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

Larry Hayes 202 Silver Rd Madison WI 53714 Complainant vs. Clean Power 1250 E Washington Ave Madison WI 53703 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER Case No. 19982028

BACKGROUND

On October 7, 1998, a public hearing on the merits of the above captioned complaint was held before Equal Opportunities Commission Hearing Examiner Clifford E. Blackwell, III, in Room 120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd. in Madison, Wisconsin. The Complainant, Larry Hayes, appeared in person and by his attorneys, Hayes, Van Camp and Schwartz, S.C. by Lawrence Classen. The Respondent, Clean Power, appeared by its corporate representative, Jennifer Brooks, and by its attorneys, Stadler & Schott, S.C. by attorney Ronald S. Stadler. Based upon the record in this matter, the Hearing Examiner now makes his Recommended Findings of Fact, Conclusions of Law and Order as follows:

RECOMMENDED FINDINGS OF FACT

1. The Complainant was convicted in 1969 of first degree homicide and is currently serving probation for that conviction.
2. The Complainant was convicted for delivery of a controlled substance in 1993. He is serving probation concurrently with his sentence on the first degree homicide conviction.
3. In 1997, the Complainant had three contacts with the Madison Police Department or his Probation Officer for purposes of registration. These contacts were routine and represent neither an arrest nor a conviction.
4. The Respondent contracts for cleaning and other similar services and employs individuals to work at various sites within the City of Madison.
5. In January of 1998, the Complainant was employed approximately 15 to 20 hours per week by Union Transfer. He was seeking additional part-time employment to supplement his income. He applied for a cleaning position with the Respondent.
6. The Respondent's application requires the disclosure of pending charges or convictions of non-minor offenses in order to determine the bondability of the applicant. The application form asks if the applicant has such a pending charge or conviction, the details surrounding such charge or conviction and the date of the charge or conviction.
7. The Complainant indicated that he had a conviction and noted that it occurred in 1969 but did not provide any of the details of his conviction.
8. The Complainant was interviewed by Jennifer Brooks, a local Human Resources person for the Respondent. She noted on the Complainant's application that the conviction was for first degree homicide in Racine County in 1969. She noted that the Complainant had no other convictions.
9. The Complainant asserts that he told Brooks of the 1993 conviction for delivery of a controlled substance during the interview. The Complainant authorized the Respondent to obtain a copy of his complete record.
10. Brooks hired the Complainant and he worked two shifts for the Respondent. When the Complainant called Brooks for his next assignment, Brooks told him that she had the copy of his conviction record

and it contained items that he had not disclosed. Brooks informed the Complainant that he could not work for the Respondent until these items were explained.

11. The Complainant came to Brooks' office to discuss the record. He indicated that his Probation Officer could verify that the 1997 contacts were neither arrests nor convictions. Brooks told the Complainant to have his Probation Officer confirm those facts.
12. The Complainant had his acting Probation Officer, Steven Rice, call Brooks. Rice erroneously told Brooks that the 1993 conviction was not a conviction. He also confirmed that the 1997 contacts were not arrests or convictions. Brooks told Rice that she would need the information in writing as she did not know whether Rice was the Complainant's Probation Officer or some friend put up to calling Brooks.
13. The Complainant checked with Brooks to see if Rice had followed through. When Brooks told the Complainant that she had not received anything from Rice, the Complainant went to Rice's office to check on the letter. Rice admitted that he had forgotten to write the confirming letter and did so while the Complainant waited. The Complainant took a copy of the letter with him and delivered it to the Respondent's office.
14. Brooks was not in when the Complainant arrived, so he left the copy of the letter with the receptionist at the front desk. The Complainant observed her place the copy on Brooks' desk.
15. Brooks again denied having received the letter brought by the Complainant. The Complainant brought another copy of Rice's letter to the Respondent's office and personally left it on Brooks' desk as there was no one in the office when he arrived.
16. Brooks denies having received either copy of Rice's letter.
17. The Complainant was never recalled to work for the Respondent.
18. The Respondent was motivated, at least in part, by the Complainant's conviction record to terminate his employment. The Respondent was not solely motivated by any failure of the Complainant to completely disclose his conviction record to terminate his employment.
19. The Complainant was to be paid $7 per hour for his employment with the Respondent. He would have worked an average of 30 hours per week.
20. The Complainant was effectively terminated from employment by the Respondent on January 12, 1998. He could have received an additional $630 in wages for the month of January, 1998.
21. In early February, 1998, the Complainant underwent ear surgery that resulted in his total unavailability for work in the first two weeks of February, 1998.
22. After being entirely unable to work for two weeks in February, the Complainant was able to work for approximately half the time he was previously available until June of 1998. From the middle of February, 1998 to the beginning of June, 1998, the Complainant could have earned approximately $1,470 in wages from the Respondent.
23. In June of 1998, the Complainant left his part-time position with Union Transfer and took a full time position with North American Transfer. Despite working full-time for North American, the Complainant was still available for additional part-time work. He was reasonably available for an additional 10 hours per week beyond what he was working for North American Transfer.
24. The combination of his pay with Union Transfer and with the Respondent would have been $20 per week more than what he made working for North American Transfer alone.
25. At the end of July, 1998, the Complainant left his position with North American Transfer and took another full time position with Allied Van Lines. At that time the Complainant ceased looking for additional employment.
26. The Complainant lost the use of $2,820 in wages as a result of his termination.

CONCLUSIONS of LAW

27. The Complainant is a member of the protected class "conviction record."
28. The Complainant is a member of the protected class "arrest record."
29. The Respondent is an employer within the meaning of the Equal Opportunities Ordinance.
30. The Respondent discriminated against the Complainant in violation of the ordinance when it terminated his employment, at least in part, because of his conviction or arrest record.

ORDER

31. The Respondent shall pay to the Complainant within 30 days of this order becoming final the sum of $2,820 in back wages subject to all normal reductions for taxes.

32. The Respondent shall pay to the Complainant, within 30 days of this order becoming final, the additional sum of $164.50 in pre-judgment interest.
33. Within 15 days of this order becoming final, the Complainant shall submit a petition for his costs and fees including a reasonable attorney's fee. The Respondent may respond to the Complainant's petition within 15 days of the filing of the petition. The Complainant may reply to the Respondent's response within 10 days of the filing of the response. If additional proceedings are required, the Hearing Examiner will schedule them appropriately.

MEMORANDUM DECISION

This complaint presents several interesting matters of analysis. None of the points involve statutory interpretation however. What is clear from this case is that where an employer acts to discipline, discharge or otherwise discriminate against an individual because of that individual's arrest or conviction record, the employer violates the ordinance unless the arrest or conviction is three years or less old and is substantially related to the employment of the individual. In this case, there is no contention that any of the Complainant's admitted convictions were substantially related to the terms of his employment as a part-time cleaning person for the Respondent.

The Respondent does not contend that the Complainant's convictions made him unfit for employment, but rather contends that the Complainant was not sufficiently forthcoming about his convictions and this lack of truthfulness is what motivated the Respondent to terminate the Complainant's employment.

In early January of 1998, the Complainant was seeking to supplement his existing part-time employment with additional part-time employment. The Complainant responded to an advertisement run by the Respondent. The Respondent's schedule was sufficiently flexible to permit the Complainant to continue to work at Union Transfer, a storage and transfer company, where he was already employed. The Complainant completed the Respondent's application and hoped for an interview.

The Respondent's application inquired into arrests or convictions that might affect an employee's bondability. The application asked for disclosure of pending charges or convictions for other than minor offenses. If the applicant responds in the affirmative, the application asks for the details of the pending charge or conviction and the date of the charge or conviction.

The Complainant noted that he had a conviction. The Complainant did not provide any of the details of the conviction, but did note that it occurred in 1969. The Complainant had been coached by his Probation Officer to be honest about his conviction record, but to attempt to discuss the nature of the conviction in person.

The Complainant was interviewed by Jennifer Brooks, a person which worked in the Respondent's Madison area Human Resources office. The Respondent is based out of the Milwaukee area and its headquarters are located in that area. Brooks reported to Amy Kenitz. During the interview, the Complainant disclosed that his 1969 conviction was for first degree homicide. He also indicates that he told Brooks about a 1993 conviction for delivery of a controlled substance. The Complainant had not specifically noted the 1993 conviction on his application.

Brooks made notes on the Complainant's application. These notes indicate the Complainant's 1969 conviction for first degree homicide, that it occurred in Racine County and that the Complainant had no other convictions.

As part of the interview process, the Complainant agreed to the release of his conviction record to the Respondent. Brooks hired the Complainant despite the 1969 conviction stating that she understood that because of the date of the conviction, she was unable to consider it under the terms of the Madison Equal Opportunities Ordinance (ordinance).

The Complainant was trained and worked two shifts for the Respondent. When he called Brooks for his next assignment, Brooks told the Complainant that his conviction record revealed additional charges beyond those disclosed in his application and she needed to discuss them with the Complainant before he could return to work. Specifically the conviction record disclosed the Complainant's 1993 conviction and three additional contacts with the police in 1997. Brooks erroneously believed the 1997 contacts to be arrests or convictions. Brooks told the Complainant that unless he could provide proof that these additional items were not convictions, he could not return to work.

The Complainant told Brooks that the Complainant's Probation Officer could explain the record to Brooks. The Complainant went to the office of his Probation Officer to have him call Brooks with the explanation. Steven Rice, who was acting as the Complainant's Probation Officer in the absence of the Complainant's assigned Probation Officer, called Brooks and discussed the Complainant's record. Rice apparently misspoke and indicated that the 1993 conviction was not a conviction and that the 1997 contacts were routine and were neither arrests nor convictions. Brooks did not question the information provided by Rice. Brooks requested that Rice provide the information in writing.

Rice initially failed to put the information in writing. He apparently forgot his promise to prepare a statement and had to be reminded by the Complainant. The Complainant had stopped by the Respondent's office to inquire if Brooks had received Rice's statement. When she indicated that she had not, the Complainant went to Rice to see about the statement.

In response to the Complainant's inquiry, Rice immediately prepared a written explanation and gave the Complainant one or more copies. The Complainant took the statement to the Respondent's office. When he arrived Brooks was not there, but the receptionist, later identified as Heidi Lee, took the statement and placed it on Brooks' desk. The Complainant returned to the Respondent's office because of his concern that Brooks receive the statement. When he arrived this second time the office was open, but empty. The Complainant took the additional copy of Rice's statement to Brooks' desk. Brooks denies having received either copy of Rice's statement.

The Respondent contends that it terminated the Complainant, not because of his conviction record, but because he failed to disclose his record, specifically the 1993 conviction for delivery of a controlled substance. With respect to the 1997 police contacts, the Respondent concedes that it may have erroneously viewed them as arrests or convictions, but that it was not motivated by the fact of the perceived arrest or conviction, but rather its belief that the Complainant had failed to disclose these misidentified arrests or convictions. The Complainant contends that it was the fact of his conviction record, specifically his 1969 conviction for first degree homicide, that caused the Respondent to terminate him.

Resolution of the issues in this complaint requires determinations of credibility and application of various inferences that can be drawn from the record.

While it is tempting to address the individual arguments of both parties, one must look at the record as a whole to make the ultimate determination in this case. It is customary for the Commission to use the burden shifting approach more commonly known as the McDonnell-Douglas/Burdine paradigm. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). However, where the parties have addressed the ultimate issues of discrimination, it is permissible for the tryer of fact to move to the ultimate issue without use of the McDonnell-Douglas/Burdine approach. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 31 FEP 609 (1983). The Hearing Examiner will utilize this latter approach.

Most striking in this record is the timing of the Respondent's decision to terminate the Complainant. After deciding to hire the Complainant, he was terminated after his first two shifts. It seems logical to believe that this timing could be related to the length of time necessary for someone at a higher level to review Brooks' decision to hire the Complainant. While Brooks understood that she could not hold the Complainant's 1969 conviction against him, it may not be the case that someone further up the chain of review had the same understanding.

The Respondent contends that rather than the fact that the Complainant had a serious conviction record being the motivating factor in the Complainant's termination, it was the fact that the Complainant failed to disclose another conviction and Brooks' misunderstanding of the Complainant's complete history of contacts that led to his termination. The record in this matter can be read to some extent supporting the Respondent's position that the Complainant did not actually disclose his 1993 conviction. It is not the only interpretation supported by the record. Even if the Respondent's position that the Complainant did not disclose his actual conviction record were true, that fact, by itself, does not compel the conclusion urged by the Respondent.

The Complainant's testimony about his initial interview with Brooks provides a basis for a different explanation for Brooks' notes in the margin of the application. The Complainant clearly accepts and understands that the 1993 conviction stands separate from the 1969 conviction. However, the sentences for the two convictions run concurrently. The fact of the concurrent sentences seems to confuse the Complainant's view of the two

convictions. Assuming that the Complainant tried to explain the combined sentence for two convictions, it is not out of the question that Brooks may well have misunderstood the Complainant's explanation. This potential confusion on the part of Brooks could have led to her notation that there were no other convictions.

The confusion scenario is somewhat strengthened by the fact that the Complainant agreed to the release of his conviction record to the Respondent. Had the Complainant knowingly withheld knowledge of his 1993 conviction, he would not have been so likely to agree to the disclosure of his complete record which would disclose the 1993 conviction.

It is possible that the Complainant agreed to the disclosure because he was given no real option and believed that he could explain his way out of the discrepancy. This seems unlikely for two reasons. First, there was no testimony indicating that Brooks insisted upon the release of the Complainant's conviction record. Second, the Complainant does not impress the Hearing Examiner as a person who is sufficiently cool and calculating to manufacture this scheme on short notice.

Even assuming that the Complainant failed to disclose his 1993 conviction to Brooks, its later appearance on the conviction record does not necessarily mean that the Respondent was motivated by the failure to disclose to terminate the Complainant. Brooks' conversation with Rice mediates against the conclusion that the Respondent acted on the basis of the failure. Brooks testified that Rice told her the 1993 conviction was in fact not a conviction. He also confirmed that the 1997 police contacts were neither arrests nor convictions.

As of the date of Brooks' conversation with Rice, she had to believe that the conviction record that she obtained after her interview with the Complainant was wrong or that she did not understand how to properly interpret its entries. The Respondent contends that it was waiting for the Complainant to provide written confirmation of the information from Rice's telephone call and that confirmation was never received. The Respondent contends that it had no way of knowing based upon a telephone call generated by Rice whether Rice was the Complainant's Probation Officer or just some friend that the Complainant put up to calling Brooks.

First, the Complainant testified that on two occasions, he brought a copy of Rice's written confirmation to the Respondent's office. Brooks denies having received it. On this point, the Complainant's testimony is more credible. It is clear that he took all of the steps required by the Respondent. He testified that he had tried to follow up to make sure that he had provided all of the information required by the Respondent. The Complainant's testimony was clear and convincing as to the steps that he took to provide Brooks with the information requested by the Respondent. Brooks' testimony, while not entirely incredible, seemed overly careful, as though she was trying to avoid embarrassing a superior who may have given her direction in this matter.

Second, Brooks seemed to have been sufficiently convinced of Rice's identity to use his name, albeit erroneously, and his title in a memorandum to her superior, Shelley Boehm. See Ex. A-3. The fact that Brooks was sufficiently sure of Rice's identity in that memorandum suggests that the requirement for written confirmation was to be merely an additional hoop for the Complainant to jump through. It also suggests that the Respondent's determination not to recall the Complainant because of a lack of written confirmation is a pretext for other motives. Third, there was nothing stopping Brooks from simply calling Rice back to confirm his identity or calling the number listed in the telephone book to see if she got Rice. Placing the entire burden on the Complainant seems to be an attempt to create a high enough burden that perhaps the Complainant might be persuaded to simply drop employment with the Respondent.

It is true that Rice's statement to Brooks that the 1993 conviction for delivery of a controlled substance was not a conviction is actually incorrect. However, Brooks could have acted only on the information provided by Rice at the time that the Respondent decided not to recall the Complainant to work. There was no testimony that Brooks did not believe Rice at the time of their conversation. The fact that circumstances proved to be different from those at the time of the action does not alter the understanding at the time of the action.

When taking the record as a whole, the Hearing Examiner concludes that the Respondent acted to terminate the Complainant's employment, at least in part, because of his conviction record and not because of its concerns that he had not accurately disclosed the full extent of his conviction record. In particular, the Hearing Examiner finds that the timing of the Respondent's decision to terminate the Complainant creates an inference of discrimination that the Respondent fails to rebut. The Respondent's credibility is doubtful because of the its

failure to train Brooks or others on how to read and interpret conviction records and its failure to explain why certain procedures were followed or not.

The testimony presents several questions relating to the proper measure of damages. The Complainant asserts that he is entitled to $9,870 through December of 1998 as his measure of back pay. The Respondent contends that, at most, the Complainant is entitled to only $160 for a back pay award.

The ordinance requires the Hearing Examiner, after a finding of discrimination, to fashion an award that redresses the act of discrimination and puts the complainant in at least as good a position as he or she would have been had there not been discrimination. At a minimum, this means an award of back pay reduced by any pay or other benefits actually received. Where the record supports a claim for emotional damages resulting from an act of discrimination, the Commission may make such an award Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. 2/6/93, Ex. Dec. on fees 7/29/93, Ex. Dec. on fees 9/23/93); Nelson v. Weight Loss Clinics of America, Inc. et al., MEOC Case No. 20684 (Ex. Dec. 09; Leatherberry v. GTE Directories Sales Corp., MEOC Case No. 21124 (MEOC 04/14/93, Ex. Dec. 01/05/93)29/89). In order to prevent a successful complainant from suffering a net loss as a result of paying an attorney to represent him or her, the Commission routinely awards a successful complainant their costs and fees including a reasonable attorney's fee. Chung, supra, Harris v. Paragon Restaurant Group, Inc. et al., MEOC Case No. 20947 (on liability/damages Comm'n Dec. 02/14/90, 05/12/94, Ex. Dec. 06/28/89, 11/08/93; on atty. fees: Comm'n Dec. 02/27/95, Ex. Dec. 08/08/94).

First, even though emotional distress is often the greatest injury suffered by a victim of discrimination, the Complainant makes no claim to such damages. The Hearing Examiner will not attempt to guess about the extent of such injury where the Complainant does not clearly place it in issue. Accordingly, the Hearing Examiner makes no award for emotional distress or related injuries.

It seems that both parties are willing to accept that the Complainant was to be paid at the rate of $7 per hour while employed with the Respondent. The parties, however, take substantially different approaches in determining how long or how many hours the Complainant would have worked while employed by the Respondent. Both parties are guilty of making unwarranted assumptions and using them for their own purposes.

In January when the Complainant was seeking employment with the Respondent, he already had a part-time position with Union Transfer. He was working 15 to 20 hours per week with Union Transfer and was available to work approximately 30 hours per week for the Respondent. The Complainant uses January 12, 1998 as the date of the Complainant's effective termination. In February of 1998, the Complainant had ear surgery that kept him from work for a two week period and limited his availability for work until April of 1998.

In June of 1998, the Complainant took a full time job with North American Transfer though he would have been available for some additional hours from the Respondent. At North American, the Complainant was paid $9 per hour for 40 hours per week.

In July of 1998, the Complainant took a full time position with Allied Van Lines and ceased looking for additional employment. The Complainant asserts that if he had not been terminated by the Respondent, he would not have taken the Allied Van Lines position.

The Respondent bases its contention that the Complainant's back pay award should only be $160 on the difference in his combined pay with Union Transfer and the Respondent, and North American Transfer. The Respondent contends that the Complainant was not available for work from his surgery until he began at North American Transfer. The Respondent also contends that the Complainant had ceased looking for work when he took his position at Allied Van Lines.

The Complainant asserts that except for two weeks in February, he was available for his full 30 hours per week throughout the remainder of the year and thereafter. The Complainant seems unwilling to concede that full time employment with another employer might limit his availability for other employment.

The Hearing Examiner will terminate the Respondent's back pay obligation as of the Complainant's employment with Allied Van Lines. The position is full time and requires substantial physical labor. It seems unlikely that the Complainant could sustain many hours of additional work for very long. The Hearing Examiner takes the Complainant at his word that he gave up searching for additional employment when he took the Allied

Van Lines position. By ceasing his look for additional employment, the Complainant signals that he is no longer mitigating his damages. However, it seems too speculative to accept the Complainant's statement that he would not have taken the Allied Van Lines position had he still had the position with the Respondent.

The Respondent contends that the Complainant should be content with an award of $20 per week for the months of June and July because if one combines the Complainant's wages from Union Transfer and the Respondent, it amounts to only $20 more per week than he was making at North American Transfer. This approach oversimplifies the factual setting. Though the Complainant was working full-time at North American Transfer, he indicated that he would have continued to work for the Respondent. However, it seems unlikely that the Complainant could have worked full-time for North American Transfer and maintained a separate 30 hour per week schedule for the Respondent. Accepting that the Complainant worked approximately 20 hours per week for Union Transfer and was willing to work 30 hours per week for the Respondent, the Complainant was working approximately 50 hours per week. Assuming that he was working 40 hours per week for North American Transfer, it would appear that the Complainant might be available for approximately 10 hours per week of employment with the Respondent. This would yield an additional $70 per week for the 8 weeks during which the Complainant worked for North American Transfer. This $560 would be on top of the $20 per week differential asserted by the Respondent. For the period of his employment with North American Transfer, the Complainant should receive $720.

That brings the Hearing Examiner to the period from January 12, 1998 until approximately June 1, 1998. For the month of January the Complainant would have had approximately three weeks of work at $210 per week for a total of $630.

The Complainant's ear surgery and resulting recovery pose some difficult proof problems. The Complainant concedes that he was unable to work at all for a period of two weeks. A fair reading of the record indicates that though the Complainant was available for work subsequent to his surgery, he may not have been as available as prior to the surgery. The problem is trying to quantify this somewhat vague amount of time. From the record, it does not appear that the Complainant was entirely unavailable throughout the period and his unavailability presumably was less at the end of the period than at the beginning of it. As it seems to be difficult to quantify the Complainant's unavailability in any precise or direct terms, the Hearing Examiner will average the Complainant's availability over the approximately 14 week period. A safe average would be that over that length of time, the Complainant was available for about half the time he was prior to his surgery. This would result in a back pay award for the period of $1,470 or 14 weeks at $105 per week.

The total back pay award is the sum of the three periods discussed above. The total award is $630 for January, $1,470 for February through May and $720 for June and July or $2,820 for the whole period for which the Respondent has a back pay obligation.

The Complainant does not specifically request an award of pre-judgment interest. For awards of back pay, such awards are customary and reflect the lost opportunity cost associated with money that should have been paid and wasn't. In the past, the Commission has used the rate of 5 percent per annum. The Hearing Examiner knows of no reason why the back pay amount should not be adjusted by this amount. For the 14 months since the Respondent's back pay obligation has ended, the total amount of pre-judgment interest is $164.50. In addition to the back pay award of $2,820 and the pre-judgment award of $164.50, the Complainant shall be entitled to his costs and fees including a reasonable attorney's fee. The Complainant shall submit a petition for these costs and fees within 15 days of this order's becoming final.

Signed and dated this 7th day of October, 1999.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner