

Headings
(2)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 74-1926

U.S.C.A. = 7th Circuit

FILED

DEC 2 - 1974

THOMAS F. STRUBBE
CLERK

CHICAGO HOUSING AUTHORITY,

Petitioner,)

v.)

THE HONORABLE RICHARD B. AUSTIN,
Judge of the U.S. District
Court for the Northern District
of Illinois,)

Respondent.)

Original Petition
for Writ of
Mandamus

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

This response, pursuant to the Court's order of November 20, 1974, is filed on behalf of the respondent, The Honorable Richard B. Austin, Judge of the United States District Court for the Northern District of Illinois.

Introduction

Petitioner, the Chicago Housing Authority ("CHA"),* casts its petition as if this case involved an abdication of judicial

*The Department of Housing and Urban Development, which is similarly affected by the reference order, has not joined in CHA's petition.

authority such as was present in La Buy v. Howes Leather Co., 352 U.S. 249 (1957), and TPO Incorporated v. McMillen, 460 F.2d 348 (7th Cir. 1972), two of the four cases cited in the petition. In those cases matters were improperly referred for "trial" (352 U.S. at 253) and for decision on a motion to dismiss (460 F.2d at 349), respectively. Here, notwithstanding CHA's effort to make the situation appear different than it is, Judge Austin's reference order does not involve any "abdication of his judicial decision making duty" or of his "judicial responsibility to decide." (Petition, p.10.) It involves rather a reference for "proposals" and for "recommendations and comments" to be submitted by the master for the court's "review and possible use." (Reference order, pp. 3, 5.)

The principle which governs here was stated by the U.S. Supreme Court in Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1 (1971), and quoted and relied upon by this Court in United States v. Board of School Commissioners of the City of Indianapolis, Indiana, ___ F.2d ___ (7th Cir. 1974), as follows:

"In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system ... It was because of this total failure of the school board that the District Court was obliged to turn to other qualified sources, and Dr. Finger [a court appointed expert] was designated to assist the District Court to do what the board should have done." (Quoted at page 12 of the slip opinion in Indianapolis.)

Here too, at the remedial stage of the case, liability having already been determined, the defendants defaulted in their obligation to proffer "acceptable remedies." It was therefore proper for the district judge to exercise his discretion, Southern Agency Company v. La Salle Casualty Company, 393 F.2d 907, 914 (8th Cir. 1968), to appoint a special master to assist him in fashioning an acceptable remedy, it having become apparent that the form of remedy previously determined upon - "best efforts" decrees - was not producing satisfactory relief for the plaintiff class. The tortuous and so far unsuccessful effort of the district court over a period of five years since its original decree to provide the plaintiffs with an effective remedy, coupled with the failure of the defendants to recommend any course of action other than the ineffective one they were pursuing, constitute an "exceptional condition" within the meaning of Federal Rule 53(b).*

Since the issue seems so clear, and from prior appeals the Court is already familiar with the relevant background, this response will be limited to a brief elaboration of these points.

*In August this Court spoke of the "eight year tortuous course of these cases," of the way in which the orders of the District Judge were "ignored and frustrated," and of the "callousness" of the defendants. Gautreaux v. CHA, ___ F.2d ___ (1974), pp. 2-3 of slip opinion of August 26, 1974.

I. The Reference Order does not Abdicate
the Judicial Duty to Decide

The basic argument advanced by CHA in support of the writ is that the reference order constitutes an "extraordinary abdication of his judicial decision making duty" by Judge Austin. (p.10.) The difficulty with the argument is apparent from the cases cited to support it. In La Buy the entire case was referred for "trial" before there had even been a determination of liability. 352 U.S. at 253. (The Court did say that the accounting required to determine damages might be referred to a master after the lower court had determined liability. 352 U.S. at 259.) In TPO Incorporated the matter was referred to a magistrate for ruling on a motion to dismiss. 460 F.2d at 349.

Here there has been no reference for such impermissible purposes. It is clear from the portions of the reference order quoted above that Judge Austin has referred the matter for proposals and recommendations respecting an effective remedial plan to be submitted to him for his "review and possible use," in exactly the same fashion as the commissioners in Swann and Indianapolis were to submit proposed remedial plans for the court's review.* If there were any doubt about Judge Austin's

*Indeed, the reference order is in some places identical to the orders approved in Swann and Indianapolis. Compare, Swann v. Charlotte-Mecklenberg Board of Education, 306 F.Supp. 1299, 1313-14 (W.D. N.Car. 1969).

intention, his own words from the bench resolve it:

"I think my order indicates I retained the ultimate responsibility." (Transcript of Proceedings of November 1, p.44.)

