OFFICE OF THE CLERK
SUPREME COURT
STATE OF WISCONSIN

Madison , April 6, 1982

To: Bryan D. Woods
P.O. Box 671
Madison, WI 53701

Gerald C. Nichol
329 West Wilson
Madison, WI 53703

Eunice Gibson
Asst. City Attorney
City-County Building
Madison, WI 53709

The Court today announced an order in your case as follows:

No. 80-1906 State ex. rel. Badger Produce Co., Inc. v. Equal Opportunities Commission, City of Madison

The court having issued its mandate in the above case on March 26, 1982,

IT IS ORDERED the mandate in this case is amended by deleting the following sentence:

"The remaining unresolved issues are held by this court for further determination."

ABRAHAMSON, J., did not participate.

MARILYN L. GRAVES
Clerk of Supreme Court.

Filed 3/20/82
Clerk of Supreme Court
Madison, Wisconsin

No. 80-1906

STATE OF WISCONSIN : IN SUPREME COURT

State ex rel. Badger Produce Co., Inc.,

Plaintiff-Appellant-Petitioner,

v.

Equal Opportunities Commission,
City of Madison,

Defendant-Respondent.

REVIEW of a decision of the Court of Appeals. Affirmed.

PER CURIAM. The court is equally divided on the question of the validity of the ordinance. The validity of the ordinance was upheld by the court of appeals and this court is equally divided as to whether that decision should be affirmed or reversed, Justice Day, Justice Coffey and Justice Steinmetz being of the opinion that the decision should be reversed; Chief Justice Beilfuss, Justice Heffernan and Justice Callow being of the opinion that the decision should be affirmed; and Justice Abrahamson not having participated in this review. The decision by the court of appeals as to the validity of the ordinance is therefore affirmed.

The remaining unresolved issues are held by this court for further determination.

As to the validity of the ordinance, the decision of the court of appeals is affirmed.

Filed July 16, 1981

STATE OF WISCONSIN
IN COURT OF APPEALS
DISTRICT IV

STATE ex rel. BADGER PRODUCE CO., INC., Plaintiff-Appellant, v. EQUAL OPPORTUNITIES COMMISSION, CITY OF MADISON Defendant-Respondent.	No. 80-1906

APPEAL from a judgment of the circuit court for Dane County; GEORGE R. CURRIE, Reserve Judge. Affirmed.

Before Decker, C.J., Cannon, J., and Hanley, Reserve Judge.

PER CURIAM. The appellant raises several issues on appeal. All but the issue concerning the authority of the city of Madison to create an employment commission were presented to the trial court. We decline to consider the issue presented for the first time on appeal. The memorandum decision of the trial court is detailed, well-reasoned, and correctly analyzes the law as applied to the case before the trial court. We adopt the trial court's opinion as our own.

By the Court. Judgment affirmed.

Not recommended for inclusion in the official reports.

STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY

STATE ex rel. BADGER PRODUCE CO., INC.,	

Plaintiff and Petitioner, vs. EQUAL OPPORTUNITY COMMISSION, CITY OF MADISON Defendant.	JUDGMENT Case No. 79-CV-4405

BEFORE: Hon. George R. Currie, Reserve Circuit Judge

WHEREAS, on August 18, 1980, the Plaintiff's Writ of i Certiorari challenging the decision and order of the City of Madison Equal Opportunities Commission, dated August 9, 1979, in which Plaintiff was ordered to pay the sum of $2,397.59 plus 6.5% annual interest on that sum, interest to begin o accumulating on January 15, 1978, and to submit to the Equal Opportunities Commission a proposed procedure for interviewing and testing of applicants for employment as drivers with Plaintiff, came on for hearing upon the merits upon the Writ issued herein, the Return of the Defendant thereto, and the Motion to Quash the Writ filed by Defendant, and the Plaintiff having appeared by Attorney Bryan Woods, and the Defendant having appeared by Assistant City Attorney Eunice Gibson,

And the Court having heard arguments of counsel for both parties and having reviewed the record returned herein, the ' Motion, and the briefs of both parties, and having taken the matter under advisement,

And the Court having filed its Memorandum Decision wherein judgment is directed to be entered as therein provided,

NOW, THEREFORE, pursuant to the Memorandum Decision;

IT IS ORDERED AND ADJUDGED:

1. That the action of the City of Madison Equal Opportunities Commission in ordering Plaintiff to pay the sum of $2,397.59 plus 6.5% annual interest as provided in the Commission's Decision and Order and to submit to the Equal Opportunities Commission a proposed procedure for interviewing and testing of applicants for employment as drivers with Plaintiff, dated August 9, 1979, be and the same hereby is affirmed, and

2. That said Writ be and the same hereby is quashed.

Dated this 23 day of September, 1980.

BY THE COURT:

George R. Currie
Reserve Circuit Judge

STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY

STATE ex rel. BADGER PRODUCE CO., INC., Plaintiff and Petitioner, vs.	MEMORANDUM DECISION

EQUAL OPPORTUNITY COMMISSION, CITY OF MADISON Defendant.	Case No. 79-CV-4405

BEFORE: Hon. GEORGE R. CURRIE, Reserve Circuit Judge

This case comes before the Court on the petition for writ of certiorari of Badger Produce Company, Inc., (hereafter Badger Produce) the writ of certiorari issued August 30, 1979, by Judge William D. Byrne of this court, and the motion of Defendant Equal Opportunities Commission, City of Madison (hereafter the Commission) to quash the writ.

STATEMENT OF FACTS

This case arises under Section 3.23 of Madison General Ordinances. Complainant Betsy Matlack, of Madison, alleges that Petitioner, Badger Product Co., Inc., violated Sec. 3.23(7)(a) of that ordinance by refusing to hire her because of her sex, handicap (small stature) and physical appearance (small stature). On July 26, 1977, she filed a complaint with the Commission. The Commission investigated, an evidentiary hearing was conducted before a hearing examiner, and exceptions were filed to the hearing examiner's recommended findings.

After hearing argument, the Commission modified and affirmed the Examiner's recommended decision, holding that Badger Produce had discriminated against Matlack because of sex and physical appearance, but not handicap. The Commission ordered Badger Produce to pay Matlack backpay and interest and to submit to the Commission a procedure for interviewing and testing applicants.

Badger Produce is a distributor of poultry and fish, usually employing several drivers who must report to work from 4:00 - 6:00 a.m. and work until deliveries are completed. They are required to clean the warehouse, load, unload, and drive trucks. The boxes containing chicken are about thirty inches long, twelve inches high, and eighteen inches wide, and weigh about 100 pounds. The boxes are sometimes loaded to a height of seven feet. A driver might have to handle from 100 - 150 boxes in a day, and work 50-6-hours a week. Matlack was 4 feet 11 and 1/2 inches tall and weighed about 110 pounds. She had worked for 3 and 1/2 years at Intra Community Cooperative (ICC) a wholesale grocery warehouse and nine months at Common Market, a cooperative retail food store. At ICC she had to lift bags weighing 115 125 pounds and boxes weighing 40, 80, and 100 pounds. She also drove the trucks and worked from 40 - 65 hours a week. Besides loading and driving trucks, she had done some bookkeeping and purchasing. She had been unemployed from January, 1977 until the incident complained of. Matlack applied in person at Badger Produce for a truck driver job advertised in the Wisconsin State Journal. She was interviewed by the president of the company, Nate Ross, on Friday, July 22, 1977. She testified that when she told him she came to apply for the job, he "looked around at me and said you can't do it, the boxes weigh 150 pounds". Later that day, Matlack telephoned the Commission. A representative of the Commission called and spoke to Ross. He testified that he told the representative to send Matlack back and he would hire her if she could do the job.

Matlack did return to Badger Produce on Monday afternoon, July 25. Testimony about the interview was in sharp conflict. Matlack stated that Ross had asked her about her work experience and told her that they were not hiring, but merely "updating their files". She testified that he told her someone else had been hired on Friday. She said he had twice asked her to lift some boxes "to prove a point to himself". She refused to lift the boxes. Ross denied making these statements. He testified that he had not hired anyone else and, that, if she had lifted the boxes, she would have had a job. He offered payroll records showing that one Larry Gene Georgeson worked 3 days or 26 hours in the pay period ending Wednesday, July 27. He also testified that his employees were paid time and one half for all time over eight hours worked in any one day. Georgeson's pay record showed 22 and 1/2 hours straight time and 3 and 1/2 hours overtime.

The Examiner found, and the Commission affirmed the finding, that Georgeson had already been hired and had begun work at the time of Matlack's second interview on July 25.

Matlack filed her complaint the next day, July 26.

THE ISSUES

Badger Produce's brief raises these issues:

(1) Whether the Commission lost jurisdiction to render any decision because of its failure to render its decision within two years of the filing of Matlack's complaint.

(2) Whether the Commission had any authority to award back pay, or to require Badger Produce to submit a proposed procedure for interviewing and testing of applicants for employment as drivers.

(3) Whether the hearing conducted by the Commission denied Badger Produce due process.

(4) Whether the Commission's Findings of Fact are supported by the evidence.

(5) Whether back pay was inappropriately awarded Matlack.

THE COURT'S DECISION

A. Failure of Commission to Render Its Decision Within Two Years of the Filing of Matlack's Complaint

The Madison Equal Opportunities Ordinance is Sec. 3.23 of the Madison General Ordinances. Section 3.23(10)(c)(2) of this ordinance at the time Matlack filed her complaint with the Commission on July 26, 1977, provided:

> The Equal Opportunity Commission shall use the following procedures in acting on complaints of discrimination:
>
> * * *
>
> 2. All complaints must be processed by the Commission within two (2) years.

The Madison Common Council repealed this provision effective July. 10, 1979, or sixteen days prior to the expiration of the two year period following the filing of Matlack's complaint. Badger Produce contends this repeal ordinance had no retrospective effect, and therefore the two year requirement was applicable to the matter initiated by Matlack's complaint.

Badger Produce particularly relies on the opinion of Judge Richard W. Bardwell rendered in City of Madison v. Community Action Commission for the County of Dane and City of 'Madison, Inc., Case No. 167-291 (Dane County Circuit Court, 1979), wherein it was ruled that the defendant Commission lost jurisdiction under Sec. 3.23(10)(c)(2), the Madison Equal Opportunities Ordinance, to render its decision. The decision in that case was entered four days after the expiration of the prescribed two year period. Judge Bardwell held because the word "must" was used in the ordinance it was mandatory and not directory that the decision be rendered within the two year prescribed period.

However, in Case No. 167-291 the repeal of the two year period requirement is not mentioned thus rendering it unnecessary to resolve the issue present here of the retrospective effect of the repeal ordinance. The Court deems this issue is controlled by Steffen v. Little, 2 Wis. 2d 350, 357, 86 N.W. 2d 622 (1957), wherein the Supreme Court declared:

> While statutes in general are construed prospectively the rule is otherwise with statutes whose operation is procedural or remedial. In State ex rel. Davis & Starr Lumber Co. v. Pors (1900), 107 Wis. 420, 427, 83 N.W. 706, we quoted Chancellor Kent as follows:
>
> > This doctrine (prospective construction of statutes only) is not understood to apply to remedial statutes, which may be of a retrospective nature, provided that they do not impair contracts or disturb absolute vested rights, and only go to confirm rights already existing and in furtherance of the remedy, by curing defects and adding to the means

> of enforcing existing obligations.

The Court is satisfied that it was not the intent of the Madison Common Council in enacting sec. 3.23(10)(c)(2) that the two year period be in the nature of a statute of limitations for the benefit of claimed violators of the ordinance so as to create a substantive or vested right in them. Rather, the obvious intent was that the two year period requirement was merely a procedure to put pressure on the Commission to render timely decisions. Being procedural, the repeal ordinance operated retrospectively. Therefore, the repeal was applicable to the instant case.

B. Authority of Commission to Order the Relief It Did

Badger Produce contends that the City of Madison was without authority to provide in sec. 3.23(10)(c)3b of its Equal Opportunities Ordinance that the Commission "shall ... order such action by the respondent as will effectuate the purpose of this ordinance" if that be construed to grant affirmative relief against the respondent as was done in this matter. It grounds this contention on the assertion that the seeking of relief because of an ordinance violation is a civil action which only the courts, and not a city administrative agency, have been authorized by the legislature to process. It is further claimed that the only relief authorized for an ordinance violation is restricted to imposing a forfeiture.

The issue of the authority of a municipal administrative agency such as the Commission to order payment of back pay to a complainant as a remedy for being discriminated against in employment or being in violation of an equal opportunities ordinance was before Judge Bardwell in City of Madison v. Community Action Commission, supra. Judge Bardwell held that the "home rule" statute, sec. 62.11(5), Stats., was broad enough to authorize the granting by the ordinance of the power to order a back pay award to the complainant.

Badger Produce contends that Judge Bardwell's holding in City of Madison v. Community Action Comm., should not control the Court's decision in this case because the civil action contention here advanced was not there raised as an issue.

Badger Produce particularly relies on this statement appearing in Milwaukee v. Horvath, 31 Wis. 2d 490, 492, 143 N.W. 2d 446 (1966):

> It is well established that actions for violations of municipal ordinances, such as those in the instant case, are civil proceedings.

and citing, among other cases, City of Neenah v. Alsteen, 30 Wis. 2d 59, 600, 142 N.W. 2d 232, (1966) and State ex rel. Keefe v. Schmiege, 251 Wis. 79, 86, 28 N.W. 2d 345 (1947). Badger Produce's brief also quotes this provision from sec. 66.12(1)(a), Stats.:

An action for violation of a municipal ordinance, resolution, or bylaw is a civil action.

The key word in the above quoted extract from Milwaukee v. Horvath, supra, is "actions" and in the quoted provision of sec. 66.12(1)(a) is "action". The Court is satisfied these words are there used in the sense that "actions" and "action" are used in sec. 801.01(1), Stats., viz., a court proceeding. As so used these words have no application whatsoever to proceedings before state and municipal administrative agencies.

The Supreme Court's statement in Milwaukee v. Horvath, supra, and in the cases cited in support thereof, that actions for ordinance violations are civil proceedings, was made solely to distinguish such actions from criminal actions.

Badger Produce's brief further quotes from the Supreme Court's statement in State ex rel. Prentice v. County Court of Milwaukee County, 70 Wis. 2d 230, 234 N.W. 2d 283, 289:

> Another reason is that violations of municipal ordinances are minor offenses for which a forfeiture is the only permissible direct punishment. (Emphasis supplied.)

Again, that statement has no application to the remedies which a municipal administrative agency may impose

against a violator of a municipal ordinance, not for punishment, but in order that a party damaged by the violation may secure redress for the harm done.

The Court considers the holding in State ex rel. Michalek v. Le Grand, 77 Wis. 2d 520, 253 N.W. 2d 505 (1977) has some significance with respect to the issue of the power of the Commission to provide the type of remedies it did in its order for violation of the Madison Equal Opportunities Ordinance. In that case the Building Inspector of the City of Milwaukee, not a municipal administrative agency, acted. A city ordinance provided for tenants of a landlord, who had violated city building code provisions, withholding their rent payments until the code violations were remedied, and paying their rent to the City Building Inspector who was to deposit the rentals in an escrow account. The Supreme Court upheld the validity of the ordinance against an attack made on the ground that the ordinance dealt with a matter of "state wide concern" and not a matter of "local affairs". While the issue of the nature of the remedy provided was not an issue, the Court believes that the Supreme Court would not have at least referred to it, if it had any ironclad rule that the only permissible remedy for an ordinance violation was a forfeiture.

Badger Produce further contends that the Commission was unauthorized to grant the relief provided in the order because it is outside the powers of such a Commission provided in sec. 66.433(3), Stats. However, that statute has no application to the instant case because the Madison Equal Opportunities Ordinance (sec. 3.23) was not enacted under sec. 66.433(3), but under the "home rule" statute, sec. 62.11(5).

Finally, Badger Produce attacks the provision in the Commission's order which required it to submit a proposed procedure for interviewing and testing of applicants for employment as drivers. It contends that implicit in such a provision "is a declaration that Badger Produce cease and desist from its present hiring practices". Upon this premise it argues that this remedy is in the nature of injunctive relief which the City cannot impose for an ordinance violation. The Court determines that no injunctive relief is actually imposed, and thus the Court is not required to resolve the issue of whether the Commission has the power to impose a cease and desist order. The Court further holds that this provision of the order is within the powers granted it by the ordinance, as is the back pay award.

C. The Due Process Issue

Badger Produce advances these two reasons why it contends it was denied due process in the proceedings before the Commission:

(1) The procedure set forth in the Equal Opportunities Ordinance and the rules of the Commission denied due process.

(2) The hearing examiner's conduct demonstrated prejudice against Badger Produce.

It is contended that the ordinance and the Commission's rules require the Commission as accuser, prosecutor and decision maker, thus denying it due process. Such a contention has been rejected by the Wisconsin Supreme Court in State ex rel. De Luca v. Common Council, 72 Wis. 2d 672, 242 N.W. 2d 689 (1976). In that case the president of the Common Council of the City of Franklin and another alderman personally investigated the activities of De Luca, the City Clerk, and, based on information they gained by interviewing witnesses, they filed charges against him before the Common Council. They also took part in the Council's hearing and deliberations on De Luca's removal. The Supreme Court, relying on Withrow v. Larkin, 421 U.S. 35 (1975), stated (at pp. 685-686):

> . . . We find nothing in the record that indicates the mere initiation of the removal proceedings by aldermen who would subsequently decide the matter after a full blown hearing created special circumstances that would result in an intolerable risk of unfairness.

The Supreme Court looked for the same type of "special circumstances that would result in an intolerable risk of unfairness" in Hortonville Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482, 96 S. Ct. 2308, 49 L. Ed. 2d 1 (1976). There the School Board had participated in the negotiations that precipitated the teachers strike and had written to warn the teachers that they would be discharged if they continued to strike. The Education Association alleged that due process would be denied if the Board made the discharge decisions. The Court saw no denial of due process because (95 S. Ct. 2314):

> . . . the teachers did not show, and the Wisconsin Courts did not find, that the Board members had the kind of personal or financial stake in the decision that might create a conflict of interest, and there is nothing in the record to support charges of personal animosity . . . .

The Court held (96 S. Ct. 2316):

> Respondents have failed to demonstrate that the decision to terminate their employment was infected by the sort of bias that we have held to disqualify other decisionmakers as a matter of federal due process. A showing that the Board was "involved" in the events preceding this decision, in light of the important interest in leaving with the Board the power given by the state legislature, is not enough to overcome the presumption of honesty and integrity in policymakers with decisionmaking power ....(Citing, Withrow v. Larkin.)

Badger Produce has suggested a number of areas in which the structure, rules and procedures of the Equal Opportunities Commission allegedly fail to provide respondents with due process of law. Not one of these suggestions has any foundation in fact or applicable case law.

Petitioner first argues that because the Commission is authorized to recommend anti discrimination ordinances, its authorization to interpret such ordinances somehow denies due process. No evidence offered as to whether this has actually taken place, so as to be even arguably relevant to this case. No case law is cited to support this argument.

It next states correctly that the Commission is authorized to receive and initiate complaints, and, incorrectly, that Matlack's complaint was initiated by the Commission. Withrow v. Larkin, supra, and State ex rel. De Luca v. Common Council, supra, make clear that administrative agencies may initiate complaints without any denial of due process. Therefore, if the Commission had initiated the Matlack complaint, that would not require a finding that petitioner had been denied due process of law. Nevertheless, an examination of Matlack's complaint makes it obvious that it was initiated by the complainant. Matlack testified that she filed the complaint and Badger Produce offered no contradictory evidence.

Petitioner then seems to imply that it is a denial of due process for the Commission to assign the duties of investigator and hearing examiner to staff. Yet the statute and Attorney General's Opinion cited by Badger Produce support the opposite conclusion. Section 227.09(5), Stats., and 66 OAG 52 (1977) both refer to cases where an "official of the agency", defined by the Attorney General as "the agency secretary, commissioner, or board member" (at 53) participates in the decision to pursue the complaint. That did not happen in the instant case. Thus, even if the Commission were covered by Chapter 227, which it is not, the terms of sub. (5) would not apply to this case where there has been no allegation that any member of the Commission was involved at any stage before the Commission hearing.

Badger Produce then argues that the investigator's procedure for determining probable cause should have allowed the parties to present and confront witnesses in an apparently adversarial proceeding. This argument has been explicitly rejected by the Wisconsin Supreme Court in State ex rel. De Luca v. Common Council, supra.

Badger Produce grounds its contention that it was entitled to confront witnesses in the investigatory procedure on Morrissy v. Brewer, 408 U.S. 471, 92 Sup. Ct. 2593, 33 L. Ed. 484 (1971). There the probable cause finding determined whether or not a parolee remained free or was kept in jail for weeks or months to await a full scale parole revocation hearing.

The U.S. Supreme Court has consistently refused to apply Morrissy to non-parole proceedings. See for example Board of Curators of University of Missouri v. Horowitz, 98 S. Ct. 948 (1978) dismissal of medical student for academis deficiencies; Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977) removal of children from foster home; Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977) infliction of corporal punishment on school children; Hortonville Joint School District No. 1. v. Hortonville Education Association, 426 U.S. 482, 96 S. Ct. 2308, 49 L. Ed. 2d 1 (1976) discharge of striking teachers.

Badger Produce sought to establish that Renee Caldwell, a member of the Commission staff, who made the probable cause determination, was not an independent decisionmaker. The Court has concluded that it failed in

this attempt for the reasons stated in the City Attorney's brief which will not be repeated here.

The Court's ultimate conclusion is that the procedure set forth in the Madison Equal Opportunities Ordinance and the rules of the Commission did not deny due process to Badger Produce. The Court turns now to the issue of whether Badger Produce was denied due process by the claimed demonstrated prejudice of the hearing examiner toward it.

The conduct of the examiner complained of by Badger Produce had to do with the examiner permitting introduction of evidence with respect to whether complainant Matlack was a resident of the City of Madison and that Badger Produce's place of business was also in the city after counsel for Matlack had rested complainant's case, and counsel for Badger Produce had moved to dismiss. Badger Produce particularly criticizes the examiner for advising counsel for complainant that such evidence of residence should have been put in and then adducing such evidence without counsel moving that it be done.

The Court is of the opinion that this conduct on the part of the examiner is to be commended rather than criticized. It certainly did not demonstrate prejudice against Badger Produce.

D. Whether Commission's Findings of Fact are Supported by the Evidence

The standard to be applied in determining whether the fact finder's findings of fact are supported by the evidence where review is by certiorari has been stated by the Supreme Court as follows:

> ". . . On review by certiorari, 'the findings of the board upon the facts before it are conclusive if in any reasonable view the evidence sustains them.' State ex rel. B'nair B'rith F. v. Walworth County, 59 'Wis. 2d 296, 303-304, 208 N.W. 2d 113, 117 (1973)", cited in Nufer v. Village Board of Village of Palmyra, 92 Wis. 2d 289, 284 N.W. 2d 649, 655 1979.

It is also axiomatic that an administrative agency fact finder, and not the reviewing court, is the judge of the credibility of witnesses.

With these principles in mind the Court will now consider the Commission's findings of fact which Badger Produce contends are not supported by the evidence.

(1) No position available on July 25, 1977 (Finding 10)

As pointed out in the STATEMENT OF FACTS, supra, the testimony of Ross, president of Badger Produce, and Matlack was in sharp conflict as to what was said in Matlack's second interview on July 25, 1977. The examiner had the right to accept Matlack's version of this interview that Ross stated the position she had applied for on July 22nd had been filled by hiring someone else, and the company was not hiring but merely updating their files.

Badger Produce stresses Exhibit 10 which showed that for its pay period ending July 14, 1977, it employed seven drivers while in the ensuing pay period which included July 25th there were but six drivers employed, including Georgeson. This exhibit, however, shows a variation in the number of drivers employed during the pay periods covered by it. The Court is of the opinion that Exhibit 10 is not conclusive on whether a driver vacancy existed on July 25, 1977, and that the Commission's finding is supported, by evidence applying the "reasonable view" test.

2. Matlack was qualified for the job Badger Produce had open on July 22, 1977, by virtue of her former experience (Finding 20).

Finding 19 sets forth Matlack's prior work experience and reads:

> Complainant had worked at the Common Market Co-op previously, unloading trucks and stacking items, and at the Intra-Community Co-op for three and one half years previously. Complainant's job duties at the Intra-Community Co-op included lifting packages, boxes and bags ranging in weight from 40 to 125 pounds, unloading and loading trucks, and driving the trucks in the Madison area, and to and from Chicago and Milwaukee, making deliveries and picking up orders for warehouses.

Much of Badger Produce's argument that Matlack was unqualified for the job is grounded on the fact that Matlack refused to lift boxes at Ross's request in the interview of July 25th. It is contended that an employer has the right to require a prospective employee to take a test to demonstrate his or her ability to perform the job.

Matlack testified: When Ross asked her to lift the boxes she asked him whether other applicants had been required to do this and he responded "no", and "on that basis plus not being clear whether there was a job I refused to lift the box" (Tr. 45).

On this testimony with respect to Matlack's reason for refusing to lift the boxes the Court cannot hold that such refusal was unreasonable, nor that this conclusively established she was unqualified for the job.

Badger Produce also stresses the testimony of John Lettman. He testified that in August, 1977, he worked with Matlack as part of a crew on a city garbage truck at the back of the truck and to lift cans of material waist high and dump the contents in the hopper of the truck. He estimated these cans weighed from 75 to 100 pounds and she had a hard time getting them "over the hopper (Tr. 96). He thought they worked together two and a half days. The Commission was not required to hold on the basis of this testimony that Matlack was unqualified to perform the duties of the job she applied for at Badger Produce.

The testimony of Matlack fully supports Finding 19, and that finding has not been attacked by Badger Produce.

Applying again the test of a reasonable view of the evidence, the Court holds that Finding 20 is supported by the evidence.

E. Whether Back Pay was Inappropriately Awarded Matlack

This issue is only concerned with the continuance of the back pay award beyond August 24, 1977, when Matlack began her employment there on August 14, 1977, but this is obviously incorrect because she only worked there two and a fraction days, quitting August 27, 1977.

Badger Produce contends, that because the job at Waste Management paid more than the position at Badger Produce, and Matlack voluntarily quit such job, it was inappropriate to award back pay beyond August 24, 1977.

Matlack testified with respect to the job she had at Waste Management. She had planned to work 50-55 hours a week, about the same number of hours she could have expected to work at Badger Produce Co. (Tr. 47.) On her fist day at Waste Management, she worked 12 hours, with only a 15 minute break taken in the truck. (Tr. 48.) On the second day, she worked nearly 11 hours, and had no break between 7:00 a.m. and 4:30 or 5:00 p.m. (Tr. 48.) On the third day, she anticipated a 13 or 13 and 1/2 hour work day, and it was on that day that she quit. (Tr. 48.) She had been told that there would be 1/2 hour lunch breaks, but that these did not turn out to be available. (Tr. 49.) She had talked to other Waste Management drivers about the long hours, and they had told her "these are how long the days are regularly." (Tr. 70.) The Waste Management work rules provided that employees were expected to finish their routes daily. (Tr. 69).

There was no testimony that the Waste Management work rule provided for breaks or for any limit of the work day.

Finding 30 found:

> Complainant was forced to leave Waste Management's employ because the hours exceeded her expectations and the work-day did not include any breaks, as provided by law.

The Court has concluded that upon this evidence, and Finding 30 based thereon, it was not inappropriate for the Commission's back pay award to embrace a period extending beyond Matlack's employment at Waste Management.

For the reasons stated herein the Court has concluded that the Commission's motion to quash the writ of certiorari must be granted. Counsel for the Commission is requested to draft the judgment providing therefor and, after furnishing opposing counsel a copy thereof, to present the same to the Court for signature. The Court will

dalay for three days after its receipt the signing of the judgment in order to afford counsel for Badger Produce time to file any objections to the form of the judgment.

Dated this 2nd day of September, 1980.

By the Court:
/s/ George R. Currie

CITY OF MADISON

August 20, 1980

The Honorable George Currie
122 Marinette Trail
Madison, Wisconsin 53711

Re: State ex rel. Badger Produce Co. v. Equal Opportunities Commission, City of Madison.
Case No. 79-CV-4405.

Dear Judge Curries:

Because some issues came up in the oral argument which did not receive substantial discussion in the briefs, I am taking the liberty of submitting this letter on behalf of the City of Madison.

Plaintiff has misapplied the provisions of Sec. 66.12, Wis. Stats. (1977) because Plaintiff has mischaracterized the proceedings of the Equal Opportunities Commission. The City maintains that they are administrative proceedings, and thus not an "action" within the meaning of Wisconsin Statutes.

Sec. 801.01(1), Wis. Stats. (1977) provides as follows:

"801.01 Kinds of proceedings; scope of Title XLII-A. (1) KINDS. Proceedings in the courts are divided into actions and special proceedings. 'Action', as used in this title, includes 'special proceeding' unless a specific provision of procedure in special proceedings exists."

In State ex rel. Thompson v. Nash, 27 Wis. 2d 183, 133 NW 2d 769 (1965), the Wisconsin Supreme Court distinguished between administrative proceedings and a civil action or proceeding governed by the statutory rules of civil procedure.

Plaintiff argues that Section 66.12, Wis. Stats. (1977) decrees that no ordinance violation may be dealt with in any other manner than by an action for forfeiture. The relevant portion of Sec. 66.12 provides as follows:

"66.12 Actions for violation of city or village regulations. (1) COLLECTION OF FORFEITURES AND PENALTIES. (a) An action for violation of a municipal ordinance, resolution or bylaw is a civil action. All forfeitures and penalties imposed by an ordinance, resolution or bylaw of the municipality, except as provided in ss. 345.20 to 345.53, may be collected in an action in the name of the municipality before the municipal court or a court of record. If the action is in municipal court, the procedures under ch. 300 apply and the procedures under this section do not apply. If the action is in a court of record, it shall be commenced by warrant or summons under s. 968.04; but the marshall, constable or police officer may arrest the offender in all cases without warrant under s. 968.07. ..."

Sec. 66.12 makes clear that forfeitures may be recovered for the violation of municipal ordinances, by means of a civil action. It does not purport to mandate that cities may not deal with ordinance violations in other ways than by seeking forfeitures. It would seem to be clear that the Equal Opportunities Commission would not have the power to impose a forfeiture, but it has never sought to do so. The Equal Opportunities ordinance does provide, at Sec. 3.23(12)(b) that failure to comply with the Commission's lawful order violates the ordinance, and Sec. 3.23(9)(c)3. provides that the City Attorney is to seek enforcement of the ordinance. Presumably, the City Attorney would do

this by seeking a forfeiture through an action in Circuit Court.

If we examine the case of State ex rel. Michalek v. LeGrand, 77 Wis. 2d 520, 253 NW 2d 505 (1977), we see a procedural situation not very different from the one in this case. There the Milwaukee Common Council had apparently determined that compliance with its building code could better be achieved by other means than the seeking of forfeitures through court action. Instead, the Milwaukee Council passed an ordinance providing that when building code violations were not repaired, an escrow account was to be set up into which tenants would make their rental payments. Obviously, this would deprive the owner of possession of these funds until such time as the repairs were made.

Wisconsin Statutes in effect at that time provided at Sec. 62.17, at Sec. 62.23(9), and at Sec. 66.301, Wis. Stats. (1975) for municipal building codes, building inspectors, etc. But there has never been a statutory provision empowering cities to do as the Milwaukee Council proposed to do. In fact, there is a statutory provision, Sec. 280.22, Wis. Stats. (1975), which provides that residential buildings which do not comply with local building codes are to be treated as a public nuisance. This would dictate a different enforcement procedure.

In Michalek, the Supreme Court was chiefly concerned with the argument that Milwaukee's ordinance was in conflict with the State Statute. The Court found no conflict. Apparently, the challenger did not argue that cities are confined strictly to actions for forfeitures in their attempt to achieve compliance with their ordinances. Certainly, the Court could not have decided as it did if that position were the correct one.

Plaintiff in our case further argues that a finding as to whether or not an ordinance has been violated cannot be made by a municipal administrative body. But an examination of the Michalek case, shows that this is exactly what was done there. In fact, the Court believed that any other approach would have amounted to a violation of due process. In analyzing the compliance of the Milwaukee procedure with due process requirements, the Court states:

"As to the nature and scope of the opportunity to challenge the proposed action, the ordinance in question provides for an evidentiary hearing before the Housing Code Enforcement Appeals Board of the City of Milwaukee. The opportunity to personally appear before such Board is assured. The right to be represented by counsel we hold, is likewise assured.

"The lessor may present his own evidence and witnesses to show why rent withholding would not be justified under sec. 51-4. If this right to present evidence did not include the right to challenge the finding of the building inspector as to the existence of building code violations on which the proposed rent withholding is bottomed, we would see a question as to constitutional sufficiency of procedural safeguards.

"However we construe the hearing to be a de novo-type hearing, with the building inspector required to establish the fact of the building code violations on which the right to withhold rent payments is predicated. With the burden of proof on the building inspector as moving party, and with lessor entitled to challenge the basis for the proposed rent withholding, we find no basis for claim that the hearing afforded is constitutionally inadequate.

"Following the hearing, the Board may affirm, reverse or modify both the authorization to withhold rent and the determination of the building inspector that a housing code violation exists. A tape record is require as to every meeting of the Board. Authority for the lessor to appeal the Board's decision to the Circuit Court is provided. . ." (Michalek at 535, 536) (Footnotes omitted) (Emphasis added)

The Board could not perform the duty assigned to it by the Milwaukee ordinance unless it had the power to determine that the housing code had been violated. The Court's analysis of this procedure makes that clear. There is no statute which authorizes the existence of a code enforcement and appeal board, nor which empowers such a board to determine that an ordinance has been violated. Nevertheless, the Court approved it; in fact the Court believed that such a procedure was essential to provide owners with due process.

Of course this Board could not have the additional power to impose a forfeiture upon these owners. The Board's power was limited to the remedy provided by the ordinance, namely, the payment of rents into an escrow account. Likewise, the Equal Opportunities Commission may not impose a forfeiture, but is limited to the remedy provided by the Equal Opportunities ordinance.

The Plaintiff has correctly pointed to statutes which show how forfeitures may be obtained for the violation of municipal ordinances, but the City respectfully urges that Plaintiff has failed to show that cities are confined by the statutes to seeking a forfeiture as a means of achieving compliance with city ordinances. No statute says that in express terms, and the Michalek case shows that other means are permissible. The City respectfully urges the Court to quash the writ.

Respectfully submitted,

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EG:bg

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See EOC Case No. 2394 for findings on Matlack v. Badger Produce Company