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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 74-1926

CHICAGO HOUSING AUTHORITY, Petitioner, vs. THE HONORABLE RICHARD B. AUSTIN, Judge of the United States District Court for the Northern District of Illinois, Respondent.	)	Original Petition for Writ of Mandamus

ANSWERING BRIEF OF
CHICAGO HOUSING AUTHORITY IN SUPPORT
OF PETITION FOR WRIT OF MANDAMUS

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ISSUES PRESENTED

1. Whether the issue of petitioner's compliance with the Court's orders are properly before the Respondent.

2. Whether a reference to a master for the determination of whether a party is in contempt of court is proper.

STATEMENT OF FACTS

CHA disagrees with the assumption of respondent that the matter at hand does not require a statement of the relevant background; set forth below are facts which CHA submits are relevant.

The action initially filed was brought by a class of black tenants of the Chicago Housing Authority (CHA) against the CHA and the Department of Housing and Urban Development (HUD) claiming, among other things, racial discrimination in the site selection*/ for new construction of low income public housing in the City of Chicago.

On cross motions for summary judgment the District Court found that the way sites were selected for CHA public housing discriminated against blacks in that almost all of the sites for its projects were in black neighborhoods. However, the District Court in that opinion also pointed out:

> "Defendants urge that CHA officials never entertained racist attitudes and that "the racial attitudes and that 'the racial character of the neighborhood has never been a factor in CHA's selection of a suitable site.' Humphrey Aff't, p. 2. In view of CHA's persistent selection of White sites at the initial stage before the pre-clearance procedure and the candor of its officials on deposition, these statements are undoubtedly true. It is

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*/ The complaint also involved tenant assignment procedures, but that aspect of the case has not been revived since the 1969 Judgment Order.

> also undenied that sites for the projects which have been constructed were chosen primarily to further the praiseworthy and urgent goals of low cost housing and urban renewal. Nevertheless, a deliberate policy to separate the races cannot be justified by the good intentions with which other laudable goals are pursued."

* * * * *

> "It is also true that there is no evidence that the Aldermen who vetoed White sites were necessarily motivated by racial animus when they followed a policy of keeping Negroes out of White neighborhoods. Most Aldermen apparently talked to their constituents and received unfavorable reactions before exercising their informal vetoes. Humphrey Dep. I, pp. 116-117; Rose Dep., p. 59. But even if the Aldermen's informal surveys were correct in their uniform assessment of public opinion, they cannot acquiesce in the sentiment of their constituents to keep their neighborhoods White and to deny admission to Negroes via the placement of public housing". (296 F. Supp. 914, 1969).

The District Court entered its basic Judgment Order of July 1, 1969 (304 F. Supp. 736) which set forth detailed provisions directing CHA as to how it would select sites for new housing in the future and which contained the following provision:

> "A. CHA shall use its best efforts to increase the supply of Dwelling Units as rapidly as possible in conformity with the provisions of this judgment order and shall take all steps necessary to that end, including making applications for allocations of federal funds and carrying out all necessary planning and development."

CHA did not appeal from either of the 1969 orders.*/

Counsel for respondent pretends that this matter is just now at the "remedial" stage in his effort to equate this case with the school cases upon which he relies (Response pp. 2, 3, 4, 5, 6, 7). The plain fact of the matter is that a comprehensive plan, remedy, is embodied in the Judgment Order of 1969, CHA has complied with the letter and spirit of it ever since, and plaintiffs have never charged in the appropriate manner that CHA has not. When, however, CHA has believed that an order of the trial court has been inimical to the goal of providing low income family public housing it has not hesitated to pursue its remedies.**/

In the spring of 1971 evidentiary hearings were held before the District Court. These hearings were over the objection of defendant CHA which protested that CHA did not know what issue or issues were being considered (App. p. 1-B). The trial judge replied that the issue was:

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*/ As to CHA's failure to appeal the trial court has commented: "After frantically consulting all the legal talent available to it Chicago Housing Authority apparently determined that an appeal of this decree would be hopeless and abandoned it." (332 F.Supp. at p. 367).

**/ CHA's first appeal, from the trial court's order of July 20, 1970 (see 436 F.2d 306), was later, in October 1971, characterized by the trial court as an effort to utilize the appellate procedure to delay the submission of sites to the City Council until after the municipal elections in the spring of 1971, and CHA was described as having gone "screaming and protesting" to the upper courts (332 F.Supp. at p. 368).

"...what haven't you done lately" (App. p. 1-B)

Those proceedings terminated on April 16, 1971, with an order, suggested by CHA, pursuant to which CHA was directed to file quarterly reports of its progress pursuant to the basic Judgment Order of July 1, 1969, as amended. The April 16, 1971 order read as follows:

> "A hearing was held in chambers and is continued until further motion by either of the parties. The Chicago Housing Authority has agreed to make quarterly reports, commencing June 30, 1971 concerning its progress in complying with the court's order, and it is so ordered."

CHA filed its first quarterly report on June 30, 1971 and has been filing such reports, which now number 14, ever since. (App. Vol. III-a and b).

On September 11, 1973, in the course of the trial court's opinion on the "metropolitan plan" issue, he pointed out that "plaintiffs should not have to be reminded that no public housing has been built in this city since any order of July 1, 1969 because the municipal authorities refused to approve sufficient sites for such housing and recently because of lack of funds". (363 F.Supp. at p. 691).

On February 11, 1974 plaintiffs' attorneys filed a motion seeking a hearing in open court in which officials of CHA and HUD would be examined as to what they were doing to carry out the judgment orders. Defendants objected for, among other reasons, that discovery, whether pre-trial or post-trial, has no place in the courtroom. The District Court agreed and entered an order on May 6, 1974 setting a schedule for discovery of CHA and HUD by plaintiffs' attorneys (App. p. 4). Plaintiffs' attorneys then examined CHA and HUD officials in May and June, 1974 about their activities pursuant to the judgment orders.

Plaintiffs' reaction to the information they gained in the discovery proceedings, was the filing of a motion on September 11, 1974, seeking an order on defendants which, among other things, would have directed them to file recommendations with the District Court as to how the process of providing dwelling units pursuant to the Judgment Orders could be speeded up. CHA opposed this motion for, among other reasons, the reason that "with the wealth of information available to plaintiffs it is high time that if they have anything realistic, practical and specific in mind, that it would be appropriate for plaintiffs to spell out such specifics", and CHA reiterated its position that it "is moving as best as it knows how to do".*/

Plaintiffs then abandoned their motion of September 11 and, on September 30, 1974, relying upon the decision of this Court

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*/ Memorandum of CHA in Opposition to the Order Proposed by Plaintiffs on September 11, 1974, pp. 2, 3.

on August 21, 1974 in U.S. v. Board of School Commissioners of Indianapolis, 503 F.2d 68, filed a motion seeking the appointment of a Commissioner. Plaintiffs stated that they had no reason not to believe that defendants were not acting in good faith but that they had lost all confidence in the ability of either defendant to progress at the rate desired by plaintiffs' attorneys.

A hearing was held before the District Court on October 8, 1974 on which occasion plaintiffs' attorneys again stated (Tr. p. 27) they had no reason to doubt the good faith of either CHA or HUD but again urged the appointment of a Commissioner. The appointment of such was resisted by the attorneys for both CHA and HUD for, among other reasons, that the condition precedent for the appointment of a Commissioner on the strength of the Indianapolis School Board case - the violation of an order of the District Court to prepare "plans" - did not exist and that the 1969 Judgment Order constituted a detailed plan for desegregation of new low income family public housing*/ (App. Vol. 1, pp. 10, 43, 44).

On November 1, 1974 the parties appeared before the District Court who handed them a draft "Memorandum Opinion and Reference

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*/ Supplemental Memorandum of CHA in Opposition to the Order Proposed by Plaintiffs on September 30, 1974, filed September 23, 1974.

Order" (App. p. 5-A) and asked the parties to appear before him on November 6, 1974, to give the Court the benefit of their reactions to the draft. In this draft opinion the District Court stated, among other things:

> "Since there is no evidence of record that defendants Chicago Housing Authority (CHA) and United States Department of Housing and Urban Development (HUD) have directly contravened my prior judgments and since plaintiffs' request is over broad, the motion [for appointment of a Commissioner] must be denied" (App. p. 5-A).

A little later in the draft, the District Court stated:

> "For reasons that are manifestly unclear to me, my orders in this case have been avoided and frustrated for over five years" (App. p. 5-C).

The draft opinion also contained the following statement:

> "For the past five years and four months, no public housing construction has been undertaken by any party" (App. 5-B).

The District Court's draft opinion stated that the appointment of a Master was appropriate to bring "this dispute to a prompt and just conclusion" and to "pin point the responsibility for this apparent lack of diligence and the different methods for achieving compliance with [the court's] orders" (App. p. 5-C).

At the hearing on the draft Memorandum and Order of Reference CHA expressed the following fundamental objections to the District Court's reference proposal:

a. It seemed to be based upon a failure to read the quarterly reports which CHA had been filing since 1971 about its progress, e.g. CHA's September 30, 1974 report stated "actual construction has been started" under four separate construction contracts for 63 housing units, yet the draft stated "no public housing construction has been undertaken".*/

b. The draft order constituted an abdication of the district court's decision making responsibility, citing TPO, Incorporation v. McMillen, 460 F.2d 348 (1974) and LaBuy v. Howes Leather Co., 352 U.S. 249, 77 S. Ct. 309, L.Ed. 2d 290 (1957).

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*/ The long series of events that lead to the commencement of construction were set forth in earlier reports. An example of the procedures that must be followed to start construction is the 63 units now under construction. On November 16, 1971 CHA submitted a Development Plan for a total of 267 units to HUD. HUD approved the plan on February 5, 1972 for 36 sites. Due to attrition and other reasons many sites were eliminated. Then environmental clearance through HUD and NIPC was sought. Then HUD, CHA and architects met in the late fall of 1972 and HUD objected to the plans due to its density of population requirements. Finally, after HUD approval of drawings, HUD approval of appraisals and purchase price or condemnation, the letting of bids in the spring of 1973 and CHA awarding of construction contracts, HUD refusal of approval of contracts in late 1973, the solicitation of new contracts under a turnkey procedure in March 1974, the awarding of new contracts and HUD approval in the spring and summer of 1974, construction began on the 63 units. (See App. Vol. III a and b).

Moreover, CHA submitted to HUD Development plans for a total of 4507 units but due to HUD regulations concerning financial feasibility, the plans were returned in November, 1972 for resubmission. After resubmission HUD returned the applications due to the moratorium on housing instituted in March, 1973. The moratorium was lifted in March of this year and CHA resubmitted its applications for 1033 units. To date CHA has not received HUD approval of these Development Plans. (App. Vol. IIIc, p. 2).

c. There was no showing of an exceptional condition as is required by Rule 53(b) F.R.Civ.P. before a matter may be referred to a Master.

d. It is not for a court to engage in a prospecting quest for other evidence to add to a record, nor to appoint a Master to make such a discovery pursuit for him, citing Arthur Murray, Inc. v. Oliver, 364 F.2d 28 (8th Cir. 1966).

The District Court's position was that "a Master may be appointed for the purpose of determining whether or not the remedies proposed by the Court have been complied with" (App. Vol. II p. 42).

CHA offered as its exhibits two volumes containing its 14 quarterly reports, filed pursuant to the order of April 16, 1971 and they were received into evidence (CHA Ex's 1 and 2, App. Vol. III a and b). Also accepted into evidence was an interim report from CHA dated November 6, 1974 which, among other things, contained photographs showing that low income family public housing in fact was under construction in accord with the Judgment Order (CHA Ex. 3; App. Vol. III c).

The interim report also related that hundreds of proposed units had been submitted to HUD and that CHA was awaiting HUD's approval.

During the course of the November 6, 1974 hearings respondent exhibited his attitude and feelings as follows:

"What I am interested in now is whether or not HUD and CHA have used their best efforts. That is what I propose to have these hearings about... if after reviewing that testimony, and whatever

> else is considered by the Master, I find that they have not, then we will start thinking about contempt citations for the chairman of the Chicago Housing Authority and maybe contempt citations for HUD...and somebody better bring their toothbrush." (App. Vol. II pp. 6-7).

> "I think that 63 after five years and three months is not a hell of a lot of progress." (App. Vol. II p. 13).

When the District Court asked who wanted to be heard on the order CHA counsel stated, "I will defer to the plaintiffs' lawyer to start the thing off, Judge" and the District Court answered as follows:

> "Well, I assume so because there is nothing more that pleases you more than to not have to build any low income housing in Chicago, knowing who you are the creature of." (App. Vol. II, p. 7).

On the subject to CHA's appeals from certain of its orders the District Court said to CHA counsel:

> "You have used your best efforts to answer these now seven appeals instead of five. There is only five that I am involved in. You have done that rather than go out to get sites to build these things on" (Tr. p. 12).

Over petitioner's objections, respondent issued its referral order of November 7, 1974.

The hearing of November 6, 1974 resulted in some changes in the draft Memorandum Opinion:

1. Originally the District Court stated there was no evidence that CHA and HUD "have directly contravened my prior

judgments". This was changed to read: "It has not been established that***CHA and***HUD have directly contravened my prior judgments" (App. p. 6-A).

2. The draft Memorandum Opinion stated: "For the past five years and four months, no public housing has been undertaken by any party". This was changed to state: "For the past five years and four months, no public housing construction has been completed by any party" (App. p. 6-B).

3. Where the draft Opinion stated that the District Court's orders "have been avoided and frustrated for over five years", the version signed stated: "***the effect and import of my orders have been avoided and frustrated for over five years" (App. p. 6-C).

4. The draft Opinion denied the motion of plaintiffs for the appointment of a Commissioner. That signed by the District Court granted plaintiffs' motion as "modified herein" (App. p. 6-E).

ARGUMENT

I. WHERE THERE IS NO CASE OR CONTROVERSY OR ADVERSE PARTIES PRESENT REGARDING PETITIONER'S "BEST EFFORTS" AN ARTICLE III COURT IS WITHOUT THE POWER TO HOLD HEARINGS REGARDING SUCH ISSUE MUCH LESS MAKE A REFERENCE TO A MASTER.

At the time respondent issued his Memorandum Opinion and Reference Order of November 7, 1974 the only motion before him was the one in which plaintiff's requested the appointment of a housing Commissioner. Although plaintiffs have never asked either for an investigation of whether CHA is exerting its "best efforts" or a determination that it was not,*/ and even though plaintiffs did not charge either CHA or its officers or HUD with "bad faith" but in fact stated that they had no reason to doubt the good faith of either CHA or HUD. (App. Vol. I p. 27), in granting plaintiff's motion, "as modified",**/ respondent referred the matter to a master to hold investigative hearings "to see whether they [CHA and HUD] have used their best efforts to increase the supply of housing." (App. Vol. II p. 17). If CHA or its officers should be found to not have used their "best efforts" they are found to have violated the 1969 Judgment Order.

Respondent directed the master to hold investigatory evidentiary hearings to see if CHA and HUD were in contempt of the court's orders although plaintiffs had refrained from seeking a rule to show cause and respondent had not requested the Justice Department to institute criminal contempt proceedings. See MacNeil

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*/ In fact, at the November 6, 1974, hearing, plaintiffs' counsel stated it did not matter to plaintiffs whether CHA was or was not exerting its "best efforts" (App. Vol. II, p. 24).

**/ Due to the many major differences between plaintiffs' proposed Order and the "Memorandum Opinion and Order of Reference", signed by the District Court, CHA is at a loss to know what this means.

v. United States 236 F.2d 149 (1st Cir. 1956) cert. denied 352 U.S. 912, 77 S.Ct. 150 (1956). Thus, the respondent on his own motion has directed proceedings to resolve an issue which is not before the court -- in short, it is a non-issue that is before the court below.

It is clear that it is not within the province of a trial judge, during the course of an adversary proceeding, to enlist the services of a master in a quest for additional evidence on his own initiative. In Arthur Murray, Inc. v. Oliver, 364 F.2d 28 (8th Cir. 1960), the trial judge at the closing of an antitrust case directed a master to examine additional evidence as to the appropriate relief. On a petition for writ of Mandamus the Appellate Court ordered the reference vacated, stating at p. 34:

> "... In the spirit of our adversary system, it is not the business of a court to make additions of evidence in a submitted case on its own motion other than as there may be some element of such probative importance that its addition will prevent a miscarriage of justice from occurring in the situation.
>
> "... from the very nature of the judicial role, it is not given to a judge to engage in a prospecting quest for other evidence possibility to add to a record, nor counterpartly to appoint a master to make such a discovery pursuit for him ..."

While the court did not precisely articulate the underlying reasoning for its holding in Oliver, it is clear that its opinion is based upon the basic concept of our judicial system as embodied in Article III of the United States Constitution. A Federal District Court is an Article III Court, which, as other Article III Courts, has a limited jurisdiction. A primary prerequisite of our federal jurisprudence is that an Article III Court may only hear actual "cases" and "controversies".

> "As we have already seen by the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies'. Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.
>
> ... By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication." Muskrat v. United States, 219 U.S. 346, 356-357, 31 S.Ct. 250, (1911). (Emphasis Added).

The necessity for true adverse parties to present the issues to the judge was re-emphasized by Justice Frankfurther in Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752 (1961) at page 505:

> "... The Court has found unfit for adjudication any cause that 'is not in any real sense

adversary', that 'does not assume the honest and actual antagonistic assertion of rights' to be adjudicated - a safefuard essential to the integrity of the judicial process ..."

Thus, Federal Courts "may not decide non-cases, which do not require decision because they are not adversary situations and nothing of immediate consequence to the parties hangs in the result."*/ Where are the adverse parties in this matter regarding whether CHA and HUD have obeyed the court's order to use their "best efforts"? Certainly plaintiffs are not adverse regarding this issue, for they have steadfastly refused to move for a rule to show cause despite extensive post-trial discovery in May and June, 1974. The United States Attorney is not an adverse party because respondent has not directed him to institute criminal contempt proceedings. And, no matter what the trial court may have to say about the parties litigant, that court may not be deemed an adversary.

It is clear that the trial court may not be an adverse party because our system of jurisprudence has rejected the procedure in Civil Code nations whereby the judiciary holds hearings to investigate possible violations of the law. In our system of justice judges rule on "cases" and "controversies", they do no[illegible] instigate litigation and become one of the parties thereto. As Alexander Hamilton wrote in the "78th Federalist":

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*/ Bickel, Alexander M., The Least Dangerous Branch, p. 115, Bobbs-Merrill Company, Inc., New York, New York, c. 1962.

> "... the judiciary, on the contrary, has no influence over either sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." (Emphasis Added).

The fact that the function of a court is judicial only and not investigative was succinctly stated in Webster Eisenlohr v. Kalodner, 145 F.2d 316 (3rd Cir. 1944) cert. denied 325 U.S. 867, 65 S.Ct. 1404 (1945). In Kalodner, plaintiffs had sued in fraud pertaining to certain stock voting rights. The judge referred the matter to a master to investigate certain actions of the corporation which had occurred subsequent to the filing of the complaint and which were not activities about which plaintiffs sued. The referral was made on the judge's own motion and not at the request of any of the parties. A writ of mandamus was sought to have the referral order vacated. The Court of Appeals vacated the order stating:

> "The fundamental proposition which probably no one would dispute is that a court's power is judicial only, not administrative or investigative . A judgment may only be properly given for something raised in the course of a litigation between the parties." Id. at 318. (Emphasis Added).

> "... [The Master] has no wider scope of activity than the court itself. If the court is limited in its judicial duties, to deciding the issues presented in the litigation before

> it, the master's function can go no further than to aid in the court's discharge of its duties.
>
> . . .
>
> We do not think this view imposes unduly restrictive limitations upon courts. The judicial power is limited to deciding controversies. That has been its function historically; that is its function under the Constitution of the United States. No doubt a great deal goes on in the world which ought not to go on. If courts had general investigatory powers, they might discover some of these things and possibly right them. Whether they would do as well in this respect as officers or bodies expressly set up for that purpose may be doubted, but until the concept of judicial power is widened to something quite different from what it now is courts will better serve their public function in limiting themselves to the controversies presented by parties in litigation." Id. at 319-320.

Moreover, in addition to the absence of adverse parties, it should be reiterated that no issue regarding CHA and HUD's "best efforts" has been presented to the district court. There has been no "case" or "controversy" regarding defendants' "best efforts" presented to the court.

However, Petitioner does not contend that respondent is without power to enforce his orders. There are proper procedures to do so - either to direct the plaintiffs to move for a rule to show cause before an Article III Judge or for respondent to direct the United States Attorney to institute criminal contempt proceedings - and these procedures have not been followed here. During the course of these proceedings whenever it has been inferred by the trial court or plaintiffs' counsel that CHA was not using its "best efforts", CHA has invited those drawing the inference to either present the charge in the usual fashion or to refrain from drawing such inferences.

Thus, there is no "case" or "controversy" before respondent because no proper party litigant has properly raised the issue of petitioner's "best efforts". As such respondent is without the authority to decide the issue on its own motion, and, thus, cannot refer it to a master for determination.

II. THERE IS NO WARRANT IN RULE 53(b) F.R.CIV.P. AS INTERPRETED BY THIS COURT, OTHER COURTS OF APPEAL, AND THE SUPREME COURT FOR THE RESPONDENT'S REFERENCE ORDER

Assuming arguendo that the issue of CHA and HUD's "best efforts" and compliance with the respondents' orders were properly before the District Court, it is clear that the reference pursuant to Rule 53(b) F.R.Civ.P.*/ is nothing less than an abdication of respondent's judicial decision-making function.

While respondent (Response, pp. 2, 4, 5, 7, 8) claims now that the purpose of the reference was to have the master assist

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*/ The relevant parts of which state:

> "A reference to a master shall be the exception and not the rule ... in actions tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it."

in the formulation of a remedial plan,*/ the transcript of the hearing of November 6, 1974 (App. Vol. II) makes it very clear why respondent took the action he did. The general reference to the master was for the purpose of holding hearings "to see whether they [CHA and HUD] have used their best efforts to increase the supply of housing" (App. Vol. II, p. 17). The basic purpose of these proposed hearings is to determine whether contempt citations should issue. Respondent stated:

> "What I am interested in now is whether or not HUD and CHA has used their best efforts. That is what I propose to have these hearings about ... if after reviewing that testimony, and whatever else is considered by the Master, I find they have not, then we will start thinking about contempt citations ..." (App. Vol. II, p. 6).

It can be fairly said that these statements of respondent along with his statement that 63 units "after five years and three months is not a heall of a lot of progress" (App. Vol. II, p. 13) and the text of the reference order ("the master shall not be limited to determining whether HUD and CHA have employed their best efforts")

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*/ Respondent places great reliance on the fact that Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 91 S.Ct. 1267 (1971) and United States v. Board of School Commissions of the City of Indianapolis, supra, and Moore v. Leflore County Board of Election Commissioners, 361 F.Supp. 603 (N.D. La. 1972), authorize the appointment of a third party to develop a remedial plan. However, respondent's reliance on these cases is ill taken for a number of reasons. First, those cases make clear that two prerequisites are necessary for such appointment: (a) a duty upon the defendant to develop a remedial plan and (b) a default by the defendant in that

(Footnote cont'd on next page.)

demonstrate that what is intended to be heard before the master is a hearing to determine whether or not a rule should be entered upon CHA to show cause why it should not be held in contempt of court for violating the "best efforts" provision in the 1969 Judgment Order.*/

Whether such a rule should issue is a matter that is strictly a judicial function. This is made clear by the fact that Congress expressly rejected the practice of having a trial of a minor offense before a magistrate without the consent of the defendant when it enacted the 1968 United States Magistrate Act, 28 U.S.C. §§ 631-639:

> "... the language of the proposed legislation was revised to make it completely clear that both the government and the defendant must consent to a trial before a magistrate of a minor offense..." TPC Incorporated v. McMillen, 460 F.2d 348,354 (7th Cir. 1972).

(Footnote cont'd from preceding page.)

duty. However, there is neither such a duty nor a default in this case. CHA has not been directed to develop a remedial plan, the district court fashioned its own plan in July, 1969, the plan CHA has been complying with. Second, those cases in no way support a reference to a master for the determination of whether parties are in contempt of court.

*/ It appears that respondent believes that CHA must demonstrate that it is in compliance with the Court's orders, however, it is clear that the presumption is that a party is not in contempt of court. N.L.R.B. v. Lightner Pub. Corp. of Illinois, 128 F.2d 237,240 (7th Cir. 1942).

Thus, it is clear that the taking of evidence and determination of CHA's compliance with the Court's orders are strictly judicial functions.

As an Article III judge, it is respondent's duty, not a master's, to decide "all cases, in Law and Equity" which come before him. Respondent may not abdicate his judicial function and responsibility to hear the evidence and decide himself whether CHA and HUD have or have not used their "best efforts" to comply with respondent's orders or whether a rule should issue for either to show cause why they should not be held in contempt because they have not.

The United States Supreme Court set forth the boundaries for when matters may be referred to a master in LaBuy v. Howes Leather Co., 352 U.S. 249, 77 S.Ct. 309 (1957). In LaBuy, Judge LaBuy referred two antitrust matters to a master "to take evidence and to report the same to this Court, together with his findings of fact and conclusions of law." Id, at 253. Petitions for writ of mandamus were filed in this Court and this Court issued the writs and ordered the reference vacated (226 F.2d 703) and the Supreme Court affirmed, stating at p. 356:

> "... Under all the circumstances, we believe the Court of Appeals was justified in finding the orders of reference were an abuse of the petitioner's power under Rule 53(b). They amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."

This Court in TPO Incorporated v. McMillen, supra, again reiterated that a judge may not abdicate his judicial function and decision-making obligations. In TPO Judge McMillen referred motions to dismiss to a magistrate for decision. A petition for writ of mandamus was granted by this Court which stated:

> "... We find that the order of reference here was lacking in power and amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation. (citing LaBuy)" Id, at 359.

> "LaBuy was preceded by a long series of opinions by this court, many of them by Judge Evans, in which a strong policy of decision making by Article III judge was established..." Id, at 360.

Thus, it is clear that CHA is entitled to a hearing before respondent on the basic issue involved in this litigation*/ and that respondent may not abdicate his judicial function. However, Respondent, by his referral order of November 7, 1974 has abdicated his judicial function to hold the hearings and make the decision himself. Under the Reference Order, it is the master, not respondent, who will hear the evidence and make conclusions of fact and conclusions of law regarding CHA's "best efforts" and whether or not CHA has

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*/ This of course assumes that the issue is properly before respondent, a point which petitioner neither admits nor waives, see Part I, ante.

complied with respondent's orders. As a result CHA will be deprived of a trial before an Article III judge on these very important issues. Yet, it is clear that CHA is entitled to a hearing and trial before respondent, an Article III judge, and not a master. LaBuy v. Howes Leather Co., supra, 356; TPO Incorporated v. McMillen, supra, 360.

In addition, the mere fact that the master is making "recommendations" to respondent does not cure the deprivation of CHA's rights. This was precisely the procedure struck down by the Supreme Court in LaBuy v. Howes Leather Co., supra 253, and which was expressly rejected by this Court in TPO Incorporated v. McMillen, supra, 360-361 where the Court stated in footnote 62:

> "We do not believe that situations of this kind would be remedied by the magistrate simply recommending to the district judge instead of adjudicating."

Moreover, although it has been customary in this litigation to refer to the CHA defendants as "CHA", the CHA defendants include more than the corporate defendant, the Chicago Housing Authority. Included as a defendant in this action is the Executive Director of CHA.

As stated above, there is no doubt that the Reference Order directs the master to determine whether the CHA defendants have employed their "best efforts" and, thus, have complied with the district court's orders (App. p. 6-D, Vol. II pp. 6 and 17). A finding with respect to whether the CHA Executive Director has or has not utilized his "best efforts" is clearly a finding of fact. If the reference pursuant to Rule 53(b) is proper, then the master's finding of fact is governed by Rule 53(e)(2), which states:

> "In an action to be tried without a jury the court shall accept the Master's finding of fact unless clearly erroneous" (emphasis added).

Therefore, if the evidence heard by the Master (and whatever he hears from persons possessing "specialized knowledge concerning federally-subsidized housing programs") convinces the master that the CHA Executive Director has not used his "best efforts", the only issue before the District Court upon the return of the matter to that forum, if Rule 53 applies, will be whether the Master's finding is "clearly erroneous".

And, of course, if the CHA Executive Director is found not to have used his "best efforts", he is in violation of the Judgment Order of July 1, 1969 and is in contempt of court.

Since the matter of possible contempt of court originated with the District Court and not with the plaintiffs, any contempt findings would be criminal in nature, MacNeill v. United States, supra, 154, since an action for civil contempt can only be commenced by someone who has an interest in the right to be protected, Federal Trade Commission v. A. McLean & Son, 94 F.2d 802 (7th Cir. 1938). That any contempt findings would be criminal in nature in this matter was also recognized by respondent when he stated at the November 6, 1974 hearing that if the Chairman of CHA or anybody else bound by the Judgment Order is found not to have used his "best efforts", "somebody had better bring their toothbrush".

Thus the Reference Order of November 7, 1974, if valid, exposes individual defendants to jail sentences of up to six months without any of them ever having had a trial before an Article III judge.*/ United States v. Seale, 461 F.2d 345, 352 (7th Cir. 1972).

The procedure launched by the respondent's Reference Order is, thus, nothing more nor less than the trial of a minor offense before a magistrate without the consent of the defendants - a procedure, which as discussed above, has been rejected by Congress. 1968 United States Magistrate Act, 28 U.S.C. §§ 631-639; TPO Incorporated v. McMillen, supra, 254. In addition, the contempt investigation and hearing procedures established by the Reference Order completely denigrates the criminal contempt procedures specified by Rule 42(b), F.R.Cr.P.

Finally since this is a case tried without a jury, Rule 53(b), F.R.Civ.P., requires a "showing that some exceptional condition requires" the appointment and reference. However, respondent has

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*/ For any sentence in excess of six months a defendant is entitled to a trial by jury. Bloom v. Illinois, 391 U.S. 194, 199, 88 S.Ct. 1477 (1968).

totally failed to make such a showing. The only reference in the Reference Order to an "exceptional condition" is the asserted slow progress in the construction of low-income housing (App. p.6-B,C). In his response (p. 6) respondent claims that the difficulty in formulating an effective remedial plan and the fact that CHA has not come forth with a plan are exceptional circumstances.*/ However, these facts cannot be considered an "exceptional condition". All respondent has set forth to support the referral is the bare conclusion of an "exceptional circumstance", that there exists "unusually complex issues" and that the "interests of justice" require it (App. p. 6-C).

However, it is clear that even "delay on the part of the defendants,**/ the variety, number, and complex nature of the problems, the issues involved, and the 'best interests of justice'" do not "amount to an exceptional circumstance". Wilver, v. Fisher, 387 F.2d 66, 69 (10th Cir. 1967), LaBuy v. Howes Leather Co., supra, 259.

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*/ Again it must be stated that CHA was not ordered to propose a remedial plan, the court entered its own remedial plan, thus respondent's misconception that CHA has been afforded an opportunity to proffer acceptable remedies and CHA's failure to do so can not be an "exceptional condition".

**/ CHA, of course, has consistently denied that it has been guilty of any delays.

Moreover, respondent has presided over these proceedings for over eight years and has heard various motions and held numerous hearings regarding petitioner's "best efforts" and the appropriate remedial relief. Thus, respondent is the msot suited individual to hear and weigh the evidence on those matters. The thrusting of a master into the middle of this complex litigation at a point where he would have to be educated regarding eight years of hearings and orders is contrary to the reason for an appointment of a master - efficiency. Respondent's "knowledge of [these] cases at the time of the references, together with his long experience in the [public-housing] field, points to the conclusion that he could dispose of the litigation with greater dispatch than anyone else." _LaBuy_ v. _Howes Leather Co._, _supra_, at p. 256.

Thus, not only has respondent abdicated his judicial responsibility but has also failed to comply with the requirements of Rule 53(b). And, in any event it is clear that a reference in this matter would be counterproductive.

Conclusion

If respondent's Reference Order is permitted to stand Article III of the Constitution and petitioner's due process rights will be violated. Article III will be violated in two respects. First, since the question of petitioner's "best efforts" and compliance with the district court's Judgment Orders has not been raised by a proper party litigant, the issue is not before respondent and there is no constitutional "case" or "controversy" within respondent's jurisdiction. Second, the reference permits respondent to abdicate his judicial function and duty to determine whether petitioner is in contempt of court. Finally, the reference precludes petitioner's right to a hearing before an Article III Judge in a proper proceeding to determine its compliance with court orders.

Wherefore, petitioner submits that for all of the foregoing reasons its Petition for Writ of Mandamus should be granted.

CHICAGO HOUSING AUTHORITY
Petitioner

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