
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

PETITION FOR REHEARING EN BANC

Patrick W. O'Brien
Steven M. Rasher
Attorneys for Petitioner
Chicago Housing Authority

OF COUNSEL:

MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
State 2-0600

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Petitioner,	)	
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v.	)	No. 74-1926
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Judge of the United States	)	
District Court for the Northern	)	
District of Illinois,	)	
	)	
Respondent.	)	

PETITION FOR REHEARING EN BANC

The Petitioner, Chicago Housing Authority ("CHA"), petitions for rehearing and suggests rehearing en banc pursuant to Rules 35 and 40, F.R.A.P., for the reasons that the decision of the majority entered January 24, 1975, conflicts with previous decisions of this Court as well as LaBuy v. Howes Leather Co., 352 U.S. 249, reh. denied 352 U.S. 1010 (1957), and for the reason that this matter presents an exceptionally important question.

DISCUSSION

The majority opinion in this matter overlooks three important issues which are vital to a proper and just determination.

A.

The majority overlooks the fact that a very detailed judg-

ment order was entered against CHA in 1969. That order was entered due to discrimination in site selection of low income public family housing. However, there is no longer any discrimination in site selection of low income public family housing, and no one disputes that fact. The district court's displeasure over the rate of progress in building low income public family housing cannot be a basis for the reference made. No one, neither plaintiffs nor the district court, has charged that CHA is not complying with the 1969 judgment order. Pursuant to that order plaintiffs got the relief they requested. If the complaint now is that CHA is not building low income public housing fast enough, then that perhaps should be the subject of a separate lawsuit. But CHA should not be forced to participate in hearings where plaintiffs have had the relief they requested and no one claims or charges that CHA is not complying with the District Court's 1969 Judgment Order.

B.

The majority opinion also overlooks the plain language of the District Court's Memorandum Opinion and Reference Order. The order of reference stated that the reason for the referral is "to pinpoint responsibility for Defendants' apparent lack of diligence". (Slip opinion, p. 9). Further on, the order of reference states that "the Master shall not be limited to determining whether HUD and CHA have employed their 'best efforts.'"

(Slip opinion, p. 11). When read in light of the district court's remarks on November 6, 1974 (See Slip Opinion, pp. 5-6, Chief Judge Swygert dissenting) it is clear that respondent indeed intended and directed the master to determine whether CHA was using its "best efforts"*/.

Despite the plain English of the reference order, the majority opinion characterizes the reference as a "preliminary inquiry" (Slip Opinion, p.3). However, the words directing the master to make findings are there and those words have an unmistakable meaning which the dissenting opinion recognized as binding on the respondent. The point was aptly set forth by Chief Justice Marshall in Gibbons v. Ogden, 22 U.S. 1, 188 (1824) when, speaking about the framers' intent in using certain language in the Constitution, he said:

"As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." (Emphasis supplied).

Obviously the same rule should apply to words used by a United States District Judge.

*/ A determination by the master that CHA had not used its best efforts is a finding that CHA is in contempt of court. Rule 53, F.R. Civ.P., which was the basis for the reference, provides that a master's findings cannot be set aside unless "clearly erroneous". Rule 53(e)(2).

What Lord Atkin said in a dissenting opinion in Liversidge v. Anderson, (1942) A.C. 206, 245, appropriately describes the situation. In dealing with the claim that the words "If a man has" should be construed "If a man thinks he has," Lord Atkin said:

"I know of only one authority which might justify the suggested method of construction:" 'when I use a word,' Humpty Dumpty said in rather a scornful tone, 'I mean just what I choose it to mean, neither more nor less.' 'The question is' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be the master - that's all.'" ("Through the Looking Glass," c. VI.) After all this long discussion the question is whether the words 'If a man has' can mean 'If a man thinks he has'. I am of the opinion that they cannot, and that the case should be decided accordingly."

The question in this case is whether an order of reference which specifically directs the master to determine if CHA is complying with the court's judgment order can be construed as a direction to conduct some sort of "preliminary inquiry". Clearly it cannot be so interpreted. Words have a natural meaning and the respondent must be understood to have intended what he said. What the majority opinion does is ignore the plain meaning of the words used by respondent.

It is, thus, clear that respondent has delegated to a master functions which are purely judicial and the reference conflicts with the teachings of LaBuy v. Howes Leather Co., 352 U.S. 249, reh. denied 252 U.S. 1019 (1957) and TPO, Incorporated v. McMillen, 460 F.2d 348 (7th Cir. 1972). In addition, the fact that

a report is to be submitted only for "review and possible use" does not cure the defect. CHA is entitled to have an Article III Judge hear the evidence and make the findings, not just a review. TPO, Incorporated v. McMillen, supra, 360, n.62.

C.

Finally, both the majority and the dissent overlook the fact that our system of justice does not require a party to submit to a "preliminary inquiry" by district courts, whether directly or indirectly through a master. Even the dissent allows CHA to be forced to attend an open ended, issueless, non-adversary, evidentiary proceeding as to how to increase the supply of low income public family housing. */

As stated in petitioner's brief (pp. 15-22), an Article III Court may only hear a "case" or "controversy," and the order of reference involves neither a "case" nor a "controversy". No one has charged that CHA is not obeying the 1969 Judgement Order, and plaintiffs only asked that a commissioner be appointed to recommend a plan to expedite the construction of housing. The majority opinion recognized this (Slip Opinion, p.3) when it said "no issues have

*/ We note that if neither the plaintiffs nor respondent, who have been active in the case since 1966 can suggest a concrete proposal, it seems irrational to believe that the master ever would, even if the hearings went on for as many years as has this protracted matter.

been framed by pleadings or otherwise".

Yet, despite this recognition that no issues are pending, the majority decision subjects CHA to a fact finding quest on the district court's own initiative. Such a holding is contrary to the basic structure and function of the judicial branch. A court's function is judicial only, not administrative or investigative. Arthur Murray, Inc. v. Oliver, 364 F.2d 28, 34 (8th Cir. 1960); Webster Eisenlohr v. Kalodner, 145 F.2d 316, 319-320 (3rd Cir. 1944) cert. denied 325 U.S. 867 (1945). Unlike the code nations, such as France, the United States Judiciary does not seek out and investigate on its own. This point was emphasized by Alexis De Tocqueville when, explaining our judicial system to his French audience accustomed to an inquisitorial form of judicial proceeding, he said:

"The judicial power is by its nature devoid of action; it must be put in motion in order to produce a result. When it is called upon to repress crime, it punishes the criminal; when a wrong is to be redressed, it is ready to redress it; when an act requires interpretation, it is prepared to interpret it; but it does not pursue criminals, hunt out wrongs or examine into evidence of its own accord." (Emphasis supplied) */

*/ Alexis De Tocqueville, Democracy in America, Pt. 1, ch. 6. quoted in M. Frances McNamara, 2000 Famous Legal Quotations, p. 310, The Lawyers Co-operative Publishing Company, c. 1967.

Yet what the majority opinion does is permit respondent and the master to engage in an activity which is in direct conflict with case law and the heritage of our judicial system - investigatory - indeed inquisitorial - hearings. Clearly if CHA is forced to participate in these unconstitutional hearings it will be severely prejudiced and bound by findings which no subsequent appeal to the district court or and Appellate Court can rectify.

CONCLUSION

For these reasons Petitioner prays that a rehearing en banc be granted and that the opinion of January 24, 1975, be reversed and that the writ of mandamus prayed for issue.

Respectfully Submitted

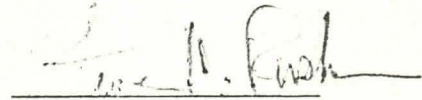
Patrick W. O'Brien
Steven M. Rasher
Attorneys for Petitioner
Chicago Housing Authority
231 South LaSalle Street
Chicago, Illinois 60604
ST2-0600

Of Counsel:
MAYER, BROWN & PLATT

Denied 2/27/75, see opinion

CERTIFICATE OF SERVICE

I, Steven M. Rasher, certify that I caused two copies of a "Petition for Rehearing En Banc" to be delivered to Alexander Polikoff, 109 N. Dearborn Street, Room 1001, Chicago, Illinois, Robert A. Filpi, 219 S. Dearborn Street, Room 1500, Chicago, Illinois, and the Honorable Richard B. Austin, 219 S. Dearborn Street, Room 2588, Chicago, Illinois prior to 5:00 p.m. on February 6, 1975.

A handwritten signature in dark ink, appearing to read "Steven M. Rasher", written over a horizontal line.

Steven M. Rasher

February 6, 1975