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

Orlando Larry
PO Box 700
Waupun WI 53963

Complainant

vs.

Ray Peterson
619 Morningside Ave
Madison WI 53716

Respondent

COMMISSION'S DECISION AND FINAL ORDER ON COSTS AND FEES

CASE NO. 20051069

This matter began with a complaint filed with the Madison Equal Opportunities Commission (now the Department of Civil Rights Equal Opportunities Division) on June 1, 2005. The Complainant, Orlando Larry, charged that the Respondent, Ray Peterson d.b.a. Master Builders, denied him housing on the basis of his conviction record and impermissibly required the provision of a social security number. The Respondent denied having discriminated against the Complainant in any manner and asserted that the Complainant had failed to submit a completed application for housing.

Subsequent to an investigation, a Commission Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant in the provision of housing on the basis of the Complainant's conviction record. The Initial Determination also concluded that there was no probable cause to believe that the Respondent discriminated against the Complainant by requiring the provision of a social security number. The Complainant timely appealed the portion of the Initial Determination's conclusion that there was no probable cause to the Hearing Examiner.

The Hearing Examiner provided the parties with the opportunity to supplement the record and to submit additional written arguments in support of their respective positions. On August 2, 2006, the Hearing Examiner issued a Decision and Order on review of the Initial Determination affirming the Initial Determination's finding of no probable cause on the social security number issue. The Complainant did not appeal the Hearing Examiner's Decision and Order. The remaining issues were transferred to conciliation.

Subsequent to the failure of conciliation, the complaint was transferred back to the Hearing Examiner for a hearing on the remaining claims of discrimination. Subsequent to a Notice of Hearing and Scheduling Order, a hearing was held on February 20, 2007. Following the hearing, the parties requested a transcript of the hearing and the Hearing Examiner

provided the parties with the opportunity to submit additional written arguments in the form of closing arguments or briefs.

On July 8, 2008, the Hearing Examiner issued his Recommended Findings of Fact, Conclusions of Law and Order. The Hearing Examiner found that the Respondent had violated the provisions of the ordinance by failing to properly comply with the notice and recordkeeping provisions of the housing section relating to the exemptions for housing decisions made with respect to an applicant's conviction record. The Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order recommended economic and non-economic damages in the amount of $4,300.00 and ordered the Respondent to pay the reasonable costs and fees of this action including a reasonable attorney's fee.

On July 23, 2008, the Respondent appealed the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order to the Commission. Subsequent to the opportunity to submit written arguments in support of the parties' respective positions, the Commission, on March 12, 2009, issued a Decision and Final Order affirming and adopting the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order. The Respondent attempted to appeal the Commission's Decision and Order to the Dane County Circuit Court.

The Circuit Court dismissed the Respondent's appeal as being premature as the Hearing Examiner had not yet rendered a decision on costs and fees. The court remanded the complaint back to the Commission for further action.

On September 2, 2009, the Hearing Examiner issued Recommended Findings of Fact, Conclusions of Law and Order on the issue of costs and fees. The Hearing Examiner awarded the Complainant $5,769.00 in costs and fees including a reasonable attorney's fee. The Respondent timely appealed the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order to the Commission.

On March 11, 2010, the Appeals Committee of the Equal Opportunities Commission met to consider the Respondent's appeal. Participating in the Committee's deliberations were Commissioners Cramer Walsh, McDowell and Morrison.

DECISION

After review of the record on the issue of costs and fees, the Appeals Committee finds that the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order issued on September 2, 2009 is fully supported by the record. The Committee adopts and incorporates by reference as if fully set forth herein, those Recommended Findings of Fact, Conclusions of Law and Order.

In general, the Committee adopts the Hearing Examiner's findings that the hours expended by counsel for the Complainant are reasonably necessary and non-duplicative. The Complainant's counsel's hourly rate is reasonable as it reflects the rate which she usually charges clients for her services.

Other than the Respondent's general objections to the finding of liability on the part of the Commission, the Respondent states no specific argument that the Committee finds credible.

ORDER

The Respondent is directed to pay the Complainant's costs and fees as found in the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order no later than 30 days from the date upon which this order becomes final. Additionally, the Respondent is directed to pay the Complainant those sums ordered as damages in the Hearing Examiner's Recommended Finding of Fact, Conclusions of Law and Order dated July 8, 2008 no later than 30 days from the date of this order becoming final.

Joining in the Committee's action are Commissioners Cramer Walsh, McDowell and Morrison. No Commissioner opposed this action.

On behalf of the Equal Opportunities Commission and the Appeals Committee,

Steven H. Morrison, Chairman
Appeals Committee

cc: Jennifer L Binkley

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

Orlando Larry PO Box 700 Madison WI 53963 Complainant vs. Ray Peterson 619 Morningside Ave Madison WI 53716 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON COSTS AND FEES Case No. 20051069

On March 12, 2009, the Equal Opportunities Commission affirmed the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order relating to liability and damages in the above-captioned matter. In its Decision and Order, the Commission remanded the case to the Hearing Examiner to allow the Complainant to file a petition for costs and fees related to the bringing of this complaint. On March 31, 2009, the Complainant filed a petition and affidavit in support of his petition for his costs and fees. On April 2, 2009, the Respondent filed an objection to the Complainant's petition and affidavit.

Based upon the record of the proceedings in this matter, the Hearing Examiner now enters his Recommended Findings of Fact, Conclusions of Law and Order on Costs and Fees.

RECOMMENDED FINDINGS OF FACT

1. The Complainant's attorney is Jennifer M. Binkley. Ms. Binkley is an attorney licensed to practice law in the State of Wisconsin and is employed by Community Justice, Inc., a not-for-profit legal services corporation.
2. At all times relevant herein, Ms. Binkley represented the Complainant.
3. At Community Justice, Inc., Ms. Binkley's customary hourly rate for the provision of legal services is $175.00 per hour.
4. As part of her representation of the Complainant, Ms. Binkley maintained contemporaneous records of her time and work expended in the representation of the Complainant.
5. Ms. Binkley expended 31.9 hours in her representation of the Complainant. The time records indicate that this time was not duplicative and was reasonably necessary in the representation of the Complainant.
6. The Complainant incurred costs of $186.50 for his share of preparation of a transcript of the hearing in this matter.

CONCLUSIONS OF LAW

1. As a prevailing party, the Complainant is entitled to the costs and fees associated with the bringing of his complaint so long as those costs and fees are reasonably required and are not duplicative.
2. In calculating a reasonable attorney's fee, an attorney's usual hourly rate is presumptively a reasonable rate to be used.
3. Costs that may be compensated include those expenses reasonably incurred and necessary to maintain the action.

4. Once a reasonable rate is established and it is multiplied against the hours reasonably expended, it is the Respondent's burden to demonstrate either that the hourly rate is unreasonable or that the time accounted for was either duplicative or was not reasonably necessary to maintain the action.

5. A prevailing Complainant is entitled to his or her costs and fees so as to preserve his or her "make whole" remedy and to encourage those who have been affected by discrimination to bring actions as a "private Attorney General" to further the goals of the law and of society.

ORDER

The Respondent is hereby ordered to pay to the Complainant and his counsel the amount of $5,769.00. This amount is comprised of $5,582.50 in attorney's fees and $186.50 in costs. This amount shall be paid no later than thirty (30) days from the date upon which this order becomes final.

All other findings, conclusions and orders remain in effect.

MEMORANDUM DECISION

The Equal Opportunities Commission has a long track record of awarding costs and fees to prevailing Complainants in complaints brought before it. See Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. atty fees 7/29/93, 9/23/93); Gardner v. Wal-Mart Vision Center, MEOC Case No. 22637 (Ex. Dec. atty fees 6/1/01); Williams and Oden v. Sinha, et al., MEOC Case 1605 (Ex. Dec. 1/23/96); Sprague v. Rowe & Hacklander-Ready, MEOC Case No. 1462 (Comm. Dec. on atty fees 2/9/98). As outlined in those decisions, the first step is to establish a reasonable attorney's fee. A lawyer's usual and customary fee charged to clients is presumptively reasonable. The burden of demonstrating the lack of reasonableness is on the Respondent.

In the present matter, the Complainant's counsel, by affidavit, indicates that her usual and customary rate is $175.00 per hour. The Respondent presents no evidence or argument to demonstrate that this is either not the Complainant's counsel's usual rate or that it is somehow unreasonable for her to charge this rate in a case such as this one.

The Hearing Examiner accepts the rate of $175.00 per hour to be a reasonable rate given Complainant's counsel's years of experience and practice. While the rate of $175.00 per hour seems high for an attorney engaged by an organization providing legal representation to the low income, there is nothing in the record to indicate that $175.00 is not the going rate.

Having arrived at a reasonable rate, the next question is whether the hours for which compensation is requested are reasonably necessary and are not duplicative. Review of the contemporaneously maintained billing records presented by Complainant's counsel in this matter do not show any duplication and appear reasonably necessary to the presentation of the Complainant's claim. The only matter questioned by the Respondent is a letter prepared by Complainant's counsel informing the Department of Civil Rights that the Complainant did not intend to appeal the Hearing Examiner's affirming of the Initial Determination's finding of no probable cause on the claim related to use of the Complainant's social security number.

While it is true that the Complainant might have simply allowed the appeal period to elapse rather than informing the Commission of the decision not to seek review, there is nothing to demonstrate that this was done in an attempt to increase the Complainant's award of fees or to "pad" the accounting. The Hearing Examiner can imagine several reasons for the Complainant's actions that would be well within the realm of the reasonable. The Hearing Examiner will not speculate on which of these might have been the Complainant's reason. However, as there are such reasons, the Hearing Examiner must accept the reasonableness of the charge absent a demonstration by the Respondent to the contrary. The record does not include such a demonstration.

The reasonable attorney's fee is derived by multiplying the Complainant's counsel's rate by the number of hours reasonably expended. That would be $175.00 x 31.9 resulting in a final fee calculation of $5,582.50.

The Complainant's request for costs of this action are relatively modest. He requests $186.50. This is the amount paid by the Complainant as his share of the costs of preparing a transcript of the hearing testimony. There are no charges for postage, copying expenses, deposition transcripts or any of the other usually assessed costs. Given

the necessity of a hearing transcript and the absence of other charges, the Hearing Examiner accepts the Complainant's requested costs as being entirely reasonable.

Adding the costs to the fees, the total amount to be paid by the Respondent to the Complainant in costs and fees is $5,769.00.

The hours expended in this litigation and the costs to be assessed are relatively small in comparison to those in Williams and Oden v. Sinha, et al. or Gardner v. Wal-Mart Vision Center, supra. In order for those who believe they've experienced discrimination to be encouraged to bring their claims, especially those that are modest in scope, Complainants must receive the costs that they would otherwise be out. For a prevailing party, especially one with a small recovery, to be required to pay his or her own expenses would result in a chilling of the enforcement of the public's interest in a society that is free of discrimination. Even in a case where the only finding is one of discrimination without a monetary recovery, there is an important societal purpose served and payment of costs and fees is required. Watkins v. LIRC 117 Wis. 2d 753, 345 N.W. 2d 482 (1984).

The primary thrust of the Respondent's argument in opposition to the Complainant's petition for costs and fees is that he does not believe that the Commission can find him to have discriminated against the Complainant. Those issues, so far as the Hearing Examiner is concerned, have been resolved. The Respondent's tendency to rehash arguments that have been already made only adds to the time and expense of the parties to address them again. In the context of this petition, the Hearing Examiner need not address the Respondent's renewed arguments.

The time set forth in the above order allows for a reasonable period for the parties to consult and to, if possible, come to some agreement about the payment of the costs and fees as well as the original damages in this matter.

Signed and dated this 2nd of September, 2009.

Clifford E. Blackwell, III
Hearing Examiner

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

Orlando Larry 245 Corry St Madison WI 53704 Complainant vs. Ray Peterson 619 Morningside Ave Madison WI 53716 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 20051069

This matter came before Hearing Examiner, Clifford E. Blackwell, III, on February 20, 2007, for a public hearing on the merits of the complaint. The Complainant, Orlando Larry, appeared in person and by his attorney, Jennifer L. Binkley, of Community Justice, Inc. The Respondent, Ray Peterson, appeared in person and without counsel. Based upon the record in this matter, the Hearing Examiner now issues his Recommended Findings of Fact, Conclusions of Law and Order.

RECOMMENDED FINDINGS OF FACT

1. The Complainant is an adult male with a substantial conviction record.
2. The Respondent is a provider of housing in Madison, Wisconsin.
3. On or about May 24, 2005, the Complainant submitted an application for housing to the Respondent.
4. The Complainant applied for housing with the Respondent because the Complainant had found the Respondent's name at the Tenant Resource Center's list of landlords who might be somewhat more flexible in their requirements for housing.
5. The Complainant deemed the Respondent's flexibility to be desirable because of the Complainant's conviction record.
6. In addition to the application, the Complainant provided the Respondent a favorable housing reference dated May 23, 2005, from one of the Complainant's previous landlords, Shaun Khazi.
7. On May 26, 2005, the Complainant provided the Respondent with additional application material pursuant to the Respondent's request.
8. On May 28, 2005, the Respondent rejected the Complainant's application for tenancy, stating in writing that it was because of the Complainant's conviction record.
9. The Respondent, as part of the application process, conducts a screening which includes an applicant's criminal records.
10. At the time of the Complainant's application, the Respondent did not notify applicants of the potential for a screening of an applicant's criminal record. There is no indication on the materials posted with the Tenant Resource Center that such a screening will be conducted. The Complainant was not informed in person that such a screening would be conducted.
11. The Respondent, at the time of the Complainant's application and at the time of hearing, did not uniformly record information received from the search of an applicant's criminal record.
12. The Respondent, at the time of the Complainant's application and at the time of hearing, did not retain uniform records of searches of an applicant's criminal records for two or more years.
13. The Respondent conducted searches of an applicant's criminal records, in part, because one of his rental properties was involved in a nuisance designation and had been made subject to forfeiture in the late 1990's. The Respondent did not wish to subject his property to similar action. The Respondent had also been advised by members of the Madison Police Department, including Noble Wray, of the importance of conducting an adequate screening of potential tenants.
14. The rent for the property for which the Complainant applied at 3638 Sargent Street was $600.00 per month. It is not clear what the Complainant's income was at the time of application. At the Complainant's previous residence, earlier in 2005, the Complainant had an income of $800.00 per month. This income was not clearly available at the time of the Complainant's application with the Respondent. The Complainant stated that he could have additionally earned $100.00 per day in a vending business. This income was not verified.
15. There were unanswered questions about the Complainant's application including a complete rental history for the two years preceding his application.
16. After being rejected for housing by the Respondent, the Complainant attempted to find housing without success. In order to avoid homelessness, the Complainant moved into the apartment of his girlfriend.
17. The Complainant was subject to a "no contact" order relating to his girlfriend resulting from the circumstances leading to the Complainant's conviction.
18. Moving in to his girlfriend's apartment in violation of the "no contact" order violated the terms of the Complainant's probation/release. He was subsequently incarcerated because of this violation.
19. Prior to applying for housing with the Respondent, the Complainant saved approximately $1,500.00 to use

towards a new apartment. The Complainant expended the $1,500.00 that he had saved for housing on hotels and other short-term housing options after the Respondent rejected his application.

20. The Complainant lost employment and unspecified personal property after being rejected for housing by the Respondent.

CONCLUSIONS OF LAW

1. The Complainant, as a person with a conviction record, is entitled to the protection of the Equal Opportunities Ordinance.
2. The Respondent, as a provider of housing within the City of Madison, is subject to the requirements of the Equal Opportunities Ordinance.
3. The Respondent violated MGO section 39.03(4)(d)4c when he conducted a regular criminal records search without first informing the Complainant.
4. The Respondent violated MGO section 39.03(4)(d)4e when he conducted a regular criminal records search and did not make a uniform record of the results of that search.
5. The Respondent violated MGO section 39.03(4)(d)4e when he conducted a regular criminal records search when he did not maintain uniform written records of the search for two years.
6. The Respondent had legitimate, nondiscriminatory reasons for rejecting the Complainant's application of housing. Specifically, the Complainant did not have sufficient verified income to pay for the housing. Also, the Complainant had submitted an incomplete rental history for the two years prior to his application.
7. The Complainant is entitled to be made whole for the Respondent's violations of the ordinance.

ORDER

It is hereby ordered that:

1. The Respondent shall immediately cease and desist from using conviction record of potential tenants as a reason for denying them housing except as in compliance with the provisions of MGO section 39.03(4)(d)4.
2. Within 30 days of this Order becoming final, the Respondent shall pay to the Complainant economic damages in the amount of $300.00.
3. Within 30 days of this Order becoming final, the Respondent shall pay to the Complainant $4,000.00 as compensation for emotional distress, embarrassment, humiliation and the loss of dignity resulting from the Respondent's violation of the ordinance. 4. Within 15 days of this Order becoming final, the Complainant shall submit a petition for his reasonable costs and fees including attorney's fees incurred in bringing this action. The Respondent may file an objection to the Complainant's petition and supporting documentation within 10 days of its receipt.

MEMORANDUM DECISION

This complaint presents some difficult issues in the application of an increasingly important provision of the ordinance. At question here is the ordinance's provisions allowing landlords, in certain circumstances, to make decisions on applications for housing based upon the conviction records of applicants for housing. Given society's tendency to criminalize and incarcerate increasing numbers of its residents, this portion of the ordinance has grown in importance over time.

The ordinance's treatment of conviction records is procedurally somewhat complicated. It starts with a general prohibition on consideration of conviction records in MGO section 39.03(4)(a). The ordinance then goes on to create certain exceptions to the general prohibition against the consideration of conviction records. These exceptions are most notably for convictions for violence to persons or property that might implicate housing or housing relationships. MGO section 39.03(4)(1). These exceptions are then limited as to time and by certain procedural requirements. MGO section 39.03(4)(3) and (4).

The present case involves the application of the procedural requirements to the decision of the Respondent not to rent a house at 3638 Sargent Street to the Complainant in May of 2005. The record is quite clear on some points and much less so on others. It is this lack of clarity and confusion that creates a difficult record.

Normally, the Commission utilizes the McDonnell Douglas/Burdine paradigm to analyze claim of discrimination including those of housing discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Williams and Oden v. Sinha, et al., MEOC Case No. 1605 (Ex. Dec. 12/23/96, Comm. Dec. 7/25/96). This case however, involves application of very specific requirements of the ordinance. Given the legal basis for the claims herein, the McDonnell Douglas/Burdine approach is inappropriate. Instead, the Hearing Examiner will simply apply the general burdens of proof to the ordinance's provisions and the evidence in the record.

In May of 2005, the Respondent owned and rented several properties in Madison for residential use. He was flexible in his requirements for tenancy, which often worked to the advantage of potential tenants with poor payment histories or other problems, such as arrest or conviction records. However, this flexibility was reflected in a somewhat imprecise screening procedure for potential tenants.

As indicated on Hearing Exhibit 1, the Respondent did not notify potential applicants of his intention to perform a criminal records review as part of the screening process. Hearing Exhibit 1 is a copy of a list posted at the Tenant Resource Center of landlords in the Madison area who were somewhat more flexible in their leasing requirements. The Respondent's name and rental information appears on this list with an indication of the information required by the Respondent along with a brief description of the screening process. The Respondent's entry makes no reference to a conviction record check. Hearing Exhibit 2, Respondent's Uniform Screening Procedure, does not indicate that a criminal records check will or may be made as part of the screening process.

Hearing Exhibits 1 and 2 must be compared with Hearing Exhibits 12 and 13. These later two documents appear to be the same documents as Hearing Exhibits 1 and 2, with an indication that a criminal record check is part of the screening process. Hearing Exhibits 12 and 13 were apparently created subsequent to the filing of the complaint in this case.

The Hearing Examiner does not take the change in these documents as a sign of bad faith or an acknowledgement of guilt or liability on the part of the Respondent. The Hearing Examiner views Hearing Exhibits 12 and 13 as evidence of the Respondent's policy as of September, 2005, without reference to the policy in May of 2005.

For the exceptions to the general prohibition to apply, a landlord such as the Respondent must have a written screening policy that is developed and used for a legitimate, non-discriminatory purpose. This process must be applied to all applicants for housing. MGO 39.03(4)(4)a and b.

A potential tenant or applicant must be informed in writing that a conviction record check may be made at the time of application. MGO section 39.03(4)(4)c. Without such a notice, a landlord may not consider an applicant's conviction record pursuant to section 39.03(4)(1).

It is not clear whether the brief description of the screening process contained in Hearing Exhibits 1 and 2 is intended to meet the requirement of a written policy or not. Given the title of Hearing Exhibits 2 and 13, it would appear that these documents represent the Respondent's written screening process.

Hearing Exhibit 2, which was apparently the policy in effect at the time of the Complainant's application, does not contain any indication that a criminal records search will be part of the screening process. The lack of a written indication that a criminal records search will be part of the screening process means that the screening process as set forth in Hearing Exhibit 2 does not comply with the provisions of MGO section 39.03(4)(4)a.

MGO section 39.03(4)(4)d indicates that if criminal record searches are part of the application screening process, the Respondent must maintain all records including those relating to the criminal records search for a period of at least two years. Danette Vollmer, the Respondent's office manager, testified that she would routinely purge the files of all applications after six months. This testimony clearly was a surprise to the Respondent, but the operations of his office are binding upon the Respondent whether he was aware of them or not.

In response to the Complainant's demonstration of a violation of the ordinance, the Respondent puts forth three primary arguments. The Respondent may have more arguments, but the Hearing Examiner has had difficulty identifying specific cognizable claims in the Respondent's post-hearing submissions. The Hearing Examiner believes that the Respondent's arguments can be recast into three claims.

First, the Respondent contends that he cannot or should not be found liable for a violation of the ordinance because he had independent and legitimate reasons for denying the Complainant's application for housing. This is perhaps the Respondent's best argument. Given the fact that the rent for the property at 3638 Sargent Street was $600.00 per month, the Complainant's demonstrated income of $800.00 per month would not seem to be adequate to support the rent. The complainant's testimony about a vending business that might earn up to an additional $100.00 per day is entirely speculative and is not otherwise reliable.

The Respondent also claimed that the Complainant's application was deficient in that it failed to accurately account for the Complainant's housing for the two years prior to his application and to provide adequate information for all individuals who would be living at the 3638 Sargent Street address. This claim is not possible to accurately adjudge because of the informality of the Respondent's application process. Very little documentation seems to exist and that which does exist may or may not have been submitted as exhibits at hearing. The Hearing Examiner cannot definitely conclude that the Complainant's application was so deficient as to require rejection.

The main problem for the Respondent with these arguments is that they seem to come too late after the fact and are undercut by the Respondent's own indication in Hearing Exhibit 4 that the reason for rejecting the Complainant's application is his conviction record. Had either the amount of the Complainant's verifiable income or the completeness of the Complainant's application been truly motivating factors in the Respondent's decision not to rent to the Complainant, the Hearing Examiner would expect to see a notation concerning these reasons in Hearing Exhibit 4 or in some other document from the Respondent. There is no such identification of reasons other than the Complainant's conviction record.

A somewhat related argument to this first contention of the Respondent is that the Complainant's conviction record created a legitimate concern about the safety of the dwelling unit for the Respondent and neighbors. There is no evidence that the Respondent performed the type of individualized examination of the circumstances of the Complainant's record contemplated by the ordinance when determining whether an individual conviction record might represent a threat to the health and safety of property or people.

Even if the record demonstrated that the Complainant's conviction record was one containing the type of offenses that might be considered an exception to the general prohibition on consideration of conviction records, the record does not indicate clearly that all such convictions fell within the two-year period permitted in MGO section 39.03(4)(d)(2). Also, as described above, the Respondent's actions in relying upon the Complainant's conviction record are not protected due to his failure to meet the requirements of MGO section 39.03(4)(d)(4).

The second general argument forwarded by the Respondent with respect to liability relates to knowledge of the provisions of the ordinance. This general argument has several subparts to it.

Generally, the Respondent contends that he was unaware of what he categorizes as a relatively new and obscure provision of the ordinance. He asserts that this lack of knowledge should somehow excuse his violation. He also argues that the Commission should not pursue complaints in this area, but might gain more substantial compliance through training and education.

The Respondent also seems to harbor some misunderstanding of the effect of the conviction record provisions as they relate to housing. In his post-hearing submissions, the Respondent seems to believe that the ordinance prevents him from accessing criminal records through a CCAP search. This is without foundation. Nothing in the ordinance prevents the Respondent from performing searches of criminal records through CCAP. What the ordinance does is to prescribe in what manner the Respondent may use the information revealed by a CCAP search. While the Respondent may use the information resulting from a CCAP search only in certain circumstances, nothing prevents the Respondent from conducting the search.

As for the assertion that the Respondent's alleged lack of knowledge of the requirements of the ordinance regarding use of conviction records, the Hearing Examiner knows of nothing that would excuse the Respondent's violation. The old bromide is perfectly applicable in this instance. The Hearing Examiner also finds it important to

note that the provisions of the ordinance in question here have been in effect for many years and do not represent a "new" provision as described by the Respondent. Similarly, the Respondent contends that the applicable provisions are obscure and not well known. The provisions represent one of the main provisions of the section prohibiting discrimination in housing. The Hearing Examiner in no way concedes that these provisions are obscure or little known.

As to whether the Commission would be better off seeking compliance through training and education than enforcement of complaints, that is a policy determination to be made by someone other than the Hearing Examiner. This matter is before the Hearing Examiner on a validly filed complaint and whether other means might have accomplished the same ends, the Hearing Examiner cannot say. It is the responsibility of the Hearing Examiner to process those complaints that come before him.

The Hearing Examiner has offered the parties at various stages of the hearing process the opportunity to mediate or conciliate the complaint. Those opportunities, to the extent utilized by the parties, have failed to gain a resolution to this matter.

The final general argument presented by the Respondent is a claim that the ordinance's application in this matter is unconstitutional. Though the Respondent's post-hearing briefs in this matter contend a lack of constitutionality, there is nothing to really state the basis for the claim.

As best as the Hearing Examiner can understand, the Respondent seems to be asserting that because the ordinance keeps the Respondent from use of CCAP, the ordinance is unconstitutional. As noted above, there is nothing in the ordinance to keep the Respondent from accessing or using the information obtained from a CCAP search. If this is the basis for the Respondent's claim of unconstitutionality, then it must fail.

If this is not the basis of the Respondent's claim, there is little that the Hearing Examiner can do to address it. The Hearing Examiner is generally without jurisdiction to consider constitutional claims regarding the ordinance. Generally speaking, the Hearing Examiner must presume the constitutionality of the ordinance and may not find that it or its application is unconstitutional.

To briefly summarize, the Respondent made a decision not to rent a housing unit to the Complainant in May of 2005 on the basis of the Complainant's conviction record. The ordinance makes such decisions an illegal discrimination practice unless several specific circumstances exist. These circumstances include universal use of a written, non-discriminatory screening process developed for a legitimate business reason; disclosure in writing to all applicants at the time of application that the screening process may include a criminal records check; and when an applicant's tenancy is rejected because of a conviction record, a written explanation of the decision not to rent and retention of all such records for a period of at least two years. With the exception of providing the Complainant with a written statement explaining that the Complainant's conviction record was the reason for the rejection of his application, the Respondent did not comply with any of the requirements applicable to consideration of an applicant's conviction record.

The fact that the Respondent later presented as reasons for his decision, reasons that might otherwise be legitimate and nondiscriminatory, cannot insulate the Respondent from his earlier statement of the reason for rejection of the Complainant's application.

The Hearing Examiner having found that the Respondent has violated MGO section 39.03(4), the Hearing Examiner must now determine a remedy that will redress the act of discrimination and make the Complainant whole. MGO section 39.03(10)(c)2b. In the context of a claim of housing discrimination, the elements of a "make-whole remedy" include economic damages, i.e., out-of-pocket expenses or economic consequences flowing from the act of discrimination, and non-economic damages, those for embarrassment, humiliation or other emotional distress resulting from the act of discrimination. Additionally, a prevailing Complainant is entitled to the costs and fees associated with the bringing of this claim.

The Complainant's request for damages is unusual in a couple of respects. First, the majority of damages sought by the Complainant are for lost wages. Second, the Complainant makes no specific claim for an award for emotional distress, embarrassment or humiliation. The Complainant's argument for damages is that because of the Respondent's rejection of the Complainant's application, the Complainant lost his other best opportunity for housing; he became homeless; he was unable to work and he had to move in with his girlfriend for whom there

was a "no contact" order which resulted in the Complainant's re-incarceration. The Complainant also states that he had saved approximately $1,500.00 for housing expenses that he had to use for short-term housing once the Respondent denied his application for housing. In addition to the loss of the $1,500.00, the Complainant seeks his lost income for the period of June 1, 2005 to June 1, 2007. He uses the figure of $800.00 per month. The Complainant also seeks statutory interest on the award of wages as consequential damages.

This record presents problems for the Complainant's claimed damages. First, assuming that the Complainant utilized his savings for housing of various types in June and July of 2005, he would be entitled to damages only in that amount which exceeded the $600.00 per month that he would have paid the Respondent had the Respondent not denied his application. In the present circumstances, the difference in housing expenses incurred by the Complainant over those that he would have expended if not discriminated against would be $300.00. This is the result of subtracting the monthly rent that the Complainant would have been liable for had the Respondent rented to him from the amount actually expended during that same period.

The Hearing Examiner only calculates this rental difference for the months of June and July, 2005, because in August, 2005, the Complainant moved in with his girlfriend. This arrangement violated the Complainant's "no contact" order and resulted in his re-incarceration. The Complainant's voluntary action that resulted in his re-incarceration acts to suspend, if not to terminate the Respondent's liability for damages. The Hearing Examiner understands that the Complainant believed that he was compelled to do something that violated a legal requirement of his probation. Despite the desperate situation in which the Complainant found himself, it would be inappropriate for the Hearing Examiner to predicate an award or portion of an award on conduct that violated a legal order.

The Complainant's claim for lost wages stems from the Complainant's testimony that prior to applying for housing with the Respondent he was making $800.00 per month as a handyman. There was also testimony that the Complainant could make up to an additional $100.00 per day through some vending business. The Complainant produced at hearing a vending license from the State of Wisconsin. Production of the license does not establish the income stream to which the Complainant might be able to avail himself.

The problem for the Hearing Examiner in recognizing the Complainant's claim for wages as consequential damages is the lack of a logical connection between the income alleged by the Complainant and the loss of housing. At hearing, the Complainant testified that without a home to operate from, it would be extremely difficult to operate his business. By this, the Hearing Examiner can only find that the Complainant was referring to his vending business. As there is no testimony clearly fixing the level of this income, to make an award of damages premised upon this record would be speculative and is beyond the ability of the Hearing Examiner to award.

The Complainant seems to calculate his wage loss at $800.00 per month. This appears to coincide with his income from his work as a handyman. This income was verified by the statement of the Complainant's prior landlord for the period up to February of 2005. There is nothing in the record to explain why lack of housing would keep the Complainant from continuing to work as a handyman. There are possible explanations, but it would require impermissible speculation on the part of the Hearing Examiner to apply such ideas to this record.

The Hearing Examiner accepts that it is difficult to maintain employment, especially alternative forms of employment while homeless. However, the record fails to explain why these difficulties rose to the level of a total bar on employment for a period of approximately two years. This is further complicated by the fact that the Complainant was incarcerated several times during the period for which he seeks wage loss as consequential damages for the Respondent's refusal to rent him a house. The intervening circumstance of the Complainant's actions resulting in incarceration act to bar or at a minimum to toll the Respondent's liability for damages.

One may debate in more global terms the responsibility of the Respondent for the Complainant's plight, but given society's current norms, it is the Complainant who is deemed responsible for his personal actions especially those that place him in jeopardy of the law. It is for this reason that his intervening incarceration acts to limit his damages.

In short, the Complainant's claim for economic damages is limited to $300.00, the excess he was required to pay during June and July of 2005 over the rent he would have paid to the Respondent had the Respondent not violated the ordinance. The Complainant's claim for wage loss as consequential economic damages is too speculative for the Hearing Examiner to make an award of damages. Even if the Hearing Examiner might find support in the record and the law for such an award, it would have to be limited to the period beginning with the

Respondent's violation of the ordinance to the Complainant's first incarceration after the violation, i.e., approximately two months.

The Hearing Examiner turns to the question of damages for emotional distress. As noted previously, the Complainant makes no specific request for damages to compensate for injuries to his dignity and civil rights resulting from the Respondent's act of discrimination. As the Hearing Examiner opined in Cronk v. Reynolds Transfer and Storage, MEOC Case No. 20022063 (Ex. Dec. 8/29/2006; other citations omitted), where there is a lack of evidence in the record as to the amount that would be appropriate to award for emotional distress, the Complainant's own statement is the best evidence of what is necessary to make the Complainant whole. In Cronk, the prevailing Complainant requested $5,000.00 in emotional distress damages and that is what the Hearing Examiner awarded. That amount was ultimately affirmed by the Commission and by the Circuit Court.

While this Complainant made no request for an award of emotional distress damages, the record supports a finding that the Complainant experienced emotional distress. Thus, an award is appropriate.

Though the Complainant's testimony was not expansive, it eloquently conveyed his distress and embarrassment at being made homeless after the Respondent rejected his application for housing. The Complainant testified that finding a place to live was important because it would allow him not to be a burden on others and to have the security of knowing he would be staying more than a week in the future. Having his own housing would allow him to operate his vending business and permit him to increase his income. Evidence of the Complainant's frustration and anxiety can be found in his decision to put himself in jeopardy of incarceration by moving in with his girlfriend in August of 2005.

Given the lack of specific testimony about emotional distress and the lack of a claim for such damages, the Hearing Examiner is constrained to consider a lower or nominal award of such damages. Given this level of damages, the Hearing Examiner looks to the recent decision in Norris v. Cost Cutters of Madison, Inc., MEOC Case No. 20052134 (Ex. Dec. 06/30/08) in which the Hearing Examiner awarded the Complainant $3,000.00 in emotional distress where the testimony was more sparse, but somewhat more direct. In Gardner v. Wal-Mart Vision Center, MEOC Case No. 22637 (Ex. Dec. 6/3/01), the Hearing Examiner awarded the Complainant $2,500.00 for emotional distress where she testified explicitly about her distress, but was not particularly convincing and did not have her testimony corroborated.

The Commission has addressed emotional distress damages in the context of a claim of housing discrimination on at least three occasions. In Ossia v. Rush, MEOC Case No. 1377 (Ex. Dec. 6/7/88), the Hearing Examiner awarded the prevailing Complainant $1,500.00 where the Complainant testified about his feelings of distress and where he presented evidence of having sought counseling for his distress. In Sprague v. Rowe and Hacklander Ready, MEOC Case No. 1462 (Comm. Dec. 02/10/94; other citations omitted), the Commission awarded the prevailing Complainant $3,000.00 for her emotional distress in being denied housing on the basis of her sexual orientation. The Complainant testified about her distress, but did not offer any witness corroboration. This award was later vacated by the Wisconsin Court of Appeals on procedural grounds. In Williams and Oden v. Sinha, et al., MEOC Case No. 1605 (Ex. Dec. 01/23/96; other citations omitted), the Hearing Examiner awarded the Complainants each $7,500.00 for their emotional distress related to discriminatory treatment at the time of an apartment showing. The parties were homeless at the time of showing and remained so. They placed friends and family in jeopardy of losing their participation in a subsidized housing program by moving in with them. The Complainants testified explicitly about their distress, and it was corroborated by other witnesses including family and housing professionals.

With this history of awards, the Hearing Examiner finds that an award in the amount of $4,000.00 will compensate the Complainant for the emotional distress injuries that were demonstrated on this record. While many of the factual circumstances mirror those in Williams and Oden, this record lacks the explicit testimony and the corroboration of that case. The type and nature of the testimony more closely resembles that in Sprague. The Hearing Examiner is less personally familiar with the record in Ossia and is unable to make the type of comparison that he can with Sprague and Williams and Oden. Given the type of circumstance and the lack of corroboration, the Hearing Examiner finds that an award between Sprague and Williams and Oden will make the Complainant whole.

A higher damage award might have been possible in this case had the Complainant's counsel paid more attention to proof of that portion of the Complainant's claim. It is the experience of the Hearing Examiner that counsel for the Complainant often fails to adequately lay a factual record for an award of damages. Without such a record, the

prevailing Complainant will not receive an appropriate award because too much is left for a Hearing Examiner's speculation. Speculation is the one thing most likely to result in reversal of an award.

Finally, counsel for the Complainant requests an award of costs and fees including a reasonable attorney's fee. Such an award is required if the Complainant is to truly be made whole. Should the Complainant be expected to compensate an attorney from the proceeds of his award, the Complainant would effectively be penalized for bring a claim which the law encourages him to pursue. To avoid this situation, the burden of legal representation is shifted to the Respondent. Accordingly, the Complainant is directed to submit a petition for his costs and fees including a reasonable attorney's fee as specified in the order.

Signed and dated this 8th of July, 2008.

Clifford E. Blackwell, III
Hearing Examiner