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THE NEW YORK STATE COMMISSION AGAINST DISCRIMINATION: A NEW TECHNIQUE FOR AN OLD PROBLEM

Despite long-standing Constitutional prohibitions¹ and manifest incompatibility with the American philosophy, discrimination against minority groups displays itself in every phase of life² and has become deeply rooted in employ-


The extent of discrimination against the colored population, the largest national minority, is documented by such works as Myrdal, An American Dilemma (1942); Mc-Williams, Brothers Under the Skin (1943); Mangum, The Legal Status of the Negro (1940). See, e.g., Note, Negro Disenfranchisement—a Challenge to the Constitu-
ment practices. SCAD, New York's State Commission Against Discrimination, is weaponed for a new attack on this problem: administrative enforcement of a law prohibiting discrimination in employment. In view of


sustained public interest in similar legislation,6 the Law Against Discrimination and SCAD's experience since it began operation thereunder in July, 1945, may appropriately be studied and the new technique measured against the old.

THE OLD TECHNIQUE: LEGISLATION WITHOUT AN ADMINISTRATIVE AGENCY

Previous Legislation. While many states and the Federal Government have laws against discrimination, most of the acts deal with fields other than employment, and enforcement is generally left to the judicial process.7 Pioneer legislation following the Civil War protected minorities as customers rather than as employees, and forbade racial and religious discrimination in the accommodations offered by inns, carriers and similar businesses.8 The small number of reported cases under these laws, while not a wholly accurate criterion, suggests their inefficacy.9 The probable causes for nonuse of the sanc-


The three state agencies work closely together. 2 SCAD ANN. REP. 18 (1947); 1 N.J. Div. Against Disc. ANN. REP. 6-7 (1946); 1 MASS. FEPC ANN. REP. 8 (1946).

In two other states legislation on discrimination in employment has established agencies empowered to make only studies and reports. Ind. Laws 1945, c. 325; Wis. Laws 1945, c. 490.

For Municipal action, see Elson and Schanfield, Local Regulation of Discriminatory Employment Practices, 56 YALE L.J. 431 (1947).

6. In 1947, at least 37 bills, concerning fair employment practices mostly modelled on the New York Law Against Discrimination, were introduced in 21 states. They are briefly summarized in 2 LAW & SOC. ACTION 51 (1947).

In Congress, Senator Ives, the former Assembly majority leader, has introduced a bill "patterned largely" on the New York Law. N.Y. Times, Mar. 28, 1947, p. 16, col. 3. At least six bills have been introduced in the House in 1947. 19 LAB. REL. REP. (Labor-Management) 194 (1947).

In New York, similar legislation in the field of education was almost passed this year. N.Y. Times, Feb. 26, 1947, p. 27, col. 5; id., Feb. 27, 1947, p. 13, col. 3; id., Mar. 5, 1947, p. 27, col. 5.


7. The most up-to-date survey is KONVITZ, op. cit. supra note 2. Eighteen states have legislation dealing with discrimination. The statutes are compiled ibid. in apps. 8 (N.Y.), 9 (N.J.) and 10 (other 16 states).

New York statutes against discrimination in field other than employment are: ALCOHOLIC REV. CONTROL LAW § 65; CIVIL RIGHTS LAW §§ 40-1; EDUCATION LAW § 920; PENAL LAW §§ 514, 700-1, 772-a, 1191; PUBLIC HOUSING LAW § 223; TAX LAW § 4(6). For statutes on discrimination in employment, see notes 11-17 infra.

For discussion of the Federal laws, see Biddle, Civil Rights and the Federal Law in Safeguarding Civil Liberty Today 109 (1945) and Clark, A Federal Prosecutor Looks at the Civil Rights Statutes, 47 Col. L. REV. 175 (1947).


9. There have been to date approximately 45 reported cases under New York anti-discrimination laws. 7 ABBOTT NEW YORK DIGEST 778-82 (1929) and 2 id. (1944 Cum.
tions thus created include the economic inability of the typical victim of discrimination to pursue litigation through its uncertainties, delays and expenses, the lack of clear allocation of responsibility between state and local law enforcement officials, and the lack of specialized knowledge of discrimination by the regular state law enforcement staffs.\textsuperscript{10}

New York statutes dealing with discrimination in employment prior to the Law Against Discrimination did not affect private employers generally. The acts were directed at the state, either directly as an employer of jurors,\textsuperscript{11} teachers,\textsuperscript{12} public works employees\textsuperscript{13} and civil servants,\textsuperscript{14} or indirectly as overseer of attorneys,\textsuperscript{15} utilities\textsuperscript{16} and defense contractors.\textsuperscript{17} No reported case has been found under any New York law prohibiting discrimination in employment.\textsuperscript{18} A 1942 statute assigning enforcement of certain Civil Rights Laws to


Some successful actions, however, are not reported. For recoveries in New York see, e.g., 3 INT'L JUR. Ass'n Bull. No. 8, p. 2 (Jan., 1935); 4 id. No. 4, p. 2 (Sept., 1935); 1 Law & Soc. Action 2 (1946). Cf. White, supra note 2, col. 2.


Only one state, Illinois, has created a special division for civil rights in the State Attorney General's office, but this division "has shown no signs of activity." Maslow, The Law and Race Relations, 244 Annals 75, 76-7 (1946). Some prosecutors are of course not sympathetic with the enforcement of anti-discrimination legislation. Id. at 75-6.

The Department of Justice established a Civil Rights Unit (now Section) in 1939, but this "imposed on itself a policy of self-limitation." Konvitz, supra, at 65. But see Biddle, supra note 7, at 134 et seq.

As companion to the Law Against Discrimination, the Legislature assigned responsibility for enforcement of laws against discrimination to the Attorney General. N.Y. Laws 1945, c. 813, Exec. Law § 62(9), (10).

11. CIVIL RIGHTS LAW § 13 (1909).

12. Id., § 40-a (1932) covers only religious discrimination.

13. LABOR LAW § 220-e (1935) provided that all public works contracts should contain a clause against discrimination in employment because of race or color, under penalty of forfeiture of outstanding fees for repeated offenses. Discrimination in "public employment" in New York has been barred—on the statute books—since 1881. PENAL LAW § 514, makes such a discrimination a misdemeanor, punishable by fines ranging from $50 to $500.

14. CIVIL SERVICE LAW § 14-b (1939). Enforcement is lodged in the state civil service commission, which has the right of review of decisions by municipal commissions.

15. JUDIC. LAW § 467 (1909).

16. CIVIL RIGHTS LAW § 42 (1933).

17. Id. § 44 (1941) covers only refusal to employ.

18. Tuttle, The New Law Against Discrimination, 17 N.Y.S. Bar Ass'n Bull. 76, 79 (1945). No reported prosecution was found under such laws in any of the other states. Maslow, supra note 10, at 77 n.12.

an existing state agency apparently did not change the picture. The Temporary Commission which reported the basic proposals for SCAD to the New York Legislature almost unanimously recommended a strong, separate, new administrative agency. It reported that discrimination in employment involved matters "extremely subtle and complex. The matter of enforcement, therefore, cannot be left to routine officials."

The Problem. Employment studies indicate the extent to which the old legislation failed to induce equal job opportunity for minority groups in New York State. The Temporary Commission on the Condition of the Colored Urban Population in its 1939 Report stated that it "was at a loss to understand how Negroes in . . . the up-State region managed to make a living and to survive starvation." In New York City in December 1937, the median annual salary of wage earners was $1721 for white and $1206 for colored. Negroes in the City were 6.1% of the total working force, but 28% of the unemployed; in Buffalo, the figures were 3% and 20%. Since the end of the war there are indications of comparable ratios. Studies of discrimination against Jews are not as comprehensive but reveal a similar pattern: difficulty in gaining employment in all fields and some lines of work almost completely closed. While common knowledge might indicate that discrimination against Catholics is as acute, the complaints to SCAD show a less serious problem.

FEPC: Transition Agency. During the national defense program max-

21. Id. at 49.
23. 2 Rep. N.Y.S. Temp. Comm. on Condition of Colored Urban Pop. 41 (Leg. Doc. No. 69, 1939). In Rochester, only 70 Negroes were employed of over 35,000 employees in "large factories and wholesale and retail establishments"; in Syracuse, 15, in 10,228; in the Triple Cities, 4 in 28,932; in Poughkeepsie, 12 Negroes were employed in one plant, while in others employing a total of 5,252, there were only 7 Negro employees. Ibid.
24. Id. at 38.
27. During the war, an investigator of a Jewish organization applied for office work in which she was well qualified to 100 firms, to be told "a Jew was not acceptable" 91 times. Rauschenbusch, Jobs Without Creed or Color 9 (1945). FEPC First Report 100-1, 143 (1945). See, e.g., Levinson, Are Insurance Companies Biased?, Congress Weekly, Dec. 27, 1946, p. 10.
28. Of 578 complaints to the end of 1946, only 5 were based on Catholicism. 2 SCAD Ann. Rep. tables following 11 (1947).
mum efficiency was demanded, but the practice of discrimination resulted in
an obvious waste of manpower by raising barriers completely foreign to in-
dividual abilities. Efforts to counteract discrimination by new techniques were
therefore undertaken by the Federal Government. The early national defense
production boards (the National Defense Advisory Committee and the Office
of Production Management) set up units to maximize the utilization of the
labor of minority groups.\textsuperscript{29} Pressure instigated by Negro groups\textsuperscript{30}
caused President Roosevelt to establish a Fair Employment Practice Committee in
June, 1941.\textsuperscript{31} The Committee did not gain independent status until 1943,\textsuperscript{32}
and ceased functioning in June, 1946.\textsuperscript{33} During its five years of life the Com-
mittee closed almost 5000 cases\textsuperscript{34} based on discrimination because of color,
creed and nationality.\textsuperscript{35} Complaints to the agency covered every phase of em-
ployment,\textsuperscript{36} and were directed against employers, unions and the government

\textsuperscript{29} FEPC, AND NEGRO EMPLOYMENT AND TRAINING AND MINORITY GROUPS BRANCHES
OF THE LABOR DIVISION OF OPM, MINORITIES IN DEFENSE 10-3 (1941); WEaver, \textit{op. cit.}
supra note 3, at 131 \textit{et seq.}

\textsuperscript{30} "The President's proclamation would have caused more enthusiasm among the
Negroes, and probably a quicker response throughout the country, had it not been so clearly
the result of pressure." \textit{The Negro's War,} Fortune, June, 1942, pp. 77, 80. Under the leadership
of President Randolph of the Porters' Union, a march on Washington of 50,000 Negroes
to symbolize the difficulties of their race in gaining war employment was scheduled for the
first week-end in July, 1941; the FEPC was established on June 25. See \textit{Brown, American
Negroes and the War,} 184 Harpers 545, 548-50 (1942).

Discrimination by Southern railroads and railroad unions was, perhaps, the chief cause
of the Negro exasperation. This discrimination persists. See Note, \textit{4 LAW. GUILD RED. No.}
2, p. 32 (1944); Tunstall v. Brotherhood of Locomotive Firemen, 148 F.2d 403 (C.C.A. 4th

\textsuperscript{31} 3 CODe FED. REGS. 957 (Cum. Supp. 1943) (Exec. Order No. 8802).

\textsuperscript{32} \textit{Id. at 1280-1.} (Exec. Order No. 9346). Compensation of $10,000 was provided for
the Committee members; previously, no compensation was provided. FEPC was originally
established in OPM, which in January, 1942, was replaced by the War Production Board,
whence the Committee later was transferred to the War Manpower Commission. \textit{Id. at}
1326-7 (Letter of July 30, 1942, to WMC Chairman McNutt, from President Roosevelt).
For discussions of the first years' work of FEPC, see Patch, \textit{Racial Discrimination and the
War Effort,} 2 \textit{EDITORIAL RES. REP.} 1, 11-4 (1942); Note, \textit{3 LAW. GUILD RED. No. 1, p. 32
(1943); Supplement on FEPC in 1 YEARBOOK OF AMERICAN LABOR at 393 (1945).

\textsuperscript{33} 18 LAB. REL. REP. (Lab. Rel. Ref. Man.) 118 (Letter of June 28, 1946 tendering
resignation of members of FEPC to President Truman).

\textsuperscript{34} \textit{Id. at 119 (FEPC Final Report 1946). From June, 1941, to the end of 1945, FEPC
received over 12,000 complaints. Huddle, \textit{Fair Practice in Employment,} 1 \textit{EDITORIAL RES.
REP. 33, 42 (1946).}

\textsuperscript{35} Over 80% of the cases closed from July, 1943, to December, 1944, involved race.
These were almost entirely filed by Negroes. Almost 10%, filed chiefly by Jewish complain-
ants, concerned creed. Of the remainder, involving ancestry, over half involved cases
founded on alienage. FEPC \textit{FIRST REP. 37-9, 126 et seq. (1945). The Law Against Dis-
crimination does not involve discrimination against aliens; see note 99 infra.}

\textsuperscript{36} Almost half of the 4,081 cases docketed in the 18 months following July 1, 1943, in-
volved refusals to hire; 12% involved discriminatory dismissals; 10%, refusals to upgrade.
For the remaining 1,281 cases there are listed 18 different discriminatory practices. \textit{Id. at}
132.
The efforts of the FEPC apparently contributed to increased utilization of the labor potential of minority groups, in terms of both the number employed and the proportions in skilled employment.37

As the first experience with application of the administrative agency technique to discrimination, the achievements and difficulties38 of FEPC constituted a sketchy textbook for the creators of SCAD.40 The chief legal defect of FEPC, corrected in the Law Against Discrimination, was lack of enforcement powers. Never gaining statutory authority,41 FEPC on paper relied ultimately on the President or other agencies for enforcement,42 and in practice was forced to depend on voluntary compliance, since its “directives” could be—and usually were—disregarded with impunity.43 FEPC taught the

37. Almost 25% of the complaints were directed against the government, almost 70% against business and over 5% against unions. Id. at 38–42, 121 et seq.
42. Annual appropriations for FEPC were under $150,000 in fiscal 1943, over $400,000 the next two years, and $250,000 in 1946. Huddle, loc. cit. supra note 34.
43. "The Committee shall formulate policies to achieve the purposes of this order and shall make recommendations to the various Federal departments and agencies and to the President which it deems necessary and proper to make effective the provisions of this Order. ... It may conduct hearings, make findings of fact, and take appropriate steps to obtain elimination of such discrimination ... ," no further powers or penalties being indicated. 3 Code Fed. Regs. 1280–1 (Cum. Supp. 1943) (Exec. Order No. 9346 §§ 4, 5). It took the President to make this order "mandatory" rather than "directive" as ruled by the Comptroller General. Id. (Supp. 1943) at 69 (Letter of Nov. 5, 1943, to Attorney General Biddle from President Roosevelt).

Other agencies had their own duties, obviously, and established only those "policies consistent with their obligations." Outstanding work was done by the War Labor Board. FEPC First Rep. 60, 21–8, 69–2 (1945).
43. "Of 35 cases during its history in which orders were issued to employers, 26 decisions were not complied with, and of 10 cases in which F. E. P. C. orders were issued to trade unions, 9 remained not in compliance." Huddle, supra note 34, at 43. See also Maslow, The Law and Race Relations, 244 Annals 75, 77–8 (1946); Sen. Rep. No. 290, 79th Cong., 1st Sess. 5 (1945).
political lesson that, although the principle of non-discrimination is rarely opposed, equal employment opportunities cannot be secured by dialectic and a straw wand.

A NEW TECHNIQUE: THE LAW AGAINST DISCRIMINATION

Political History of SCAD. A New York State Committee on Discrimination in Employment was instituted in March, 1941, and continued for three years as part of the State War Council. The Committee "satisfactorily adjusted" over 95% of its approximately 1000 cases and attempted to mobilize public opinion against discrimination. Its successor was an independent Temporary Commission on Discrimination instructed to recommend legislation by February 1945. This Commission held public hearings and submitted proposals introduced in the Legislature under bi-partisan support as the Ives-Quinn Bill. The Temporary Commission considered lack of equal employment opportunity for minority groups the most economically wasteful and socially dangerous form of discrimination and its elimination a sufficiently desirable and difficult task to call for use of administrative enforcement techniques untried in previous approaches to the problem.

