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At an IAS Term, Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of March, 2004

P R E S E N T:

HON. DAVID I. SCHMIDT
Justice.

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SILVER DRAGON RESTAURANT,

Petitioner,

- against - Index No. 30727/03

THE CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS,
DEREK BRYSON PARK, DR. EDISON JACKSON, &
GRACE L-U-VOLCKHAUSEN, COMMISSIONERS,
INDIVIDUALLY AND AS MEMBERS OF
THE NEW YORK CITY COMMISSION ON
HUMAN RIGHTS,

Respondents.

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The following papers numbered 1 to 5 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3-4
Reply Affidavits (Affirmations)	5
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, petitioner Silver Dragon Restaurant (Silver Dragon) moves for a judgment, pursuant to CPLR Article 78, annulling or modifying the decision and order of respondent City of New York Commission on Human Rights (Commission), dated

July 28,2003, which: (1) found that petitioner had racially discriminated against customers, (2) imposed a $10,000 civil penalty and **(3)** required petitioner to implement an anti-discrimination policy.

Respondent Commission and its individual commissioners, respondents Derek Bryson Park, Dr. Edison Jackson and Grace Lyu-Volckhausen, cross-move for an order enforcing the above-mentioned decision and order pursuant to §§ 8-125[1] and 8-126[2] of the Administrative Code of the City of New York.

Background

The Pre-Hearing Events

This case stems from incidents which occurred at a Chinese restaurant located on 86th Street in Brooklyn. Dana Monroe, an African-American, had filed a verified complaint with the Commission on or about May 31,2002 that charged Seafood King, a Chinese restaurant

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[1] Subdivision (a) of that provision provides, in part, that: Any action or proceeding that may be appropriate or necessary for the enforcement of any order issued by the commission pursuant to this chapter. . . may be initiated in any court of competent jurisdiction on behalf of the commission."

[2] Subdivision (a) of that provision, effective September **16, 1991,** pertinently provides that: "where the commission finds that a person has engaged in an unlawful discriminatory practice, the commission may, to vindicate the public interest, impose a civil penalty of not more than fifty thousand dollars. Where the commission finds that an unlawful discriminatory practice was the result of the respondent's willful, wanton or malicious act or where the commission finds that an act of discriminatory harassment or violence as set forth in chapter six of this title has occurred, the commission may, to vindicate the public interest, impose a civil penalty of not more than one hundred thousand dollars."

Subdivision (d) of that provision provides that: "[a]n action or proceeding may be commenced in any court of competent jurisdiction on behalf of the commission for the recovery of the civil penalties provided for in this section."

which had been in business at the above location, with racially discriminating against her on March 4,2002 by refusing to prepare food for her until she paid for the order.

Deputy Commissioner Clifford Mulqueen, a white male, and Commission staff attorney Natalie Holder-Winfield, an African-American female, subsequently went to the restaurant on July 15,2002 to determine if it treated black patrons differently from patrons from other racial or ethnic groups. By that time, the ownership of the restaurant had changed and its name was Silver Dragon Restaurant. Ms. Holder-Winfield entered before her colleague, according to his investigation memo, and an Asian male worker behind the counter, who handled her "take-out" order, told her to "pay now" before processing the order. The investigation memo then states that the same worker gave Deputy Commissioner Mulqueen his food before asking for any money. The memo further claims that Ms. Holder-Winfield observed two additional non-black patrons receive their food before paying.

This incident resulted in the filing of a verified amended complaint by both Dana Monroe and the Commission itself on or about August 21,2002. The amended complaint reiterated the March 4,2002 allegation, added the Commission as a complainant, named Silver Dragon as the respondent and charged it with responsibility for the alleged racial discrimination on both March 4,2002 and July 15,2002.[3]

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[3] Specifically, the administrative complaint charged a violation of Administrative Code § 8-107 (4) (a) which provides that: "It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation because of the actual or perceived race, creed, [or] color. . . of any person directly or indirectly, to refuse, withhold from or deny to such person any of the accnmmodations, advantages, facilities or privileges thereof . . ." Administrative Code

Because Silver Dragon had not begun its sublet of the premises until April 10,2002, after Seafood King's dispossession, Silver Dragon's verified answer to the Commission asserted an affirmative defense that "it was not in business and did not occupy the restaurant premises" on March 4,2002 when Dana. Monroe allegedly experienced racial discrimination.

