely notice and opportunity to answer these charges and to defend against attempted proof of such accusation, and (3) the proceedings are conducted in a fair and impartial manner."

Paragraphs 3, 4 and 6 of the original Complaint averred as follows:

> 3. On or about to wit, October 17, 1969, the Respondent during review and investigation of Docket No. H-937 sufficient information was received to indicate the practices of the Respondent in their placement of non-white housing applicants are discriminatory by limiting the applicants to only two streets, "L" and "M" located in the Van Buren Homes housing complex.

4. Such action by the Respondent constitutes an unlawful discriminatory practice and is in violation of: (check below according to complaint).

[X] Section 5, Sub-Section(s) (h)(1) of the Act of October 27, 1955, P.L. 744, as amended by the Act of February 28, 1961 P.L. 47, known as the Pennsylvania Human Relations Act.

6. The unlawful discriminatory practice referred to in this Complaint is of a continuing nature which has persisted up to and including the present time.
(R. 4a - 5a)

As can be seen from the reproduced portions of the Complaint above, the Complaint, as amended at hearing, substituted the word "Blacks" for "Non-Whites" in Paragraph 3.[1]

Van Buren contends that the Commission violated the requirements of due process of law when it permitted counsel to amend the original Complaint as described above at the public hearing. In support of this contention, Van Buren mistakenly relies on the case of Straw v. Commonwealth, 10 Pa.Cmwlth. 99, 308 A.2d 619 (1973).

In Straw v. P.H.R.C., supra, the Commonwealth Court held that a party charged with a violation of Section 5 (h)(1) of the Pennsylvania Human Relations Act (refusing to sell, lease, finance or otherwise to deny or withhold commercial housing from another person because of race, etc.) could not be found in violation of Section 5 (h)(6) of the Act, an entirely different section which prohibits inquiries, elicitation of information, keeping of records, etc., concerning race.

---

[1]Section 9 of the Pennsylvania Human Relations Act, 43 P.S. 959, the Administrative Agency Law, 1945, Act of June 4, P.L. 1388, 71 Pa. Stat. Ann. §1710.35 1 Pa. Code §35.50, and 16 Pa. Code §42.35 (Special Rules of Practice and Procedure of the Pennsylvania Human Relations Commission) give the Commission authority to offer and rule on amendments at a public hearing.

Consequently, Straw is easily distinguishable from the case at bar. The precedent which controls the present fact situation is clearly Pittsburgh Press, supra, and that case was properly cited by the Commonwealth Court in response to the assertion of Van Buren that it received inadequate notice of the charge filed against it:

> "We view the challenged amendment of the classification of applicants from "non-white' to "Black" as not offensive to the requirement of due process. The classification "non-white" is broader than the classification "Black." Van Buren, being confronted at the hearing with a narrowing of the charge asserted in the complaint, had sufficient definite warning as to the nature of the placement practice about which the Commission complained." Speare v. PHRC, supra. at 505.

There is no doubt that the amendment at hearing did not materially alter the charge contained in the complaint to some other matter as Van Buren maintains. The substance of the complaint remained the same--that Van Buren Homes segregated its housing development by locating Blacks in one section and Whites in another.

Surely, Van Buren Homes had sufficient warning from the complaint to understand and prepare to rebut evidence concerning its placement of White applicants in some sections and non-whites in others. As the U.S. Supreme Court stated in Roth v. U.S., 354 U.S. 476, 77 S.Ct. 1304, 1312, (1957), "all that is required is that the language convey sufficient definite warning as to the proscribed conduct when measured by common understanding and practice." Blacks, in common understanding, are non-whites. The allegation in the complaint gave reasonable notice and the record indicates that Van Buren was aware of the type of investigation being done by the Commission. In fact, Van Buren had specific

knowledge of the charge because it refused to comply with subpoenas requesting information on its placement policy which resulted in litigation eventually resolved in favor of the Commission. Since the foregoing analysis establishes that the amendment offered at hearing was minor and Van Buren was sufficiently informed as to the nature of the charge filed against it, the Commission submits that it did not abuse its authority nor violate the requirements of due process of law when counsel was permitted to amend the complaint at hearing.

Appellant also contends that due process was violated because the findings of the Commission and the relief it granted extended far beyond the limited subject matter of the complaint. Van Buren alleges that it was not put on notice that the charge filed against it would call into question its overall policies, both past and present. This assertion will be discussed in detail in Argument III, infra., at page 21.

II. THERE IS SUFFICIENT EVIDENCE ON THE RECORD TO SUPPORT THE COMMISSION'S FINDINGS OF FACT AND CONCLUSIONS OF LAW.

An adjudication of the Pennsylvania Human Relations Commission may be set aside or modified only in those instances where such adjudication is in violation of the Constitutional rights of the Appellant, or is not in accordance with law, or where the Findings of Fact necessary to support the adjudication are "not supported by substantial evidence". Administrative Agency Law, Act of June 4, 1945, P.L. 1388 §44, 71 P.S. §1710.44; Pennsylvania Human Relations Commission v. Chester School District, 427 Pa. 157, 181, 233 A.2d 290, 302-03 (1967). The requirement of substantial evidence has been defined as follows:

> "Substantial evidence" should be construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, if found to be such that a reasonable man, acting reasonably, might have reached the decision; but, on the other hand, if a reasonable man acting reasonably, could not have reached the decision from the evidence and its inferences then the decision is not supported by substantial evidence ... St. Andrews Development, Inc. vs. Pennsylvania Human Relations Commission, 10 Pa. Cmwlth 123, 128, 308 A.2d 623, 625 (1973), citing A.P. Weaver and Son's v. Sanitary Water Board, 3 Pa. Cmwlth 499, 505, 284 A.2d 515, 518 (1971) (emphasis in original).

The credibility of witnesses, the weight of testimony and the inferences to be drawn from all the evidence are matters for determination by the agency. A reviewing court may not

substitute its judgment for that of the agency, but may only determine whether there is evidence to support the administrative adjudication.

> "Our duty is performed by studying the testimony in the light most favorable to the party in whose favor the board has found, giving that party the benefit of every inference which can reasonably be drawn from it ... Stillman Unemployment Case, 161 Pa. Super. 569, 575, 56 A.2d 380, 383 (1948)."

Thus, where the evidence reasonably permits several inferences, it is for the administrative agency to decide which inference or inferences to be drawn, and upon review, the prevailing party below must be afforded every reasonable inference in its favor. Kline v. Kiehl, 157 Pa. Super 392, 43 A.2d 616 (1945). Furthermore, the agency's assessment of testimony should be upheld unless it is shown that competent testimony has been capriciously disregarded, that is,

> ... "there must be willful deliberate disbelief of an apparently trustworthy witness whose testimony one of ordinary intelligence could not possibly challenge or entertain the slightest doubt as to its truth." Chilcote v. Leidy, 207 Pa. Super. 345, 349, 217 A.2d 764 (1966)

Finally, due deference must be given to the technical expertise of the Administrative Agency. "Substantive Evidence in Administrative Law, "89 U. Pa. L. Rev. 1026, 1051 (1941) cited in A. P. Weaver, supra, at 505.

Applying these principles to the case at hand, it is clear that substantial evidence appears of record to support the Commission's Finding of Fact and Conclusions of Law. Contrary to the assertion of Van Buren Homes, the Commission did not rely on

vague feelings of the witnesses or some purely subjective test of what is believed to be in the minds of the parties. Instead, the Commission relied on objective testimonial and documentary evidence and the reasonable inferences drawn from that evidence.

The principles of law which apply to the case at bar were elucidated in the landmark decision of Chester Housing Authority v. P.H.R.C., 9 Pa. Cmwlth. 415, 305 A.2d 751 (1973), aff'd 458 Pa. 67, 327 A.2d 335 (1974), cert. denied 420 U.S. 974 (1975), where this Honorable Court unanimously held that the Pennsylvania Human Relations Act covers de facto segregation in housing. (p. 76) The Commission submits that there is ample evidence of record to support its material Findings of Fact which are as follows: (R. 138a-139a)

> 4. The policy of the Respondents has been to systematically confine Black residents solely to "L" and "M" Streets in the Van Buren Homes project and to prevent Black applicants from occupying dwelling units in other areas of the project exclusively occupied by White residents.
> (T. 4, 44, 47, 52, 54-55, 72, 78, 81)
>
> 6. There have never been any Black residents occupying any other units in the project other than those situated on "L" and "M" Streets.
> (T. 4, 44, 47, 52, 54-55, 72, 78, 81)
>
> 7. Black residents had requested units on Streets other than "L" and "M", but were refused such placement although units were available in other areas.
> (T. 78)

A map of Van Buren Homes introduced at the hearing showed that the streets in question, "L" and "M", were geographically separated from the rest of the development by a stream. (R. 63a)

When asked if he had known of any Blacks living on the other side of the stream from "L" and "M" Streets at Van Buren Homes in the twenty-two years he lived in the complex, Mr. Stephen Speare, President of Van Buren Homes, admitted that he did not know of any. (R. 68a)

Mattie Crouch, a Black resident of "L" Street since 1955, testified that no Blacks lived on the other side of the stream as long as she had lived at Van Buren Homes. (R. 72a) Her testimony was corroborated by William Sallis, another Black resident of "L" Street. He testified that he was never offered an apartment on other than "L" or "M" Streets, and that during four years as a part-time painter for Van Buren, he painted apartments throughout the complex but never observed Blacks living on any streets except "L" and "M". (R. 77a) Mr. Sallis also testified that Stephen Speare, in speaking to him about restricting Blacks to "L" and "M" Streets, admitted, "that the majority of people wanted it that way . . . that's the way it is and that's the way it's going to stay." (R. 79a)

Furthermore, Mrs. Shirley Moxley, another Black resident of "L" Street, asserted that when she applied to Van Buren in 1966 for an apartment and checked to see the status of her application, Van Buren's agent asked her race and, in response to her answer of "Negro", stated . . ."you're restricted to two streets, "L" and "M" Street . . . and at the present time we have no openings." (R. 96a) She further testified that when she was finally offered an apartment, she was informed by Van Buren's agent that there were no apartments available other than on "L" and "M" Streets; but that she personally observed

six empty apartments in other areas of the complex which Van Buren's agent maintained were being used for storage. (R. 100a)

Finally, Mr. David Dorsey, Jr., an investigator for the Commission, substantiated Mrs. Moxley's testimony by testifying that Tilford Carpenter, Van Buren's agent, conceded to him that insofar as Negroes are concerned . . . we put people where we think they'll fit in . . . if we put Negroes on any street other than 'L' Street and 'M' Street, White occupants would move out." (R. 103a)

The Commission correctly relied on the above-cited objective testimony in determining that Van Buren committed discriminatory practices in violation of Section 5(h) of the Human Relations Act by confining Black residents and Black applicants solely to dwelling units in one portion of the Van Buren Homes development -- those units on "L" and "M" Streets (Conclusion of Law No. 4, R. 139a - 140a).

In support of its contention that the Commission's Findings of Fact are not supported by substantial evidence, Van Buren mistakenly relies on the cases of Tomlinson v. P.H.R.C., 11 Pa.Cmwlth. 227, 312 A.2d 118 (1973); Marhoefer v. P.H.R.C., 4 Pa.Cmwlth. 242, 285 A.2d 547 (1971); P.H.R.C. v. Altman, 87 Dauph. 227, 42 D and C 2d. 317 (1967) and St. Andrews Development Company v. P.H.R.C. 10 Pa.Cmwlth. 123, 308 A.2d 623 (1973). However, because these cases are factually and legally distinguishable from the case at bar, Van Buren's assertion requires little discussion.

The above-cited cases involved attempts by the Commission to prove individual acts of housing discrimination on the basis of race. In each situation the Commission was faced with the difficult burden of proving racial discrimination in the rental of commercial housing in the absence of identifiable overt acts of discrimination by the Respondent. Consequently, the Commission was relegated to the onerous burden of proving that the non-discriminatory reasons advanced by the Repsondents for refusing to rent to Blacks were merely a pretext for discrimination. The Commonwealth Court held in each instance that the Commission's adjudication was based on inferences which were not supported by objective evidence.

In contrast to the cases cited by Van Buren, the evidence obtained from the testimony at hearing including the President of Van Buren Homes, compels but one significant conclusion as noted by the Court below -- that Van Buren maintained a racially segregated housing development.

The testimony of Stephen Speare, President of Van Buren Homes, indicated quite definitely that no Blacks lived on other than "L" and "M" Streets during the twenty-two years he resided at Van Buren Homes, and this testimony was corroborated by three other witnesses. In addition, several witnesses testified that agents of Van Buren admitted the existence of a long-standing policy of racial segregation.[2] Another witness indicated that Stephen Speare

[2] Van Buren asserts that the Commission erred in permitting testimony concerning admissions made by its rental agents. Although Appellant cites no authority for its proposition, the Commission submits that the declarations of an agent, made in the course of business, are competent evidence against the principal and constitute a well-recognized exception to the hearsay rule. Weir v. Borough of Plymouth, 148 Pa. 566, 244 A.94 (1892) Assuming arguendo that said statements constitute hearsay, the Commission submits no error resulted because the Commission's Findings are not wholly based on such evidence. See Bleitevens v. State Civil Service Commission, 11 Pa.Cmwlth. 1, 312 A.2d 109 (1973)

also conceded that Van Buren maintained a policy of racial segregation. None of the testimony adduced at hearing was based on the subjective impressions of witnesses. In fact, all the witnesses, including Stephen Speare testified to objective fact - the fact that occupancy at Van Buren Homes, Inc. is a function of an individual's race. None of the testimony was contradicted and none was rebutted. Indeed, Van Buren never even attempted to rebut any evidence. The weight and credibility given to the witnesses' testimony were matters to be determined by the Commission. The inferences reached by the Commission from the testimony "so preponderate in favor of that conclusion as to outweigh in the mind of the Fact-Finder any other evidence and reasonable inferences therefrom which are inconsistent therewith." P.H.R.C v. Brucker, 93 Dauph. 8, 51 D. and C. 2d 369, (1970) citing Smith v. Bell Telephone Co., 397 Pa. 134, 139, 153 A.2d 477 (1959). The Commission submits that in view of the afore-mentioned principles, the conclusions reached by the Commission based upon the inferences drawn from the testimony of the witnesses at trial as to the remarks made by Van Buren's agents regarding the segregation of Black applicants and residents, and the map showing the physical separation of "L" and "M" Streets where Black residents are confined, are reasonable inferences of discriminatory practices and preponderate in favor of that conclusion.

Van Buren also asserts the rather novel position that since it has Blacks living in its housing development, and because a former President of Van Buren Homes was Black, it cannot be found to be in violation of the Pennsylvania Human Relations Act.

This argument was specifically rejected by the Court below with an appropriate quotation from Chester Housing Authority, supra, and merits little discussion.

> "Appellant suggests that unless there is a complete refusal to rent to a Black, there can be no violation of the Act. Let us examine Appellant's rationalization. When a Black person is told by [Chester Housing Authority] that there is no apartment space available when in fact there is space available at the White project, at that precise moment there is a refusal to rent because of the race of the prospective occupant, which specifically defies Section 5 of the Human Relations Act. To say as Appellant does, that a later offer of space to the same Black person within the black housing project when and if it becomes available erases the racial discrimination initially practiced is to clothe this Court with naivete which we are unwilling to accept. Moreover, acceptance of Appellant's tight interpretation of the term 'refuse to lease' would also cause us to decimate the legislature's obvious pronouncement that the provisions of the Pennsylvania Human Relations Act '. . . shall be construed liberally for the accomplishment of the purposes thereof. . . ." 43 P.S. §962(a).
>
> "Also and very simply, we feel that denying Blacks the opportunity to rent apartments in the white housing projects fits squarely within §5(h)(1) which prohibits 'withhold[ing] commercial housing because of the race' of any prospective owner (tenant or occupant)." 9 Pa. Cmwlth. at 421-422, 305 A.2d at 754-755 (emphasis in original).

Finally, Van Buren asserts that its policies and practices are non-discriminatory--that the Commission has made no attempt to determine whether the present racial composition of Van Buren Homes is due to factors other than an alleged unlawful practice.

This contention was specifically rejected by this Honorable Court in Chester Housing, supra (p.72-73). The evidence adduced at hearing showed that an identifiable black section was

maintained within the Van Buren Homes housing complex. Van Buren ignores the fact that the mere existence of a separate and distinct black section violates the Act. Section 954 of the Act provides:

> Definitions:
>
> As used in this Act unless a different meaning clearly appears from the context:
>
> * * *
>
> (g) The term "discriminate" includes segregate.

Chester Housing is clearly dispositive of the issue raised by Van Buren:

> "Mindful of our statutory duty to construe the provisions of the Human Relations Act 'liberally for the accomplishment of (its) purpose' 43 P.S. §962(a) (1964), we conclude the purposes of the Act would be vindicated only by holding, See Chester School District, that the Act covers de facto segregation in housing." (p.76)

Thus, the Commission need not prove the duration of discriminatory practices, nor their effect upon the racial composition of the housing complex. The Commission need show only the existence of segregation, regardless of its cause. As this Honorable Court pointed out in Chester Housing, supra, at p.72, F.N. 13 "Human experience and common sense dictate that when a landlord routes Blacks into all-Black projects and Whites into all-White projects, the result is racial segregation."

The Commission respectfully submits that in the instant case, it had substantial evidence of a racially segregated housing project. Such a circumstance is sufficient to show a violation of the Act.

III. THE FINAL ORDER OF THE COMMISSION IS DESIGNED TO EFFECTUATE THE PURPOSES OF THE PENNSYLVANIA HUMAN RELATIONS ACT

The Commission's Final Order which was upheld in its entirety by the Court below is within the broad remedial powers provided by the Act and is not arbitrary, burdensome or unreasonable. Section 9 of the Pennsylvania Human Relations Act provides:

> ". . . The Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action including but not limited to . . . selling or leasing specified commercial housing upon such equal terms and conditions and with such equal facilities, services and privileges . . . 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 . . ."

This provision was interpreted by the Pennsylvania Supreme Court as follows:

> "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 Commission quite properly, maximum flexibility to remedy and hopefully eradicate the 'evils' of discrimination. Pennsylvania Human Relations Act, supra. at §2(a), 43 P.S. §952(a) (Supp.1973). The legislative mandate that the provisions of the Act be 'construed liberally', noted supra, serves to reinforce this view." Pennsylvania Human Relations Commission v. Alto Reste Park Cemetary Association, 453 Pa. 124, 133, 306 A.2d 881, 887 (1973).

The scope of the Legislature's concern is explicitly set forth in Section 2 of the Act. Findings and Declaration of Policy: ". . . discrimination foments domestic strife and unrest, threatens the rights and privileges of the inhabitants of the Commonwealth and undermines the foundations of a free democratic state . . ." 43 P.S. 952(a). Clearly, the Legislature intended a strong enforcement agency. Thus, the Court in Alto-Reste, supra set forth the standard of review applicable to Commission Orders:

> ". . . 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,'" . . . Alto-Reste, supra at 134, 306 A.2d at 887, adopting United States Supreme Court's statement in Fibreboard Paper Products Corporation v. National Labor Relations Board et al. 379 U.S. 203, 216 85 S. Ct. 398, 405-6 (1964)

Paragraphs 2 through 13 of the Commission's Final Order (R.142a-195a) requiring Van Buren Homes to undertake a program of tenant transfer at Van Buren's expense cannot be construed as a patent attempt to achieve ends other than to effectuate the purposes of the Act. In Chester Housing, supra, this Honorable Court unanimously affirmed the Final Order of the Commission which directed the Chester Housing Authority to take affirmative steps to end de facto segregation in its projects. Having determined that de facto segregation in housing is prohibited by the Human Relations Act, this Court reasoned that the attempt to desegregate such a facility by ordering a tenant transfer plan is clearly within the authority of the Commission. This holding is consistent with the legislative mandate contained in Section 3 of the Act:

> "The opportunity for an individual . . . to obtain all the accommodations, advantages, facilities and privileges . . . of commercial housing without discrimination because of race . . .[is] declared to be [a] civil [right] . . ."
>
> Chester supra, at 76, citing 43 P.S. §953 (Supp.1974)

Relying on Chester School District, supra, this Honorable Court further indicated that "the statutory scheme does not treat housing differently from schooling for purposes of ending racial discrimination," Chester Housing, supra, at 76., and more importantly, "courts have resolved that blacks are entitled to a meaningful opportunity to live in integrated housing." Chester Housing, at 77., (citations omitted.) The Commission respectfully submits that paragraphs 2 through 13 of its Final Order are reasonably means to secure that opportunity.

Similarly, the provisions requiring Van Buren Homes to institute an application procedure as outlined in paragraphs 14 through 17 of the Commission's Final Order (R. 145a - 146a), are designed to prevent discriminatory placement practices in the future.

In Alto-Reste, supra, the Court specifically upheld the power of the Commission "to not only fashion an effective remedy for the individual aggrieved but also to guard against and deter the same discriminatory action from recurring to the detriment of others within the same class." at pp. 136-7. This holding echoed similar sentiments of the New Jersey Supreme

Court in Jackson v. Concord Co., 54 N.J. 113, 253 A.2d 793 (1969) at 799 (dealing with a Commission Order and anti-discriminatio statute virtually identical to those involved in the instant case:

> "From all of this it is patently clear that the Legislature intended to create an effective enforcement 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 climinate 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. . ."

Moreover, in Alto-Reste, supra, only a specific discriminatory act was alleged, whereas in the case at hand, an on-going practice was alleged. Here, the Commission determined that the application procedure set forth in paragraphs 14 through 17 were necessary and appropriate to remedy that practice and deter its recurrence. The Court should not interfere with the Commission's conscientious determination in the absence of a showing of arbitrariness or illegality, Alto-Reste at p. 137. or as Judge Feld

stated for the New York Court of Appeals in State Commission Against Discrimination v. Holland, 307 N. Y. 38, 46, 119 N. E.2d 581, 585 (1954):

> "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).

There is nothing arbitrary or illegal about the requirement that Van Buren establish and maintain organized files of vacancies and applications, including a special affirmative action waiting list. Indeed, such an Order was also upheld in Chester Housing where this Honorable Court quoted the United States Supreme Court in Louisiana v. U. S., 380 U. S. 145, 154, 85 S. Ct. 817, 822 (1965) to the effect that:

> "We bear in mind that the Court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

Likewise, the provisions in paragraphs 18 - 20 (R. 147a - 148a) requiring Van Buren Homes to maintain records for a period of two years indicating the race of applicants and occupants along with other data is discussed in great detail in Argument No. IV and has has been specifically upheld by this Honorable Court in Alto-Reste and Chester Housing.

The foregoing principles clearly establish that the Commission's Final Order is designed to execute the

Legislature's mandate to eliminate racial discrimination in housing. Furthermore, the provisions of the Final Order fall clearly within the perimeter of affirmative relief as sanctioned by earlier decisions of this Honorable Court.

There is no merit to Van Buren's contention that the Order is void because of its cost. Initially, it should be pointed out that Van Buren has never even attempted to suggest the cost of complying with the Order. Secondly, Van Buren cites no authority for the proposition that cost is a defense to a violation of an individual's civil rights. Thirdly, this Honorable Court and many other courts have recognized that incidental expenses must be absorbed by parties who have committed unlawful discriminatory practices. It is axiomatic that the remedial portions of an order based on unlawful discriminatory practices must be borne by the party responsible for the unlawful act. This Honorable Court has not hesitated to rely on this principle in ordering and enforcing desegration plans far broader than that objected to by Van Buren Homes.[3]

Similarly, Van Buren's argument that the Commission's Final Order is unenforceable with respect to a two-year reporting requirement is patently incorrect in view of Alto-Reste and Chester Housing, discussed supra. What

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[3] See Chester Housing supra, Chester School District, infra. PHRC v. Uniontown Area School District, 455 Pa. 52, 313 A.2d 156 (1973), Philadelphia School District v. PHRC, 6 Pa. Cmwlth. 281, 294 A.2d 410, (1972), aff'd. sub. nom.

counsel for respondent has characterized as a direct interference in Van Buren's business is merely a reasonable remedy to correct discriminatory housing practices.

Van Buren also erroneously contends that the Commission's Order is unenforceable because the Commission made no attempt to determine whether the racial composition of Van Buren Homes was the result of individual preference or social and economic factors. The first contention of Van Buren was specifically addressed by the United States Court of Appeals for the Fifth Circuit in a school desegregation case, United States v. Jefferson County Bd. of Education 417 F.2d 834 (1969):

> "there was testimony that white students would not attend formerly Negro schools. This is not a legal argument."
>
> Id at 837.n.2

The second argument was specifically rejected by this Honorable Court in Chester Housing, supra, at 72-73, where it is stated:

> "Two complaints were voiced. The Commission had neither proved the duration of the unlawful discriminatory practices nor shown that these seventeen sets were the sole cause of the racial imbalance. Aside from noting that the Human Relations Act does not explicitly require either that a particular number of acts must be proved or that race must be the sole factor in bringing about discrimination before the Commission may order affirmative action, 43 P.S. §959 (supp. 1974), we find it unnecessary to address these assertions of the lower court. In our view, substantial evidence supporting the Commission's adjudication can be found in the figures of the racial composition of the four housing projects."

As in Chester Housing, the Commission found a housing project segregated by race in the instant case. To paraphrase

the court in Chester, no more vivid a picture of racial segregation in housing can be imagined, than that which shows a 398 apartment unit complex with two streets exclusively reserved for blacks, separated from the rest of the development by a stream no less.

Lastly, Van Buren asserts that the Commission's Order violates the due process requirement of fair notice.

There is no question that from the time the original complaint was filed in November, 1969, Van Buren was put on notice that its tenant placement policies, both past and present were being challenged. (See paragraphs 3, 4, and 6 of the complaint, supra.) The words in paragraph 3 of the complaint, "sufficient information was received to indicate the practices of the Respondent in their placement of non-white housing applicants by limiting the applicants to only two streets . . .", have direct reference to a pattern and practice of routing tenants according to their race. Such practices are prohibited by Section 5 (h)(1) of the Act, and the Commission's findings are based solely upon a violation of that Section. See, Chester Housing Authority v. PHRC, infra. Administrative proceedings are not restricted by the niceties of common law proceedings. Kochinsky v. Independent Pier Co., 157 Pa. Super. 15, 41 A.2d 409 (1945). More importantly, "the question of what constitutes a specific designation of the issue raised or charges made

depends upon the violation alleged and the type of investigation being conducted." W. J. Dillner Transfer Co. v. P.U.C., 175 Pa. Super. 461, 468-9, 107 A.2d 159 (1954). The words of the complaint are not so obscure that Van Buren was unable to perceive the specific nature of the charge against it. Appellant was aware that between the time the original complaint was filed on November 5, 1969, and the date that the actual public hearing was convened on June 18, 1973, the Commission was investigating the segregation of tenants by race in the Van Buren housing complex. In addition, the complaint itself, in paragraph 6, informed Van Buren that on on-going illegal practice was being investigated.

This Court forcefully resolved in Chester Housing, at 76., that the "removal of racial discrimination and assurance of equal opportunity in housing are strong and fundamental policies of this Commonwealth." Specifically, it was decided that:

> "In Chester School District, we reasoned that racial imbalance triggered the Commission's authority under the Human Relations Act to order affirmative action because to hold otherwise would ignore 'completely the legislative conclusion that racial segregation in public schools, whatever its source, threatens the peace, health, safety and general welfare of the Commonwealth and its inhabitants.' 427 Pa. at 170, 233 A.2d at 297. Today we reach a similar conclusion with respect to racial imbalance in housing covered by the Act. Mindful of our statutory duty to construe the provisions of the Human Relations Act 'liberally for the accomplishment of [its] purposes,' 43 P.S. §962(a) (1964), we conclude the pruposes of the Act would be vindicated only by holding, see Chester School District, that the Act covers de facto segregation in housing."

It is this mandate that the Commission follows in the case at bar.

The Commission submits that the relief it ordered is commensurate with the illegal practice which was held to be violative of the Act. The provisions of the Commission's Final Order are designed to accomplish one primary purpose--to eliminate the restriction of occupancy as it applies to applicants and residents who are Black. Anything less would only reinforce the illegal practice of Van Buren Homes. Consequently. the Commission concludes that the transfer plan delineated in its Final Order is reasonably calculated to achieve this end, and such relief is well within the authority of the Commission. Indeed, such relief is compelled by the very nature of Van Buren's illegal practice. See, PHRC v. Alto-Reste Cemetary Association, 453 Pa. 124, 306 A.2d 881 (1973).

IV. A FINAL ORDER REQUIRING RESPONDENT TO MAINTAIN RECORDS SHOWING THE RACIAL IDENTIFICATION OF APPLICANTS FOR HOUSING, AS PART OF A PLAN TO REMEDY UNLAWFUL DISCRIMINATORY PRACTICES, DOES NOT VIOLATE THE PENNSYLVANIA HUMAN RELATIONS ACT.

Paragraphs 18 and 19 of the Commission's Final Order require that Van Buren maintain a registry of all persons seeking housing, indicating their race. Van Buren contends that the Commission is prohibited from ordering the maintenance of records which include designations of race by Section 5 (h)(6) of the Pennsylvania Human Relations Act. That Section provides, inter alia:

> "It shall be . . . an unlawful discriminatory practice:
>
> * * *
>
> (h) for any person to:
>
> * * *
>
> (6) make any inquiry, elicit any information, make or keep any record or use any form of application, containing questions or entries concerning race, color, religious creed, ancestry, sex or national origin in connection with the sale or lease of any commercial housing."
>
> 43 P.S. §955 (h)(6)

Appellant incorrectly relies on Span v. P.H.R.C., Walnut Garden Apts., Inc. v. P.H.R.C., 15 Pa.Cmwlth. 334, 325 A.2d 678, in which the Commonwealth Court held that the Commission did not have the authority to order a Respondent to maintain records which designate the race of an applicant or of a

former occupant. However, in its December 4, 1974 decision in Midland Heights Homes v. P.H.R.C., 17 Pa.Cmwlth 563, 333 A.2d 516, the Commonwealth Court overturned its previous holding and upheld the Commission's authority to require a Respondent to record the racial identification of applicants for housing as being within the Commission's broad discretionary remedial power. The Court was specifically following the opinion expressed by the Pennsylvania Supreme Court in P.H.R.C. v. Chester Housing Authority, supra, and P.H.R.C. v. Alto-Reste Park Cemetary Association, infra, which affirmed the Commission's ordering the maintenance of racial records.

It should be clear from Section 5 (h)(6) that no person may elicit information or maintain records of the race of applicants for housing, so as to enable that person to unlawfully discriminate on the basis of race. The Legislature recognized that such inquiries and records have been used to deny housing opportunities to certain classes of persons. Inquiries or records used for such purposes are certainly illegal.

However, Section 5 (h)(6) was not intended and should not be construed so as to restrict the power of the Commission effectively to enforce the Act. Accordingly, Section 5 (h)(6) should be construed in a limited fashion. Application of the prohibition against record keeping should not interfere with the enforcement of the Act. Such an interpretation does not disregard the letter of the law, but

specifies the breadth of its application to achieve a reasonable result in harmony with the general purpose and design of the Act.

Neither the Commission nor the Court is bound by a literal interpretation of the language of the statute as argued by Van Buren where such an interpretation is inconsistent with the Legislative design and is in direct conflict with other provisions of the Act.

Appellant mistakenly relies primarily on the "plain meaning" theory of statutory construction. However, in doing so, Van Buren ignores the fundamental principle of statutory construction that the Legislative intent controls. Accordingly, the provisions of Section 5 (h)(6) must be interpreted in conjunction with the broad remedial powers vested in the Commission. Consideration must be given to the purposes to be achieved and the consequences of the particular interpretation put forth. Where doubt or ambiguity appears the rules of statutory construction must be applied.

The Statutory Construction Act of 1972, Act of November 25, 1970 P.L. 707, No. 230 added December 6, 1972, No. 290, 1 P.S. §1501, et seq. provides that "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly . . . " 1 P.S. §1921(a). The presumptions to be applied in ascertaining the intention of the General ASsembly are enumerated in Section 1922:

(1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.

(2) That the General Assembly intends the entire statute to be effective and certain.

(3) That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.

(4) That when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.

(5) That the General Assembly intends to favor the public interest as against any private interest.

Applying these presumptions to the Pennsylvania Human Relations Act, particularly Section 5 (h)(6), there is ample support for a narrow interpretation of the prohibition against record keeping.

If the Commission is prohibited from incorporating reporting requirements into a comprehensive remedial plan, then the effectiveness of the Commission's Final Order is substantially diminished. Indeed, the Commission would be precluded from enforcing its own order. The existence of written records as provided in Paragraphs 18 and 19, available for review upon reasonable notice, enables the Commission to confirm compliance or to expose violations upon simple examination of the list of applicants compared with the schedule of vacancies. Without such records, enforcement of the Commission's order would entail visual identification of each and every resident and each and every applicant for housing. To require extensive investigation for purposes

of enforcement is not merely inconvenient, it is unreasonable and absurd.

Furthermore, a broad prohibition brings Section 5 (h)(6) into direct conflict with Section 9 of the Act which explicitly empowers the Commission to order a report on the manner of compliance. Where discrimination on the basis of race has been found, a report on the manner of compliance must necessarily include designations as to race. To construe Section 5 (h)(6) otherwise would be to nullify the reporting requirement of Section 9.

There is no merit to Van Buren's contention that the Commission has no authority to waive Section 5 (h)(6). Such an assertion strongly suggests that Respondent misconstrues the legislative intent in enacting that section of the Act.

It is true that the Statutory Construction Act provides that "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 P.S. §1921(b). However, this section does not preclude consideration of the context and other terms and provisions in determining whether the words are used in their literal significance or in a limited sense. In Girard Trust Company v. Philadelphia, 369 Pa. 499, 87 A.2d 277 (1952), the Pennsylvania Supreme Court construed the words "all mortgages" to mean "all indebtedness secured by mortgage," despite the literal words of the statute, and with specific reference to the above-quoted section. The court sought to avoid an unreasonable result by limiting the broad wording

of the statute.

> Thus, in Guessfeldt v. McGrath, Attorney General ____ U.S. ____ (Opinion handed down January 28, 1952), an act of Congress provided that "No property . . . of . . . any national of either country (Germany of Japan) . . . shall be returned to former owners thereof . . . " It was ruled notwithstanding the inclusiveness of the term "any national," that it should be held applicable only to some German "nationals," namely, those who were enemies. 369 Pa.499, 506.

Consequently, there is no authority or reason to adopt Van Buren's technical interpretation of Section 5 (h)(6) of the Act.

Notwithstanding the foregoing analysis, Van Buren insists that Span, supra, is controlling. However, the Commission submits that Span is inapplicable as recognized by the Commonwealth Court in Midland, supra, and in light of Pennsylvania Supreme Court decisions in Alto-Reste, Supra, and Chester Housing, supra.

In Alto-Reste, the Court ruled that the Commission has such maximum flexibility to remedy and hopefully eradicate the 'evils' of discrimination". The Court adopted as its own the United States Supreme Court statement in Fibreboard Paper Products Corp. v. N.L.R.B., et al., 379 U.S. 203, 216, 85 S.Ct. 398, 405-6 (1964) dealing with a provision of the Taft-Hartley 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.' ... "

More importantly, in Alto-Reste, supra, the Commission ordered a cemetary which was found to have illegally refused to bury a Black person because of his race, to keep records when persons are refused burial, and to send to the Commission a copy of the reasons for said refusal. In upholding the order, this Honorable Court stated:

> "It is beyond cavil that the Human Relations Act was intended, by the Legislature, to protect more than individuals unlawfully discriminated against -- of equal importance is the Act's intent that the public generally be protected from such discrimination. Accordngly, it is, and was here, incumbent upon the Commission to not only fashion an effective remedy for the individual aggrieved, but also to guard against and deter the same discriminatory action from recurring, to the detriment of others within the same class. Alto-Reste, supra at 888. (Citations omitted).

It has been the experience of the Commission that an order which does not include the identification of the race of applicants is almost impossible to enforce. In such situations an investigator must personally check race by visual identification of all persons not given units, a procedure which is quite time consuming, considering most applicants would have moved to a new address. Otherwise, to detect a violation, the Commission must await a complaint. However, unless a Black is aware of a vacancy which has been denied him or her, a complaint might very well not be filed. Therefore, the only truly effective method of enforcing orders is by means of the provision in question.

In the instant case, the requirement that Appellants maintain a registry of applicants, indicating race, is one that, in the judgment of the Commission, will "effectuate the policies of the Act," by providing the Commission an effective and reasonable method of reviewing Appellant's compliance with the Commission's Final Order and the Act itself. The existence of such records, available upon reasonable notice to the Commission staff, would discourage Appellants from discrimination.

A simple review of the applicants, compared with the schedule of vacancies, would lead to any possible violations.[4]

Furthermore, this Honorable Court has upheld another Final Order of the Commission which specifically requires record keeping by race. In Chester Housing Authority, supra, Paragraph 8 of the Commission's Final Order was upheld. Paragraph 8 required that Respondent:

> Shall report to the Pennsylvania Human Relations Commission at its Regional as above set forth, beginning one month from the effective date of this Order, and monthly thereafter until such time as the racial composition in each project, as set forth in items 2 and 3 above, is achieved. Such report to contain information regarding the racial composition of each of its housing projects, as well as a list of all applicants,

---

[4] Section 9 of the Pennsylvania Human Relations Act, 43 P.S. §959, provided, inter alia,: "If upon all evidence at the hearing the Commission shall find that a Respondent was engaged in or is engaged 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 ... 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]

> transfers, assignment and re-assignments of all units in all said projects under its supervision, direction and control by racial identification and reflecting the ratial of Negro and White tenant families as set forth in Paragraphs 2 and 3 above, family size and size of unit requested and assigned, list of vacancies in each project, and thereafter, shall for a further period of two years make such reports quarter-annually. Appendix C, pp. C2 and C3.

Thus, there is ample authority for limited application of the prohibition contained in Section 5(h)(6) of the Act. So interpreted, that section does not restrict the authority of the Commission to enter a Final Order, such as in this case, reasonably designed to promote the purposes of the Act.

It has been the experience of the Commission, and also of those Courts which have had to fashion remedies in discrimination cases, that to end discrimination and reverse past effects of discrimination, one must be color-conscious rather than color blind. As stated by the Court in Associated General Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973):

> "It is by now well understood, however, that our society cannot be completely color blind in the short term if we are to have a color blind society in the long term."
>
> p. 16

This is the very essence of affirmative action plans prevalent in employment discrimination cases, but also applicable to housing situations. Although this case does not involve an affirmative action plan, a brief review of their treatment is appropriate at this point, since a requisite of any affirmative action plan is racial or sexual identification of applicants.

In Contractor's Assn. of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3rd Cir. 1971), cert. den., 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed 2d 95 (1971), the United States Supreme Court refused certiorari in a case involving the so-called Philadelphia Plan. The Plan was adopted by the Secretary of Labor pursuant to regulations in an attempt to relieve the results of past discrimination in the Philadelphia trade unions.

Under the plan, contractors were required to formulate specific programs to utilize minority workers before qualifying for federal contracts. The contractors Association claimed that proper adherence to the Plan required them to list and classify employees by race, and give preference in some cases to nonwhites, contrary to the express provisions of the Civil Rights Act. The Act provides:

> (a) It shall be an unlawful employment practice for an employer . . .
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> (42 U.S.C. §2000e-2 (a))

The court ruled that the Plan did not violate the Act, stating,

> "To read (the Act) in the manner suggested by the Plaintiffs we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils. We discern no such intention either from the language of the statute or from its legislative history."
>
> p. 172-3.

Although the requirements of the Plan were, indeed, color conscious, the Plan was seen as a proper, reasonable approach to remedying the evils of past discrimination.

The aforementioned principles have been rigorously adhered to by this Honorable Court since 1967, when, in Pennsylvania Human Relations Commission v. Chester School District, 427 Pa. 157, 233 A.2d 290 (1967), it upheld the authority of the Commission to require school districts to submit plans for the desegregation of public schools.[5] Implicit in that ruling was the understanding that any such plan must of necessity, include a racial breakdown of present and future students. Certainly, the many desegregation plans adopted in the federal judicial system have included such racial identification.

---

[5] See also P.H.R.C. v. Uniontown Area School District 455 Pa. 52 (1973), P.H.R.C. v. Norristown Area School District, 20 Pa. Cmwlth. 555, 342 A.2d 464 (1975)

The importance of the inclusion of racial identification in plans to remedy past discrimination, therefore, has been universally recognized by many jurisdictions, including our own, in various situations where a literal reading of the statute involved would have rendered such plans unlawful.

A similar interpretation of the New Jersey Law against discrimination was upheld by the Supreme Court of New Jersey in New Jersey Builders, Owners, & Managers Assn. v. Blair, 60 N.J. 330, 288 A.2d 855 (1972). The New Jersey Division on Civil Rights attempted to promulgate a regulations called the Multiple Dwelling Reporting Rule. The Rule required certain landlords to supply the Division at periodic intervals with information regarding, inter alia, the racial designation of tenants and applicants for housing.

The proposed Rule was attacked in Court as being contrary to the New Jersey Law Against Discrimination, which provides that:

> It shall be . . . an unlawful discrimination:
>
> * * *
>
> g. For the owner, lessee, sublessee, assignee, or managing agent of, or other person have the right of ownership of possession of or the right to sell, rent, lease, assign, or sublease any real property, or part or portion thereof, or any agent or employee of any of these:

* * *

(3) To . . . make any record or inquiry in connection with the prospective purchase, rental, lease, assignment, or sublease of any real property, or part or portion thereof which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, ancestry, marital status or sex or any intent to make any such limitation, specification or discrimination . . . (N.J.S.A. 10:512)

The New Jersey Court held that the statutory language of the Act did not prohibit the Division from adopting reasonable regulations which constitute a rational approach toward fulfilling its responsibilities, stating,

> "If there is any internal inconsistency in the statutory scheme, either appearing in the words of the enactment or emerging upon its implementation by the agency - as is perhaps here the case - reference to the fundamental purpose of the act will provide the touchstone to resolve the dilemma."
> 288 A.2d at 857.

> "In reading and interpreting a statute, primary regard must be given to the fundamental purpose for which the legislation was enacted. Where a literal rendering will lead to a result not in accord with the essential purpose and design of the act, the spirit of the law will control the letter . . . "
> 288 A.2d at 859

In addition, the public interest as set forth in the Human Relations Act, Findings and Declaration of Policy is promoted by an interpretation which supports and maintains the Commission as an effective enforcement agency.

Section 12(a) of the Pennsylvania Human Relations Act states, "the provisions of this Act shall be construed liberally for the accomplishment of the purposes thereof . . "

The purposes spoken of in Section 9 and 12 are reflected throughout the Act. However, Section 2(a) of the Act reflects the findings of the Legislature, and should be regarded as the basis for the remainder of the provisions of the Act . It reads:

> (a) The practice or policy of discrim ination 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 democratic state. The denial of equal employment, housing and public accommo- dation opportunities because of such discrimination, and the consequent failure to utilize the productive capacities of individuals to their fullest extent, deprives segments of the population of the Commonwealth of earnings necessary to maintain decent standards of living, necessitates their resort to publc 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 sub-standard, 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.

Thus, it is clear that the Legislature intented a strong administrative agency with maximum flexilibity to deal with the very serious problems of discrimination. Certainly the

need for effective enforcement of the Act is as much evident today as it was nineteen years ago. It is therefore, the policy of the Commission to attempt to frame orders in a manner that will best assure compliance with the spirit, as well as the letter, of the law. That the Commission has such flexibility and broad remedial powers has been affirmed by the Pennsylvania Supreme Court in Pennsylvania Human Relations Commission v. Alto Reste Park Cemetary Ass'n., supra.

The Commission could not agree more that the practice of labelling applicants and leases by race is "disgusting and degrading" as maintained in Van Buren's Brief. However, the Commission submits that Van Buren Homes itself is responsible for something even more offensive than that which it now objects to as illegal. As appropriately stated by the Court in Norwalk Redevelopment Agency, 395 F.2d 920 (2nd Cir., 1968) at 931.

> "What we have said may require classification by race. That is something which the constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purposes of achieving equality, it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required."

Given the strong legislative language of the Pennsylvania Human Relations Act, and the broad language of this Honorable Court in the cases cited above, the Commission submits the Act does not restrict it from requiring Respondents to identify applicants by race, where such identification is designed and intended to enforce the provisions of the Act. It is therefore submitted, and the Commission respectfully requests that this Honorable Court uphold and affirm Paragraphs 18 and 19 of the instant Final Order.

V. THE PENNSYLVANIA HUMAN RELATIONS COMMISSION HAS JURISDICTION OVER THE RENTAL POLICIES AND PRACTICES OF VAN BUREN HOMES, INCORPORATED.

Section 5 (h)(1) of the Pennsylvania Human Relations Act, 43 P.S. §955 (h)(1) provides, inter alia, that:

> "It shall be an unlawful discriminatory practice . . . for any person to refuse to sell, lease, finance or otherwise to deny or withhold commercial housing from any person because of the race . . . of any prospective owner, occupant or user of such commercial housing. . ."

The pertinent parts of Section 4, which bring Respondent under the purview of the Act are as follows:

4a, (43 P.S. §954a):

> "The term 'person' includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives . . . it also includes, but is not limited to, any owner, lessor, assignor, . . . manager, broker, salesman, agent, employee. . ."

4j, (43 P.S. §954j):

> "The term 'commercial housing' means housing accommodations held or offered for sale or rent (1) by a real estate broker, salesman or agent, or by any other pursuant to authorization of the owner; (2) by the owner himself; or (3) by legal representatives. . .
>
> as amended 1967, November 29, P.L. 632 §1.

Van Buren asserts that it is not engaged in the area defined as commercial housing by the Pennsylvania Human Relations Act. Specifically, it is argued that because Van Buren is operated as a non-profit corporation and has Black shareholders and a former president was Black, it does not meet the definition of commercial housing as outlined by the Act.

It is clear from a reading of the Pennsylvania Human Relations Act that none of the aforementioned facts exempt Van Buren from the purview of the Act. The record indicates that Van Buren identifies itself as a non-profit corporation (R. 15a), and there is no qualifications in Section 4(a) of the Act as to the type of corporation included. In addition, the evidence shows that Van Buren maintained an office from which applications for apartments in the complex were taken. (R. 96a, 100a, 103a). Therefore, it is clear that Van Buren falls squarely within the applicalbe definitions in the Human Relations Act. As correctly stated by the Honorable Court below,

> "Van Buren's assertion that it is not engaged in commercial housing is without merit and flies directly in the face of the definitional section of the Pennsylvania Human Relations Act . . . the evidence of Van Buren's operations in leasing housing units clearly establishes that Van Buren comes within the Act's definitional test."
>
> Speare v. PHRC, supra, at 507

Consequently, the Commission submits that Van Buren Homes, Inc. is engaged in commercial housing as defined by the Pennsylvania Human Relations Act.

