EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

Sara Petzold 506 Evergreen Avenue Madison, WI 53704 Complainant vs. Princeton Club 4030 East Towne Mall Madison, WI 53704 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS Case No. 3252

BACKGROUND

On September 13, 1989, the Complainant, Sara Petzold, filed a complaint of discrimination with the Madison Equal Opportunities Commission (MEOC or Commission) against the Respondent, the Princeton Club. In her complaint, Petzold charged that the Respondent had discriminated against her on the basis of her sexual orientation in the provision of a public place of accommodation or amusement when the Respondent refused to sell the Complainant and her partner a family membership. The Respondent denied the allegation of discrimination. The complaint was assigned to a Commission investigator, who after an investigation, issued on November 27, 1989, an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant on the basis of her sexual orientation in the provision of a public place of accommodation or amusement. During a Pre-Hearing Conference, the Respondent requested the opportunity to file a Motion for Summary Judgment because it sought to challenge the jurisdiction of the Commission over the subject matter of the complaint. In an interim decision in the case of Rhone v. Marquip, MEOC Case No. 20967 (interim decision April 5, 1989), the Hearing Examiner determined that Motions for Summary Judgment were not appropriate in actions before the Commission. It was not clear from the text of this decision that such a prohibition extended to claims of a lack of jurisdiction. The Hearing Examiner set a briefing schedule for the submission of arguments on the issue of the Commission's authority to make jurisdictional determinations in complaints certified to public hearing, prior to the conduct of the hearing. The parties submitted arguments and after a lengthy delay, the Hearing Examiner concludes that the Commission has the authority to make such determinations.

DECISION

In his Interim Decision in the case of Rhone v. Marquip, MEOC Case No. 20967 (interim decision April 5, 1989), Hearing Examiner Harold Menendez, determined that the Commission was without authority to decide Motions for Summary Judgment once a complaint had been certified to public hearing. A Motion for Summary Judgment is generally one that states that there is no material dispute over the essential facts and that as a matter of law the moving party is entitled to a judgment in the party's favor. These motions are filed to save the time and expense related to a lengthy fact finding

proceeding where there is no actual need to find facts but only to apply the law to an accepted set of facts. Menendez determined that the Equal Opportunities Ordinance MGO 3.23 et seq. and the Rules of the Equal Opportunities Commission as a matter of policy state a preference to allow all parties the opportunity to "have their day in court." He determined this to be the policy expressed in the ordinance and by the Commission by interpreting the broad language of these underlying authorities. He did not specifically rule on the issue of Motions for Summary Judgment that challenge the jurisdiction of the Commission. It appears that he left open Motions on these grounds.

Jurisdiction is synonymous with authority or power. In order to have the authority to regulate, an administrative agency or court must have both jurisdiction over the person and the subject matter. If either of these elements are lacking, the agency or court is without authority to act. An administrative agency such as the Commission derives its authority or jurisdiction from the underlying statute or ordinance creating the agency. The jurisdiction of the agency is strictly limited to the subject matter of the authorizing statute or ordinance. Mid-Plains Tel., Inc. v. Public Service Commission, 56 Wis. 2d 780, 202 N.W.2d 907 (1973). Should an agency act where it has no subject matter jurisdiction that action is void. Board of Regents of University of Wisconsin System v. Wisconsin Personnel Commission,103 Wis. 2d 545, 309 N.W.2d 366 (Ct. App. 1981). Jurisdiction is such a fundamental matter that questions of jurisdiction may be raised at any time during the proceeding. Damp v. Town of Dane, 29 Wis. 419 (1872), Harrigan v. Gilchrist, 121 Wis. 127, 99 N.W. 909 (1904). This includes raising the issue of jurisdiction for the first time on appeal. In other words, a challenge to jurisdiction is never waived.

In the present case, the Hearing Examiner must allow the Respondent to file its motion challenging the subject matter jurisdiction of the Commission. While the Commission has expressed its general preference that all parties have their opportunity to fully present their claims, questions relating to the jurisdiction of the Commission must be addressed when they arise. If the Commission were to act without jurisdiction, its action would be a nullity. To force the parties to litigate a claim to the end of the process when there is a question of jurisdiction may well result in a significant expenditure of time and resources on the part of the parties and the Commission when such expenditures may not be necessary.

The question that the Respondent wishes to raise is one that clearly calls into question the Commission's subject matter jurisdiction. The Respondent contends that at the time of the incidents that led to the complaint, the conduct of the Respondent was not regulated by the Equal Opportunities Ordinance. In other words, the Respondent's position is that even if the Complainant proves all that she says she can prove that there would be no violation of the ordinance because the subject matter of the complaint was not regulated by the ordinance at the time.

For the foregoing reasons, the Hearing Examiner will allow the Respondent to file a Motion to Dismiss for lack of subject matter jurisdiction.

ORDER

1. The Respondent has already filed some argument relating to the question of the Commission's subject matter jurisdiction. The Respondent may supplement the record and file a formal Motion to Dismiss on or before February 28, 1994.
2. The Complainant may file a rebuttal argument or brief to that submitted by the Respondent on or before March 18, 1994.
3. The Respondent may submit a reply brief or argument to that of the Complainant on or before March 25, 1994.

4. When either party files a brief or argument with the Commission they will also serve a copy of the submission on the opposing party and the attorney or representative of that party, if any.

Signed and dated this _____ day of _____, 19____.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

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Sara Petzold 506 Evergreen Avenue Madison, WI 53704 Complainant vs. Princeton Club 4030 East Towne Mall Madison, WI 53704 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS Case No. 3252

This comes before the Hearing Examiner on Respondent's Motion to Dismiss the complaint for lack of subject matter jurisdiction. The complaint was filed on September 13, 1989 by Sara Petzold against the Respondent, the Princeton Club. The complaint alleges that the Respondent discriminated against her on the bases of her marital status and her sexual orientation when it refused to allow her and her partner to obtain a special couples membership at a reduced price. The Respondent, a health club, is a public place of accommodation or amusement as that term is used in the Ordinance, MGO 3.23(2)(e).

After investigation, the Investigator/Conciliator to whom this complaint was assigned issued an Initial Determination, on December 27, 1989, concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant in the provision of a public place of accommodation or amusement on both of the alleged bases. Efforts to conciliate the complaint failed. The complaint was transferred to the Hearing Examiner for the holding of a public hearing.

On June 13, 1990, the Respondent filed its motion to dismiss alleging that the Commission, in a previous case, had determined that it was without jurisdiction over a similar set of facts and that the City of Madison had recently amended the Ordinance to provide such protection. Before addressing the issues raised by the Respondent's motion, the Hearing Examiner requested and received briefs from the parties on the Hearing Examiner's authority to hear and decide such motions. The Hearing Examiner's authority was limited to hear some motions by an interim decision in Rhone v. Marquip, MEOC Case No. 20967 (Interim dec., April 5, 1989) After a protracted delay not caused by the

parties, the Hearing Examiner issued a decision on February 15, 1994 determining that motions to dismiss for lack of jurisdiction could not be covered by the limitation of the Rhone case.

The Hearing Examiner asked if the parties would like the opportunity to conciliate the complaint. Upon being informed that the Complainant wished the complaint to go forward, the Hearing Examiner gave the Respondent the opportunity to supplement its motion and to file any additional materials. On March 1, 1994, the Respondent renewed its motion. The Complainant responded and the Respondent replied.

DECISION

The Respondent argues that the complaint must be dismissed because, at the time of its filing, the conduct alleged in the complaint was not prohibited by the Ordinance. On June 14, 1990, the City of Madison put into effect a domestic partners provision to the Ordinance. In general, this provision makes it illegal for public places of accommodation or amusement that offer family memberships to deny the benefits of those memberships to couples who have registered as domestic partners with the City of Madison. This amendment extended certain protections of the Ordinance to domestic partners that had been previously determined not to be covered by the Ordinance. The Commission had reached this conclusion in the case of Olson and Popp v. YMCA, MEOC Case No. 3110 (October 10, 1985).

The YMCA case and the one presently before the Hearing Examiner are similar but not identical. The similarities and differences dictate the result in the current case.

In the present case, the Complainant sought to obtain a special couples membership from the Respondent. Upon inquiring to whom the membership applied, she was allegedly told that it could be purchased by married couples, families, engaged couples or others who were related to each other. She was subsequently told that sometimes unmarried couples were sold the couples membership in an effort to build the Respondent's membership base. The Complainant does not complain that the Respondent offers both single and couple memberships at different prices but argues that the limitations upon who may purchase a couples membership is illegally discriminatory.

In the YMCA case the Complainants sought a family membership to the YMCA. The YMCA used a definition of family that requires a principle member, with other members to be dependents within the meaning of the United States tax code. The Complainants, who were lesbians in a committed relationship, did not meet that definition. Their complaint alleged discrimination on the same bases, marital status and sexual orientation, as in the current complaint. Relying on its interpretation of the City Council's intent in adopting the Ordinance, the Commission dismissed the complaint finding that the allegations fell outside of the intent of the City Council. As in the current case, the Complainants did not challenge the practice of selling separate individual and family memberships.

In most respects the two cases are identical. Where the allegations of the complaints diverge is with respect to whether or not heterosexual couples who were not married have been offered couples memberships while lesbian couples were denied the special couples rates.

The Commission's decision in Olson and Popp v. YMCA requires that the allegations of discrimination based upon the Complainant's marital status be dismissed. The complaints are identical with respect to this specific allegation. In neither case did the Complainants contest the fact that the Respondent offered different levels of membership for those who were married and those who were single. The important allegation is who can qualify for the special advantageous membership price.

An additional factor in the current case that further removes the marital status issue of the current case from Commission jurisdiction is that the couples membership is offered to both those who are married and those who are not. The domestic partners provision of the Ordinance adopted in June of 1990 should cover this allegation, and its adoption after the Olson and Popp decision clearly indicates the lack of Commission jurisdiction at the time this complaint was filed.

The allegation of sexual orientation discrimination is different though. In the YMCA case, it was clear that the selection criterion was facially neutral and uniformly applied with respect to sexual orientation. It was a fact of state, federal and local law that tended to disqualify lesbians in a committed relationship from being able to qualify for dependency status and thus to qualify for a family membership. In the present case, the Respondent has a stated couples policy that is less clearly neutral than that in the YMCA case. Essentially the Respondent claims that only persons who are related by blood or marriage may purchase the couples membership. It is unclear whether couples who are engaged to be married fall within the general policy or an exception to the policy. The Initial Determination indicates that even with a somewhat less clear policy, the Respondent has granted unspecified exemptions from the stated policy.

The Respondent argues that the exemptions from the stated policy only involve persons who are related or who intend to become related, i.e. engaged couples. Without support the Respondent asserts that the intention to become related should be given the same status as actual relationship. The Hearing Examiner knows of no support for such a conclusion. While it is arguable that one's status as an engaged person can be construed to be legally similar to that of a married person, the record in the current matter reflects that the Respondent made unspecified exceptions to the policy. It is these exceptions that could lead to liability in this case.

While not deciding any of the facts at this time, if the Complainant demonstrates that the Respondent's failure or refusal to grant her an exception to the couples policy was, at least in part, based upon the fact that she is a lesbian or is involved in a lesbian relationship, discrimination under the Ordinance could be found. A claim of discrimination under these circumstances would not be barred by the Olson and Popp case because it is premised upon the intent of the Respondent and does not flow strictly from the legal peculiarities of a system that prohibits same sex marriages.

ORDER

The allegations of the complaint regarding discrimination against the Complainant on the basis of her marital status are dismissed. The allegations of discriminations regarding the Complainant's sexual orientation may proceed to hearing. A separate notice of a Scheduling Conference will be sent to the parties.

Signed and dated this 10th day of May, 1994.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner