

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MONONA AVENUE, ROOM 500
MADISON, WISCONSIN**

<p>Carolyn A. Lazar, Complainant vs. Madison Metropolitan School District, Respondent</p>	<p>AMENDED FINAL ORDER PER STIPULATION Case No. 2472</p>
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In consideration for the Respondent Appellant's withdrawal of the Writ of Certiorari filed as Case Number 81 CV 3914 and in light of the attached Stipulation entered into by the Complainant and Respondent, the Madison Equal Opportunities Commission hereby vacates the Final Order entered in this matter, dated June 26, 1981, and substitutes the attached Stipulation Agreement as the Commission's final order. It is understood and agreed to by all of the undersigned parties that the terms of the attached Stipulation may be enforced in any court in the same manner as any other final order entered pursuant to Section 3.23, Madison General Ordinances. This Amended Final Order Per Stipulation will become effective only upon withdrawal of the Writ of Certiorari filed as Case Number 81 CV 3914.

Carolyn Lazar, Complainant
Date: 9/29/81

Madison Metropolitan School District,
Respondent
Date: 9/25/81

Robert Kelly, Attorney for Complainant
Date: 9/23/81

Clarence Sherrod, Legal Counsel for Respondent
Date:

A. Gridley Hall, EOC President
Date: 8/27/81

J. C. Wright
EOC Executive Director
Date: 8/28/81

EQUAL OPPORTUNITIES COMMISSION, CITY OF MADISON

<p>Carolyn A. Lazar, Complainant vs. Madison Metropolitan School District, Respondent</p>	<p>AMENDED FINAL ORDER PER STIPULATION EOC Case No. 2472</p>
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STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between Carolyn Lazar, the Madison Metropolitan School District, and Madison Teachers Inc., in full and final settlement of the above entitled matter, as follows:

1. That neither the signing of this agreement nor any actions taken in fulfillment of the representations contained herein, shall constitute an admission by the Madison Metropolitan School District of any violation of Madison's Equal Opportunity Ordinance, Wisconsin's Fair Employment Law, or Title VII of the Civil Rights Act of 1964, as amended, or any other local, state or federal law relating to discrimination or equal opportunities in employment.
2. That Madison Metropolitan School District shall, on August 19, 1981, issue to Carolyn Lazar, a regular full time, individual teaching contract for the 1981 82 school year.
3. That Carolyn Lazar shall be placed on the contractual salary schedule at Track 2, Level 10, for the 1981 82 school year.
4. That Carolyn Lazar's seniority date shall be January 20, 1975.
5. That upon compliance with the above terms, the parties further agree:
 - a. That Madison Metropolitan School District shall withdraw its Petition for Writ of Certiorari filed with the Circuit Court for Dane County, Branch 3 on July 24, 1981 in Case #81 CV 3914.
 - b. That the parties shall jointly request the Madison Equal Opportunities Commission to vacate its order issued on June 26, 1981 in the above captioned matter, and substitute therefore as its Order, the terms and conditions of this Stipulation.

Carolyn Lazar
Date: August 19, 1981

MADISON TEACHERS INCORPORATED
By: John A. Matthews, Executive Director
Date: August 19, 1981

MADISON METROPOLITAN SCHOOL DISTRICT
By: _____
Dated: August 20, 1981

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
351 WEST WILSON STREET
MADISON, WISCONSIN**

<p>Carolyn Lazar 7413 Old Sauk Road Madison, Wisconsin 53717</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Madison Metropolitan School District 545 West Dayton Street Madison, Wisconsin 53703</p> <p style="text-align: center;">Respondent</p>	<p>FINAL ORDER</p> <p>EOC Case No. 2472</p>
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The Examiner issued his Recommended Findings of Fact, Conclusions of Law and Order on December 16, 1980. Timely exceptions were filed, written arguments were submitted and oral arguments were heard by eleven Commissioners.