Ac mi nistrative Law Judge (ALJ) Ray Fleischacker subsequently addressed this issue at a conf(rence on October 7, 2002. This conference resulted after the Commission had issued a notice on October **3,** 2002 finding probable cause to credit the allegations in the amended complaint and stating its law enforcement bureau's intention to schedule the case for public hearing and adjudication. ALJ Fleischacker ruled that the Commission needed to prove a :onnection between Seafood King and Silver Dragon to proceed with Dana Monroe': allegations concerning the March 4,2002 incident. He recommended withdrawal of her cla'm against Silver Dragon with leave to the Commission to re-serve a new complaint against S'lver Dragon for the alleged racial discrimination on July 15, 2002.

Tl e Commission thereafter filed a new verified complaint against Silver Dragon on or about December 30. 2002. This complaint confined itself to **the July** 15. 2002 incident **and** reiterated the same Administrative Code violation footnoted above, but omitted any mention

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§ 8-102 (9), in turn, pertinently provides that: "[t]he term 'place or provider of public accommodation' shall include providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind, and places, whether licensed or unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold, or otherwise made available."

of Dana Monroe or Seafood King.[4] Silver Dragon again submitted a verified answer denying the allegations of the complaint. An administrative hearing was held on February 12,2003 before ALJ Suzanne Christen of the New York City Office of Administrative Trials and Hearings pursuant to a referral authorized by an applicable Commission rule.[5]

The Administrative Hearing and Post-Hearing Submissions

Deputy Commissioner Mulqueen testified at the hearing that he saw white and Asian customers pay for their meals when they received their food. He then related that the person at the counter handling **Ms.** Holder-Winfield's order directed her to pay when she placed her order and repeated "pay now" even after she told the worker that she wanted to pay when her food arrived. Deputy Commissioner Mulqueen also testified that the same worker, after taking his order, told him that he did not have to pay immediately for his food. He, in fact, only paid, according to his testimony, when the food arrived. Ms. Holder-Winfield confirmed this scenario. She testified that she too saw white and Asian patrons pay upon receiving their food. She added that the same worker who served these other customers asked her to

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[4] The Commission eventually issued a notice of administrative closure on June 18,2003 which closed the original complaint, discussed above, on the grounds, as summarized by the Commission's answer herein, that "(1) Silver Dragon, was not in business at the time of complainant Monroe's allegation of discrimination, and **(2)** that the Commission had subsequently initiated a new claim against Silver Dragon alleging that its staff was engaged in discriminatory practices."

[5] Specifically, 47 RCNY § 1-71(a) provides, in part, that: [w]hen the Law Enforcement Bureau determines that a case is ready for adjudication, the Bureau shall refer the case to the Office of Administrative Trials and Hearings **(OATH)** pursuant to this section."

pay for her food immediately after she placed the order. He further remarked, "You pay now" when she delayed, according to her testimony, but she replied that she wanted to pay for the food upon receiving it. She recounted that the worker then escorted her to a table, but that she returned to the cash register five minutes later and told the worker that she had decided to take out her food, rather than eat it in the restaurant. He once again told her "You pay now." She then paid and received her food.

Wong Char, the Treasurer and Secretary of Silver Dragon's corporate owner, testified that Silver Dragon never before faced discrimination charges and that he investigated what happened on July 15,2002 after receiving the original written complaint in August 2002. He learned that the employees at the take-out counter on July 15, 2002, none managerial or supervisory, no longer worked for the restaurant and were then working out of state. Mr. Char explained that the restaurant maintained two different types of menus, a Dim Sum menu for displayed food which required no kitchen preparation and a take-out menu which required the food to be cooked to order in the kitchen. Customers ordering from the take-out menu are asked for advance payment because food prepared to order cannot be resold if the customer fails to pay for the food. Such non-payment, he testified, happens four or five times a week, often from people posing as customers who seek to use the restroom. He claimed that this advance payment policy applied to everyone ordering from the take-out menu. He surmised on cross-examination that an employee might not seek payment in advance when the employee could sell an order from a non-paying patron to another

customer. Mr. Char testified that he never spoke directly to the employee monitoring the cash register that day, a relative of the restaurant's manager, but the manager told Mr. Char that no one remembered what happened on that date.

Both sides made post-hearing submissions. Silver Dragon argued that its management lacked knowledge of the alleged discriminatory conduct and, thus, should not be held strictly liable. The Commission's law enforcement bureau responded that "management's lack of knowledge does not absolve Silver Dragon of liability" and urged the ALJ to recommend a $10,000 fine, as well as to direct the establishment of a non-discrimination policy at the restaurant.

The ALJ's Report and Recommendation

ALJ Christen subsequently issued her 11-page report and recommendation, dated May 30, 2003, which found that Silver Dragon "discriminated against an African-American investigator on July 15, 2002, by asking her to pay for her order before receiving it." She mentioned that no dispute existed that Silver Dragon, as a restaurant, qualified as a "provider of public accommodation" under Administrative Code § 8-102 (9).[6] ALJ Christen found that the Commission had made a prima facie case based on the credible and unrebutted testimony presented which needed no showing of discriminatory intent.[7] She explained that such

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[6] See footnote 3, second paragraph, above.

[7] Her report cited *Hudson Transit Lines, Inc. v State Human Rights Appeal Bd.*, 47 NY2d 971 which noted that: "[i]t is not always necessary to find specific evidence of spoken references to complainants' national origin or color, for acts of discrimination may occur without such references" (*id.* at 972).

"discriminatory intent is presumed once petitioner establishes a ***prima facie*** case, and the burden shifts to [Silver Dragon] to articulate a legitimate, non-discriminatory reason for treating Ms. Holder-Winfield differently from other restaurant patrons. ***See McDonnell Douglas Corp. v. Green,*** 411 U.S. 792, 802-03, 93 S. Ct. 1817, 1824 (1973)." She found that Silver Dragon failed to meet that burden. She reasoned that ordering from the Dim Sum menu which required no kitchen preparation and no advance payment might plausibly explain "why the two patrons ahead of Ms. Holder-Winfield were not asked to pay in advance of receiving their orders, [but] it does not explain the disparity in the treatment given to Ms. Holder-Winfield and Deputy Commissioner Mulqueen." Both of them had placed virtually the same food order requiring kitchen preparation.[8] Allowing Deputy Commissioner Mulqueen to wait to pay, ALJ Christen found, "is not satisfactorily explained by Mr. Char's speculation that the employee or agent who took his order would have figured that the earlier order from Ms. Holder-Winfield could be given to him if she did not pay for it, because there is no evidence that her earlier order was ever placed with the kitchen." Instead, the report reminds the **parties** that **Ms.** Holder-Winfield "had to pay in **advance** for her kitchen order to go through." ALJ Christen therefore concluded that Silver Dragon "failed to articulate a legitimate, non-discriminatory reason for requiring Ms. Holder-Winfield to pay in advance for her food."

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[8] Deputy Commissioner Mulqueen testified to ordering General Tsao's chicken and Ms. Holder-Winfield testified to ordering General Tsao's chicken and an egg roll.

One instance of discrimination, alone, ALJ Christen's report observed, suffices to sustain a human rights violation.[9] In addition, the report rejected Silver Dragon's attempt to argue that it had no knowledge of the alleged discriminatory conduct and could thus invoke the strict liability affirmative defense available under Administrative Code § 8-107(13)(b).[10] The report explained that Silver Dragon "may not avail itself of the affirmative defense provided for in section 8-107(13) (b) because, under section 8-107 (13) (a) of the Code:

> An employer shall be held liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of any provision of this section ***other than subdivisions one and*** *two* of ***this section*** (emphasis added). . .

