BEFORE THE IOWA CIVIL RIGHTS COMMISSION,

CP # 09-92-22984

ALLEN CHRISTOPHER DAVIS, Complainant,
and
IOWA CIVIL RIGHTS COMMISSION

vs.

LOCAL P-3 RETIREES, INC., Respondent.

SUMMARY

This matter came before the Iowa Civil Rights Commission on the Complaint, alleging discrimination in public accommodations on the basis of race, filed by Allen Christopher Davis against the Respondent Local P-3 Retirees, Inc.

Complainant Davis, a Black male, alleges that the Respondent effectively denied him rental of the Respondent's hall through different treatment on the basis of race because he was required to hire police officers as security in order to rent the hall. He also alleged that Jessie Taken, who was acting on behalf of the Respondent, made blatant discriminatory remarks regarding Blacks renting the hall.

A public hearing on this complaint was held on March 7, 1995 before the Honorable Donald W. Bohlken, Administrative Law Judge, at the Linn County Courthouse in Cedar Rapids, Iowa. The Respondent was represented by Robert F. Wilson, Attorney. The Iowa Civil Rights Commission was represented by Rick Autry, Assistant Attorney General. The Complainant, Allen Christopher Davis, was not represented by counsel.

The Commission's Brief was received on May 25, 1995. The Respondent's Brief was received on May 23, 1995.

The Commission failed to prove Complainant Davis's allegations of discrimination in public accommodations because of his race under the disparate treatment theory. The Commission attempted to establish a prima facie case of discrimination by utilizing both circumstantial and direct evidence of discrimination.

The circumstantial evidence did establish some elements of a prima facie case of race discrimination, i.e. that Complainant Davis was Black; that the hall was available for rent; that Davis offered to rent the hall; that the hall ultimately was not rented to him and remained available for rent. However, the Commission did not establish the remaining element of Complainant's qualification for renting the hall. The evidence did not show that he met the requirements for arranging security for the party even though those requirements were not discriminatorily applied.

The Commission tried to show discriminatory animus toward Complainant Davis by suggesting that, once the Respondent saw Davis in person, and became aware he was Black, it engaged in a series of delaying tactics designed to discourage him from renting the hall. These included (1) requiring him to pay in cash; (2) raising the issue of whether liquor was to be sold at the party Davis planned to hold; and (3) requiring that he provide security consisting of two uniformed police officers.

The evidence indicated that: (1) As admitted in his complaint, Davis was initially informed over the telephone that cash would be required before he ever met the Respondent's representative, Ms. Taken. (2) (a) The topic of selling liquor was initially raised in the telephone conversation with Davis, (b) at his meeting with Ms. Taken, Davis raised the issue of liquor being sold or served at the party, and (c) asking Davis about the sale of liquor was in accordance with established Respondent policies prohibiting such sale. (3) (a)The requirement of security was raised at the initial telephone conversation, and (b) asking Davis if he could meet security requirements was in accordance with established Respondent policy for the kind of party which Davis intended to hold.

The requirement imposed on Complainant Davis that two police officers be hired as security for the hall was in accordance with the Respondent's policy for functions other than wedding receptions, anniversaries, and similar functions which would normally be limited to invited family and friends. The circumstantial evidence did not support the proposition that Respondent treated renters or prospective renters of the hall differently on the basis of race.

Although Ms. Taken mentioned gangs when talking to Davis, she did so when explaining the reason the police had given her for requiring two officers at a party where police were used as security. She simply reiterated what the police had told her. She did not engage in the racial stereotyping of Blacks or of Complainant Davis while discussing the rental of the hall.

Racial discrimination may also be proven by direct evidence. Although the complaint suggested that Ms. Taken made blatant discriminatory remarks concerning Blacks renting the hall, no evidence was introduced to support that allegation.

The testimony of Complainant Davis girlfriend, Andrea Arneson, indicates that she placed only one telephone call in an attempt to contact the Respondent and see what the response would be if she tried to rent the hall. She testified that the call was to the Respondent's hall and that she talked to an unidentified male. This man allegedly told her that she did not need security and that the only problems they had were with Blacks. There are, however, numerous problems with Ms. Arneson's testimony. The evidence indicates that, in fact, she made more than one call. It is impossible on this record to determine who she talked to or what locations she actually called. It cannot be said on this record that she actually talked to someone who had the authority to represent the Respondent in renting the hall. Also, there were other problems with her credibility which indicate this testimony is unreliable.

Given that the Commission has failed to meet its burden of proving that discrimination occurred, this case should be dismissed.

FINDINGS OF FACT:

I. JURISDICTIONAL AND PROCEDURAL FACTS:

A. Subject Matter Jurisdiction:

1. Complainant Davis alleges that Respondent Local P-3 Retirees, Inc. effectively denied him rental of the Respondent's hall through different treatment on the basis of race because he was required to hire police officers as security in order to rent the hall. He also alleged that Jessie Taken, who was acting on behalf of the Respondent, made blatant discriminatory remarks regarding Blacks renting the hall. (Notice of Hearing-Complaint). These allegations bring his complaint within the subject matter jurisdiction of the Commission. See Conclusions of Law Nos. 1-2.

B. Procedural Matters:

2. Complainant Davis filed his complaint against Local P-3 Retirees, Inc. with the Iowa Civil Rights Commission on September 3, 1992. The date of the alleged discriminatory failure to rent is on or about August 20, 1992. Thus, the original complaint was filed less than one hundred eighty days after the alleged act of discrimination.

3. The complaint was investigated. After probable cause was found, conciliation was attempted and failed. Notice of Hearing was issued on July 13, 1994.

II. BACKGROUND:

4. Complainant Davis, a Black male, has lived in Cedar Rapids, Iowa for approximately seven years with Andrea Arneson, a white female, and their two children. (Tr. at 6). Complainant Davis has a college degree in communications from Kirkwood Community College. His original major was in criminal justice as, at one time, he wished to be a police officer. (Tr. at 7).

5. Complainant Davis has been active in community activities which oppose criminal gangs in the Wellington Heights residential area of Cedar Rapids. (Tr. at 8, 54, 56). In the summer of 1992, gang activity in this area became well-known and publicized for the first time. (Tr. at 53). The participants in the hearing were aware that these gangs were believed to be Black gangs. (Tr. at 94-95).

6. Respondent Local P-3 Retirees, Inc. is a nonprofit corporation. (Tr. at 117). It's membership is composed of approximately 5000 former employees of the Cedar Rapids meatpacking facility previously operated by Wilson and Company and Farmstead. (Tr. at 83, 116, 118). Eligibility for membership in the Respondent is held by anybody who was ever a member of the former union local at this facility or their spouses. (Tr. at 85). The last such union local reflected in the record was UFCW Local P-3. (Tr. at 114-116). The purpose of the corporation is to provide the former union hall as an asset for the use of the former union members. (Tr. at 117-19). Various activities of the organization, such as bingo, are held there. (Tr. at 119). The hall is located in a business

area at least 25 blocks from Wellington Heights. (Tr. at 55-56). The Respondent's address is 116 14th Avenue S.E., Cedar Rapids, Iowa 52405. (Notice of Hearing-Complaint).

7. Twenty-five to thirty percent of the membership are minority persons. Minorities, Blacks and Hispanics, have held office in the Respondent's organization and were active in the predecessor union. (Tr. at 84, 90, 139-41). The union was an active supporter of civil rights. (Tr. at 140).

8. In order to finance the maintenance of the union hall, it is also rented out for various functions. Ron Sevening, Jessie Taken, and Dale Bevill are the three persons authorized to make reservations for the hall. (Tr. at 98, 105, 109, 111, 120). Their race is not set forth in the record but, from the visual observation of the administrative law judge, they appear to be white. Each of these individuals has a calendar on which to record reservations they make. They meet periodically to reconcile their calendars. (Tr. at 105-06, 124). These individuals' telephone numbers are given in a recorded message on an answering machine at the union hall. The message indicates they should be called if a person wishes to rent the hall. The message is given if no one answers the telephone at the hall. While there is a calendar of scheduled events at the hall, the record does not show whether or not it is normally kept up to date. (Tr. at 108-09). If a call concerning a rental were answered by someone at the hall, the inquiry is to be referred to one of these individuals as opposed to being written on the hall calendar by whomever answers the telephone. (Tr. at 98, 109).

9. On April 20, 1992, the Respondent's Board, which included Jesse Taken, passed the following motion concerning the rental of the hall:

> [T]hat no parties be held on the premises where liquor would be sold. If the subject of selling alcohol or suspicion of selling was brought up during the rent interview than rent of the hall will be denied on that basis. The rental contract clearly states no selling of alcoholic beverages on premises. Security would have to be hired.

R. EX. D (Minutes of Board Meeting of April 20, 1992).

10. This motion was passed due to parties resulting in damages to the premises. A Halloween party was thrown by Quality Electric in 1991 which resulted in "a total disaster." Damages included broken bottles, holes in the walls, broken tables, a thermostat ripped off the wall, and bottles and glass inside and outside, including a parking lot filled with glass. (Tr. at 122, 149, 155-56). There is no evidence in the record to indicate that Quality Electric is associated with persons of any particular race. Another such party was a graduation party thrown by George Leach, a Black male, for his son. (Tr. at 126-27, 148-49). Ms. Taken had informed them that no liquor would be sold, but liquor was sold or brought in because several broken liquor bottles were found in the garbage cans. Several tables were turned upside down and the place was generally a mess. The participants had to be told at 2:00 a.m. to leave while Ms. Taken, Ron Sevening, and Jim Cavay cleaned the hall. (Tr. at 127).

11. In August of 1992, Complainant Davis was still attending Kirkwood. Complainant Davis and Joe Ingram, who is a Black male, decided to have a back to school party. (Tr. at 9, 59) . Davis

had learned about the P-3 hall from an acquaintance. He phoned the hall and was informed of a telephone number to call for reserving the hall for a party by an answering machine message. (Tr. at 12). While Davis' testimony is that he called this number and spoke to Jessie Taken, it appears more likely that he was contacted by Ms. Taken after leaving a message with Ron Sevening. (Tr. at 12-13, 128). It is more likely that he first contacted Sevening as the reservation entry was made on Sevening's calendar, not Taken's. (R. EX. A; Tr. at 125). In any event, he spoke to Jessie Taken by telephone. (Tr. at 12-13, 128). Jessie Taken and Complainant Davis discussed when he wanted to have it, when he could pick up the keys and make the deposit. (Tr. at 13). He was able to reserve the hall at that time. (Tr. at 13-14). His name was placed on the calendar for Saturday, August 22, 1992 . (R. EX. A; Tr. at 40-41, 98, 125).

12. Complainant Davis and Joe Ingram went to the P-3 hall in person on Thursday, August 20, 1992, to pay the deposit and pick up the keys for the hall. (Notice of Hearing-Complaint; Tr. at 41-42, 63, 84, 86,119, 130-31, 147-48). Ultimately, however, they were not able to rent the hall because they could not afford to pay for two Cedar Rapids police officers to provide security at the party as required by Respondent P-3 Retirees, Inc. (Tr. at 29-30). The reservation made was then canceled, leaving the hall open for others to rent on August 22nd. (R. EX. A; Tr. at 125). Whether this requirement of two Cedar Rapids Police officers for security at parties is applied equally to those who wish to rent the hall, without regard to race, is in dispute.

III. OFFICIAL NOTICE IS TAKEN OF FACTS REQUESTED IN THE COMMISSION'S NOTICE OF SEEKING OFFICIAL NOTICE:

13. On February 25, 1995, the Commission filed a Notice That Iowa Civil Rights Commission Will Seek Official Notice of Facts Within the Specialized Knowledge of the Agency. (Notice of 2/25/95). The Notice was not resisted by the Respondent. Therefore, official notice is taken of the following facts, as listed in the Notice, which are within the specialized knowledge of the agency:

> 1. A common racial stereotype in America is that young African-American men are more likely to be criminals and/or members of criminal gangs than other members of the public.
>
> 2. A common racial stereotype in America is that young African-American men are more likely to cause public disturbances than other members of the public.
>
> 3. A common racial stereotype in America is that young African-American men are more prone to violence than other members of the public.
>
> 4. The above common stereotypes of young African-American men are specific to sex, race, and age. The above described stereotypes are not as pervasive with respect to young European-American men, elderly African-Americans or female African Americans.

(Notice of 2/25/95).

IV. CIRCUMSTANTIAL EVIDENCE OF DISCRIMINATION:

A. Prima Facie Case:

14. The facts already established prove some, but not all elements of a prima facie case of race discrimination in the failure to rent a union hall. See Conclusions of Law Nos. 10-14. These facts include the racial minority status of Complainant Davis and Mr. Ingram, that the hall was available for rent, that Davis offered to rent the hall, that the hall ultimately was not rented to him, and, therefore, remained available for others to rent. See Findings of Fact Nos. 4, 8, 11, 12. The remaining element of Complainant's qualification for renting the hall, i.e. whether he met the nondiscriminatory requirements for arranging security for the party, will be discussed below.

B. Alleged Delaying Tactics:

15. The Commission argues that, once Jesse Taken met Complainant Davis and Mr. Ingram in person and realized they were Black, she brought up certain subjects as delaying tactics intended to discourage them from renting the hall. These topics included: (a) that payment must be made by cash and not by check, (b) that liquor may not be sold at the union hall, and (c) that security was required at the hall during parties. (Commission's Post Hearing Brief at 8, 11-13).

1. Payment By Cash Required:

16. The first alleged delaying tactic involved the refusal of Complainant Davis' check by Jesse Taken. According to Davis, after he arrived at the union hall on August 20th, he attempted to write a check for payment of the rental of the hall. Ms. Taken then refused the check, indicating she would have to have cash. Once she said this, Davis and Ingram offered cash, which they had with them. (Tr. at 15-16).

17. Ms. Taken's recollection is that, during the initial telephone conversation, she had asked Davis if he were going to pay by cash or check. He had indicated, "No, I'll probably pay cash." (Tr. at 149). When asked what he and Ms. Taken had discussed in this conversation, Complainant Davis did not mention the method of payment as being one of the items discussed. (Tr. at 13). He averred that only topics like the date, the price, and the deposit were discussed. (Tr. at 13, 45-46).

18. The text of Davis' complaint contradicts the suggestion that the requirement or expectation of cash payment was a delaying tactic which originated with the Complainant's appearance at the union hall. Paragraph number 1 of the complaint apparently refers to the telephone conversation with Jesse Taken where arrangements were made to reserve the hall. See Finding of Fact No. 11. The complaint states, with respect to this initial contact with the Respondent, that:

> 1. On or about the first week of August 1992, I reserved the hall for the purpose of having a party on 22 August 1992. Arrangements were made as to when to bring the deposit and to get the key to the hall. I was told at this time to bring cash for the deposit; no checks would be accepted.

(Notice of Hearing-Complaint)(emphasis added). For reasons stated in the conclusions of law, this admission of fact is binding on the Commission. See Conclusion of Law No. 5A.

19. While Mr. Ingram could not recall for certain whether or not they were allowed to pay by check, he noted that Complainant Davis had brought cash to the hall for the specific purpose of paying in cash. (Tr. at 62-65).

20. Based on the text of the complaint, and the testimony of Mr. Ingram and Ms. Taken, it would appear that the requirement to pay in cash was not a delaying tactic which was placed in effect when Ms. Taken noticed that Mr. Davis was Black.

21. There are some further points with respect to the cash payment issue which should be discussed. On brief, the Commission points out that Jessie Taken must have informed Complainant Davis that the check for George Leach's party had bounced, as the Complainant testified, because "how else would he have known the name of the person whose check bounced." (Commission's Brief at 11; Tr. at 16).

22. Ms. Taken's testimony is that she did not discuss with the Complainant the possibility that his check would bounce. Nor did she associate him with George Leach. (Tr. at 149). While her testimony does not address the issue of whether she told him about the check for George Leach, she did acknowledge that the check for that party had bounced. (Tr. at 149). Also, she had discussed George Leach's party, as well as the Quality Electric Halloween party, with Complainant Davis, so it is possible that she discussed the check for Leach's party bouncing with Davis. (Tr. at 16, 148-49). Another possible source for this information would have been Leach himself, who the Complainant saw approximately every other day at that time. (Tr. at 22-23). Nonetheless, even if Taken did mention to the Complainant that Leach's check had bounced, that would not be sufficient to support an inference that she was engaged in race discrimination merely because both Complainant Davis and Mr. Leach happen to be Black.

23. The Commission's brief also suggests, based on Ms. Taken's testimony, that accepting only cash was not in accordance with the Respondent's general policy at that time. (Commission brief at 11). However, Ms. Taken's testimony reveals only that, at one point in time, there was a problem with bad checks which was eventually resolved by developing a policy whereby the bank would be called to ascertain if a proffered check was good. (Tr. at 143). The record does not reveal when this policy was put into effect. Therefore, it has not been established in the record that Respondent's treatment of Complainant Davis was contrary to the policy in effect at that time.

2. Liquor May Not Be Sold on the Premises:

24. On brief, the Commission suggests that, once she saw Complainant Davis in person, "[a]nother roadblock Jesse [Taken] made sure to bring up was whether liquor was going to be sold." (Commission Brief at 11). However, according to the Complainant, he was the first one to bring up the subject of liquor when they met in person: "I had asked first about this permission for liquor, and she said that they couldn't have liquor there because of something, and I just left it at that." (Tr. at 21)(emphasis added). Although Complainant testified that he and Ingram

intended to have beer and liquor at the party, but not to sell it, he later admitted that the "something" given him as a reason for not having liquor was the absence of a liquor license and dram shop insurance. (Tr. at 11, 21, 43). These reasons would be consistent with Respondent's understanding that Complainant Davis did intend to sell liquor at the party. (Tr. at 134).

25. The Complainant's testimony quoted above negates the contention that this topic was brought up by Ms. Taken as an attempted roadblock to renting to Complainant Davis once she became aware of his race. The topic was initially brought up by him, not the Respondent. Even if the above testimony of the Complainant was viewed as addressing the topic of having liquor at the party as opposed to the topic of the sale of liquor, it would only be natural for Ms. Taken to inquire about the sale of liquor once the topic of liquor at the party was brought up by Complainant Davis. It would certainly be appropriate for Ms. Taken to react in this manner when the policy set forth in the Respondent Board's motion of April 20, 1992 is considered. That policy provides that rental will be denied "[i]f the subject of selling alcohol or suspicion of selling was brought up during the rent interview." (emphasis added). See Finding of Fact No. 9.

26. Although beer is allowed and a tapper is included as part of the rental, the record is not clear on whether or not Respondent's policy allows the possession, as opposed to the sale, of liquor for parties at the hall. (Tr. at 21, 145-46).

27. Joe Ingram's recollection of the meeting or meetings with Jessie Taken is fuzzy. (Tr. at 64). His testimony indicates that the topic of liquor was brought up, but does not indicate who brought it up. (Tr. at 61).

28. There is a discrepancy between the testimonies of Ms. Taken and Complainant Davis with respect to whether this topic was brought up during the initial telephone conversation. Complainant Davis testified that the sale of liquor was not brought up during the initial telephone conversation with Taken. (Tr. at 13, 34, 36, 45-46). Ms. Taken testified that she told him at that time that they couldn't sell liquor. (Tr. at 128). It is likely that Ms. Taken's recollection of that conversation is more accurate than Complainant Davis' with respect to this topic as it was with respect to the requirement for cash payment. See Findings of Fact Nos. 17-20.

29. As noted, there is a discrepancy between the Respondent's and the Complainant's testimony concerning whether the Complainant or Ingram indicated at the meeting that he intended to sell liquor. Ms. Taken testified that the topic of the sale of liquor came up because she had asked Complainant Davis and Mr. Ingram how they were going to pay for the hall. Ingram replied that they were going to sell liquor. (Tr. at 134). Ms. Taken informed him that they had no dram shop insurance and had never allowed liquor to be sold at the hall. (Tr. at 135-36). According to Ms. Taken, Mr. Davis later telephoned her at home. He admitted that they were initially going to sell liquor, but once they found out they could not, he had decided not to. (Tr. at 152). Ms. Taken responded that because they had been planning to sell it she could not rent them the hall. (Tr. at 152-53). This would be in accordance with the Board's Motion of April 20th. See Finding of Fact No. 9.

30. Joe Ingram could not recall whether or not they had intended to sell liquor. (Tr. at 61). He could also not recall whether or not he had told Ms. Taken that he intended to sell liquor. (Tr. at 65).

31. Cora Lee is a Black female who overheard part of the conversation between Jesse Taken, Complainant Davis and Mr. Ingram. Her recollection supports Taken's testimony, i.e. that either the Complainant or Ingram indicated that they were going to sell liquor. (Tr. at 90, 97).

32. It should be noted that Ms. Lee informed the Cedar Rapids Civil Rights Commission, during the investigation of this matter, that the conversation was between Jesse Taken, Complainant Davis and Chuck Jones, not Joe Ingram. (Tr. at 160-63). It is clear, despite her testimony to the contrary, that Cora Lee did confuse the identity of Joe Ingram and Chuck Jones. (Tr. at 91-93). Some of the evidence helps explain why she may have been uncertain as to Joe Ingram's identity. She testified that, when Complainant Davis and Joe Ingram came into the hall, "I saw them. I didn't actually know who they were at the time they first came in there, but I did notice them." (Tr. at 86). She also stated that "I wasn't . . . looking them right in the face as they talked. " (Tr. at 97). She told Louise Lorenz, the director of the Cedar Rapids Civil Rights Commission, that she knew Chuck Jones and Joe Ingram were cousins. (Tr. at 157, 165).

33. Although she confused the identities of Chuck Jones and Joe Ingram, it does not necessarily follow that her testimony on the conversation between Taken, Davis, and Ingram is wholly incredible. In both her interview with Louise Lorenz and her testimony at hearing, Cora Lee maintained that Complainant Davis and the individual accompanying him told Jessie Taken that they were planning to sell liquor at the party. (Tr. at 97, 160, 164). Based on this consistency with respect to her prior statement and her testimony at hearing, as well as her demeanor at hearing, her testimony on this issue appears to be credible.

34. The preponderance of the credible evidence supports the conclusion that Ms. Taken did not initiate an inquiry into the topic of liquor or the sale of liquor once she met with the Complainant and Mr. Ingram and realized they were Black. Rather, the Complainant initiated the discussion on liquor at the meeting and Ms. Taken followed it up.

3. Security Required at the Hall During Parties:

a. Under what circumstances was security required at parties?

35. In order to determine whether the requirement of security at parties was brought up by Jessie Taken as a means of delaying rental of the hall once she realized the hall was going to be rented by Blacks, it is first necessary to determine what was meant by the Respondent's Board's motion of April 20, 1992. Under what circumstances was security required and what kind of security was required?

36. As previously noted, the Respondent's Board's motion of April 20, 1992 ends by stating, "Security would have to be hired." The first part of the motion is concerned with denying rental for parties where alcohol is to be sold or the suspicion is raised that alcohol would be sold. Therefore, it would appear that the security was not being required for parties where liquor was

sold because such parties were prohibited by the motion. Therefore, from the text of the motion alone it is not possible to determine when "Security would have to be hired." See Finding of Fact No. 9.

37. The text of the Board minutes for April 20, 1992 are also not helpful since they record none of the discussion on the motion concerning parties. (R. EX. D). While the Board's minutes typically record the motions and votes and discussion of the motions, it is obvious from an examination of these minutes that they are not a complete record of discussion of the motions. (R. EX. D; Tr. at 145). If the minutes were complete, there was a one hour meeting of the board during which virtually the total activity was moving, seconding, and passing six motions. The only discussion recorded is "Example: Sunday afternoon Anniversary celebration" with respect to a motion to charge $200.00 "for hall rental if the hall is needed for 4-6 hours." It is highly unlikely that this was the only discussion in a one hour meeting. It is necessary, therefore, to turn to the testimony to ascertain in what situations the Board intended that "[s]ecurity would have to be hired" and what "security" refers to. (R. EX. D).

38. The most credible evidence on this issue is the testimony of Jessie Taken, a board member who was present when the April 20 motion was passed. (R. EX. D). Her testimony indicates that the requirement of security was imposed on regular parties as opposed to wedding receptions and similar functions such as observances of wedding anniversaries. (Tr. at 138, 147).

39. Cora Lee testified, and Respondent suggested on brief, that the motion of April 20, 1992 was intended to ban all "regular parties". (Respondent's Post-hearing Brief at 7; Tr. at 88). This suggestion and testimony is not believable as it is contrary to the language of the motion which nowhere suggests that all regular parties are banned, but only those where liquor is to be sold or it is suspected will be sold. See Finding of Fact No. 9. Also, the motion mentions that "[s]ecurity would have to be hired" for some unspecified functions. If the only functions allowed at the hall are wedding receptions and other functions for which no security is required, then nothing is left for "which security would have to be hired." Finally, unlike Jessie Taken, Cora Lee had no official role with the Respondent, was not present at the Board meeting, and did not have the responsibility of making arrangements for reserving the hall. (R. EX. D; Tr. at 95, 96, 98).

b. What kind of security was required?

