

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 74-1048 and 74-1049

DOROTHY GAUTREAUX, et al.,

Plaintiffs-Appellants,
U.S.C.A. - 7th Circuit

v.

FILED

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

SEP 23 1974

THOMAS F. STROBLE
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Defendants-Appellees.

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

ANSWER TO PETITION FOR REHEARING

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ANSWER TO PETITION FOR REHEARING

The petition for rehearing contends that the panel's decision conflicts with previous decisions of this Court (pp. 3-7) and with the Supreme Court's decision in Milliken v. Bradley (pp. 7-9). These contentions will be responded to in I and II, respectively, of this answer.

I. THE PANEL'S DECISION DOES NOT CONFLICT WITH "GAUTREAUX II" OR "GAUTREAUX III".

The petition first argues (p. 3) that the panel's decision conflicts with Gautreaux v. Romney, 448 F.2d 731 (1971) ("Gautreaux II") and Gautreaux v. Romney, 457 F.2d 124 (1972) ("Gautreaux III") because it does not follow a "suggestion" made in Gautreaux II and repeated in Gautreaux III that a best efforts decree "may well be" a sufficient remedy. (The full quotation is at page 3 of the petition.) The argument is frivolous. Even apart from the distinction between holdings and dicta in the earlier decisions, the panel's determination that evidence not before the Court in either Gautreaux II or Gautreaux III required more than a best efforts decree is obviously not in conflict with an earlier "suggestion" that such a decree "may well be" a sufficient remedy. A "suggestion" couched in non-mandatory terms, gratuitously made at an earlier stage of the case and therefore not based on the record considered by the panel on this appeal, was clearly not intended to be the law of the case to which subsequent decisions would be bound to adhere.

The petition also argues (pp. 4-7) that the panel's decision conflicts with Gautreaux III insofar as that case "rejected an expansion of the remedial decree into

untainted programs." (p. 4.) This argument is likewise without merit. In Gautreaux III, where a divided court (the panel divided 2-1 and rehearing was denied 4-3) overturned an injunction against HUD's payment of further model cities funds to the City of Chicago until remedial housing was provided, the Court:

- (1) emphasized that the model cities program was not a housing program, 457 F.2d at 126-28;
- (2) distinguished from the case before it a termination of funds for a housing program, 457 F.2d at 128; and
- (3) in reaching its conclusion relied upon a statute that restricted the termination of funding for ongoing programs. [Ibid.]*

Moreover the order the Court reversed was a coercive one which sought to force the provision of remedial housing

*/ A recently enacted law (signed by the President on August 22, 1974) has reversed the legislative situation that existed at the time of Gautreaux III by conditioning the receipt of community development funds upon the provision of subsidized housing. The Housing and Community Development Act of 1974, Public Law 93-383, replaces the model cities program with a "community development" program, and Section 104(a)(4) of the Act requires that an application for community development funds include a "housing assistance plan." Explaining this provision the House Report says, "Metropolitan cities and urban counties would receive annual entitlements to block grant funds, in return for which they would be required to ... provide housing for lower income families" House Report No. 93-1114, p. 4.

by cutting off funds for a non-housing program; it was not itself a part of the remedial process of supplying housing. Here only housing programs are involved and there is no question of terminating funds in any program. The coercive character of the earlier order is entirely lacking; the metropolitan plan called for by the panel's opinion would itself be a mechanism for providing housing relief. The asserted conflict with Gautreaux III is thus not to be found.*

Accordingly, neither of HUD's arguments that the decision of the panel conflicts with previous decisions in this case is sound.

*/ HUD singles out as "not sufficient to justify a remedial decree against the suburbs ..." (p. 5) the panel's statement that, although the record below was not made with the Supreme Court's Milliken v. Bradley opinions in mind, there was evidence of suburban discrimination. But the panel's conclusion was not predicated on that statement alone; it was reached, "In light of all of these considerations ..." (slip opinion, 15), most of which are not mentioned in the petition. In addition, HUD's concerns about the panel's statement (for example, that the suburbs "should not be condemned as discriminators without having had an opportunity to defend themselves" - p. 5) completely ignore the procedural posture of this case. As we made clear in our memorandum on Milliken v. Bradley filed on August 14, 1974, "on remand, of course, adjacent housing authorities or other public bodies would have the opportunity of demonstrating that a 'compelling governmental interest' of theirs should preclude the entry of even the limited form of inter-district relief proposed by plaintiff below. See Gautreaux v. City of Chicago, 480 F.2d 210, 216 (1973) ..." (Memorandum of Appellants, filed August 14, 1974, p. 14) Thus, no one has been or will be "condemned ... without ... an opportunity to defend themselves."

II. THE PANEL'S DECISION DOES NOT
CONFLICT WITH MILLIKEN V. BRADLEY.*

The final argument of the petition is that by authorizing inter-district relief without a showing of inter-district violations the panel's decision conflicts with Milliken v. Bradley. The petition asserts that Milliken must be read as prohibiting such relief under all circumstances in which an inter-district violation is not shown.

This is, of course, the very reading of Milliken a majority of the panel considered and rejected. As the panel's opinion states, prior to Milliken the law was clear that political subdivisions of a state could be readily bridged when necessary to vindicate federal constitutional rights; the equal protection clause speaks to the state, which cannot escape its obligations under that clause by delegating governmental functions to local units. (Slip opinion, p. 7; see also appellants' brief filed March 11, 1974, pp. 12-25.) The panel opinion then points out that the Chief Justice's opinion in Milliken did not purport to change this long-established law, and

*/ The Court is respectfully referred to plaintiffs' memorandum, filed August 14, 1974, which deals exclusively with Milliken v. Bradley. The material contained in the memorandum is not repeated here; instead the Clerk has been requested to distribute the memorandum with this answer to the petition for rehearing. A copy of the letter so requesting is attached hereto.

that Mr. Justice Stewart's concurring opinion expressly stated,

"the Court does not deal with questions of substantive constitutional law. The basic issue now before the Court concerns, rather, the appropriate exercise of federal equity jurisdiction." (Quoted at Slip opinion, p. 8.)

The majority of the panel thus rightly concluded,

"In view of the dominant theme of the majority opinion as a whole, the fact that any application of the opinion to factual situations other than the one before the Court would be dictum, and particularly in view of Justice Stewart's opinion for the fifth vote, we conclude that the majority opinion in Milliken v. Bradley deals with equitable limitations on remedies." (Slip opinion, p. 9.)*

It follows, of course, that the "controlling principle" to which both the petition (p. 7) and Judge Tone's dissenting opinion refer must be a principle of equitable remedies, not constitutional law. But an equitable principle that erected an inflexible prohibition against an inter-district remedy wherever an inter-district violation was lacking, regardless of the facts and circumstances of the particular case, would be a principle inconsistent with the very essence of equity -- that it is flexible in its operation

*/ The quotation from Mr. Justice White's opinion set out in the petition (p. 8) does not reflect a different view. While criticizing the majority's reasoning, Mr. Justice White left no doubt that in his view the majority's conclusion was based on equitable considerations - a metropolitan remedy was denied "because [it] would cause what the Court considers to be undue administrative inconvenience ...". 42 U.S.L.W. at 5263, emphasis added.

and may always be shaped to meet particular circumstances. The equitable principle of tailoring a remedy to the nature and scope of the violation to be remedied is the antithesis of the view that the major historical, legal and administrative differences between public school programs and public housing programs should be ignored; on the contrary, a good tailoring job must of necessity take them into account. (See the slip opinion, pp. 9-15, and appellants' memorandum filed August 14, 1974, pp. 6-14, for discussions of those major differences.)

Accordingly, there is no conflict with Milliken v. Bradley; there is only a "conflict" with the way, specifically considered and rejected by the panel, in which HUD would like that case to be read.

CONCLUSION

There are no conflicts with prior decisions of this Court or with Milliken v. Bradley, and there is no showing of points of law or fact "overlooked or misapprehended."

(Appellate Rule 40(a).) It is therefore respectfully suggested that the petition for rehearing should be denied.

Respectfully submitted,

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By:


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September 23, 1974

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September 23, 1974

Mr. Thomas F. Strubbe
Clerk
United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Re: Gautreaux, et al., v. CHA, et al.,
Nos. 74-1048 and 74-1049

Dear Mr. Strubbe:

I am delivering to you herewith for filing the answer to the petition for rehearing in the above case. I should like to request that you distribute with the answer to the petition for rehearing copies of appellants' memorandum, filed in this appeal on August 14, 1974. For this purpose, I am also delivering to you herewith additional copies of the memorandum.

Sincerely,


Alexander Polikoff

AP:eb
encl.

cc: Patrick W. O'Brien, Esq.
R.B. Schaefer, Esq.
Stephen F. Eilperin, Esq.
Anthony J. Steinmeyer, Esq.

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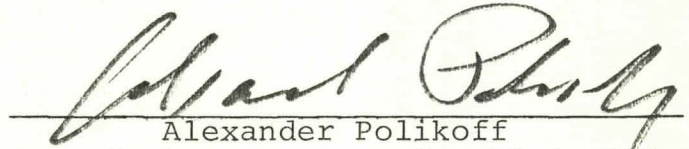
NOTICE

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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 Answer to Petition for Rehearing, copies of which are attached hereto.


Alexander Polikoff
One of the Attorneys for Plaintiffs

September 23, 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 Answer to Petition for Rehearing 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, airmail, postage prepaid, to Messrs. Eilperin and Steinmeyer, this 23rd day of September, 1974.


Alexander Polikoff