Here, [Silver Dragon] is charged with a violation of subdivision four, for which the affirmative defense is not available." Consequently, ALJ Christen found the verified complaint proven and recommended, as requested by the Commission's law enforcement

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[9] Her report cited ***Imperial Diner, Inc. v State Human Rights Appeal Bd.***, 52 NY2d 72 in noting that Executive Law § 296, the state law equivalent to the New York City Human Rights Law: "prohibits discrimination, and not just repeated discriminatory acts . . . [T]he commissioner could find that petitioners engaged in an unlawful discriminatory employment practice which should be redressed. He did not have to also find that this was a regular practice, nor did he have to wait and see if it would become one."

[10] That provision provides, in part, that: "[a]n employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision one or two of this section only where: (1) the employee or agent exercised managerial or supervisory responsibility; or (2) the employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action . . . or **(3)** the employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.

bureau, that Silver Dragon "implement a policy against discrimination, and train its employees to comport themselves in a manner consistent with that policy." However, she recommended a civil penalty of $2,000, not $10,000 as the law enforcement bureau had urged, in view of "undisputed mitigating evidence of no complaints of prior or subsequent discriminatory conduct towards patrons of the Silver Dragon Restaurant . . ."

The Post-Report and Recommendation Submissions

Both sides then accepted the invitation of the Commission's General Counsel to submit comments to the Commission concerning the report and recommendation. The Commission's law enforcement bureau agreed with the violation findings, took the "position that respondent's treatmen' of the African-American tester was deliberate" and chastised Silver Dragon for "deliberate and malicious conduct." It referenced other Commission decisions and particularly highlight :d *Southgate* v *United African Movement,* NYCCHR Compl. No. MPA95-0031, Rec. Dec. & Ord. (June 30, 1997), Decision & Ord. (Sept. 24, 1997) in which a $5,000 civil penalty had been imposed. In that case, a Caucasian reporter had been barred from attending a publicly advertise I forum. in violation of the same § **8-107 (4).** as involved herein. The Commission's decision observed, according to the law enforcement bureau, that: "Exclusion from [the] forum does not impact the City's interest in the same manner as race-based exclusions from . . . public accommodation where commercial transactions take place." Hence, the law enforcem cnt bureau contrasted the *Southgate* decision "where racial exclusion was less egregious because it occurred outside of a commercial context" with "the case at hand [which]

exemplifies a greater impact upon the City's interest because [Silver Dragon's] act of discrimination occurred in a public accommodation where commercial transactions take place. Thus, the discrimination has a detrimental effect upon customers." The law enforcement bureau ended its submission by stating that: "[t]he Commission is therefore respectfully urged to modify the recommended decision to the amount of $5000.00 in order to protect the rights of the public."

Silver Dragon's opposition to the law enforcement bureau's submission stated that the offending employee no longer worked at the restaurant and that management had taken corrective measures after notice of the charges. The opposition statement characterized the case as presenting an isolated incident of discrimination. Silver Dragon viewed the **ALJ's** recommended penalty of $2,000 as excessive, but agreed to "honor her decision in this matter."

The Commission's Determination

The Commission thereafter issued its decision and order, dated July **28,** 2003, which found **ALJ** Christen's report and recommendation supported by the record. It regarded the recommendation **for** implementing an anti-discriminatinn policy with training as appropriate affirmative relief. However, the Commission believed "that the circumstances of this case warrant the imposition of a civil penalty in the amount of $10,000." The Commission, following its law enforcement bureau's argument, commented that "Discrimination based on race by a place of public accommodation where commercial transactions take place is particularly egregious." The decision recounted that an investigator "was subjected to the

presumption that solely because of her race, she was less trustworthy than [Silver Dragon's] non-African-American customers." The filing of this case after a Commission-initiated test, the decision continued, made it "reasonable to assume that [Silver Dragon], as a matter of policy, treated African-American customers in this manner." Consequently, the decision stated that "[t]he indignity that the investigator and other African-American customers suffered as a result of [Silver Dragon's] raw bigotry is precisely why the [Administrative] Code provides for the imposition of civil penalties to vindicate the public interest." Therefore, the Commission adopted ALJ Christen's report and recommendation, but modified the civil penalty aspect by ordering Silver Dragon to pay $10,000.

Petitioner's Position

In its petition, petitioner challenges the Commission's $10,000 civil penalty as both unwarranted and excessive. It disputes the Commission's assumption that a policy existed to discriminatorily treat African-American customers. Silver Dragon views the July 15, 2002 incident as an isolated error of judgment marring its otherwise unblemished record and urges either that the civil penalty be vacated in its entirety as impermissible under Administrative Code

8-107 (13) (f)[11] or that it be modified by applying the mitigating factors cited in Administrative Code §§ E-107 (13) (d) (2)[12] and 8-107 (13) (e).[13]

Respondents' Position

Respondents assert that the evidence supports the Commission's determination that Silver Dragon discriminated against African-American customers. They regard the civil penalty imposed as reasonably related to Silver Dragon's discriminatory conduct and within the Commission's broad authority. They also assert that Silver Dragon improperly filed its petition as an Article 78 proceeding.

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[11] That provision provides, in part, that: "[t]he commission may establish by rule, policies, programs and procedures which may be implemented by employers for the prevention and detection of unlawful discriminatory practices by employees, agents and persons employed as independent contractors. Notwithstanding any other provision of law to the contrary, an employer found to be liable for an unlawful discriminatory practice based solely on the conduct of an employee, agent or person employed as an independent contractor who pleads and proves that such policies, programs and procedures had been implemented and complied with at the time of the unlawful conduct shall not be liable for any civil penalties which may be imposed pursuant to this chapter . . ."

[12] That provision provides that: "[w]here liability of an employer has been established pursuant to this section and is based solely on the conduct of an employee, agent, or independent contractor, the employer shall be permitted to plead and prove that prior to the discriminatory conduct for which it was found liable it had: **(2) A** record of no, or relatively few, prior incidents of discriminatory conduct by such employee, agent or person employed as an independent contractor or other employees, agents or persons employed as independent contractors."

[13] That provision provides, in part, that: "[t]he demonstration of any or all of the factors listed above in addition to any other relevant factors shall be considered in mitigation of the amount of civil penalties to be imposed by the commission pursuant to this chapter . . ."

Discussion

Procedural Aspects

Respondents correctly indicate, as a procedural matter, the inapplicability of CPLR article 78 to this case. CPLR 7801 (1) provides, in part, that: "[e]xcept where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination: which . . . can be adequately reviewed by appeal to a court . . ." Here, Administrative Code § 8-123[14] expressly provides for the Supreme Court's exclusive jurisdiction to initially review Commission orders and thus supplants CPLR Article 78.

"Where, as here, an exclusive review procedure by a specified court is expressly provided for by statute, a proceeding under article 78 is not maintainable" (*Maloff v City Commission on Human Rights*, 45 AD2d 834, 834). "Thus, under Code § 8-123, in the first instance this court has exclusive jurisdiction of the issues in this proceeding" (*City of New York Commission on Human Rights v Salinas Realty Corp.*, 183 Misc 2d 897, 898). "[T]itle 8 of the New York City Administrative Code provides a special mechanism for judicial review of decisions made by [the

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[14] Subdivision (a) of that provision pertinently provides that: "[a]ny complainant, respondent or other person aggrieved by a final order of the commission issued pursuant to section 8-120 or section 8-126 of this chapter. . . may obtain judicial review thereof in a proceeding as provided in this section.

Subdivision (b) of that provision pertinently provides that: "[s]uch proceeding shall be brought in the supreme court of the state within any county within the city of New York wherein the unlawful discriminatory practice or act of discriminatory harassment . . . occurs . . ."

Subdivision (f) of that provision pertinently provides that: "[t]he jurisdiction of the supreme court shall be exclusive and its judgement and order shall be final, subject to review by the appellate division of the supreme court and the court of appeals in the same manner and with the same effect as provided for appeals from a judgement in a special proceeding."

City] Human Rights Commission. Thus, section 123 (b) gives this court exclusive jurisdiction to hear proceedings commenced by persons aggrieved by a final order of the Human Rights Commission, subject only to review by the Appellate Division and the Court of Appeals" ***(Rodriguez v New York City Commission on Human Rights,*** Sup Ct, NY County, February 14, 2003, Madden, J., Index No. 400790/02). "[A]ny application for judicial review of a final order of the NYCCHR must be brought pursuant to [Administrative Code § 8-123]" ***(Matter of United African Movement v New York City Commission on Human Rights,*** NYLJ, March 9, 1999, at 25, col 1).

Here, Silver Dragon has incorrectly proceeded under CPLR Article 78. However, the conversion of such proceeding, pursuant to CPLR 103 (c),[15] into a review proceeding under Administrative Code § 8-123 represents an appropriate remedy considering that jurisdiction over the parties exists ***(New York City Commission on Human Rights v Pathmark Stores Inc.***, NYLJ, October 3, 1999, at 28, col 5 [special proceeding pursuant to CPLR Article 4 converted to enforcement action under Administrative Code 8-125 (b) regarding civil penalty for discriminatorily denying access to a public accommodation]). In addition, no issue of timeliness, attributable to the **shorter** statute of limitations in Administrative Code **§ 8-123 (h),[16] exists** in **this** case."

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[15] That provision pertinently provides that: "[i]f a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution."

[16] That provision provides that: "[a] proceeding under this section must be instituted within thirty days after the service of the order of the commission."

[17] Here, Silver Dragon initiated this proceeding, as mentioned earlier, by first filing an order to show cause on August **22, 2003** and then a notice of petition, petition and supporting papers on August **28, 2003.** These filings followed the Commission's decision and order, dated July **28, 2003**. Neither side mentions when and how service of the decision and order was made

Discrimination Finding

Silver Dragon, does not object to the evidentiary support for the Commission's determination that discrimination, as found by ALJ Christen, occurred against an African-American investigator on July 15, 2002 by asking her to pay for her order before receiving it. Instead, Silver Dragon cites Administrative Code § 8-107 (f) and argues, in essence, that its alleged implementation of Commission policies, programs and procedures to detect its workers' unlawful discriminatory practices should enable it to avoid any civil penalty, as that law allows.[18] However, Silver Dragon neither pleaded nor proved such implementation or compliance, as that law also requires." Indeed, its verified answer before the Commission regarding the July 15, 2002 incident simply denied the allegations of the complaint and contained no affirmative defenses. Even more significantly, ALJ Christen's report and recommendation contains no finding that Silver Dragon implemented or complied with Commission policies, programs and procedures. The report simply notes Mr. Char's testimony that "[h]e instructs any employee that he hires to treat everyone equally" [and] "that his policy has always been to treat everyone the same." The only favorable finding regarding Silver Dragon states that: "it has not had any prior complaints of discrimination." Hence. Silver Dragon fails to qualify for avoidance of a civil penalty after having been found liable for its worker's unlawful discriminatory practice.

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but, even more significantly, respondents raise no timeliness defense.

[18] ***See*** fn. 11.

[19] ***Id.***

Silver Dragon's post-hearing submission and post-report and recommendation submission made no objection based upon Administrative Code § 8-107 (13) **(f).** Consequently, pursuant to Administrative Code § 8-123 (c), it may not be considered by this court .[20]

Propriety of the $10,000 Civil Penalty

Although Silver Dragon was directed to implement an anti-discrimination policy with attendant training, the amount of the civil penalty presents a thornier issue. Three prior Commission cases imposing civil penalties and their subsequent judicial review in two instances show that the propriety of the amount of the penalty is determined by "examin[ing] how egregious the violation is and its impact on the public."[21]

For example, the Commission adopted the recommended decision and order of the Chief **ALJ** in *Southgate v United African Movement,* NYCCHR Compl. *No.* MPA95-0851/PA95-0031, and imposed a $5,000 civil penalty where a respondent had barred a Caucasian reporter from attending a publicly advertised forum because of her race. There, the Chief **ALJ** had written that "[e]xclusion from Respondents' forums does not impact the City's interest in the same manner as race-based exclusions from housing accommodations, employment opportunities or public accommodations where commercial transactions take place." However, the Chief **ALJ** recognized that "some amount

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[20] That provision provides, in part, that: "[n]o objection that has not been urged before the commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

[21] *Southgate v United African Movement* (Sup Ct, *N Y* County, Index No. 10169/98), Rec. Dec. & Ord., p **33.** The omission of the administrative ruling cited by respondents herein caused the court to independently review that court file.

of civil penalty is appropriate" and, in imposing the $5,000 penalty, commented that '[t]he extreme nature of the] exclusionary actions and blatant race-based criteria cannot be ignored. Moreover, the enforcement of this [exclusionary] policy was so extreme that a [Law Enforcement] Bureau tester was manhandled by Respondents [therein] as he was 'escorted' from the Slave One Theater."

Aggravating factors in a commercial context resulted in civil penalties of $5,000 and $20,000, respectively, against a landlord and brokerage firm in ***Smith*** v ***Park West Realty,*** NYCHHR Compl. No. MH-93-0877.[22] There, the Commission adopted the recommended decision of ALJ Steven E. Presberg, who found that the landlord had purposely instructed the brokerage firm to utilize a race-coded restriction on the landlord's apartment listings. This coding implemented his instructions not to bring blacks or Hispanics to see an apartment. The landlord had also refused to show an available apartment to a black woman when she appeared for a scheduled appointment. The ALJ further mentioned the brokerage firm's pattern of discrimination against blacks, Hispanics and others over an extended period of time. He referred to rental listings and notations of "no children" and "no doctors, no lawyers" on many firm rental forms to establish this discriminatory pattern. The size of the brokerage firm, which included at least five salespersons and the broker, coupled with the duration of the race-based coding scheme and the notations on numerous

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[22] **The omission of this administrative ruling, referred to by the Commission's law enforcement bureau in its submission to the Commission, and the ensuing judicial review noted in Chief ALJ Maldonado's *Southgate* opinion, cited by respondents herein, caused the court to independently review the court file containing the actual administrative ruling, *Rosenshein dba Park West Realty v New York City Commission on Human Rights* (Sup Ct, Kings County, 15481/95).**

documenti, led the ALJ and the Commission to conclude that the discriminatory policy affected a large number of potential renters.

A review proceeding in the ***Park West Realty*** case upheld those civil penalties.[23] However, the subsequent Appellate Division decision in ***119-121 East 97"" Street Corp. v New York City Commission on Human Rights,*** 220 AD2d 79, reduced a $75,000 civil penalty to $25,000 by "apply[ing] a principle of proportionality since the Commission is precluded from assessing ***more*** than $10C ,000 as a civil penalty in ***any*** case." There, the appellate court set forth the numerous acts of harassment by landlords directed against an HIV-positive tenant, Mr. Baca, over an 18-month period which led the Commission to find discrimination based upon sexual orientation and disability:

> [P]etitioners [i.e., the landlords] commissioned someone or acted themselves to burglarize respondent's [i.e., Baca's] apartment, disabled his door locks, and turned off his electricity. Petitioners refused to accept his timely rent checks, refused to renew his lease, and commenced eviction proceedings against respondent. Petitioners verbally and physically accosted respondent Baca and encouraged their employees to do ***so,*** including calling him, in public, a "faggot punk", "male whore", and "sicko" telling him he had **AIDS** and they hoped he died, leaving threatening messages on his answering machine, distributing a notice to tenants in respondent's building informing them of his Human Rights complaint and HIV status and warning the tenants not to cooperate with him. . . . Petitioners telephoned or had someone telephone respondent's employer . . . and divulged his HIV status ***(id.*** at 82-83).

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[23] *Id.*, Memorandum Decision at 10-11.

The appellate decision upheld an award of $100,000 for mental anguish to the tenant for these acts, but noted that the civil penalty "is not intended to compensate the complainant but to punish the violator" (*id.* at 88). The decision observed that the 50 units owned by petitioners failed to place them "in the upper range of units owned by large landlords in the City" ***(id.)***. Consequently, "while their acticns were egregious, committed over a period of time, and implicated individuals besides complainant, the public interest was not affected to the much greater extent it would have been had petitioners been large landlords whose actions affected hundreds, if not thousands of individuals'' ***(id.*** at **88-89).** Utilizing the proportionality principle and considering that no previous findings of discrimination existed against those petitioners, the appellate court reduced by two-thirds the Commission's civil penalty which the Supreme Court had allowed.

Using the Appellate Division's proportionality analysis means determining whether the Commission ultimately imposed a civil penalty commensurate with the infraction. The limited prior administrative and judicial case law, discussed above, involved either extensive discriminatory conduct over an extended period of time or other aggravating factors. Documentary evidence in the *Park West Realty* case, for example, indicated the broad scope and entrenched nature of the racial coding and other discriminatory activities in that case. In addition, the ALJ carefully analyzed the civil penalties in the context of the Commission's $75,000 award in the ***Baca*** case, which included "some of the most willful, wanton and malicious conduct ever scrutinized by this tribunal."[24] However, neither the ALJ, the Commission or the reviewing court in that case had the benefit of the

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[24] ***Rosenshein dba Park West*** Realty **v New** York City Commission on Human Rights (Sup Ct, Kings County, 15481/95), Rec. Dec. & Ord., **p 36.**

appellate decision in the ***Baca*** case, ***sub nom*** 119-121 ***East 97th Street*** *Corp.* ***v New York City Commission on Human Rights,*** 220 AD2d at 88-89 which reduced the $75,000 civil penalty by two-thirds to $25,000. Utilizing the $25,000 figure and two-thirds reduction as a guide suggests that a penalty of about $6,650--- two-thirds of $20,000---might have resulted in the ***Park West Realty*** case by a literal application of the proportionality analysis made in the ***Baca*** case.

Chief ALJ's ***Southgate*** opinion and the Commission's resulting decision and order, referenced above, occurred after the appellate decision in ***Baca,*** and imposed a $5,000 fine in a non-commercial case, as respondents mention. However, the manhandling of a Commission law enforcement bureau tester in enforcing the exclusionary policy significantly contributed to the amount of this civil penalty.

Here, Silver Dragon's proven discriminatory action, while intolerable, clearly differs from the litany of severely hostile discriminatory acts found over a period of time in the ***Baca*** case, the documented discriminatory scheme, again over an extended period of time, in the ***Park West Realty*** case and the overt manhandling that occurred in the ***Southgate*** case.[25] Indeed, perhaps after recognizing these differences, the Commission's own law enforcement bureau, "charged with the Commission's investigatory and prosecutorial functions,"[26] revised its $10,000 recommendation to ALJ Christen in this case to a subsequent $5,000 recommendation to the Commission. The law

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[25] Those cases, like this one, at least involve the similarity of no previous findings of discrimination.

[26] 47 RCNY § 1-02 (a).

enforcement bureau's revised recommendation, in any event, represented a substantial percentage increase over ALJ Christen's recommended $2,000 civil penalty.

Administrative Code § 8-105(8)[27] empowers the Commission to adjudicate discrimination complaints and Administrative Code § 8-126(a)[28] places responsibility with the Commission for imposing a civil penalty. Although the Commission had the right to reject the law enforcement bureau's recommendation, just as it can modify the ALJ's recommendation, the circumstances in this case warrant a penalty in an amount different from the $10,000 imposed by the Commission in its decision of July 28,2003.. The prevailing principle of proportionality makes $5,000, more than double the ALJ's recommendation, appropriate under the facts herein.

Accordingly, the court, sua sponte, converts Silver Dragon's CPLR Article 78 proceeding into a review proceeding under Administrative Code § 8-123 and grants Silver Dragon's petition to annul or modify the decision and order of respondent Commission, dated July 28,2003, only to the exten of reducing the civil penalty against Silver Dragon from $10,000 to $5,000.

Respondents' cross petition to enforce the challenged relief in the Commission's decision and

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[27] That provision pertinently provides that the Commission shall have the: "power to determine that a respondent has engaged in an unlawful discriminatory practice and to issue an order for such relief **as** is necessary and proper . . ."

[28] ***See*** fn. 2.

order is granted, except to the extent of reducing the civil penalty against Silver Dragon to $5,000.

The foregoing constitutes the decision, order and judgment of this court.

ENTER,

J. S. C.

HON. DAVID I. SCHMIDT