

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

David Gerald Schrankler  
1009 Gilbert Rd Apt #6  
Madison WI 53711

Complainant

vs.

Best Buy Stores, L.P.  
2452 E Springs Dr.  
Madison WI 53704

Respondent

HEARING EXAMINER'S RECOMMENDED  
FINDINGS OF FACT  
CONCLUSIONS OF LAW AND ORDER

CASE NO. 20122001

On October 1, 2, 3, 23, and 24, 2014, Clifford E. Blackwell, III, Hearing Examiner for the Madison Department of Civil Rights, held a public hearing on the merits of the above-captioned complaint. The Complainant, David G. Schrankler, appeared in person and by his attorney, Amy F. Scarr. The Respondent appeared by its attorneys, Amy Schmidt Jones and Anne M. Carroll of Michael, Best and Friedrich LLP and by Jane K. Kirshbaum, Corporate Counsel for the Respondent.

Based upon the record of the proceedings in this matter, the Hearing Examiner now issues his Recommended Findings of Fact, Conclusions of Law and Order.

**RECOMMENDED FINDINGS OF FACT**

1. The Complainant began work as a Product Process Specialist at Store 59 of the Respondent in 2003.
2. The Complainant is an individual with an arrest record for 12 counts of possession of child pornography.
3. The Respondent is a retailer of electronics and household goods and employs more than 15 individuals at a store located at 2452 East Springs Road, Madison, Wisconsin, designated as Store 59.
4. The Complainant's employment with the Respondent was generally unremarkable until July 28, 2011. On that date, the Complainant was arrested for 12 counts of possession of child pornography. The Complainant was not scheduled to work again until August, 2011.
5. In early August, 2011, the Complainant requested leave to address personal issues. That leave was granted. On or about either August 11 or 13, 2011, the Complainant contacted his manager to indicate that he was prepared to return to work.

6. On or about August 8, 2011, Jeffrey Bord, the Complainant's supervisor, became aware of the Complainant's arrest and the reasons for that arrest through two stories in the newspaper. Bord contacted the Respondent's Human Relations Department to inquire about how to address the Complainant's situation. Bord contacted Cory Livingood, Director of Employee Relations at Store 59. After consultation with counsel and the Human Relations Department, the Respondent, on or about August 9, 2011, determined that it would suspend the Complainant pending the outcome of the charges against the Complainant.

7. When the Complainant contacted his manager on August 13, 2011, the Complainant was informed that the Respondent wanted to have a meeting with the Complainant on August 18, 2011 to discuss his request. At the meeting on August 18, 2011, the Complainant was informed of the Respondent's decision to suspend him without pay pending the resolution of the charges against the Complainant.

8. The person who Bord contacted was Cory Livingood, Director of Employee Relations for Store 59. Livingood spoke with Rhonda Tripp of the Respondent's Employee Relations Department and with counsel prior to making her recommendation that the Complainant be suspended.

9. The Respondent did not review the criminal complaint or the requirements of the Complainant's bond before reaching the decision to suspend the Complainant.

10. The Respondent's decision to suspend the Complainant was based upon Livingood's knowledge of the Product Process Specialist position, her knowledge of the physical layout of Store 59, the newspaper articles forwarded by Bord, and the discussions Livingood had with other managers in the Respondent's corporate headquarters.

11. The Complainant did not engage in any conduct related to his arrest on the Respondent's premises.

12. The Complainant was not charged with a contact offense of any kind.

13. The Respondent's business premises contain many computers and other electronic devices that can access the Internet, including, but not limited to demonstration computers, cellular telephones and tablets, computerized work stations accessible only to employees, and personal electronic devices brought into the store by employees or customers. Some of these devices are not located so that they may be observed by other individuals or by store security. Such locations may include the TV warehouse, the appliance department and the building warehouse.

14. The Internet may be accessed from some of these devices without surveillance by others or without triggering filtering software utilized by the Respondent.

15. There are locations within the building that are not readily observable by others for some periods of time. The Respondent's security cameras only cover a percentage of the floor space and the use of displays and large storage or shelving units may block sight lines to certain locations in the building.

16. The Respondent employs minors to work in its stores. Due to the types of merchandise offered by the Respondent, minors shop at the Respondent's stores and may or may not be accompanied by adults.

17. The time needed to commit a contact offense involving a minor or another individual is very small, perhaps less than a minute.

18. Not all sources of pornography on the Internet are blocked by the type of software utilized by the Respondent to block access to prohibited sites. Many of the computers at the Respondent's store could receive images and other software from use of flash or thumb drives.

19. The Complainant has been diagnosed as a pedophile. As a general rule, pedophiles should not be given unsupervised access to minors even for short periods of time. Though Dr. Coffee testified that the risk of the Complainant's repeating his crime was low, as was the chance that he would commit a contact offense involving a minor, she could not entirely rule out those possibilities.

20. The Complainant's job duties took him all over Store 59, most often without the supervision of a manager. This access included the warehouse, the appliance department, the parking lot, and the bathrooms, as well as other areas that might not be easily observed. Some small percentage of the Complainant's job duties involved direct assistance to customers or work with other employees.

21. Under the terms of the Complainant's bond, he was not to have unsupervised contact with minors and was to have the use of computers or access to the Internet only as required for work. These conditions were carried forward to restrictions placed on the Complainant subsequent to his conviction for one count of possession of child pornography.

22. The Complainant's Probation Agent, Amanda Bell, stated that she would not have consented to the Complainant's employment at Store 59 due to the unsupervised nature of the Complainant's employment, the potential access to minors and the potential access to the Internet on computers located at Store 59. Bell was only assigned to the Complainant subsequent to his conviction.

#### CONCLUSIONS OF LAW

1. As an individual with an arrest record, the Complainant is an individual covered by the Equal Opportunities Ordinance and its protections.

2. As an employer, the Respondent is subject to the requirements and provisions of the Equal Opportunities Ordinance.

3. The Respondent did not violate the Equal Opportunities Ordinance when it suspended the employment of the Complainant without pay in August of 2011.

4. Though the Respondent suspended the Complainant's employment because of a pending charge for possession of child pornography, the charge was substantially related to the terms and circumstances of the Complainant's employment with the Respondent.

5. Employment of the Complainant by the Respondent after August 8, 2011 would likely have violated the terms of the Complainant's bond which prohibited his unsupervised contact with minors.

#### ORDER

The complaint is dismissed. The parties shall bear their own costs and expenses.

#### MEMORANDUM DECISION

This complaint presents difficult issues balancing competing interests in a single section of the Equal Opportunities Ordinance. To some extent, the different interests reflect divergent interests in society as a whole. The context of this dispute is played out in an area of relatively little case experience for the Commission, though an area in which there is growing activity.

As noted in the Hearing Examiner's Decision and Order in this matter dated February 13, 2014, the Hearing Examiner may turn to other jurisdictions with similar provisions to seek guidance in how to best interpret and to apply the provisions of the Ordinance where there may be few decisions to help guide the Hearing Examiner. While bearing in mind that the duty of the Hearing Examiner is to apply the provisions of the Ordinance, McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W.2d 830 (Ct. App. 1988), the circumstances of this claim dictate that the Hearing Examiner seek the guidance of other tribunals in interpreting the provisions of the Ordinance.

To this end, the parties and the Hearing Examiner have drawn upon the decisions of the Labor and Industry Review Commission and the Wisconsin courts in their interpretation of similar provisions in the Wisconsin Fair Employment Act to assist the Hearing Examiner in interpreting and applying the provisions of the Equal Opportunities Ordinance to the facts and circumstances of this complaint. The Hearing Examiner seeks this guidance voluntarily and not, as the Respondent argues, as a matter of binding guidance.

This complaint focuses on the determination of the Respondent to suspend, without pay, the Complainant because of his arrest in July of 2011 for 12 counts of possession of child pornography. The Equal Opportunities Ordinance makes it illegal and a violation of the Ordinance to otherwise discriminate against an individual in his/her terms or conditions of employment on the basis, among other reasons, of the individual's arrest record. Sec. 39.03(8)(a) Mad. Gen. Ord. In the present matter, there is no question that the Respondent decided to suspend the Complainant's employment pending resolution of the charges against him because of his arrest on July 28, 2011. The testimony of Cory Livingood and Jeffrey Bord, as well as that of the Complainant, clearly indicate that the Respondent's decision was based upon the Complainant's arrest and the nature of the charges for which he was arrested.