The word "determine" in the reference order, which CHA stresses (for example, petition p.11), must of course be read in light of the language used elsewhere in the order and of this judicial statement from the bench. Any reasonable reading of the reference order makes it plain that the word "determine" was not used in the sense in which CHA would have this Court take it.

Accordingly it is clear that the reference order does not involve any abdication of judicial decision-making responsibility. Instead the trial judge merely called for assistance in seeking to fashion effective relief at the remedial stage of an enormously difficult and complex case, a situation analogous to those in Swann and Indianapolis.*

*Although the special master is not herself an expert of the sort appointed in Swann and Indianapolis, where technical "references" under Rule 53 were apparently not involved, the reference order here specifically authorizes the employment of persons "who possess specialized knowledge concerning federally-subsidized housing programs." (Reference order, p.6.) See Moore v. Leflore County Board of Election Commissioners, 361 F.Supp. 603, 609 (N.D. Miss. 1972).

II. The Reference Order is Justified in
the Circumstances of this Case

District judges have discretion to order a reference to a special master when an exceptional condition requires it. Federal Rule 53(b). The district judge's decision to refer is of course reviewable, but cases such as Swann, Indianapolis, and Moore v. Leflore County Board of Election Commissioners, 361 F.Supp. 603, 609 (N.D. Miss. 1972), indicate that the circumstances present in this case - difficulty in formulating an effective remedial plan after a determination of liability and after the defendants have been afforded an opportunity to proffer acceptable remedies and have not done so - are precisely those in which the courts have found references to aid in the formulation of complex remedial decrees to be appropriate.*

None of the cases cited by CHA even remotely suggests that a reference under such circumstances is improper. In La Buy

*The circumstances are also analogous to those of an accounting, a familiar context for a reference. See Southern Agency Company, supra. Like an exploration of the accounts between parties the necessity here is to explore the step by step process CHA and HUD have been following to produce housing in order to understand the reasons for delay and to see how the process can be expedited. A copy of CHA's description of that process, submitted to the master, is attached hereto. CHA's own lawyer had previously described the process as "too complicated, I don't understand [it]," (Transcript of Proceedings of October 8, 1974, p.11), and the Judge said, "Well, I feel the need of a vehicle. I can't let this go on another five years." (Id. at p.49.)

the only reason for the reference was "an extremely congested calendar." 352 U.S. at 253. In TPO Incorporated the reason was apparently the same. 462 F.2d at 349. In Wilver v. Fisher, 387 F.2d 66, 69 (10th Cir. 1967), "the trial court made no finding of an exceptional circumstance." In Arthur Murray Inc. v. Oliver, 364 F.2d 28, 33 (8th Cir. 1966), the fourth and last case cited by CHA, the court of appeals set aside that portion of the order which directed a master to report "as to factors which could have at most collateral relevance and incidence on the damage which the plaintiff sustained" while upholding another part of the reference order.

Here, by contrast, the reference order does not deal with collateral matters but is intended to assist the judge with what is at the heart of the remedial stage of a case - providing effective relief. The order comes more than five years after CHA was ordered to provide additional dwelling units as rapidly as possible, and after two supplemental enforcement orders (see 436 F.2d 306 and 480 F.2d 210) had failed to produce effective relief. Filing reports is no substitute for providing such relief. Notwithstanding the most recent of CHA's reports shows that construction has finally begun on 63 units of the 1500 Judge Austin ordered to be begun many years earlier, the record also shows that an impasse had developed between CHA and HUD - that they were at "loggerheads" - with respect to most of the remaining units and that adequate progress on the vast bulk

of the dwelling units to be provided was not being made. (See Transcript of Proceedings of October 8, 1974, pp. 29-31; 34.) When CHA and HUD both said they had nothing further to recommend after such a long lapse of unproductive time (Id. at pp. 19-20; Transcript of Proceedings of November 1, 1974, p.51), an "exceptional circumstance" was clearly presented. Judge Austin was therefore entitled in his discretion to follow the lead of Swann and Indianapolis and - while clearly retaining the decision-making power - provide himself with assistance in formulating an effective remedy.

Respectfully submitted,

By: 

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