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

John Reid 2201 Fish Hatchery Road, #2 Madison, WI 53713 Complainant vs. PDQ 2538 Fish Hatchery Road Madison, WI 53713 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 21680

This matter came on for Public Hearing on the merits before Hearing Examiner Clifford E. Blackwell, III on December 9, 1992 at 8:30 a.m. and was held in Room 312 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard Madison, Wisconsin 53710. The Complainant, John Reid, appeared in person and by his attorney, Willie J. Nunnery of the law firm of Hill and Nunnery. The Respondent, PDQ Food Stores, Inc., appeared by its representative Daniel Freeman and its attorney, Thomas R. Crone of the law firm of Melli, Walker, Pease and Ruhly. On the basis of the record in this matter, the Hearing Examiner now makes the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant is a married Black or African American male who resides at 2201 Fish Hatchery Road in the City of Madison.
2. The Respondent is a corporation doing business in the State of Wisconsin with corporate offices and business locations within the City of Madison, including a store whose address is 2538 Fish Hatchery Road.
3. The Respondent employs workers at its corporate offices and at its various stores within the City of Madison in furtherance of its enterprise or business.
4. At the end of August, 1991, the Respondent opened a new store at 2538 Fish Hatchery Road. Prior to this time, the Complainant did not have a store at this location. During the weeks immediately preceding the opening of this store, the Respondent accepted applications for employment to prepare the store for opening and to properly staff the store once the store opened for business. There was a pool of up to 200 applications from which to select employees. Initially, the Complainant employed between 18 and 20 people at the Fish Hatchery store. Once the store opened, the Complainant transferred several employees from the Fish Hatchery store to other stores in order to reduce the staff to its necessary operating staffing level of 10 to 13 employees.
5. David Bauman was the Respondent's store manager at this new location. He held this position from the start-up of the store until February 17, 1992 at which time he transferred to another location. Prior to managing the store at 2538 Fish Hatchery Road, Bauman had held a number of positions with the Respondent in the Madison area.

6. Bauman was replaced at the 2538 Fish Hatchery Road location by Brian Mangan. As with Bauman, Mangan had held a number of different positions with the Respondent in the Madison area prior to replacing Bauman.
7. The Complainant first submitted an application for employment at the Respondent's store at 2538 Fish Hatchery Road on or about September 15, 1991. At that time, there were no vacant positions despite a "Help Wanted" sign displayed in the window. The Complainant's application was placed on file along with many others. There were approximately 200 other applications on file.
8. The Respondent's standard policy is to display a "Help Wanted" sign at all times. The purpose of the Respondent's policy is to maintain a current file of applications from which new employees may be selected. Additionally, the Respondent uses the pool of applications on file to refer qualified applicants to other PDQ stores in the Madison area. It was Bauman's practice to discard applications after they had been on file for a period of approximately six months.
9. No vacancies occurred until the end of October, 1991. That vacancy was filled by an acquaintance of an existing employee. There may have been a couple of additional vacancies at the end of 1991, but the record is uncertain with respect to this matter.
10. On February 17, 1992 the Complainant saw a "Help Wanted" sign in the window of the 2538 Fish Hatchery Road store and asked for an employment application. He received an application and was told that he would need to speak to a manager upon submitting the application. The Complainant took the application home and completed it.
11. The Complainant brought the completed application back to the store on February 18, 1992. He was again told that he would have to speak to a manager about his application. He was told that there were positions available. There was apparently no manager at the store when the Complainant brought his application in.
12. On February 19, 1992 the Complainant returned to the Fish Hatchery Road store to speak with a manager about his application. Again, there was no manager present. The clerk to whom the Complainant spoke indicated that there were no positions available.
13. The Complainant did not go back to the store to speak with a manager again. He became convinced that he was being discriminated against because he thought he had seen a new employee that he had not recognized and because of the presence of the "Help Wanted" sign and the lack of an interview after his application.
14. Because he felt that he was being wrongly treated, he asked a friend of his, Bernie Schmitz, to ask for an application to see how he was treated. This conversation occurred on or about February 20, 1992.
15. On February 21, 1992, Schmitz went to the Fish Hatchery Road store and asked for an application. He saw the "Help Wanted" sign. He completed the application in his car and immediately brought it back to the clerk at the desk. He did not speak to a manager. The clerk indicated that there were positions available.
16. The Respondent has no record of an application having been submitted by either the Complainant or Schmitz in February of 1992.
17. There were no positions available at the Fish Hatchery Road store In February of 1992. From the time that the Complainant submitted his application on February 18, 1992, there was no one hired at the Fish Hatchery Road store until March 25, 1992.
18. It is unclear on the record whether there were positions available at other stores of the Respondent in the Madison area.
19. On March 12, 1992, Jeremy Craven, a White male, submitted an application for employment at the Fish Hatchery Road store. He spoke with the manager at the time that he submitted his application. At the time that he submitted his application, he was told that there were no

positions available. Craven was called on March 21, 1992 for an interview for a part-time position that had recently opened. He was hired for that position after an interview.

CONCLUSIONS OF LAW

20. The Complainant, a Black or African American person, is a member of the protected class "race" and is entitled to the protections of Section 3.23(7) of the Ordinance.
21. The Respondent is an employer within the meaning of the ordinance and does business within the City of Madison. The Respondent is subject to the jurisdiction of the Commission and the requirements of Section 3.23(7) of the Ordinance.
22. The Respondent did not discriminate against the Complainant on the basis of his race in failing or refusing to hire him for employment in February or March of 1992.

ORDER

23. The complaint is hereby dismissed without further costs to either party.

MEMORANDUM DECISION

As is typical for claims of discrimination, the parties have distinctly different views of the facts and how those facts fit together with the law. The Complainant is a sincere and generally credible person who has a faulty memory. The Respondent is a corporation with employees who have a vested interest in running their stores efficiently and not calling adverse attention to themselves. This combination of parties creates difficulties for the Hearing Examiner in piecing together what may have happened in this case. It is clear that the Respondent built and put into operation a new store at 2538 Fish Hatchery Road during 1991. The store was constructed through the summer. While construction was underway, the Respondent had a sign posted indicating that applications for employment were being accepted to staff the new store. Prior to opening, the Respondent received approximately 200 applications from which Dave Bauman, the store manager, selected the opening staff. The opening staff was larger than the typical operating staff because of the extra work in stocking the store and making sure that the store was operating smoothly. There were 15 to 18 employees in the opening staff. Over the first couple of months of operation that number was reduced to 12 or 13 operating staff. The additional employees were not fired but were given the opportunity to transfer to other locations owned by the Respondent in the Madison area.

The Complainant had observed the progress of the 2538 Fish Hatchery Road store during the construction phase and decided to seek employment there because it was closer to his home than his current employment. On September 14, 1991, the Complainant completed and submitted an application for employment at the store in question. He spoke to the manager about his application as required by the Respondent's normal application procedure. The Complainant was told at that time that there were no positions available. This is reasonable given the overstaffing that was in the process of being reduced to reach more typical operating levels. The Complainant's application would be retained for six months pursuant to the manager's policy.

In late October, 1991, there was an opening at the store in question. The position was filled by a friend of a current employee. There is no testimony in the record clearly identifying the race of that person. The Complainant was not contacted about that opening.

There may have been additional openings at the end of 1991 and early 1992. The record is not entirely clear about such possible openings. If there were openings, the Complainant was not contacted to come in for an interview.

Throughout the last four months of 1991 and, at least, the first three months of 1992, the Respondent posted a "Help Wanted", sign in the window of the 2538 Fish Hatchery Road store. The sign remained posted whether there were positions available at that store or not. In the case of inquiry, an application was to be given out and accepted after completion. Applicants were to be told that before their application could be considered they would have to speak to a manager.

At some time in February of 1992, the Complainant again picked up an application for employment at the 2538 Fish Hatchery Road store. He took the form home and brought it in the next day to submit it. He did not speak with a manager at that time. Instead he was to come back the next day to speak to the manager as required by the Respondent's policy and procedure. Due to a scheduling problem, the Complainant did not see the manager as scheduled and did not go back again to see a manager.