The opponents of the Bill, chiefly employer groups, argued both that it could not be effective and that it would be too effective. The latter argument

44. "Though every opportunity was afforded to opponents to testify, and though 36 witnesses, representing more than 60,000,000 of our citizens (after discounting the overlapping of various organizations), appeared in the course of these hearings, no witness appeared in opposition... and no witness appeared who was willing to see the enforcement provisions of this bill sacrificed..." Id. at 6. "With very few exceptions, all who spoke endorsed the proposals in substance and principal;..." REP. TEMP. COMM. 24 (1945).

45. Id. at 21.

46. Ibid. The two outstanding booklets issued by the Committee were How MANAGEMENT CAN INTEGRATE NEGROES IN WAR INDUSTRY (1942) and THE NEGRO INTEGRATED (1945), giving management testimonials. The Committee distributed over 25,000 copies. Note, 60 MONTHLY LAB. REV. 1003, 1006 (1945).

47. N.Y. Laws 1944, c. 692, § 6. This enactment appears at REP. TEMP. COMM. 11-2 (1945).

48. Seven public hearings were held in five cities. Excerpts from the testimony may be found id. at 64-76. The Hearings were transcribed but have not been published.

49. The Report was made public on Jan. 28, 1945, and the Bill introduced two days later. N.Y. Times, Jan. 29, 1945, p. 1, col. 3; id., Jan. 31, 1945, p. 16, col. 5. Assemblyman Ives, Republican, was Chairman of the Temporary Commission and Assembly majority leader. Senator Quinn, Democrat, was minority leader in the upper house. He had also been a member of the Temporary Commission, which was bi-partisan. REP. TEMP. COMM. 22 (1945).

50. Id. at 26, 48-50.


52. E.g., it will not solve the problem, N.Y. Times, Jan. 1, 1945, p. 25, col. 6; "What is really needed is a better public sentiment, a sentiment which this bill will not help but will hinder." Id., Feb. 13, 1945, p. 22, col. 5. In commenting on the Law in operation, Judge Liebowitz echoed perhaps the most frequent variation: "In the last analysis, no law is better than
was stressed the more heavily; it was charged, for example, that the law "dictates to any employer in private enterprise whom he shall employ,"53 that it would drive business from that state and that it was totalitarian and communist.54 In the Assembly debate, the leader of the opposition threatened that reprisals on minority groups would be the result, specifying pogroms and the Klan.55 The SCAD proposal nevertheless survived to be passed by decisive majorities in both houses.56

Scope of The Law. The Law Against Discrimination declares opportunity for employment to be a civil right57 the abrogation of which is illegal,58 and establishes a new agency to enforce the right.59 While SCAD has enforcement powers only in the field of employment, it is authorized to undertake an educational offensive against discrimination generally.60 The Law expressly leaves untouched existing statutes against discrimination."61 One member of the Temporary Commission recommended that SCAD be assigned enforcement jurisdiction over all civil rights; this would appear to be the ultimate ideal, but it was deemed too heavy a burden for a new experiment.62

The Agency.63 Responsibility for administration of the Law lies with SCAD, a five-member Commission in the Executive Department.64 The

the citizenry which supports it." Id., Feb. 26, 1946, p. 17, col. 4. The standard answer to this type of argument is that there is a distinction between prejudice and discrimination, the overt manifestation which the law may reach. See McWilliams, Race Discrimination and the Law, 9 Sci. & Soc. 1 (1945). But see, Polier, Law, Conscience, and Society, 6 Law Guild Rev. 490 (1946).


55. Id., Mar. 1, 1945, p. 16, col. 4. It was "considered the longest debate on a single measure in the state during the past five years." The Negro Handbook 303 (1947).

56. The vote was 109-32 in the Assembly and 32-6 in the Senate. N.Y. Times, Mar. 1, 1945, p. 1, col. 2; id., Mar. 6, 1945, p. 1, col. 1. 57. Section 126.

58. Sections 125, 131-4.


60. Section 125.

61. Section 135.

62. Rep. Temp. Comm. 26 (1945). Chairman Ives expected that "ultimately they will go into those functions," i.e., discrimination in fields other than employment, and that the educational powers were given SCAD as "the entering wedge." Hearings Before New York State Temporary Commission Against Discrimination 990 (1944) (not published).

63. Section 128.

64. Annual reports are to be submitted "to the governor and the legislature," § 130 (10); in practice, they have been addressed to the governor. See 1-2 SCAD Ann. Rep. Letters of Transmittal.
Commissioners, who have staggered five-year terms, are appointed by the Governor with Senate confirmation and are removable by the Governor, but only for cause. The salary provided is $10,000 and there is no prohibition against other employment.

SCAD has received increasing appropriations and, in accordance with its statutory powers, has set up three branch offices in addition to its New York City headquarters and hired an expanding staff which at present totals. There are three organizational Divisions: Legal; Administrative; and Education, Public Relations and Research.

Constitutionality. Although in its enforcement area the Law Against Discrimination is a major extension of State authority over employers and trade unions, its constitutionality seems assured. The New York constitution is unique in providing that "No person shall, because of race, creed, color, or religion, be subjected to any discrimination in his civil rights by any other person. . . ." The language would support state power to pass the Law Against Discrimination, and the debates at the 1938 constitutional convention indicate that this provision was intended to permit legislation against discrimination in employment. The Law is declared to be in fulfillment of the constitutional provision and includes also a broad statement of purposes justifying use of the police power.

65. The backgrounds of the Commissioners are sketched in N.Y. Times, June 7, 1945, p. 21, col. 6 and Ross, New York's "FEPC" Pays Off, This Week Magazine, Aug. 25, 1946, pp. 8-9. The Commissioners are the same as those originally appointed, except for the appointment of a new chairman on April 22, 1947, Chairman Turner having resigned. N.Y. Times, April 23, 1947, p. 52, col. 5.

66. For the part-year ending March 30, 1946, $250,000; 1946-7, $315,000; 1947-8, $372,000 (approximately 0.05% of the total state budget). The New-Jersey and Massachusetts agencies have each gained increases to approximately $55,000 for the current year. Interview with SCAD Director of Public Relations, Education and Research Division; N.Y. Times, Mar. 28, 1947, p. 16, col. 2.

FEPC's peak annual appropriation was $453,800. See Huddle, loc. cit. supra note 34.

67. In authorizing branch offices, the statute specifies that the "principal office" shall be in Albany, § 130(1); the chief office in fact is at 270 Broadway, New York City. 2 SCAD ANN. Rep. 4 (1947). The original branch offices were in Buffalo and Albany; in 1946, an office was opened in Syracuse.

SCAD may "meet and function at any place within the state," § 130(2).

68. Interview with SCAD Director of Public Relations, Education and Research; § 130(3) grants authority to hire independently a staff of "attorneys, clerks, and other employees and agents."

69. Their functions are described in 2 SCAD ANN. Rep. 4-8 (1947).

70. See supra pp. 839-40.

71. Before 1940, unions in New York were apparently free to exclude whomever they chose. Miller v. Ruehl, 166 Misc. 479, 2 N.Y.S.2d 394 (Sup. Ct. 1938).

72. REP. TEM. COMM. 17 (1945).

73. Amendment to Art. I, § 11, adopted in 1938.

74. REP. TEM. COMM. 16, 18 (1945).

75. The Law "... shall be deemed an exercise of the police power of the state..."
The constitutionalizing of non-discrimination, however, was apparently not required to insure the constitutionality of SCAD, since the Court of Appeals has without exception upheld the Civil Rights Laws. The old leading case, People v. King, held that it was a valid exercise of the police power to exact a criminal penalty from the proprietor of a skating rink who had refused admission to complainants admittedly because they were colored. While a few later decisions construed the Laws strictly and some dicta indicated that the Legislature would not be allowed to deal, as SCAD now does, with discrimination in such fields as the professions and retail trade, a broad constitutional attack based upon freedom of contract or violation of due process was never successful and would appear certain of failure under judicial attitudes prevailing since the Nebbia, West Coast Hotel and Jones & Laughlin

and in fulfillment of the provisions of the constitution of this state concerning civil rights; and the legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color or national origin are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundations of a free democratic state. § 125.


