

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

<p>Roy U. Schenk 1129 Drake St. Madison WI 53715</p> <p style="text-align:center">Complainant</p> <p style="text-align:center">vs.</p> <p>Women's Transit Authority 306 N. Brooks St. Madison WI 53715</p> <p style="text-align:center">Respondent</p>	<p>HEARING EXAMINER'S DECISION AND ORDER ON JURISDICTION</p> <p>Case No. 3377</p>
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### **BACKGROUND**

On October 1, 1996, the Complainant, Roy U. Schenk, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint alleges that the Respondent, the Women's Transit Authority, discriminated against him on the basis of his sex by refusing to provide him with a ride for purposes of shopping. The Respondent is an agency that provides rides to women during certain hours of the day for no charge. The Respondent denies having discriminated against the Complainant and asserts that the Commission is without jurisdiction to hear the Complainant's complaint.

The complaint was transferred to the Hearing Examiner to resolve the jurisdictional issue. The Hearing Examiner provided the parties with the opportunity to submit briefs in support of their respective positions. Based upon those briefs and the record in this matter as a whole, the Hearing Examiner concludes that the Commission has jurisdiction over this complaint.

### **DECISION**

In challenging the Commission's jurisdiction, the Respondent generally raises two arguments. First, because the City of Madison partially funds the Respondent through its Community Services grant program, the City of Madison must have intended to create an implied exception to the Equal Opportunities Ordinance Section 3.23(5), Madison General Ordinances, which prohibits discrimination in places of public accommodation or amusement. Second, even if there is not an implied exception, the Respondent's activities fall outside of the coverage of the ordinance.

The question of creation of implied exceptions to the ordinance has been approached by the Commission in the case of Schultz v. Madison Senior Center, MEOC Case No. 3188 (Comm'n Dec. 5/24/90, Ex. Dec. 9/15/89). In that case the Complainant alleged that the Respondent discriminated against him on the basis of his age by charging him a higher rate than that charged to older individuals for a theatre trip.

The Hearing Examiner, in that case, crafted the same type of exception that the Respondent in the present case urges. Essentially, the Senior Center was a creation of the Common Council and its budget is heavily subsidized by the City of Madison. Because of its history and continuing funding, the Hearing Examiner found the existence of an implied exception to the ordinance.

While recognizing the work of the Hearing Examiner in crafting the exception, the Commission discarded the Hearing Examiner's approach in reaching essentially the same result. The Commission determined that the Senior Center was merely passing on an arguably discriminatory price for tickets from the theatre and subsidies for transportation required by a federal program. The Commission reasoned that because the Senior Center was merely passing on charges determined by another and maintaining the same price for those elements over which it exercised control, the Senior Center was not discriminating against Schultz.

In basing its result on a theory different from that utilized by the Hearing Examiner, the Commission impliedly rejected the finding of an implied exception to the ordinance resulting from the Common Council's funding of the Senior Center. The Hearing Examiner takes guidance from the Commission's action and declines the Respondent's invitation to find such an exception in the current case. In addition to the Commission's action in the Senior Center case, the Hearing Examiner is concerned that to find such an exception to the public accommodations provisions of the ordinance may lead to an action against the City of Madison under Section 3.23(6). That section of the ordinance prohibits discrimination by the City of Madison or its agents in programs, facilities or services of the City. Changing the focus of the complaint from the Respondent to the City of Madison does not strike the Hearing Examiner as an outcome intended by the City of Madison.

The Hearing Examiner also notes that there is a significant difference between the Respondent in this case and the Senior Center. The Respondent is a privately organized organization that benefits from a funding program of the City of Madison. The Senior Center, on the other hand, was established by the City and functions as a direct City program with City employees working in managerial positions. The Respondent in this case is not operated by employees of the City of Madison. Given the record in this matter and prior action by the Commission, the Hearing Examiner cannot find that there is an implied exception to the ordinance excluding the Respondent from regulation under the ordinance.

The Respondent's contention that it is excluded from the coverage of the ordinance has two components. First, it contends that because it is a bona fide, private, nonprofit organization, it is entitled to the exemption stated in the ordinance for such organizations. Second, the Respondent asserts that its activities are limited in scope so that it does not hold itself out to provide its services to the public and is therefore not a public accommodation.

Application of the exemption for bona fide, private, nonprofit organizations is limited to those organizations that have a highly selective membership process. Schultz v. Rape Crisis Center-Chimera Self Defense, MEOC Case No. 3200 (on jurisdiction, Comm'n Dec. 1/9/92, Ex. Dec. 8/1/91), Rape Crisis Center, Inc. v. City of Madison, Equal Opportunities Commission of the City of Madison and Robert Schultz, Dane County Circuit Court Case No. 92 CV 648 (August 19, 1992). Reading the exemption as broadly as urged by the Respondent would lead to the unreasonable and absurd result that all private, nonprofits would be exempt. Rape Crisis Center, Inc., supra. In the current case, if the Respondent was found to be exempt from the ordinance, it would not only be able to deny its service to men, but to any other protected group. It cannot be reasonably argued that the Common Council intended a result that would allow such a possibility. It has long been recognized that one must give effect to the spirit or intent of the ordinance where given the words of the ordinance their literal meaning would lead to an unreasonable or absurd result. State v. S & S Meats, Inc., 92 Wis. 2d 64, 70

N.W.2d 712 (Ct. App. 1979), City of Madison v. Town of Fitchburg, 112 Wis. 2d 224, 332 N.W.2d 782 (1983), State ex rel. Jackson v. Leicht, 231 Wis. 178 (1939). The Hearing Examiner cannot give the ordinance exemption the effect argued for by the Respondent.

The Respondent may contend that it doesn't and wouldn't discriminate against a woman of color or one with a disability/handicap, but by recognizing the exemption, the Respondent would be free to do so. The Common Council is unlikely to have intended to permit the Respondent to discriminate against all persons by permitting it to discriminate against one. The Respondent provides no evidence or argument to that effect.

In order for the exemption as provided for in the ordinance to apply, the Respondent must demonstrate that it is a highly selective organization in either its membership or in the provision of its services. Rape Crisis Center, Inc., supra citing United States v. Trustees of the Fraternal Order of Eagles, 472 F. Supp. 1174 (E.D. Wis 1979). The record does not contain any information about the Respondent's membership policies or if it is even a membership organization. The record indicates that the Respondent is not particularly selective in its provision of services. The primary limitation is gender. The limitations of purpose of ride and the time of day do not serve to significantly limit use of the Respondent's service in a manner reflecting intentional selectivity along associational rights or beliefs. The nature or basis of selection is important because of the associational basis for recognizing an exemption. Rape Crisis Center, Inc., supra, Fraternal Order of Eagles, supra.

The Respondent's argument that it does not hold itself out to the public as a whole also has two components. First, the Respondent's Articles of Incorporation specify that it is incorporated to provide rides to women who do not have the economic means of other transportation during hours when sexual assaults are likely to occur. The Respondent contends that this represents a significant limitation on its services. The Hearing Examiner disagrees.

If an organization could limit applicability of the ordinance by how it crafts its Articles of Incorporation, then the ordinance would be limited in ways not intended by the Common Council. Such a result would place a premium on words rather than action. The Respondent provides a service to women in Madison. It excludes males but does not appear to significantly limit its service in other ways except by way of its meager budget.

The second component is really folded into the first. The Respondent contends that it limits its service as a matter of program in ways that keep it from being open to the public. Part of the Respondent's defense to the complaint is that the Complainant wished a ride for purposes not contemplated by the Respondent's service. This relies more on factual determinations more appropriate to the Investigator/Conciliator or at a hearing on the merits of the complaint than in a dispute about jurisdiction. As noted above, the record at this time does not support a conclusion that the Respondent's service is so limited or specific not to be a public accommodation.

This complaint presents difficult issues of conflicting public policies. On one hand, there is the important policy encouraging women to provide services for themselves that encourage their full participation in society and community life. On the other hand, there is the public policy represented by the ordinance that one should not be denied access to programs or services that are open to the community as a whole for artificial reasons. Given the requirement that the Hearing Examiner give as full effect to the ordinance as consistent with the intentions and purposes of the ordinance, it falls to the Common Council to harmonize these conflicting policies. The Common Council has acted to specifically exempt groups or activities when it chose to do so. Section 3.23(5)(d).

**ORDER**

The complaint is hereby remanded to the Investigator/Conciliator for completion of an investigation and issuance of an Initial Determination.

Signed and dated this 17th day of March, 1999.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III  
Hearing Examiner