Shortly after the Complainant's application was submitted in February, 1992, he spoke with a friend of his, Bernie Schmitz. He indicated that he felt that he was being treated unfairly by the Respondent and asked if Schmitz, a White male, would apply and see if he was treated any differently. This was a form of a "test" for racial discrimination.

Testing has been long recognized as an important tool for ascertaining the existence of discrimination in housing transactions, but has only recently gained a measure of acceptance in the employment setting. In order to be valid, a "test" must be strictly controlled as to the variables to be tested. Without such controls, the results of the "test" may be subject to multiple interpretations some of which may well indicate a lack of discrimination on the part of the entity being tested. One important control is keeping and maintaining an accurate record of the "test" including, if possible, tape recording of any face-to-face contacts.

Schmitz agreed to participate in the test as requested by the Complainant. Schmitz went to the 2538 Fish Hatchery Road store and requested an application. He took the application to his car and completed it. He returned the application to a clerk at the store who informed him that he would need to speak to a manager. Schmitz did not speak to a manager at that time or at any other time. On March 12, Jeremy Craven, a White male, submitted an application for employment at the 2538 Fish Hatchery Road store. On March 25, 1992, Craven was hired to fill an unexpected vacancy at the store. The Complainant had not been contacted about the vacancy.

The Respondent asserts that neither the Complainant nor Schmitz applied for employment in February of 1992. In support of its position, the Respondent states that there is no record of such applications and that it does not possess applications from either the Complainant or Schmitz except for the Complainant's application dated September 14, 1991. The Respondent also points out numerous inconsistencies in the testimony of the Complainant and Schmitz both between themselves and their deposition testimony. Indeed some of these inconsistent statements are difficult to reconcile. However, the Hearing Examiner is convinced by the testimony when taken as a whole, that the Complainant did actually submit a second application in February of 1992 and that Schmitz did too.

The first problem area is the fact that the Respondent was able to produce the application dated September 14, 1991 but stated that it was unable to find any application of either the Complainant or Schmitz dated during February of 1992. The Respondent only produced the September 14, 1991 application a few days prior to hearing after steadfastly denying having even that application. Both the

Respondent's witnesses, Bauman and Mangan testified that they had searched for any application by the Complainant and failed to find one at all. The Respondent asks the Hearing Examiner to accept without question its contention that its corporate representative, Daniel Freeman, found the application after making a search similar to that of Bauman and Mangan. Freeman did not testify at the hearing about the parameters of his search so the record is silent with regard to the extent of his efforts. It seems to the Hearing Examiner that under these circumstances the Respondent's statement that the Complainant and Schmitz could not have submitted applications in February of 1992 because it has no record of the applications, cannot be accepted as a complete answer.

The Complainant's testimony at hearing was that he picked up an application on February 17, 1992 and that he submitted the completed application the next day, February 18, 1992. The record is clear that February 17, 1992 was the first day on the job for Bauman's replacement manager, Brian Mangan. Given the confusion surrounding the typical transfer of responsibility from one manager to another, the Hearing Examiner is prepared to believe that one or more pieces of paperwork in the form of job applications could go missing. Mangan had just started the job and presumably had not yet had time to set up his own recordkeeping systems and procedures. It may well be that the September 14, 1991 application was preserved only because it was part of the group of applications taken by Bauman and placed in the file drawer at an earlier date. The testimony was that the file drawer in which the applications were kept was in the manager's office and was kept locked. If applications came in during Mangan's first week, employees taking application's would not have had access to the drawer to file the application and Mangan may not have known or thought to file the applications right away. Under these conditions it is understandable that applications of the Complainant and Schmitz could be missing without immediately imputing wrongdoing to the Respondent.

The Respondent also seeks to discredit the Complainant's hearing testimony by comparing it to his deposition testimony. The Complainant's deposition was taken approximately two weeks prior to the date of the hearing. At his deposition, the Complainant first stated that he had submitted only one application. At the time of hearing the Complainant had amended his testimony to reflect the submission of two applications. The Complainant at his deposition could not recall the specific dates of his application. By the time of the hearing, the Complainant was able to recall and testify about specific dates. While these discrepancies are noteworthy, they do not make the Complainant's testimony so incredible that it can be ignored as easily as urged by the Respondent.

It is not unusual for a witness' testimony to improve or to become more precise between the taking of a deposition and the time of hearing. Once a question has been raised at a deposition about a witness' recollection, it is natural that the witness will make some effort to remove inconsistencies or to more precisely remember a date or event. What is important is the steps taken by the witness to accomplish this improvement in performance and how markedly the testimony differs between the deposition and the hearing.

It is clear that the Complainant is not possessed of a great memory. The Hearing Examiner however, finds that the Complainant was sincere in his testimony and that it was truthfully given but likely limited by his lack of perfect recall. The "improvements" in the Complainant's recall at the time of hearing do not seem to be the result of any improper coaching of the Complainant and represent a sincere effort to respond to the demands of testimony and the rigors of questioning by the Respondent's counsel. The Complainant states that he was able to recall the date of his application by referring to his wife's birthday which occurred five days prior. This method for enhancing one's memory is not at all unusual and is frequently effective. It is not a great stretch for a witness to go

from no recollection of specific dates to relative certainty between the time of a deposition and the time of hearing despite the Respondent's contention to the contrary.

Similarly, the fact that the Complainant recalled that his application had been submitted while he was employed at Rocky Rococo's despite the testimony that he was employed at Rocky Rococo's between July of 1991 and at the latest January 15, 1992 does not make the Complainant's entire testimony unbelievable. Clearly, the Complainant did submit an application while employed at Rocky Rococo's. That application was the one dated September 14, 1991. The fact that the Complainant is confused about which application was submitted at what time does not significantly limit the effectiveness of his testimony about the other application that he submitted. If the testimony was still that there was only one application, then the testimony concerning when the application was submitted would be crucial. However, where the Hearing Examiner has found that there were two separate applications, the confusion between them is more understandable and explainable.

The Respondent also contends that inconsistencies between the testimony of the Complainant and Schmitz and Schmitz's own testimony demonstrate that the Complainant did not submit an application in February of 1992. At his deposition which occurred approximately two weeks before the hearing, Schmitz testified that the Complainant had asked him in February of 1991 to participate in a "test" of the Respondent. At the hearing, Schmitz changed his testimony to reflect that the request had come in February of 1992, a year after the date he had testified to earlier. Schmitz attributed the difference to stress that he had been under. Counsel for the Respondent attempted to demonstrate that the change had come about as a result of prompting by Complainant's counsel subsequent to Schmitz's deposition. Even if Complainant's counsel called the inconsistency to Schmitz's attention, that in itself does not mean that the testimony given at the hearing has no factual basis. The store in question opened in August of 1991. It would not have been possible for Schmitz to have submitted an application at the 2538 Fish Hatchery Road store in February of 1991. There is nothing in the record to support any supposition that Schmitz submitted an application in February of 1991 but at a different location. The written statement provided by Schmitz to the Commission Investigator supports Schmitz's hearing testimony in that the statement makes specific reference to the manager, Brian Mangan, although Mangan's name is misspelled. This statement was prepared substantially before Schmitz's deposition. This fact also rules out the possibility that Schmitz submitted an application in September of 1991 instead of February of 1992. The Hearing Examiner is convinced that Schmitz's testimony truly regarded actions taken in February of 1992.

Schmitz testified at the hearing that he went to the store in question on either February 20 or 21 to pick up an application for employment at the request of the Complainant. He stated that he completed the application in his car and submitted it immediately thereafter. Schmitz is able to fix the date with some certainty because it coincided with his purchase and mailing of a birthday present to his sister. The Respondent asserts that this testimony is entirely inconsistent with that of the Complainant in which the Complainant states that he spoke with Schmitz about a week after his submission of an application in February of 1992. Since the Complainant testified that he went to the 2538 Fish Hatchery Road store on February 17, 1992 to pick up an application, that he submitted the application on February 18, 1992 and that he returned on February 19, 1992 to speak with the manager, there is plainly an inconsistency in the testimony of the two witnesses. However, the Hearing Examiner does not view this inconsistency with so much alarm as does the Respondent. The testimony of the two witnesses demonstrates that the Complainant applied for employment with the Respondent for a second time, that he believed that he was not being treated fairly and that he sought the assistance of a White friend to attempt to ascertain whether he had been the victim of discrimination. The friend, Schmitz, did as the Complainant asked and the Complainant reached the conclusion that he had been,

