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

Billie Barry
515 Moorland Rd #101
Madison WI 53713

Complainant

vs.

Total Security Management
250 E Wisconsin Ave Ste 1800
Milwaukee WI 53202

Respondent

HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS

CASE NO. 20122076

BACKGROUND

On April 30, 2012, the Complainant, Billie Barry, filed a complaint of discrimination with the City of Madison Department of Civil Rights Equal Opportunities Division (Division). Barry's complaint alleged that the Respondent, Total Security Management, discriminated against her in violation of the Madison Equal Opportunities Ordinance, when it either failed or refused to hire her or terminated her employment after initially hiring her because of her conviction record. The Respondent contends that it did not discriminate against the Complainant and alleges that it did not hire the Complainant because she had been less than truthful on her application and its contract with BMO Harris Bank, prevented it from hiring any individual with any conviction record.

The complaint was transferred to a Division Investigator/Conciliator who conducted an investigation of the allegations of the complaint. Subsequent to that investigation, the Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that discrimination had occurred as alleged in the complaint. Efforts at conciliation were unsuccessful and the complaint was transferred to the Hearing Examiner for further proceedings.

On August 23, 2012, the Hearing Examiner conducted a Pre-Hearing Conference which identified the issues for hearing and set a date for hearing along with various interim dates. These interim dates included a date for the filing of dispositive motions.

On September 26, 2012, the Respondent filed a motion seeking to have the complaint dismissed for a lack of jurisdiction because of the preemption of Wis. Stats. Section 440.26 relating to the licensing of private security guards. On October 16, 2012, the Complainant filed a brief in opposition to the Respondent's motion. On October 26, 2012, the Respondent filed a reply to the Complainant's response.

DECISION

At this stage, the record in this matter seems somewhat scant for purposes of determining this motion. As in almost any motion to dismiss, the Hearing Examiner is required to examine the record in the light most favorable to the non-moving party. In the present matter that would be the Complainant.

Generally speaking, the events leading to this complaint occurred in a fairly short period of time. For purposes of this motion only, it appears that the Complainant applied for a position as a private security person with the Respondent on or about April 19, 2012. She initially submitted an application provided by the Respondent which asked her to disclose any convictions for other than minor traffic offenses. The Complainant indicated that she had no such convictions. In fact, the Complainant had a conviction for a first offense operating while intoxicated (OWI) from 1992. In Wisconsin, a first offense OWI is a misdemeanor.

It is not clear from this record exactly what action the Respondent took with respect to the Complainant's application, but on Sunday, April 22, 2012, the Complainant went to the home of Aubrey Deschner for training as a private security person. The Complainant took with her the application for a permit to be a private security person in Wisconsin.

Such permits are issued by the Department of Safety and Professional Services and are required to work as a private security person in the State of Wisconsin. This application requires the disclosure of all convictions regardless of when or where they occurred and for all types of convictions including felonies, misdemeanors and municipal violations.

The application to be submitted by the prospective private security person must be signed by the entity hiring that individual. Signature by the employing entity signifies that the employer accepts the responsibility for the individual and knowledge of the contents of the application.

While an applicant with a conviction of a felony who has not been pardoned from that felony is not eligible for a private security permit, it appears that pardoned felons and those convicted of misdemeanors and violations of ordinances or provisions subject to a forfeiture can receive a permit. In determining the applicability of one's conviction record to the issuance of a permit, the Department is to apply the standards of the Wisconsin Fair Employment Act (FEA), section 111.31-111.395 Wis Stats. Essentially, the FEA requires a determination that a conviction is substantially related to the duties of the job. Under the provisions of the FEA, there is no time limit for which a conviction record cannot be considered.

It is this provision and step in the application process that forms the basis for the Respondent's claim of preemption. It is also the point at which both parties miss the mark in the view of the Hearing Examiner.

Essentially, the Respondent argues that because the private security person law refers to conviction records as possibly being a disqualifying factor and because there is no time limit on the use of conviction records contained in the FEA that the provisions of section 440.26 override the provisions of the Equal Opportunities Ordinance under which this complaint is brought. The Equal Opportunities Ordinance indicates that only conviction records, as that term is defined, occurring within the last three years and which are substantially related to the duties

of the job may be considered by the employer. In the present matter, the conviction occurred well outside of the three-year period specified in the ordinance.

The Complainant defends by arguing that the provisions of the FEA as referenced in section 440.26 and the ordinance can be harmonized and do not stand in conflict with each other. This position is generally supported by past case law and would be especially applicable if the question were the possible preemption of the FEA. However, the question here is not whether the FEA preempts the ordinance, but whether the provisions of section 440.26 and its specification of the FEA preempt the ordinance.

The Hearing Examiner finds the arguments of both parties to be well laid out and interesting. However, the Hearing Examiner need not and does not decide the issue as framed by the parties.

While the possible preemption of the Private Security Personnel statute may yet come into play, the record, as currently before the Hearing Examiner, does not indicate that the Department of Safety and Professional Services has ever acted upon the application of the Complainant in this action. As such, it is mere speculation as to how the Department might view the circumstances and nature of the Complainant's 1992 conviction for OWI. In other words, it is not at all clear that the Department would conclude or did conclude that the Complainant's 1992 conviction was or was not substantially related to the position which she sought.

In addition to the facts stated above, it appears that on April 22, 2012, Ms. Deschner signed the Complainant's application for a private security person permit. The Complainant went to her assigned place of work, at one of the Marshall and Ilsley Bank branches. Marshall and Ilsley Bank is now known as BMO Harris Bank since completion of a purchase of the bank.

The Complainant's brief indicates that the Complainant, on April 23, 2012, completed filling out the application signed by Deschner on April 22, 2012. At the end of her shift on April 23, 2012, the Complainant was informed that her 1992 OWI conviction precluded her from working with the Respondent as a private security person. The Respondent does not specifically refute the Complainant's limited statement of these facts.

Given the facts as outlined above, the Hearing Examiner cannot find that the Department took any action on the Complainant's application. One possible interpretation of these facts is that the Respondent believed that if the Complainant's application were to be submitted to the Department, it would be rejected and therefore it determined not to hire the Complainant. However, given the record in this matter as currently before the Hearing Examiner, such a predetermination appears unwarranted.

A second possible interpretation of the record as presently constituted is that the Respondent, arguably, in rejecting the Complainant's application was reacting to what it argues was a belated and contradictory disclosure of the Complainant's conviction record. The Hearing Examiner makes no determination of the factual basis for such a claim.

A third potential interpretation is that the Respondent believed that its contract with with its client precluded it from hiring the Complainant. This leaves open the question of whether such is a possible defense to liability or not.

It seems likely that there are additional possible interpretations of the record as it currently stands. The Hearing Examiner will not engage in speculation about those possible other inferences that might be drawn from the record. However, what does seem clear to the Hearing Examiner is that there is no basis for making a determination that section 440.26 and the rules promulgated thereunder actually preempt the application of the ordinance as argued by the Respondent. In part, this is because there is nothing in the record indicating that there has been any actual application of section 440.26 to the facts in this matter.

At this stage of the proceedings, the Hearing Examiner is more inclined to describe this as a question of whether the Complainant met or could meet a condition precedent to her employment by the Respondent as a private security person. It is clear that the Complainant was required to have the permit issued by the Department of Safety and Professional Services in order to work for the Respondent in the position under question in this matter. If the Department did not or would not issue such a permit to the Complainant, she could not meet one of the requirements for employment. However, absent some determination on the part of the Department, it's not possible to determine whether the Complainant was lawfully barred from employment by action of state law.

As the ordinance recognizes as a limitation convictions that prohibit an individual from obtaining required licenses, it does not appear that the ordinance would conflict with the provisions of section 440.26 regardless of the time frame stated in either the FEA or the ordinance with respect to the conviction in question in this complaint.

For the foregoing reasons, the Respondent's motion to dismiss is denied. This matter will proceed as scheduled.

Signed and dated this 27th day of November, 2012.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Colin B Good
Kathryn S Clark