110 N.Y. 418, 18 N.E. 245 (1888). The majority repeated the point that the legislation did not enforce "social equality"; id. at 427 and 428, 18 N.E. at 248 and 249. Peckham and Gray, JJ., dissented without opinion.


For résumé of typical problems of interpretation of civil rights laws, see Legis., 84 U. of Pa. L. Rev. 75, 80–3 (1935).

"... no one will contend that the Legislature could forbid discrimination in the private business affairs ... prevent an employer from refusing to employ colored servants, or a servant from refusing to work for a white or for a colored master. ... Such conduct may be the result of prejudice entirely, but a man's prejudices may be part of his most cherished possessions, which cannot be invaded except when displayed in the conduct of public affairs or quasi public enterprises." Aaron v. Ward, 203 N.Y. 351, 356, 96 N.E. 736, 738 (1911). See also Burks v. Bosso, 180 N.Y. 341, 345, 73 N.E. 58, 59 (1905); Gibbs v. Arras Bros., 222 N.Y. 332, 336, 118 N.E. 857, 858 (1918).


West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). The Labor Relations Acts cases would appear to be the most persuasive precedent. See Dodd, The Constitution-
cases. The provision of the Law respecting labor unions is essentially a re-
statement of a 1940 Civil Rights Law prohibiting discrimination in admission to membership, which was sustained by both the Court of Appeals and the United States Supreme Court. More recently, a ruling of the New York Attorney General that advertisements of camps specifying “restricted clientele” violated the Civil Rights Law was upheld in language so sweeping as to validate legislative and administrative action against discrimination in any field.

Provisions Regarding Discrimination in Employment:

SCAD’s enforcement field encompasses discrimination based on “race, creed, color or national origin” in any phase of employment. In its general outlines, the Law follows the state and National Labor Relations Acts. “Unfair employment practices” define the obligations imposed and the enforcement procedures are essentially similar.

Obligations Imposed By The Law. The Law Against Discrimination provides that equal opportunity for employment be afforded all individuals regardless of ancestry, color or creed, and forbids discrimination at any stage of the employment process from hiring to discharge. While the law thus


The New York Labor Relations Act was upheld in Metropolitan Life Ins. v. NYSLRB, 280 N.Y. 194, 20 N.E.2d 390 (1939).

83. Civil Rights Law § 43.


Political creed is not included; only religious creed is intended. 1 SCAD Ann. Rep. 12 (1946). Accordingly, SCAD declined its services to a university professor allegedly discharged for Communist affiliation. Interview with SCAD General Counsel. “National origin” is defined to include “ancestry.” §127(8).


91. Section 131 provides: “It shall be unlawful employment practice: 1. For an employer, because of the race, creed, color or national origin of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

2. For a labor organization, because of the race, creed, color or national origin of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.
curtails traditional prerogatives of employers, unions, employment agencies, and anyone abetting the deprivation of equal rights, it insures only that the same standards be applied to all employees and applicants. No quota system has been enacted; the Law does not require that any employer hire any specific employee or any number from any given minority. The racial composition of the employee group is obviously one factor in deciding whether discrimination may exist, but the basic datum is the procedure followed in the employment process. Where, for example, a Negro writes a letter, has an interview for a job, and is then told that he cannot be used although the reply to the letter was very favorable, discrimination may be inferred. But should the complainant refuse to submit to a fair test of his skill, there clearly is no discrimination.

The practical effect of the Law is illustrated by SCAD's detailed rulings—the only major delineations of substantive policy to date—implementing the broad prohibition of "any inquiry in connection with prospective employment" redolent of discriminatory practices "unless based upon a bona fide occupational qualification." First, direct inquiries into race, religion, color and national origin are forbidden. An applicant may not be asked where he or his close relatives were born. He may not be asked whether he is an atheist, although there may be inquiry respecting regularity of attendance at a house of worship.

3. For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color or national origin, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification.

4. For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this article or because he has filed a complaint, testified or assisted in any proceeding under this article.

5. For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so."

92. Rulings, SCAD Release, June 1, 1946; SCAD, INSIDE FACTS 3 (1946); 2 SCAD ANN. REP. 10 (1947). A quota not only is not required by the Law but may be "a positive violation." 16 LAB. REL. REP. 2555 (Comm. & Ind. Ass'n of N.Y. Ind'l Relations Bur. Bull., July, 1945).

93. See case, note 140 infra.

94. Ross, supra note 65, at p. 9, col. 2.

95. Id. at p. 14, col. 5.

96. Rulings, SCAD Release, June 1, 1946.

97. "No restriction is placed on inquiries made AFTER employment, provided the information obtained is not used for purposes of discrimination." (emphasis in original); Rulings, SCAD Release, June 1, 1946.

98. Section 131 (3), quoted in note 91 supra.
Whether the applicant is a citizen is a legitimate question, but not whether he is a native or naturalized citizen.

Second, inquiries may not be used which frequently elicit information on which discrimination may be based and do not relate to job performance. Included here are questions concerning: former names, except that a married woman may be asked her maiden name; military training in any forces but those of the United States; foreign business addresses of close relatives; membership in organizations with names indicating the race, religion or ancestry of its members.

Third, documents may not be required which give permissible information but also possibly discriminatory data. Requiring a birth or baptismal certificate, for example, is unlawful, acceptable proof of age being a certificate of a department of health or board of education. It is also illegal to require that a photograph be attached to the application blank.

Finally, statements that may exclude certain groups are proscribed. An applicant may not be told, for instance, that this is a "Protestant" plant, or that the organization observes "Christian" holidays only, although he may be told that he is applying for a six-day-a-week job.

Accompanying these rules the Commission issued a partial clarification of "bona fide occupational qualification," the only basis specified in the Law for exempting employers and employment agencies from the requirements relating to inquiries prior to employment. Neither "traditional practices" nor "the preference of customers, employers and employees to deal or work with persons of a particular" group are considered as generally "material to the existence of a bona fide occupational qualification."

The general statement would appear to preclude the defense of "occupational qualification" in the most commonly recurring situation where minority groups have been denied employment. However, the Commission urges employers doubtful of the application of this statement to submit specific cases.

99. Alienage is not one of the bases of discrimination covered by the Law. See LADOR LAW § 220-c (a) providing that public works contractors shall not "by reason of race, creed, color or national origin discriminate against any citizen of the state of New York . . . " (italics supplied).

The Law does, however, require that the same treatment be given all aliens; they too may not be discriminated against because of their national origin, religion or race. 17 LAB. REL. REP. (Lab. Rel. Ref. Man.) 2625, 2628 (Address by SCAD Chairman, Nov. 15, 1945).

100. This had been prohibited in previous versions of this Ruling, but there were complaints apparently chiefly from department stores fearful of hiring shoplifters who had confined their police record to the maiden name. Interview with SCAD executive Secretary.

101. Except for the German-American Bund. It is also legitimate to ask whether applicant is a member of the Communist Party; why SCAD found this statement necessary is difficult to understand since its jurisdiction does not extend to political creed. See note 86 supra.

102. Section 131 (3), quoted in note 91 supra; cf. § 131 (1), (2).

103. Rulings, SCAD Release, June 1, 1946.
for advance ruling. In applying the rule thus far, SCAD has refused to allow "the preference of customers, employers and employees" for certain groups to operate as a defense in cases where Negroes have been excluded from jobs as hotel clerks and "front" elevator operators. Nor has "traditional practice" been accepted as excusing the total exclusion of minority groups, or their restriction to less favorable positions. Where the employer had colored factory workers but no Negroes on his office staff and where Jews and employees of other minority groups were never given positions involving "direct sales contact," SCAD has held that the past practice was no ground for denying complainant the job for which he was qualified.

Conceivably, SCAD's refusal to recognize preference of customers and employees as a legitimate excuse for discriminatory practices might prove harmful to some business concerns. Neither SCAD nor the total powers of New York government could compel potential purchasers to patronize employers of minority groups. The Law's prohibition of employee pressure for discrimination could presumably be invoked to prevent a strike designed to maintain a racial or religious closed shop, but individual employees cannot be stopped from seeking work in surroundings deemed more congenial. Thus far, it does not appear that SCAD's rulings have placed employers in an untenable position. When, and if, the prejudices of persons indirectly af-

105. Ross, supra note 65, at 8, cols. 1-4.
106. Mark Rafalsky & Co., Case No. 1309-46, SCAD Press Release, June 19, 1946. Complainant had secured other employment but did receive wages for the period of unemployment. Respondent issued orders to its supervisors to comply with the Law, and warned them that penalties for future violations might be taken out of their pay.
109. Section 131 (5), quoted in note 91 supra; § 132 provides: "Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this article, may file with the commission a verified complaint asking for assistance by conciliation or other remedial action."
111. "The employment of members of minority groups has not resulted in the disruption of plant morale nor have we been able to find that any mass group of employees have left their jobs because of the advent of members of a minority group. In only two or three cases have single employees gone out." 1 SCAD Ann. Rep. 17 (1946). The Commission has not "received a single complaint from an employer that compliance with the law has turned away customers or caused a loss of revenue." Ross, supra note 65, at 23, col. 2.
In one instance where workers threatened to quit because of the proposed introduction of Negroes, the employer's firm insistence upon compliance with the Law brought not only dissipation of the threat but apparently friendly adjustment to the new employees.\textsuperscript{113} The statutory language is broad enough to extend the influence of SCAD beyond the geographic limits of the State, so far as employee recruitment is concerned. Since the circulation as well as the printing of discriminatory application blanks is forbidden, the SCAD General Counsel ruled that a firm was subject to the Law, although it printed its forms and conducted its employment interviews outside New York for jobs to be performed outside the State, but sent the applications to its central office in New York City for formal ratification.\textsuperscript{114} Accordingly, interstate concerns might well be advised to print different application forms for New York use.

Since advertisements as well as application blanks are mentioned in the Law,\textsuperscript{115} SCAD has ruled that neither "help wanted" nor "situations wanted" advertisements may state discriminatory qualifications.\textsuperscript{116} Moreover, exclusive use in recruitment of newspapers or agencies appealing only to certain groups (the foreign language press, for example) will be deemed a violation, unless it reflects a long-established and consistently-followed practice.\textsuperscript{117} Although newspapers and periodicals are not in terms brought within the Law, it would appear that the publisher who accepts and prints discriminatory advertisements is punishable for aiding a violation of the Law.\textsuperscript{118}

Every employer, union and employment agency subject to the Law Against Discrimination is required to post conspicuously a notice summarizing the provisions of the Law.\textsuperscript{119} This requirement, representing the only substantive regulation promulgated through the Secretary of State by SCAD under its rule-making power,\textsuperscript{120} is intended primarily to inform potential complainants of their rights.

To extend the protection of the Law to those participating in the newly established procedures, it is declared an unfair practice to discriminate against any person because he has filed a complaint, testified at a Commission

\textsuperscript{112} Especially since the Law stresses the informal procedures of "conference, conciliation and persuasion"; § 132.

\textsuperscript{113} Ross, supra note 65, at 9, col. 1.

\textsuperscript{114} Interview with SCAD General Counsel.

\textsuperscript{115} Section 131 (3), quoted in note 91 supra.

\textsuperscript{116} Interview with SCAD General Counsel and Associate Counsel.

\textsuperscript{117} Ibid.; P-H State Lab. Laws (3 Lab. Equip.) § 44,021.6 (1946).


\textsuperscript{119} Posting of Notices, SCAD General Regulation, filed with Secretary of State, Nov. 1, 1946. The agency has distributed 115,000 posters. 2 SCAD Ann. Rep. 7 (1947).

\textsuperscript{120} Section 130 (5). This power has been used only one other time, in the promulgation of Procedural Rules. See note 134 infra.
hearing, or taken similar action. This provision, common in administrative law, appears especially important for the safeguarding of new rights such as those granted by this Law.

Two types of employers and two types of employees are expressly exempted from the obligations imposed by the Law. Educational, religious and social institutions not organized for profit are excluded. Employment agencies operated by such institutions, or through which they secure their own employees, however, are within the Law. Employers of fewer than six workers are not subject to the statute. This exception is intended to facilitate administration and to remove from government review relatively personal employment relationships. Both the “employer” exemptions were recommended for further study by the Temporary Commission; SCAD has as yet adopted no stand respecting any changes in the Law. The “employee” exemptions of domestics and those working for immediate relatives would appear founded on the personal nature of the relationships.

While the Law does not specify that the State itself is subject to its provisions, the Attorney General has ruled that it is. Thus, a City Board of Education modified its employment applications when the SCAD General Counsel ruled that it was a subdivision of the State, although it had originally claimed exemption as an educational institution.

Procedure. Since only SCAD is authorized to rectify violations of the Law, application to the Commission is the only remedy for deprivation of equal employment opportunities, except for the scant protection given by earlier piecemeal legislation, or by municipal ordinance. Consequently, the

121. Section 131 (5), quoted in note 91 supra.
122. Section 127 (5); there is no exception of employees in buildings conducted for profit by those organizations as there is in Labor Law § 715.
123. Columbia University case, N. Y. Times, Feb. 25, 1947, p. 23, col. 1; § 127 (2) defines “employment agency” to include “any person undertaking to procure employees” (italics added), not stating that it must be for profit. See 47 Col. L. Rev. 674 (1947).
124. I SCAD ANN. REP. 12 (1946). The inclusion of a specific religious or nationality group in the name of an employment agency violates § 131 (3); the word “American” is permissible as connoting no restriction. Interview with SCAD General Counsel.
125. Section 127 (5).
127. Ibid.
128. Section 127 (6).
131. Interview with SCAD General Counsel and Associate Counsel.
132. See statutes cited in notes 11-17, 83 supra; Elson and Schanfield, Local Regulation of Discriminatory Employment Practices 56 Yale L. J. 431 (1947). Election of remedies is required under the Law. No other action may be instituted during the pendency of a complaint, a decision (other than denial of jurisdiction) by SCAD precludes any other remedy,
heart of the Law lies in the procedures whereby a victim of discrimination may secure recognition of his New York Constitutional rights.

Under the Law, a judicially-enforceable order may issue from SCAD only after formal hearing initiated by verified complaint. Accordingly, the provisions of the Law regulating procedure, and SCAD's Rules of Procedure, have dealt primarily with the processing of complaints. A verified complaint may be filed by "any person claiming to be aggrieved," but not by the agency itself. The Commission may, however, apply to the Industrial Commissioner or the Attorney General, who may file complaints; in practice SCAD has never requested such action from either official, nor has either filed a complaint on his own initiative.

The Commission has enlarged its sphere of action somewhat by construing the Law as authorizing self-instituted investigation of discriminatory practices on the part of employers exempt from the Law's provisions and by utilizing each complaint as an opportunity for extensive review of the respondent's employment practices. Similarly, the Commission has surveyed

and, if any other action is instituted, there may be no subsequent recourse to the Commission. Sec. 135; see REP. TEMP. Comm. 35 (1945). However, if the other forum dismisses the complaint for lack of jurisdiction, SCAD will accept it. 1 SCAD ANN. REP. 12 (1946).

133. Sections 130 (6), 132-3.
134. RULES GOVERNING PRACTICE AND PROCEDURE BEFORE SCAD, adopted by the Commission on Oct. 18, 1946, and filed with the Department of State on Nov. 6, 1946, replacing Rules of July 31, 1945, which in essence restated the provisions of the Law. Hereafter cited by RULE. These Rules may be changed at any SCAD meeting, on 24-hour notice to three Commissioners that such will be the business of the meeting; the modifications are to be filed with the Department of State and are to be available to the public. RULE 13.
135. Section 132. Under the Labor Relations Acts, the official complainant is the Labor Board itself. However, this differs only nominally from procedure under the Law Against Discrimination, since the Labor Boards may not investigate or issue a complaint until a charge of unfair practice has been filed. LABOR LAW § 706 (2); 49 STAT. 453 (1935), 29 U.S.C. § 160 (b) (1940).
136. Interview with SCAD General Counsel.
137. "... the Commission has not waited for complaints but has also moved into areas where it was public belief that discrimination was being practiced." SCAD Rev. First Year's Operation 4 (1946). The power to do so may be implied from that granted to authorize community councils to undertake studies in "specific fields," § 130 (8), and from SCAD's right to compel testimony and production of records "relating to any matter under investigation or in question before the commission" (italics added), § 130 (7). Presumably, an investigation could be justified under SCAD's policy and rule-making powers, §§ 129, 130 (5), for example, as preliminary to recommending changes in the employee coverage. Moreover the Law is to be "construed liberally for the accomplishment of the purposes thereof..." § 135.
138. In at least one case, the Commission induced a hospital not subject to the Law to hire a Negro nurse; conferences are continuing "with the State Board of Social Welfare to insure non-discriminatory employment practices in all hospitals." 2 SCAD ANN. REP. 14 (1947). See Turner, Tolerance on Trial, The American Magazine, June 1946, pp. 14, 127.
139. 2 SCAD ANN. REP. 11 (1947); SCAD Rev. First Year's Operation 6 (1946). Should the SCAD investigation uncover discrimination not complained of, presumably
employment practices at the request of the employer. SCAD relies on moral suasion for the correction of discrimination thus uncovered.

Thus far the Commission has taken no position as to whether a private organization combatting discrimination may qualify as a "person claiming to be aggrieved" and so be entitled to file and prosecute a complaint, except where the unlawful practice charged is discriminatory inquiry prior to employment. The Commission's caution may be induced by fear lest a legalistic court void a SCAD order bottomed on a private-agency complaint; but a fair reading of legislative intent would appear to support a broad construction of "aggrieved person." At the hearings before the Temporary Commission, its counsel repeatedly minimized the expressions of disquiet by representatives of the private organizations, and pointed out that the statutory definition of "person" included more than one individual, although he apparently did not discuss the significance of "aggrieved."

From the policy viewpoint, it might be feared that authorization of private-agency complaint would open the gates to a flood of petty complaints, vociferously pushed by anti-discrimination "fanatics." Data on the war-time agencies' experience does not appear to support such a conclusion, and SCAD itself reports few attempts by private organization to invoke the Commission's investigatory powers under the present granted permission—although SCAD could enlarge the complaint through "the power reasonably and fairly to amend any complaint..." §132.

The outstanding reported case so initiated involved a public utility company which was found to be following an established practice of recruitment by recommendations of present employees. Comparison of the ratios of minority groups in the community population and in the company employ was instrumental in revealing discrimination against Jews and Negroes. The employer voluntarily undertook to abandon organizational self-pollination and adopt corrective measures. Brooklyn Borough Gas Co., SCAD Case No. 95-45, 19 LAB. REL. REP. (Labor-Management) 57 (1946).

SCAD Press Release, Oct. 8, 1946 characterized §131 (3) (quoted in note 91 supra), which proscribes application-blank and job-interview extraction of information prerequisite to discrimination as "the preventive clause of the law," and indicated that private-agency complaint may be appropriate here, although not where other violations are alleged, because §131 (3) contains "no requirement that an actual act of discrimination be committed..." Nevertheless, at least the American Jewish Congress desires full power to file complaint, 1 LAW & Soc. Action 33 (1946), although apparently it has not filed under any other Section. See Note, "Persons Aggrieved" Under the Ives-Quinn Law, 6 LAW. GUILD REV. 421 (1946) (based on the SCAD case leading to the ruling); Assoc. Industries v. Ickes, 134 F.2d 694 (C.C.A.2d 1943).

The Law is to be "construed liberally:" §135.


Both FEPC and the state wartime Committee allowed such complaints, and neither found them a substantial proportion of its business. Interview with SCAD General Counsel. The Massachusetts FEPC permits such complaints and has received fewer than it expected. N. Y. Times, Mar. 28, 1947, p. 16, col. 2.

There have been five. Communication from SCAD General Counsel, April 15, 1947.
it may be that the private agencies are awaiting full authorization before calling instances of discrimination to SCAD's attention. On the other hand, private-agency complaint might be especially useful in enforcing such SCAD requirements as the posting of notices, since organizations would seem more likely than individuals to feel aggrieved by a virgin bulletin-board.

Under present practice, the complaint is typically filed by the victim of discrimination or his lawyer in a SCAD office, with a field representative aiding in the completion of the form. While the Law specifies that the complaint must be filed within 90 days of the alleged violation, SCAD has ruled that this requirement is not jurisdictional but must be raised by the defense pleadings. The Chairman decides whether SCAD has jurisdiction to accept the complaint, and if it has, assigns the case to a Commissioner who assumes full responsibility for its processing until the formal hearing. The complaint may not be withdrawn without the Commissioner's approval before notice of hearing is issued, or thereafter without the approval of two of the Commissioners assigned to the hearing. This rule appears desirable to prevent private settlements by employers who might prefer not to have their employment practices reviewed.

In the disposition of complaints, the emphasis is on informal methods. The Commissioner responsible for the case assigns it for initial investigation to a field representative, who is instructed never to go beyond persuasion; if there is resistance, the Commissioner personally completes the investigation. Should he find probable cause for the charges, the Commissioner is directed by the Law to endeavor to eliminate the unfair practice by "conference, conciliation and persuasion," before taking more formal action. Every one of the 567 cases closed thus far has been settled at this negotiation stage. Adequate assessment of the standards applied by the agency

146. Complaint may be made by mail. SCAD Press Release, Feb. 4, 1946; Rule 2 (f).
147. Rule 2 (c) gives the contents of the complaint. The form is a simple one.
148. Section 132. The commission's power to grant back pay accounts for the provision. Rep. Temp. Comm. 32 (1945). If the alleged unfair practice is a continuing one, complainant may calculate his 90 days from the day on which practice ceased, Rule 2 (e); in such a case there would appear to be no legal obstacle preventing the award of back pay from the initial discriminatory act. However, SCAD's policy is not to award back pay for more than 90 days prior to filing of the complaint. Interview with SCAD General Counsel.
150. Section 132.
151. Rule 2 (j).
152. Interview with SCAD Executive Director.
153. Section 132. For suggestion that settlements so reached may be judicially enforceable, see NLRB v. Draper Corp., 159 F.2d 294 (C.C.A.1st 1947).
154. 2 SCAD Ann. Rep. 19 (1947). The Temporary Commission had predicted from the experience of the wartime State Committee and the FEPC that "the great majority of the complaints" would be settled at this stage. Rep. Temp. Comm. 32 (1945). Despite its reputation in some quarters, FEPC accomplished the "bulk" of its "useful work"
in settling complaints informally is, however, impossible at the present time, since SCAD has revealed few details of the conciliation work.

The veil of silence in this respect reflects SCAD's construction of the statutory injunction that "The members of the Commission and its staff shall not disclose what has transpired in the course of . . . [informal] endeavors. . . ." Under SCAD's interpretation, the consent of a violator is necessary before the case can be publicized. As a result, SCAD has reported few cases with the full facts and promptness appropriate for press use and has made little use even of anonymous case summaries. This policy appears to militate against full implementation of the Law, since it minimizes the effectiveness of publicity and the threat of publicity as an enforcement weapon, and discourages potential complainants by concealing the nature and volume of successful agency actions. The general intention of the Law—to encourage "honest efforts at adjustment without legal proceedings" would seem better served by applying the prohibition against publicity to the negotiations only and not necessarily to the terms of the informal settlement.

Should conciliation fail, subsequent procedures center on a formal hearing conforming to the general administrative agency pattern, except that there is no provision for delegation of the hearing authority. When the Commission originally assigned the case issues notice for hearing, his direct par-


155. Section 132.

156. "... releases can only be made where both parties to the complaint have consented." SCAD REV. FIRST YEAR'S OPERATION 13 (1946).

157. Only two cases involving employers have been released by SCAD. N. Y. Telephone Co., SCAD Press Release, May 28, 1946, reporting dismissals in 7 out of 10 complaints; Mark Rafalsky & Co., SCAD Case No. 1309-46, June 19, 1946. At least two other cases have been reported, but apparently on the initiative of private anti-bias groups and not SCAD. On the Brooklyn Borough Gas Co. case, see 1 LAW & SOC. ACTION 19 (1946) and id. at 35. On Columbia University case, see 2 LAW & SOC. ACTION 45 (1946); N. Y. Times, Feb. 25, 1947, p. 23, col. 1. In a report of a long-term study of unions, SCAD announced the disposition of one complaint, a finding that restrictive provisions in the union ritual were not being enforced in New York. Union Practices, SCAD Press Release, Jan. 8, 1947.

158. Two summaries have been officially released: Case Histories, SCAD Press Release, Aug., 1946; 2 SCAD ANN. REP. 12-7 (1947); cf. Ross, supra note 65. The SCAD Director of Education, Public Relations and Research stated in interview that more use is to be made of summaries.

159. FEPC found that "Dislike of public exposure of their intolerant actions is a stimulant to move the indifferent or the timid into taking the first steps. . . ." 18 LAB. REL. REP. (Lab. Rel. Ref. Man.) 119, 124 (FEPC Final Report 1946). SCAD's timorous publicity policy may reflect a general desire to avoid comparison with FEPC; cf. N. Y. Times, Mar. 28, 1947, p. 16, col. 3 [Sen. Ives "should like it definitely understood that this (his proposal for a federal law patterned on the New York Law) is not an FEPC bill"]. See note 202 infra. For a recent criticism of SCAD publicity policy, see N. Y. Times, April 11, 1947, p. 19, col. 7.

160. REP. TEMP. COMM. 32 (1945).
participation in the case is at an end." His "endeavors at conciliation shall not be received in evidence." Three other Commissioners are to conduct the hearings. Thus, no more than one hearing can be held at a time. Accordingly, if informal procedures prove less effective in future cases, Commissioners may find relatively little time for duties other than holding hearings.

For the hearing, the Law provides full subpoena power for the agency and other parties, notice to the parties, the inapplicability of strict rules of evidence and for decisions on evidence, and on motions and objections by a majority vote of the Commissioners hearing the case; such rulings must be included in the record. The complainant, whose case is presented by the SCAD counsel, "may" be allowed to appear; the respondent has the right of cross-examination and, if he has filed an answer, of submitting testimony of his own. The Commissioners may allow anyone to intervene; and the hearings are to be public.

The decision resulting from the hearing is to be incorporated into a formal order which is available for public inspection. Should the hearing lead to a finding of violation, the Commission has broad powers of action to "effectuate the purposes" of the Law. The agency may issue cease and desist orders, and may also take positive action such as requiring employers to hire, reinstate or promote complainants, with or without back pay, or unions to admit complainants to membership. The power to call for the submission of follow-up reports is expressly granted by the statute, and SCAD in practice checks on the results of its case dispositions. For disobedience to a SCAD order, or any "wilful" violation of the Law, there is provision for criminal penalties of imprisonment up to one year, fine up to $500, or both.

For the enforcement of its order SCAD must apply to the courts. Judicial review of its orders may be obtained by any "person aggrieved" thereby.

161. The original Commissioner may issue notice for hearing "in advance" of "failure" of persuasion, and may not take part in the hearing except as witness, or participate "in the deliberations of the commission in such case." § 132.
162. Ibid.
163. The individual Commissioner may issue subpoenas. § 130 (7); Rule 7(a).
164. "... upon a showing of the necessity therefor." Rule 7(a). There is provision for depositions. Rule 8.
165. Rules 2(g), 4(g), 5(b).
166. Both the commission and the respondent have power "reasonably and fairly to amend" their pleadings. § 132; Rules 2(i), 4(e).
167. "The commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity." § 132; Rule 5(f) (2).
168. Rule 5(h).
169. The right to counsel is expressly granted. § 132; Rule 5(c).
170. Rule 5(c), (n).
171. Section 132; Rule 9.
172. Rule 9(e).
173. Section 132.
174. Section 134.
175. Section 133.
The review, which is to be expeditious, is limited to the record made at the hearing, except in unusual circumstances, and findings of fact are conclusive if "supported by sufficient evidence on the record considered as a whole." While the Law expressly provides judicial review only of orders issued after formal hearings, some prior determinations may be held reviewable. Whether judicial review of SCAD decisions cutting off the complainant before formal hearing is desirable is debatable pending further experience under the Law, and demonstration of the adequacy of intra-agency review procedures. SCAD's Procedural Rules permit applications for reconsideration of both a finding of no probable cause and a conciliation settlement considered unsatisfactory. The Chairman rules on the application, and if he accepts it, there is review by three other Commissioners who may order the original Commissioner to take whatever action they see fit.

It is not clear whether the Rules contemplate a formal hearing in three-Commissioner reconsideration proceedings; however, a record is required which would be appropriate for judicial review.

176. "All such proceedings shall be heard and determined by the court and by any appellate court as expeditiously as possible and with lawful precedence over other matters." Ibid; see Rep. Temp. Comm. 32 (1945).


178. Review may be had by any "person aggrieved by such order of the Commission..." (italics added). § 133.

179. E.g., dismissal for insufficiency on the face of the complaint, or for lack of probable cause, or because of the 90-day statute of limitations. Interview with SCAD General Counsel. Absence of a specified procedure for judicial review does not preclude review under such methods as mandamus, certiorari, and prohibition [see United States v. Griffin, 303 U.S. 226, 238 (1938)], providing that legislative intent is not conclusive against judicial review. Switchman's Union of N. Amer. v. Nat'l Med. Bd., 320 U.S. 297, 301, 303 (1943); cf. dissent at 316, and the cases there cited. Moreover, a declaratory judgment action is apparently appropriate to test the decision of a state agency that it has jurisdiction. New York Post v. Kelley, 296 N.Y. 172, 71 N.E.2d 455 (1947); cf. Alleghany Ludlum Steel Corp. v. Kelley, 295 N.Y. 507, 64 N.E.2d 352 (1945); Bank of Yorktown v. Boland, 220 N.Y. 673, 21 N.E.2d 191 (1945). The latter two cases were distinguished by the dissenting opinion in the Post case on the ground that there it was a question of law whether the SLRB had jurisdiction, whereas in the Post case it was a question of fact; 296 N.Y. at 192, 71 N.E.2d at 462.

It should be noted that the Post case makes no decision on the merits; it decides only that a question of action is stated and that the jurisdiction may be tested. The Court of Appeals has upheld agency determinations of jurisdiction. Alleghany Ludlum Steel Corp. v. Kelley, supra; Red Hook Cold Storage Co. v. Dept of Labor, 295 N.Y. 1, 9, 64 N.E.2d 265, 268 (1945); Mounting & Finishing Co. v. McGoldrick, 294 N.Y. 104, 103, 60 N.E.2d 825, 827 (1945). The latter two cases cite the rule of NLRB v. Hearst Publications, 322 U.S. 42, 78, 64 S.Ct. 265, 268 (1944) that the determination of the administrative agency is to be upheld if supported by "warrant in the record and reasonable basis in law".

180. RULES 2 (1), (m), (n), 3 (e), (f), (g). On reviewability of such determinations including settlement agreements, see related discussion in ROSENFAER, THE NATIONAL LABOR POLICY AND HOW IT WORKS 614-5 (1940); 5 BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 534, 163-4 (1942). For general discussion of judicial review of agency findings in New York, see 1 id. at 326-68.
Volume of Investigations and Complaints.181 In its first eighteen months to the end of 1946, SCAD undertook on its own initiative 174 investigations, of which 146 have been closed. In 61, no unlawful practice was found, while in the remaining 85, settlement was achieved through conference and conciliation. The Commission also reviewed over 12,000 employment application forms submitted by employers and employment agencies.

During the same period, SCAD received 536 complaints, an average of slightly under one per calendar day. The data do not indicate the particular unfair practices alleged. Over half the complaints, 366, were based on color, almost all filed by Negroes; 121, filed chiefly by Jews, were based on creed; and 68, of which almost half were filed by Italians, complained of discrimination because of national origin. Over 450 of the complaints were directed against employers, 40 against unions and 14 against employment agencies.

The volume of complaints is below that received in New York by FEPC during the war182 or currently by the aggregate of private agencies in this field.183

Of the 536 complaints, 421 are closed cases. In 96 cases, or 23%, probable cause was found and the alleged discrimination removed by conference and conciliation. In 109 cases, over 25% of the total, SCAD’s policy of using a complaint as an opportunity for reviewing the entire employment practice of respondent184 led to the discovery and elimination of unfair practices, although the complaint involved was decided to be without probable cause. No violation was found in 181 cases, or 30% of the complaints. In the remaining cases, apparently no action was required: 14 were withdrawn and 71 ruled outside the agency’s jurisdiction. Only a few of the latter group were referred to other state agencies enforcing legislation against discrimination.185

Provisions Regarding Discrimination Generally: Educational Powers

The Law’s preamble186 and statement of purposes187 make clear a legislative intent to enable SCAD to combat discrimination as a menace to democ-

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181. These data appear in the statistical tables following 2 SCAD ANN. REP. 11 (1947).
182. FEPC’s Region II received 820 complaints in the year starting July 1, 1943, the lowest in any single month being 40. The next six months ending Dec. 31, 1944, it averaged 37 monthly. FEPC FIRST REPORT 115-6 (1945).
183. Unpublished case load figures indicate that three of the leading anti-bias organizations have greater New York case loads. It should be remembered that the effectiveness of their work has been increased by the mere existence of SCAD; see 1 LAW & SOC. ACTION 8 (1946).
184. See supra pp. 854-5.
185. Interview with SCAD General Counsel.
186. “… prevention and elimination of practices in discrimination in employment and otherwise.” (Italics added).
187. “… and the legislature hereby finds and declares that practices of discrimination . . . are a matter of state concern, that such discrimination . . . menaces the institutions and foundations of a free democratic state. A state agency is hereby created with power to eliminate and prevent discrimination in employment . . . and to take other actions.
racy. SCAD apparently has the authority to coordinate and direct state activity toward this end, and to engage in a major educational campaign. The chief power granted is to create advisory agencies and councils, which may be state-wide or for particular localities. These groups may be empowered by SCAD to study discrimination either generally or with reference to specific situations, to foster good will among the various groups in the population and to suggest "programs of formal and informal education which the commission may recommend to the appropriate state agency." SCAD also is authorized "to issue such publications and such results of investigations and research as in its judgment will combat discrimination. In terms of long-run social potentiality, both the Temporary Commission and SCAD have regarded these educational provisions as the most significant parts of the Law.

The practical effectuation of these powers appears still in the organizational stage. During SCAD's first year, two community councils were established, at least one being a continuation of the committee that had functioned under the State War Council. Three more were set up in the last half of 1946, including one in New York City. At least two others are almost fully organized and efforts are going forward in other communities. This activity is under the direction of a Community Council Organizer in the Education, Public Relations and Research Division of SCAD. The established community councils have brought conditions requiring investigation to the attention of the Commission and have themselves undertaken studies in education and housing.

No research publications have been issued by the agency. The chief accomplishment in research has been the marshalling of leading universities in New York and neighboring states for a program of study to be supervised by the schools for the general use of SCAD. Studies under way include a community survey to gain detailed knowledge of discrimination in all its phases, an analysis of attitudes of employees in the retail trades to co-workers of...

..." (italics added to note that the Law expressly distinguishes between discrimination in employment and discrimination generally). § 125.

188. Sections 120, 130 (4), (8).
189. Section 130 (8).
190. Section 130 (9).
194. Id. at App. B, Organization Chart.
195. Id. at 19-22; SCAD Rev. First Year's Operations 10-1 (1946).
minority groups, and a review of discrimination in assignments to duty and other aspects of public employment.196

In cooperation with the State Bureau of Adult Education, a regular program of activity in the schools has been planned and will shortly be started.197 In New York City social science classes 17,000 copies of a pamphlet descriptive of the work of SCAD are in use. Almost 50,000 other copies of this agency pamphlet, which has gone through three editions, have been distributed to employers throughout the State.198 Knowledge of SCAD and its activities is also being spread through reprints of Commissioners' speeches and articles, press releases, radio and movies.199

Summary

Calling public attention to the problem of discrimination is the chief task and accomplishment of SCAD. Its educational efforts and the enforcement of the new civil right of equal employment opportunity compose its record. The agency is aware that the Law contains controversial and unprecedented provisions.200 Many provisions of the statute and practices of SCAD can best be understood in terms of a "cautious" policy,201 a desire to pacify opposition and an apprehensiveness about going too far too fast.202

While studies have shown areas in which enforcement is apparently weak,203

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196. Interview with Director of Research.

197. Interview with Director of Public Relations, Education and Research Division.

198. 2 SCAD ANN. REP. 23 (1947). The pamphlet, INSIDE FACTS, was most recently revised in Dec., 1946.

199. 2 SCAD ANN. REP. 20 (1947); SCAD REV. FIRST YEAR'S OPERATION 13-4 (1946); releases are distributed to about 150 daily newspapers throughout the state. Interview with Director of Public Relations, Education and Research Division.

200. 1 SCAD ANN. REP. 1, 17 (1946) (other states are watching). The law has been noted abroad. See 109 JUST. P. 207 (1945).

201. Commissioners have defended their "cautious" policy against "liberal" critics. N. Y. Times, Apr. 5, 1946, p. 19, col. 4.

202. 2 SCAD ANN. REP. 24 (1947); 1 SCAD ANN. REP. 2 (1946); cf. Turner, supra, note 138, at 16 (1946); N. Y. Times, Mar. 28, 1947, p. 16, col. 2. Compare statement of Governor Dewey that if the Law "were left to a collection of reformers and social dreamers it would crash with a mighty bang. . . . In New York I have appointed a group of very sound, high minded people who made it a living reality. . . ." Letter to Sen. Smith (R., N.J.), Dec. 21, 1945, 92 CONG. REC. 383 (1946), with verdict of Sen. Johnston (D., S.C.) that SCAD ". . . is a lukewarm kind of an agency. It investigates under cover and does nothing. It keeps secret practically everything that it does. . . . That is the way they handle it, and it is done in order to keep from stirring opposition. . . ." Id. at 388. Quoted in 1 LAW & SOC. ACTION 8 (1946).

203. Employment agencies are apparently the chief present enforcement problem. N. Y. Times, Mar. 28, 1947, p. 16, col. 2; 1 LAW & SOC. ACTION 1 (1946) (of 102 agencies studied, 37 show willingness to obey the law, 35 do not even give lip service, and 30 are openly determined to flout the Law); 2 id. 48 (1947) (only 14 of 121 agencies refused to accept a discriminatory order). Insurance firms have apparently not modified their policy against hiring Negro and Jewish office workers. AMERICAN JEWISH CONGRESS, SURVEY
they seem to have revealed no inherent defect in the administrative agency technique. The general effectiveness of SCAD is indicated by a survey of private anti-discrimination organizations, showing a 43% rise in complaints received in various out-of-state cities, but a 6% decrease in New York. None of the predictions made by its original opponents has proved valid. While only a preliminary assessment can now be made, SCAD demonstrates at least that the new legal weapon can be made effective in the struggle against discrimination.

The Brotherhood of Locomotive Engineers is apparently recalcitrant. N.Y. Times, supra. Unions generally seem to have given satisfactory cooperation, in some instances amending their constitutions to preclude discrimination. 19 LAB. REL. REP. (Labor-Management) 125 (1947); SCAD Press Release, Jan. 8, 1947.

204. 1 LAW & SOC. ACTION 19 (1946). "Only two of 107 employment agencies in New York and Newark had discriminatory registration forms (which they agreed to change to conform to N.Y. and N.J. state laws) while 89 percent of the agencies outside of New York and Newark had discriminatory forms." Ibid.