Based upon a review of the record in its entirety, the MADISON EQUAL OPPORTUNITIES COMMISSION issues the following:

ORDER

That the attached RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER of the Examiner is adopted in its entirety except that number 2 of the Recommended Order is deleted and is replaced by the following:

2. Respondent shall pay to the Complainant all amounts she would have received had she been hired for the vacancy available at the Marquette Middle School for which Stasia Hangis was hired and began employment in January of 1980. Payments shall cover the period from the time Complainant would have begun teaching in January of 1980 to the time that Complainant is instated into the next available position by Respondent pursuant to Order 1 above. The backpay shall, however, be reduced by any amounts earned by the Complainant over said period, except that amounts received as unemployment or welfare payments shall not reduce the backpay allowable but shall be withheld and immediately paid to the unemployment reserve fund or to the welfare agency making such payment.

Commissioners Amato, Baerwolf, Goldstein, Hall, Perkins and Swamp all join in affirming the Examiner's decision in the manner described above. Commissioners Abramson, Fineman, Hisgen and Mendez abstain¹ from rendering an opinion. Commissioner Conrad disqualified himself.

Signed this 26th day of June, 1981.

A. Gridley Hall, Acting EOC President

J.C. Wright, Executive Director

¹The four Commissioners do not formally dissent from the majority but do not join in their affirmation.

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
351 WEST WILSON STREET
MADISON, WISCONSIN**

<p>Carolyn Lazar 7413 Old Sauk Road Madison, Wisconsin 53717</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Madison Metropolitan School District 545 West Dayton Street Madison, Wisconsin 53703</p> <p style="text-align: center;">Respondent</p>	<p>NOTICE OF RIGHT TO APPEAL</p> <p>EOC Case No. 2472</p>
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Attached are the Recommended Findings of Fact, Conclusions of Law, and Order of the Equal Opportunities Commission's Hearing Examiner. The Rules of the EOC provide for appeal of this decision in the following terms:

10.1 "Either party may appeal the recommended findings of fact, conclusions of law and order of the Commission's designee within ten (10) days after receiving them by filing written exceptions to such findings, conclusions, or order."

10.2 "If neither party appeals the recommended findings of fact, conclusions of law, or order within ten (10) days, they become final findings, conclusions and order of the Commission."

This Notice, Findings, Conclusions of Law and order have been sent to both parties by certified mail, with a dated receipt. Any appeal from these Findings, Conclusions and order must be postmarked or delivered at the offices of the EOC within ten (10) days of the date of receipt.

Date at Madison, Wisconsin this , 16th day of December, 1980.

Allen T. Lawent
Hearing Examiner

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
351 WEST WILSON STREET
MADISON, WISCONSIN**

<p>Carolyn Lazar 7413 Old Sauk Road Madison, Wisconsin 53717</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Madison Metropolitan School District 545 West Dayton Street Madison, Wisconsin 53703</p> <p style="text-align: center;">Respondent</p>	<p>EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER</p> <p>EOC Case No. 2472</p>
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On September 25, 1978, a complaint was filed with the Madison Equal Opportunities Commission (MEOC) alleging that the Respondent discriminated against the Complainant on the basis of age in regard to employment. Said complaint was amended on January 16, 1980 to include a charge that Respondent had discriminated against Complainant by failing to hire her in retaliation for Complainant having filed the September 25, 1978 complaint.

The charges were investigated by MEOC Human Relations Investigator Mary Pierce. An Initial Determination dated March 25, 1980 was issued, finding probable cause to believe that discrimination had occurred in regard to both the age and retaliation allegations.

Conciliation was waived and/or unsuccessful and the above entitled matter was certified to public hearing.

Said public hearing was held on August 22, 1980 in the Rear Lecture Hall. of the Madison Public Library, 201 West Mifflin Street, Madison Wisconsin. The Complainant appeared in person and by her attorney Robert Kelly of Kelly and Haus. The Respondent appeared by its Legal Counsel Clarence Sherrod.

Based on the hearing and after consideration of the post hearing briefs submitted by the parties, the Examiner proposes the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. Carolyn Lazar, the Complainant, is an adult female who was born on January 8, 1943 and who resides in the State of Wisconsin.
2. Respondent, Madison Metropolitan School District, is a school district with a main office at 545 West Dayton Street in the City of Madison.
3. Complainant is an honor graduate of the University of Wisconsin-Madison, having obtained a Bachelor of Science degree from said university in June of 1964.

4. Complainant possesses an unlimited life certificate from the Wisconsin Department of Public Instruction (WDPI) as a secondary school teacher in both English and French. She obtained said unlimited life certificate in June of 1964.
5. Complainant was employed by the Madison Metropolitan School District (hereinafter, the "District") from the 1964 65 school year through the 1967 68 school year as a full time teacher of French and English at the LaFollette Senior and Junior High Schools. Her teaching assignment involved teaching four classes of French and one class of English at LaFollette.
6. In June of 1968, Complainant resigned her employment with the District and moved with her husband to Milwaukee where he was to attend dental school. She did not teach at all during the 1968 69 school year because she gave birth to a child in the summer of 1968.
7. In September of 1969, Complainant became employed as a substitute teacher at Nicolet High School in Glendale, Wisconsin. She taught in said substitute capacity until January of 1970 at which time she began employment as a French teacher at Cudahay High School in Cudahay, Wisconsin. Although Cudahay offered to continue her employment through the 1970 71 school year, she accepted employment as a full time teacher of French at Nicolet in June of 1970 and taught there through the 1971 72 school year. She chose Nicolet over Cudahay because Nicolet was a three mile round trip from her home whereas Cudahay was a forty mile round trip.
8. As a full time teacher at Nicolet, Complainant taught French II and French III. Further, at the request of her Department Chairperson, Complainant designed and implemented a program of Team Teaching in French at Nicolet, and she taught French III on a team basis while employed at Nicolet during this 1970 72 period.
9. Complainant resigned her teaching employment at Nicolet upon the conclusion of the 1971 72 school year in order to devote her energies to being a full time mother and wife.
10. A pending divorce caused Complainant to seek a return to teaching in the Spring of 1977. She first applied for full time employment as a French teacher with the Madison Metropolitan School District. When it became apparent she was not going to obtain such a regular full time position for the 1977 78 school year, she applied for and was accepted for employment as a "substitute teacher" for said school year.
11. On May 11, 1978, Complainant was interviewed for inclusion in the District's "employment pool" as a candidate to teach French and English on a full time basis. Said interview was conducted by Caroline L. Taylor, an assistant principal assigned to LaFollette High School, who was in her fourth year of employment with the District.
12. The employment pool is operated by the District as follows:
 - a. Candidates for full time employment with the District are reviewed first on the basis of their credentials.
 - b. If their credentials are in order and meet the District's minimum standards, such candidates are then personally interviewed by administrative personnel, such as principals and assistant principals, who are selected on an informal rotating basis.
 - c. Those candidates who are determined, upon review of both their credentials and the personal interview, to be acceptable for employment with the District are placed by area of teaching certification into the employment pool.
 - d. When a vacancy occurs in a particular school building in a particular area of certification, persons in the employment pool in that area of certification are referred by the District's Employment Service's office to the involved building principal for interviews.
 - e. After interviewing the referred candidates, the building principal recommends one such candidate for employment to Employee Services. A building principal may also ask for additional candidates to be certified prior to making a recommendation.
13. After Complainant's interview by Taylor for admission into the employment pool, Taylor prepared a written "Interview Summary of her interview with Complainant using a form furnished by the District for that purpose.

14. Taylor could have rated Complainant from a "1" to a "5" and did rate Complainant a "3". All of Taylor's comments about Complainant were "positive" except for one (see Complainant's Exhibit 7). Some of the positive comments included:
 - a. extremely self assured
 - b. has high expectations
 - c. was impressed with her understanding of his students
 - d. vivacious personality
 - e. has had much positive feedback from students during her teaching experience
15. Taylor's rating of a "3" for Complainant stemmed solely from experiences Taylor had with Complainant as a substitute teacher at LaFollette. Taylor felt Complainant had a capacity for offending other faculty members and being overbearing with her colleagues.
16. Complainant was initially rejected for admission in the employment pool, but did not learn of said rejection until sometime in June of 1978.
17. Taylor's belief that Complainant had the capacity to offend other faculty members derived from the following incidents that occurred while Complainant was a substitute teacher at LaFollette during the 1977 78 school year:
 - a. A job discussion that Complainant had with a French teacher at LaFollette. Lazar had offered to trade the other teacher English classes for French classes should she (Lazar) procure a part time opening that was supposedly available. It was Lazar's understanding that the other teacher preferred teaching English, and Lazar preferred French. The opening involved English classes. However, the other teacher became apprehensive that Lazar was after her job and reported the incident to Taylor. Taylor discussed the matter with Lazar. Lazar apologized to the other teacher with regrets that her (Lazar's) intentions were misunderstood, and the apology was accepted with no further problems arising.
 - b. An incident where Complainant had criticized a regular teacher in the faculty lounge because the regular teacher had left Complainant an inadequate lesson plan.
 - c. Incidents reported second hand to Taylor by a LaFollette department chairperson regarding Complainant's overexuberance in asking regular ("permanent") teachers about their future plans.

None of these incidents are detailed in the "Interview Summary" and none appear on Complainant's substitute teacher evaluation forms.

18. Upon learning of her rejection by the employment pool, Complainant telephoned Dr. Shirley Baum of Employee Services who informed Complainant that her credentials were not up to par.
19. Complainant then contacted her union representative, John Matthews. Matthews recommended to Complainant to write a letter to Baum requesting reconsideration of the employment pool rejection. Baum replied in a letter to Complainant dated June 16, 1978 informing Complainant that "based upon your qualifications as compared with other applicants, you were not selected."
20. Matthews then arranged a meeting with Director of Employee Services Sullivan, and took a copy of Complainant's personnel file to said meeting. After reviewing Complainant's teaching evaluations, recommendations, transcripts, and so on with Matthews, Sullivan concluded the meeting by asking for some time to review the documentation.
21. On July 11, 1978, Sullivan wrote to Matthews informing him that Complainant was accepted into the 1978 79 Employment Pool on a "non precedential" basis, and that she would be considered along with the other candidates for English/French vacancies.
22. A full time position for a French teacher became available at Marquette Middle School for the 1978 79 school year as the result of a resignation.
23. George Maki, the building principal at Marquette Middle School, filled out a "Vacancy Notice" dated July 13, 1978 and filed it with Employee Services for the District. Employee Services subsequently referred to Maki the following four names:
 - a. Gertrude Pieterick

- b. Nancy Gathing
- c. Carolyn Lazar
- d. Jennifer Peters

24. Maki travelled "downtown" to the Employee Services office at 545 West Dayton Street in the City of Madison. There Maki reviewed the personnel files of the four above named candidates.
25. Complainant's personnel file contained at least the following documents at the time of Maki's review:
- a. copies of all of Complainant's written evaluations for her first four years of employment with the District
 - b. copies of Complainant's most recent employment application, including a transcript of her college credits and grades received and written references relating to her profession competence from at least seven administrators who had worked with her
 - c. a specific notation on her application that she had "Developed and implemented team teaching of French IV at Nicolet H S" and that she had "trained numerous student teachers"
 - d. all evaluations Complainant had received as a substitute teacher
 - e. a copy of the "Interview Summary" prepared by Taylor
26. On July 17, 1978, Maki interviewed Complainant for the full time French vacancy. Upon leaving the interview, Maki told Complainant that he could see no trouble at all with her getting a job except for her experience.
27. Maki recommended Jennifer Peters for the vacant French position at Marquette Middle School and she was hired by the District.
28. Maki's reasons for not recommending Complainant were as follows:
- a. tend toward average performance according to credentials
 - b. concern about her capacity to work in a team arrangement which is required in this position
 - c. does not meet all requirements for this position
29. Lazar's credentials tended toward above average performance.
30. Qualification 3 for the position outlined in Maki's vacancy notice was that the applicant "must be multi lingual in training background due to school and student needs." Qualification 7 for the position outlined in said vacancy notice was that "Background should preferably include wide experience such as travel to foreign countries and extensive knowledge of cultural differences."
31. Peters was multi lingual; Complainant was bi lingual.
32. Peters had spent several years more time in Europe than Complainant, including more time in France.
33. Peters past teaching experience consisted primarily of having taught in the District for a brief period as an on call substitute, and Peters had substituted more frequently than the Complainant at Marquette.
34. On September 25, 1978, Complainant filed a "Complaint of Discrimination" with the Madison Equal Opportunities Commission (MEOC) alleging that she was denied employment because of her experience, i.e., because of her age which was then 36 in her failure to be hired for the French vacancy at Marquette for the 1978 79 school year. At the time of filing her complaint, Complainant was not aware of Taylor's comments on the "Interview Summary" that had been prepared for the employment pool application procedure.
35. Maki was interviewed as part of the investigative process stemming from the September 25, 1978 complaint filed with the MEOC. Maki also was required to attend a fact finding conference and he was required to submit to detailed questions as part of the investigative process.
36. Peters resigned from employment with the District in December of 1979, leaving a new full time teaching at Marquette to begin in January of 1980.
37. Maki filled out a new "Vacancy Notice" and forwarded it to Employee Services where it was received on December 13, 1979.

38. Employee Services referred a list of four candidates to Maki for the January of 1980 vacancy:
 - a. Richard Kelsey
 - b. Lynda Lewis
 - c. Nancy Gathing
 - d. Carolyn Lazar
39. Maki interviewed all the candidates except for Complainant.
40. Maki did not recommend any of the four candidates referred by Employee Services, but recommended a woman named Stasia Hargis who had no prior full time experience but had substituted at Marquette Middle School. Hargis was hired for the position by the District.
41. At the time of Maki's recommendation for the 1980 vacancy, Hargis' total teaching experience was as a substitute for the District from September of 1979 through December 13, 1979.
42. At the time of Maki's recommendation, Hargis was not certified to teach French by the Wisconsin Department of Public Instruction, although she was certified by WDPI to teach English.
43. Hargis was not in the District's employment pool at the time of Maki's recommendation.
44. Section 118.19(1), Wis. Stats. effective at the time of Maki's recommendation provided as follows:

Any person seeking to teach in a public school or in a school or institution operated by a county or the state shall first procure a certificate or license from the department.
45. Section 118.21(1), Wis. Stats. effective at the time of Maki's recommendation provided in relevant part that "a teaching contract with any person not legally authorized to teach the named subject or at the named school shall be void."
46. On August 12, 1980, the State Superintendent of Public Instruction in a Final Order granted Stasia Hargis a special license to teach French retroactively for the 1979 80 school year in the Madison Metropolitan School District. Hargis is not teaching French in the 1980 81 school year nor is yet fully certified to teach French in the State of Wisconsin.
47. Sec. PI 3.03 (3)(a) Wisconsin Administrative Code requires that a school district which is a party to an application for special license justify the need for such license. One of the most significant facts militating against the issuance of such a license is the availability within the District of fully certified personnel for the position for which the special license is sought. Accordingly, had the Bureau's processing of the application in question revealed the availability of certified individuals prior to approval of the application, the Bureau (for Teacher Education and Certification) could properly have denied the application. (see Superintendent Thompson's Final Order, page 2, for which Administrative Notice was taken)
48. Stasia Hargis applied to the WDPI for a special license to teach French on December 18, 1979 in conjunction with a written request for approval from the District justifying the need for said license. The Bureau for Teacher Education and Certification proceeded to approve the application and issued a form assuring the District that Hargis had in fact been duly issued a special license and that the form would serve as verification of that fact since the license form was still in the process of being printed. The District then entered into a contract with Hargis. Subsequent to the contract but prior to the printing of the license, a third party advised the Bureau that several individuals with full certification in French had been turned down by the District in favor of offering the position to Hargis. Thereafter the Bureau withheld the printed license from Hargis and advised both her and the District that the application for special license had been denied.
49. The position that Stasia Hargis filled did not require that the individual be multi lingual, but did require the individual to be bilingual and fluent in French.
50. Stasia Hargis was not qualified for the French teaching position that she was hired for, although the hiring was retroactively legitimized by the Superintendent granting her a special license.

51. Maki, in addition to not interviewing Complainant for the January of 1980 position, failed to inquire about any of Complainant's recommendations, including one from LaFollette High School Principal August Vandermuehlen and one from then Assistant School Superintendent Donald Hafeman. Hafeman's recommendation stated in part that "Carolyn was also held in esteem by her colleagues."
52. Maki did not always interview all of the candidates certified for each position. He would not interview a candidate when he felt he was sufficiently familiar with that individual's performance. He did interview Nancy Gathing for the January of 1980 position. Gathing, like Complainant, was also one of the candidates certified for the position in 1978 when Peters had been hired.
53. The District hired at least 20 teachers at Complainant's experience level or higher in the years of 1978 through 1980, inclusive. Maki had also recommended experienced teachers for hire during the course of his employment as Marquette Middle School Building Principal.
54. It would have cost the District initially at least \$3,000 more per year to hire Complainant than to hire Peters or Hargis for the respective vacancies.
55. Complainant was qualified for the teaching position which was to begin in January of 1980 and for which Hargis was hired.
56. Hargis, as part of her substitute teaching experience, had taught for the Allied Arts program at Marquette for several consecutive weeks to finish out the Fall semester of 1979 as a replacement for another teacher who had to discontinue employment during the semester.

RECOMMENDED CONCLUSIONS OF LAW

1. Complainant is a member of a protected status, age, under sec. 3.23 of the Madison General Ordinances.
2. Respondent is an employer within the meaning of sec. 3.23 of the Madison General Ordinances.
3. Respondent did not discriminate against Complainant on the basis of age in violation of sec. 3.23 (7)(a) of the Madison General Ordinances.
4. Respondent discriminated against Complainant in violation of sec. 3.23 (7)(e) of the Madison General Ordinances by failing to hire her as a full time French teacher at Marquette Middle School for a position to have begun in January of 1980, because she had made a complaint and otherwise opposed practices that she in good faith believed to be prohibited by Sec. 3.23, Madison General Ordinances.

RECOMMENDED ORDER

1. Complainant shall be instated by Respondent into the next available full time French teaching position in the Madison Metropolitan School District.
2. Respondent shall pay to the Complaint all amounts of money she would have received had she been hired for the vacancy available at Marquette Middle School for which Stasia Hargis was hired and began employment in January of 1980. Payments shall cover the period from the time Complainant would have begun teaching in January of 1980 to the time that Complainant is instated into the next available position by Respondent pursuant to Order 1 above.
3. Respondent shall grant to Complainant all rights and benefits that she would have received had she been employed by Respondent in January of 1980, including but not limited to seniority, vacation, sick leave, personal holidays, and employer contributions to any employee benefit plans.
4. Complainant, upon instatement, shall begin employment at the salary level she would be had she been hired by Respondent in January of 1980.
5. Respondent shall consider Complainant immediately eligible for any health insurance or other insurance coverage she would have been eligible had she been hired in January of 1980. Respondent shall further

reimburse any amounts to Complainant which she incurred as expenses as the result of not being covered by insurance for which she would have been eligible had she been hired by Respondent in January of 1980.

6. Respondent shall send proof of payment of all amounts paid to Complainant to the Executive Director of the Equal Opportunities Commission. All backpay shall be paid by Respondent to the Complainant within 30 days of the date this order becomes final, and all additional amounts which Respondent must pay to Complainant shall be tendered in 30 day intervals or less, thereafter. Respondent shall also send proof of payment to the EOC Executive Director within 10 days of submitting each payment to Complainant. Respondent shall also be responsible for providing proof that the other requirements of this Order have been complied with upon the Equal Opportunities Commission's request.

MEMORANDUM OPINION

I. RESPONDENT'S MOTION TO DISMISS SINCE THE LOCAL ORDINANCE 'UNDER WHICH IT IS BROUGHT, SEC. 3.23 (7)(a), IS INVALID OWING TO ITS PREEMPTION BY CONFLICTING STATE LEGISLATION

This motion was not formally argued by both parties but was stated for the record in the event of an appeal. The Examiner summarily denies this motion to dismiss and states further that the issue of preemption is best left to the courts. The Respondent does state arguments in support of the motion in its post hearing brief. The Examiner states briefly that the Circuit Courts have so far upheld sec. 3.23 of the Madison General ordinances under the so called "home rule" statute, Wis. Stats. sec. 62.11(5). see State ex rel Badger Produce Co., Inc. vs. Equal Opportunities Commission, City of Madison, No. 79 CV 4405 (Dane County Circuit Court, Hon. George R. Currie, September 2, 1980)

II. RESPONDENT'S MOTION TO DISMISS ON THE GROUNDS THAT THE MADISON EQUAL OPPORTUNITIES COMMISSION LACKS THE STATUTORY AUTHORITY TO GRANT THE RELIEF REQUESTED THEREIN

Like the previous motion, this motion was not formally argued by the parties but was stated on the record to preserve it in the event of an appeal. This motion to dismiss is also summarily denied by the Examiner. The Hon. Judge Currie's recent decision cited above is a basis for denial of Respondent's motion.

III. MERITS OF THE CASE

The primary issues in this case are as follows:

1. Whether or not "experience" is analogous to "age" under sec. 3.23 (7)(a), Madison General Ordinances such that a failure to hire an individual on the basis of "experience" could in some instances constitute a violation of sec. 3.23 (7)(a) of the Madison General Ordinances?
2. If so, whether or not Respondent's failure to hire Complainant for a vacant full time position as a French teacher at the Marquette Middle School for the 1978 79 school year constituted a violation of sec. 3.23 (7)(a) of the Madison General Ordinances proscribing discrimination on the basis of age in regard to employment?
3. Whether or not Respondent discriminated against Complainant in violation of sec. 3.23 (7)(e) of the Madison General ordinances proscribing retaliation against persons who file complaints under the Madison Equal Opportunities Ordinance by failing to hire Complainant for a French teaching vacancy at Marquette Middle School to have begun in January of 1980?

As I decide the second issue in the negative, there is no need to address the first issue. However, I decide the third issue in the affirmative and order appropriate remedies (see RECOMMENDED ORDER).

A. THE SELECTION OF JENNIFER PETERS INSTEAD OF COMPLAINANT WAS NOT DISCRIMINATION ON THE BASIS OF AGE

Although the Examiner finds that Maki made a comment to Complainant regarding her experience (see Finding of Fact 26), the Examiner does not find that this was a factor in the hiring decision. Peters was hired instead of Complainant for a number of reasons:

- a. The job involved a Team Teaching situation, and Maki felt that Peters could interact more favorably than Complainant with other faculty members. Maki's perceptions arose from Taylor's comments

- on the Interview Summary alluding to Complainant's tendencies to offend faculty members at LaFollette High School
- b. Peters was multi lingual which was one of the job specifications; Complainant was bilingual but not multi lingual
 - c. Peters had spent more time in France than Complainant

While the comment on Complainant's Interview Summary made by Taylor was perhaps the only negative blemish on Complainant's entire teaching credentials, it was a factor in the decision not to hire Complainant and is not a discriminatory factor by itself. Complainant did not succeed in showing that the above listed factors were pretextual, particularly in light of Respondent's Exhibit 4 enumerating at least 20 teachers hired at or above Complainant's experience level and testimony that Maki had recommended experienced teachers for hire by the School District.

B. THE FAILURE TO HIRE COMPLAINANT FOR THE POSITION FOR WHICH STASIA HARGIS WAS HIRED CONSTITUTED RETALIATION IN VIOLATION OF SEC. 3.23 (7)(e) OF THE MADISON GENERAL ORDINANCES

Sec. 3.23 (7)(e), Madison General ordinances makes it unlawful "For any person or employer, employment agency, labor organization, individually or in concert with others to discharge, harass, intimidate, or otherwise discriminate against any person because he or she has opposed any discriminatory practices under this section or because he or she has made a complaint, testified or assisted in any proceeding under this chapter." (emphasis supplied)

In Herslof Optical v. DILHR (Leonard), No. 153 121 (Dane County Circuit Court, Hon. Michael B. Torphy, March 28, 1978), the Hon. Judge Torphy construed the retaliation provision of the Wisconsin Fair Employment Act (WFEA) as follows: (copy of decision available from the Court)

An employee's good faith opposition to practices viewed as discriminatory is protected under the Act from retaliation even though the practices may not themselves be discriminatory.

Herslof involved the protection of informal practices, whereas the matter at hand involves the protection of formal practices, such as the filing of a complaint, which are explicitly prohibited by Madison ordinance. Further, the Examiner holds that Judge Torphy's construction of the WFEA is applicable to the retaliation provision of sec. 3.23 (7)(e), Madison General Ordinances. The Complainant must therefore establish two essentials to prevail under sec. 3.23 (7) (e):

1. good faith opposition to practices believed by the Complainant to be discriminatory, regardless of whether or not the practices were discriminatory
2. a causal connection between the good faith opposition and Respondent's alleged retaliatory act (s).

In this case, the Complainant filed a "Complaint of Discrimination" subsequent to her 1978 rejection by Respondent but prior to her 1979 rejection for the position which was to begin in January of 1980. At the time of filing, the Complainant was aware of Maki's comment about her experience being a possible obstacle to her getting a job. Believing the term "experience" to relate to a form of age discrimination, aware that Respondent had hired an individual with some substitute teaching experience but no full time experience, having had unexplained problems in gaining entrance to Respondent's employment pool and then being accepted on a "non precedential" basis, and not being aware of Taylor's Interview Summary comments regarding Complainant's alleged capacity for offending other faculty members, Complainant filed her initial "Complaint of Discrimination" with the Madison Equal Opportunities Commission on September 25, 1978. The Examiner concludes for the reasons just stated that such filing was in good faith opposition to practices the Complainant viewed as discriminatory.

In the December, 1979 vacancy hiring, Respondent chose to fill the position with Stasia Hargis. Hargis was not certified to teach French by the WDPI and was therefore unqualified for the position. While the District aided Hargis in her attempt to obtain a special license, and such license was ultimately granted on a retroactive basis, the following factors raise a cloud of suspicion regarding the School District's conduct:

- a. While the special license was granted retroactively, Hargis is not yet fully certified to teach French
- b. The license was granted according to Superintendent Thompson because the licensing Bureau had assured the School District it would be granted, but the Bureau then later denied the special license on the basis of new information. In other words, the WDPI granted the license retroactively on a sort of "reliance" principle that is often associated with contract law but not because the license should have been granted. In fact, the WDPI Superintendent's order clearly implies that the denial of the special license ordinarily would have been proper.

The Examiner also concludes that the District must not have provided information regarding the rejection of the candidates licensed in French as this information was provided to the Licensing Bureau by a "third party." While it perhaps was not incumbent on the District to volunteer such information, such conduct by the District in failing to provide the information must be closely scrutinized.

Maki failed to inquire into any of Complainant's recommendations, including Principal Vandermuehlen's and Assistant School Superintendent Hafeman's which indicated that the Complainant was held in esteem by her colleagues. While Complainant's alleged capacity for offending faculty members was a distinguishing factor in the hire of Peters, such capacity could not have been fatal to her ever obtaining employment with the District, particularly in light of her otherwise impressive credentials. The failure to inquire into her recommendations combined with the failure to interview her casts further suspicion on Respondent's conduct. Maki had not interviewed her in about a year and a half, but he did interview Nancy Gathing who also was involved in the 1978 hiring certification. Further Maki was aware of Lazar's Complaint to the Madison Equal Opportunities Commission as the investigation had proceeded and he had been required to attend a fact finding conference and answer detailed questions regarding her complaint.

Regardless of whether Respondent's reasons for rejecting the other candidates were valid, Respondent's reason for not hiring Complainant are shown to be pretextual. Respondent failed to adequately consider the Complainant by failing to interview her and failing to inquire about her recommendations while at the same time going outside the certified list and choosing an unlicensed candidate. The manner in which the special license was sought is also suspicious, and Complainant has established by inference the requisite causal connection between her good faith opposition to Respondent's discriminatory practices filing a complaint and participating in the investigative process following the 1978 failure to hire and the Respondent's failure to hire her for the 1980 position - therefore establishing Respondent's violation of Section 3.23(7)(e), Madison General Ordinances.

Dated at Madison, Wisconsin this 16th day of December, 1980.

Allen T. Lawent
Hearing Examiner