IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 871 C. D. 1975

PENNSYLVANIA HUMAN RELATIONS COMMISSION

vs.

BOROUGH OF BENDERSVILLE,
THE BOROUGH COUNCIL, DALE E. CLARK, Mayor
GEORGE SHRIVER, President of Borough Council

Appellants

BRIEF FOR APPELLEE

Appeal from Final Order of Pennsylvania Human Relations Commission dated June 1, 1975
Docket No. H-1945

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COUNTER HISTORY OF THE CASE

This case came to the Pennsylvania Human Relations Commission (The "Commission") when the Complainant, Pedro Vega, filed a complaint on December 27, 1972 charging he had been "denied the right to build a commercial-residential housing unit on Main Street, Bendersville, Pennsylvania, because of his National Origin, Puerto Rican, in violation of Section 5(h)(3) of the Pennsylvania Human Relations Act (The "Act"), 43 P.S. §951 et seq. The Complaint charged that the alleged unlawful discrimination took place on or about July 10, 1972 and was a continuing violation.

On January 31, 1973, the Complainant executed an amended complaint naming as Respondents The Borough of Bendersville, the Borough Council, George Shriver, President of the Borough Council, and Dale E. Clark, Mayor of Bendersville.

The Commission's investigation established probable cause to credit the allegations of the complaint whereupon the Commission endeavored to conciliate the matter by conference, conciliation and persuasion. These endeavors were unsuccessful and on May 28, 1974, a Public Hearing was convened pursuant to §9 of the Act. The Hearing Panel consisted of Commissioner Doris M. Leader, Chairperson of the Panel, and Elizabeth M. Scott and E. E. Smith. Sanford Kahn, Esquire, represented the Complainant and Walter W. Wilt, Esquire, represented the Respondents. Mark Senick, Esquire, served as Legal Advisor to the Panel. The

Hearing was adjourned on May 28 and reconvened and completed on July 9, 1974.

The Hearing Panel, upon consideration of the Transcript and the Briefs submitted subsequent to the Hearing by parties, unanimously recommended that the Commission find in favor of the Complainant. The full Commission unanimously adopted the recommendations of the Hearing Panel and entered the Final Order which is the subject of this Appeal.

COUNTER-STATEMENT OF FACTS

The Complainant is of Puerto Rican National Origin. On May 22, 1972, he and his wife purchased the land in question on Main Street in Bendersville from Dale E. Clark for the sum of $1,000. He intended to construct a Spanish-American grocery store on the site, with a residence in the same building for himself and his family. He expected to draw upon the Puerto Rican migrant workers who lived in the migrant camps in the vicinity of Bendersville and Adams County. (R. 75a)

The Complainant had for approximately five years travelled by truck from his house in Mechanicsburg to the Adams County area and pedalled Spanish groceries to the Puerto Rican migrant workers in that area. (R. 73a) This fact was known to the Appellants. (R. 406a)

On June 6, 1972, the Complainant obtained a building permit for his newly-acquired property from Kenneth E. McKee, Secretary-Treasurer of the Borough. The Complainant told Mr. McKee he intended to build a residential-commercial structure with four bedrooms and two bathrooms and the permit reflected this. (C - 1, R. 12a) At the time, Complainant was not aware of the requirement that he obtain a sewage permit, nor was he so advised by Mr. McKee. (R. 82a) After obtaining the building permit, Complainant began work on the site, first tearing down the existing structure, then beginning to build the new structure.

Complainant was advised by his carpenter of the requirements of a sewage permit. (R. 86a)

On June 27, 1972, his application to install a septic tank on his property was approved by Terry Louer, who had been employed as Sewage Enforcement Officer for the Borough of Bendersville for one or two years. (R. 13a, 157a) This application reflects that Louer's approval was for a residential, two-bedroom structure. The Complainant testified that he answered whatever questions he was asked by Louer. He accounted for the discrepancy as a misunderstanding. The Commission found that the Complainant had no intention to deceive and attributed the discrepancy to the evident and obvious difficulty the Complainant had in speaking and understanding English. (Finding of Fact No. 11-R. 37a, 379a)

The Appellants made no effort to resolve the discrepancy between the two permits; rather they advised the Complainant in three successive letters (C-3, 4, and 5, R. 14, 15, 16a) that his permits had been revoked and that he should halt work on his property and reapply for a sewage permit. Although they advised Complainant that he would be reissued a sewage permit if his land was approved by the State, the Appellants knew that the land would not be approved for a septic tank if the State standards were strictly adhered to. (R. 442a)

Complainant, upon being advised of the discrepancy, contacted Mr. Louer and G. E. Robinson, Sanitarian for the Department of Environmental Resources, and attempted to clear up the matter. He explained that he thought Mr. Louer had asked him how many bathrooms there would be and he answered truthfully there would be two, when apparently Louer was inquiring about the number of bedrooms. (R. 233-

234a) Complainant repeatedly sought to secure another permit but, because of the unavailability of a Sewage Enforcement Officer, was unable to have his land tested. (R.101-102a, 141-152a, 195-196a, 233-235a)

After Complainant began working on his new property, tearing down the existing structure, he had several encounters with the Appellant George Shriver, evidencing a gratutious unfriendliness and hostility on the part of Shriver, and an inflexible determination to cause Complainant to cease his work and leave. (R.85a, 91-96a)

The Appellants discussed at a Council meeting on July 12th or 13, 1972 the fact that a Puerto Rican wanted to build a store in their community. (R.144a)

As a result of this discussion, Mr. Shriver contacted G. E. Robinson and asked him to come to the Complainant's site on July 14, 1972, at which time Appellants learned for the first time that the State had to approve the issuance of sewage permits for commercial structures. (R.243a, 405-406a, 422a)

Although Appellants offered several varying reasons to the Complainant for revoking his building and sewage permits, (C-3, 4 and 5, R.14-16a) their explanation at the Public Hearing was essentially that the issuance of a sewage permit for a commercial structure was within the jurisdiction of the State and not the local unit. The Commission found that this given reason was a pretext seized upon by the Appellants because they opposed a Puerto Rican opening a grocery store that would attract largely Puerto Ricans into Bendersville. (Findings of Fact No. 27 - R. 41a)

Although the Borough had some 530 residents and 106 houses according to 1970 Census, no more than two Puerto Rican families lived in Bendersville at the time of the Public Hearing, one having moved in after the filing of the complaint, the other living on the edge of town. (R. 368a, 389a, 457a)

The Commission also established by the testimony of Terry Louer and G. E. Robinson, as well as though the records of previously issued sewage permits, that sewage permits had been issued for other properties which failed to conform to the requirements of state law in essentially the same manner as the Complainant's property, and that many properties in Bendersville with septic tanks installed prior to the time sewage permits were required had surface sewage malfunctions much as could be expected from the Complainant's property, but that the Appellants had never sought corrective action from the state, even though they could have done so. (R. 162-163a, 181-194a, 225-233a, 278-279a, 326-331a)

ARGUMENT

I. WHERE APPELLANTS SINGLED OUT FOR SPECIAL ATTENTION COMPLAINANT'S APPLICATION FOR A SEWAGE PERMIT BECAUSE HE WAS A PUERTO RICAN AND BECAUSE HIS PLAN TO CONSTRUCT A GROCERY STORE WOULD ATTRACT PUERTO RICANS TO THE BOROUGH, AND WHERE THEY REVOKED COMPLAINANT'S SEWAGE PERMIT FOR NON-COMPLIANCE WITH REQUIREMENTS PERTAINING TO SEWAGE PERMITS BUT DID NOT REVOKE FOR SIMILAR NON-COMPLIANCE BY WHITE PROPERTY OWNERS, AND WHERE THE RECORD SUBSTANTIATES THE COMMISSION'S FINDING THAT THEY SO ACTED AGAINST THE COMPLAINANT BECAUSE OF HIS NATIONAL ORIGIN, APPELLANTS HAVE VIOLATED THE PENNSYLVANIA HUMAN RELATIONS ACT.

Appellants totally miss the point when they assert in their Brief,

> Since the Borough Council acted within its scope of authority in revoking Mr. Vega's permit, the propriety of their actions is not a matter for the Human Relations Commission.

While Appellants may otherwise have had authority to revoke Complainant's permit on the grounds it relies on, where the National Origin of the Complainant and the class of persons he hoped to attract to his store was a factor or the principal reason for the decision to revoke, they may not so abuse the Law as an instrument of discrimination.

The Appellants included the Borough of Bendersville, its Legislative body, the Borough Council, and its principal officials. Appellants were charged with a violation of §5(h)(3) which provides:

> It shall be an unlawful discriminatory practice ... for any person to: discriminate against any person in the terms or conditions of selling or leasing any commercial housing or in furnishing facilities, services or privileges in connection with the ownership, occupancy or use of any commercial housing because of the race, color, religious creed, ancestry, sex, national

> origin ... of any present or prospective owner ... or user of such commercial housing. (emphasis added)

Section 4(e) defines person so as to include all of the Appellants:

> The term "person" includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees in bankruptcy or receivers. It also includes but is not limited to any owner, lessor, assignor, builder, manager, broker, salesman, agent, employe, lending institution and the Commonwealth of Pennsylvania and all political subdivisions, authorities, boards and commissions thereof.

Thus the Commission clearly has jurisdiction over any conduct of the Appellants falling within the prohibitions of 5(h)(3).

It is a fundamental to civil rights law that disparate treatment to the disadvantage of a member of a protected class constitutes proof of unlawful discrimination. The Commission found that the Complainant was the victim of disparate treatment at the hands of the Appellants. Specifically, Appellants discriminated in the furnishing of services and privileges in connection with the Complainant's use of his property. By singling out Complainant for special attention because of his national origin and then discriminatorily revoking Complainant's sewage and building permits, Appellants effectively denied Complainant the right to use his property in the manner he intended, to build a grocery store-residence.

This same principle, the abuse of the law as a pretext and device to discriminate, was involved in United Farm Workers vs. City of Delray Beach, Florida, 493 F. 2d 799 (5th Cir. 1974).

The United Farm Workers Union which represented minority farm workers, attempted to build a federally assisted low-income housing project in the city of Delray. Their efforts had been stymied by the refusal of the city to permit the proposed project to tie into the city's existing water and sewage systems. The city stated it had based its decision on a number of non-racial factors such as an anticipated violation of the city's Master Plan and an inability to provide sewer services commensurate with federal standards. The farm workers argued that all of these conditions had obtained in similar cases involving White developers, but that in those instances the city had made an exception to its requirements. The Court of Appeals found that the city had applied the criterion cited in the refusal in a racially discriminatory manner. While up-holding a municipality's right to impose land-use and environ mental restraints within its jurisdiction, the Court found that "a city's claim of land-use planning is hardly credible where the city denies a minority group's request ... if under the same circumstances it would have granted such a request to an all White group."

In Ybarra vs. City of San Jose, 503 F. 2d 1041 (9th Cir., 1974), the Court reinstated a complaint which charged the City with discrimination in administering its zoning ordinances, granting of variances and building permits so as to create an ethnically imbalanced neighborhood. The Court found this racially discriminatory administration of otherwise proper powers was State action which, if "tainted" by racial discrimination, violated the Equal Protection Clause.

The landmark case of Hawkins vs. Town of Shaw, 461 F. 2d 1171 (5th Cir. 1972) held that gross disparity in the provision of municipal services between Black and White areas, regardless of the intent of the town, violated the Equal Protection Clause.

> "By our decision in this case," said Judge Wisdom, concurring, "we recognize the right of every citizen regardless of race to equal municipal services"

In United Farm Workers vs. City of Delray Beach, supra, the Court concluded with language appropriate to the instant case:

> In disposing of this case as we have, we do not pretend expertise in municipal planning ... and we do not in any way intend to minimize the importance of land-use or master plans. On the contrary, we recognize that the protection and controlled use of our environment is of great importance. We would suggest, however, that a city's claim of land-use planning is hardly credible where the city denies a minority group's request for municipal services if under the same circumstances it would have granted such a request to an all-White group. To paraphrase Justice Frankfurter, there comes a point where this Court should not be ignorant as Judges of what we know as men. The city's annexation and land-use policies presented only a facade of propriety. Under that facade, the city practices unjustified racial discrimination. That the constitution forbids. And since it does, so must we.

II. THE COMMISSION FINDINGS AND ADJUDICATION ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

By the Appellants' own admission at the Public Hearing, they called a special meeting to consider the Complainant's plan to build a store in the town because the Complainant was a Puerto Rican.

> QUESTION BY MR. KAHN:
>
> Well, how did it come to your attention in this case? How did Mr. Vega's sewage application permit happen to come to your attention?
>
> ANSWER BY MR. SHRIVER:
>
> Well, again, I can't exactly recall; but it's an unusual case when a Puerto Rican wants to build a store in your town. And this, as a matter of fact, was talked about in the Council meeting. (R. 441-442a)

By Appellants' own testimony, their stated principal reasons for revoking the Complainant's building and sewage permits - that the State must approve the issuance of a sewage permit for a commercial structure - was clearly a facade.

It is clear that the decision to find some way to stop the Complainant from building his store was taken before Appellants knew of the requirement that the State approve the sewage permit.

The special Borough Council meeting to discuss the fact that a Puerto Rican wanted to build a store took place on July 12 or 13, 1972. (R. 144a) As a result of this decision, Mr. Shriver contacted G. E. Robinson, who met with Borough officials on July 14, 1972, at which time Appellants first learned that the State had to approve sewage permits for commercial structures.

QUESTION BY MR. KAHN:

Well, did you have a discussion about the fact that it was store and not a house, as indicated in the agreement?

ANSWER BY MR. CLARK:

That came out with Mr. Robinson from the Department of Environmental Resources and the fact that a commercial building was on the site.

QUESTION:

And that's when it first came out, is that correct?

ANSWER:

Thats when the question came out as far as the law. (R. 405-406a)

Even before the Complainant applied for a sewage permit, his first encounter with the Appellant Shriver was marked by unfriendliness or hostility on the part of Shriver. (R. 85a)

Appellants never indicated any interest in resolving the matter so that the Complainant could complete his store such as they might be expected to, since it would presumably be in the economic interest of the Borough to have a new store which would attract new people into the Borough. One would assume that the Borough would be interested in having new persons visit the town and shop there, unless they felt that there was something undesirable about the class of customers, Puerto Ricans, that the Complainant's store would attract.

Far from seeking to resolve the matter so that Complainant could remain in the town, the Appellants' dealings with the Complainant were characterized by deceit and high-handedness evidencing a determination to see him abandon his plans for a store.

Shriver admittedly tore the sewage permit off of the Complainant's site after the Complainant had received an "unofficial" letter (R.465a) advising him that the permit had been revoked. Prior to that, according to Complainant, Shriver offered to pay him ten dollars for the permit. (R. 92a)

On another occasion, Shriver asked the Complainant's carpenter to see his license and then said to the Complainant, "You're not going to finish this building over here." (R. 96a)

The Appellants continued to insist, in their letters to the Complainant and at the Public Hearing itself, that their action in revoking the permit was taken in some part because of the discrepancy between the building and sewage permits.

That the discrepancy was in good faith and attributable to the Complainant's difficulty with the English language was obvious to the Commission. But for the Appellants' error in failing to adhere to the proper procedure of requiring a sewage permit prior to the issuance of a building permit, the discrepancy would never have occurred. (R. 371a) And if the Complainant was intent on deliberately misleading the Appellants, why did he give the correct information to Mr. McKee in the first instance?

Yet the Appellants characterize and continue to characterize the Complainant's action in this regard as deliberate, and rely on this as grounds for revocation.

Mr. Shriver's comment is significant in this regard. Asked by Commissioner Smith if he felt the language barrier may have accounted for the problem and warranted informal conciliation action to straighten it out, Shriver replied:

> Mr. Vega and I talked the English language. Sometimes I have some trouble understanding a few words that he says, but I've been around Puerto Ricans enough to understand ninety-five percent of their language unless they try to confuse me. (R. 453a)

The record also established that the requirements of the law for the approval of sewage permits had been ignored by Borough officials for some White property owners.

The Standards for Sewage Disposal Facilities in Pennsylvania issued by the Department of Environmental Resources after passage of the Sewage Facilities Act in 1966 set minimum total absorbtion areas for land on which a septic tank is to be installed. The minimum absorbtion area is determined by first determining the percolation rate of the land. If the percolation rate is six to fifteen minutes, a minimum of 175 square feet of land is required per bedroom. The Standard provides that "in every case, sufficient absorbtion area shall be provided for at least three bedrooms." (R. 189-198)

The Appellants complained that the Sewage Enforcement Officer, Louer, in approving the Complainant's application, failed to give him the prescribed percolation test. (C-3, 4 and 5, R. 14-16a) Louer testified that he did not conduct a percolation test for the Complainant's property but approved three or four other applications for septic tanks on land with soil suitable to the Complainant's without administering the test. (R. 16a) However, Louer said he approved the Complainant's application on the assumption that it was for a two bedroom residential dwelling. A greater absorbtion area would be required for the four-bedroom structure which the Complainant actually planned to erect. But the Complainant

established at the Hearing that at least four other sewage perm
approved by Louer for White owners had a total absorbtion area
than the minimum required by the State DER Standards. (R. 190-1
326-330a) Mr. Robinson, who had testified that the Complainant'
land probably would have been unsuitable for a septic tank for fc
bedrooms, said that the other defective applications were similar
in unsuitability to the Complainant's. (R. 279a)

Robinson testified that if a septic tank were installed on "unsuitable" soil it could have two consequences, the contaminatio of the underground water supply and surface malfunction of the sewage. He said that contamination of drinking water was not applicable in that Bendersville had municipal water. (R. 219-220a) As to surface malfunction of the sewage, he said that this condition was prevalent throughout Bendersville on properties, many of them with septic tanks, wih soil indistinguishable as to "suitabilit from that of the Vega property. (R. 225-226a) He said he had never received any complaints from Borough officials about any of these properties. (R. 221a) He said "quite a few" of the properties in Bendersville, many of them with septic tanks, would not qualify for sewage permits under the strict standards invoked against Vega. (R. 228a) He said he had never received any complaints from the Borough or its officials. He said that the Sewage Facilities Act, which for the first time required that a property owner must receive a sewage permit before installing a septic tank, was enacted in 1966 and was prospective. But he pointed out that as to property with evidence of surface sewage malfunction on which septic tanks had been installed prior to 1966, the State had procedures

for dealing with that, procedures which were triggered by a complaint from the affected locality or an individual and that in more than four years that he worked in the area that included Bendersville, neither he nor to his knowledge anyone in his department had received such complaints about properties in Bendersville evidencing surface sewage malfunctions. (R. 231, 233a) Robinson confirmed what was obvious, that no greater threat to public health was posed by surface sewage malfunction from a septic tank installed after 1966 than from one installed before that date.

The foregoing substantial evidence with regard to other properties with similar defects being ignored or tolerated by the Appellants highlights the pretextual nature of their position.

The special role of the fact finder in a case of this kind, where questions of motive and discriminatory intent are involved, must also be borne in mind.

Of course, it could be argued that in spite of Appellants' tolerating defective sewage conditions in properties owned by Whites, they still had a right and a compelling reason for not permitting the Complainant to continue with his structure, since a grocery store is different from a private residence. But this argument is without merit because the Appellants' right to insist that proper standards be met has not been questioned by the Commission. The Final Order reflects this recognition. (See Infra)

What may not be argued by Appellants, it is submitted, is that the national origin of the Complainant, Puerto Rican, was not the reason for the Appellants' decision to look into the Complainant's application. Appellant Shriver admitted this at the Public Hearing.

(At the time of the incident, one Puerto Rican family lived in Bendersville, a rural community with substantial Puerto Ricans living throughout the Adams County area and in and around Bendersville in migrant labor camps.) This being the case, the action of the Respondents is so tainted by invidious discrimination as to violate the Pennsylvania Human Relations Act. (It is well established that the National Origin -- or race -- of the Complainant need not be the sole factor if it was a factor in the alleged discriminatory conduct. (See e.g., Smith vs. Sol D. Adler Realty Co., 433 F. 2d 344 (7th Cir. 1971).

In Kennedy Park Homes Association vs. City of Lackawanna New York, the Plaintiffs charged that the City, its Council and Mayor and other officials, had deliberately rezoned the property which Plaintiffs had selected for low income projects and had declared a moratarium on new subdivisions in order to deny the use of the land to minorities. The second Circuit Court, in an Opinion written by former United States Supreme Court Justice Clark, upheld the trial Court's finding in behalf of the Plaintiffs and wrote these instructive words:

> However, Rule 52(a) of the Federal Rules of Civil Procedure does not permit us to set aside findings unless they are "clearly erroneous," giving due regard to the opportunity of the trial Court to judge the credibility of the witnesses. ... the trial Judge here devoted twenty-two days to the trial. He listened to and observed the witnesses, read and studied the various exhibits, and he was fully informed as to the atmosphere in which the parties acted. The conclusions and findings "as to the design, motive and intent with which men act depend peculiarly upon the credibility given the witnesses by those who see and hear them."

United States vs. Yellow Cab Company, 338 U.S. 338, 341, (1949). This factor is more significant where the state action under inquiry is insidious and subtle rather than direct and open. While it would be our duty to correct clear error, even in findings of fact, we could not do so where the findings have substantial support in the record.

As the Supreme Court said in Burton vs. Wilmington Parking Authority, 365 U.S. 715, (1961): "Only by sifting facts and weighing circumstances on a case by case basis can the "non-obvious" involvement of the State in private conduct be attributed its true significance." (emphasis added) 436 F. 2d, 108 (1970).

III. THE COMMISSION FULLY INFORMED THE APPELLANTS OF THE NATURE OF THE CHARGE AGAINST THEM AND ACCORDED THEM DUE PROCESS.

This complaint was filed against Appellants on December 22, 1973 naming the Appellant Clark and the Borough Council, which included the Appellant Shriver. An amended complaint was served on January 31, 1973 adding the Borough of Bendersville as a Respondent. Thereafter the Commission engaged in conciliation endeavors with the Appellants who were represented by their Solicitor, Robert Campbell, who had entered his appearance with the Commission. (R. 46la) The issue of the case and the facts were of course clearly discussed in the course of conciliation.

In April of 1974, the Appellants were notified that the matter had been set down for a Public Hearing. On May 8, 1974, the Commission received a request for a Bill of Particulars from Mr. Wilt. Mr. Kahn, General Counsel of the Commission, immediately contacted Mr. Wilt and invited him to inspect his file in this case. Mr. Wilt came to Mr. Kahn's office and reviewed the file. It came, therefore, as a complete surprise to Mr. Kahn when Mr. Wilt submitted on the Friday before the Public Hearing a Motion for More Specific Pleadings. (R. lla)

Appellants' Brief acknowledged that Mr. Wilt had examined the Commission's file, but stated:

> However, a review of that file added very little, if anything, to Appellants' knowledge of the case against them and they were still without adequate notice of what charges would be brought against them, what the Commission would attempt to prove or the names of the Commission's witnesses...

In fact, the Commission file contained statements from all of the principal witnesses who testified for the Complainant at the Public Hearing and all of the documentary evidence which was introduced at the Hearing, as well as a good deal of other information.

At the Hearing, Mr. Wilt stated:

> I should add, as I indicated to Mr. Kahn, after I filed the Motion for Bill of Particulars, he did give me the opportunity to review matters in his file without filing amended complaint inserting more detail.
>
> He did, however, give me the opportunity to review a great deal of material. And I think, on the basis of this review, I have been greatly more informed as to what the Commission intends to prove. (R. 55a)

Certainly, due process requires that Appellant be adequately informed of the nature of the charges against him so that he may adequately prepare his defense. Here, Appellants were in fact adequately informed, informed in far more detail than the most particular complaint can ever set forth, of the nature of the charges against them.

It is clear that the Appellants were not prejudiced in the preparation of their case. Indeed, the Public Hearing was adjourned on May 28, 1974 before the Complainant had rested his case and was not resumed until July 9, 1975, at which time the Complainant concluded his case and Appellants presented their case, calling four witnesses.

The Appellants had almost eighteen months to prepare for this Hearing. They were represented by Counsel throughout that period. They were in fact aware with great particularity of the nature of

Mr. Vega's complaint. From the time the complaint was served the Appellants insisted, as they did at the Public Hearing, that the decision to revoke the building and sewage permits was taken because of the discrepancy betweeen the building and sewage permits and because the Department of Environmental Resources, not the Borough, was required to approve sewage permits for a grocery store and was not connected with the Complainant's national origin. The Complainant's position, of course, was that the decision was taken because of the Complainant's national origin.

The fact that the Appellants on the eve of the Hearing retained a new Counsel is, of course, irrelevant. Nevertheless, that new Counsel was in fact informed, through access to the Commission file, of virtually all the particulars known to the Complainant and the Commission.

IV. THE FINAL ORDER WAS WITHIN THE COMMISSION'S AUTHORITY AND, UNDER THE CIRCUMSTANCES, APPROPRIATE.

The Appellants, in attacking the Final Order, complained that the Complainant will be unjustly enriched by the remedy the Commission has fashioned.

This is indeed ironic for, of course, the opposite is true. The Commission recognized that it was obviously impossible to measure the full extent of the Complainant's monetary losses caused by Appellants' unlawful discrimination. Clearly, the Complainant expected to and presumably would have earned profits by opening a grocery store in Bendersville. Some three years have elapsed since he was forced, unlawfully so the Commission found, to abandon construction. The Commission, because of the impossibility of measuring such losses, made no effort to order such compensatory damages. To that extent, Complainant has been irreparably harmed by Appellants' unlawful conduct and can never been made whole.

In Pennsylvania Human Relations Commission vs. Alto-Reste Park Cemetary Association, 453 Pa. 124 (1973) 306 A. 2d 881, the Court expressly recognized that the "expertise of the Commission in fashioning remedies is not to be lightly regarded." The Court then adopted the standard of review which the United States Supreme Court declared in Fibreboard Paper Products Corp. vs. N.L.R.B., 85 S. Ct. 398, 406-407, (1964):

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

Section 9 of the Human Relations Act authorizes the Commission, upon finding unlawful discrimination, to order the Respondent to cease and desist and to order the Respondent to take such affirmative action "as, in the judgment of the Commission, will effectuate the purposes of the Act."

The Commission found the Appellants had engaged in unlawful discrimination in revoking Complainant's building and sewage permits because of his national origin. Having so found, it had to consider what remedy would best effectuate the purpose of the Act of eliminating discrimination in housing. The Commission has previously taken a policy position that, in appropriate cases, the awarding of compensatory damages to a Complainant will best effectuate this purpose by deterring other persons from engaging in such unlawful conduct. (The Commission's authority in this regard is, of course, under review by the Pennsylvania Supreme Court in Pennsylvania Human Relations Commission vs. Zamantakis, 10 Pa. Commonwealth Ct. 107 (1973), now waiting a decision by the Pennsylvania Supreme Court. And the provision of the Order

requiring compensatory damages is contingent upon the Court's upholding the Commission's authority. If the Court holds the Commission to be without such authority, the Complainant will simply have no relief under the Act.)

In the instant case, in the Commission's judgment, the Act could best be effectuated by ordering Appellants to cease and desist from this kind of conduct and taking steps to ensure such compliance, by requiring Appellants to submit objective criteria, as well as by making the unlawful conduct as costly as possible to Appellants as a deterrent to others, and finally by enabling the Complainants to complete his store and do business in Bendersville should he still so desire. Clearly, it would be an ineffective order that did not make it realistically possible for the victim of the attempt to exclude to locate and then do business in Bendersville. Otherwise, the Appellants would have achieved their unlawful purpose. Indeed, it may still succeed in that purpose should the Complainant decline to resume work after the lengthy delay, under such unpleasant circumstances.

Appellants also apparently complain of the two-step hearing procedure followed in this case.

In the judgment of the Complainant's Counsel, it was most appropriate under the circumstances to ask for bifurcation of the "merits" and "remedy" aspects of the case. The Commission agreed.

The advisability of such an approach seems apparent. Clearly, there would be a substantial delay between the Public Hearing and the adjudication of the case. There was. If the Complainant's position was upheld, there would in all likelihood be an appeal. There was. The remedy eventually adopted by the Commission required

current data. That is, the appraiser's report must be based on the facts as they existed when the Appellants would be required to carry out the provisions of the Order. Obviously, an appraiser's report issued in May or July of 1973 would be already outdated.

Secondly, the interests of administrative and judicial economy also dictated that the remedy stage be separated from the Hearing on the merits. If the Complainant failed to establish liability on the part of the Appellants, then the expensive procedures, involving the retaining of an expert appraiser, and the time-consuming preparation and consideration at the Hearing of the evidence bearing on the remedy, would be unnecessary. See Love vs. Pullman Company, 10 EPD ¶10, 288, (D. of Colo., 1975), Pettway vs. American Cast Iron Company, 7 EPD ¶9291 (5th Cir. 1974).

The Final Order carefully included a provision for an evidentiary hearing, with Appellants afforded prior access to all information bearing on damages and cross-examination.

It is submitted that not only did the Commission have the administrative discretion and authority to fashion this remedy, but that it exercised its discretion wisely and with the utmost responsibility.

V. ALL THE APPELLANTS WERE PROPER PARTIES.

As to the Appellants the Borough of Bendersville and the Borough Council, it is sufficient to note that Section 4(a) of the Act expressly defines "person" to include "all political subdivisions, authorities, boards and commissions thereof."

Appellants argue that the individually-named Respondents, Borough Council President George Shriver and Mayor Clark, are clothed with absolute immunity under the doctrine of Montgomery vs. City of Philadelphia, 392 Pa. 178 (1958) and DuBree, Jr., Exr. vs. Commonwealth, 8 Commonwealth Ct. 567 (1973). See also Jonnet vs. Bodick, 431 Pa. 59 (1968). The instant case is clearly distinguishable.

In both Supreme Court cases cited above, the theory of liability depended upon the doctrine of respondeat superior. The Court held that the high public officials of the political subdivisions were protected by an absolute immunity from civil liability when acting officially and within the scope of their authority. Thus, where the agents are immune, "... it follows that the city cannot be held liable therefore on the theory of respondeat superior." Montgomery vs. City of Philadelphia, supra. Similarly, in DuBree, supra, the governmental body, the Commonwealth, was immune from civil liability under the doctrine of sovereign immunity.

Under the Pennsylvania Human Relations Act, governmental bodies, including the Commonwealth, were by Section 4(a) expressly made subject to the jurisdiction of the Commission -- and subject to any remedial order "which in the judgment of the Commission will

effectuate the purposes of the Act."

Thus, even the doctrine of sovereign immunity was abolished by the Legislature with regard to violations of the Pennsylvania Human Relations Act. Section 5 clearly sets forth that "any person" is within the proscriptions of the section and will be subject to all the provisions of the Act, including the remedial Section 9, including, inter alia, back pay. Nothing in the Act suggest that high public officials are immune from any part of the Act.

The Commission cannot believe that the rule providing absolute immunity for high public officials, even for malicious and wanton acts, will be applied to high public officials, such as the individual Appellants, for deliberate and intentional racial or, as in this case, national origin discrimination. This factor was not included on the scale when the Court in Montgomery vs. City of Philadelphia, weighed the balancing interests and concluded that the public interest required absolute immunity.