in fact, the victim of discrimination. The fact that the Complainant's somewhat imprecise memory inserted several additional days does not necessarily invalidate a finding that the events occurred in that particular sequence. Over the period of time between the events and the time of hearing, some loss of precision with respect to exact days or the precise number of days is understandable and excusable. The testimony is essentially consistent and differs only with respect to relatively minor and not particularly important details.

The Hearing Examiner concludes for the foregoing reasons that the Complainant submitted a second application for employment with the Respondent at the 2538 Fish Hatchery Road store on or about February 18, 1992 and that his friend, Bernie Schmitz submitted an application on or about February 21, 1992. There are admittedly inconsistencies in the testimony but there is support in the record for these findings and rational explanations that make the inconsistencies either irrelevant or eliminate them entirely.

The next problem that the Hearing Examiner must analyze is whether the Complainant and Schmitz were treated differently from each other or not. This is crucial because if they were treated similarly, then the Complainant's claim of discrimination cannot be founded solely on the "test" conducted by the Complainant and Schmitz.

The Complainant asserts that he was told that the Respondent had no positions available despite the sign in the window, "Help Wanted". The Complainant and Schmitz state that Schmitz was told only shortly after the Complainant's conversation with a clerk at the store that there were positions available. While on its face this supports the Complainant's claim, there are significant unresolved questions raised by this testimony. Most notably, was the information given to the Complainant and to Schmitz about the 2538 Fish Hatchery Road store or other of Respondent's stores?

A reasonable answer provided by the Respondent is that, in fact, there were no positions available at the 2538 Fish Hatchery Road store when the Complainant submitted his application and the person to whom the Complainant spoke correctly informed the Complainant of that condition. However, if there were positions available at other stores of the Respondent, it would be consistent with the Respondent's policy to take the Complainant's application and ask him to speak to a manager about his availability for and interest in other positions. This information may well have been beyond the knowledge of a specific clerk at the Respondent's store. In fact, the Complainant's confused and confusing testimony indicates that the clerk to whom he submitted his application may have told him that there were positions available. His testimony continues to the effect that it was the clerk on February 19 who told him that there were no positions available. Between his deposition and his testimony at the time of hearing, the Complainant was unclear whether this applied solely to the 2538 Fish Hatchery Road store or to all of the Respondent's stores in the Madison area.

Similarly, Schmitz testified that the clerk with whom he spoke told him that positions were available. Schmitz was under the impression that the clerk meant at the 2538 Fish Hatchery Road location but nothing in the conversation specifically states that the positions available were at the Fish Hatchery Road store. Schmitz admitted that he did not know for sure, in retrospect, whether the clerk meant the 2538 Fish Hatchery Road store or other of the Respondent's stores.

As with the Complainant, Schmitz was told that he would have to speak to a manager about his application. Again as with the Complainant, Schmitz did not speak with the manager. The degree of knowledge of the clerk about the availability of positions at the Fish Hatchery Road store or elsewhere is not disclosed on this record.

This record demonstrates the difficulty in relying on testing information in some cases. While the instincts of the Complainant were accurate about attempting to obtain verification that race was a factor in his treatment by conducting a "test", the test actually conducted was flawed in several respects. There is no record of the questions asked by the Complainant and by Schmitz. Without such a record, one cannot conclude that the information obtained by the participants in the test was provided to answer comparable questions. It is critical to be able to demonstrate that different answers were given to the same questions in this type of a test. If the questions are different, then it might be expected that answers would be different. This is where a tape recording of the conversation between the clerk and the participants in the test would have been helpful. Failing a tape recording, the testimony of a witness to both conversations would have provided some assurance of consistency in the questions.

Similarly, there is no assurance that the Complainant spoke to the same clerk. They both generally described women that might have been the same person but given the several day gap between the Complainant's conversation and the one of Schmitz, there is a reasonable doubt that they spoke to the same person. The Complainant's testimony is that he spoke with three different women on February 17, 18 and 19 respectively. Though his testimony is admittedly confused he seems to indicate that the clerk with whom he spoke on February 18, may have told him that positions were available and that it was the clerk on February 19 who told him that there were no positions available. Demonstrating that the information comes from the same person is important because the level of knowledge may well differ between two people and though their answers may differ, one may be inaccurate while the other possesses reliable information. It is almost impossible to reach a conclusion about discrimination in a case like this one where the information may have been provided by two or more different persons.

Another problem with this test is the time that elapsed between the Complainant's contact with the Respondent and that of Schmitz. It is preferable that there be the shortest period of time between the Black and White testers' visits as possible. This eliminates the possibility that the factual situation has changed between the visits. In general, the approximately three days that passed between the Complainant's submission of his application and that of Schmitz's submission would represent too large of a gap. On this record however, this flaw is not fatal.

In their briefs, both parties recognize that the Commission uses the McDonnell-Douglas/Burdine paradigm in reviewing cases of discrimination. McDonnell-Douglas Corporation v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973), Texas Department of Community Affairs v. Burdine, 450 U.S. 48, 25 FEP Cases 113 (1981), Rose v. Kippcast, MEOC Case No 20851 (Ex. Dec. September 29, 1989). In this method of analysis, the complainant always carries the ultimate burden of proof but the burden of production shifts between the complainant and respondent. In the first step, the complainant must present a prima facie case of discrimination. The Complainant has failed to meet this initial burden. There is no question that as a Black male, the Complainant is a member of the protected class "race". The Respondent apparently concedes this issue. Similarly, there seems to be no real issue about the Complainant's ability to perform the type (of work that might be required of him for the typical jobs of the Respondent.

One of the major problems of proof for the Complainant regards the question of whether there was a job available or not for which the Complainant could be considered. The Complainant establishes a prima facie case through his testimony and that of his witness Schmitz. This testimony, on its face, tends to show that the Complainant, a Black male, was told that there were no jobs available, when as demonstrated by the testimony of Schmitz, there were jobs open. The testimony of the Complainant and of Schmitz was credible despite some significant inconsistencies. Those inconsistencies are discussed above. This demonstration shifts the burden of production to the Respondent to state a

legitimate, nondiscriminatory reason for its actions. The Respondent puts forth essentially two substantive explanations for not hiring the Complainant in February of 1992. The first is that despite the Complainant's testimony to the contrary, there were actually no jobs available at the 2538 Fish Hatchery Road store in February of 1992. The second reason put forth by the Respondent is that regardless of whether there were positions available at the 2538 Fish Hatchery Road store or some other location of the Respondent that the Complainant failed to complete the application process by speaking with a manager. Both of these reasons are legitimate, nondiscriminatory explanations of the Respondent's actions. Articulation of these reasons meets the Respondent's burden of production. The Respondent does not carry a burden of proof at this stage under the McDonnell-Douglas/Burdine paradigm. Burdine, supra, Rose, supra. The ultimate burden remains with the Complainant throughout the hearing. Burdine, supra, Saint Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

The burden now shifts back to the Complainant to prove that the explanations offered by the Respondent are either not worthy of credence or are a pretext for other discriminatory reasons. It is not sufficient, by itself, to merely demonstrate that the Respondent may have lied about the reasons for its actions. Saint Mary's Honor Center, supra. The Complainant must demonstrate that behind the false explanation lies a discriminatory motive. Saint Mary's Honor Center, supra.

The question of whether there was or was not a position available is more difficult to answer than whether the Complainant completed the application process or not. The Hearing Examiner will first address the easier issue. The testimony is uncontroverted that the Complainant failed to speak to a manager after submitting his application on or about February 18, 1992. The Complainant clearly knew of the requirement because he had been told that he would need to speak with a manager when he submitted his application dated September 14, 1991. Additionally, when the Complainant picked up the application on February 17, 1992 and again when he submitted the application on February 18, 1992, he admits that he was told that he would need to speak with a manager. He specifically returned on February 19, 1992 to speak with the manager about possible employment. There was not a manager at the store when the Complainant was there on that date. The Complainant was told at that time that he should come back to speak to a manager when one was present. There is no explanation of why the Complainant never returned to speak to a manager about his application after submitting it on February 18, 1992. The purposes for a requirement to speak to a manager are obvious and directly applicable in this case. Managers possess the sole power to hire and fire, and as such are the only employees who will know whether there are positions at a store or not. In addition, because managers are the focal point for contact with other stores of the Respondent and the corporate headquarters, they are the person who is most likely to know of the staffing needs of other stores and act in this regard as a clearinghouse for staffing. The manager is also the person who is responsible for making out work schedules and assuring that his or her employees are capable of performing their duties. If a prospective employee does not speak to a manager that person is likely to be given either inaccurate information about positions and their availability as well as their general requirements. Such an applicant may also miss out on other employment possibilities with the Respondent. Centralized decision making and information dispersal avoids mistakes in transmission and in a small organization like the typical store of the Respondent reduces the amount of time in meetings and other nonproductive endeavors. The Complainant contends that even if the requirement to speak with a manager is legitimate, the Respondent did not require Jeremy Craven, a White male, to speak with a manager before processing his application. In fact, the Complainant's position is that Craven was provided with preferential treatment to that given the Complainant because the Respondent called Craven for an interview and did not require Craven to first speak with a manager.

There are several problems with the Complainant's position. First, it is not factually correct. The testimony of Jeremy Craven was that he turned his application into the then manager, Brian Mangan. At that time Mangan told Craven that there were no jobs available. It was only after a job became available that Craven was called for an interview.

Second, the Respondent's treatment of Craven is irrelevant to the Complainant's claim. The Complainant filed his complaint on March 16, 1992. Craven was not hired until well after this date, March 25, 1992 specifically, and therefore does not comprise a part of the Complainant's allegations of discrimination. The Notice of Hearing agreed to by the Complainant limits the issues to be tried to discrimination in February, 1992. This Notice of Hearing was not amended nor was there a request by the Complainant to amend it to include conduct occurring in March of 1992.

Third, once the Complainant filed his complaint of discrimination and it was served on the Respondent, the Complainant was contacted by Daniel Freeman, the Respondent's security officer. Freeman in a letter dated March 26, 1992, informed the Complainant that he had been unable to find the Complainant's application and invited him to submit a new application and to speak with the Respondent about employment possibilities. The Complainant made an appointment to speak with representatives of the Respondent about his complaint and some part-time hours. To this end, the Complainant set up an appointment to meet with the Respondent. The Complainant failed to keep this appointment because he overslept.

The Complainant never contacted the Respondent to explain his failure to make the appointment or to reschedule it. Given these circumstances combined with the Complainant's full-time employment, it was reasonable for the Respondent to conclude that he was no longer interested in employment with the Respondent. This testimony could be characterized as an offer of settlement on the part of the Respondent and would normally be inadmissible. Neither party objected at the time of hearing to the admission of this evidence and both parties have sought to use it in support of their positions. The parties have waived any objection to use of this material by their conduct.

The Hearing Examiner now turns to the issue of whether there actually was a position available to the Complainant when he submitted an application in February of 1992. The Respondent has articulated the position that despite the testimony of the Complainant and of Schmitz that there were no positions available at the 2538 Fish Hatchery Road store though there were positions available at other of Respondent's locations. In order to prevail at this point the Complainant must demonstrate that either the Respondent's position is not worthy of credence or is a pretext for otherwise discriminatory motives. The Complainant presents no evidence demonstrating that the Respondent's position is a pretext for other discriminatory motives. The ultimate question is whether the Complainant has proven his allegations. On this record, the Hearing Examiner must conclude that the Complainant has not proven his allegation by a preponderance of the evidence.

