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COMMENT

THE SHEET METAL WORKERS CASE

On March 23, 1962, James Ballard, Negro aged 22, filed an application for admission to the apprenticeship program in the sheet metal trades. The four-year training program[1] is operated by the Joint Apprenticeship Committee (JAC), an agency composed of representatives of the union—Local No. 28 of the Sheet Metal Workers' International Association of Greater New York[2]—and of the contractors—the Sheet Metal Contractors' Association of New York City, Incorporated and the Mechanical Contractors' Association of New York, Incorporated. The union selects apprentice candidates.[3] The sole explicit requirement for eligibility is an age between 18 and 23 years[4] (25 years for veterans), but past practice has established unofficial qualifications of a high school diploma or equivalent and of sponsorship by a union member (waived for veterans.)[5]

Ballard, at the time of application, met the age requirement, possessed a high school equivalency diploma and was a veteran.[6] Three months after applying, he was tested by the state Department of Labor and determined to be qualified to undertake training for sheet metal work. The July, 1962 class of 56 new apprentices did not include Ballard or any other Negro. Neither was he (nor any other Negro) selected for the subsequent class of January, 1963.[7] The entire membership of the union was white. Eighty per cent of all apprentices in training were relatives of union members.[8]

The Attorney Gerneral of New York filed a verified complaint with the State Commission for Human Rights (SCHR) charging racial discrimination against Ballard specifically and against Negroes generally, in violation of the state Law Against Discrimination.[9] The following respondents were named: Local 28 and its president, the JAC, the secretary of Local 28 and the JAC, and the individual union and contractor representatives serving as members of the JAC. The Investigating Commissioner of SCHR found probable cause to credit the allegations of the complaint, and thereupon attempted, according to established SCHR procedure, to secure compliance with the Law by conciliation

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1. Registered with the New York State Apprenticeship Council and the U.S. Department of Labor Bureau of Apprenticeship and Training.
2. Hereinafter cited as the union or Local 28.
3. Pursuant to the provisions of the Standard Form of Union Agreement; see Lefkowitz v. Farrell, C-9287-63 (N.Y. State Comm'n for Human Rights, 1964) (mimeo.) at 2.
4. *Ibid.*, Rule 2 of the Rules Governing Apprentices.
5. Instant case at 2, Brief of Intervener-Complainant pp. 7, 12. Hereinafter cited as Attorney General's Brief.
6. Instant case at 2-3.
7. *Id.* at 3.
8. *Ibid.*
9. N.Y. Executive Law, art. 15, §§ 290-301. Hereinafter cited as LAD or the Law. The alleged violations pertained to sections 296.1-a, 296.1(b) and 296.6.

and persuasion. The failure of this effort resulted in noticing the case for public hearing in September, 1963.[10]

The respondents collectively denied the discrimination charged in the complaint. Local 28 asserted that apprentices were selected chronologically from a waiting list of applicants, that Ballard was not, in fact, qualified and that SCHR was without authority in the instant case to find a general discriminatory pattern operating against Negroes as a group.[11] In its opinion of February 26, 1964, the Commission found the acts of respondents violative of sections 296.1-a, 296.1(b) and 296.6 of the Law as charged by the Attorney General.[12] The Commission issued its order on March 20, 1964. *Lefkowitz v. Farrell*, C-9287-63 (New York State Commission for Human Rights, 1964).

The respondents filed a petition for review of the Commission's order[13] alleging that the order is invalid:

> insofar as it purports to delegate to the Industrial Commissioner the power to evaluate and determine, wholly unrelated to any discriminatory aspects, the reasonableness and suitability of minimum qualifications for any apprenticeship training program to be established by the Petitioners and insofar as it purports to delegate to the Commissioner of Education the power to designate an additional authority to adjudicate complaints of discrimination in the administration of the apprentice training program.[14]

The petition is currently pending in Supreme Court, New York County.

SURVEY OF STATUTORY, ADMINISTRATIVE AND ECONOMIC DEVELOPMENTS RELATING TO APPRENTICESHIP PROGRAMS

In view of the recent investigation into the efficacy of FEP laws and commissions and the evaluation of the many factors affecting equal opportunity in employment, this case assumes proportions beyond the vindication of one

10. Instant case at 2.
11. *Id.* at 4.
12. *Id.* at 22.
13. Paragraphs 1 and 8 are being challenged by respondents. Paragraph 1 requires that the union and JAC formulate in writing, the minimum qualifications and objective standards they intend to apply. However, "Prior to adopting such minimum qualifications or any specific objective standards, tests or requirements, said Local Union 28 and said Committee shall submit the same to the Industrial Commissioner for his confidential evaluation of their reasonableness and suitability for use in the selection of persons for sheet metal apprenticeship training; and unless approved by the Industrial Commissioner, the same shall not be adopted or used; provided, moreover, that in no event shall sponsorship by a member or members of Local Union 28 be adopted as a requirement either for applying or being selected for apprenticeship training."
Paragraph 8 deals with the review procedure available to a rejected applicant. "If an applicant asserts or makes claim to said Local Union 28 or to said Committee that he was not selected because of his race, creed, color or national origin, said applicant shall be advised by said Local Union 28 or said Committee, in writing, within ten (10) days of making such assertion or claim, that he may obtain review of the evaluation of his qualifications by a competent authority to be designated by the Commissioner of Education of the State of New York."
14. Petitioners' Memorandum, p. 10.

Negro's right to apprentice training.[15] For this reason, a brief overview of the more obvious legal and economic considerations which frame the specific area of discrimination in job training may appropriately precede a detailed scrutiny of the instant case.

At the apex of the legal structure is the Civil Rights Act of July 2, 1964.[16] Title VII, proscribing discriminatory employment practices on the part of employers, employment agencies and labor organizations[17] in industries affecting commerce[18] deals, on the national level,[19] with two of the practices charged in the *Sheet Metal Workers* complaint. Section 703(c) provides:

> It shall be an unlawful employment practice for a labor organization—
> (1) to exclude . . . from its membership . . . any individual because of his race, color, religion, sex, or national origin.

And section 703(d) declares:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training . . . to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

The general powers of the Equal Employment Opportunity Commission established by the Civil Rights Act of 1964[20] parallel the grants to state FEP commissions but reveal a specific concern for apprenticeship opportunities. The Commission is directed to require each employer, union and committee controlling training programs to keep records of applicants, of the chronological order of applications and to supply the Commission with data on selection methods.[21]

Unlawful employment practice charges may be filed with the Equal Opportunity Commission by the aggrieved person or by a member of the Commission.[22] A civil action may be directly instituted by the Attorney General if he ". . . has reasonable cause to believe any person or group . . . is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title. . . ."[23]

In New York, statutory controls emanate from the Law Against Discrimination, the Civil Rights Law and the Labor Law.[24] The first of these is

15. See subsequent analysis of the instant case for discussion of the pattern approach utilized by SCHR.
16. Public Law 88-352, 78 Stat. 241 (July 2, 1964).
17. Section 701(b)(c)(d).
18. Section 701(e)(g)(h).
19. The Act provides in section 708 that "person[s]" (defined in section 701(a) to include labor unions) are not exempted from compliance with state statutes barring discriminatory employment practices.
20. Section 705(a).
21. Section 709(c).
22. Section 706(a).
23. Section 707(a).
24. See also N.Y. Const. art. 1 § 11 (1938). See references in Conway, *supra* to section

examined, and the work of the Commission created by it appraised, in the papers of Herbert Hill and Henry Spitz, *supra*. The New York Civil Rights Law bars exclusion from union membership on racial grounds and bars inequality of treatment of members on racial grounds.[25] The amendment to the New York Labor Law (section 815) which conforms to the recent additions to LAD (section 296.1-a(a)) is treated below.