The Ordinance, after setting forth the illegality of such a reason for making this employment decision, provides an exception at Sec.39.03(8)(i)(3)(a) Mad. Gen. Ord., to the effect that if an individual's pending charge is substantially related to the circumstances of the individual's employment, the decision to take an employment action does not violate the Ordinance. It is on the ground of whether the charges pending against the Complainant in August of 2011 when the decision to suspend the Complainant was made are substantially related to the circumstances of the Complainant's employment that this case is fought.

The Department has addressed the issue of substantial relatedness only twice in recent history and both of those cases dealt with the concept in the context of claims based upon the Complainant's conviction record. In Rogers v. New Horizon, MEOC Case No. 19982232 (Ex. Dec. 08/10/99), the Hearing Examiner found that the Complainant's conviction for homicide was not substantially related to the position of Receptionist for which the Complainant had applied and been rejected after disclosure of his conviction record. In the case of Wollschlager v Hy-Vee, MEOC Case No. 20142022 (Ex. Dec. 06/16/2017), a case decided after briefing in the present matter, the Hearing Examiner determined that the Respondent's decision not to hire the Complainant after disclosure of his conviction for possession of child pornography was justified under the terms of the Ordinance. Both of these cases have similarities and differences to the present matter. Application of these cases to the circumstances of the current complaint will be discussed later in this memorandum.

The Hearing Examiner must first establish the analytical framework in which he will address the issues presented in this record. It is clear that as a defense to a claim of arrest record discrimination that it is the Respondent's burden to demonstrate that the arrest is substantially related to the circumstances of the Complainant's employment. It is not the burden of the Complainant to establish both that the Respondent's actions were motivated by the Complainant's arrest record and that the arrest record was not substantially related to the terms and conditions of his/her employment. In placing this burden on the Respondent, the Ordinance seeks to place the burdens on the parties in the best position to explain the decision. As noted above, the record adequately demonstrates that the Complainant has met his burden to establish that his arrest in July of 2011 was the motivating factor in the Respondent's decision to suspend him without pay. It cannot reasonably be argued that such a suspension, especially without pay, does not represent an adverse employment action, as it deprived the Complainant of income and reduced his earning capacity for the period of the suspension. The Complainant having met his burden, the burden shifts to the Respondent to establish that the circumstances of the charges for which the Complainant was arrested were substantially related to the position for which the Complainant was employed.

In this regard, the record shows that the Complainant did not disclose his arrest to the Respondent, but that the Respondent became aware of the Complainant's arrest through two news items on August 8, 2011. Jeffrey Bord, the Complainant's supervisor, after becoming aware of the Complainant's arrest, contacted Cory Livingood, the Respondent's Employee Relations Manager for Store 59, for guidance on how to address the Complainant's circumstances. Livingood reviewed the news items forwarded by Bord and opened a file on the matter. Livingood, as part of her responsibilities, contacted the Respondent's Employee Relations office in the Respondent's corporate headquarters and discussed the circumstances of the Complainant's arrest with Rhonda Tripp, the Director of Employee Relations, and with counsel for the Respondent. Based upon Livingood's knowledge of the premises of Store 59, her discussions with others at the Respondent, and the information contained in the news reports, Livingood and Tripp, on or about August 9, 2011, determined that it was most prudent to suspend the Complainant pending resolution of the charges against him.

The Hearing Examiner notes that there is no indication that the Respondent reviewed the criminal complaint against the Complainant, nor reviewed the terms and conditions of the Complainant's bond under which he was released from incarceration. It is possible that such matters were subjects of the discussion between Livingood and counsel for the Respondent, but as those conversations are subject to the attorney/client privilege, they were not disclosed at the

time of hearing. However, Livingood's testimony indicated that she had not reviewed those items herself.

Key factors in the Respondent's decision included the lack of supervision of the Complainant in performance of his daily responsibilities, his access to a variety of computers and thence to the Internet at the Respondent's workplace, and the presence of minors both as coworkers of the Complainant and customers of the Respondent. The Respondent was also concerned that the physical setup of Store 59 meant that there were locations within the store where the Complainant's activities could not be observed.

Implicitly and explicitly, the record indicates that the Respondent was concerned that the circumstances of the Complainant's employment created or permitted a risk of the Complainant's downloading or observing child pornography while on the Respondent's premises. Additionally, the Respondent clearly was concerned that the Complainant might commit a crime of sexual contact against a minor coworker or a customer while on the Respondent's premises.

The Complainant asserts that the Respondent's existing monitoring and prevention systems and the history of the Complainant's employment shows the Respondent's concerns to be unrealistic and present a mere possibility of future criminal activity on the part of the Complainant. The Complainant also argues that he was never charged with a contact violation and that subsequent examination by experts indicates that he presented a negligible risk for such crimes in the future. Essentially, the Complainant contends that the circumstances of the crimes with which he was charged and his history of employment and the physical setting of the store made further criminal activity unlikely at best.

The purpose of the two provisions of the Ordinance are, on the one hand, to protect an accused from stereotypical or unreasoned reactions to arrest, while on the other hand, to protect employers and the public from reoccurrence of criminal activity that is permitted or encouraged by the circumstances of one's employment. Sec. 39.03(8)(i) Mad. Gen. Ord. The problem facing the Hearing Examiner is how to determine whether the Respondent has acted reasonably and within the contemplation of the Ordinance in seeking to protect itself and its employees and customers when it suspended the Complainant in August of 2011.

The record in this matter creates concerns for the Hearing Examiner about the positions of both parties. On one hand, the Complainant's record as an employee of the Respondent appears relatively clean. There is no evidence indicating that the Complainant ever engaged in any activity related to his arrest at the site of his employment. While the Complainant's work record indicates that he was generally a good employee and was often tapped to help with training new employees, he did have a record of attendance and timeliness issues that could have placed his employment in jeopardy. Also, the record indicates that the Complainant routinely violated the Respondent's drug-free workplace policy by coming to work under the influence of marijuana. Had the Respondent known of the Complainant's condition, it would have terminated the Complainant. The Complainant hid this drug use from the Respondent.

It is clear from the record that the Complainant exercised a large degree of independence in performing his duties as a Product Process Specialist. While he was given a list of duties to perform, how and when he performed those duties was up to the Complainant. Jeffrey Bord, the Complainant's supervisor, testified that his and the Complainant's schedules only overlapped a couple times per week and that the rest of the time, the Complainant was

pretty much on his own. Bord did not have a problem giving the Complainant this type of latitude as the Complainant accomplished his job duties without much difficulty. However, this lack of direct supervision meant that there were times during the Complainant's workday that he was not under the direct supervision of a manager.

While the record indicates that the Complainant generally was a good employee, in that his performance at work was not questioned, the record does indicate that the Complainant's credibility is in doubt. The Complainant's testimony indicated that he was extremely secretive about his pornography collection activities, that he repeatedly lied on various occasions to benefit himself and that he still fails to see the subjects of the pornography he collected as being victims of the system that ensnared them.

The Respondent described its process of review of the information relating to the Complainant's arrest through the testimony of Cory Livingood. Livingood relied upon her knowledge of Store 59, the store at which the Complainant was employed, and her discussions with Rhonda Tripp, the Respondent's Director of Employee Relations, and counsel, to come to her conclusion that the Complainant's arrest created an unacceptable risk of activity related to the Complainant's conduct for which he was arrested. However, it is clear from the record that Livingood did little in the way of investigation of the charge or the circumstances of the Complainant's specific employment in reaching her decision that the Complainant should be suspended. The lack of inquiry made by Livingood into such a basic matter as viewing the complaint, which was referenced in the newspaper articles, troubles the Hearing Examiner. However, Livingood's discussions with counsel and Tripp may or may not have addressed some of these concerns. The testimony at hearing does not reveal the extent of those discussions.

The bottom line for the Hearing Examiner is whether the offense for which the Complainant was arrested substantially relates to the circumstances of his employment. Taking the record as a whole and the accompanying case law, the Hearing Examiner concludes that it does. LIRC has described possession of child pornography as a "gross objectification of children." Holze v Security Link, LIRC 09/23/2005, ERD Case No. CR200200629. The Respondent's brief describes the environment of the Complainant's work as a toxic mixture of computers and kids. This statement is borne out by the testimony of witnesses for both sides. The conditions of the Complainant's bond under which he was released make it clear that any unchaperoned contact with minors was prohibited and that computer use was to be substantially limited to that necessary for work. Amanda Bell, the Complainant's Probation Agent, indicated that she would not have permitted the Complainant to work at the Respondent's store due to the lack of supervision of the Complainant and the potential access to computers and the likely contact with minors.

In Wollschlager v. Hy-Vee, MEOC Case No. 20142022 (Ex. Dec. 06/16/2017), the Hearing Examiner reached a similar conclusion but for a different reason. In that case, the Respondent withdrew an offer of employment after it was made aware of the Complainant's conviction for possession of child pornography and the restrictions on employment placed upon the Complainant by the Department of Corrections. Those restrictions are substantially similar to those contained in the Complainant's bond. The position for which the Complainant applied in Wollschlager would have permitted him to work without substantial supervision and would have permitted potential contact with minor coworkers and customers in a busy grocery store.

In concluding that the Respondent's action in Wollschlager withdrawing its offer of employment did not violate the Ordinance, the Hearing Examiner found that the Respondent's

actions were not motivated by the Complainant's conviction record, but by the Respondent's determination that it could not comply with the requirements of the Complainant's probation. In the present case, had the Respondent investigated the conditions of the Complainant's bond and relied on those, the Hearing Examiner could have easily found that there was no violation of the Ordinance. However, the Respondent's short investigation and conclusion did not include reference to the conditions of the Complainant's bond.

The Complainant emphasizes in his argument that the testimony in the record only speaks to the possibility of further criminal activity based upon the Complainant's arrest. There is nothing in the Ordinance or the case law that requires the Respondent to establish the probability of future criminal activity. Given the uncertain nature of the inquiry into "what might happen in the future," the Hearing Examiner finds that the testimony in the record was given to a sufficient degree of certainty to support the conclusion that the Complainant's arrest substantially relates to the circumstances of his position with the Respondent.

The elements of the crime for which the Complainant was arrested include possession of sexually explicit materials depicting sexual activity involving persons under the age of 18 and knowing that the images are of an individual who is under the age of 18. The character traits revealed by these elements include a person who is secretive, who does not care for the welfare of minors and who places a higher importance on his own self-interest than on that of the minors depicted in the images or in conforming his conduct to the requirements of the law.

The Hearing Examiner finds that the record, when taken as a whole, demonstrates that as a pedophile, the Complainant should not be trusted to be in even passing contact with minors or be in a position where his unsupervised use of computers is permitted. These conclusions are supported by the conditions of the Complainant's bond, the testimony of Drs. Coffee and Collins, the Complainant's own testimony and that of his Probation Agent. It is clear that the Complainant's work allowed him substantial freedom to come and go in the confines of Store 59. It is also clear that there are numerous locations in the store where employees including the Complainant could go and not be seen or observed including the warehouse, the "TV warehouse," and the appliance department, as well as other locations. The testimony is convincing that a contact violation of a minor would take only a brief time and that such a violation could occur in several different locations in Store 59. Equally, these locations create spaces where a sufficiently motivated individual could download or observe materials of a prohibited nature.

While there is no indication in the record that the Complainant ever actually engaged in such conduct and there are no allegations of any contact offenses involving the Complainant, the fact that the circumstances present the opportunity for an individual who is predisposed to commit such acts is sufficient to establish a substantial relationship between the crimes for which the Complainant was arrested and the circumstances of his employment.

The Hearing Examiner is troubled by the seeming cursory inquiry into the Complainant's arrest and his employment, but the Hearing Examiner cannot find that the Respondent was wrong in its conclusion. The Hearing Examiner would have been much more comfortable with the investigation performed by the Respondent had it at least reviewed the criminal complaint or the bond issued to the Complainant. However, there is no specific requirement that a Respondent obtain its facts or conclusions in that manner.

