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

Roy U. Schenk PO Box 259141 Madison WI 53725 Complainant vs. Domestic Abuse Intervention Services, Inc., f/k/a Dane County Advocates For Battered Women PO Box 1761 Madison WI 53701 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON JURISDICTION Case No. 03384

BACKGROUND

The Complainant, Roy U. Schenk, filed a complaint with the Madison Equal Opportunities Commission (Commission) on January 7, 1997. The Complainant amended the complaint on December 30, 1997 and February 17, 1998. The complaint alleges, in general terms, that the Respondent, Domestic Abuse Intervention Services, Inc., discriminated against him on the basis of his political beliefs and sex in housing, employment, public accommodations and in the provision of City services or facilities. The Respondent denies that it discriminated against the Complainant on any basis and asserts that the Commission is without jurisdiction to hear any of the Complainant's complaints.

The Respondent, as part of its initial response to the Investigator/Conciliator, moved the Commission to dismiss the Complainant's complaint for a lack of jurisdiction. The complaint was transferred to the Hearing Examiner for resolution of the jurisdictional issues. The parties were given the opportunity to present argument in support of their respective positions. Based upon that argument and the record in this matter, the Hearing Examiner concludes that the Commission is without jurisdiction and the Complainant's complaint must be dismissed.

DECISION

The record in this matter is one of the most nebulous and confused that the Hearing Examiner has had to wade through. It includes claims originally brought before the Equal Rights Division of the Wisconsin Department of Workforce Development, claims filed in Dane County Circuit Court and claims that may implicate four sections of the Madison Equal Opportunities Ordinance, Section 3.23 Madison General Ordinances et seq. The claims include ones relating to employment, City services, advertising and service on a Board of Directors. Because of the number of allegations and their interrelation, the Hearing Examiner may address allegations or issues that may not technically need to be addressed. If this approach creates some confusion about the issues actually pending before the Hearing Examiner, it reflects a certain degree of confusion on the part of the Hearing Examiner by this record.

First, the Hearing Examiner must make a general observation about the record in this matter. In all of the Complainant's allegations, there is only one in which he indicates he has been directly affected. This lack of direct injury would seem to create a problem of standing for the Complainant. The Commission does not offer advisory opinions. The fact that the Respondent does not directly raise this question of standing could create the impression that it does not object to the complaint on standing grounds. Because these issues are not particularly clear and because the Hearing Examiner believes that the Complainant would attempt to remedy the standing problem and immediately refile his complaint, the Hearing Examiner will move forward with the matter and specifically address the standing issue only when necessary.

Second, the Respondent bases many of its arguments on the Work Sharing Agreement between the Commission and the Department of Workforce Development, and on the Equal Rights Division's (ERD) resolution of the complaints filed with that agency by the Complainant. While the Hearing Examiner would like to give full force and effect to the ERD'S decisions, in this case, it is not possible. First, the Complainant has made additional allegations of discrimination not prohibited by the Wisconsin Fair Employment Act, WSA 111.31 et seq. Specifically, the claims of discrimination on the basis of political beliefs could not be addressed by the ERD and the Complainant is entitled to have those claims addressed by the Commission. The Respondent's contention that the Complainant is somehow stopped from proceeding because he did not respond to Anthony Brown's letters giving him the opportunity to raise issues before the Commission not covered by the complaint filed with the ERD is without merit. While it is regrettable that the Respondent is put to additional expense and effort by the manner in which the Complainant has chosen to proceed, the nature of the Complainant's allegations makes multiple actions likely. However, the letters are administrative in nature without establishing any legally enforceable time limits. Besides, the Respondent would be responding to those complaints at an earlier stage even if the Complainant had responded to Brown's letter.

Another problem with the Respondent's Work Sharing argument is that for the most part the decisions of the ERD on the Complainant's complaints fail to give any rationale or basis for the decisions. It is impossible to determine under these circumstances whether the ERD decisions were based upon any factors that might call for recognition under the Work Sharing Agreement. The agreement only requires the recognition of outcomes that represent action on the merits. The exception to this lack of specification is the Complainant's claims relating to the Respondent's shelter facilities and programs. However, those claims are currently pending in Dane County Circuit Court and the Hearing Examiner will not address them during the pendency of that action. The Hearing Examiner notes, however, that the Complainant's lack of an allegation that he wished to use and was otherwise qualified for those services poses significant problems for the Complainant's claim before the Commission.

The Complainant's first major allegation of discrimination is that the Respondent's Board of Directors is composed of all women or at least by those who meet the Respondent's definition of feminist. As previously noted, the Complainant nowhere alleges that he has ever applied for a position on the Respondent's Board of Directors or that other than his sex or political beliefs, meets the qualifications to serve on the Respondent's Board of Directors. The Complainant contends that he has been discriminated against on the basis of his sex or political beliefs in a public place of accommodation or amusement or in the provision of a City service or program.

The initial question for the Hearing Examiner is whether service on the Respondent's Board of Directors represents either a public place of accommodation or amusement or a City facility, service or program. The Hearing Examiner, on this record, concludes that it is neither.

The essence of a public place of accommodation or amusement is the open availability of the business or enterprise to the public as a whole. One of the keystones of open availability is the lack of selectivity exercised by the organization in determining who may avail themselves of the service or organization. Schenk v. Women's Transit Authority, MEOC Case No. 3377 (Ex. Dec. 3/17/99), Schultz v. Rape Crisis Center Chimera Self Defense, MEOC Case No. 3200 (Comm'n. Dec. 1/9/92, Ex. Dec. 8/1/91), Rape Crisis Center, Inc. v. City of Madison, Wisconsin, Equal Opportunities Commission of the City of Madison and Robert Schultz, Dane County Circuit Court Case No. 92 CV 648 (8/19/92), United States v. Trustees of the Fraternal Order of Eagles, 472 F. Supp. 1174 (E.D. Wis 1979). The Hearing Examiner can hardly imagine anybody that requires a greater degree of selectivity in order to achieve the required cooperation and collegiality than a Board of Directors. Generally speaking, there are a limited number of positions available on a Board of Directors. In the present case, the Respondent's Board has but six members. This small number of positions requires a higher degree of selectivity for any organization to meet its management needs. Boards generally select members for compatibility with the organization, compatibility with the other members and with an eye to the specific skills or expertise a prospective board member can bring to the organization. All of these considerations mediate against a Board of Directors being a public place of accommodation or amusement.

This requirement of selectivity may well be different from that required for the service or product offered by the organization. While the service may be a public place of accommodation or amusement, the organization's Board of Directors will seldom be considered to be one.

Further, service on the Respondent's or any corporation's Board of Directors is entirely different in character or nature from those establishments specifically listed in the ordinance's definition of a public place of accommodation or amusement. While the list found that Section 3.23(2)(e) is not intended to be exhaustive, it is illustrative of the types of businesses or entities that are considered to be public places of accommodation or amusement. Hatheway v. Gannett Satellite Network, Inc., 157 Wis. 2d 395, 459 N.W.2d 873 (Ct. App. 1990). Nothing in that list is remotely related to a public or private Board of Directors.

The Complainant's argument relating to City facilities or services is unique. The Complainant asserts that the Commission is empowered to enforce the nondiscrimination provisions of the contract between the Respondent and the City of Madison through the Community Services Commission (CSC). That contract recognizes that the provision of services to battered women and their dependents along with other victims of domestic abuse is a matter of legitimate interest to the City of Madison. By entering into a contract for the provision of services to this targeted population, the City is recognizing that the Respondent can better provide services than can the City. By virtue of the contract, the City of Madison is providing, through the Respondent, shelter and counseling services, as well as other community support and education services to the targeted population.

The contract between the Respondent and the City of Madison specifically requires the Respondent not to discriminate with respect to the recruitment and management of volunteers and members of the Board of Directors. The contract appears to provide that failure to comply with these provisions may result in cancellation of the contract, a failure to renew or otherwise debar the contracting organization. However the contract is silent on the means of demonstrating that there has been a breach of the contract. There is also no indication of what body has the authority to make determinations of compliance and to take steps to enforce a contract. The contract does not name the Commission as any form of adjudicatory body with respect to the terms and conditions of the contract.

The Complainant urges the Commission to undertake responsibility for enforcement of the nondiscrimination provisions of the Respondent's contract with the Community Services Commission. The Complainant's argument has two prongs; first, no one else is willing to take responsibility and second, the Commission's authority to address discrimination in City facilities, programs or services should extend to enforcement of the contract. The Hearing Examiner disagrees.

Simply because the other authorities to which the Complainant has complained about the Respondent's performance under its contract have chosen not to proceed does not bestow authority on the Commission. The Commission, as is any municipal agency, is a body of limited authority. It can only act within the specific limits established by the Common Council. Where the authority is not clear, the Commission must examine the question to determine whether a given complaint or activity might fall within the scope of its grant of authority though there is not an explicit grant of authority. The absence of action by other agencies such as the Community Services Commission or the Affirmative Action Office can in no way be seen as a grant of authority to review those others actions or lack of actions.

The contention that the ordinance's provisions prohibit discrimination in access to City facilities, programs and services has no merit with respect to this particular claim. The services recognized to be of a legitimate interest to the City and therefore the subject of the contract include provision of shelter and support services to victims of domestic violence, outreach and education to the public and victims of domestic abuse, and special programs for children from violent households. None of these services remotely relate to or require service on the Respondent's Board of Directors. Essentially, Section 3.23(6) is designed to assure that City agencies, their agents and contractors are providing services to the public without regard to a person's membership in any of the categories protected by the ordinance. The Complainant's access to the services to be provided by the City's agent, the Respondent, do not include the ability to sit on the Respondent's Board of Directors. The contract with the Community Services Commission may make the Respondent an agent of the City for provision of a City program, facility or service and may create some liability or at least a cause of action for discrimination in the provision of a service, but this liability does not extend to the Respondent's internal management or administrative provisions of the contract.

The Complainant's complaint as amended states no claim upon which relief can be granted by the Commission with respect to the membership of the Respondent's Board of Directors. The Hearing Examiner bases his decision solely on the coverage of the ordinance and does not reach any of the factual issues. Such issues not addressed by the Hearing Examiner include whether men may serve on the Respondent's Board of Directors

or whether the Complainant has ever actually applied to serve on the Respondent's Board of Directors. In determining that membership on the Respondent's Board of Directors is neither a public place of accommodation or a City facility, program or service and therefore decisions relating to its composition are beyond the jurisdiction of the Commission, the Hearing Examiner does not need to resolve or even address the specifics of the Complainant's sex or political beliefs claims.

The next general issue raised by the Complainant relates to his allegation that the Respondent refused to allow him to volunteer to work on the Respondent's crisis line because of his sex. The Complainant asserts this claim primarily under the employment section of the ordinance. The heart of the Complainant's claim is his conclusory assertion that volunteers are merely unpaid employees and are therefore entitled to the protection of the ordinance.

The Hearing Examiner finds no support in the law for the Complainant's claim. The issue of whether volunteers should be considered employees within the meaning of the ordinance has not been previously addressed by the Commission. The common sense approach argued for by the Respondent in its Reply Brief strikes the Hearing Examiner as being correct. The essence of the employment relationship is work in exchange for compensation. While volunteering for a not for profit organization may benefit the volunteer by giving experience and a sense of support for one's beliefs, it is not the type of compensation envisioned in the employment relationship.

Cases brought under Title VII make clear that volunteers are not employees and are not entitled to the protection of Title VII. O'Conner v. Davis, 126 F.3d 112 (2nd Cir. 1997), Gomez v. City and County of Denver, 54 F.3d 787 (10th Cir. 1995). While the Commission is not bound by interpretations of federal law, the Commission may use such decisions as guidance in interpreting the coverage of the ordinance. Under the circumstances of this claim, the Hearing Examiner is convinced that the Common Council did not intend to extend the protection of the ordinance to volunteers. While fair and equitable treatment of those donating their time and expertise to any organization or effort should be expected, there is nothing in the ordinance to bring volunteers within the Commission's jurisdiction over employment relations.

To the extent that the Complainant also contends that his attempt to volunteer triggers Commission jurisdiction under the public place of accommodation or amusement provision or the City facilities programs or services provision, the Hearing Examiner incorporates his rationale and conclusions from the Complainant's claim relating to membership on the Respondent's Board of Directors. The opportunity to volunteer for any particular organization, while an opportunity that is often open to the public, is not a product or service within the contemplation of the ordinance. Similarly, volunteering or the opportunity to serve as a volunteer is not a City facility, program or service within the meaning of Section 3.23(6). The services of the Respondent that may be subject to that section are those specified in the contract with the Community Services Commission relating to domestic abuse. The Respondent is not organized for the purpose of providing volunteer opportunities.

The next allegation of the Complainant is that the Respondent violates Section 3.23(7)(e) by printing or publishing a notice or advertisement indicating a preference, limitation, specification or discrimination on the basis of sex or political beliefs. The Complainant asserts that several items printed by the Respondent violate the ordinance. The Complainant specifically points to the Respondent's Bylaws and to certain job advertisements.

The Hearing Examiner concludes that the Respondent's Articles of Incorporation and Bylaws are not the type of notice or advertisement intended to be covered by the ordinance. A corporation's Articles of Incorporation and Bylaws represent a written model for the entity. They are intended to describe the purposes of the corporation and to some extent the manner in which the corporation intends to accomplish its corporate purposes and goals. Such documents, though public by virtue of their filing with various governmental agencies, do not represent an openly public display of preference, limitation, specification or discrimination that was intended to be covered by the ordinance. The ordinance is directed at statements made in an open and public manner that are intended to discourage the average person from application or inquiry. Articles of Incorporation or Bylaws are simply not sufficiently public and are not prepared with an intent to discourage people from participation in employment with the corporation.

The newspaper advertisements complained of by the Complainant are more clearly the type of publication intended to be covered by the ordinance. While finding that the newspaper advertising is covered, the Hearing Examiner does not necessarily accept the Complainant's contention that it violates the ordinance.

Before discussing whether certain statements in the Respondent's recruitment advertising violate the ordinance, the Hearing Examiner must address the procedural stance of this claim. In most respects, it may be most appropriate to remand this claim to the Investigator/Conciliator for findings and issuance of an Initial Determination; for reasons of administrative economy the Hearing Examiner will resolve the issue. Remand to the Investigator/Conciliator is not likely to produce any additional facts necessary to a determination. The parties, in addition to briefing the jurisdictional issue, have argued the merits of the claim. In short, the record present before the Hearing Examiner appears to be as complete as necessary and as complete as it would be if there had been a remand. Given this status, it seems most efficient for the Hearing Examiner to issue a determination of the merits of the allegation at this time.

The Complainant points specifically to the statements in the Respondent's recruitment advertising that the Respondent is a feminist organization and that victims of domestic abuse are specifically encouraged to apply. The Complainant contends that the first statement relating to the Respondent's status as a feminist organization is intended to discourage anyone holding a non-feminist or anti-feminist philosophy from applying and that such persons would be unwelcome. The Complainant argues that the second statement is intended to discourage men from applying because the Complainant admits only women and children to its shelter and because as an organization it states that the vast majority of domestic abuse is perpetrated on women by men.

The Hearing Examiner finds that neither statement appearing in the Respondent's printings or publications indicates a preference, limitation, specification or discrimination on the basis of sex or political belief. Nothing in the statement identifying the Respondent as a feminist organization attempts to limit or discourage anyone not considering himself or herself to be a feminist from applying for employment. It stands more as an identification of the organizational principles of the Respondent than as a warning to non-feminists that they will not be welcome. By identifying itself as a feminist organization, the Respondent may benefit from some degree of self-selection on the part of applicants, but the identification by itself does not violate the ordinance.

The statement encouraging victims of domestic abuse to apply is even more clearly not violative of the ordinance. The Complainant's contention that because the Respondent's shelter facilities only house women and children that indicates a preference in employment based upon sex is twisted and absurd. There is nothing in the statement limiting its appeal to only those victims of domestic abuse who have been sheltered by the Respondent. The universe of victims is substantially greater than that comprising the Respondent's shelter residents. It would seem reasonable to encourage someone who has been through the experience of domestic abuse to work with others currently undergoing a similar experience. To state such an encouragement does not express a preference, limitation, specification or discrimination on the basis of sex even if the Respondent's statistics about the incidence of domestic abuse are correct. It is the experience of domestic abuse that is important, not the sex of the victim.

The Hearing Examiner does not believe that it is necessary to resolve the dispute between the parties over the frequency and nature of domestic abuse in society. The Hearing Examiner is convinced that the accuracy or inaccuracy of statistics plays no part in this matter.

The final allegations of the Complainant relating to whether the Respondent violates the ordinance by providing shelter facilities only to women and their children and refering men to other programs will not be directly addressed at this time. The Complainant notes that for the most part, these claims made on the basis of public place of accommodation or amusement and housing are subsumed by litigation currently pending in Dane County Circuit Court. That litigation began as a complaint filed before the Equal Rights Division (ERD) of the Wisconsin Department of Workforce Development. An ERD Administrative Law Judge found that the ERD had jurisdiction to process the Complainant's public place of accommodation and amusement claims. Subsequent to that determination, the Complainant dismissed his action before the ERD and filed in Circuit Court.

As is true with virtually every allegation in this complaint, it is somewhat difficult to pin down what the Complainant is actually complaining about and what protected class he asserts membership in for purposes of this specific allegation of discrimination. The Complainant asserts so many claims with so many possible subparts, that it is difficult to determine with any precision how to appropriately respond to the allegations.

The Hearing Examiner finds the lack of any allegation that the Complainant sought to use the shelter facilities of the Respondent and was either refused or referred to another service that was not equivalent to be fatal in this instance. The Hearing Examiner will not issue an entirely advisory opinion since on this record, there is no allegation that the Complainant was denied service at a public place of accommodation or amusement.

Similarly, to the extent that the Complainant asserts a claim under the City facilities, programs and services provision of the ordinance, he has not alleged having been denied entry to such a facility, participation in such a program or denial of such a service. The Complainant's contention that the Commission should take jurisdiction over the contract between the Respondent and the Community Services Commission has previously been addressed and is incorporated herein and need not be repeated.

With respect to the City facilities, programs and services claim, both parties seem to hold the opinion that the Hearing Examiner can simply add the City of Madison as a party on his own initiative. The Hearing Examiner, absent other circumstances, does not have such authority. If the Complainant wishes to file a complaint against the Respondent and the City of Madison, he will need to file a complaint containing the necessary allegations as to both parties. The Hearing Examiner will not guess about the specific allegations the Complainant might wish to make.

The Hearing Examiner can find no basis for jurisdiction over the complaint given the current state of this record. The Complainant has repeatedly failed to allege sufficient facts to establish a prima facie claim, his claims are being litigated elsewhere or his allegations simply fall outside of the coverage of the ordinance.

ORDER

The Respondent's motion to dismiss is hereby granted. The parties shall bear their own costs and fees of this action.

Signed and dated this 26th day of March, 1999.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

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

Roy U. Schenk PO Box 259141 Madison WI 53725 Complainant vs. Domestic Abuse Intervention Services, Inc PO Box 1761 Madison WI 53701 Respondent	COMMISSION DECISION AND FINAL ORDER Case No. 03384

BACKGROUND

The Complainant, Roy U. Schenk, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission) on January 7, 1997. The Complainant amended the complaint on December 30, 1997 and February 17, 1998. The complaint alleges, in general terms, that the Respondent, Domestic Abuse Intervention Services, Inc., discriminated against the Complainant on the bases of his political beliefs and sex in housing, employment, public accommodations and in the provision of City services or facilities. The Respondent denies that it discriminated against the Complainant on any basis and asserts that the Commission is without jurisdiction to hear any of the Complainant's allegations.

The Respondent as part of its initial response to the Investigator/Conciliator moved the Commission to dismiss the complaint for a lack of jurisdiction. The complaint was transferred to the Hearing Examiner for resolution of the jurisdictional issues. The parties were given the opportunity to present argument in support of their respective positions. Based upon those arguments and the record in this matter, the Hearing Examiner issued a Decision and Order on March 26, 1999 concluding that the Commission is without jurisdiction over any of the allegations of the complaint. The Hearing Examiner dismissed the complaint subject to the Complainant's right to appeal.

The Complainant timely appealed the Hearing Examiner's Decision and Order. Both parties were given the opportunity to submit additional arguments in support of their respective positions. The Commission met on August 12, 1999 to consider the Complainant's appeal. Taking part in the Commission's deliberations were Commissioners: Fieber, Hicks, Poulson, Rahman, Rudd, Sentmanat and Zipperer. Commissioners Morrison and Tomlinson recused themselves from any actions regarding this complaint.

DECISION

After considering the record as a whole and the arguments of the parties, the Commission adopts and incorporates by reference as if fully set forth herein, the Hearing Examiner's Decision and Order dated March 26, 1999.

ORDER

The complaint is hereby dismissed. Agreeing in this decision were Commissioners: Fieber, Hicks, Poulson, Rahman, Rudd, Sentmanat and Zipperer. Commissioners Morrison and Tomlinson took no part in the Commission's actions. There were no Commissioners in opposition to this action.

Signed and dated this 20th day of August, 1999.

EQUAL OPPORTUNITIES COMMISSION

Burt Zipperer
President

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
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MADISON, WISCONSIN

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On August 20, 1999, the Commission issued a Decision and Final Order affirming the Hearing Examiner's Decision and Order. By the terms of the Commission's Order, it is appealable to the Circuit Court for Dane County. The Complainant has not appealed the Commission's Decision and Final Order.

On August 25, 1999, the Complainant filed a request that the Commission reconsider its August 20, 1999 Decision and Final Order. On September 9, 1999, the Commission met to consider the Complainant's request for reconsideration. Participating in the Commission's deliberations were Commissioners Fieber, Hicks, Rudd, Sentmanat, Verriden, Zarate and Zipperer.

DECISION

The Complainant makes his request that the Commission reconsider its decision because he seems to believe that questions of jurisdiction regarding the Commission's authority have yet to be answered. The Complainant appears to contend that because certain questions were not referred for consideration of other agencies, he was denied a full opportunity to present his position on appeal.

The Commission disagrees with the Complainant. The Commission appropriately considered all issues before it and rendered its decision after review of the complete record. The Complainant was given the same opportunity given any party appealing a decision to the Commission to submit additional argument and the Commission listened to the Complainant's generalized concerns at a public meeting of the Commission. The record does not demonstrate that the Complainant has been denied any opportunity to present his position. To the extent that the Complainant has misunderstood the Commission process and believed that he could seek an additional outside opinion, the Complainant cannot come to the Commission to correct his mistake.

The Complainant has presented no compelling information to justify the Commission's reconsideration of its August 20, 1999, Decision and Final Order. The Commission's Decision and Final Order will remain in effect.

ORDER

The Complainant's request for reconsideration of the Commission Decision and Final Order is denied.

Agreeing in this decision were Commissioners: Fieber, Hicks, Rudd, Sentmanat, Verriden, Zarate and Zipperer. There were no Commissioners in opposition to this action.

Signed and dated this 27th day of September, 1999.

EQUAL OPPORTUNITIES COMMISSION

Burt Zipperer
President