The Complainant's testimony is extremely confused on the subject of whether there were positions available or not. At one point he states that the clerk with whom he spoke on February 18, said that there were positions available. From the record it is impossible to tell whether that meant that there were positions available at the store in question or at some other location. At the time of hearing, the Complainant stated that the clerk on February 19, the day he returned to speak to a manager, told him that there were no positions available. Again, there is nothing in the record to indicate whether that was limited to the Fish Hatchery Road store or whether that was meant to include all locations. In the Complainant's deposition testimony, he stated that he could not remember whether the clerk stated that there were no positions available at other stores or not. The situation is complicated by Schmitz's testimony that he was told that there were positions available but that, in retrospect, he did not know

whether that meant at the Fish Hatchery Road location or other locations of the Respondent. Though at the time, Schmitz believed the clerk to be referring to the Fish Hatchery Road store, he conceded at hearing that things might be different if the clerk meant other locations.

Regardless of the testimony given by the Complainant and Schmitz, the record is clear that from the time that the Complainant submitted his application on February 18, 1992 until Jeremy Craven was hired on March 25, 1992, no one else was hired at the Fish Hatchery Road store. This clearly includes the period of time set forth in the Complainant's complaint. The Complainant provides no personnel records or any other testimony to the contrary. The record is silent with respect to any vacancies filled at other locations of the Respondent during the same period.

Given this record the Hearing Examiner cannot conclude that there definitely was a position available at the store at which the Complainant applied. At most, the Hearing Examiner can say that there may have been a position at that store or some other store in the Respondent's network. This is not enough for the Complainant to demonstrate that he was the victim of discrimination in violation of the ordinance.

The Complainant presents several additional arguments that must be addressed. First, the Complainant contends that regardless of the status of his February, 1992 application, he was treated differently than others not of his race with respect to the September 14, 1991 application. Second, the Complainant asserts that the Respondent's hiring procedures and policies have a disparate impact on Blacks. Third, the Complainant contends that the arbitrary nature of the Respondent's hiring process subjects it to liability under the ordinance.

With respect to the first contention, there is no support in the record. At the time that the Complainant submitted his application dated September 14, 1991, there were approximately 200 other applications on file. The Complainant presents no testimony with respect to the race of any of these other applicants. There is nothing in the record indicating that any of these other applicants, be they White or African American, ever received employment or even other than passing consideration from the Respondent. In short, there is nothing in the record to support a claim based upon this theory. Even if there was some support for this claim, the Notice of Hearing agreed to by the Complainant indicates that the issues for hearing were limited to the February, 1992 application. The Notice of Hearing was never amended to reflect a claim based upon the September 14, 1991 application.

While the Commission has recognized claims based upon the disparate impact theory, the requirements of proof are strict. Rose, supra. The Complainant presents no evidence or even coherent argument in support of such a theory of liability. For example, the Complainant presents no evidence of the number of Black applicants, no evidence of Blacks in the base population and no analysis of what should constitute the base population. Without this type of testimony and statistical analysis, it is impossible to demonstrate a claim based upon disparate impact.

Finally, the Complainant seems to argue that because the hiring process and procedures used by the Respondent are arbitrary that he must have been discriminated against. The commission has never recognized that such a theory of liability exists under the ordinance. Such a claim comes perilously close to asserting that the Complainant has a right to employment because of his race. While the Respondent's hiring process seems to leave much room for discretion that could be used to discriminate against protected group applicants, there is insufficient evidence in this record to lead to the conclusion that such discrimination occurred in this instance. Again, the numerous applications on file when the Complainant submitted his applications do not appear to have received any different treatment.

The Hearing Examiner believes that the Complainant genuinely feels that he was treated wrongly by the Respondent. Unfortunately, there is insufficient evidence in this record to demonstrate that the treatment received by the Complainant was illegal discrimination under the ordinance.

The hiring process and procedures used by the Respondent in this case present much opportunity for confusion and misunderstanding. The Respondent would be well warned to consider a system for hiring that is less open to question or discretion. Continued use of the existing system may subject the Respondent to additional claims of discrimination.

Signed and dated this _____ day of _____, 19_____.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner