

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 74-1048 and 74-1049

DOROTHY GAUTREAUX, et al.,

Plaintiffs-Appellants,

v.

CHICAGO HOUSING AUTHORITY and
JAMES T. LYNN, Successor to George
W. Romney, Secretary of the
Department of Housing and Urban
Development, et al.,

Defendants-Appellees.

On Appeal from the Judgment of the United States
District Court for the Northern District of Illinois
Eastern Division

REPLY BRIEF OF PLAINTIFFS-APPELLANTS
TO BRIEF OF APPELLEE CHA

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CHA says that the district court "merely concluded the
plaintiffs failed to demonstrate the necessity of metropolitan

*This reply brief is directed only to the brief of CHA; plaintiffs will file their reply brief to the brief of HUD within a very few days and in any event no later than June 10, 1974. The CHA and HUD briefs were originally due to be filed on April 15, 1974. CHA's brief was filed on time but the Court granted two extensions to HUD, first to May 15, 1974 and then to May 20, 1974. Plaintiffs originally intended to file a single brief in reply to the briefs of CHA and HUD and anticipated that there would be ample time to do so before oral argument even in light of the second HUD extension.

However, HUD's brief was not received by plaintiffs' counsel until May 28, 1974. Unfortunately, this did not allow sufficient time before the oral argument (to be held on June 4, 1974) to prepare a reply to HUD's brief.

relief," and that, since in reaching that conclusion the court did not in CHA's view abuse its discretion, the district court must be upheld. (p.18.) This formulation grievously misconceives the issue on appeal.

Initially it was HUD's burden to propose a plan promising "meaningful and immediate progress," Green v. County School Board, 391 U.S. 430, 439 (1968), toward the end of achieving "the greatest possible degree of actual desegregation." Davis v. Board of School Commissioners, 402 U.S. 33, 37 (1971).^{*} It then became the duty of the district court to fashion an effective remedy. Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 16 (1971). In performing that duty the district court was obligated to consider the use of "all available techniques," Davis, supra, 402 U.S. at 37, under the implicit command of the Supreme Court that "all reasonable methods be available to formulate an effective remedy," North Carolina State Board of Education v. Swann, 402 U.S. 43, 46 (1971), and to weigh any proposed plan in the light of any alternatives which might be "more promising in their effectiveness." Green, supra, 391 U.S. at

^{*}CHA argues as if the plaintiffs had a kind of burden of proof to bear in the proceedings below. But, as Green shows, in racial desegregation cases it is the duty of the party who has done the discriminating, not the duty of the party against whom the discrimination has been practiced, to come forward with an effective remedial plan and to establish that the plan is in fact likely to be effective. It is clear that HUD failed to bear that burden below - its evidence was confined to the paucity of subsidy money then available. CHA offered no evidence at all, on the effectiveness of HUD's proposed order or anything else.

Thus, it was the duty of the district court to consider any available technique that might be more promising in its effectiveness than what had been proposed by HUD; it was not proper, as CHA argues, for the court to exclude from consideration any approach the "necessity" of which had not been demonstrated by plaintiffs. The standard to be applied to proposed remedies in desegregation cases is not "necessity" but whether they are more promising in effectiveness than alternatives. The correct statement of the issue on appeal then (CHA having apparently conceded the power of the district court to grant metropolitan relief - p.8) is whether the record shows that metropolitan relief would be "more promising in ... effectiveness" than a remedial order confined within the boundaries of Chicago.

As to that question CHA's brief reads as if the only evidence were the testimony of one witness, Professor Philip Hauser.* In

*CHA asserts that the district court "rejected" Professor Hauser's opinion, was "unwilling to adopt [it] as a matter of fact," and so on (p.12), and argues that this supposed rejection is a finding of fact not to be set aside unless clearly erroneous. (p.10.) However, the district court's opinion at no point says that it rejected or was unwilling to adopt Professor Hauser's opinion; it says only that the opinion was inadequate to support a request to consider imposing obligations upon suburban entities who had not engaged in any discrimination within Chicago. (A.46.) This coupling of the opinion's sole reference to Professor Hauser's testimony with the absence of any allegation of discrimination by the suburbs (a consideration of obvious legal significance to the district court) is dealt with in the text, infra. Here it will suffice to observe that the district court's single reference to Professor Hauser's opinion is not a "rejection" of it, is probably not a "finding of fact" at all, and, given that coupling, is certainly not a finding to which the "unless clearly erroneous" doctrine applies. That doctrine is inapplicable to findings that are induced by an erroneous view of the law or combine both fact and law. See 5A Moore's Federal Practice, ¶52.03[2], and Tow Mfg. Corp. v. Jacobsen Mfg. Corp., 357 F.2d 901, 903 (7th Cir. 1966).

fact there was a great deal of evidence in addition to Professor Hauser's testimony, much of it in the form of the defendants' own statements, supporting the desirability ("more promising in ... effectiveness") of a metropolitan-wide remedial approach. (See pp. 30-34 of our opening brief.) It would be hard to find more unambiguous admissions of the point than HUD's own declaration that "only metropolitan wide solutions will do,"* or HUD's "joint representation" with the plaintiffs to Judge Austin that "the parties are of the view that a metropolitan remedy is desirable,** or CHA's statement that,

"CHA fully agrees that public housing must be metropolitan in nature, and not confined to the City of Chicago ... [A] dispersal program for public housing will not work unless it is operated on a metropolitan basis."***

CHA now seeks to qualify the position it took in the court below by asserting that this quotation and others are taken out of context, that it has limited its espousal of the metropolitan approach to the "social point of view," and that it has always urged that this case has "specific parameters" (presumably the boundaries of Chicago) and is not a "proper vehicle" for metropolitan relief. (pp. 10-11.)

*Statement of Secretary Romney, App. A, pp. 15-16, to HUD's Memorandum, December 17, 1971, Record Doc. 283, Attachment 6, Memorandum 2, p.2.

**Transcript of Proceedings of February 22, 1972, pp. 4, 6.

***CHA Memorandum, December 21, 1971, p.27, Record Doc. 167.

We have not quoted out of context; although it is true that CHA has doggedly opposed the entry of every remedial order proposed in this case, it has also consistently maintained that only metropolitan solutions will be workable solutions. It has said, flatly and without qualification, that "a dispersal program for public housing will not work unless it is operated on a metropolitan basis." (CHA Memorandum, December 21, 1971, p.27, Record Doc. 167.) It has taken that position not from some abstract "social point of view" but with respect to a specific proposed remedial order in this case. Thus, on an earlier appeal in this litigation (Appeal No. 18681 in this Court), the following statements appeared in CHA's brief for the appellant:

"... the Commissioners of the Chicago Housing Authority ... have concluded as a matter of policy that the interests of the community and the public housing program will best be served by developing sites simultaneously in the city and suburban areas; that the difficulties involved in housing the underprivileged are the problems of the Metropolitan Area and must be solved on a metropolitan area basis. ..." (p.7.)

"The CHA offered as a prospective witness Dr. Andrew M. Greeley who, according to a statement from him attached to the Motion to Vacate, would, if permitted to testify, state his opinion as follows: 'I heartily endorse and am in complete agreement with the policy and program conceived by the CHA Board of Commissioners that the most effective way to carry out the federal order requiring it to build integrated housing is to develop sites simultaneously in the city and the suburbs' (A-14)." (p.9.) [emphasis added.]

"In the same document (A-12, 13), Dr. Greeley expressed his 'conviction' that the choice is not between metropolitan public housing or public housing in Chicago only, but rather one between metropolitan public housing or no public housing.'" (p.9.)

"The opinion of Dr. Greeley as to the dangers if the public housing issue is not treated as a metropolitan problem was shared by the Chairman of the CHA. His June 26 memorandum to the court also stated that to proceed now only in Chicago, as the court ordered on July 20, threatened:

- '(1) complete stoppage of the urgently-needed public housing program;
- '(2) racial tension in the city to the point of strife;
- '(3) acceleration of an already alarming flight to the suburbs by middle-class white families*;
- '(4) vigorous protests from the Black community for failure to make housing available to them outside the city.' (A-38)." (p.9.)

*CHA says that so-called "white flight" is not an issue before this Court (p.7), and that Professor Hauser's testimony amounted to an unsupported assumption or forecast about the future migration patterns of millions of human beings. (p.14.) We have not asserted that "white flight" is itself an "issue." But it is obviously one of the "practicalities" to be taken into account in framing an effective desegregation plan, as CHA, formerly if not now, agreed. See authorities cited in our opening brief, pp. 32, 35-36. At the hearing below CHA's counsel said, "The reason we had no objection to Professor Hauser ... is very simple; Professor Hauser testified ... exactly, precisely the same way we sought to have Dr. Greeley testify in the summer of 1970. CHA has always said it is a harmful thing for the City of Chicago, not a good thing, to proceed only in the City of Chicago with a scattered site program ..." (Tr. 450.)

It may also be noted in this connection that at an earlier stage of this case the district court said:

"On the basis of present trends of Negro residential concentration and of Negro migration into and White migration out of the central city, the President's Commission on Civil Disorders estimates that Chicago will become 50% Negro by 1984. By 1984 it may be too late to heal racial divisions." 296 F.Supp. at 915.

It is to be emphasized that these statements were offered to this Court in support of CHA's argument against an earlier remedial order in this case that directed CHA to proceed with public housing solely within the City of Chicago, without waiting for the development of a simultaneous suburban public housing component. CHA was not then arguing from the "social point of view" or that the "specific parameters" of this lawsuit were confined to Chicago, or that the lawsuit was not a "proper vehicle" for metropolitan relief. To the contrary, it was arguing not only that metropolitan relief was a desirable component of a specific remedial order in this case but that it was a necessary component without which remedial public housing confined to the City of Chicago would not work.

There can thus be no doubt that the evidence, including a representation to Judge Austin by HUD, showed that a metropolitan remedial plan was desirable, i.e., more promising in effectiveness, than a plan confined to the City of Chicago. Professor Hauser's opinion was simply added support for the already established proposition; no party offered any views, let alone evidence, to the contrary. It is this circumstance - the substantial and uncontradicted evidence in the record below that a metropolitan remedy is desirable - that rendered it erroneous for the district court to rule out any form of metropolitan relief.

It is true, of course, as the Supreme Court has said, that one lawsuit can carry only a limited amount of baggage, or, as CHA's metaphor runs, that not every desegregation case is

necessarily a "proper vehicle" for metropolitan relief. For example, such relief might be impractical in a particular situation (or might not be shown - the reverse of the case here - to be more promising in effectiveness). But the record below contained no evidence whatever of impracticality. Neither HUD nor CHA offered any evidence at all in support of such an objection (or any other) to metropolitan relief. Thus, there is no evidentiary support in this case for the "proper vehicle" argument. If metropolitan relief is more promising in effectiveness than relief confined to the City of Chicago, as the uncontradicted evidence and admissions of the parties clearly show it to be, there is no basis in the record below for rejecting it.

In particular, as Bradley, Indianapolis and Newburgh Area Council show, the conceded circumstance that the constitutional violations occurred within Chicago is no such basis. (See pp. 14-16 of our opening brief.) CHA keeps reminding us of that circumstance, misconstruing the adage that the nature of a violation determines the scope of the remedy. But it is the "nature," not the "place," of the violation to which the adage refers. The nature of the violation here makes it extremely difficult to provide an effective remedy; we can afford to ignore no promising possibilities. In school cases boundaries can be redrawn or pupils transported to different schools. Here, only the construction of new housing - something that under the best of circumstances will take a long time - can provide the remedy.* For various reasons, including

*The purpose is not to "adjust all of the housing patterns in the Chicago metropolitan area." (CHA br. 7.) The purpose is to provide the plaintiff class as rapidly as possible with an opportunity to live in public housing outside of segregated neighborhoods.

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migration patterns and the availability of vacant land, it is clear (and uncontradicted) that a metropolitan area remedial plan is more promising in its effectiveness to lead to the greatest possible degree of actual desegregation as quickly as may be done than is a remedial plan confined within Chicago. A metropolitan plan presents no legal impediment; the constitutional obligation to remedy state-imposed segregation is in law shared by all agencies of the state and is not confined to those who committed the wrongs. (See pp. 12-25 of our opening brief.) Moreover, the "nature" of the violation makes a metropolitan remedial plan particularly appropriate. As HUD's regulation states, "[H]ousing market areas often are independent of arbitrary political boundaries . . .," and as its General Counsel has stated, "State legislatures have determined that the city and its surrounding area comprise a single 'locality' for low-rent housing purposes." (Plaintiffs' Exhibits 16, p.1 and 13, pp. 3-4, respectively.) Under these circumstances it does not follow that the remedy should be confined to the place of the violation. On the contrary, all the evidence showed that to do so would violate the command of the Supreme Court to rule out no available techniques or reasonable methods in striving toward the goal of achieving the greatest possible degree of actual desegregation.

CHA nonetheless argues that a proper basis for denying metropolitan relief was the unpersuasive nature (as it assumes) of Professor Hauser's testimony, the "rejection" of which, it

contends, has nothing to do with the district court's view of the legal question of its power to order metropolitan relief.* We have already pointed out that the Hauser testimony was not "rejected," that evidence in support of the desirability of metropolitan relief comes from HUD and CHA as well as from Professor Hauser (and includes a formal representation as to desirability from HUD to the district court), and that there is no contrary evidence at all. Obviously it was not inadequacy of evidence that led the district court to reject metropolitan relief; it is fair to say that there was no contest as to the desirability of such relief - that it was conceded. (If inadequate evidence were the basis for the ruling, how explain the district court's failure to mention the compelling evidence before it of the admissions of CHA and HUD as to the desirability of metropolitan relief?) Rather, the district court appeared to consider such relief to be beyond its equitable powers in the absence of any contention that suburban entities participated in CHA's discrimination or that CHA and HUD had discriminated in the suburbs.

The definitive paragraph of the opinion below (A.46) begins by noting that the wrongs in the case were committed exclusively within Chicago, continues by observing that there is no

*At one point CHA incorrectly says the question is whether the district court abused its discretion "in denying consideration of plaintiffs' plan ..." (p.1.) The issue is the preclusion of any metropolitan plan for relief; no particular metropolitan plan was considered. (A.44.)

allegation that CHA and HUD discriminated in the suburbs, goes on to note that the suburbs have previously had nothing to do with the lawsuit, and then and in that context says the testimony of Professor Hauser - that the geographic area within which relief was to be provided in Chicago would disappear well before the year 2000 - was inadequate to support a request to consider imposing obligations on those (suburban entities) who had not discriminated within the City of Chicago. The court thus appeared to be saying that even though relief limited to the City of Chicago might ultimately fail completely - the "worst case" - it was powerless to impose obligations on the suburbs because they had not discriminated, nor had discrimination taken place there. Contrary to CHA's conclusion that the scope of the district court's powers had nothing to do with the decision below, this mistaken view of its remedial powers (our opening brief, pp. 12-25) infused the district court's consideration of the factual record and predetermined the erroneous result it reached.

CHA concludes by asserting that the district court did not abuse its discretion. (p.18.) There is no doubt, as this Court has said, that "a determination of just what type of equitable remedy might be appropriate ... is a question best left initially to the sound discretion of the District Court." Gautreaux v. Romney, 448 F.2d 731, 734 (7th Cir. 1971). But there is also no doubt that that discretion must be exercised in compliance with principles the Supreme Court has laid down to govern the framing of remedial

decrees in racial desegregation cases. Among these are the principles that the district court should strive to achieve the greatest possible degree of desegregation, that in so doing all reasonable methods and techniques should be available, and that any proposed remedial plan should be weighed in the light of any alternatives which might be more promising in effectiveness. "Discretion" is not a talisman against the violation of any of these principles. Notwithstanding a district court's discretion the Supreme Court has not hesitated to direct that a district court's remedial decree be set aside where one or another of those principles was not complied with. Davis, supra, 402 U.S. 33, Green, supra, 391 U.S. 430, Raney v. Board of Education, 391 U.S. 443 (1968), and Monroe v. Board of Commissioners, 391 U.S. 450 (1968), are all instances. In remanding for further proceedings in Monroe the Supreme Court observed:

"We note also that on the record as it now stands, it appears that petitioners' recommended "feeder system," the feasibility of which respondent did not challenge in the District Court, is an effective alternative reasonably available ..." 391 U.S. at 460 (emphasis added).

As the Fifth Circuit has said, "The law requires the court to implement the most effective plan ..." for remedying school segregation. Adams v. Rankin County Board of Education, 485 F.2d 324, 326 (5th Cir. 1973). There is no indication that the law requires anything less to remedy housing segregation.

In short, it is an abuse of discretion to enter a racial

desegregation decree which ignores an available alternative more promising in effectiveness - i.e., more likely to produce a greater degree of actual desegregation. That is precisely what happened below. When this Court said that little more than a simple best efforts decree might suffice to remedy the wrongs that had been committed (Gautreaux, supra, 448 F.2d at 740-41), it was before HUD had represented that a metropolitan remedy was desirable and before all the other evidence to that same effect had been submitted to the district court. Once it was made clear that a metropolitan remedy promised greater effectiveness in remedying those wrongs than a remedy confined to the City, and there was no countervailing evidence, either on that question or on the question of feasibility, it was no longer open to the district court to ignore that - more promising in effectiveness - remedy.

* * *

The uncontradicted evidence showed that metropolitan relief would be more promising in effectiveness than a remedial order confined to the City of Chicago. No evidence of any kind was offered to show why such relief should not be granted. On that record it was a breach of the implicit command of the Supreme Court that all reasonable methods be available to formulate a remedy to achieve the greatest possible degree of actual

desegregation - and therefore an abuse of the district court's discretion - to rule out any form of metropolitan relief.

In Davis, the lower courts approved a remedial plan that would have promised greater effectiveness had it not stopped short of crossing a major highway. Saying that a district judge should make "every effort" to achieve the greatest possible degree of actual desegregation, the Supreme Court reversed and remanded for the development of a new decree giving greater consideration to remedial arrangements that would involve crossing the highway. Davis, supra, 402 U.S. at 36-38. Here the remedial plan likewise would have promised greater effectiveness had it not stopped short of crossing a local political boundary line. No sound reason has been advanced why the Davis result should not obtain here.

Respectfully submitted,

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NOTICE

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PLEASE TAKE NOTICE that we have this day filed with the
Clerk of the United States Court of Appeals for the Seventh
Circuit the Reply Brief of Plaintiffs-Appellants to Brief of

Appellee CHA, copies of which are attached hereto.



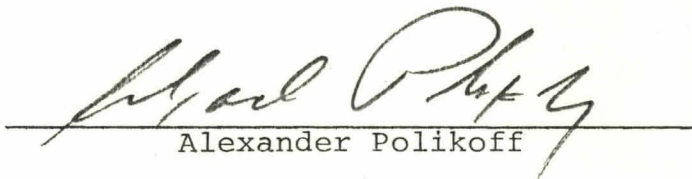
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May 31, 1974

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CERTIFICATE OF SERVICE

Alexander Polikoff, one of the attorneys for plaintiffs-appellants, hereby certifies that he served a copy of the foregoing Notice and Reply Brief of Plaintiffs-Appellants to Brief of Appellee CHA referred to therein upon the parties named in the Notice at the addresses there shown, by delivering a copy to Messrs. O'Brien and Schaefer and by mailing a copy, postage prepaid, to Messrs. Eilperin and Steinmeyer, this 31st day of May, 1974.


Alexander Polikoff