During her testimony, Dr. Coffee was asked about the possibility of an employer performing an examination of the risk factors facing an employer by a given arrestee. She indicated that such an examination could be performed. The record indicates that such an examination, even if the Complainant agreed to it, would take in excess of 10 hours and would likely cost in excess of several thousand dollars. While the Hearing Examiner might find such an examination helpful, he cannot find that a Complainant facing criminal charges would be likely to consent to such an examination and that the time and cost of such a process for many employers would be prohibitive.

Both parties cite to the Hearing Examiner's decision in Rogers v. New Horizons, MEOC Case No. 19982232 (Ex. Dec 08/10/1999). The Complainant finds that the Hearing Examiner required an in-depth examination of the facts and circumstances surrounding a conviction and the circumstances of the Complainant's employment. The Respondent attacks the Hearing Examiner's decision in Rogers as not requiring the same "objective" test that it contends is required by the Fair Employment Act's similar provision. The Hearing Examiner finds that both parties read too much into the Hearing Examiner's decision in that earlier case.

In Rogers, the Complainant applied for a position as a Secretary/Receptionist at a computer training company. The Respondent interviewed the Complainant including both an initial interview and a second interview. Well into the process, the Complainant disclosed a conviction of second degree homicide. After this disclosure, the Respondent indicated that it was no longer interested in the Complainant's application. What the Hearing Examiner found in that case is that the Respondent did not perform any investigation into the crime which the Complainant was convicted of before it acted to terminate the application process. Further the Respondent, after the fact, argued that it had conducted an investigation and concluded that the Complainant's conviction was substantially related to the position for which he applied. The Hearing Examiner found that the Respondent lacked credibility and that it had not done anything to identify whether the Complainant's conviction was substantially related to his employment and that the explanation of what it had done was not believable.

The Hearing Examiner in Rogers indicated that something more than an immediate conclusion without analysis was necessary to demonstrate a substantial relationship to employment. The Respondent characterizes this as a "subjective" approach that is not sanctioned by the Fair Employment Act and by extension to the Equal Opportunities Ordinance. The Hearing Examiner disagrees with the Respondent's conclusion and sees the requirement of some inquiry as being the only reasonable way for a reviewing body to know/understand how the Respondent reached its conclusion to undertake a given action.

In the present matter, the Respondent demonstrated the steps it took to reach and to support its conclusion that the Complainant's arrest was substantially related to his position. That upon initial review, the Respondent's steps appeared cursory and incomplete and lacked the type of detail to support its conclusion resulted in the reversal of the Initial Determination's conclusion that there was no probable cause to believe that discrimination occurred. At hearing, the record supporting the Respondent's determination was more clearly set forth and leads the Hearing Examiner to the present conclusion.

The Hearing Examiner, as is the case with most trial or hearing officials, claims no omniscience. One takes the facts as presented to them and considers the arguments of the parties as to the law and how the facts inform their particular positions. The Rogers case presented some unusual facts and issues and the Hearing Examiner reached a decision, as best he could, given those facts and arguments. Of particular note was the fact that the Complainant interfered in the orderly process of making a determination of substantial relatedness by lying about the nature and facts of his crime. This was complicated by the Respondent's apparent failure to conduct any analysis of the crime/conviction and the position for which the Complainant sought employment. Under the particular circumstances of that complaint, the Hearing Examiner reached his conclusion that discrimination had occurred and sought to address the unusual circumstances through the analysis of the issues of damages.

In the present matter, the Hearing Examiner is presented with different circumstances that make clear that the Respondent promptly undertook an analysis of the circumstances of the Complainant's employment and reached the conclusion that it should suspend the Complainant's employment. That the Respondent's analysis did not include an extensive examination of the actual crime and how that might affect its conclusion is ultimately overcome by the record as a whole that someone with the Complainant's particular charges should not be placed in a position to interact with minors in an unsupervised environment. The record did indicate that the Respondent had some experience other than that of the Complainant with similar arrests. How that experience affected, if at all, the decision in the present matter is not clear. However, the record does convincingly demonstrate that the Respondent's conclusion was not unreasonable.