40. The Board understood that, since it took care of the hall, it could determine who it would require as security. (Tr. at 134, 136, 141-42). The Respondent Board's understanding of what was meant by "security" was the Cedar Rapids police and not private security companies. (Tr. at 136, 141-42).

c. The subject of security was initially brought up by Jesse Taken during her initial telephone conversation with Complainant Davis:

41. As has been previously noted, Ms. Taken's recollection of her original telephone conversation with Complainant Davis appears to be more accurate than his. See Finding of Fact No. 28. Therefore, her account of that conversation with respect to security is credited. Once she called the Complainant, Taken asked him what kind of party he was going to have. He indicated,

"just a party." At that point she told him that if they are going to have a party, they will need security. Since Davis indicated that there were only two weeks until the party, she informed him, that given the lateness of the date, it might be difficult to obtain security. (Tr. at 128, 137-38).

d. The preponderance of the evidence indicates that security was not raised by Ms. Taken as a delaying tactic designed to prevent Complainant Davis from renting the hall because he was Black:

42. The fact that security was initially brought up in the telephone conversation with Complainant Davis demonstrates that it was not brought up as a delaying tactic at Taken's meeting with the Complainant and Ingram on August 20th. Even if there had been no inquiry on security until that meeting, such inquiry would be in accord with the April 20th motion of the Respondent's Board in light of the Board's understanding of what kind of functions the security requirement applied to and what kind of security was required. It would be sensible for the Respondent's representative to inform a potential renter of the security requirements and to ascertain whether he would provide it.

C. Was Complainant Davis Subjected to Different Treatment on the Basis of Race With Respect to the Security Requirement?:

43. In order to determine whether the remaining circumstantial evidence demonstrates that Complainant Davis was subjected to different treatment on the basis of race, it is necessary to determine: (1) the chain of events with respect to the security issue which occurred after the initial telephone conversation between Ms. Taken and the Complainant; (2) whether the requirements expected of Complainant Davis conformed to the Respondent's security policy; (3) whether Respondent's actual practice with respect to security requirements is to treat renters differently on the basis of race, and (4) whether remarks made by Jessie Taken concerning gangs reflect racial stereotyping in the rental process.

1. Events After Ms. Taken and Complainant Davis Initially Talked on the Telephone:

44. After Ms. Taken talked to Complainant Davis on the telephone, she called the police to determine whether security could still be obtained. (Tr. at 129, 147). The person who normally handled such matters was absent. He returned her call on the Monday or Tuesday before Saturday, August 22nd. (Tr. at 129). Her understanding is that he informed her that they could probably get two police officers as security at the rate of $30 per officer per hour. (Tr. at 130).

45. Complainant Davis, Jessie Taken, and Joe Ingram are all in agreement that they talked about security at the meeting in person at the hall on August 20th. (Tr. at 17, 62, 133-34). There is, however, disagreement on whether they met once or twice on that date. Ms. Taken's testimony is that they met only once, although they did talk later about these security issues when the Complainant telephoned her at home. (Tr. at 136). The Complainant and Mr. Ingram testified that they met in person with Ms. Taken twice that day. During the interim between the two meetings, the Complainant and Ingram visited the local police department and a private security firm. (Tr. at 17-19, 62-63, 69). Since this hiatus is mentioned not only in Davis' and Ingram's testimony, but is also consistent with Davis' complaint, which was signed on September 2, 1992,

a time much closer to the events in question, their testimony is more credible with respect to this issue. (Notice of Hearing-Complaint). It appears that, because the Complainant's and Mr. Ingram's visit to Cedar Rapids Police and a security firm were later discussed between Complainant Davis and Ms. Taken by telephone, she may have forgotten that they were also discussed at a second meeting. (Tr. at 24, 136-37).

46. On brief, the Commission suggests that "Only after Chris [Davis , the Complainant] and Joe [Ingram] agreed to provide security from a private security company did Jesse [Taken] insist that the security be provided by off-duty police. Tr. at p. 20." This position is not supported by the record. The testimony on page twenty refers to the second meeting where Ms. Taken told Complainant Davis and Ingram that, although the police suggested that the work could be done by a private security firm, the Respondent still wanted police officers. (Tr. at 20). The testimony of both Complainant Davis and Ms. Taken make clear that the requirement of police officers had been expressed to the Complainant from at least from the first meeting on, and did not originate at this second meeting. (Tr. at 17, 133). When Complainant Davis was asked what Ms. Taken said about security at the first meeting, he testified, "That I would need security for the party, two uniformed police." (Tr. at 17)(emphasis added).

47. One minor discrepancy concerns whether Ms. Taken not only informed Complainant Davis and Mr. Ingram that she wanted police officers, but also informed them of the price. Ms. Taken testified that she did, while Complainant Davis avers she did not know how much it would cost when they asked her. (Tr. at 17, 135). Davis testified that he and Ingram then went to the police to check the price. (Tr. at 17). Regardless of whether Taken gave them the price or not, there is no dispute that the Complainant and Ingram went to check the price for security with the Cedar Rapids police. It doesn't matter whether the reason for doing so was to check the accuracy of the price given by Taken or to obtain the price information for the first time. (Tr. 17-19, 136-37).

48. From the record it is impossible to tell whether Complainant Davis and Ingram were given a price by the police which is double what was quoted Ms. Taken or whether they or Ms. Taken misunderstood the price quoted. (Tr. at 18, 130). In any event, the police also suggested they check with a private firm, which would be less expensive. (Tr. at 18). They checked with two private firms, one of which was Midland Security, and were quoted a price which was $25.00 to $30.00 cheaper. (Tr. at 18-19, 51-52, 137, 153).

49. When the Complainant and Ingram met with Taken the second time, and when the Complainant and Taken subsequently talked on the telephone, the Complainant told Taken that (a) the police had indicated they could use a private firm, and (b) that they wished to use a private firm. (Tr . at 19-20, 24, 51, 69, 136, 137, 153). Ms. Taken responded by reiterating that the Respondent Board required police officers. (Tr. at 20, 136, 137, 153). Given the cost of the police, Complainant Davis and Mr. Ingram elected to not have the party. (Notice of Hearing-Complaint; Tr. at 29-30).

2. The Requirements Expected of Complainant Davis Conformed to the Respondent's Security Policy:

50. It is apparent from the facts already stated that the security requirements expected of Complainant Davis, two uniformed police officers at a regular party, conformed to the policy of the Respondent as set forth by the evidence in the record. See Findings of Fact Nos. 35-40, 46, 49.

3. The Evidence Does Not Support the Proposition that the Respondent's Actual Practice With Respect to Security Requirements Was to Treat Renters Differently on the Basis of Race:

51. The greater weight of the evidence does not support the proposition that the Respondent's actual treatment of renters or potential renters of the hall with respect to security requirements differed on the basis of race. An examination of the reservation calendars for 1992 and the testimony of Ms. Taken reveals that not one party was held at the hall except wedding receptions and anniversaries after the April 20, 1992 motion requiring security was passed. (R. EX. A, B; Tr. at 122-24, 128, 142-43). As previously noted, these parties do not require security. See Finding of Fact No. 38.

52. Several of these wedding receptions were held for Black persons who rented the hall. (Tr. at 90, 98, 138). Complainant Davis had attended three past parties at the hall held by Black persons. (Tr. at 40).

53. There is one entry on the calendar for July 31, 1992 which states, "Hlavacek Frankie Birthday Party." (R. EX. A). Since there has never been a party with security at the hall, it follows security was not required for that party. (Tr. at 140-41). However, the party for Hlavacek was misstated as a birthday party. It was actually a wedding anniversary for a member who was over 80 years old. (Tr. at 143, 154).

54. In any event, if this had been a birthday party it could have been considered to be a function similar to a wedding reception in the sense that one would routinely expect that invitations would be sent out and that the guests would be limited to invited family and friends. This was the rationale for not requiring security at weddings, anniversaries, and similar functions. (Tr. at 138). The Respondent was not aware that Complainant Davis had sent invitations out to the guests for his back to school party. (Tr. at 9, 138).

55. Also, Mr. Hlavacek's race is not reflected in the record. Therefore, no inference of race discrimination based on different treatment of Mr. Hlavacek and Complainant Davis may be made.

4. The Remarks Made to Complainant Davis and Mr. Ingram By Jesse Taken Concerning Gangs Did Not Reflect Racial Stereotyping In the Rental of the Hall:

56. When Ms. Taken informed Complainant Davis about security requirements at their meeting on Thursday, she mentioned that the police had informed her that two police officers were required. The reason why a minimum of two were required was because the police would not permit fewer than two to be assigned as security at parties due to the presence of gangs from Chicago on the southeast side of Cedar Rapids. (Tr. at 21, 97, 133-34, 149-150). Although the hall is not in the Wellington Heights area where many of the gang related problems occurred,

both Wellington Heights and the hall are on the southeast side. See Finding of Fact No. 5, 6. Ms. Taken repeated to Complainant Davis and Mr. Ingram what the police had told her. (Tr. at 133-34, 149-50). She did not mention Blacks or that the gangs were Black, but it was understood by Ms. Taken and others that the gangs were composed of Blacks. (Tr. at 21, 95, 149-50). Gang activity had been widely publicized in Cedar Rapids in the summer of 1992. See Finding of Fact No. 5.

57. When he heard Ms. Taken tell him the reasons the police had given for wanting a minimum of two officers in situations where officers provided security, Complainant Davis received the misimpression that Ms. Taken thought he had something to do with gangs. (Tr. at 57). Apparently, Davis thought that the widespread racial stereotypes concerning young Black men, gangs, and violence which have been previously noted, see Finding of Fact No. 13, were being applied to him. When Complainant Davis subsequently talked to Ms. Taken on the telephone, he told her at that time that he felt he was being subjected to racial discrimination. (Tr. at 26, 134, 152). However, since she was simply reiterating the reasons given by the police for requiring two officers as security, her remarks did not reflect any racial stereotyping.

58. In summary, the Complainant has not established a prima facie case of discrimination through circumstantial evidence because the evidence does not show that he met the qualification of being willing and able to meet the security requirements established by the Respondents. The preponderance of the evidence does not support the propositions that Complainant Davis was subjected to different treatment on the basis of race under either the policy or practices of Respondent Local P-3 Retirees, Inc. with respect to security requirements. Nor does the preponderance of the evidence indicate that the treatment of Complainant Davis with respect to security requirements was influenced by racial stereotypes.

V. DIRECT EVIDENCE OF DISCRIMINATION:

A. Direct Evidence Which Is Suggested in the Complaint Was Never Introduced in the Record.

58A. One of the allegations made in the complaint is that Jessie Taken, at the time of discussing security for the hall, "began naming individuals who had caused damage while renting the hall. All individuals named were black Americans." (Notice of hearing-Complaint). The next paragraph of the complaint alleges that Ms. Taken made "blatant discriminatory remarks . . . regarding black Americans renting the hall." (Notice of hearing-Complaint). The combination of these events or of "blatant discriminatory remarks" alone might well constitute direct evidence of discrimination. There is no evidence, however, of Ms. Taken naming any Black individual, except George Leach, as being responsible for damaging the hall. See Finding of Fact No. 22. There is also no evidence of Ms. Taken making "blatant discriminatory remarks" regarding Blacks.

B. Andrea Arneson's Testimony Relied on As Direct Evidence of Discrimination:

59. On brief, the Commission cites the testimony of Andrea Arneson as direct evidence of discrimination. (Commission's Brief at 13-14). This testimony is that, after Complainant Davis returned from the hall, Ms. Arneson placed one telephone call to the hall utilizing one of the

telephone numbers associated with the Respondent which was in the possession of Complainant Davis; that the exact number is unknown; that she talked to an unidentified male; that she had to wait three to five minutes while this unidentified male consulted an appointment book; that the male informed her that the hall was available, and that he also informed her, when she inquired about security requirements for a back to school party, that security was not required, but she could hire someone from in town, and that "the only problem they had was with Blacks." (Tr. at 73-81).

60. There are three problems with Ms. Arneson's testimony. These include: (1) based on the evidence in the record, it cannot be said with any degree of certainty how many calls Ms. Arneson made and who she talked to; (2) it cannot be established under the present record that the male was an agent of the respondent with either apparent or actual authority to represent the respondent in regard to what the security arrangements were for rental of the hall; and (3) the accuracy of Ms. Arneson's testimony is questionable in light of the discrepancies between her testimony and other evidence in the record.

C. Under the Present Record, It Cannot Be Established How Many Telephone Calls Andrea Arneson Made and to Whom They Were Made:

61. On this record, it cannot be said with any degree of certainty how many calls Ms. Arneson made or who she spoke with. Suppose that Ms. Arneson is correct and she made one call to the hall and spoke to an unidentified male. (Tr. at 73, 77, 80). This means the hall telephone would have been answered by this male prior to the answering machine being activated. (Tr. at 108). This male could have been any man who remained at the hall after bingo that day. It could have been any male who was at the hall, but who was not familiar with the appropriate procedures for renting the hall. (Tr. at 80). See Finding of Fact No. 8. This male may have erroneously believed, based on the fact that there was a calendar there, that all he needed to do was write in the date and name on the calendar in order to reserve a time. (Tr. at 108-09). This same individual could have made the remarks attributed to him by Ms. Arneson. (Tr. at 75).

62. Although Ms. Arneson testified that she had made only one call to the hall, the Commission suggests that her memory is flawed and she actually made several telephone calls to a variety of locations, but recollects only the one. (Tr. at 74, 81; Commission's Brief at 13). The Commission reaches this conclusion by resolving certain differences in the testimonies of Jesse Taken and Ms. Arneson. (Commission Brief at 13). The brief correctly notes that "Jesse Taken . . . testified that she spoke with a[n unidentified] woman on that same day and that she could hear Chris Davis talking in the background. Jesse further testified that she was told by Dale Bevill and Ron Sevening that they had spoken to a[n unidentified] woman about rental. Tran. at p. 150. Andrea testified that she called the number Chris had been calling which was Jesse Taken's [residence] number, but that she spoke with a man. Tran. at p. 81, 74." (Commission Brief at 13). Apparently, the Commission credits Ms. Taken's testimony over that of Ms. Arneson's on this matter, because Taken's testimony raises the possibility that Ms. Arneson may have talked to Dale Bevill or Ron Sevening, although they both deny talking to Ms. Arneson. (Commission Brief at 13; Tr. at 105, 111).

63. If it is reasonable to credit this testimony of Ms. Taken, it is also reasonable to credit her testimony that she told the female that security would be required. However, Ms. Taken was aware that the Complainant was with this woman. (Tr. at 150-51). Since it is not known whether that influenced her response to the female's inquiry about security, this conversation is not a reliable indicator of whether or not the Respondent's security policies were race neutral.

64. In addition to Mr. Bevill, Mr. Sevening, or a male at the Respondent's hall, it is possible that Ms. Arneson may have spoken to Ms. Taken's son. It has already been noted that Ms. Arneson called Ms. Taken. See Finding of Fact Nos. 62-63. Ms. Taken also testified that, after she received about the fifth call from Complainant Davis, she told her son to tell him that she was out of town. She left the house after that call. (Tr. at 152).

65. Complainant Davis' testimony is similar in some respects to that of Ms. Taken's. He testified about at least four calls to Ms. Taken. (Tr. at 25-26). On the second call, he accused Taken of discrimination. (Tr. at 26). After she hung up, he made a third call. (Tr. at 26). According to him, Ms. Arneson then called Ms. Taken. (Tr. at 27). Immediately after that, he called back and was told by somebody that Jessie Taken was out of town. (Tr. at 27). After that, according to Complainant Davis, Ms. Arneson again called the same number and spoke to a man. (Tr. at 28). However, the conclusion that Arneson's conversation was with Jesse Taken's son (or, for that matter Mr. Sevening or Mr. Bevill) conflicts with Ms. Arneson's testimony that she called the hall. See Finding of Fact No. 61. Also, Complainant Davis was not sure which number Ms. Arneson called when she talked to a man. (Tr. at 27-28).

D. Under the Present Record It Cannot Be Established That the Male With Whom Ms. Arneson Spoke Was An Agent of Respondent Local P-3 Retirees, Inc. With Actual or Apparent Authority to Speak on Behalf of the Respondent With Respect to Security Arrangements for Hall Rentals:

66. Under this record, there are only three persons established as having the authority to represent the Respondent with regard to hall rentals: Jesse Taken, Ron Sevening and Dale Bevill. See Finding of Fact No. 8. The male that Ms. Arneson may have talked to could have been either Jesse Taken's son, an unidentified male at the hall, Mr. Sevening or Mr. Bevill. All of these individuals had access to calendars which were or may have been used to record reservations for the hall. See Finding of Fact No. 8. Of these it seems more likely that she talked to Ms. Taken's son (based on Davis and Taken's testimony) or an unidentified male at the hall (based on Arneson's testimony). See Finding of Fact No. 65. Since it cannot be established which of these persons actually talked to Ms. Arneson, it is the Commission's burden to demonstrate that all four of these persons were agents of the Respondent, in order for the Respondent to be held liable for the statement alleged by Ms. Arneson. See Conclusion of Law No. 20. There is, however, no evidence in the record indicating that either an unidentified male at the Respondent's hall or Jesse Taken's son were either decisionmakers for or agents of the Respondent. There is (a) no evidence of a manifestation by the Respondent that Ms. Taken's son or the unidentified male at the Respondent's hall would act for the Respondent, (b) no evidence of any acceptance of such undertaking by these persons; and (c) no evidence that these persons were subject to the control of the Respondent. Nor is there any evidence they had actual or apparent authority to act for the Respondent. See Conclusions of Law Nos.19-20.

