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

Michael Brown
PO Box 181
Madison WI 53701-0181

Complainant

vs.

CDA
215 Martin Luther King Jr Blvd Ste 120
Madison WI 53710

Respondent

HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

CASE NO. 20101085

BACKGROUND

On May 24, 2010, the Complainant, Michael Brown, filed a complaint with the City of Madison Department of Civil Rights, Equal Opportunities Division (EOD). The complaint charged that the Respondent, the City of Madison Community Development Authority, refused him housing on the bases of his arrest and/or conviction records and/or his color in violation of Madison General Ordinance sec. 39.03(4)(d), Mad. Gen. Ord. The Respondent denies that it discriminated against the Complainant and asserts that it denied his application for Section 8 housing pursuant to the requirements of federal law and, specifically, because of his past violent conduct.

An investigation was commenced by a Division Investigator/Conciliator. On June 24, 2010, the Respondent challenged the Division's authority to process this complaint in a letter brief responding to the complaint. The Respondent requested that the complaint be transferred to the Hearing Examiner to determine whether the Division has jurisdiction. On June 28, 2010, the Division Investigator/Conciliator transferred the complaint to the Hearing Examiner.

On July 8, 2010, the Hearing Examiner issued a briefing schedule requesting that the parties support their respective positions. The Respondent submitted a brief and the Complainant, who is unrepresented, did not submit any argument.

DECISION

The Respondent challenges the Division's processing of the complaint on several grounds. First, the Respondent initially contended that the complaint was improperly served upon the Respondent. In its motion and brief filed on August 13, 2010, the Respondent withdrew this objection. Second, the Respondent asserts that the nature of the Respondent as an independent body politic and as a public housing authority regulated by federal law precludes regulation by a municipal civil rights agency. Third, the Respondent charges that the Complainant's failure to continue with the Respondent's prescribed appeal process prevents the

Division from processing the Complainant's charge as a matter of a failure to exhaust administrative remedies. Finally, the Respondent asserts that the Complainant's failure to submit a brief in response to the Hearing Examiner's July 8, 2010 order represents a waiver of his claim.

The Hearing Examiner does not accept that the Complainant's failure to submit a brief should result in a bar to his complaint. The Complainant is unrepresented and is likely unprepared to meet such a requirement. This failure on the Complainant's part does not impose a greater burden on the Respondent or work to the Respondent's detriment. It does mean, however, that the Hearing Examiner must examine the arguments of the Respondent somewhat more independently.

First, the Hearing Examiner notes that Madison General Ordinance sec. 39.03(10)(d)1-3 specifically addresses the procedure to be utilized by the Division when addressing claims against the City of Madison and/or those against the Community Development Authority (CDA). These provisions clearly dictate that where either the Equal Rights Division of the Wisconsin Department of Workforce Development (ERD) or the United States Department of Housing and Urban Development (HUD) have concurrent jurisdiction, the complaint must be referred to one of those agencies for processing. It is only where a claim cannot be heard by either that a complaint will be processed by the EOD.

In the present matter, the Complainant asserts that the Respondent denied him housing on the bases of arrest record, conviction record and color. The allegation of color discrimination could be processed by either the ERD or HUD. Since this claim must be referred to either of those agencies, its transfer moots the Respondent's concerns with respect to that particular claim. In accordance with the requirements of sec. 39.03(10)(d)1 and 2, the Hearing Examiner orders this allegation transferred to either the ERD or HUD. It is noted that the EOD currently has a worksharing agreement with the ERD, but not necessarily with HUD.

Having directed the transfer of the claim of discrimination on the basis color, the Hearing Examiner turns to the claims of discrimination in housing on the bases of arrest record and conviction record. The Respondent states two general arguments for dismissal of the complaint. First, that the Respondent is not capable of suit under the ordinance for a variety of reasons. Second, the Respondent asserts that the Complainant has failed to exhaust the administrative remedies afforded to him by the Respondent's appeal process.

The Hearing Examiner will first address the exhaustion argument. If the Respondent is correct with respect to this argument, the Hearing Examiner need not entertain a broader attack on the EOD's jurisdiction.

The Respondent asserts that, because the Complainant had begun to follow the Respondent's process for appealing the denial of housing, he must entirely exhaust this process before filing a complaint with the EOD. The Respondent's argument is founded on notions of collateral estoppel and the need to avoid inconsistent outcomes. While such concerns are not insignificant, given the record in the present matter, they seem unrealistic.

The record at this point is vague because the Respondent's motion interrupted the EOD's investigative process. However, it appears that the Complainant's appeal in the Respondent's process was extremely limited and that his claims and concerns received cursory

attention. Given the informal nature of the Respondent's appeal process, it seems likely to the Hearing Examiner that the Complainant did not have the opportunity for a full and complete consideration of his claims that might give rise to a claim for issue or fact preclusion. The Hearing Examiner reaches this conclusion not because of the Complainant's *pro se* status, but due to the open and informal nature of the CDA's initial decision, of the Complainant's appeal and of the subsequent appeal hearing. It seems probable to the Hearing Examiner that an appeal to the circuit court would yield a determination on an incomplete record. In this way, requiring the Complainant to pursue his appeal to the circuit court would be fruitless.

Additionally, sec. 39.03(10)(d) et seq. clearly contemplates a process for addressing complaints filed against the Respondent. If, once an administrative appeal before the CDA is commenced, the Complainant is required to follow that appeal process to its end, there would seem to be little need for the process established in the Equal Opportunities Ordinance. As the Respondent eloquently argues, one must interpret an ordinance to avoid rendering its requirements meaningless or absurd. To strictly apply the exhaustion requirement as contended by the Respondent would render sec. 39.03(10)(d) a nullity.

The Hearing Examiner also notes that federal regulations concerning the informal appeal process may not have been followed. It is not entirely clear, due to the interruption of the investigation process, who initially denied the Complainant's application and who heard the Complainant's appeal. It is possible that the relationship of these actors to other decision-makers may not be consistent with federal regulations. See HUD Informal Review Procedures, 24 C.F.R. § 982.554(b)(1) (2011) (permitting a public housing authority to designate a person to review appeals, but prohibiting from designation one who made or approved the decision and one who is a subordinate of the person who made or approved the decision). This possible lack of consistency with federal rules could also create an additional reason not to require exhaustion of the Complainant's administrative remedies.

The Hearing Examiner concludes that given the record of these proceedings to date, a requirement to exhaust the Complainant's appeal remedies in the Respondent's internal appeal process does not make sense. The Complainant's complaint is not barred by a requirement to exhaust the Respondent's administrative process.

The Hearing Examiner now turns to the Respondent's assertions of preemption and exclusion from the process. The Respondent first contends that it is an entity which is incapable of being the subject of a complaint under the Equal Opportunities Ordinance. Essentially, the Respondent argues that it is not an agency or department of the City of Madison and, as an independent body politic, it is not the type of entity that is capable of being named as a Respondent before the EOD.

Before addressing the specifics of the Respondent's argument, the Hearing Examiner must clarify his role and authority with respect to claims brought under the ordinance. While the Hearing Examiner is granted a broad scope of authority to address claims brought under the ordinance, the Hearing Examiner's authority is not unlimited. For example, the Hearing Examiner may not recognize a claim or impose a requirement for action with respect to a claim outside of the contemplation of the ordinance. The Hearing Examiner cannot exercise jurisdiction over a complaint occurring outside of the geographic limits of the City of Madison. The Hearing Examiner may not exercise authority over a complaint that was filed outside the

statute of limitations. In other words, the Hearing Examiner is limited by the ordinance in the scope of his authority.

There are other limitations on the authority of a Hearing Examiner. While a Hearing Examiner must apply constitutional principles, i.e. the Supremacy Clause, a Hearing Examiner must assume the constitutionality of the enactment under whose authority he/she acts. See Pasha v. Gonzales, 433 F.3d 530, 536-37 (7th Cir. 2005) (recognizing that administrative agencies generally refuse to adjudicate the constitutionality of the statutes under which they operate). Determinations of constitutionality are reserved to the judiciary. See Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is"); Warshafsky v. Journal Co., 216 N.W. 2d 197, 205 (Wis. 1974) (recognizing that determinations as to the interpretation and constitutionality of statutes is the exclusive province of the courts).

The Respondent, in asserting that the CDA is not capable of being named in a complaint under the ordinance, asks the Hearing Examiner to ignore the clear language of the ordinance. As previously noted, section 39.03(10)(d)1-3 sets forth a process and procedure for addressing complaints brought against the Respondent. It is not a matter of interpretation that this section applies to the Respondent. Given the duty of the Hearing Examiner to apply the provisions of the ordinance, the Hearing Examiner must conclude that he may not find that the Respondent is not capable of being named as a Respondent in this complaint.

As part of its position that the EOD may not exercise jurisdiction over this complaint, the Respondent describes itself as an independent body politic and as not an agency or department of the City of Madison. The Respondent points to other entities over which the EOD has declined to exercise jurisdiction and seeks to equate itself with those entities. For the most part, the entities identified by the Respondent are outside of the geographical boundaries of the City of Madison. Even where those bodies may not be physically located outside of the City of Madison, they represent bodies of government that are "superior" to the City, i.e. the United States government, the State of Wisconsin, etc. The basis for determining that the EOD is without jurisdiction over these entities has nothing to do with the fact that they do or do not act for the City in their official capacity.

One question raised by the Respondent's position that remains unanswered on this record is, if the Respondent is not a department or agency of the City of Madison, how it comes to be represented by an assistant City Attorney. It would seem that the Respondent must be overstating its independence from the City of Madison if it is able to draw upon the administrative and professional resources of the City of Madison.

Even if the Respondent is correct that it is an independent body politic from the City of Madison, section 39.03(4)(a) prohibits discrimination by any person or agent of that person in the provision of housing, where "person" is defined to include the City of Madison. See M.G.O, § 39.03(2)(aa). Further, section 66.1335 of the Wisconsin Statutes acknowledges that a Community Development Authority may act as the agent of the City in planning and carrying out community development programs and activities. Wis. Stat. § 66.1335(1) (2010).

Given the record in this matter, it appears that the Respondent is acting as an agent for the City of Madison in the provision of housing and in the operation of City-owned housing units.

In such a circumstance, the status of the Respondent as an independent body politic would seem to be irrelevant to its potential liability, as an agent for the City of Madison.

The final issue presented by the Respondent is the preemptive effect of federal law and regulations on the claim of the Complainant. As previously noted, the Complainant's color claim will be transferred to another agency for resolution. With respect to the Complainant's claim that his arrest and conviction records formed the basis for the Respondent's denial, the Hearing Examiner finds that it is premature to determine the preclusive effect of federal law. Rather than attempt to determine whether the Complainant's claim is precluded by federal law or regulations, this matter should proceed through investigation and to the issuance of an Initial Determination.

Given the Hearing Examiner's decision in Pagel v. Elder Care of Dane County, it is clear that the EOD may not exercise jurisdiction where a Respondent receives federal funds and those funds are conditioned on the performance of certain actions on the part of the Respondent. MEOC Case No. 22442 (Ex. Dec. 10/31/96). In the present matter, the Respondent administers funds under the Section 8 program and as a condition of its receipt of such funds, the Respondent is required to perform various record checks and is affirmatively prohibited from renting to individuals who do not meet certain specified criteria. The most relevant condition imposed is the obligation to inquire into an applicant's (such as the Complainant) criminal history and background and to deny the rental application of one who has a record of certain types of "criminal" behavior. Here again, the most relevant concern is a history of violence towards people or property or a history of disruptive conduct that interferes with the rights of others.

Should the EOD's investigation demonstrate that the Respondent's denial of the Complainant stemmed from activity covered by HUD regulations, the Complainant's claim would be preempted by the application of those regulations. However, as this matter was halted prior to the completion of the investigation, it is premature to determine the outcome of this complaint. The Complainant has alleged that the Respondent's decision was predicated upon the fact of his arrest and conviction records. Currently, the Respondent states that it was not the Complainant's prior arrests or convictions, but rather it was the conduct leading to his April 2009 arrest that directed its decision.

Arguably, the Investigator/Conciliator could find that there is sufficient evidence in the record to conclude that the Complainant has made out a *prima facie* claim of discrimination in housing based upon the Complainant's arrest record. If the EOD record is yet incomplete, it has not yet been closed and further evidence may yet be produced.

Assuming *arguendo* that the Complainant satisfies his initial burden, the Investigator/Conciliator could conclude that the Respondent has presented a legitimate, non-discriminatory explanation for its denial of the Complainant, i.e. application of the HUD guidelines. However, despite such a possible demonstration, the Complainant might still prevail, if he can adduce evidence to demonstrate that the Respondent's explanation is not credible or represents a pretext for an otherwise discriminatory reason.

The Hearing Examiner does not believe that these determinations are automatic or even easy to make. However, the parties have not had the full opportunity to set forth their evidence and positions.

Accordingly, the Hearing Examiner directs that the claim of discrimination in housing on the basis of color be transferred to the ERD or, in the alternative, to HUD. The remaining claims of discrimination in housing on the bases of arrest record and conviction record are remanded to the Investigator/Conciliator for further investigation and the issuance of an Initial Determination. Should the Investigator/Conciliator find that the reasons stated by the Respondent for its denial of housing to the Complainant conflict with the provisions of the ordinance, the Investigator/Conciliator should find that there is no probable cause to believe that discrimination has occurred.

Signed and dated this 20th day of January, 2011.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Roger Allen