

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

PENNSYLVANIA HUMAN RELATIONS :
COMMISSION, :
Complainant :
vs. : DOCKET NO. H-2435
ARNOLD J. BRYAN :
T/A WATERVIEW LTD., PARTNERSHIP :
d/b/a WATERVIEW APARTMENTS, :
Respondent :

HISTORY OF THE CASE

This case arises on the complaint of the Pennsylvania Human Relations Commission dated February 21, 1975, as amended on January 3, 1977, alleging that the Respondent, Arnold J. Bryan, T/A Waterview Ltd., Partnership d/b/a Waterview Apartments, violated §5(h) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §955(h), by withholding information concerning available commercial housing for rent from a prospective lessee because of her race, black. The complaint also alleges that the Respondent violated §5(j) of the Act, 43 P.S. §955(j), by its failure to post a copy of the Pennsylvania Human Relations Commission fair housing notice.

Pursuant to §9 of the Act, probable cause was found to credit the allegations of the complaint and, conciliation failing, a hearing on the merits of the complaint was held on October 6, 1977 and November 3, 1977 at the Philadelphia Regional Office of the Commission before a hearing panel consisting of Commissioner Everett Smith, Hearing Chairperson, Commissioner Alvin Echols, Esquire, and Commissioner Doris Leader. Benjamin G. Lipman, Esquire served as Legal Advisor to the panel.

The case for the Complainant was presented by James D. Pagliaro, Esquire, case for Respondent presented by Barry W. VanRensler, Esquire.

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FINDINGS OF FACT

1. Complainant herein is the Pennsylvania Human Relations Commission, (the Commission), 711 State Office Building, Broad and Spring Garden Streets, Philadelphia, Pennsylvania, 19130.
2. Respondent herein is Arnold J. Bryan, T/A Waterview Apartments, 2 Waterview Road, West Chester, Pennsylvania.
3. The Respondent-operated Waterview Apartments are "commercial housing" within the meaning of §4(j) of the Pennsylvania Human Relations Act (the Act); Respondent is a "person" within the meaning of §4(a) of the Act; all the jurisdictional prerequisites of §5(h) and §5(j) of the Act are satisfied.

4. From October 17, 1974 to the date of the hearing in this case Mrs. Mary Martorana was employed in the capacity of Manager at Respondent's Waterview Apartments (Tr. 115) and in that capacity was Respondent's agent authorized to provide information to prospective tenants and to initiate the process whereby applicants entered into agreements for the lease of one of Respondent's apartments.
5. On February 3, 1975, just before noon, Mrs. Martorana was the victim of a robbery. Her handbag was stolen from her office at Respondent's apartment complex. The event left her emotionally upset (Tr. 116-120).
6. At approximately 2:05 p.m., February 3, 1975, Jane Lowenstein, a white female and a Commission investigator, (Tr. 94), approached Mrs. Martorana's Waterview Office, the "Rental Office", and inquired if there was a one or two bedroom apartment available. (Tr. 97-98)
7. After questioning Ms. Lowenstein, Mrs. Martorana advised her that a two bedroom apartment would be available for March at \$225.00 per month plus electricity. She showed Ms. Lowenstein around the Rental Office which was also a sample two bedroom apartment and gave Ms. Lowenstein her business card (Tr.99).

8. At approximately 2:16 p.m., February 3, 1975, Eileen Burke, a black female and a Commission investigator (Tr. 27), approached Mrs. Martorana's office and inquired if there was a one or two bedroom apartment available (Tr. 30-33).
9. Mrs. Martorana, without any further questioning of Ms. Burke, advised her that she had nothing available (Tr.33).
10. At approximately 3:30 p.m., February 3, 1975, Joel Harnick, a white male and a Commission investigator (Tr. 38-39), approached Mrs. Martorana's office and inquired if there was a one or two bedroom apartment available (Tr. 42).
11. Mrs. Martorana told Mr. Harnick that apartment Q-11 was immediately available for \$225.00 per month plus electricity. She gave Mr. Harnick a key to inspect the apartment and a business card (Tr. 43).
12. A federal Department of Commerce survey taken around the year 1972 of the Standard Metropolitan Statistical Area (SMSA) of West Chester, Pennsylvania, which includes the area in which the Waterview Apartment complex is located, revealed that about 16% of the people living in the SMSA were black (Tr. 63-64, Exh. C-6).
13. In February, 1975, 7 of the 199 total units at the Waterview Apartment complex were occupied by blacks, or approximately 3.5% (Tr. 61-62, Exh. C-4).

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CONCLUSIONS OF LAW

1. Substantial evidence was not introduced to show that Respondent failed to post or exhibit prominently a fair practices notice distributed by the Pennsylvania Human Relations Commission.
2. Substantial, un rebutted evidence was introduced showing that Respondent's agent provided different treatment regarding the availability of rental units, rent rates, and courtesies of the rental office to a black person than was provided to two white persons and there is no apparent or reasonable explanation for such different treatment other than race.

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OPINION

The amended complaint in this case alleged violations of §5(h) and §5(j) of the Pennsylvania Human Relations Act (the Act). In pertinent part §5(h) says:

§5 It shall be an unlawful discriminatory practice...
(h) 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 (or) color...of any prospective owner, occupant or user of such commercial housing...

Commonwealth Court has held "that this legislation was intended to prohibit the withholding of information on housing availability because of race or color", Tomlinson Agency

v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission, 11 Pa. Cmwlth. 227, _____, 312 A.2d 118,120 (1973),

that "the term 'prospective owner, occupant or user' in Section 5(h)(1) of the Act must be interpreted to mean prospective in the eyes of the beholder, i.e., the real estate broker or salesman", J. Howard Brandt, Inc. v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission, 15 Pa. Cmwlth. 123, _____, 324 A.2d 840, 843 (1974), and that "the use of testers is a permissible method under the statute to assist the Commission in making a determination on whether a complaint should be filed", Brandt, supra, 324 A.2d at 842. The Commission takes the collective effect of these holdings to mean that a violation of the Act is established where substantial evidence supports a Commission finding that black and white testers, because of their race, have been given different information about the availability of rental property from renters who perceive them to be bona fide apartment seekers.

In Tomlinson, supra, Brandt, supra, and Gorchov Brothers Real Estate v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission, 14 Pa. Cmwlth. 310, 324 A.2d 405 (1974), Commonwealth Court reversed Commission orders based upon findings of discrimination in housing test cases. However, in all three of those cases evidence in support of the complaint was limited to the testimony of two testers and reversal was based upon insufficiency of the evidence. The case at bar involved the so-called "sandwich test" where a white, then a black, then a white tester confronted Respondent in rapid

succession with identical requests for information. Evidence was also introduced to show the disproportionately low percentage of black persons occupying Respondent's apartments relative to the apparently available pool of prospective black tenants.

In Tomlinson, supra, 312 A.2d at 121, Commonwealth Court appears to suggest that evidence of a pattern of discrimination would bolster a case based upon the testimony of testers. In both Tomlinson and Brandt, supra, the court indicates that providing different information to just two testers may be due to inadvertence or ordinary human error; that additional evidence is necessary. The statistics introduced in this case showing significant underrepresentation of blacks in Respondent's apartments are just such additional evidence.

Statistics of this character are commonly held to be significant evidence in discrimination cases. In D.C. Williams v. Matthews Company, 499 F.2d 819 (8th Cir. 1974), for example, the court stated:

Where a black buyer meets the objective requirements of a real estate developer so that a sale would in all likelihood have been consummated were he white, and where statistics show that all of a substantial number of lots in the development have been sold only to whites, a prima facie inference of discrimination arises as a matter of law if his offer to purchase is refused.

The Commission specifically rejects Respondent's contention that he is deprived of such notice as is required by the Due Process clause of the Fourteenth Amendment to the U.S. Constitution

where statistical evidence is introduced in a case alleging a singular act of discrimination. The preceding discussion should make plain the Commission's agreement with the D.C. Williams court that statistical evidence of a pattern and practice of discrimination is probative with respect to allegations that singular discriminatory acts have taken place. Where such statistical evidence is only introduced for this limited purpose, where there is no attempt to prove or to find a pattern and practice of discrimination, and where in fact the only findings made relate to the very specific event alleged in the complaint the Commission cannot agree that there has been defective notice.

Both the Brandt and Gorchov decisions rely in part on the court's observation that the Commission made no determination in either case that any rental unit was actually available when the black tester made inquiry. In this case too there is no specific finding of actual availability. However, the Commission considers that this defect in the earlier cases is overcome by use of the "sandwich test". While the use of only two testers leaves open the possibility that an event intervening between their inquiries will actually render legitimate a change in information provided the two testers, adding a third tester, a white person to make inquiry following the original white and then the black testers, makes such an intervening event the remotest of possibilities.

Accordingly, the Commission finds that there is on the record of this case substantial evidence that Respondent has violated §5(h) of the Act.

The Commission does not find that Respondent failed to post a fair practices notice in violation of §5(j) of the Act.

That section says:

§5 It shall be an unlawful discriminatory practice...

(j) For any person subject to the act to fail to post and exhibit prominently in his place of business any fair practices notice prepared and distributed by the Pennsylvania Human Relations Commission (emphasis added).

While there is some evidence on the record suggesting that the Commission periodically prepared such notices (Tr. 104-105), there is absolutely no evidence that one was ever distributed to the Respondent.

Furthermore, Commission investigator Eileen Burke, who testified that she did not see a fair practice poster, also testified that she never entered the Rental Office, that she could only see part of one room of the office from where she was standing outside the office, and that she only stood there about one minute (Tr. 33-34). Investigator Harnick gave no testimony to indicate whether or not he saw a poster, and investigator Lowenstein, who testified that she did not see the poster on display (Tr. 100), gave no indication whether or not she was looking for one or if it was commonly her practice to look for one.

To the contrary, Respondent Bryan testified that the poster is definitely on display now and while he could not recall with certainty that it was on display on February 3, 1975, "it has been (his) general rule to keep all the rules and regulations of the Human Relations Commission" (Tr. 170-171).

On the basis of this record the Commission cannot find substantial evidence of a §5(j) violation.

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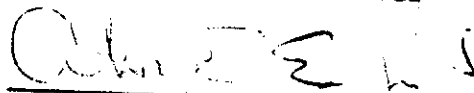
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RECOMMENDATION OF HEARING COMMISSIONERS

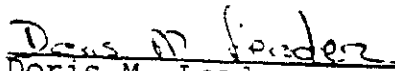
AND NOW, this 27th day of February, 1978,
upon consideration of all the evidence presented at the public
hearing in the above-captioned matter, the Hearing Commissioners
recommend to the entire Commission that the attached Findings
of Fact, Conclusions of Law, Final Order, and Opinion be adopted.



E. E. Smith
Presiding Commissioner



Alvin E. Echols, Esq.
Commissioner



Doris M. Leader
Commissioner

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COMMISSION'S DECISION

AND NOW, this 27th day of February, 1978,
upon the recommendation of the Public Hearing Commissioners
and upon all the evidence at the Public Hearing of this case,
the Pennsylvania Human Relations Commission determines that
Respondent has violated §5(h) and has not violated §5(j) of
the Pennsylvania Human Relations Act, Act of October 27, 1955,
P.L. 744 as amended, 43 P.S. §951 et seq. Accordingly, the
Commission adopts the attached History of the Case, Findings
of Fact, Conclusions of Law, Opinion, and Final Order.

PENNSYLVANIA HUMAN RELATIONS
COMMISSION

By: Joseph X. Yaffe

JOSEPH X. YAFFE
CHAIRPERSON

ATTEST:

Elizabeth M. Scott
ELIZABETH M. SCOTT
SECRETARY

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FINAL ORDER

AND NOW, this 13th day of ~~March, 1978,~~
upon consideration of the Findings of Fact, Conclusions of
Law, Opinion, and Commission's Decision, the Pennsylvania
Human Relations Commission hereby

ORDERS:

1. That the Respondent, agents, and employees will fully comply with the Pennsylvania Human Relations Act, as amended, and will henceforth cease and desist from directly or indirectly discriminating on the basis of race, or color in the terms, conditions or privileges of the rental of any and all

- commercial housing accommodations which the Respondent owns or operates, or in the furnishing of advantages, privileges, facilities or services in connection therewith.
2. That the Respondent, agents, and employees shall take the following affirmative actions which, in the judgment of the Commission, will effectuate the purposes of the Pennsylvania Human Relations Act.
- a) Offer full, equal and non-discriminatory assistance without regard to race or color to all persons who come to the Respondent seeking assistance regarding commercial housing accommodations.
 - b) Immediately issue copies of this Order to all employees and agents as well as written instructions directing them to abide by this Order and to comply with the Act.
 - c) Furnish the Commission with a copy of said instructions within ten(10) days of the effective date of this Order.
 - d) Post the Fair Housing Practices Notice citing the provisions of the Pennsylvania Human Relations Act relating to housing in a conspicuous and well-lighted place in the normal place of business where both present and prospective tenants will normally see it and be able to read it.
 - e) For a period of one(1) year from the effective date of this Order, send to the Commission a monthly report

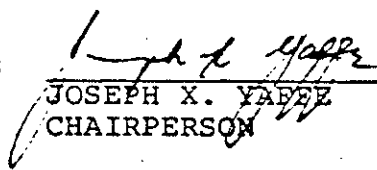
concerning the Waterview Apartments setting forth:

1. each apartment number and size of the unit for which a notice of intent to vacate has been received during the preceding month along with the anticipated date of availability;
 2. the name, address, telephone number, and race of every person who has applied for an apartment during the preceding month; and
 3. the name, race, and apartment number of all new occupants.
- f) For a period of one(1) year from the effective date of this Order, maintain a registry of the names, addresses phone numbers, and race of all persons seeking to, applying for, inquiring about or requesting information concerning the availability of commercial housing accommodations at the Waterview Apartments.
- g) For a period of one(1) year from the effective date of the Order prepare and post in a conspicuous place, a unified listing of all available units in the Waterview Apartments. All persons seeking information regarding units shall be referred to this unified list. Any information given by the Respondent, agents, or employees regarding units not on the list shall be construed as a violation of this Order.

- In
- h) Permit any person to make application for an apartment without regard to whether a vacancy then exists.
 - i) Include in all advertising of availability of commercial housing at the Waterview Apartments the words "Equal Opportunity Housing". The Respondent may, in addition, use the Equal Opportunity Logotype.
3. Any infraction of this Order by an employee of the Respondent constitutes an infraction by the Respondent of record.


PENNSYLVANIA HUMAN RELATIONS
COMMISSION

BY:



JOSEPH X. YAFFE
CHAIRPERSON

ATTEST:



ELIZABETH M. SCOTT
SECRETARY

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

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OPINION

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Commonwealth Court has held "that this legislation was intended to prohibit the withholding of information on housing availability because of race or color", Tomlinson Agency v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission, 11 Pa. Cmwlth. 227, _____, 312 A.2d 118,120 (1973),

that "the term 'prospective owner, occupant or user' in Section 5(h)(1) of the Act must be interpreted to mean prospective in the eyes of the beholder, i.e., the real estate broker or salesman", J. Howard Brandt, Inc. v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission, 15 Pa. Cmwlth. 123, _____, 324 A.2d 840, 843 (1974), and that "the use of testers is a permissible method under the statute to assist the Commission in making a determination on whether a complaint should be filed", Brandt, supra, 324 A.2d at 842. The Commission takes the collective effect of these holdings to mean that a violation of the Act is established where substantial evidence supports a Commission finding that black and white testers, because of their race, have been given different information about the availability of rental property from renters who perceive them to be bona fide apartment seekers.

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succession with identical requests for information. Evidence was also introduced to show the disproportionately low percentage of black persons occupying Respondent's apartments relative to the apparently available pool of prospective black tenants.

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Accordingly, the Commission finds that there is on the record of this case substantial evidence that Respondent has violated §5(h) of the Act.

The Commission does not find that Respondent failed to post a fair practices notice in violation of §5(j) of the Act. That section says:

§5. It shall be an unlawful discriminatory practice...

(j) For any person subject to the act to fail to post and exhibit prominently in his place of business any fair practices notice prepared and distributed by the Pennsylvania Human Relations Commission (emphasis added).

While there is some evidence on the record suggesting that the Commission periodically prepared such notices (Tr. 104-105), there is absolutely no evidence that one was ever distributed to the Respondent.

Furthermore, Commission investigator Eileen Burke, who testified that she did not see a fair practice poster, also testified that she never entered the Rental Office, that she could only see part of one room of the office from where she was standing outside the office, and that she only stood there about one minute (Tr. 33-34). Investigator Harnick gave no testimony to indicate whether or not he saw a poster, and investigator Lowenstein, who testified that she did not see the poster on display (Tr. 100), gave no indication whether or not she was looking for one or if it was commonly her practice to look for one.

To the contrary, Respondent Bryan testified that the poster is definitely on display now and while he could not recall with certainty that it was on display on February 3, 1975, "it has been (his) general rule to keep all the rules and regulations of the Human Relations Commission" (Tr. 170-171). On the basis of this record the Commission cannot find substantial evidence of a §5(j) violation.