67. Given that the preponderance of the evidence does not demonstrate that the statements alleged to have been given to Ms. Arneson were made by agents of the Respondent, the statements do not establish discriminatory intent by the Respondent.

E. The Accuracy of Ms. Arneson's Testimony Is Questionable in Light of the Discrepancies Between Her Testimony and Other More Credible Evidence in the Record:

68. The accuracy of Ms. Arneson's testimony is questionable because of the discrepancies between her testimony and the preponderance of the evidence in the record on various subjects. The most important of these matters have already been noted with respect to the security issue. Ms. Arneson's testimony was that she made one call to the Respondent hall. Other testimony in the record indicates she may have made more than one call to a variety of persons. See Findings of Fact Nos. 61-65.

69. It is interesting to note that Complainant Davis was present during the telephone calls made by Ms. Arneson, but was not listening in by an extension or similar means. He had to rely on what she told him in order to learn what was said by the person with whom Ms. Arneson was talking. (Tr. at 27-29). When asked if he had heard Ms. Arneson make any mention of security, he replied, "Yes. She asked will she need security, and they said they didn't think so, it was up to her if she wanted it or not." (Tr. at 29). He did not testify that she told him that the person she was talking to had indicated they only had trouble with Blacks. (Tr. at 29).

70. Finally, Ms. Arneson testified that, when Complainant Davis returned home from the Respondent hall, he had stated that the Respondent "had went into detail about things that weren't even pertaining to his party about blacks and a problem over on the southeast side with Wellington Heights." (Tr. at 72). Complainant Davis's testimony confirms that Jessie Taken had mentioned Wellington Heights and gang problems. When asked, however, "Did she ever make any mention of blacks?," he responded, "Not at this time." (Tr. at 21). There is no evidence in the record, including Davis's testimony, that Jessie Taken ever did mention Blacks as a group during her meetings with Complainant Davis and Mr. Ingram. As previously noted she did tell the Complainant about the problems she had with one individual Black person, George Leach. See Finding of Fact No. 22.

71. The overall impression left by Ms. Arneson is that her testimony was somewhat inflated in order to aid Mr. Davis. These problems with the accuracy of Ms. Arneson's testimony provide an additional reason for not relying on the alleged statements constituting direct evidence of discrimination which were given in her testimony.

72. The Commission has failed to establish race discrimination against the Complainant in the hall rental practices or policies of the Respondent through direct evidence.

VI. CREDIBILITY FINDINGS:

73. With the exception of Louise Lorenz and Glen Jones none of the witnesses' testimony was wholly credible. This appears to be largely due to the witnesses having difficulty remembering the exact order and nature of events. Joseph Ingram's comment that his memory of events was

fuzzy could have been applied to many of the witnesses. (Tr. at 64). Although Ron Sevening and Dale Bevill's testimony seemed to be highly reliable, it should be noted they wouldn't necessarily remember the names of persons who called about renting the hall in 1992 when those persons took no further action to rent the hall. (Tr. at 108, 112).

74. Mr. Ingram's demeanor reflected the fuzziness and uncertainty of his memory. At times, he sat hunched over in his chair, hat on, with his hand sometimes covering his mouth. Mr. Ingram was the only witness whose demeanor reflected so poorly on his credibility.

75. The credibility of Cora Lee and Andrea Arneson has already been extensively discussed. See Findings of Fact Nos. 31-33, 39, 61-63, 68-71. In addition, there has been some discussion of the credibility of Complainant Davis, Jesse Taken and Joseph Ingram with regard to specific factual issues. See Findings of Fact Nos. 11, 27-28, 30, 38, 41-42, 45.

76. Discrepancies in the testimony were resolved by determining which version of events made the most sense in the light of the facts previously established and the whole evidentiary record. For example, in some instances where there was a discrepancy between the testimony of Complainant Davis and Jesse Taken, Ms. Taken's testimony was credited. In another instance, concerning the number of in person meetings held with Ms. Taken, the Complainant, and Mr. Ingram, Complainant Davis's testimony was credited over that of Ms. Taken. The difference occurred because, based on all the evidence in the record, it appeared that in some instances Ms. Taken's recollection was more accurate, while in one instance it was not. See Findings of Fact Nos. 11, 20, 28-29, 31, 33-34, 41-42, 45.

CONCLUSIONS OF LAW

I. JURISDICTION AND PROCEDURE:

A. Subject Matter Jurisdiction:

1. Subject matter jurisdiction ordinarily means the authority of a tribunal to hear and determine cases of the general class to which the proceedings in question belong. Tombergs v. City of Eldridge, 433 N.W.2d 731, 733 (Iowa 1988). Mr. Davis's complaint is within the subject matter jurisdiction of the Commission as the allegations that the Respondent failed to rent its hall to the Complainant by different treatment on the basis of race with respect to security requirements and by discriminatory remarks concerning Blacks renting the hall fall within the statutory prohibition against unfair public accommodations practices which the Commission has the power to hear and determine. Iowa Code SS 601A.7, .15 (now SS 216.7, .15). See Finding of Fact No. 1.

2. "It shall be an unfair or discriminatory practice for any owner, lessee, sublessee, proprietor, manager, or superintendent of any public accommodation or any agent or employee thereof:

> a. To refuse or deny to any person because of race . . . the accommodations, advantages, facilities, services or privileges thereof, or otherwise to discriminate against any person because of race . . . in the furnishing of such accommodations, advantages, facilities, services, or privileges.

> b. To directly or indirectly advertise or in any other manner indicate or publicize that the patronage of persons of any particular race . . . is unwelcome

Iowa Code S 601A.7 (now S 216.7)(emphasis added).

B. Timeliness and Other Statutory Prerequisites:

3. Complainant Davis's complaint was timely filed within one hundred eighty days of the alleged discriminatory practice. Iowa Code S 216.15(11) (1995). See Finding of Fact No. 2. All the statutory prerequisites for hearing have been met, i.e. investigation, finding of probable cause, attempted conciliation, and issuance of Notice of Hearing. Iowa Code S 216.15 (1995). See Finding of Fact No. 3.

II. OFFICIAL NOTICE:

4. Official notice has been taken of certain facts with regard to racial stereotyping in accordance with the statutory authority permitting the Commission to take official notice of all facts of which judicial notice may be taken and of matters within the specialized knowledge of the agency. Iowa Code S 17A.14(4). See Finding No. 13. Judicial notice may be taken of matters which are "common knowledge or capable of certain verification." In Re Tresnak, 297 N.W.2d 109, 112 (Iowa 1980).

5. It was appropriate to take official notice of the existence of certain racial stereotypes in this case as their existence is within the specialized knowledge of this agency. Cf. Royd Jackman, XI ICRC Case Reports 70, 71 (1991)(within the specialized knowledge of the agency that the use of the word "boy" when applied to adult Black men is a racial epithet reflecting the stereotype that Black males are incapable of acting as adults.).

III. ADMISSIONS:

5A. As noted in Finding of Fact 18, the Complainant's statement in his complaint indicating that he was informed in advance of his meeting with Jesse Taken that payment would have to be in cash is binding on the Commission. The reason this statement is binding was previously set forth in the Commission's decision in the Maxine Boomgarden case:

> When an allegation, which militates against the party making it, is made on pleadings or in a brief, and such allegation has not been withdrawn or superseded, it binds the party making it and must be taken as true by a court, administrative agency, or other finder of fact. See Grantham v. Potthoff-Rosene Company, 257 Iowa 224, 230-31, 131 N.W.2d 256 (1965)(cited in Wilson Trailer Co. v. Iowa Employment Security Comm'n, 168 N.W.2d 771, 776 (Iowa 1969)). See also Larson v. Employment Appeal Board, 474 N.W.2d 570, 572 (Iowa 1991).

Maxine Boomgarden, XII Iowa Civil Rights Commission Case Reports 31, 48-49 (1993).