CONCLUSION

For all of the foregoing reasons, the Pennsylvania Human Relations Commission respectfully requests this Honorable Court affirm the decision of the Commonwealth Court.

Respectfully submitted:

Marc Kranson
Marc Kranson
Assistant General Counsel

s/ Sanford Kahn
Sanford Kahn
General Counsel

In the Commonwealth Court of Pennsylvania

No. 1665 C.D. 1973

GWENDOLYN A. LEE and ERNEST L. YOKELY,

Appellees

v.

WALNUT GARDEN APARTMENTS, INC., and ROBERT E. SPAN, SR., MANAGER,

Appellants

BRIEF FOR APPELLEES

Appeal From Order of the Pennsylvania Human Relations Commission at Docket H-1654

SANFORD KAHN
MARK A. SENICK
Attorneys for Appellees

Pennsylvania Human Relations Commission
4 Smithfield Street
Pittsburgh, Pa. 15222
(412) 565-5395

Murrelle Printing Co., Law Printers, Box 100, Bayre, Pa. 18640

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STATUTE:

COUNTER-HISTORY OF THE CASE

This case arises upon a complaint filed by dolyn A. Lee and Ernest L. Yokely with the sylvania Human Relations Commission at Dock H-1654, alleging that Walnut Gardens Apartn Inc., and Robert E. Span, Sr. (hereafter "A lants") had violated Section 5(h) of the Pe vania Human Relations Act, Act of Octobe 1955, P. L. 744, as amended, 43 P.S. 955(h that Appellants had failed to rent an apartme Appellees because of their race, black.

Subsequent to an investigation by the Con sion, a finding of probable cause, and attemp conciliation, the Commission ordered a public ing be held. Said hearing was had on August 1973.

Following the public hearing, the Commission caused to be issued its findings of fact, conclusions of law, Commission's decision, and final order. The Commission found, inter alia, that the failure of Appellants to rent to Appellees was due to the race of the Appellees, and that Appellants had thus violated the Pennsylvania Human Relations Act, supra, as alleged by Appellees. The Appellants were ordered to take certain affirmative actions designed to effectuate the purposes and policies of the Act. The Appellants now appeal the Commission's findings of fact, conclusions of law, Commission's decision, and final order to this Court.

On November 4, 1971, Gwendolyn A. Lee, a black female, after seeing an advertisement in the Beaver County Times offering apartments for rent, went to the Walnut Garden Apartments with the intention of viewing an apartment for possible tenancy. Robert Span, manager of Walnut Garden Apartments, met Ms. Lee at the door to his residence at the Apartments which also served as the rental office. Speaking through the screen door, he informed Ms. Lee that there were no apartments available. Ms. Lee stated that she had seen some vacant apartments, but Mr. Span replied that they had been taken. Mr. Span did not admit Ms. Lee into the apartment.

Believing she had been discriminated against because of her race, Ms. Lee returned to the Walnut Garden Apartments on or about November 8, 1971, with Ernest Yokely, a black male, and Diane Eardling, a white female. Upon arriving at the Apartments, Ms. Eardling went to Mr. Span's office by

herself. She was admitted inside and told Mr. S
that she was interested in renting an apartment.
Span replied that there were vacancies and aske
she had any children. Ms. Eardling told him she
one child. Mr. Span replied that he did not lik
rent to persons with children, but when he did
placed them on the first floor, and that there pres
ly were vacancies on that floor. Arrangements w
made for Ms. Eardling to return that evening w
her husband and child to view the apartment.

During the time Ms. Eardling was speaking w
Mr. Span, Ms. Lee and Mr. Yokely approached
office. Mr. Span met them at the door, and told th
that there were no vacancies, and that he did not l
to rent to people with children. Ms. Lee asked
an application in case a vacancy would occur in t
future, and was told it would not be necessary. M
Lee and Mr. Yokely then left and Mr. Span return
to Ms. Eardling to complete arrangements for h
visit that evening. Ms. Eardling had overheard t
entire conversation with Mr. Span.

ARGUMENT

I. There is substantial evidence on the record to show that Appellants refused to rent an apartment to Appellees because of their race, thus engaging in an unlawful discriminatory practice in violation of Section 5 (h) of the Pennsylvania Human Relations Act, supra.

Section 5 (h) of the Pennsylvania Human Relations Act, supra, provides that it shall be an unlawful discriminatory practice for any person to:

> "(1) Refuse to sell, lease, finance or otherwise to deny or withhold commercial housing from any person because of the race, color, religious creed, ancestry, sex or national origin of any prospective owner, occupant or user of such commercial housing, or to refuse to lease commercial housing to any person due to use of a guide dog because of the blindness of the user.
>
> * * * * * *
>
> (3) Discriminate against any person in the terms or conditions of selling or leasing any commercial housing because of the race, color, religious creed, ancestry, sex or national origin of any present or prospective owner, occupant or user of such commercial housing . . ."

The Pennsylvania Human Relations Cor
after holding an adjudicatory hearing, conclu
Appellants violated the above section with
to Appellees. Upon review, this Court mu
mine whether the Commission's adjudicatio
in accordance with the law" or whether "a
ing of fact made by the agency and necessar
port its adjudication is not supported by su
evidence." *Straw v. Commonwealth, Huma
tions Commission,* 10 Pa. Commonwealth Ct.
A. 2d 619 (1973). This Court reiterated the
determining the existence of substantial evi
*St. Andrews Development Co., Inc. v. C
wealth, Human Relations Commission,* 10 P
monwealth Ct. 123, 308 A. 2d 623 (1973)
lows:

> " ' " '[S]ubstantial evidence' should
> strued to confer finality upon an admini
> decision on the facts when, upon an exam
> of the entire record, the evidence, includ
> inferences therefrom, is found to be su
> a reasonable man, acting reasonably, *migh*
> reached the decision; but, on the other h
> a reasonable man, acting reasonably, *cou*
> have reached the decision from the eviden
> its inferences then the decision is not sup
> by substantial evidence and it should
> aside." ' " 308 A. 2d at 625. (Emphasis i
> inal.)

In the case now before this Court the Comm
strongly maintains that the record does, in fact,
substantial evidence to support its findings o
and conclusions of law. It is not disputed th

Appellees were told on two occasions that there were no vacancies at Walnut Garden Apartments on or after November 4, 1971. However, there is evidence in the record that clearly indicates vacancies did exist. There is the undisputed testimony of Diane Eardling, a white female, who stated that Appellant Span told her that vacancies did exist, one in particular on the first floor which would accommodate her needs as she had a child. Ms. Eardling testified as follows:

> "The Witness: She told me to come in and sit down and she called the manager. So, then, I sat there—it was like a little desk and she called him and he came in and he sat down and he asked, you know, what did I want and I asked him if he had any two-bedroom apartments and he said yes and he asked me if I had any children and I told him one.
>
> By Mr. Levine:
>
> Q. Excuse me, let me get this straight. You asked him if there were any apartments available?
>
> A. Yes.
>
> Q. What was his response?
>
> A. He said yes.
>
> Q. Then what happened?
>
> A. Well, he told me he didn't like to rent to families with children, but he said, you know, he said he would rent to them and he would like to put them on the first floor. So I asked him, I said, 'Well, do you have anything available on the first floor now?' He said yes, that he had one available, but it was being painted, but I could look at it. He told me that I would have to bring my husband back later." (R. 45a)

It was at about this time that Mr. Span w his door to speak with the Appellees. Within e of Ms. Eardling, he told them there were no cies, having just told Ms. Eardling the contra

In addition, Mr. Span discussed vacancies Kathleen Guinn, a Commission field represen during her investigation of this case. He ad to her that a vacancy did exist on or about N ber 4, 1971 (R. 55a).

As further evidence that vacancies existed, A lees testified that they saw apartments that app to be vacant, although they could not establish cifically which apartments they saw.

Also, Ms. Guinn testified that on Novemb and 4, 1971, an advertisement was placed in the ver County Times for the rental of apartments at nut Garden Apartments (R. 88a-90a).

Of course, once it is shown that a vacancy di ist, it must also be shown that the reason Appe were denied an opportunity to rent an apartment because of their race. In *St. Andrews Develop Co., Inc.*, supra, at p. 626, this Court noted,

> ". . . We recognize that in human relat cases it is rare for the respondent to have n positive statements or to have performed pa acts of discrimination; and therefore, m cases must be resolved by findings of disc ination based upon inferences and circums tial evidence. . . ."

In this case, there is no admission of discrimination. However, there are inferences and circumstantial evidence which support the conclusion of the Commission that the Appellees were denied housing because of their race.

As has already been shown, Diane Eardling, a white woman, was told of vacancies, while the black Appellees were not. No explanation for this differentiation in treatment was offered by Appellants. Further, Mr. Span's reaction to the Appellees is relevant to the issue of discrimination because of race. Ms. Eardling testified regarding Mr. Span's reaction as follows:

> "Q. Now, after Ms. Lee and Mr. Yokely left, did Mr. Span then return to you?
>
> A. Yes.
>
> Q. What was the conversation at that time?
>
> A. When he came from the door, he said, those blacks and he was angry, you know, because they kept him at the door so long. They asked him about the application, because Gwen asked if she could fill out an application and he said no, because she said in case you ever have anything available and he said that no, he didn't think that would be necessary.
>
> Q. Now, did he mumble this or did he—
>
> A. No. He said it loud enough. It was very clear.
>
> Q. Now, when Mr. Span returned, did you continue to talk about rental?
>
> A. Yes." (R. 46a)

Looking at the record as a whole, it becon
that the Appellees did not just believe they
ing discriminated against. Substantial evide
merely subjective in nature, exists to show th
time of Appellees' inquiries there was a vac
the Walnut Garden Apartments and that th
denied that vacancy because of their race.
tion to Mr. Span's statements that a vacanc
ed, inferences and conclusions can be draw
the fact that Mr. Span did not permit Appe
enter his office at any time and talked t
through his screen door, and further, that he
them the opportunity to submit an application
future vacancies. Based upon this substant
dence, the Pennsylvania Human Relations C
ison quite properly determined that the Ap
did violate section 5(h) of the Pennsylvania
Relations Act and it urges this Court to now
that determination.

**II. The Pennsylvania Human Relations C
sion has the authority to order the Appellants
certain affirmative actions to effectuate the p
of the Pennsylvania Human Relations Act.**

Section 9 of the Pennsylvania Human Re
Act, supra, sets forth the authority of the C
sion with regard to final orders, as follows:

> "If, upon all the evidence at the heari
> Commission shall find that a respondent
> gaged in or is engaging in any unlawful d

> inatory 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 an order requiring 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, 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."

It is the position of the Commission that the final order issued in this case details certain affirmative actions that will best effectuate the purposes and policies of the Pennsylvania Human Relations Act, and is clearly within the statutory authority granted to the Commission by the Legislature.

Appellants maintain that the Commission erred in entering paragraphs two and three of the final order which require Appellants to rent an apartment to the Appellees. It is clear from a reading of the Act that

such an order has been specifically authorized
Legislature, contrary to the position taken
Appellants. Appellants' argument seems to s
proposition, however, that the final order is n
ported by the findings of fact. That there w
stantial evidence to show that Appellees were
rental of an apartment at Walnut Garden
ments because of their race has been demon
in the preceding section. Such being the cas
quite proper for the Commission to order App
to offer an apartment as specified in the final

Appellants also maintain that the Commiss
ceeded its power and authority with respect
remainder of the final order excluding par
eleven. However, the entire order is intended
sure that the Appellants will act in a manner s
prevent any future acts of discrimination. In
ing, the Commission has acted in its discret
protect all citizens of the Commonwealth. The
mission is clearly empowered to promulgate
which extend the scope of relief beyond indi
complainants. As stated by the Supreme Co
Pennsylvania:

> "It is beyond cavil that the Human Rel
> Act was intended, by the Legislature, to p
> more than individuals unlawfully discrim
> against—of equal importance is the Act's
> that the public generally be protected from
> discrimination. . . . Accordingly, it is . .
> cumbent upon the Commission to not only
> ion an effective remedy for the individu
> grieved, but also to guard against and det

same discriminatory action from recurring, to the detriment of others within the same class. . . ." *Pennsylvania H. R. Comm. v. Alto-Reste Pk. Cem. Assn.*, 453 Pa. 124, 306 A. 2d 881, 888 (1973).

It is for this reason that specific procedures have been set out to insure that all rental applicants will be treated fairly and without discrimination.

In the *Alto-Reste* case, supra, the Supreme Court specifically upheld provisions of a final order similar to the one issued in the instant case. One such section required a cemetery to maintain wirtten records indicating whether a person had been refused burial, and the reasons therefor, sending copies to the family of the deceased and to the Commission. This is quite similar, as recognized by the Appellants, to section 7(a) through (e) of the instant order, and should be upheld on that basis. Another section similar to one upheld by the Supreme Court is 5(a) through (c), requiring all advertisements to be placed in general circulation newspapers and include and utilize on all printed material for circulation to the public an indication of an equal opportunity policy. Again, this provision should likewise be upheld.

Appellants also assert that paragraphs eight, nine and ten be stricken. These paragraphs concern the assignment of future tenants, instructions to Appellants' employees regarding the implementation of this order, and the right of the Commission to inspect records required to be kept. These provisions are clearly within the power of the Commission granted

by the Legislaure to eradicate the evils of dis
ination. As stated in *Alto-Reste,* supra, at 88

". . . the expertise of the Commission in
ioning remedies is not to be lightly rega
. . . '. . . *"The relation of remedy to poli*
peculiarly a matter for administrative co
tence" . . . "In fashioning remedies to und
effects of violation of the Act, the Board [
mission] must draw on enlightenment g
from experience" ' " (Emphasis theirs.)

Furthermore, particularly with regard to req
ments for the inspection of records, the Court sta

". . . *record inspection provisions are n*
sary to enable ready check of compliance
the public future aspects of a remedial o
Efforts to remain free to discriminate or to
der the enforcement of the law cannot be
erated any more than attempted subtle evasic
Alto Reste, supra, at 889, citing with appr
Jackson v. Concord Co., 54 N.J. 113, 124,
A. 2d 793, 799 (1969).

It is the position of the Pennsylvania Human
lations Commission that all of the provisions of
final order issued and served upon Appellants in
case are designed to achieve ends which should e
tuate the policies of the Human Relations Act
should therefore be sustained by this Court.

III. The Pennsylvania Human Relations Commission has the authority to order a respondent who has unlawfully discriminated to compensate an injured party for embarrassment, humiliation, and emotional upset resulting from the discriminatory action.

Paragraph 12 of the instant final order provides as follows:

> "That the Respondents shall pay the Complainant Gwendolyn Lee the sum of One Thousand Dollars ($1,000.00) for embarrassment, humiliation and emotional upset as a result of their discriminatory actions. The execution of this provision of the Order shall be held in abeyance until the Supreme Court of Pennsylvania issues an opinion on the power of the Commission to make such awards."

The above provision was based upon the finding of the Commission that Appellee Lee suffered emotional and physical distress requiring medical treatment as a result of the Appellants' discriminatory action. With due respect to this Honorable Court and its decisions cited by Appellants in their brief, the Commission believes such an award is justiifed should the Pennsylvania Supreme Court determine that there is the requisite authority for the Commission to promulgate that aspect of the order. It is, therefore, conditional upon such a determination by the Supreme Court.

CONCLUSION

For the reasons stated herein, the Penn
Human Relations Commission prays this H
Court uphold its findings of fact, conclusion
decision, and final order in this case.

Respectfully submitted,

SANFORD KAHN,
General Counsel,
MARK A. SENICK,
Assistant General Co
Attorneys for App