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

Rachel Potter 613 Clemons Avenue Madison, WI 53704 Complainant vs. Madison Gospel Tabernacle 4909 E. Buckeye Road Madison, WI 53716 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION Case No. 21269

BACKGROUND

On March 9, 1990, the Complainant, Rachel Potter, filed a claim of discrimination with the Madison Equal Opportunities Commission (MEOC or Commission) against the Respondent, the Madison Gospel Tabernacle, alleging that it discriminated against her on the basis of her sex, religion and sexual orientation. The Complainant charged that the Respondent refused to hire her in violation of the Equal Opportunities Ordinance, specifically, Madison General Ordinances MGO 3.23(7). The complaint was assigned to an MEOC investigator for purposes of investigating the allegations of the complaint and making an Initial Determination of either probable or no probable cause to believe that discrimination occurred.

The Respondent filed, on June 29, 1990, a Motion to Dismiss the complaint claiming that the Commission was without jurisdiction to investigate or accept the complaint on the basis of exceptions relating to religious organizations contained in Wis. Stats. sec. 111.337 of the Wisconsin Fair Employment Act (FEA). The question was transferred to the Hearing Examiner for determination of the jurisdictional issue.

The Hearing Examiner issued a Briefing Schedule and received written argument from both parties. Based upon these arguments and the record of the complaint, the Hearing Examiner concludes that this matter must be remanded for further investigation and that the Commission may have jurisdiction over the allegations of the complaint.

DECISION

The Respondent raises two primary issues in its Motion to Dismiss for Lack of Jurisdiction. First, it argues that application of the Ordinance to the Respondent would represent an unconstitutional entanglement with a religious organization. Second, the Respondent contends that a provision of the Wisconsin Fair Employment Act, Wis. Stats. 111.31 et seq., specifically Wis. Stats. 111.337(3), expresses an intent on the part of the legislature to preempt the field of regulation with respect to discrimination by religious organizations in hiring. This preemption, according to the Respondent, deprives the Commission of jurisdiction to proceed with this complaint.

With respect to the first ground raised by the Respondent, the Hearing Examiner and the Commission are unable to rule. It is a well established principle of administrative law that administrative agencies are without authority to rule on the constitutionality of ordinances or statutes. This authority is reserved to the courts. Wisconsin Socialist Workers 1976 Campaign Committee v. McCann 433 F. Supp. 540 (E.D. Wis. 1977). Given this limitation on the authority of the Hearing Examiner, he must presume that the Ordinance is constitutional and allow the Respondent to raise this issue on appeal before a court of competent jurisdiction.

The second argument of the Respondent relates to the applicability of Wis. Stats. Sec. 111.337(3). This provision prohibits local governments from adopting any provision that makes illegal that which is authorized by the State. This applies specifically to the regulation of discrimination on the basis of creed by religious associations or organizations. The Respondent contends that because the Equal Opportunity Ordinance states protections that are broader with respect to discrimination by religious associations or organizations than the specific exemptions of Wis. Stats. 111.337(2), that all of the protections relating to discrimination in employment by a religious association or organization in the Equal Opportunities Ordinance MGO 3.23(7) are preempted and thereby unenforceable. This reading relies on equating the term "provision" with Ordinance. There is no basis for this reading. The Respondent ignores the limiting language in Volunteers of America Care Facilities v. Village of Brown Deer, 97 Wis. 2d 619, 622, 294 N.W.2d 44 (Ct. App. 1980). This case, in recognizing the concept of preemption, limits its application to the extent of the overlap. It does not require that the entire area surrounding the overlap be invalid.

There is little question that Wis. Stats. 111.337(3) acts to preempt the provisions of MGO 3.23(7) to the extent that MGO 3.23(7) would impose stricter requirements than state law on a not for profit religious association or organization. However, Wis. Stats. 111.337 when taken as a whole does not express the legislature's intent to totally remove jurisdiction from other levels of government over not for profit, religious associations and organizations. That section works to invalidate only provisions of local ordinances that provide protections that are more stringent than those of state law. Had the legislature intended to totally withdraw from other levels of government regulatory authority over not for profit, religious associations and organizations, it could have done so expressly. Instead, the legislature sought only to remove authority from local governments when enactments of those levels were more stringent than at the State level. Since Wis. Stats. 111.337(3) recognizes the legitimacy of some local ordinances, it is not reasonable to read this section as a complete withdrawal of authority because there is a partial overlap of provisions between the Ordinance and the State law as argued by the Respondent. We must determine the extent to which the City Ordinance is preempted by Wis. Stats. 111.337(2) to see if the complaint in this matter falls outside of the area preempted by the state law.

The differences between State law and the Ordinance are not that great. As noted by the Respondent, both state and local law were identical to each other until the legislature made the exceptions found in Wis. Stats. 111.337(2) broader. Though somewhat broadened, the exceptions are actually rather narrow. Sacred Heart School Board v. LIRC, 157 Wis. 2d 638, 460 N.W.2d 430 (1990). In Wis. Stats. 111.337(2)(a) the legislature removed the occupational limitation of the exception, granting to not for profit, religious associations and organizations the ability to give a preference to members of its religion or denomination for any position. In Wis. Stats. 111.337(2)(am), the expansion removed a similar occupational limitation and granted to not for profit, religious associations and organizations the ability to give hiring preference to any person who shares its teachings or beliefs for a job where the job description clearly demonstrates that it is related to the teachings or beliefs of the association

or organization. The previous exception and that currently recognized in MGO 3.23(7)(h)2 permitted such a preference to be given only to members of one's own religion or denomination.

The exception of Wis. Stats. 111.337(2)(a) is not in question in this matter. The affidavit of the Respondent's Business Manager, John Ruck, states that the Respondent does not limit employment to members of its own religion or denomination. Further evidence of this is the fact that the newspaper advertisement to which the Complainant responded apparently made no reference to such a limitation or preference. It is clear that this exception is not relied upon by the Respondent.

What is at question is the exception found in Wis. Stats. 111.337(2)(am) relating to preferences for persons who adhere to the general teachings and beliefs of the organization. The Respondent reads this exception broadly to cover any employee of the Respondent. The Respondent's position is premised partially on the fact that all employees are expected to sign the Statement of Affirmation and the agreement to be bound by its provisions. The Respondent seems to equate this Statement of Affirmation with a job description. This reading is not supported by the language of the statute. The statute requires a demonstration that the position involved is clearly related to the teachings and beliefs of the not for profit religious association or organization. The requirement that the position as set forth in a job description be related to the teachings or beliefs indicates that the legislature intended those jobs or positions of a not for profit religious association or organization that have a function connected to the religious principles of the association or organization to be subject to the protections of the statute. Presumably the legislature was attempting to recognize that not just the clergy or similar instructional positions may be closely related to the religious functioning of an organization and were therefore entitled to the benefits of the exception, without granting an exception to all employees. If it had intended a complete exception the legislature would not have tied the application of the exception to the specific function of the job as set forth in a job description.

The Respondent's argument that the Statement of Affirmation and the agreement to be bound by it are the equivalent of a job description, if accepted, would nullify the requirement that application of the exception be addressed on a case by case basis. To evade coverage of the requirements of the FEA and by extension the ordinance, all a not for profit religious association or organization would have to do is require each employee, no matter what their duties or responsibilities, to sign a document requiring them to adhere to the teaching or beliefs of the organization. This is manifestly not what the legislature intended.

On the record before the Hearing Examiner, it is not possible to determine whether the specific job duties and requirements of the position in which the Complainant was interested are clearly related to the teaching and beliefs of the Respondent. There is no specific job description to review. In fact, there seems to be a conflict between the Complainant and the Respondent as to the nature of the exact position. The Complainant states that the position was essentially a janitorial one, while the Respondent indicates that it was more of an Kitchen Assistant in a day care program. Only further investigation can determine the nature of the position and whether it is actually related to the teachings and beliefs of the Respondent.

The Respondent has a legitimate interest in seeing that its employees are of suitable character and fitness. It may not however, seek to require all who work for it regardless of the duties and requirements of the position to adhere to their teachings and beliefs.

The Respondent also seems to argue that the Commission may not exercise jurisdiction in the area of discrimination by religious associations or organizations because the state has comprehensively regulated the area and has therefore preempted the field since such an area is a matter of statewide

concern. The authority of the Commission to regulate employment discrimination despite state regulation in the same area has been upheld in numerous actions. Anchor Savings and Loan v. MEOC (Schenk) 120 Wis. 2d 391, 355 N.W.2d 234 (1984), State ex rel. McDonald's v. MEOC (Karaffa), Dane Co. Cir. Ct. Case No. 82 CV 2423 (07/06/83). Part of the Respondent's argument in this area goes beyond those cases however. The Respondent contends that the adoption of the exceptions in Wis. Stats. 111.337(2) and the preemptive language in Wis. Stats. 111.337(3) indicates an intent to make this subject only to statewide regulation and therefore not a matter of home rule authority for the City. Given the language of Wis. Stats. 111.337(3) that clearly recognizes the possibility of some regulation by local levels of government, the Respondent's argument is without merit. The legislature could not have intended to withdraw home rule authority in this area because it specifically allows counties and cities to adopt ordinances so long as they do not seek to make illegal that which the state allows.

This matter is remanded to the investigator for further investigation and issuance of an Initial Determination. Should the Investigator conclude that the position in which the Complainant was interested is clearly related to the teachings and beliefs of the Respondent, the Investigator should conclude that there is no jurisdiction over this matter. It is appropriate for the Commission to investigate this matter to the extent necessary to determine whether the Respondent's proffered religious basis is supported by the facts and is not a pretext for other discriminatory motives. Sacred Heart School Board v. LIRC, 157 Wis. 2d 638, 460 N.W.2d 430 (Ct. App. 1990), Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc. 477 U.S. 619 (1986).

All of the Complainant's allegations of discrimination relate to the application of the Statement of Affirmation. Since the Statement itself may not serve as the basis of the exemption, the Investigator must examine each of the allegations of discrimination individually.

Signed and dated this 14th day of February, 1994.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner