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

William Pagel 622 Morningstar Lane Madison, WI 53704 Complainant vs. Elder Care of Dane County 2909 Landmark Place Madison, WI 53713 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION Case No. 22442

INTRODUCTION

This matter is before the Hearing Examiner on the Respondent's Motion to Dismiss for Lack of Jurisdiction. The motion addresses only one of the Complainant's alleged protected classes, "conviction record." The Complainant alleges that he was discriminated against on the bases of his conviction record and his sexual orientation. At a minimum, the complaint will be remanded to investigation of the allegations of discrimination on the basis of sexual orientation.

BACKGROUND

The Complainant, William Pagel, began working for the Respondent, Elder Care of Dane County, Inc., on or about March 5, 1996 as a Live-In Home Care Worker. He was assigned to attend to the needs of two developmentally disabled men. The Complainant is a corporation that is organized for the provision of physical and related care of elderly and/or developmentally disabled individuals who are not able to care entirely for themselves. The Respondent is primarily funded by grants and contracts passed through from the federal agencies with responsibilities in this area through the State of Wisconsin and Dane County. As part and parcel of these grants and contracts, the Respondent must make certain guarantees to the governmental units supervising the funds about the quality of the care and environment of the individuals for whom the Respondent cares. For purposes of this complaint, the guarantees most important to the funding sources is that those in the care of the Respondent are provided with a safe and secure living arrangement.

In 1988, the Complainant was convicted of second degree sexual assault, a felony in the State of Wisconsin. He spent approximately five years on probation and appears to have been considered cooperative and not a likely candidate for repeated criminal activity. The conviction stemmed from an allegedly consensual sexual relationship between the Complainant and a 15 year old male. At the time, the Complainant was seventeen 17 years old.

At the time of his hire by the Respondent, the Complainant was informed that a check of his background would be made, including a check for a criminal record. The Complainant did not object. The Respondent's investigation of the Complainant's background revealed the Complainant's

conviction. The Complainant was questioned by the Respondent about the circumstances of the conviction. The Complainant volunteered information about the circumstances of the conviction. The Respondent did not take any immediate action with respect to the Complainant's employment based upon the information provided by the Complainant. However, the Respondent began a further investigation of the Complainant's conviction and increased its observation of the Complainant's work.

The Respondent alleges that its continued investigation and observation of the Complainant raised concerns about his suitability for employment in a situation where he dealt with vulnerable and frail people in a dependant relationship. The Complainant alleges that the Respondent's concerns took the form of unwarranted meddling in his personal life and demands that he give up a Big Brother type relationship with a younger male. The conflict between the Complainant and the Respondent came to a head when the Complainant was terminated on or about June 6, 1996. The Complainant filed this complaint of discrimination on June 10, 1996 alleging that he had been afforded different terms and conditions of employment from those not of his protected classes and that he had been terminated because of his conviction record and his sexual orientation (gay).

On July 5, 1996, the Respondent filed its motion to dismiss alleging that the Madison Equal Opportunities Commission (Commission) is without jurisdiction to process the allegation of conviction record discrimination because the Commission is preempted by state and federal law. The Hearing Examiner provided both parties the opportunity to submit argument or material in support of their respective positions. Neither party submitted any additional material.

DECISION

The Respondent contends that the Commission may not proceed with the portion of the complaint relating to the Complainant's allegation of discrimination based upon the Complainant's conviction record because the protections of the Madison Equal Opportunities Ordinance (ordinance) MGO 3.23 et seq., specifically with regards to conviction record discrimination, MGO Sec. 3.23(7)(a) and 3.23 (7)(i)(3)(a), are in conflict with similar provisions in the Wisconsin Fair Employment Act (FEA), Wis. Stats. 111.31 et seq., specifically Wis. Stats. 111.335(1)(c)(1), and provisions of federal law relating to the operation of facilities for the developmentally disabled and elderly funded through programs of the federal government, specifically the Community Supported Living Arrangements program and the Community Integration Program. The Hearing Examiner will separately address the claims of state and federal preemption.

Both the ordinance and the FEA make it illegal for an employer to provide an employee terms and conditions of employment less favorable than those provided to another because of an employee's conviction record. MGO Sec. 3.23(7)(a), Wis. Stats. Sec. 111.322. The same protection prevents the termination of employment of an employee because of that employee's conviction record. MGO Sec. 3.23(7)(a), Wis. Stats. 111.322. Both the ordinance and the FEA contain an exception providing that the protections of the ordinance and the FEA do not extend to convictions for offenses that are substantially related to the business or enterprise of the employer. MGO Sec. 3.23(7)(i)(3)(a), Wis. Stats. 111.335(c). The FEA does not appear to place any time limit on the applicability of the exception to convictions, where the ordinance limits applicability of the exception to those offenses that have occurred within three years of the alleged act of discrimination. Because the ordinance does not permit an employer to consider a conviction record that is more than three years old even though it may have been for an offense that is substantially related to the business or enterprise of the employer, the Respondent asserts that the ordinance is preempted by the more expansive exception provided by the FEA.

In support of its position, the Respondent relies on a variety of cases establishing the general principle that where the provisions of a municipal ordinance are in conflict with a state law, the provisions of the ordinance to the extent of the conflict are preempted by the state law. DeRosso v. City of Oak Creek, 547 N.W.2d 770 (1996), Fox v. Racine, 225 Wis. 542, 275 N.W. 513 (1937), Wisconsin Environmental Decade, Inc. v. Department of Natural Resources, 85 Wis. 2d 518, 271 N.W.2d 69 (1978). In judging whether there is a conflict, the Wisconsin Supreme Court has established a four point checklist. If the ordinance runs afoul of any of the items on the list, the ordinance is preempted. Anchor Savings and Loan Assn'. v. MEOC, 120 Wis. 2d 391, 355 N.W.2d 234 (1984). The four ways in which a conflict may arise are: 1) The state has withdrawn authority to act; 2) The ordinance logically conflicts with state legislation; 3) The ordinance defeats the purpose of state legislation; and 4) The ordinance is contrary to the spirit of state legislation. Anchor, supra. The ordinance does not fall within any of the four areas.

First, the state has not withdrawn the area from municipal regulation. The courts have long recognized the joint authority of the state and the Commission in the area of the prevention and elimination of discrimination. State ex rel. McDonald's Restaurant v. MEOC (Karaffa), Case No 82 CV 2423 (Dane County Circuit Court, 07/06/83), Fed. Rural Elec. Ins. v. MEOC (Kessler), Case No. 79-538 (Ct. App. 04/27/81) aff'd by an equally divided court (Wis. Sup. Ct. 03/28/82). In Kessler, the Court of Appeals specifically recognized the authority of the City Council to adopt an ordinance that is more expansive and regulatorily more restrictive than the FEA. In recognition of the dual authority of the state and municipalities, the legislature has taken special action where it wished to remove an area from the regulatory reach of municipalities. See specifically Wis. Stats. 111.337(c). Given the legislature's failure to adopt a provision similar to Wis. Stats. 111.337(c) in Wis. Stats. 111.335, one is compelled to reach the conclusion that the legislature intended to leave open the area for more stringent regulation by municipalities.

Clearly the legislature did not intend that adoption of the FEA, by itself, entirely absorb the area of all possible regulation of employment discrimination. As noted above, the legislature has taken special precautions where it wished to remove an area of regulation from the authority of a municipal anti-discrimination agency. In Kessler, the Supreme Court adopted the Court of Appeals determination that the Commission had the authority to adopt ordinance provisions that were more stringent than those similar provisions in the FEA without a threat of preemption. The Kessler case involved a claim of marital status discrimination, a category regulated by both the ordinance and the FEA. The Supreme Court ultimately found that there was no discrimination in Kessler on the merits of the claim.

The provision of the ordinance in question here does not logically conflict with the similar provision of the FEA. Both provisions recognize the balance of interests discussed in City of Milwaukee v. LIRC, 139 Wis. 2d 805, 407 N.W.2d 908 (1987), but the ordinance reflects the legislative determination of the City of Madison that the balance of public interests favoring the employer's ability to use conviction record as a factor in employment is outweighed by the employee's interest in not being discriminated against after the passage of three years. The fact that the state has adopted a somewhat different approach and struck a different balance does not compel a conclusion that the two schemes are logically inconsistent.

MGO Sec. 3.23(7)(i)(3)(a) does not defeat the purpose of the exception found at Wis. Stats. 111.335 (1)(c)(1). Both the ordinance and the FEA intend to protect those who have a criminal record from the unreasoned use of that record as a factor in employment decisions. Both the ordinance and the FEA recognize that in certain circumstances, this protection must be limited. As noted in City of Milwaukee v. LIRC, supra, the exception contained in Wis. Stats. 111.335(1)(c)(1) is intended to

protect the public from the possible criminal consequences of placing an individual into a situation in which he or she may be tempted to repeat his or her past criminal conduct. The three year limitation on the exception found in MGO Sec. 3.23(7)(i)(3)(a) represents a legislative determination that the likelihood of the repetition of criminal activity is significantly reduced after three years to warrant an end to the exception. The existence of the exception in MGO Sec. 3.23(7)(i)(3)(a) does not defeat the purpose of protecting the public because nothing in the section attempts to limit an employer's ability to make employment decisions on the basis of an employee's past conduct. An employee who steals from an employer regardless of his or her conviction for stealing from an employer may be terminated without reference to the protections of MGO Sec. 3.23(7)(a). What the exception of the ordinance does is require the employer to make decisions based upon one's past conduct not on the fact of a conviction record. While the provision of the FEA may make accomplishment of the same policy somewhat easier, the ordinance's provision does not frustrate the purpose of the exception contained in the FEA.

Finally, the exception as found in the ordinance is not contrary to the spirit of the similar provision found in the FEA. It seems obvious to the Hearing Examiner that there is no conflict in the spirit behind the two provisions in question here. They both seek to strike a balance between the interests of the employer and the public and those of the individual with a conviction record. The time limitation contained in the ordinance's exception is not contrary to the purposes, intent or spirit of the exception contained in the FEA. If the ordinance contained no exception, then the Hearing Examiner could be persuaded that there is such a conflict. However, the two enactments appear to intend the same end and accomplish it in somewhat different ways. These differences do not appear to the Hearing Examiner to be sufficient to find that the ordinance is preempted by the FEA.

Turning to the Respondent's argument concerning the preemption of the ordinance by federal law, the Hearing Examiner finds a different balance of interests. It is clear that where a local enactment directly conflicts with an applicable provision of federal law the local provision is void. California Federal Savings & Loan Assn'., et al. v. Guerra, 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed.2d 613 (1987). This result is dictated by the Supremacy Clause, Art. VI, Clause 2 of the Constitution of the United States. The only question before the Hearing Examiner is whether there is a conflict between the protections of the ordinance and a provision of federal law.

The Respondent is subject to the provisions of two federally funded programs controlled by the requirements of 42 U.S.C. Sec. 1396 et seq. These programs provide funding for local efforts designed to assist the developmentally disabled or elderly to remain in their local communities rather than being institutionalized. More commonly, the programs are known as the Community Supported Living Arrangements program (CSLA) and the Community Integration Program (CIP).

Both of these programs require local providers of service such as the Respondent to assure the safety and well-being of individual participants. More specifically, 42 U.S.C. Sec. 1396u requires providers of services to conduct background checks including criminal background checks and not to employ any person who has been convicted of a crime involving an injury to another person. There are other requirements found in 42 U.S.C. Sec. 1396u and accompanying regulations found at 42 CFR Sec. 441.400 but the provisions referred to herein are those most pertinent to this complaint.

To the extent that the provisions of the ordinance contained in MGO Sec. 3.23(7)(i)(3)(a) conflict with the requirements of the CSLA found at 42 U.S.C. Sec. 1396u, the provisions of the ordinance are unenforceable against the Respondent. The requirements of federal law clearly set forth a list of convictions that automatically disqualify any individual from employment by a provider of services funded by the CSLA. Most importantly for this case is a bar on employment of any person who has

been convicted of a crime involving an injury to another person. As noted above, the Respondent is a provider of services funded by the CSLA program. This provision is not limited as to the time of the conviction. Since MGO Sec. 3.23(7)(i)(3)(a) would require the Respondent to ignore the Complainant's conviction for second degree sexual assault because it occurred more than three years prior to the employment actions complained of in this case, the provisions of 42 U.S.C. Sec. 1396u preempt the provision of the ordinance and render it void.

The Complainant may assert that the circumstances of his conviction do not represent a conviction for a crime involving an injury to another person. The record indicates that the Complainant takes the position that he was convicted for being involved in a consensual sexual relationship with a minor and that no physical threat or injury was involved. The law imputes an injury in such circumstances since it provides that a minor is not capable of giving consent to such a sexual relationship. The Hearing Examiner is convinced that a conviction for a second degree sexual assault is the type of conviction contemplated by Congress in its adoption of 42 U.S.C. Sec. 1396u.

The circumstances of the Complainant's conviction are more relevant in determining the applicability of 42 U.S.C. Sec. 1396n(c) regarding the CIP. This provision speaks more generally about providing for the safety and welfare of participants in the program. It appears that this program covers housing for the elderly as opposed to housing for the developmentally disabled which is covered by the CSLA program. Since the Complainant's conviction could be seen as demonstrating an interest in sexual relationships with young boys and not with older individuals, the conviction may well be irrelevant to assuring the safety and welfare of participants in the CIP. It is also possible that one can view the Complainant's conviction as indicating a willingness to dominate those in a dependant relationship. In this circumstance, the Complainant's conviction could be relevant to the requirements of 42 U.S.C. Sec. 1396n(c). However, because 42 U.S.C. Sec. 1396u makes the ordinance's conviction record protections unenforceable against the Respondent, resolution of this conflict is not necessary.

The Hearing Examiner notes with interest that the Respondent was informed of the Complainant's conviction shortly after his beginning employment. It did not act to immediately terminate the Complainant as it may well have been required to do pursuant to 42 U.S.C. Sec. 1396u. Instead of terminating the Complainant as it should, the Respondent undertook an investigation that allegedly included demands on the Complainant to cease a relationship with a twelve year old boy that was sought and desired by the boy's family. These circumstances indicate to the Hearing Examiner that the Complainant's conviction record was not so important to the Respondent as it now indicates. While this fact may be legally irrelevant because of the application of the preemption doctrine, it raises questions of the purity of the Respondent's motivations.

ORDER

Because the provisions of the ordinance directly conflict with the provisions of 42 U.S.C. Sec. 1396u the provisions of the ordinance are void as applied in this complaint. The complaint's allegations of discrimination in employment on the basis of conviction record are hereby dismissed. The complaint is remanded to the Investigator/Conciliator for investigation of the allegations of discrimination in employment on the basis of sexual orientation.

Signed and dated this 31st day of October, 1996.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner