

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

**VELENTIA PIPKIN,
Complainant**

v.

**JOSEPH and BARBARA ALLISON,
Respondents**

DOCKET NO. H-7003

ENFORCEMENT DETERMINATION HEARING FINDINGS OF FACT

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

**VELENTIA PIPKIN,
Complainant**

v.

**JOSEPH and BARBARA ALLISON,
Respondents**

DOCKET NO. H-7003

**ENFORCEMENT DETERMINATION HEARING
FINDINGS OF FACT**

1. In a Pennsylvania Human Relations Commission ("PHRC") Final Order dated October 28, 1997, the PHRC ordered the following:

- a. that the Respondents shall permanently cease and desist from practices which deny equal housing opportunities because of race;
- b. that the Respondents, jointly and severally, shall pay Pipkin \$8,000 as compensatory damages;
- c. that the Respondents, jointly and severally, shall pay a \$2,000 civil penalty within thirty days of October 28, 1997;
- d. that the Respondents shall post a "Fair Housing Practice" notice alongside any "For Rent" signs they may post in connection with any apartments they own. Additionally, the Respondents shall include the fair housing "Equal Opportunity in Housing" symbol in any advertisements they take out

"Equal Opportunity in Housing" symbol in any advertisements they take out regarding any apartment they own;

e. that the Respondents shall submit certain reports to the PHRC's Housing Division; and

f. that the Respondents shall provide written verification of their compliance with the PHRC's October 28, 1997 order.

2. The Respondents have appealed the PHRC's Final Order.

3. By order dated July 16, 1998, the Commonwealth Court affirmed the PHRC's October 28, 1997 order.

4. On August 17, 1998, the Respondents filed a Petition for Allowance of Appeal in the Pennsylvania Supreme Court.

5. On March 3, 1999, the Supreme Court denied the Respondents' petition.

6. As of the date of the Enforcement Determination Hearing, the Respondents have failed to comply with the PHRC's October 28, 1997 order.

7. The Respondents have presented no justification for their failure to comply with the PHRC's October 28, 1997 order.

Dated

By: _____

Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

VELENTIA PIPKIN,
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v.

DOCKET NO. H-7003

JOSEPH and BARBARA ALLISON,
Respondents

RECOMMENDATION OF PERMANENT HEARING EXAMINER

AND NOW, this 13th day of May, 1999, upon consideration of the entire record of the Enforcement Determination Hearing held on May 7, 1999, the Permanent Hearing Examiner concludes that the Respondents have failed to comply with the Pennsylvania Human Relations Commission ("PHRC") Final Order dated October 28, 1997, and therefore recommends that the foregoing Enforcement Determination Hearing Findings of Fact and Final Order attached be adopted by the full Commission, pursuant to PHRC policy adopted on June 2, 1986.

By: 

Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

VELENTIA PIPKIN,
Complainant

v.

DOCKET NO. H-7003

JOSEPH and BARBARA ALLISON,
Respondents

FINAL ORDER

AND NOW, this 25th day of May, 1999,

the Pennsylvania Human Relations Commission ("PHRC") hereby adopts the foregoing Enforcement Determination Hearing Findings of Fact in accordance with the Recommendation of the Permanent Hearing Examiner, and therefore

ORDERS

1. that the Respondents shall, within thirty days of the effective date of this order, comply with the PHRC October 28, 1997 Final Order in the above-captioned case; and

2. that the Respondents' failure to comply with such order within thirty days shall automatically operate to authorize enforcement proceedings to be initiated in Commonwealth Court.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Raquel O. Yienget /ao
Raquel Otero de Yienget
Vice Chairperson

Attest:

Gregory J. Celia, Jr.
Gregory J. Celia, Jr.
Secretary

COMMONWEALTH OF PENNSYLVANIA

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FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT *

1. The Complainant, Velentia Pipkin (hereinafter "Pipkin"), is an individual whose race is black. (NT 115.)

2. The Respondents, Joseph and Barbara Allison (hereinafter collectively "the Allisons"), are joint owners of a building in New Brighton, Pennsylvania. (NT 241, 314; CE 3.)

3. Although the Allisons have owned their building for twelve years, it was not until approximately three years ago that the Allisons began to renovate the building to create apartment units. (NT 87, 242.)

4. At the beginning of March 1996, Pipkin was an employee of Mellon Mortgage Company and lived in an apartment located at 3226 Sixth Avenue, Greentree. (NT 80, 103, 104.)

5. At that time, Pipkin wanted to find a new apartment which was closer to her job, in a better school district for her son, and because the apartment in which she was living had developed a roof leak which caused personal property damage. (NT 25, 80, 84, 88, 103.)

* To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

NT Notes of Testimony
CE Complainant's Exhibit
RE Respondent's Exhibit

6. Pipkin was withholding rent payments due to the property damages caused by the leaking roof. (NT 25.)

7. In a newspaper advertisement appearing in a local paper on Sunday, March 3, 1996, the Allisons advertised the imminent vacancy of Apartment 10, a two-bedroom unit in their building. (NT 81, 83, 87; CE 3.)

8. The tenant of unit 10 was Renee Harrison (hereinafter "Harrison"), a white female whose boyfriend, a black male, had created a domestic disturbance necessitating police intervention resulting in the arrest of Harrison's boyfriend. (NT 25, 26, 41, 292.)

9. On Sunday, March 3, 1996, Pipkin saw the Allisons' advertisement but did not make her initial call to the Allisons until 8:30 a.m. on March 6, 1996. (NT 35, 83, 85, 106, 130, 252.)

10. Pipkin called a number of other prospective landlords before calling the Allisons. (NT 106.)

11. Before Pipkin's call to Barbara Allison on the morning of March 6, 1996, Barbara Allison had received four other calls inquiring about the vacancy. (NT 38; CE 1.)

12. In the order these calls were received, the following individuals had inquired about the vacant apartment:

- a. Tony and Rose Cuifo;
- b. Donna Vojnovich;
- c. Holly McKay; and
- d. Angela West.

(NT 248, 249; CE 1.)

13. Barbara Allison initially made appointments for the Cuifos to view the apartment on Thursday, March 7, 1996; on Tuesday, March 5, 1996 at 6:30 p.m. for Vojnovich; and 7:00 p.m. the same day for McKay. (NT 248, 249.)

14. Due to the unavailability on March 5, 1996 of the tenant who was still in Apartment 10, Vojnovich and McKay's appointments were rescheduled to Wednesday evening on March 6, 1996. (NT 144, 148, 162, 190-191, 249.)

15. Pipkin called Barbara Allison from her work site at Mellon Mortgage Company at 8:30 a.m., Wednesday, March 6, 1996. (NT 35, 85, 106, 130, 252.)

16. Pipkin initially found Barbara Allison to be nice, talkative, open and helpful. (NT 88, 123.)

17. During their conversation, Pipkin told Barbara Allison that she had seen her ad and wanted additional information. (NT 87.)

18. During the conversation Pipkin indicated one reason for the urgency of her search for a new apartment was the leaking roof in her present apartment, and that she was withholding rent. (NT 25, 88.)

19. In response, Barbara Allison advised Pipkin to send her landlord a bill for the damages and to pay her rent minus the cost of the damages. (NT 25, 88, 262, 304-305.)

20. Pipkin also offered that she is married and has a five-year-old child. (NT 89.)

21. Barbara Allison then informed Pipkin that she has to be leery of mixed couples and asked Pipkin if she and her husband are the same race. (NT 89-90, 111.)

22. Pipkin responded by informing Barbara Allison that she is black and asked if that would be a problem. (NT 26, 34, 70, 90, 255, 256.)

23. Barbara Allison responded by telling Pipkin "it could be." (NT 70, 256, 286, 302, 352.)

24. When Pipkin asked why, Barbara Allison told Pipkin that she had two tenants that may have a problem and that they might move out. (NT 70, 352.)

25. Although Pipkin had wanted to arrange to view the apartment that evening, Pipkin told Allison that she would not want to rent from a person like her and hung up. (NT 86, 110, 115-116.)

26. Pipkin went to the bathroom in tears to gather her composure. (NT 124.)

27. Still crying and upset, Pipkin then went to her boss's office to tell him what had happened to her. (NT 125, 129.)

28. Pipkin called Barbara Allison back to tell her she could not believe what Allison had said. (NT 71, 124.)

29. During the second phone call, Barbara Allison related the prior problem between Harrison and her boyfriend, and asked Pipkin "What do you want me to do?" (NT 71, 110, 116, 117, 263-264.)

30. Pipkin neither viewed the apartment nor filled out an application. (NT 110.)

31. When Pipkin went to her boss's office, Wendy Nottingham (hereinafter "Nottingham"), a co-worker of Pipkin's, was there. (NT 101, 107, 125, 129.)

32. Pipkin asked Nottingham if she would call Barbara Allison, in effect to see how she would be treated. (NT 125, 129-130.)

33. At approximately 10 a.m. on March 6, 1996, Nottingham called Barbara Allison. (NT 130.)

34. Nottingham told Barbara Allison she was looking for an apartment, is married and has two children. (NT 131.)

35. Barbara Allison asked Nottingham if she and her husband are of the same race, and when Nottingham said yes and did not respond further, Allison asked her what race would that be? (NT 131-132.)

36. Nottingham told Barbara Allison that she was "caucasian" and asked why she would ask that. (NT 132.)

37. In response Barbara Allison related the prior Harrison incident. (NT 132, 135, 138.)

38. During the call between Nottingham and Barbara Allison, Allison's tone was always nice. (NT 134.)

39. On the evening of March 6, 1996, Barbara Allison first showed the apartment to Vojnovich, who did not take it. (NT 250.)

40. The second viewing of the apartment on March 6, 1996 was by Holly McKay (hereinafter "McKay"), a light-skinned, biracial woman who has one black and one white parent, and her white boyfriend. (NT 109, 149, 160.)

41. When McKay informed Barbara Allison that her credit is not flawless, Barbara Allison responded by saying, "As long as both of you are white and have a job it's not a problem." (NT 148, 167.)

42. McKay was unemployed at the time. (NT 148, 164.)

43. Barbara Allison perceived McKay to be white. (NT 36, 51, 65, 149.)

44. McKay accepted the apartment on March 7, 1996, at which time she gave Barbara Allison a security deposit. (NT 49-50, 151; CE 5.)

45. During McKay's tenancy, Barbara Allison told McKay that she did not want to rent to a black couple because other tenants would be scared. (NT 154.)

46. Barbara Allison further told McKay that it was her choice to whom to rent, that it was her building, and she will have the tenants she wants. (NT 159.)

47. Later in 1996, Pipkin rented an apartment elsewhere. (NT 106.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of this case.
2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing.
3. Pipkin is an individual within the meaning of the Pennsylvania Human Relations Act.
4. The Allisons' building is a housing accommodation within the meaning of the Act.
5. Pipkin presented direct evidence of a 5(h)(1) violation.
6. When discrimination has been found, the Commission has broad discretion in fashioning a remedy.

OPINION

This case arises on a complaint filed by Velentia Pipkin (hereinafter "Pipkin") against Joseph and Barbara Allison (hereinafter collectively "the Allisons") at Pennsylvania Human Relations Commission (hereinafter "PHRC") Docket No. H-7003.

In her complaint Pipkin alleges that on or about March 6, 1996, Barbara Allison refused to deal with her and denied her an opportunity to rent one of the Allisons' apartments. Pipkin's initial complaint alleged the Allisons' actions violate Sections 5(a)(1) and (3) of the Pennsylvania Human Relations Act (hereinafter "PHRA"). At the public hearing a motion to amend was granted allowing a change which indicates Sections 5(h)(1) and (3) were violated.

The PHRC investigated Pipkin's allegations and, at the conclusion of the investigation, informed the Allisons that probable cause existed to credit Pipkin's allegations. Thereafter, the PHRC attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently the PHRC notified the parties that it had approved a public hearing.

The public hearing was held on July 23, 1997, in Beaver, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The Commission's interest in the complaint was overseen by the PHRC Housing Division's Assistant Chief Counsel Jonathan J. Williams. Joseph M. Spratt, Esquire, appeared on behalf of the Allisons. The parties were afforded an opportunity to submit post-hearing briefs. The post-hearing brief on behalf of the complaint was received on October 10, 1997.

At issue in this case are the following three provisions of the PHRA that make it an unlawful discriminatory practice for any person to:

1. Refuse to . . . lease. . . or otherwise deny or withhold any housing. . . from any person because of the race. . . of any person. . . (PHRA, Section 5(h)(1));

2. Discriminate against any person in the terms or conditions of . . . leasing any housing accommodation. . . because of the race. . . of any person. . . (PHRA, Section 5(h)(3)); and

3. Make any inquiry, elicit any information. . . concerning race. . . of an individual in connection with the. . . lease of any housing accommodation. . . (PHRA, Section 5(h)(6)).

Originally, paragraph 3 of Pipkin's complaint generally alleged a race-based refusal to deal with her and a denied opportunity to lease. Paragraph 3.A.3 of the original complaint specifically alleged that Barbara Allison stated "She already has a black tenant who the other white tenants object to and therefore cannot rent to any additional blacks." Paragraph 4 of the original complaint initially alleged that Barbara Allison's actions violated Sections 5(a)(1) and (3) of the PHRA.

Near the conclusion of the public hearing, a motion to amend paragraph 4 of Pipkin's complaint was granted in part and reserved in part. The motion to amend sought to amend paragraph 4 so that Sections 5(h)(1), (3) and (6) would be noted as having been violated, rather than Sections 5(a)(1) and (3).

Finding that the original citation to Section 5(a) was likely a typographical error, the motion to amend was granted to permit the substitution of Sections

5(h)(1) and (3) for 5(a)(1) and (3). However, the parties were instructed to brief the issue of whether it would be proper to permit an amendment which adds Section 5(h)(6).

On at least two prior occasions the Pennsylvania Commonwealth Court has reviewed this precise issue. See St. Andrews Development Co., Inc v. PHRC, 308 A.2d 623 (1973); and Straw v. PHRC, 308 A.2d 619 (1973). In both instances, although complainants' complaints had alleged only 5(h)(1) violations, the PHRC found 5(h)(6) violations. Noting that a respondent's due process right was violated by finding against respondents on a section of the PHRC not alleged, it was held to be error to hold that a respondent had violated a section of the PHRA for which the respondent had not received proper notice.

Here, while some evidence was submitted with regard to activity which may well be a violation of Section 5(h)(6) of the PHRA, due process prohibits an amendment to add 5(h)(6) to paragraph 4 of Pipkin's complaint. The alleged comment by Barbara Allison found at paragraph 3.A.3 of the complaint does not change this finding. Had the alleged comment contained an "inquiry" or been an "eliciting of information," it could be held that the substance of Pipkin's complaint had at least stated a 5(h)(6) allegation. However, the alleged comment does not amount to an alleged 5(h)(6) violation.

As a whole, the substance of Pipkin's complaint found in paragraph 3 constitutes an alleged violation of Section 5(h)(1) only. The evidence presented in this case reveals clearly that Pipkin never leased an apartment from the Allisons. For there to be discrimination in the terms or conditions of leasing in violation of 5(h)(3),

one would normally look to an in-place lease. There being no lease between the Allisons and Pipkin, Pipkin's allegations state a Section 5(h)(1) allegation only. More specifically, Pipkin's allegations implicate Section 5(h)(1)'s phrase "otherwise deny or withhold any housing accommodation. . . because of the race . . . of any person"

In interpreting what constitutes a violation of this general language, we are specifically guided by another fundamental provision of the PHRA. Section 12(a) of the PHRA makes the pronouncement that the provisions of the PHRA ". . . shall be construed liberally for the accomplishment of the purposes thereof. . ." See, Speare v. PHRC, 328 A.2d 570, 573 (Pa.Cmwlth.Ct. 1974).

Where direct evidence of discrimination is presented, such evidence, if established by a preponderance of evidence, is sufficient to support a finding of discrimination. See HUD v. Tucker, 2 FHFL ¶25,033 (HUD ALF Aug. 1992), citing Pinchback v. Armistead Homes Corp., 907 F.2d 1447, 1452 (4th Cir.), cert. denied 111 S.Ct. 515 (1990).

Here, by a direct and unambiguous showing, Pipkin has established that when she asked Barbara Allison if it would be a problem that she is black, Barbara Allison responded that "it could be." Barbara Allison admitted that she had made that response to Pipkin's inquiry. A statement by a person engaged in rental of a housing accommodation that either conveys that housing is unavailable because of race or expresses a preference for or limitation on a potential renter because of race violates Section 5(h)(1) of the PHRA. When Barbara Allison told Pipkin that her race could be a problem, Barbara Allison's action had the effect of deliberately discouraging

Pipkin. Such an action amounts to a refusal to negotiate with Pipkin because of her race and evidences a racially subjective leasing procedure.

Barbara Allison contends that Pipkin had already been rejected by her before telling Pipkin that her race could be a problem. Barbara Allison testified that at the point Pipkin told her she had withheld rent from her landlord, Pipkin was no longer under consideration as a prospective tenant. However, the record is clear that Barbara Allison never conveyed to Pipkin that her act of withholding rent had disqualified her. On the contrary, the evidence establishes that Barbara Allison's tone continued to be nice and that Barbara Allison offered Pipkin advice on how to handle the situation of damages to Pipkin's property by withholding only an amount which covered the damages Pipkin had sustained, and to pay the remainder.

Even more irreparable to the credibility of Barbara Allison's contention is the nature of the conversation which occurred after Barbara Allison offered Pipkin sympathetic help regarding the rent withholding issue. The conversation between Pipkin and Barbara Allison not only continued but had a focus on Barbara Allison's seeking information from Pipkin which Barbara Allison was using to weigh Pipkin's qualifications to rent an apartment from her. Such a conversation would have been unnecessary had Barbara Allison already disqualified Pipkin.

Barbara Allison's contention that Pipkin had already been dropped from consideration is deemed to lack credibility, and is viewed as an attempted after-the-fact rationalization for subsequent behavior recognized to be inappropriate.

The Allison's also submit that their procedures for finding tenants excluded Pipkin from renting their vacant apartment. The Allison's asserted that applicants are

prioritized in the order of their inquiry. In this instance, the Allisons had initially indicated that they had received seven inquiries about the impending vacancy. (CE 1). The initial assertion was that five of the seven inquiries had been received before Pipkin's call on the morning of March 6, 1996.

First, the call asserted to have been the fourth inquiry was conclusively shown to have been made after Pipkin's call. Wendy Nottingham was initially noted by the Allisons as having been their fourth inquiry, however, Nottingham testified that she called only after her co-worker, Pipkin, had become upset after speaking with Barbara Allison. Nottingham's call to Barbara Allison was made not to actually inquire about the vacancy but, instead, as a gesture to see if Barbara Allison would treat her differently than she had Pipkin.

Regarding the remainder of those actually calling before Pipkin, no one actually viewed the Allisons' apartment until the evening of March 6, 1996. The first inquiry was not even scheduled to view the apartment until March 7, 1996. The second inquiry did not immediately decide to take the apartment after being the first to view the unit. Holly McKay and her boyfriend, the third to inquire, were the first to give an indication that they wanted the apartment.

At the time of Pipkin's call to Barbara Allison, there had been no commitment by any applicant for the apartment. One can only speculate that had Pipkin been white and arranged to view the apartment first, she would have been the successful applicant. However, such speculation is unnecessary here. The act of discrimination had already occurred.

At the moment Barbara Allison informed Pipkin that her race could be a problem, the act of discrimination was complete. Had a 5(h)(6) allegation been made, that section was violated even earlier when Barbara Allison asked Pipkin if she and her husband were of the same race. As noted earlier, however, since no Section 5(h)(6) allegation was made, such a finding has no impact on the liability finding in this case.

Several other factors do, however, contribute to the revelation of culpability in this matter. First, there is McKay's credible testimony that Barbara Allison attempted to persuade McKay to assist her in the attempted concealment of when McKay had accepted the apartment. McKay offered that, subsequent to Pipkin's PHRC action, Barbara Allison had solicited her to sign a notarized letter that McKay had accepted the apartment on March 4, 1996. (NT 150-151.)

McKay also testified credibly that on the evening of March 6, 1996, McKay, worried about the status of her credit, advised Barbara Allison that her credit was not flawless, and Barbara Allison responded, "As long as both of you are white and have a job, it's not a problem." (NT 148.) At that point, McKay was unemployed.

Just as damaging to the Allisons was McKay's revelation of an admission to her by Barbara Allison that she did not want to rent to a black couple. (NT 154.) Barbara Allison's stated reason was her own fear and the fear of other tenants. (NT 154.) On yet another occasion, Barbara Allison told McKay that it is her choice to whom to rent, that it is her building, and that she will have the tenants she wants. (NT 159.)

Finally, one further incident supports the conclusion that Barbara Allison's actions were designed to discourage and ultimately deny Pipkin's opportunity to rent from the Allisons. When Nottingham spoke with Barbara Allison on the telephone on the morning of March 6, 1996, Barbara Allison asked Nottingham if she and her husband were of the same race. When Nottingham indicated they are, she intentionally did not tell Barbara Allison her race. Barbara Allison then asked "What race would that be?" (NT 131-132.)

Once again, both the inquiry regarding whether Nottingham and her husband are the same race, and what her race is are both capable of a 5(h)(6) allegation. Here, however, these allegations were not made. Instead, liability in this case is limited to the 5(h)(1) violation which occurred when Barbara Allison told Pipkin that her race could be a problem. Although Joseph Allison had no apparent role in his wife's discriminatory action in discouraging Pipkin because of her race, as co-owner of the housing accommodation, he is vicariously liable for Barbara Allison's actions. See HUD v. Banai, 2 FHFL ¶125,095 (HUD ALJ February 1995); citing Walker v. Crigler, 976 F.2d 901 (4th Cir. 1992); and United States v. Youritan Construction Co., 370 F.Supp. 643 (N.D. Cal. 1973), aff'd. as modified, 509 F.2d 623 (9th Cir. 1975).

- Remedy -

Section 9(f)(1) of the PHRA provides that when a respondent is found to have engaged in an unlawful discriminatory practice, the Commission may issue an order which requires a respondent to cease and desist from unlawful discrimination. Such

an order may also order "such affirmative action" and "actual damages, including damages caused by humiliation and embarrassment, as, in the judgment of the Commission, will effectuate the purpose of [the PHRA]. . ." Additionally, Section 9(f)(2) authorizes the assessment of a civil penalty "in an amount not exceeding ten thousand dollars. . ."

At the conclusion of the public hearing, in the final argument on behalf of this complaint, the PHRC housing attorney prayed for a \$10,000 civil penalty and a \$17,000 award to Pipkin "because of how egregious the activity of these Respondents was." Here, the question of the egregiousness of the activity is a matter which weighs on the amount of an appropriate civil penalty. Damages for mental suffering are generally regarded as being actual or compensatory in nature, and not vindictive or punitive. Stevens v. Dobs, Inc., et al., 373 F.Supp. 618 (E.D. N.C. 1974). Any monetary assessment to be awarded to Pipkin must be based only on consideration of humiliation and embarrassment caused by Barbara Allison's actions. No evidence was submitted which seeks an economic vindication. Instead, the entire focus on Pipkin's damages addressed an affront to Pipkin's dignity.

Humiliation and embarrassment can be inferred from the circumstances as well as established by testimony. Seaton v. Sky Realty Co. Inc., et al., 491 F.2d 634, 636 (7th Cir. 1974). See also HUD v. Blackwell, 2 FHFL ¶125,001 (HUD ALJ Dec. 21, 1989), *aff'd*. 908 F.2d 844 (11th Cir. 1990). The key factor in determining the size of an award for humiliation and embarrassment is a victim's reaction to discriminatory conduct. HUD v. Banai, *supra* at ¶125,857.

Although the record is sparse regarding the precise degree of Pipkin's subjective reaction to Barbara Allison's insensitivity, it is clear that Pipkin was the victim of a wrongful deprivation of valuable rights from which damages are presumed without the necessity for evidence of an economic loss. Here, Pipkin not only lost her interest in seeking a house of her choice on the same terms as a prospective white tenant, she also lost her protection from the stigmatic injury of being made to feel inferior. With stigmatic injuries, there should be a strong presumption of damages because any reasonable person would naturally suffer intangible damages in such circumstances.

From Pipkin's completely credible testimony we find that at the moment of Barbara Allison's affront to Pipkin's dignity, Pipkin felt like she had been slapped in the face. (NT 118.) While no real attempt was made to paint a detailed, fully developed picture of the degree of Pipkin's humiliation, Pipkin did generally describe her flustered reaction as having been shocked and hurt. (NT 91.) Pipkin analogized the hurtful nature of the incident as similar to the pain associated with childbirth. (NT 92.) Pipkin indicated that the experience will continue to haunt her. (NT 118.)

Pipkin's testimony is enhanced by her contemporaneous communication of her distress to others, one of whom testified. Nottingham confirms that immediately after Pipkin spoke with Barbara Allison, Pipkin was brought to tears. (NT 101, 124, 129.) Nottingham's corroboration of Pipkin's reaction tends to dispel the unavoidable self-serving aura which surrounds a case where only a victim testifies about their reaction.

There are a multitude of things which Pipkin did not claim. For example, Pipkin made no claim that she has suffered weakened relationships or resultant physical ailments. No impact on Pipkin's daily life with respect to changes in eating, sleeping or working were described. In fact, there was no attempt to contrast Pipkin's emotional state before and after Barbara Allison's discrimination.

However, there was some indication that the power of Barbara Allison's discriminatory assault on Pipkin's personhood triggered some confusion of identity. The profoundly upsetting nature of the racial indignity made Pipkin feel that she was less worthy or valuable than whites. Pipkin expressed that at the same time she almost wished that she were not black. (NT 125.) Barbara Allison's behavior disturbed both the appropriate view that people are just people, and the idea of identity as a human first. Further, Pipkin was made to feel inferior with respect to something as fundamental as where she may live.

It must be recognized that a damage award can never fully compensate a victim of discrimination and that it is inherently difficult to measure an amount which will ease one's hurt feelings and experience of humiliation. Our task is to make an appropriate transformation of Pipkin's general qualitative testimony into quantitative relief. Therefore, considering the record as a whole, it is reasonable and fair to award Pipkin \$8,000 for the humiliation Pipkin suffered. A compensatory award is not intended to be a windfall but, instead, to make Pipkin whole for the psychic injury she suffered.

Turning to the issue of an appropriate civil damage, we first note that Barbara Allison is found to not only have intentionally discriminated, but also to have

attempted to engage in duplicity which aggravated the situation. Here, Barbara Allison did not really lie to Pipkin, she just did not have much faith in her tenants. Further, Barbara Allison took no steps to rectify the situation she caused. Instead, she continued to maintain the untenable position that her actions were permissible because she believed tenants would leave.

To vindicate the public interest, the PHRA authorizes the imposition of a civil penalty upon a respondent who has violated the PHRA. Determining an appropriate penalty requires consideration of five factors: (1) the nature and circumstances of the violation; (2) the degree of the respondent's culpability; (3) the goal of deterrence; (4) whether a respondent has previously been found to have committed unlawful housing discrimination; and (5) a respondent's financial resources. See, *e.g.*, HUD v. Jerrard, 2 FHFL ¶125,005 (HUD ALJ Sept. 28, 1990); HUD v. Blackwell, 2 FHFL ¶125,001 (HUD ALJ Dec. 21, 1989).

After consideration of these factors, a civil penalty of \$2,000 imposed upon a modest-sized owner such as the Allisons, under the circumstances present here, will demonstrate the seriousness of the unlawful action. Although Barbara Allison may have expressed a belief that she has the right to rent to anybody she wants to, clearly she only has the right to rent her apartments in a nondiscriminatory manner. This civil penalty should send the message to modest-sized owners of housing accommodations that violations of the PHRA are not only unlawful, but also expensive.

An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

VELENTIA PIPKIN,
Complainant

v.

DOCKET NO. H-7003

JOSEPH and BARBARA ALLISON,
Respondents

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Pipkin has proven discrimination against the Allisons in violation of Section 5(h)(1) of the Pennsylvania Human Relations Act.

It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

By: 

Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

VELENTIA PIPKIN,
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DOCKET NO. H-7003

JOSEPH and BARBARA ALLISON,
Respondents

FINAL ORDER

AND NOW, this 28th day of October, 1997, after

a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law, and Opinion as its own finding in this matter, and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

1. The Allisons shall permanently cease and desist from engaging in any acts or practices which have the purpose or effect of denying equal housing opportunities because of race. Prohibited acts include, but are not limited to:

- a. refusing or failing to rent an apartment, or refusing to negotiate for the rental of an apartment because of race;
- b. otherwise making unavailable or denying an apartment to any person because of race;
- c. making any inquiry or eliciting any information concerning the race of an applicant for an apartment; and
- d. indicating in any way a discriminatory preference or limitation based on race.

2. That, jointly and severally, the Allisons shall pay Pipkin the lump sum of \$8,000 in compensatory damages for the humiliation Pipkin suffered.

3. That, within thirty days of the effective date of this Order, the Allisons shall deliver to PHRC Housing Division Assistant Chief Counsel Nancy L. Gippert a check payable to the Commonwealth of Pennsylvania in the amount of \$2,000, which amount represents an assessment of a civil penalty pursuant to Section 9(f)(2)(i) of the PHRA.

4. Consistent with Section 5(j) of the PHRA, the Allisons shall prominently post and exhibit a "Fair Housing Practice" notice distributed by the PHRC Housing Division alongside any "for rent" signs posted in connection with any apartments they own. The Allisons shall hereafter also include the fair housing "Equal Opportunity in Housing" symbol in any advertisement for any apartment owned by the Allisons.

5. On the last day of every third month, beginning thirty days after this decision becomes final (or four times per year), and continuing for three years from the date this Order becomes final, the Allisons shall submit reports containing the following information to the PHRC Housing Division, PO Box 3145, Harrisburg, PA 17105, provided that the Housing Division may modify this paragraph of this Order as that office deems necessary to make its requirements less, but not more, burdensome:

a. A duplicate of every written application, and a log of all persons who applied for occupancy at any of the properties owned, operated, or otherwise controlled in whole or in part by the Allisons indicating the name and address of each applicant, the number of persons to reside in the unit, the number of bedrooms in the unit for which the applicant applied, whether the applicant was rejected or accepted, the date on which the applicant was notified of acceptance or rejection, and if rejected, the reason for such rejection. The Allisons shall maintain the originals of all applications described in the log.

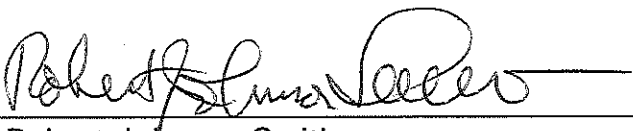
b. A list of vacancies at properties owned, operated, or otherwise controlled in whole or in part by the Allisons during the reporting period, including: the address of the unit, the number of bedrooms in the unit, the date the tenant gave notice of an intent to move out, the date the tenant moved out, the date the unit was rented again or committed to a new rental, and the date the new tenant moved in.

c. Sample copies of advertisements published during the reporting period, specifying the dates and media used or, if applicable, a statement that no advertisements have been published during the reporting period.

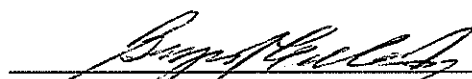
d. A list of all people who inquired, in writing, in person, or by telephone, about renting an apartment, including their names and addresses, the date of their inquiry, and the disposition of their inquiry.

6. That, within thirty days of the effective date of this Order, the Allison shall report to the PHRC on the manner of their compliance with the terms of this Order by letter addressed to Nancy L. Gippert, Assistant Chief Counsel, PHRC Housing Division, PO Box 3145, Harrisburg, PA 17105.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: 
Robert Johnson Smith
Chairperson

Attest:


Gregory J. Celia, Jr.
Secretary

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JOSEPH ALLISON and BARBARA
ALLISON,

Petitioners

v.

PENNSYLVANIA HUMAN
RELATIONS COMMISSION,

Respondent

No. 3168 C.D. 1997

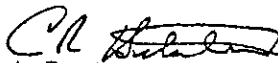
PER CURIAM

ORDER

AND NOW, this 20th day of August, 1998, it is ordered that the above-captioned opinion filed July 16, 1998 shall be designated OPINION rather than MEMORANDUM OPINION, and it shall be reported.

CERTIFIED FROM THE RECORD
AND ORDER EXIT

AUG 20 1998


Deputy Prothonotary - Chief Clerk

The facts, as found by the Permanent Hearing Examiner and adopted by the PHRC, are summarized as follows. The Allisons renovated a building they owned in New Brighton, Pennsylvania to create apartment units. On March 3, 1996, the Allisons advertised the imminent vacancy of one of these units, then tenanted by Renee Harrison (Harrison), a white female, and her boyfriend, a black male. Following a domestic disturbance, police had arrested Harrison's boyfriend. On the morning of March 6, 1996, Valentia Pipkin (Pipkin), a black female employed at Mellon Mortgage Company, called the Allisons to inquire about the apartment and spoke to Barbara Allison.

During the course of Pipkin's conversation with Barbara Allison, Pipkin stated that she was married with a five year old child.³ Barbara Allison then responded that she had to be leery of mixed couples and asked Pipkin if she and her husband were of the same race. Pipkin said she was black and asked if that would be a problem, to which Allison replied, "it could be." Barbara Allison explained that two of her tenants might have a problem with Pipkin's race and move out of the building. At that point, Pipkin told Allison that she would not want to rent the apartment from a person like her and hung up.

³ During the conversation, Pipkin also told Barbara Allison that she was withholding rent payments on her current apartment because of a leak in the roof that had caused property damage. In response, Allison was sympathetic and helpful, suggesting that Pipkin have the leak fixed and then send the bill to her landlord along with the rent payment less the amount of the repair bill.

After this conversation, Pipkin went to the bathroom in tears to gather her composure. Still crying and upset, Pipkin told her boss what had happened.⁴ When Pipkin went to her boss's office, Wendy Nottingham (Nottingham), a co-worker, was present. At Pipkin's request, Nottingham agreed to call Barbara Allison to see if she would treat Nottingham any differently than Pipkin. During the call, Nottingham stated that she was looking for an apartment and that she was married with two children. Barbara Allison then asked Nottingham if she and her husband were of the same race; when Nottingham merely said "yes" without further elaboration, Allison asked "what race would that be?" Nottingham replied "caucasian" and inquired why Allison asked the question. Barbara Allison responded by relating the prior Harrison incident.

Prior to Pipkin's call, the Allison's had received four other inquiries about the vacancy and had scheduled appointments with three of these people to view the apartment. On the evening of March 6, 1996, Barbara Allison showed the apartment to Holly McKay (McKay), a light-skinned, biracial woman who Allison perceived to be white, and McKay's white boyfriend. McKay informed Barbara Allison about possible credit problems; however, Allison responded by saying, "as long as both of you are white and have a job it's not a problem." McKay was unemployed at the time; however, she accepted the apartment on March 7, 1996 and gave the Allison's a security deposit. During McKay's tenancy, Barbara Allison told McKay that other tenants would be scared if Allison were to rent to a

⁴ In a return call to Barbara Allison, Pipkin stated that she could not believe what Allison had said; Barbara Allison then related the prior problem with Harrison and her boyfriend.

black couple. Further, Barbara Allison stated that it was her choice to whom to rent, that it was her building and that she will have the tenants she wants.

After her conversation with Barbara Allison, Pipkin filed a complaint with the PHRC alleging that Allison refused to deal with her and denied her an opportunity to rent one of the Allisons' apartments, in violation of section 5(h)(1) of the PHRA, 43 P.S. §955(h)(1).⁵ Following an investigation of the allegations, and after other efforts to settle the matter failed, the PHRC approved a public hearing, which was held on July 23, 1997 before a Permanent Hearing Examiner. At the conclusion of the PHRC's case in chief, counsel for the Allisons made a

⁵ Initially, Pipkin's complaint alleged that the Allisons' actions violated sections 5(a)(1) and (3) of the PHRA, 43 P.S. §§955(a)(1) and (3). At the public hearing, this was determined to be a typographical error and a motion to amend was granted, allowing Pipkin to substitute allegations of a violation of sections 5(h)(1) and (3) of the PHRA for sections 5(a)(1) and (3). Pipkin also sought to amend her complaint to include an allegation of a violation of section 5(h)(6) of the PHRA, which makes it unlawful to inquire about race in connection with the lease of any housing accommodation; however, this motion was denied.

Sections 5(h)(1) and (3) of the PHRA make it an unlawful discriminatory practice:

(h) For any person to:

(1) Refuse to...lease...or otherwise to deny or withhold any housing accommodation...from any person because of the race...of any person....

....
(3) Discriminate against any person in the terms or conditions of...leasing any housing accommodation...because of the race...of any person....

43 P.S. §955(h)(1) and (3). As the Permanent Hearing Examiner noted, because Pipkin never leased an apartment from the Allisons, she sets forth no section 5(h)(3) violation; rather, her complaint constitutes an alleged violation of section 5(h)(1) only.

motion for a compulsory non-suit which was denied. After the hearing, the Permanent Hearing Examiner gave the parties an opportunity to file post-hearing briefs within 30 days from receipt of the hearing transcript. The Allisons received their transcript on October 15, 1997; however, the PHRC entered its final order against the Allisons⁶ on October 28, 1997, prior to the expiration of the allotted 30 days. The Allisons appeal from that order.⁷

The Allisons first contend that, because Pipkin failed to establish a prima facie case of housing discrimination, the PHRC's Permanent Hearing Examiner erred in denying the Allisons' motion for a compulsory non-suit. However, in making this argument, the Allisons fail to recognize that the Permanent Hearing Examiner based his determination on direct evidence that Barbara Allison had discriminated against Pipkin. Where direct evidence of discrimination is presented, such evidence, if supported by a preponderance of the evidence, is sufficient to support a finding of discrimination. See Pinchback v. Armistead Homes Corp., 907 F.2d 1447 (4th Cir.), cert. denied, 498 U.S. 983 (1990). We agree that direct evidence of discrimination existed in this case. As the Permanent Hearing Examiner noted in his opinion:

⁶ Although Joseph Allison had no apparent role in his wife's discriminatory action, as co-owner of the housing accommodation, he was deemed vicariously liable for Barbara Allison's actions.

⁷ Our scope of review of an order of the PHRC is limited to determining whether there was a violation of constitutional rights, whether there was an error of law or whether the findings of fact necessary to support the adjudication are supported by substantial evidence. Pennsylvania State Police v. Pennsylvania Human Relations Commission, 561 A.2d 1320 (Pa. Cmwlth. 1989).

Here, by a direct and unambiguous showing, Pipkin has established that when she asked Barbara Allison if it would be a problem that she is black, Barbara Allison responded that "it could be." Barbara Allison admitted that she had made that response to Pipkin's inquiry. A statement by a person engaged in rental of a housing accommodation that either conveys that housing is unavailable because of race or expresses a preference for or limitation on a potential renter because of race violates Section 5(h)(1) of the PHRA. When Barbara Allison told Pipkin that her race could be a problem, Barbara Allison's action had the effect of deliberately discouraging Pipkin. Such an action amounts to a refusal to negotiate with Pipkin because of her race and evidences a racially subjective leasing procedure.

(Permanent Hearing Examiner op. at 12-13.)

Moreover, contrary to the Allisons' claim, we believe that the record does support a prima facie case of housing discrimination. In Allegheny Housing Rehabilitation Corp. v. Pennsylvania Human Relations Commission, 516 Pa. 124, 532 A.2d 315 (1987), our supreme court set forth the standards for proving a prima facie case of discrimination. Adapting those standards to accommodate the nature of the discrimination alleged here, the PHRC would have to establish that: (1) Pipkin is a member of a protected class; (2) the Allisons were aware of Pipkin's race; (3) Pipkin was qualified to rent the property in question; (4) Pipkin was denied the opportunity to rent the apartment; and (5) the apartment remained available for rent.

Here, the Allisons contend that counsel for the PHRC established only the first two of these elements in its case in chief; however, we conclude that the evidence presented is sufficient to establish the remaining three elements as well.

Because Pipkin was employed and could afford the rent, she was qualified to rent the apartment.⁸ Further, Pipkin was effectively denied the opportunity to rent the apartment when she was told that her race would be a problem. Finally, the record indicates that the apartment remained available after it was denied to Pipkin. In fact, no one viewed the apartment until the evening of March 6, 1996, after the conversation between Barbara Allison and Pipkin. By that time, the discrimination had already occurred. Accordingly, the Permanent Hearing Examiner properly denied the Allisons' motion for compulsory non-suit.

Next, the Allisons assert that they were denied their procedural due process rights because the Permanent Hearing Examiner engaged in quasi-prosecutorial questioning of the PHRC's witnesses, resulting in an improper commingling of the PHRC's prosecutorial and adjudicative functions. Relying on Lyness v. State Board of Medicine, 529 Pa. 535, 605 A.2d 1204 (1992), the Allisons contend that the Permanent Hearing Examiner created an impermissible appearance of bias by questioning Pipkin with regard to matters not addressed by the PHRC's attorney during the PHRC's case in chief. The Allisons maintain that the Permanent Hearing Examiner supplemented the record by raising these

⁸ The Allisons argue that Pipkin was not qualified to rent the apartment because she was two months in arrears to her present landlord; however, the Permanent Hearing Examiner points out the fallacy in this argument, noting that Barbara Allison never conveyed to Pipkin that the act of her withholding rent disqualified her from renting the Allisons' apartment. To the contrary, it was after discussing the rent withholding issue that Allison sought information from Pipkin regarding her race and that of her spouse; had Pipkin been disqualified from consideration because of the rent problem, such further conversation would have been unnecessary. We would also point out that such a claim by the Allisons lacks credibility in light of the fact that McKay was able to rent the apartment despite being unemployed and revealing a less than stellar credit history.

additional matters and, had he not done so, the record would not and could not have supported a finding of discrimination. Therefore, the Allisons contend that this court must set aside the PHRC's order based on those findings. Again, we disagree.

The questioning of a witness by a hearing examiner is authorized by law; indeed, in questioning witnesses about matters not raised by the prosecution, the Permanent Hearing Examiner was acting in accordance with 16 Pa. Code §42.111, which not only allows a hearing examiner to require additional evidence but also specifically grants the hearing examiner the power “[t]o call and examine witnesses.”⁹ 16 Pa. Code §§42.111 (9) and (10).

Moreover, such authorized questioning should not be deemed to constitute an impermissible commingling of prosecutorial and adjudicative functions sufficient to violate due process. Given the recognized flexibility of administrative proceedings, hearing examiners clearly are not required to assume a purely passive role in conducting those proceedings. Although a hearing examiner should not assist a prosecutor in a way that demonstrates bias, the authorized questioning of witnesses by the Permanent Hearing Examiner here, in an attempt to clarify the evidence and the claims, is a far cry from the situation in Lyness, where members of the administrative board who determined that a professional licensing

⁹ The Allisons have not raised a constitutional challenge to this regulation and, thus, have waived the right to make this challenge now.

prosecution should be initiated were the very same board members involved in the ultimate adjudication of the charges.

The Allisons also argue that they were denied procedural due process because they were not permitted to file a post-hearing brief. The parties had been directed to file a post-hearing brief within thirty days after receipt of the transcript. According to the Allisons, the PHRC and the Permanent Hearing Examiner were well aware that the Allisons did not receive their transcript until October 15, 1997, a day after the submission deadline, because counsel for the Allisons informed them by letter sent on that date.¹⁰ The Allisons contend that, despite this knowledge, the PHRC entered its final order on October 28, 1997, without affording the Allisons the opportunity to file a post-hearing brief. Relying on Bengal v. State Board of Pharmacy, 279 A.2d 374 (Pa. Cmwlth. 1971), the Allisons claim that this constituted a due process error requiring this court to set aside the PHRC's order.

The PHRC asserts that the Allisons were never denied an opportunity to file a post-hearing brief. In support of this contention, the PHRC points to an

¹⁰ The letter, addressed to the Permanent Hearing Examiner, stated:

Please be advised that I have just today received the transcript of the above-captioned hearing which was held on July 23, 1997.

Opposing counsel has no objection to our office using the thirty (30) day period from today's date to file our Post Hearing Brief.

(R.R. at 38a.)

October 29, 1997 letter written by the Permanent Hearing Examiner in response to the Allisons' letter of October 15, 1997, which provided:

The purpose of this letter is to respond to your letter dated October 15, 1997, which was received in my office on Monday, October 20, 1997. In your letter you indicated that you had not received a copy of the transcript in the referenced case until October 15, 1997. Your letter further indicated that opposing counsel had no objection to an additional thirty days to file a post-hearing brief.

According to my calculations, post-hearing briefs had been due on or before October 14, 1997. Having received neither a post-hearing brief nor a request for a continuance from you, on October 15, 1997 my recommended findings, along with the full record in this matter, was forwarded to the PHRC Commissioners for their review and consideration.

On October 17, 1997, I commenced a week's vacation and upon my return, I was informed of your letter. During my absence I had instructed my colleague to either field any call requesting an extension or to forward any post-hearing brief to the Commissioners for inclusion in the materials previously sent.

As you are perhaps aware, the PHRC met on October 27, 1997 and acted on my recommendations. Prior to their action, I informed them of the specifics of the chronology of events regarding the absence of your post-hearing brief and advised them of the content of your October 15, 1997 letter. Since you failed to make a timely request for an extension, they adjudicated the referenced matter without consideration of any brief on behalf of the Respondents.

(R.R. at 10a-11a.) According to the PHRC, this letter demonstrates that, unlike the petitioner in Bengal,¹¹ the Allisons were given a full and fair opportunity to protect their interests, but simply neglected to take advantage of that opportunity when they neither submitted a post-hearing brief nor made a proper request for an extension of time to make the submission. Here, the PHRC issued its order without considering any post-hearing brief on behalf of the Allisons, in seeming violation of the Administrative Agency Law, 2 Pa.C.S. §506; however, because we agree that the PHRC's action was the result of the Allisons' failure to avail themselves of the process afforded them, rather than of the PHRC's denial of due process to the Allisons, we conclude that the PHRC's order need not be set aside on that basis.

Next, the Allisons argue that the PHRC erred in awarding \$8,000.00 in compensatory damages to Pipkin for humiliation she suffered as a result of discrimination because the record does not contain substantial evidence to support

¹¹ The petitioner in Bengal appealed from an adjudication of the State Board of Pharmacy (Board) that suspended the petitioner's pharmacy license, arguing that he was denied due process when he was not afforded an opportunity to file a brief with the Board prior to the adjudication. We noted that, following his hearing, the petitioner had requested to be notified when the transcript was transcribed and filed so that he could file a brief, but that, despite this request, the next word the petitioner received was that the adjudication and order had been filed over a month earlier. Under these circumstances, we concluded that the Board's action constituted a violation of the Administrative Agency Law's mandatory provision that parties be afforded an opportunity to submit briefs prior to adjudication as well as a violation of the petitioner's constitutional due process rights. Accordingly, we remanded the case to the Board to give the petitioner an opportunity to file a brief. In contrast to the situation in Bengal, here, the Allisons received a copy of the transcript almost two weeks prior to the PHRC's adjudication, during which time the Allisons either could have filed their brief or requested an extension of time in which to make that filing. By failing to take either course of action, the Allisons forfeited the opportunity to plead their case to the PHRC.

a finding that the Allisons discriminated against Pipkin based on her race. To the contrary, the Allisons contend that the record clearly fails to establish that they engaged in any discriminatory practices. Specifically, the Allisons maintain that the record indicates that they used a waiting list to address inquiries into any vacant apartment, and because the Allisons, in fact, rented the apartment to a black individual (McKay) who had priority on the waiting list, no discrimination could be found. We cannot accept the Allisons' argument.

In his opinion, the Permanent Hearing Examiner expressly discredited the Allisons' claim "that their procedures for finding tenants excluded Pipkin from renting their vacant apartment" because applicants are prioritized in order of their inquiry. Indeed, the Permanent Hearing Examiner pointed out that the record showed that the Allisons did not adhere to a prioritized list in showing the apartment, a fact which Barbara Allison attempted to conceal with McKay's assistance.¹² (Permanent Hearing Examiner's op. at 13-15.) Here, the determination of discrimination was based on supported findings of fact reflecting the Permanent Hearing Examiner's reasonable and careful weighing of the evidence, his assessment of credibility and his construction of the inferences from the testimony before him. These findings were fully adopted by the PHRC in its role as factfinder. Because the PHRC has broad discretion in fashioning a remedy when discrimination has been found, the PHRC did not err in awarding Pipkin \$8,000.00 in compensatory damages for the humiliation she suffered.

¹² As to the fact that, in renting to McKay, Barbara Allison rented the apartment to a "black" tenant, the findings clearly indicate that Allison perceived McKay as white and rented to her on that basis. (N.T. at 148.)

Finally, the Allisons contend that the PHRC erred in basing its order on violations which had not been alleged. In making this argument, the Allisons appear to challenge evidence in the record that would support a finding that the Allisons violated section 5(h)(6) of the PHRA, a charge which was not alleged in Pipkin's complaint. However, because the PHRC's order was based solely upon a violation of section 5(h)(1) of the PHRA, an allegation fully set forth in the complaint, the Allisons argument is without merit. In fact, although the Permanent Hearing Examiner recognized that some of the evidence submitted could support a violation of section 5(h)(6) of the PHRA, he specifically ruled that such evidence had no impact on the Allisons' liability because Pipkin's complaint did not contain an allegation of a section 5(h)(6) violation and because Pipkin's motion to amend her complaint to add this allegation was denied. (Permanent Hearing Examiner's op. at 15, 16.)

Accordingly, for the foregoing reasons, we affirm the PHRC's order.


ROCHELLE S. FRIEDMAN, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JOSEPH ALLISON and BARBARA
ALLISON,

Petitioners

v.

PENNSYLVANIA HUMAN
RELATIONS COMMISSION,

Respondent

No. 3168 C.D. 1997

ORDER

AND NOW, this 16th day of July, 1998, the order of the
Pennsylvania Human Relations Commission, dated October 28, 1997, is hereby
affirmed.


ROCHELLE S. FRIEDMAN, Judge

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

VELENTIA PIPKIN,
Complainant

v.

JOSEPH and BARBARA ALLISON,
Respondents

DOCKET NO. H-7003

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Pipkin has proven discrimination against the Allisons in violation of Section 5(h)(1) of the Pennsylvania Human Relations Act.

It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

By: 

Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

VELENTIA PIPKIN,
Complainant

v.

JOSEPH and BARBARA ALLISON,
Respondents

DOCKET NO. H-7003

FINAL ORDER

AND NOW, this 28th day of October, 1997, after

a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law, and Opinion as its own finding in this matter, and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

1. The Allisons shall permanently cease and desist from engaging in any acts or practices which have the purpose or effect of denying equal housing opportunities because of race. Prohibited acts include, but are not limited to:

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b. otherwise making unavailable or denying an apartment to any person because of race;

c. making any inquiry or eliciting any information concerning the race of an applicant for an apartment; and

d. indicating in any way a discriminatory preference or limitation based on race.

2. That, jointly and severally, the Allisons shall pay Pipkin the lump sum of \$8,000 in compensatory damages for the humiliation Pipkin suffered.

3. That, within thirty days of the effective date of this Order, the Allisons shall deliver to PHRC Housing Division Assistant Chief Counsel Nancy L. Gippert a check payable to the Commonwealth of Pennsylvania in the amount of \$2,000, which amount represents an assessment of a civil penalty pursuant to Section 9(f)(2)(i) of the PHRA.

4. Consistent with Section 5(j) of the PHRA, the Allisons shall prominently post and exhibit a "Fair Housing Practice" notice distributed by the PHRC Housing Division alongside any "for rent" signs posted in connection with any apartments they own. The Allisons shall hereafter also include the fair housing "Equal Opportunity in Housing" symbol in any advertisement for any apartment owned by the Allisons.

5. On the last day of every third month, beginning thirty days after this decision becomes final (or four times per year), and continuing for three years from the date this Order becomes final, the Allisons shall submit reports containing the following information to the PHRC Housing Division, PO Box 3145, Harrisburg, PA 17105, provided that the Housing Division may modify this paragraph of this Order as that office deems necessary to make its requirements less, but not more, burdensome:

a. A duplicate of every written application, and a log of all persons who applied for occupancy at any of the properties owned, operated, or otherwise controlled in whole or in part by the Allisons indicating the name and address of each applicant, the number of persons to reside in the unit, the number of bedrooms in the unit for which the applicant applied, whether the applicant was rejected or accepted, the date on which the applicant was notified of acceptance or rejection, and if rejected, the reason for such rejection. The Allisons shall maintain the originals of all applications described in the log.

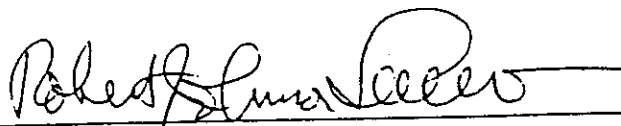
b. A list of vacancies at properties owned, operated, or otherwise controlled in whole or in part by the Allisons during the reporting period, including: the address of the unit, the number of bedrooms in the unit, the date the tenant gave notice of an intent to move out, the date the tenant moved out, the date the unit was rented again or committed to a new rental, and the date the new tenant moved in.

c. Sample copies of advertisements published during the reporting period, specifying the dates and media used or, if applicable, a statement that no advertisements have been published during the reporting period.

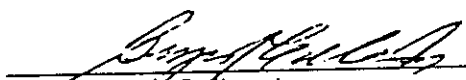
d. A list of all people who inquired, in writing, in person, or by telephone, about renting an apartment, including their names and addresses, the date of their inquiry, and the disposition of their inquiry.

6. That, within thirty days of the effective date of this Order, the Allisons shall report to the PHRC on the manner of their compliance with the terms of this Order by letter addressed to Nancy L. Gippert, Assistant Chief Counsel, PHRC Housing Division, PO Box 3145, Harrisburg, PA 17105.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: 
Robert Johnson Smith
Chairperson

Attest:


Gregory J. Celia, Jr.
Secretary

CERTIFICATE OF SERVICE

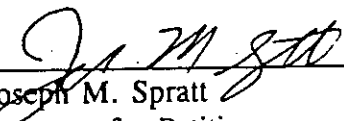
I, Joseph M. Spratt, ESQUIRE, do hereby certify that a true and correct copy of
PETITIONER'S BRIEF was forwarded to the following counsel of record by first class mail,
postage pre-paid, on this 26th day of January, 1998:

Nancy L. Gippert, Esquire
Human Relations Commission
101 South Second Street, Suite 300
P.O. Box 3145
Harrisburg, PA 17105-3145

Carl Summerson, Hearing Officer
Human Relations Commission
101 S. Second Street, Suite 300
P.O. Box 3145
Harrisburg, PA 17105-3145

CONTE, MELTON & D'ANTONIO

By



Joseph M. Spratt
Attorney for Petitioner

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JOSEPH ALLISON and BARBARA ALLISON, :
 :
 : Petitioners :
 :
 : v. : No. 3168 C.D. 1997
 : Argued: June 12, 1998
 :
 PENNSYLVANIA HUMAN :
 RELATIONS COMMISSION, :
 : Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JESS S. JULIANTE, Senior Judge

OPINION BY JUDGE FRIEDMAN FILED: July 16, 1998

Joseph and Barbara Allison (Allisons)¹ appeal from an order of the Pennsylvania Human Relations Commission (PHRC) that adopts the Findings of Fact, Conclusions of Law and Opinion of the PHRC's Permanent Hearing Examiner and, *inter alia*, directs the Allisons to: (1) cease and desist from any acts that have the purpose or effect of denying equal housing opportunities because of race; (2) pay Valentia Pipkin the lump sum of \$8,000.00 in compensatory damages for humiliation; and (3) deliver a check for \$2,000.00 payable to the Commonwealth of Pennsylvania as an assessment of a civil penalty pursuant to section 9(f)(2)(i) of the Pennsylvania Human Relations Act (PHRA).²

¹ In this opinion, any reference to an individual Allison is to Barbara Allison only.

² Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §959(f)(2)(i).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JOSEPH ALLISON and BARBARA
ALLISON,

Petitioners

v.

PENNSYLVANIA HUMAN
RELATIONS COMMISSION,

Respondent

No. 3168 C.D. 1997

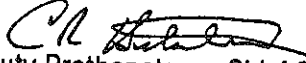
PER CURIAM

ORDER

AND NOW, this 20th day of August, 1998, it is ordered that the above-captioned opinion filed July 16, 1998 shall be designated OPINION rather than MEMORANDUM OPINION, and it shall be reported.

CERTIFIED FROM THE RECORD
AND ORDER EXIT

AUG 20 1998


Deputy Prothonotary - Chief Clerk

The facts, as found by the Permanent Hearing Examiner and adopted by the PHRC, are summarized as follows. The Allisons renovated a building they owned in New Brighton, Pennsylvania to create apartment units. On March 3, 1996, the Allisons advertised the imminent vacancy of one of these units, then tenanted by Renee Harrison (Harrison), a white female, and her boyfriend, a black male. Following a domestic disturbance, police had arrested Harrison's boyfriend. On the morning of March 6, 1996, Valentia Pipkin (Pipkin), a black female employed at Mellon Mortgage Company, called the Allisons to inquire about the apartment and spoke to Barbara Allison.

During the course of Pipkin's conversation with Barbara Allison, Pipkin stated that she was married with a five year old child.³ Barbara Allison then responded that she had to be leery of mixed couples and asked Pipkin if she and her husband were of the same race. Pipkin said she was black and asked if that would be a problem, to which Allison replied, "it could be." Barbara Allison explained that two of her tenants might have a problem with Pipkin's race and move out of the building. At that point, Pipkin told Allison that she would not want to rent the apartment from a person like her and hung up.

³ During the conversation, Pipkin also told Barbara Allison that she was withholding rent payments on her current apartment because of a leak in the roof that had caused property damage. In response, Allison was sympathetic and helpful, suggesting that Pipkin have the leak fixed and then send the bill to her landlord along with the rent payment less the amount of the repair bill.

After this conversation, Pipkin went to the bathroom in tears to gather her composure. Still crying and upset, Pipkin told her boss what had happened.⁴ When Pipkin went to her boss's office, Wendy Nottingham (Nottingham), a co-worker, was present. At Pipkin's request, Nottingham agreed to call Barbara Allison to see if she would treat Nottingham any differently than Pipkin. During the call, Nottingham stated that she was looking for an apartment and that she was married with two children. Barbara Allison then asked Nottingham if she and her husband were of the same race; when Nottingham merely said "yes" without further elaboration, Allison asked "what race would that be?" Nottingham replied "caucasian" and inquired why Allison asked the question. Barbara Allison responded by relating the prior Harrison incident.

Prior to Pipkin's call, the Allisons had received four other inquiries about the vacancy and had scheduled appointments with three of these people to view the apartment. On the evening of March 6, 1996, Barbara Allison showed the apartment to Holly McKay (McKay), a light-skinned, biracial woman who Allison perceived to be white, and McKay's white boyfriend. McKay informed Barbara Allison about possible credit problems; however, Allison responded by saying, "as long as both of you are white and have a job it's not a problem." McKay was unemployed at the time; however, she accepted the apartment on March 7, 1996 and gave the Allisons a security deposit. During McKay's tenancy, Barbara Allison told McKay that other tenants would be scared if Allison were to rent to a

⁴ In a return call to Barbara Allison, Pipkin stated that she could not believe what Allison had said; Barbara Allison then related the prior problem with Harrison and her boyfriend.

black couple. Further, Barbara Allison stated that it was her choice to whom to rent, that it was her building and that she will have the tenants she wants.

After her conversation with Barbara Allison, Pipkin filed a complaint with the PHRC alleging that Allison refused to deal with her and denied her an opportunity to rent one of the Allisons' apartments, in violation of section 5(h)(1) of the PHRA, 43 P.S. §955(h)(1).⁵ Following an investigation of the allegations, and after other efforts to settle the matter failed, the PHRC approved a public hearing, which was held on July 23, 1997 before a Permanent Hearing Examiner. At the conclusion of the PHRC's case in chief, counsel for the Allisons made a

⁵ Initially, Pipkin's complaint alleged that the Allisons' actions violated sections 5(a)(1) and (3) of the PHRA, 43 P.S. §§955(a)(1) and (3). At the public hearing, this was determined to be a typographical error and a motion to amend was granted, allowing Pipkin to substitute allegations of a violation of sections 5(h)(1) and (3) of the PHRA for sections 5(a)(1) and (3). Pipkin also sought to amend her complaint to include an allegation of a violation of section 5(h)(6) of the PHRA, which makes it unlawful to inquire about race in connection with the lease of any housing accommodation; however, this motion was denied.

Sections 5(h)(1) and (3) of the PHRA make it an unlawful discriminatory practice:

(h) For any person to:

(1) Refuse to...lease...or otherwise to deny or withhold any housing accommodation...from any person because of the race...of any person....

....
(3) Discriminate against any person in the terms or conditions of...leasing any housing accommodation...because of the race...of any person....

43 P.S. §955(h)(1) and (3). As the Permanent Hearing Examiner noted, because Pipkin never leased an apartment from the Allisons, she sets forth no section 5(h)(3) violation; rather, her complaint constitutes an alleged violation of section 5(h)(1) only.

motion for a compulsory non-suit which was denied. After the hearing, the Permanent Hearing Examiner gave the parties an opportunity to file post-hearing briefs within 30 days from receipt of the hearing transcript. The Allisons received their transcript on October 15, 1997; however, the PHRC entered its final order against the Allisons⁶ on October 28, 1997, prior to the expiration of the allotted 30 days. The Allisons appeal from that order.⁷

The Allisons first contend that, because Pipkin failed to establish a prima facie case of housing discrimination, the PHRC's Permanent Hearing Examiner erred in denying the Allisons' motion for a compulsory non-suit. However, in making this argument, the Allisons fail to recognize that the Permanent Hearing Examiner based his determination on direct evidence that Barbara Allison had discriminated against Pipkin. Where direct evidence of discrimination is presented, such evidence, if supported by a preponderance of the evidence, is sufficient to support a finding of discrimination. See Pinchback v. Armistead Homes Corp., 907 F.2d 1447 (4th Cir.), cert. denied, 498 U.S. 983 (1990). We agree that direct evidence of discrimination existed in this case. As the Permanent Hearing Examiner noted in his opinion:

⁶ Although Joseph Allison had no apparent role in his wife's discriminatory action, as co-owner of the housing accommodation, he was deemed vicariously liable for Barbara Allison's actions.

⁷ Our scope of review of an order of the PHRC is limited to determining whether there was a violation of constitutional rights, whether there was an error of law or whether the findings of fact necessary to support the adjudication are supported by substantial evidence. Pennsylvania State Police v. Pennsylvania Human Relations Commission, 561 A.2d 1320 (Pa. Cmwlth. 1989).

Here, by a direct and unambiguous showing, Pipkin has established that when she asked Barbara Allison if it would be a problem that she is black, Barbara Allison responded that "it could be." Barbara Allison admitted that she had made that response to Pipkin's inquiry. A statement by a person engaged in rental of a housing accommodation that either conveys that housing is unavailable because of race or expresses a preference for or limitation on a potential renter because of race violates Section 5(h)(1) of the PHRA. When Barbara Allison told Pipkin that her race could be a problem, Barbara Allison's action had the effect of deliberately discouraging Pipkin. Such an action amounts to a refusal to negotiate with Pipkin because of her race and evidences a racially subjective leasing procedure.

(Permanent Hearing Examiner op. at 12-13.)

Moreover, contrary to the Allisons' claim, we believe that the record does support a prima facie case of housing discrimination. In Allegheny Housing Rehabilitation Corp. v. Pennsylvania Human Relations Commission, 516 Pa. 124, 532 A.2d 315 (1987), our supreme court set forth the standards for proving a prima facie case of discrimination. Adapting those standards to accommodate the nature of the discrimination alleged here, the PHRC would have to establish that: (1) Pipkin is a member of a protected class; (2) the Allisons were aware of Pipkin's race; (3) Pipkin was qualified to rent the property in question; (4) Pipkin was denied the opportunity to rent the apartment; and (5) the apartment remained available for rent.

Here, the Allisons contend that counsel for the PHRC established only the first two of these elements in its case in chief; however, we conclude that the evidence presented is sufficient to establish the remaining three elements as well.

Because Pipkin was employed and could afford the rent, she was qualified to rent the apartment.⁸ Further, Pipkin was effectively denied the opportunity to rent the apartment when she was told that her race would be a problem. Finally, the record indicates that the apartment remained available after it was denied to Pipkin. In fact, no one viewed the apartment until the evening of March 6, 1996, after the conversation between Barbara Allison and Pipkin. By that time, the discrimination had already occurred. Accordingly, the Permanent Hearing Examiner properly denied the Allisons' motion for compulsory non-suit.

Next, the Allisons assert that they were denied their procedural due process rights because the Permanent Hearing Examiner engaged in quasi-prosecutorial questioning of the PHRC's witnesses, resulting in an improper commingling of the PHRC's prosecutorial and adjudicative functions. Relying on Lyness v. State Board of Medicine, 529 Pa. 535, 605 A.2d 1204 (1992), the Allisons contend that the Permanent Hearing Examiner created an impermissible appearance of bias by questioning Pipkin with regard to matters not addressed by the PHRC's attorney during the PHRC's case in chief. The Allisons maintain that the Permanent Hearing Examiner supplemented the record by raising these

⁸ The Allisons argue that Pipkin was not qualified to rent the apartment because she was two months in arrears to her present landlord; however, the Permanent Hearing Examiner points out the fallacy in this argument, noting that Barbara Allison never conveyed to Pipkin that the act of her withholding rent disqualified her from renting the Allisons' apartment. To the contrary, it was after discussing the rent withholding issue that Allison sought information from Pipkin regarding her race and that of her spouse; had Pipkin been disqualified from consideration because of the rent problem, such further conversation would have been unnecessary. We would also point out that such a claim by the Allisons lacks credibility in light of the fact that McKay was able to rent the apartment despite being unemployed and revealing a less than stellar credit history.

additional matters and, had he not done so, the record would not and could not have supported a finding of discrimination. Therefore, the Allisons contend that this court must set aside the PHRC's order based on those findings. Again, we disagree.

The questioning of a witness by a hearing examiner is authorized by law; indeed, in questioning witnesses about matters not raised by the prosecution, the Permanent Hearing Examiner was acting in accordance with 16 Pa. Code §42.111, which not only allows a hearing examiner to require additional evidence but also specifically grants the hearing examiner the power “[t]o call and examine witnesses.”⁹ 16 Pa. Code §§42.111 (9) and (10).

Moreover, such authorized questioning should not be deemed to constitute an impermissible commingling of prosecutorial and adjudicative functions sufficient to violate due process. Given the recognized flexibility of administrative proceedings, hearing examiners clearly are not required to assume a purely passive role in conducting those proceedings. Although a hearing examiner should not assist a prosecutor in a way that demonstrates bias, the authorized questioning of witnesses by the Permanent Hearing Examiner here, in an attempt to clarify the evidence and the claims, is a far cry from the situation in Lyness, where members of the administrative board who determined that a professional licensing

⁹ The Allisons have not raised a constitutional challenge to this regulation and, thus, have waived the right to make this challenge now.

prosecution should be initiated were the very same board members involved in the ultimate adjudication of the charges.

The Allisons also argue that they were denied procedural due process because they were not permitted to file a post-hearing brief. The parties had been directed to file a post-hearing brief within thirty days after receipt of the transcript. According to the Allisons, the PHRC and the Permanent Hearing Examiner were well aware that the Allisons did not receive their transcript until October 15, 1997, a day after the submission deadline, because counsel for the Allisons informed them by letter sent on that date.¹⁰ The Allisons contend that, despite this knowledge, the PHRC entered its final order on October 28, 1997, without affording the Allisons the opportunity to file a post-hearing brief. Relying on Bengal v. State Board of Pharmacy, 279 A.2d 374 (Pa. Cmwlth. 1971), the Allisons claim that this constituted a due process error requiring this court to set aside the PHRC's order.

The PHRC asserts that the Allisons were never denied an opportunity to file a post-hearing brief. In support of this contention, the PHRC points to an

¹⁰ The letter, addressed to the Permanent Hearing Examiner, stated:

Please be advised that I have just today received the transcript of the above-captioned hearing which was held on July 23, 1997.

Opposing counsel has no objection to our office using the thirty (30) day period from today's date to file our Post Hearing Brief.

(R.R. at 38a.)

October 29, 1997 letter written by the Permanent Hearing Examiner in response to the Allisons' letter of October 15, 1997, which provided:

The purpose of this letter is to respond to your letter dated October 15, 1997, which was received in my office on Monday, October 20, 1997. In your letter you indicated that you had not received a copy of the transcript in the referenced case until October 15, 1997. Your letter further indicated that opposing counsel had no objection to an additional thirty days to file a post-hearing brief.

According to my calculations, post-hearing briefs had been due on or before October 14, 1997. Having received neither a post-hearing brief nor a request for a continuance from you, on October 15, 1997 my recommended findings, along with the full record in this matter, was forwarded to the PHRC Commissioners for their review and consideration.

On October 17, 1997, I commenced a week's vacation and upon my return, I was informed of your letter. During my absence I had instructed my colleague to either field any call requesting an extension or to forward any post-hearing brief to the Commissioners for inclusion in the materials previously sent.

As you are perhaps aware, the PHRC met on October 27, 1997 and acted on my recommendations. Prior to their action, I informed them of the specifics of the chronology of events regarding the absence of your post-hearing brief and advised them of the content of your October 15, 1997 letter. Since you failed to make a timely request for an extension, they adjudicated the referenced matter without consideration of any brief on behalf of the Respondents.

(R.R. at 10a-11a.) According to the PHRC, this letter demonstrates that, unlike the petitioner in Bengal,¹¹ the Allisons were given a full and fair opportunity to protect their interests, but simply neglected to take advantage of that opportunity when they neither submitted a post-hearing brief nor made a proper request for an extension of time to make the submission. Here, the PHRC issued its order without considering any post-hearing brief on behalf of the Allisons, in seeming violation of the Administrative Agency Law, 2 Pa.C.S. §506; however, because we agree that the PHRC's action was the result of the Allisons' failure to avail themselves of the process afforded them, rather than of the PHRC's denial of due process to the Allisons, we conclude that the PHRC's order need not be set aside on that basis.

Next, the Allisons argue that the PHRC erred in awarding \$8,000.00 in compensatory damages to Pipkin for humiliation she suffered as a result of discrimination because the record does not contain substantial evidence to support

¹¹ The petitioner in Bengal appealed from an adjudication of the State Board of Pharmacy (Board) that suspended the petitioner's pharmacy license, arguing that he was denied due process when he was not afforded an opportunity to file a brief with the Board prior to the adjudication. We noted that, following his hearing, the petitioner had requested to be notified when the transcript was transcribed and filed so that he could file a brief, but that, despite this request, the next word the petitioner received was that the adjudication and order had been filed over a month earlier. Under these circumstances, we concluded that the Board's action constituted a violation of the Administrative Agency Law's mandatory provision that parties be afforded an opportunity to submit briefs prior to adjudication as well as a violation of the petitioner's constitutional due process rights. Accordingly, we remanded the case to the Board to give the petitioner an opportunity to file a brief. In contrast to the situation in Bengal, here, the Allisons received a copy of the transcript almost two weeks prior to the PHRC's adjudication, during which time the Allisons either could have filed their brief or requested an extension of time in which to make that filing. By failing to take either course of action, the Allisons forfeited the opportunity to plead their case to the PHRC.

a finding that the Allisons discriminated against Pipkin based on her race. To the contrary, the Allisons contend that the record clearly fails to establish that they engaged in any discriminatory practices. Specifically, the Allisons maintain that the record indicates that they used a waiting list to address inquiries into any vacant apartment, and because the Allisons, in fact, rented the apartment to a black individual (McKay) who had priority on the waiting list, no discrimination could be found. We cannot accept the Allisons' argument.

In his opinion, the Permanent Hearing Examiner expressly discredited the Allisons' claim "that their procedures for finding tenants excluded Pipkin from renting their vacant apartment" because applicants are prioritized in order of their inquiry. Indeed, the Permanent Hearing Examiner pointed out that the record showed that the Allisons did not adhere to a prioritized list in showing the apartment, a fact which Barbara Allison attempted to conceal with McKay's assistance.¹² (Permanent Hearing Examiner's op. at 13-15.) Here, the determination of discrimination was based on supported findings of fact reflecting the Permanent Hearing Examiner's reasonable and careful weighing of the evidence, his assessment of credibility and his construction of the inferences from the testimony before him. These findings were fully adopted by the PHRC in its role as factfinder. Because the PHRC has broad discretion in fashioning a remedy when discrimination has been found, the PHRC did not err in awarding Pipkin \$8,000.00 in compensatory damages for the humiliation she suffered.

¹² As to the fact that, in renting to McKay, Barbara Allison rented the apartment to a "black" tenant, the findings clearly indicate that Allison perceived McKay as white and rented to her on that basis. (N.T. at 148.)

Finally, the Allisons contend that the PHRC erred in basing its order on violations which had not been alleged. In making this argument, the Allisons appear to challenge evidence in the record that would support a finding that the Allisons violated section 5(h)(6) of the PHRA, a charge which was not alleged in Pipkin's complaint. However, because the PHRC's order was based solely upon a violation of section 5(h)(1) of the PHRA, an allegation fully set forth in the complaint, the Allisons argument is without merit. In fact, although the Permanent Hearing Examiner recognized that some of the evidence submitted could support a violation of section 5(h)(6) of the PHRA, he specifically ruled that such evidence had no impact on the Allisons' liability because Pipkin's complaint did not contain an allegation of a section 5(h)(6) violation and because Pipkin's motion to amend her complaint to add this allegation was denied. (Permanent Hearing Examiner's op. at 15, 16.)

Accordingly, for the foregoing reasons, we affirm the PHRC's order.


ROCHELLE S. FRIEDMAN, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JOSEPH ALLISON and BARBARA
ALLISON,

Petitioners

v.

PENNSYLVANIA HUMAN
RELATIONS COMMISSION,

Respondent

No. 3168 C.D. 1997

ORDER

AND NOW, this 16th day of July, 1998, the order of the
Pennsylvania Human Relations Commission, dated October 28, 1997, is hereby
affirmed.


ROCHELLE S. FRIEDMAN, Judge

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

VELENTIA PIPKIN,
Complainant

v.

JOSEPH and BARBARA ALLISON,
Respondents

DOCKET NO. H-7003

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Pipkin has proven discrimination against the Allisons in violation of Section 5(h)(1) of the Pennsylvania Human Relations Act.

It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

By: 

Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

VELENTIA PIPKIN,
Complainant

v.

JOSEPH and BARBARA ALLISON,
Respondents

DOCKET NO. H-7003

FINAL ORDER

AND NOW, this 28th day of October, 1997, after

a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law, and Opinion as its own finding in this matter, and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

1. The Allisons shall permanently cease and desist from engaging in any acts or practices which have the purpose or effect of denying equal housing opportunities because of race. Prohibited acts include, but are not limited to:

- a. refusing or failing to rent an apartment, or refusing to negotiate for the rental of an apartment because of race;
- b. otherwise making unavailable or denying an apartment to any person because of race;
- c. making any inquiry or eliciting any information concerning the race of an applicant for an apartment; and
- d. indicating in any way a discriminatory preference or limitation based on race.

2. That, jointly and severally, the Allisons shall pay Pipkin the lump sum of \$8,000 in compensatory damages for the humiliation Pipkin suffered.

3. That, within thirty days of the effective date of this Order, the Allisons shall deliver to PHRC Housing Division Assistant Chief Counsel Nancy L. Gippert a check payable to the Commonwealth of Pennsylvania in the amount of \$2,000, which amount represents an assessment of a civil penalty pursuant to Section 9(f)(2)(i) of the PHRA.

4. Consistent with Section 5(j) of the PHRA, the Allisons shall prominently post and exhibit a "Fair Housing Practice" notice distributed by the PHRC Housing Division alongside any "for rent" signs posted in connection with any apartments they own. The Allisons shall hereafter also include the fair housing "Equal Opportunity in Housing" symbol in any advertisement for any apartment owned by the Allisons.

5. On the last day of every third month, beginning thirty days after this decision becomes final (or four times per year), and continuing for three years from the date this Order becomes final, the Allisons shall submit reports containing the following information to the PHRC Housing Division, PO Box 3145, Harrisburg, PA 17105, provided that the Housing Division may modify this paragraph of this Order as that office deems necessary to make its requirements less, but not more, burdensome:

a. A duplicate of every written application, and a log of all persons who applied for occupancy at any of the properties owned, operated, or otherwise controlled in whole or in part by the Allisons indicating the name and address of each applicant, the number of persons to reside in the unit, the number of bedrooms in the unit for which the applicant applied, whether the applicant was rejected or accepted, the date on which the applicant was notified of acceptance or rejection, and if rejected, the reason for such rejection. The Allisons shall maintain the originals of all applications described in the log.

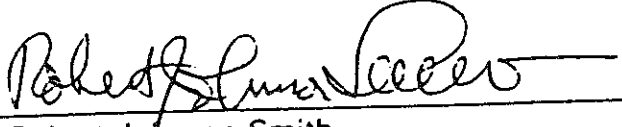
b. A list of vacancies at properties owned, operated, or otherwise controlled in whole or in part by the Allisons during the reporting period, including: the address of the unit, the number of bedrooms in the unit, the date the tenant gave notice of an intent to move out, the date the tenant moved out, the date the unit was rented again or committed to a new rental, and the date the new tenant moved in.

c. Sample copies of advertisements published during the reporting period, specifying the dates and media used or, if applicable, a statement that no advertisements have been published during the reporting period.


d. A list of all people who inquired, in writing, in person, or by telephone, about renting an apartment, including their names and addresses, the date of their inquiry, and the disposition of their inquiry.

6. That, within thirty days of the effective date of this Order, the Allisons shall report to the PHRC on the manner of their compliance with the terms of this Order by letter addressed to Nancy L. Gippert, Assistant Chief Counsel, PHRC Housing Division, PO Box 3145, Harrisburg, PA 17105.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: 
Robert Johnson Smith
Chairperson

Attest:


Gregory J. Celia, Jr.
Secretary

CERTIFICATE OF SERVICE

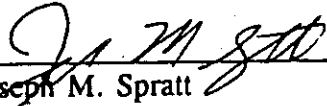
I, Joseph M. Spratt, ESQUIRE, do hereby certify that a true and correct copy of PETITIONER'S BRIEF was forwarded to the following counsel of record by first class mail, postage pre-paid, on this 26th day of January, 1998:

Nancy L. Gippert, Esquire
Human Relations Commission
101 South Second Street, Suite 300
P.O. Box 3145
Harrisburg, PA 17105-3145

Carl Summerson, Hearing Officer
Human Relations Commission
101 S. Second Street, Suite 300
P.O. Box 3145
Harrisburg, PA 17105-3145

CONTE, MELTON & D'ANTONIO

By



Joseph M. Spratt
Attorney for Petitioner