IV. MCDONNELL DOUGLAS DISPARATE TREATMENT ANALYSIS RELYING ON CIRCUMSTANTIAL EVIDENCE:

A. Distinction Between "Burden of Persuasion" and "Burden of Production:

6. In order to understand the McDonnell-Douglas order and allocation of proof, it is necessary to note the distinction between "burden of persuasion" and "burden of production":

7. The "burden of persuasion" in any proceeding is on the party which has the burden of persuading the finder of fact that the elements of his case have been proven. BLACK'S LAW DICTIONARY 178 (5th ed. 1979). The burden of proof in this agency proceeding was on the Commission to persuade the finder of fact that race discrimination has been proven. See Iowa Code S 216.15(7)(burden of proof on Commission). Of course, in discrimination cases as in all civil cases, the burden of persuasion is "measured by the test of preponderance of the evidence," Iowa R. App. Pro. 14(f)(6).

8. The burden of persuasion must be distinguished from what is known as "the burden of production" or the "burden of going forward." The burden of production refers to the obligation of a party to introduce evidence sufficient to avoid a ruling against him or her on an issue. BLACK'S LAW DICTIONARY 178 (5th ed. 1979).

D. Summary of the Order and Allocation of Proof In Disparate Treatment Cases Where the McDonnell-Douglas Analysis is Used:

9. The order and allocation of proof known as the "pretext," or "McDonnell-Douglas" method was described in the Dorene Polton case. Although the cases refer to the complainant's burdens of establishing a prima facie case and pretext, those burdens are borne here by the Commission as this proceeding is before this agency and not a court:

> 25. In the typical discrimination case, in which the Complainant uses circumstantial evidence to prove disparate treatment on a prohibited basis, the burden of production, but not of persuasion, shifts. Iowa Civil Rights Commission v. Woodbury County Community Action Agency, 304 N.W.2d 448 (Iowa Ct. App. 1981). These shifting burdens of production "are designed to assure that the [Complainant has] his day in court despite the unavailability of direct evidence." Trans World Airlines v. Thurston, 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed. 2d 523, 533 (1985).
>
> 26. The Complainant has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986). This showing is not the equivalent of an ultimate factual finding of discrimination. Furnco Construction Corp. v. Waters, 438 U.S. 579 (1978). Once a prima facie case is established, a presumption of discrimination arises. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986).

27. The burden of production then shifts to the Respondent, i.e. the Respondent is required to produce evidence that shows a legitimate, non- discriminatory reason for its action. Id.; Linn Co-operative Oil Company v. Quigley, 305 N.W.2d 728, 733 (Iowa 1981); Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988). If the Respondent does nothing in the face of the presumption of discrimination which arises from the establishment of a prima facie case, judgment must be entered for Complainant as no issue of fact remains. Hamilton v. First Baptist Elderly Housing Foundation, 436 N.W.2d 336, 338 (Iowa 1989). If Respondent does produce evidence of a legitimate non-discriminatory reason for its actions, the presumption of discrimination drops from the case.

Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986).

28. Once the Respondent has produced evidence in support of such reasons, the burden of production then shifts back to the Complainant to show that the reasons given are pretextual. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 157 (Iowa 1986); Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988). Pretext may be shown by "persuading the [finder of fact] that a discriminatory reason more likely motivated the [Respondent] or indirectly by showing that the [Respondent's] proffered explanation is unworthy of credence." Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988) (quoting Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 216 & n.10 (1981)).

29. This burden of production may be met through the introduction of evidence or by cross- examination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 216 & n.10 (1981). The Complainant's initial evidence and inferences drawn therefrom may be considered on the issue of pretext. Id. at n.10. Dorene Polton, 11 Iowa Civil Rights Commission Case Reports 152, 162 (1992).

E. **Complainant Has Failed to Establish a Prima Facie Case of Discrimination:**

10. The McDonnell-Douglas case set forth a specific pattern of facts which, if proven, establish a prima facie case of discrimination. McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L.Ed. 2d 207 (1973). However, it is well recognized that decision: did not purport to create an inflexible formulation. . . . 'The facts necessarily will vary in [employment discrimination] cases, and the specification . . . of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations.". . . The importance of McDonnell-Douglas lies not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any [employment discrimination] plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act. Teamsters v. United States, 431 U.S. 324, 358, 97 S. Ct. 1843, 52 L. Ed. 2d 396, 429 (1977)(citing and quoting McDonnell-Douglas Corp. v. Green, 411 U.S. at 802 n.13)).

11. A modification of the elements set forth in McDonnell Douglas to establish a prima facie case in failure to hire cases may be utilized to establish a prima facie case in failure to rent public accommodations cases: (1) Complainant is a member of a racial minority; (2) Complainant applied for **and was qualified to rent the property in question**; (3) Complainant was rejected by the defendant; and (4) The property remained available thereafter. *Cf.* Schwemm, Housing Discrimination Law *S* 10.2 (1995)(prima facie case in housing cases-- the words "unit" and "housing opportunity" appear in place of the word "property" in the second and fourth elements of the above formulation).

12. With respect to either the rental of housing or the rental of a hall, the word "qualified" would mean meeting the legitimate expectations of the landlord. Id. Of course, under the plain language of the statute prohibiting race discrimination in the "furnishing of such accommodations, facilities, services or privileges," Iowa Code *S* 601A.7 (now 216.7), there can be no difference in the qualifications required of renters or potential renters which is based on race. The qualifications in this case, particularly those relating to security requirements, were not shown to be discriminatorily applied. See Findings of Fact Nos. 50-58.

13. The burden of establishing a prima facie case of discrimination under the disparate treatment theory is not onerous. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Nonetheless, the phrase "prima facie case," as used here, denotes that a "legally mandatory rebuttable presumption" of discrimination, id. at 254 n.7, must be established by a preponderance of the evidence. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986). The Complainant attempted but failed to establish a prima facie case of discrimination under the above formula, as the Complainant could not meet the security requirements qualification. See Conclusions of Law No. 11-12. See Finding of Fact No. 58. The Complainant also attempted and failed to show that the Respondent engaged in delaying tactics designed to discourage the Complainant from renting the hall due to his race. See Findings of Fact Nos 15-42. Such race based delaying tactics, if proven, would have constituted illegal race discrimination in public accommodations. *Cf.* Schwemm, Housing Discrimination Law *S* 13.4 (1995)(race based delaying tactics with respect to housing constitute race discrimination in housing).

14. The Commission has failed to establish a prima facie case of race discrimination in public accommodations under the McDonnell Douglas method.

V. THE DIRECT EVIDENCE METHOD OF PROVING DISPARATE TREATMENT:

A. Order and Allocation of Proof Where Complainant Relies on Direct Evidence of Discrimination:

15. "Direct evidence" is that "evidence, which if believed, proves existence of [the] fact in issue without inference or presumption." It is "that means of proof which tends to show the existence of a fact in question, without the intervention of the proof of any other fact, and is distinguished from circumstantial evidence, which is often called "indirect". BLACK'S LAW DICTIONARY 413-14 (1979)(emphasis added). Either policies which on their face call for consideration of a prohibited factor or statements by relevant managers reflecting bias constitute direct evidence of

discrimination. Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 477-78 (2nd ed. 1989).

16. Examples of direct evidence that a protected class status, such as race or sex, is a motivating factor in an employment decision include comments by decisionmakers expressing a preference for employees who are members of a particular protected class or comments indicating that stereotypes of members of a particular protected class played a role in the challenged decision or practice. See e.g. Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 288 (1989)(promotion) ; Barbano v. Madison County, ___ F.2d ___, 54 Fair Empl. Prac. Cas. 1287, 1290, 1292 (2nd Cir. 1990)(hiring); Buckley v. Hospital Corporation of America, 758 F.2d 1525, 1530 (11th Cir. 1985)(discharge); Storey v. City of Sparta Police Department, 667 F. Supp. 1164, 45 Fair Empl. Prac. Cas. 1546, 1551 (M.D. Tenn. 1987)(hiring). By analogy, the same reasoning applies in public accommodations cases. Diane Humburd, 10 Iowa Civil Rights Commission Case Reports 1, 6-7 (1989)(denial of child care services).

17. The proper analytical approach in a case with direct evidence of discrimination is, first, to note the presence of such evidence; second, to make the finding, if the evidence is sufficiently probative, that the challenged practice discriminates against the complainant because of the prohibited basis; third, to consider any affirmative defenses of the respondent; and, fourth, to then conclude whether or not illegal discrimination has occurred. See Trans World Airlines v. Thurston, 469 U.S. 111, 121-22, 124-25, 105 S. Ct. 613, 83 L.Ed. 2d 523, 533, 535 (1985)(Age Discrimination in Employment Act). With the presence of such direct evidence, the analytical framework, involving shifting burdens of production, which was originally set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 207 (1973), and subsequently adopted by the Iowa Supreme Court, e.g. Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa 1982); Consolidated Freightways v. Cedar Rapids Civil Rights Commission, 366 N.W.2d 522, 530 (Iowa 1985), is inapplicable. Landals v. Rolfes Co., 454 N.W.2d 891, 893-94 (Iowa 1990); Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 301 (1989)(O'Connor, J. concurring); Trans World Airlines v. Thurston, 469 U.S. 111, 121, 124-25, 105 S. Ct. 613, 83 L.Ed. 2d 523, 533 (1985); Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 473, 476 (2nd ed. 1989).