Established governmental agencies which possess some jurisdiction in the apprenticeship area are the New York State Apprenticeship Council[26] and the Bureau of Apprenticeship and Training in the federal Department of Labor.[27] These agencies, at least to the present time, have not been equipped with effective regulatory powers. They "register" apprenticeship agreements which conform to agency standards, and may withdraw a registration if the parties do not comply with the terms of the agreement. The State Council seeks to have labor and management adopt the "suggested standards for apprenticeship agreements" contained in the Labor Law,[28] but it has thus far exercised no clear influence in the area of racial discrimination.

For a quarter of a century, the Bureau of Apprenticeship and Training has operated as a national agency to assist and encourage apprenticeship programs. Before 1961, the Bureau had not undertaken as part of its responsibilities, the elimination of discriminatory practices in such programs.[29] The House hearings of that year,[30] as well as 1961 *Report* of the United States Commission on Civil Rights[31] exposed the necessity for nondiscrimination clauses and for affirmative action in craft training programs under government contract work. In 1963, the Secretary of Labor issued new standards applicable to all federally registered apprenticeship programs.[32] These instructions called

220-e of the New York Labor Law relating to employment discrimination under construction contracts of the state or a municipality, and section 343-8.0 of the New York City Administrative Code. The New York standard contract form set forth in the appendix to Conway, *supra* calls in clause (a) for affirmative action to ensure equal opportunity in ". . . selection for training or retraining, including apprenticeship and on-the-job training."

25. Section 43.

26. N.Y. Labor Law, art. 23, §§ 810-818.

27. Created by the Fitzgerald Act of 1937, 50 stat. 664 (1937), 29 U.S.C. § 50 (1958).

28. N.Y. Labor Law § 815. This section illustrates a shift in emphasis. Before 1957 the provision (then § 814) contained "suggested standards for apprenticeship agreements" which concentrated almost wholly on educational aspects, wages and hours. L. 1957, ch. 697, § 2 added a suggested standard that apprentices be *hired* without discrimination; L. 1964, ch. 948, § 2 supplants the former hiring standard by a suggested provision that apprentices be *selected* without discrimination.

29. See U.S. Commission on Civil Rights, State Advisory Committees Division, *Reports on Apprenticeships* 5-6 (Jan. 1964).

30. *Hearings on H.R. 8219 Before the House of Representatives Special Committee on Labor of the Committee on Education and Labor*, 87th Cong., 1st Sess. (1961).

31. *Employment* 104-11 (1961).

32. 28 Fed. Reg. 11299-344 (Oct. 23, 1963). See U.S. Dep't of Labor, Bureau of Apprenticeship and Training, *Non-discrimination in Apprenticeship and Training Policy*, Circular 64-7 (July 17, 1963). The new standards are interpreted to require that if prior apprentice lists were not evolved on the basis of merit and equality of opportunity, the sponsor must not only disregard prior lists but also offset the effects of previously discriminatory practices. Such corrective action would include increasing the opportunities for selection of a "significant number" of qualified members of minority groups.

for affirmative action to ensure "full and fair opportunity for application" for admission to training programs. The efficacy of the new standards has not, as yet, been assessed.

On the national level also, the President's Committee on Equal Employment Opportunity[33] (whose area of jurisdiction was increased in 1963)[34] has recognized that nondiscrimination agreements binding the primary contractor do not ensure impartial admission to training programs.[35] The Committee has, therefore, more recently emphasized the need "to place more direct responsibilities upon the union in recognition of its role in controlling access to some kinds of employment."[36]

Apposite to this new direction of efforts by the President's Committee is the conclusion reached by the New York Advisory Committee[37] to the United States Commission on Civil Rights. In its report, *Building Construction in New York City*,[38] the Advisory Committee notes at the outset that

> . . . the economic structure of the building industry tends to concentrate in the local unions the decision as to who obtains employment and, even more important, who gets admitted into the craft. The dominating role of the union in construction employment affords to contractors the opportunity to disclaim all responsibility for discrimination in the building trades. . . . Our study found no instance in which an employer sought to promote equal employment opportunity in the building trades.[39]

The sociological aspects of the construction industry are characterized not by a relatively stable employer-employee relationship, but by short-term identification of the worker with a particular job and a particular employer. The union operates as the employment agency, the training school and the master of labor supply in the craft; by performing this dominant role, it may be assumed to bear primary responsibility for discriminatory employment practices.

In the New York City construction trade unions surveyed for the Advisory Committee, Dr. Donald Shaughnessy found that, in general, objective tests were not utilized to determine admission to apprenticeship programs and that the number of union craftsmen was maintained at a level substantially below local demand.[40] Pointing to Local 28 of the International Sheet Metal Workers Union, he noted that in 1963 there were no Negroes in the apprenticeship program or in the union, and that admission to apprenticeship was dependent

33. Established by Executive Order No. 10925, 26 Fed. Reg. 1977 (Mar. 2, 1961).
34. Pursuant to Executive Order No. 11114, 28 Fed. Reg. 6485 (June 22, 1963).
35. *Op. cit. supra* note 29, at 13.
36. *Ibid.*
37. Established pursuant to section 105(c) of the Civil Rights Act of 1957, 71 Stat. 634, 42 U.S.C. § 1975d(a) (1958).
38. *Op. cit. supra* note 29, at 109-23. This report is based on the study made by Dr. Donald Shaughnessy of Columbia University for the Advisory Committee.
39. *Id.* at 113-14.
40. *Id.* at 116-17.

upon sponsorship of an applicant by a union member.[41] Local 2, United Association of Journeymen Plumbers and Steamfitters exhibited the same total exclusion of Negroes in 1963 and under-supplied the New York City demand to the extent that 1,000 plumbers were imported from out of town to fill the gap.[42]

The rationale underlying a limitation of numbers admitted to a craft may be rooted in the union's belief in the classical theory of supply and demand.[43] But racial exclusion achieved through the practice of accepting only relatives or "sponsored" friends has not been, nor can it be, justified by the union on the basis of irrelevant economic theory and is, in fact, prohibited by state law.[44] It has continued as a modus operandi of some local unions, unaffected by policies of federal or state apprenticeship agencies.[45] The Advisory Committee concluded:

> 4. By rigid limitations on the number of apprentices, the unions have maintained a chronic labor shortage in the building trades .... Union members value highly the right to secure admissions to apprenticeship programs—and tend to exercise it . . . in favor of their sons, nephews and others with whom they have personal connections.
>
> 5. Since admission to apprenticeship is controlled largely on a personal basis, . . . patterns of exclusion of Negroes will tend to be perpetuated.[46]

These conclusions are appropriate to the conditions existing within the Sheet Metal Workers Union and to the labor market demand and supply picture in New York City. The members of Local 28 fabricate and erect air conditioning systems in new buildings.[47] But this static union (maintaining a level of about 3,000 members over the past decade), with a static admission policy (severely limiting the numbers of new craftsmen) has produced a static labor supply—during a period of rising construction demands and projected serious shortages of skilled labor.[48]

The president of Local 28 candidly informed the Civil Rights Bureau that:

> . . .virtually all the new construction . . . in New York City following the Second World War was covered by Local 28 contracts. . . . [T]here frequently were insufficient numbers of union members . . . available, and that Local 28 called upon sister locals of the International from without the city, as well as allied trades in the building trades council . . . and even upon a group of non-union specialty men. . . .[49]

41. *Id.* at 116.
42. *Ibid.*
43. See *e.g.*, Int'l Brotherhood of Electrical Workers Local 35 v. Comm'n on Civil Rights, 140 Conn. 537, 102 A.2d 366 (1953).
44. N.Y. Executive Law § 296.
45. *Op. cit. supra* note 29, at 115, 121.
46. *Id.* at 120.
47. Respondents' Brief, p. 2.
48. Instant case at 13.
49. *Id.* at 14.

There is no question that at the time and place of Ballard's application for apprenticeship training, Local 28 possessed monopolistic power over its craft in New York City.

THE SCOPE OF THE SHEET METAL WORKERS CASE

On all the evidence, SCHR concluded that three provisions of the Law had been violated in the instant case.

1. *Violation of Section 296.1-a*

First, the union and JAC were held to have contravened section 296.1-a. At the time the Commission's decision was rendered, section 296.1-a(a) proscribed it as a discriminatory practice on the part of an employer, union or labor-management committee "To deny to . . . any qualified person because of race, creed, color or national origin the right to be admitted to . . . an apprenticeship training program. . . ." The questions which, therefore, required answers were: Was Ballard "qualified"? and, Was he denied admission on racial grounds?

Ballard met the mandatory requirement applicable to age. As a veteran possessing a high school equivalency diploma, he met the educational preference and was exempt from the sponsorship preference, which preferences although not embodied in the written specifications were nonetheless embedded in the selection practices of the union.[50]

Assuming Ballard was qualified, was he excluded because he was a Negro? Respondents alleged that Ballard's application was filed in the same manner as other applications[51] and his name placed on the chronological list. Evidence adduced at the hearing pointed to the fact that selection in the past had not adhered to a chronological order. But, argued respondents, such deviations did not prove a section 296 violation as to Ballard, for no one applying after him was selected for the 1962-1963 classes.[52]

Respondents contended, also that "[t]he exclusive white composition of the applicants for apprentice appointment cannot by itself establish unlawful discrimination."[53] Admitting the primary importance of member sponsorship, respondents maintained that it was nonetheless a legal device:

> While this sponsorship system might concededly be described as discriminatory in that it results in different treatment based on union member sponsorship, it is not discriminatory in the sense of . . . Section 296 which requires different treatment because of race or color. The sponsorship system does result in discrimination against every applicant who fails to secure a sponsor from amongst Local

50. Instant case at 2.

51. "The consideration, or lack of consideration, given to Ballard's application was identical to that given to all applicants who were not appointed to the three apprentice classes herein involved." Respondents' Brief, p. 7.

52. *Id.* at 6. This fact was contested by the complainant; see Attorney General's Brief, p. 5 and instant case at 7.

53. Respondents' Brief, p. 26.

> 28's membership. All applicants, regardless of race or color, are subject to this. . . .[54]

The union and JAC arguments denying violation of section 296.1-a can be summarized as assertions that a chronological selection practice was established (even though not always adhered to), that sponsorship was indispensable (even though it was a discriminatory device) but that there was equality of discrimination under the sponsorship system (even though it operated to exclude one racial class completely.) The Commission concluded that since 80 per cent of all apprentices in training were relatives of union members and since the union was all-white,[55] the rejection of Ballard and of Negroes as a class was automatic.

> It is no defense to say that selection based on family ties affects whites and non-whites alike, and therefore does not discriminate against Negroes specifically. . . . Local 28 is not charged with discrimination against a cross-section of all persons, but against Negroes specifically. The fact that its practices may work against some white persons at some time does not alter the fact that they work against all Negro applicants at all times.[56]

In making this finding of a violation by Local 28 and JAC, the Commission cited alumni sponsorship[57] and voting grandfathers[58] as analogous discriminatory requirements that have been held unconstitutional by the United States Supreme Court, and demolished the respondents' ingenious argument of equality of opportunity in discrimination.

The legislative mandate governing this type of discrimination has been clarified and extended by the recent amendment to section 296.1-a, effective September 1, 1964.[59] It is now an unlawful discriminatory practice:

> (a) To select persons for an apprentice training program registered with the state of New York on any basis other than their qualifications, as determined by objective criteria which permit review;
> (b) To deny . . . any person because of his race, creed, color or national origin the right to be admitted to or participate in . . . an apprenticeship training program . . .[60]

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54. *Id.* at 17.
55. Instant case at 3, 14.
56. *Id.* at 15.
57. Meredith v. Fair, 305 F.2d 343 (1962), *cert. denied,* 371 U.S. 828 (1962).
58. Guinn v. United States, 238 U.S. 347 (1915).
59. L. 1964, ch. 948, § 1. See also N.Y. Labor Law, § 815, as amended by L. 1964, ch. 948, § 2, effective September 1, 1964. Subdivision 5 of section 815 contains as a "suggested standard" for apprenticeship agreements: "Provision that apprentices be selected on the basis of qualification alone, as determined by objective criteria which permit review, and without any direct or indirect limitation, specification or discrimination as to race, creed, color or national origin."
60. The amendment deletes "qualified" as a limitation on the "persons" whose right to admission is protected by this section, and supplies the standard upon which qualification is to be determined: objective, reviewable criteria. The order of the Commission anticipates this modification and, in paragraph 1, provides for an additional check upon the standards—their evaluation by the Industrial Commissioner to test their "reasonableness" and "suitability." See note 13 *supra.*

2. *Violation of Section 296.1(b)*

The second violation found by the Commission involved Local 28 alone. Section 296.1(b) states that it is an unlawful discriminatory practice:

> For a labor organization, because of the age, race, creed, color or national origin of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.[61]

In reaching the conclusion that Local 28 excluded Ballard and all Negroes from membership, the Commission's reasoning was built on these facts: that the union tightly controlled and limited the number of craftsmen in sheet metal work in New York City; that the history of the union revealed no Negro apprentices and no Negro members in the past; that practically "the only way of gaining admission into Local 28 is through apprenticeship," that virtually "the only way of getting an apprenticeship is by being a son, nephew or other close relative of a union member," and that such "close relatives" had, without exception, turned out to be white.[62] The history and practice of Local 28 had consequently erected a racial bar to union membership.

3. *Violation of Section 296.6*

Thirdly, the Commission held that all individual respondents[63] had violated section 296.6 which provides that: "It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so." Respondents' position on this issue was to challenge the basic jurisdiction of the Commission to find and hold them individually culpable.

The two respondents who represented the Mechanical Contractors' Association on JAC argued sequentially: that the union alone selected apprentices; that section 296.6 encompassed affirmative action only, that if section 296.6 reached passive approval, nevertheless such apathy on the part of the contractors was not tantamount to an endorsement of racial discrimination. The first assertion was refuted by the terms of the agreement between the union and employer (contractor) associations which required JAC approval for all apprentices selected by the Local. Secondly, it was held by SCHR that "practice" as used in the pertinent section of the Law was "broad enough to embrace

61. While clearly the thrust of the case is admission to apprenticeship, the Commission in its opinion and in its order proceeded to attack the practice of Negro exclusion from union membership. The facts of the case do not directly raise this issue, for Ballard had not applied for membership, and was not identifiable with any of the three classes protected by 296.1(b) from union discrimination, *i.e.*, he was not a union member, employer, or individual employed by an employer. The fact that the Commission reached out to cope with this discriminatory practice as well as the apprenticeship problem underscores the thoroughness of the pattern approach it utilized.

62. Instant case at 15.

63. These were the president of the Local, the secretary of the Local and JAC, union representatives on JAC and contractor representatives on JAC.

a series of repeated and customary failures to act,"[64] and ". . . failure of the JAC to act, whether intentional or otherwise, helped, supported, encouraged, and assisted Local 28 in the achievement of its discriminatory purpose, and amounted to aiding and abetting within the meaning of Section 296.6."[65]

JAC representatives of the Sheet Metal Contractors advanced the argument one step further by denying that the individual members of JAC had a positive legal duty to challenge Local 28's selection practices. The Commission held that JAC members as administrators of the trust fund created to finance the apprentice training program were clothed with the special duties of trustees, among which was the duty to participate with the union in selecting apprentices.[66] The abdication of that function constituted a violation of a duty imposed by law.

4. *Provisions of the Order*

SCHR's order of March 20, 1964 in the instant case directs the respondents to cease and desist from (a) denying, because of race or color, the right of qualified Negroes to be admitted to apprentice training; (b) aiding and abetting the union and JAC in denying this right; (c) excluding Negroes from union membership because of race or color.

The Commission ordered the following affirmative action:

Paragraph 1—Adoption of objective standards for apprentice selection, such standards to be approved by the Industrial Commissioner. This paragraph contains the explicit prohibition "that in no event shall sponsorship by a member or members of Local Union 28 be adopted as a requirement either for applying or being selected for apprentice training."

Paragraph 4—The compilation of a new waiting list based on new applications. Former apprentice applicants are required to reapply.

Paragraph 5—Advance notice to be given to the State Employment Service and the New York City Board of Education of new apprentice classes to be selected. Such announcement must contain particulars relating to the requirements for applicants, date of application, period of instruction, etc.

Paragraph 8—Written statements to be furnished (upon applicant's request) to rejected applicants, detailing reasons for non-selection. If the applicant asserts that he was rejected because of race, creed, color or national origin, the union or JAC must advise him of his right to obtain review by a designee of the Commissioner of Education.

Paragraph 9—Availability to SCHR of records relative to selection and rejection of applicants.

Paragraph 10—Incorporation of a provision barring discrimination in any apprenticeship agreement concluded by Local 28 and JAC.

64. Instant case at 18.
65. *Id.* at 19.
66. *Id.* at 20-21.

Paragraph 11—Notification to SCHR within sixty days of compliance measures undertaken by respondents.

The current petition for review filed by respondents centers on the roles assigned to the Industrial Commissioner and to the Commissioner of Education in evaluating and reviewing the selection practices of Local 28 and JAC. But it is doubtful that this alleged unlawful delegation of power by SCHR represents the fundamental objection of the union. It is more likely to be found in that provision of the order which mandates the total elimination of union sponsorship as a factor in the selection process. The union may have relied on this device to accomplish much more than the exclusion of an applicant whose color may have seemed objectionable to the membership. Sponsorship could also be utilized as a device to centralize power and patronage within the union, and to provide a job-secure future for sons and nephews who would otherwise enter a competitive labor market untrained and unprotected.

CONCLUSIONS

The *Sheet Metal Workers* decision finds its place in the strengthening current of thought and action which is wearing a new course in the vast area of discrimination.[67] Consequently, the future significance of the Commission's opinion and order does not emanate from the findings of technical violations of the Law or from the requirement for new, supervised standards of admission. Rather, it emerges from the conceptual broadening of the principle that public responsibility comes from monopoly power. The Commission does not interpret this principle as a statutory duty confluent with a statutory power or privilege bestowed by the legislature,[68] but as a duty arising from the status of the union as absolute arbiter of who may acquire the right to work[69] in a

67. At the same time that SCHR decided the *Sheet Metal Workers* case, it issued an order in Mitchell v. R. & S. Plumbing & Mechanical Systems, Inc., C-9092-62 (1964) (mimeo.) The real party respondent in the *Plumbers* case was not the company but Local 373 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (AFL-CIO). The all-white local which controls the craft in Rockland County refused to admit a Negro journeyman. Complainant had applied for membership after his employer signed an agreement to employ only Local 373 members. The Commission concluded that the union had violated section 296.1(b) of the Law and ordered the union to admit applicants to membership without regard to race. The union was directed to admit complainant to membership, if impartial tests (at which a SCHR observer was present) qualified him as a journeyman. Furthermore, although accessibility to apprentice training was not a patent issue in the case, SCHR ordered Local 373 to notify the State Employment Service of apprenticeship openings and to assure equal opportunity to all applicants. In the *Plumbers* case, as in the instant case, the order of the Commission extended beyond the redress of an individual grievance to the problem of discrimination against Negroes generally, in the selection of apprentices as well as in the admission of applicants for union membership.

68. *Cf.* Steele v. Louisville and Nashville R.R., 323 U.S. 193, 202-03 (1944). It was held that the Railway Labor Act "imposes upon the statutory representative of a craft . . . a duty . . . to protect the interests of the members of the craft. . . ." And Congress by the Act imposed on the union a "duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts. . . ."

69. See Truax v. Raich, 239 U.S. 33, 41 (1915), ". . . the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] Amendment to secure."

given craft. Such a role thrusts the union into a "quasi-public position"[70] and it cannot choose its members (and, one step further removed, its apprentices) according to the preferences (or caprices) of a private, social club. The choice, if predicated on subjective and nepotic standards operates as a denial of a civil right—equality of opportunity to compete for a job in the labor market.[71]

This definition of responsibility attaching to a dominant craft union is buttressed by the Commission's determination that passive acquiescence in, or a disclaimer of knowledge of, discriminatory admission standards is no defense to any party who is administratively associated with the selection process.[72] The duty blankets both acts of commission and of omission.

Finally, the Commission, while stating that its finding of discrimination is based on a combination of practices[73] which singly are not necessarily discriminatory *per se*, employs clearly a "pattern of discrimination" approach.[74] The application of such an approach to other craft unions is a logical next step. Logically too, where violation of the Law is determined on the basis of a comprehensive assessment of dependent factors, the Commission is enabled to address its order to the more general problem of class exclusion.[75]

Josephine King

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70. Instant case at 17.

71. See, Independent Metal Workers Union, 147 N.L.R.B. No. 166, 56 L.R.R.M. 1289 (July 1, 1964). This case arose in Houston and concerned a Negro and a white Local which had been certified as the joint bargaining representative by the N.L.R.B. in 1961. The contract covered two kinds of jobs: Group I—open only to whites and Group II—open only to Negroes. The Negro local (No. 2) proposed that job segregation be gradually eliminated. Local No. 1 refused, and entered into an agreement with the employer enlarging the apprenticeship program with the understanding that apprenticeship would be available only to white applicants. A rejected Negro applicant presented his grievance to Local No. 1 which refused to process it. The N.L.R.B. found that sections 8(b)(1)(A), 8(b)(2) and 8(b)(3) of the Labor Management Relations Act had been violated. The opinion stated: "Specifically, we hold that the Board cannot validly render aid under Section 9 of the Act to a labor organization which discriminates racially when acting as a statutory bargaining representative." 56 L.R.R.M. 1294. The certification of both locals was rescinded by the Board's order "because Locals Nos. 1 and 2 discriminated on the basis of race in determining eligibility for full and equal membership, and segregated their members on the basis of race." (*Ibid.*)

72. Instant case at 19.

73. *Id.* at 17.

74. *Id.* at 9. "Once evidence of a discriminatory practice is found, this Commission may determine whether a general discriminatory pattern exists and order its elimination."

75. The instant case focuses on the responsibility of the union, since the union controls the course of instruction which is indispensable to skill in the craft. The reverse side of the coin is exposed in *Matter of Myart and Motorola, Inc.*, Charge No. 63C-127 (Ill. Fair Employment Practices Comm'n, 1964) (mimeo.) Myart contended that he was qualified for the position of Analyzer and Phaser, but that Motorola refused to hire him because of race. The respondent failed to produce Myart's application test, or competent testimony as to the grade he had achieved, to substantiate respondent's allegation that Myart was not qualified. The Hearing Examiner concluded that the company had engaged in discriminatory hiring practices and ordered the employment of Myart as Analyzer and Phaser.

The most significant aspect of the case, however, may be found in the dictum rather than in the decision of the case. The Hearing Examiner sharply criticized the form of the examination administered to Myart. He noted that it was copyrighted in 1949 and described it as obsolete. "Its norm was derived from standardization on disadvantaged groups," and therefore did not provide ". . . equal opportunity to qualify for the culturally

deprived. . . ." (p. 8) The order directed Motorola to discontinue use of this test; any substituted examination must ". . . reflect and equate inequalities and environmental factors among the disadvantaged . . ." (p. 9).

The Examiner recognized, further, that revision of application tests and forms would not incisively deal with the problem. He emphasized that:

> Selection techniques may have to be modified at the outset in the light of the experience, education or attitudes of the group. . . . The employer may have to establish in-plant training programs and employ the heretofore culturally deprived . . . as learners, placing them under such supervision that will *enable* them to achieve job success. (p. 10).

Thus, the employer may have to assume, ultimately, the responsibility for elevating the unskilled and the uneducated to a plane at which they can realistically compete for job opportunities.