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**In the Commonwealth Court  
of Pennsylvania**

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No. 11 C.D. 1970

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PENNSYLVANIA HUMAN RELATIONS  
COMMISSION,

*Appellee*

v.

G. L. MARHOEFFER d/b/a MARHOEFFER  
REALTY and DAVID STOEHR,

*Appellants*

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**BRIEF FOR APPELLEE**

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*Appeal From the Order of the Pennsylvania Hu-  
man Relations Commission at Complaint  
Docket No. 1143.*

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STANTON W. KRATZOK  
*Assistant Attorney General*  
Attorney for Appellee

Suite 310-318  
121 S. Broad Street  
Philadelphia, Pa. 19107  
(215) PE 5-6383

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STATUTE CITED

Pennsylvania Human Relations Act (Oct. 27, 1955, P. L. 744 et seq., as amended; 43 P.S. 951 et seq.) . . . . . 15, 16

ISSUES TO BE DETERMINED

- 1. Did the Hearing Commissioners err in having a summary of the case prepared by Appellee's staff and on which basis a witness was partially interrogated?
- 2. Did Appellants discriminate against Complainant because of her race?
- 3. Did the Hearing Commissioners err in permitting certain testimony from Appellee's staff member?

## ARGUMENT

### I.

No error was committed by the Hearing Commissioners in having a summary of the case prepared by Appellee's staff and on which basis a witness was partially interrogated.

Although no objection at the hearing was made by Appellants' counsel to a Hearing Commissioner referring to a summary of the case when questioning Complainant, he now urges that the Hearing Commissioners had thereby disqualified themselves from making a ruling in this case. This summary was physically in the hands of the Hearing Commissioner referred to at the time of the testimony. Neither then nor at any time thereafter was any request or demand, formal or informal, ever made by Appellants' counsel for inspection of that summary.

It is to be noted that the Commissioner's questions elicited answers on a matter already gone over earlier in the testimony and were merely clarifications for that Commissioner of what the same witness had said previously.

Further, it does not follow that the Commissioners, having possession of or having previously read a summary of the case, would thereby be unable to make their recommendation based solely on the testimony presented to them at the hearing. The furnishing of

a summary to Commissioners is a necessary part of the Commission's procedure. The Commission, under the Pennsylvania Human Relations Act, must determine that probable cause exists for crediting the allegations of a Complaint. This must be determined before the conciliation process, mandated under the Act, and is a necessary prerequisite to the public hearing. In fact, as a matter of present practice, the Commission receives a full report from its staff and/or counsel. How otherwise can the Commission make a determination of probable cause or that no probable cause exists unless it has a report of its staff investigators before it? The summary of such investigation was what was referred to by the Hearing Commissioner as the basis for the questions and no inference of impropriety can be made from such reference there-to. Nor can it be maintained that the recommendation of the Hearing Commissioners in this matter did not stem only from the testimony presented before them at the hearing.

Unlike the case cited by Appellants, where a government department head adopted findings prepared by government prosecutors, after an ex parte discussion with them, and without an opportunity afforded Respondents to be heard and without Respondents having any knowledge of what the findings contained and without a hearing, in this case Appellants knew what they were charged with and the findings were made only after a full and probing hearing in which Appellants actively participated.

## II.

Appellant discriminated against Complainant because of her race.

Appellants have properly narrowed the question of their discrimination against Complainant because of her race (which was Negro) to a determination as to whether on August 14, 1968, Complainant was accorded the same treatment as was a white tester who sought an apartment earlier on the same day in Baldwin Court in Pittsburgh, Pennsylvania.

The white tester was told by the office employee of management that there was an apartment available with a hold on it for subletting. Complainant, two hours later on the same day, was told by Appellant Stoehr, another employee in the same office, that no apartments of the kind Complainant was seeking (the same type sought by the white tester) were available. Stoehr did not tell Complainant that there was an apartment with a hold on it. He claimed that he did not know of the availability of the apartment with the "hold" on it when Complainant talked to him. He did admit that he referred other white applicants to the tenant of the apartment with the "hold" on it earlier in the week.

The question of the meaning of the word "hold" in the minds of the white tester and of the Complainant was raised frequently in the testimony and, even though no definition was ever arrived at, nevertheless, both the white tester and the Complainant, in direct and in thorough cross-examination, that whatever "hold" really means or meant, they clearly indicated

that the "hold" qualification did not mean that the apartment was unavailable; that, in fact, to them that apartment was one that could be applied for. There was no contradiction that the white tester was permitted to apply for the apartment and was told that there was a "hold" on it. On the other hand, that information was withheld from Complainant, a Negro. Complainant was not treated in this regard as was the white tester. She was allowed, after some urging on her part, to fill in an application having no particular reference to the apartment concerned and without hope of getting any.

Below are all those excerpts from the testimony pertaining to the difference in treatment and the meaning of "hold".

At the hearing of February 15, 1969—Complainant, on direct examination, testified:

"A. . . I went out to Baldwin Court looking for apartments. I went into the apartment and the man at the desk—I asked him did he have a two-bedroom apartment and he said 'no'. I said, 'you have no apartment at all?' He said, 'no'. I said, 'Well, could I make out an application?' He said, 'Well, it won't do any good. Come back in a month or so.' I said, 'Well, I would like to fill out an application anyway,' so he handed me an application and I filled it out and I gave it back to him and, then, I left." (p. 13a.)

Commission counsel then asked Complainant:

"Q. Do you see the person to whom you talked to here in the room?" And Complainant answered:

"A. Yes.

Q. He is the gentleman on the far end?

A. That is right.

Q. Do you know his name at the present time?

A. At the present time his name is David Stoehr." (p. 15a.)

Commission counsel questioned Complainant as to what the white tester (Mrs. Klosek) had told her after the tester's visit to the apartment:

"Q. What did you learn from her?

A. I learned they had an apartment and they also gave her—she filled out an application.

Q. Do you recall her exact words to that effect?

A. Something to the effect that they had a hold on an apartment.

Q. She told you that they had a hold on an apartment?

A. Yes.

Q. What did that mean to you?

A. To me, it means that there is an apartment available, but they are holding it or maybe a deposit has been put down. That there should be an apartment available in time." (p. 39a.)

On cross-examination, Respondents' counsel asked Complainant:

"Q. Do you feel that when someone says they have a hold on an apartment that that apartment is available for you to rent?

A. Yes." (p. 41a.)

On redirect examination, Commission counsel asked Complainant concerning Respondent Stoehr:

"Q. Did he at that time or at any other time while you were with him say, 'there is now an apartment available to sublet?'

A. No, he didn't." (pp. 67a-68a.)

At the continued hearing of September 20, 1969, Appellants' counsel, questioning Complainant as on cross-examination, asked:

"Q. Did Mrs. Klosek tell you that Baldwin Court had an apartment available?

A. To my understanding, then, she told me there was a possibility of one.

Q. Did she tell you that there was a sublet apartment available?

A. She said that the person in the office said there was a hold.

Q. A hold on an apartment.

A. I remember that.

Q. What did you think that she meant when she said there was a hold on the apartment?" (Colloquy among counsel and chairman.)

"A. I don't know, exactly, whether there was an apartment available, or what.

Q. What did that mean to you when someone says I have got a hold on the apartment?

A. That there might be a possibility that an apartment might be available or vacant.

Q. Is that what it means?

A. I don't know.

Q. It meant something to you?

A. Yes, but what it meant to me, I told you.

*Argument*

Q. Yes, but I don't know exactly what hold means.

A. I don't know. Just what it meant to me. What the word meant, I don't know.

Q. When she said there was a hold, you thought that meant a possibility of an apartment being available?

A. Yes.

Q. Does it also suggest that somebody else has some kind of rights in that apartment prior to you, the person who has a hold?

A. It could be.

Q. But doesn't that suggest that to you?

A. No.

Q. It doesn't suggest that to you?

A. No." (pp. 238a-241a.)

On direct examination by Commission counsel, Mrs. Klosek, the white tester, was asked what Appellants' woman employee had shown her and Mrs. Klosek answered:

"A. She showed me the two-bedroom apartment, the floor plans that were available and she pointed out the apartment that would be available—or not would be available—the apartment with the hold on it for \$115.00.

\* \* \* \* \*  
 Q. Was there any discussion whatsoever about what was meant by hold?

A. No, there was not.

Q. What was your understanding of it?

A. I just thought that someone might have a deposit on it and they were checking out their

application, and they were just accepting applications." (pp. 77a-78a.)

This witness was thoroughly cross-examined on this matter later on during the same hearing (pp. 106a-107a) and held to her previous testimony.

Appellants' counsel cross-examined Complainant as to the difference in treatment accorded her and the white tester. She was asked:

"Q. Were you treated any differently than Mrs. Klosek?

A. Yes, I was.

Q. Now, all right, that is what I want to know. How were you treated differently than her? Neither one of you got an apartment?

A. No, but they did tell her there was a hold. Why couldn't he have told me there was a hold that same afternoon?

Q. And that is the only difference, isn't it?

A. That day I learned later on that there was.

Q. But that day the only difference was that when she went in there, the girl said there was a hold, and when you went in there, they told you there was no apartments? Is that right?

A. Yes.

Q. That is the difference?

A. Yes.

Q. Because of that difference, you feel you were discriminated against?

A. Right." (pp. 251a-252a.)

There is no evidence contradicting that on the next day, August 15, 1968, a second white tester (Mrs. McClung) was immediately told by Appellant Stoehr

about the apartment's availability. Stoehr claims that he did not know this the day before and, therefore, did not withhold information from Complainant on August 14, 1968. The question is whether he can be believed.

The credibility of Stoehr on this point is seriously in doubt. Within two days after he talked to Complainant, Appellant Stoehr, being interviewed by the Commission's investigator, volunteered that he had referred four other white applicants to the apartment in question.

This area in evidence was thoroughly gone over in the testimony, and below is set out an account of a colloquy, elicited on direct examination of the Commission's investigator, concerning his interview with Appellant Stoehr:

"A. . . . So then I said to him, 'It is my understanding that you do have a vacancy for subletting and that you sent, at least, one white person down the day before or Thursday,' because this was a Saturday and he agreed that she (sic) had a sublet and he didn't recall sending anyone, but then he said—I asked him, 'When did they notify you of the sublet' and he said, 'I don't know'. He said, 'maybe it was not until after Mrs. Harris was there.'

"We talked for a while and, then, he said—no, I said, 'I know that you sent one down the next day' and he referred to the fact that he had sent, at least, four other white women to the same place and so I said to him, 'Well, since it is established that you have a vacancy there, the

Morgantis,' I said, 'And you have Mrs. Harris' card and you said she would make a good tenant, was a very nice lady,' I said, 'Why don't you call her and arrange for her to go to the Morgantis and see if she wants that place' . . . and he said, 'I can't.' I said 'Why?' He said, 'I have orders' . . . I said, 'Who gave you these orders, was it Mr. Marhoefer?' He said, 'No, it was my boss.' I said, 'Who is your boss, Mr. Marlow?' And he nodded or agreed . . ." (p. 150a.)

At the hearing of September 20, 1969, on rebuttal, Commission counsel asked the investigator whether he had:

"Q. . . . Any conversation during that interview with Mr. Stoehr with reference to whether he had made references or referrals previous to Mrs. Harris's appearance on the scene to the Morganti apartment?

A. We spoke of Mrs. Klosek, then he voluntarily, which I never asked him, said they had other people prior to this during the week, and I said, 'Were they white', and he said, 'Sure.'

Q. White? Where?

A. To the Morganti apartments (sic), that this was the only one he knew was available.

Q. Do you remember that?

A. It was the only topic discussed." (pp. 264a-265a.)

When Appellant Stoehr was cross-examined by Commission counsel at the hearing of September 20, 1969, he was asked:

“Q. Do you recall that on that same afternoon with Mr. Davidson from the Commission, do you recall saying to him that in the previous week you referred four or five white people up to the Morganti apartment?”

A. I didn't say it like that.

Q. How did you say it?

A. We may have referred a few people. Myself, I didn't, because these were, maybe, someone else that were subletting apartments that I knew of, and I had tried to help them, but at the time I didn't know about the Morganti apartment, that it was available.

Q. You didn't say that to Mr. Davidson at that time?

A. I probably did.

Q. Which means, you possibly didn't?”

(There followed a colloquy among counsel and the Chairman and) Commission then asked:

“Q. . . . And you did tell Mr. Davidson that you had referred four or five white people for subletting apartments, did you not?”

(Another colloquy followed and) the witness replied:

“A. We don't refer to people by their race or creed or anything like that. That is the way you placed the question.

Q. Were there other white people who came during that week to sublet apartments?”

A. Other people.

Q. Other people. Were most of the people white?

A. I don't remember, sir.

Q. You don't remember what color these other people were?

A. I am not there to look at their color.”

(Another colloquy ensued and) Commission counsel continued:

“Q. Were there non-white people among those you referred during that week?”

A. No, sir.

Q. When Mr. Davidson talked to you on that Saturday, was he not talking to you about the Morganti apartment?

A. I believe so, yes.

Q. When you talked about having previously during that week referring other people, wasn't that much reference to the Morganti apartment?

A. It is pretty hard to try to remember that far back.”

(Interjection by Respondents' counsel.)

“A. I think I might have referred a couple of people after I found out about it. Yes. One or two.

Q. Was that on Monday of that week?

A. No. I didn't find out about it until later in the day that Mrs. Harris had been there.

Q. How did you find out about it?

A. The girls in the office told me they had been in and they had been given permission to sublet the apartment.

Q. Do you know, Mr. Stoehr, who the girls are you referred to, got notice of the Morganti subletting? Do you know when they got the notice?



A. When they did? No, sir." (pp. 213a-217a.)

The evidence that Appellants knew, or are to be held to have known, of the apartment for subletting—the one with the "hold" on it—on August 14 is obvious from the testimony of the white tester who was told about it by one of Appellant Marhoefer's office employees. That employee's knowledge must be imputed to Marhoefer. There was no denial by Appellants of the white tester's testimony on this matter.

However, it is not obvious that the term "hold" meant that the apartment was not available. If it meant "unavailability", why would the white tester have been permitted to file a futile application. And if the white tester was permitted to file under those circumstances why wasn't the Complainant, a Negro, treated similarly, that is, told there was a "hold" (whatever it meant or should have been taken to mean) and to file an application?

On this, the testimony of the Commission's investigator is not to be disregarded as to Stoehr's volunteering to him that he had, earlier in the week, treated white applicants differently than he treated Complainant. The investigator's testimony is, of course, subject to the test of credibility. It was not effectively denied by Stoehr. Can Stoehr be believed when he testified he didn't know about the apartment with the "hold" on it? Appellant thought not and decided accordingly.

### III.

The admission of testimony by Appellee's staff member as to statements made by one Appellant was proper.

The argument that testimony of the investigator concerning statements against interest made to him by Appellant Stoehr is inadmissible because of the failure to give warning that such statements could be used against him, it is urged, was not relevant to the proceeding before Appellee. Were it a criminal proceeding that argument might be properly advanced.

Under the Pennsylvania Human Relations Act, the investigation cannot begin until a Complaint is filed. The investigation is not an accusatory proceeding but is an attempt to gather facts and these facts may consist of records or statements of Complainant and Respondent. That Act contemplates an Order based on findings of fact substantiated by testimony at a public hearing, and that hearing is ordered only after probable cause is found, an investigation and a failure to adjust by conciliation. It is pure civil action.

Only after there has been a willful violation of the Commission's Order, the matter having been brought before a Court of Record in order to secure enforcement, is there any resort to punishment.

Section 10 of the Act reads as follows:

"SECTION 10. ENFORCEMENT AND JUDICIAL REVIEW.

The complainant, the Attorney General or the Commission may secure enforcement of the or-

der of the Commission or other appropriate relief by the Court of Common Pleas of Dauphin County, or by the court of common pleas of the county within which the hearing was held. When the Commission has heard and decided any complaint brought before it, enforcement of its order shall be initiated by the filing of a petition in such court, together with a transcript of the record of the hearing before the Commission, and issuance and service of a copy of said petition as in proceedings in equity. When enforcement of a Commission order is sought, the court may make and enter, upon the pleadings, testimony and proceedings set forth in such transcript, an order or decree enforcing, modifying and enforcing as so modified, or setting aside, in whole or in part, the order of the Commission, and the jurisdiction of the court shall not be limited by acts pertaining to equity jurisdiction of the courts. *An appeal may be taken as in other civil actions. . . .*" (43 P.S. 960) (Italics supplied.)

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#### CONCLUSION

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It is urged that Your Honorable Court uphold the findings that Complainant, a Negro, was, because of her race, accorded different treatment than a white applicant in that information furnished the white person was not furnished Complainant; that the findings were based on proper evidence leading to the legal conclusion that Complainant was discriminated

against by Appellants and that the findings and conclusions were based on substantial evidence.

It is, therefore, respectfully urged that the appeal of Appellants be dismissed.

Respectfully submitted,

STANTON W. KRATZOK

*Assistant Attorney General*

Attorney for Appellee