18. The reason why the McDonnell Douglas order and allocation of proof is not applicable where there is direct evidence of discrimination, and why the employer's defenses are then treated as affirmative defenses, i.e. the employer has a burden of persuasion and not just of production, is because:

> [T]he entire purpose of the McDonnell Douglas prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by. That the employer's burden in rebutting such an inferential case of discrimination is only one of production does not mean that the scales should be weighted in the same manner where there is direct evidence of intentional discrimination.

Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 301 (1989)(O'Connor, J. concurring). See also Landals v. Rolfes Co., 454 N.W.2d 891, 893-94 (Iowa 1990).

B. Application of the Direct Evidence Method to This Case:

19. In this case, the Commission offered as direct evidence of discrimination the statement of an unidentified male who allegedly told Ms. Arneson, when asked about security requirements, that security was not required, but she could hire someone from in town, and that "the only problem they had was with Blacks." See Finding of Fact No. 59. However, under the evidence in the record, it cannot be established that these comments were made by an individual closely involved in the decisionmaking process with respect to the rental of the hall. . See Findings of Fact Nos. 59-71. It cannot be established that this remark was "uttered by [an individual] closely involved in [the allegedly discriminatory] decisions." Radabaugh v. Zip Feed Mills, 997 F.2d 444, 62 Fair Empl. Prac. 438, 441 (8th Cir. 1993)(quoting Price-Waterhouse v. Hopkins, 490 U.S. at 278 (O'Connor, J. concurring)). Given the failure to identify the man who made this statement, such remarks may constitute "stray remarks" or "statements by nondecisionmakers" which are not sufficiently probative as to constitute direct evidence of discrimination by the Respondent. See id.

20. These comments were not shown to have been made by a person who is an agent of the Respondent. See Finding of Fact No. 66. If this person were an agent of the Respondent acting within his actual or apparent authority, what he said would be binding on the Respondent. Grismore v. Consolidated Products Co., 232 Iowa 328, 5 N.W.2d 646, 651 (1942). The burden of proving that an agency relationship existed between the unidentified male and the Respondent, and that this person acted within the scope of his actual or apparent authority, is on the party wishing to show that such a relationship existed, i.e. the Commission. Id. There is no evidence in the record which proves any of the elements necessary to show that an agency relationship was established between the Respondent and Jesse Taken's son or any unidentified male at the hall to whom Ms. Arneson spoke. See Findings of Fact Nos. 66-67. These elements are: "the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking, and the understanding of the parties that the principal is to be in control of the undertaking." RESTATEMENT (SECOND) OF AGENCY S 1 comment b (1959)(quoted in Stacey D. Davies, XII Iowa Civil Rights Commission Case Reports 142, 151 (1994)). Similarly, apparent authority would have to be proven by acts of the principal which would lead persons dealing with the agent to believe that the agent has such authority. Waukon Auto Supply v. Farmers and Merchants Savings Bank, 440 N.W.2d 844, 847 (Iowa 1989). There is no such evidence of any such acts in the record with regard to these persons. See Findings of Fact Nos. 66-67.

21. Since the statements alleged to constitute direct evidence of discrimination have not been shown to have been made by a person clearly involved in decisionmaking with respect to rental of the hall or by any agent of the Respondent, these statements are not sufficiently probative to constitute direct evidence of discrimination.

22. The Commission has failed to establish a prima facie case of race discrimination in public accommodations under the direct evidence method.

VI. CREDIBILITY AND TESTIMONY

23. In addition to other factors mentioned in the findings of fact on credibility, the Administrative Law Judge and the Commission have been guided by the following principles:

> [T]he ultimate determination of the finder of fact "is not dependent on the number of witnesses. The weight of the testimony is the important factor." Wiese v. Hoffman, 249 Iowa 416, 424, 86 N.W.2d 861, 867 (1957). In determining the credibility of a witness and what weight is to be given to testimony, the factfinder may consider the witness' "conduct and demeanor. . . [including] the frankness, or lack thereof, and the general demeanor of witnesses," In Re Moffatt, 279 N.W.2d 15, 17-18 (Iowa 1979); Wiese v. Hoffman, 249 Iowa 416, 424, 86 N.W.2d 861, 867 (1957), as well as "the plausibility of the evidence. The [factfinder] may use its good judgment as to the details of the occurrence . . . and all proper and reasonable deductions to be drawn from the evidence." Wiese v. Hoffman, 249 Iowa 416, 424-25, 86 N.W.2d 861 (1957).
>
> Testimony may be unimpeached by any direct evidence to the contrary and yet be so . . . inconsistent with other circumstances established in the evidence, . . . , as to be subject to rejection by the . . . trier of the facts.
>
> . . .
>
> The [factfinder] . . . might well scrutinize closely such testimony as to its credibility, taking into consideration all the circumstances throwing light thereon, such as the interest of the witnesses, remote or otherwise.

Kaiser v. Strathas, 263 N.W.2d 522, 526 (Iowa 1978)(citations omitted).

24. The factors cited above, such as consistency with the other circumstances in the record, interest, conduct and demeanor have been used in determining credibility in this case. In resolving discrepancies in the testimony, the following principle was also applied. "When the trier of fact . . . finds that any witness has willfully testified falsely to any material matter, it should take that fact into consideration in determining what credit, if any, is to be given to the rest of his testimony." Arthur Elevator Company v. Grove, 236 N.W.2d 383, 388 (Iowa 1975). "[T]he facts disputed in litigation are not random unknowns in isolated equations--they are facets of related human behavior, and the chiseling of one facet helps to mark the borders of the next. Thus, in the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next." NLRB. v. Pittsburgh Steamship Company, 337 U.S. 656, 659 (1949).

25. "Deference is due to hearing officer [now administrative law judge] decisions concerning issues of credibility of witnesses." Peoples Memorial Hospital v. Iowa Civil Rights Commission,

322 N.W.2d 87, 92 (Iowa 1982)(citing Bangor and Aroostook Railroad Co. v. ICC, 574 F.2d 1096, 1110 (1st Cir.), cert. denied, 439 U.S. 837, 99 S.Ct. 121, 58 L.Ed2d 133 (1978)(deference is due by reviewing court to ALJ findings on credibility even when agency has reached a contrary decision)).

26. Such deference is given because the administrative adjudicator who views the witnesses and observes their demeanor at the hearing is "in a far superior position to determine the question of credibility than is this court." Libe v. Board of Education, 350 N.W.2d 748, 750 (Iowa Ct. App. 1984). "Factual disputes depending heavily on the credibility of witnesses are best resolved by the trial court" Capital Savings & Loan Assn. v. First Financial Savings & Loan Assn., 364 N.W.2d 267, 271 (Iowa Ct. App. 1984)(quoted in Board v. Justman, 476 N.W.2d 335, 338 (Iowa 1991)). See Anderson v. City of Bessemer City, 470 U.S. 564, 575, 37 Fair Empl. Prac. Cas. 396 (1985).

DECISION AND ORDER:

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Iowa Civil Rights Commission has failed to prove, by the greater weight of the evidence, Complainant Davis's allegations (a) that Respondent Local P-3 Retirees, Inc. effectively denied him rental of the Respondent's hall through different treatment on the basis of race because he was required to hire police officers as security in order to rent the hall; and (b) that Jessie Taken, who was acting on behalf of the Respondent, made blatant discriminatory remarks regarding Blacks renting the hall.

B. Therefore, this complaint is DISMISSED.
Signed this the 6th day of December, 1995.

_____

Donald W. Bohlken
Administrative Law Judge
211 E. Maple Street
Des Moines, Iowa 50309
515-281-4480 FAX 515-242-5840

FINAL DECISION AND ORDER:

1. On January 26, 1996, the Iowa Civil Rights Commission, at its regular meeting, adopted the Administrative Law Judge's proposed decision and order which is hereby incorporated in its entirety as if fully set forth herein.

IT IS SO ORDERED.

Signed this the _____th day of _____, 1996.

_____

Dale Repass
Chairperson
Iowa Civil Rights Commission
211 E. Maple
Des Moines, Iowa 50319