The record in this matter strayed significantly from the underlying question in this matter. To some extent, the Hearing Examiner's desire to allow the parties to build their record may be at fault. In thinking about the issues to come out of this complaint, the Hearing Examiner still believes that it is in the best interests of the parties and the public to utilize all the facts and circumstances available to them at the time a decision affecting one's employment is made. From the case law, it appears clear that an in-depth analysis of the circumstances of the crime and analysis of the Complainant and his circumstances is not required to make a rational determination of substantial relationship. However, if a decision maker is to, after the fact, make a determination of substantial relationship, it would be helpful for the employer to engage in some meaningful analysis of the crime and the traits revealed by the crime as close to the time of its determination of how to handle an employee's situation as possible. The somewhat broad scope of the testimony in this matter helped the Hearing Examiner in reaching his determination, but was not entirely necessary.

The Respondent has repeatedly criticized the Hearing Examiner's conduct of this proceeding asserting that it reveals bias on the part of the Hearing Examiner. It is the Hearing Examiner's belief that this, in part, stems from a difference in opinion concerning the duties of the Hearing Examiner. The Hearing Examiner sees his position as requiring him to make sure that the record is clear enough for a reviewing body to be able to understand the positions of the parties and the bases for the Hearing Examiner's determinations.

The complaint is dismissed.

Signed and dated this 8th day of September, 2017.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III  
Hearing Examiner

cc: Amy F Scarr  
Jason A Kunschke

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

David Gerald Schrankler  
1009 Gilbert Rd Apt #6  
Madison WI 53711

Complainant

vs.

Best Buy Stores, L.P.  
2452 E Springs Dr  
Madison WI 53704

Respondent

HEARING EXAMINER'S DECISION  
AND ORDER ON RESPONDENT'S  
MOTION FOR RECUSAL

CASE NO. 20122001

**BACKGROUND**

On December 30, 2011, the Complainant, David Schrankler, filed a complaint of discrimination with the City of Madison Department of Civil Rights Equal Opportunities Division (EOD). The complaint charged that the Respondent, Best Buy Stores LP, discriminated against him on the basis of arrest record when it suspended his employment without pay in August of 2011. The Respondent denied that it discriminated against the Complainant on the basis of his arrest record and contended that the crime for which the Complainant was arrested was substantially related to the duties and requirements of his employment and as such, the decision to suspend the Complainant was protected.

The complaint was assigned to a Division Investigator/Conciliator for investigation and issuance of an Initial Determination. Subsequent to her investigation, the Investigator/Conciliator issued an Initial Determination concluding that there was no probable cause to believe that the Respondent had discriminated against the Complainant on the basis of arrest record in employment. The Complainant timely appealed the finding of no probable cause to the Hearing Examiner.

After providing the parties with the opportunity to conduct discovery and to supplement the record, the Hearing Examiner issued a Decision and Order on Review of the Initial Determination on February 13, 2014, concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant on the basis of his arrest record and reversing the Initial Determination's contrary conclusion. The complaint was transferred to conciliation.

Efforts at conciliation were unsuccessful. The complaint was transferred to the Hearing Examiner for further proceedings on the merits of the complaint.

On April 2, 2014, the Hearing Examiner held a Pre-Hearing Conference in the above-captioned matter. The purpose of the Pre-Hearing Conference is to establish the issues for hearing, a time and date for the hearing, and to establish various other interim dates.

At the Pre-Hearing Conference, the Hearing Examiner, on the record, disclosed a prior employment relationship with counsel for the Complainant. The Hearing Examiner indicated that he had employed counsel for the Complainant as a secretary in the mid-1980s for a period of one year or so while the Hearing Examiner was in private practice. The Hearing Examiner further indicated that he had virtually no contact, either professional or personal, with counsel for the Complainant since that relationship was terminated by counsel's attendance at law school. The Hearing Examiner did indicate that he may have provided a reference of good character for counsel for the Complainant at the point that she was seeking admission to the bar, though memories on this point were not clear.

Counsel for the Respondent asked several general questions about the timeframe and nature of the relationship and indicated that she would advise the Respondent of the information. On April 14, 2014, the Respondent moved that the Hearing Examiner recuse himself from further proceedings in this matter stating as grounds the appearance of a lack of impartiality on the part of the Hearing Examiner. On April 16, 2014, the Hearing Examiner issued a Briefing Schedule to give both parties the opportunity to supplement the record on this point.

#### DECISION

It is axiomatic that the parties in judicial and, by extension, administrative hearings have a right to a fair and impartial hearing including a fair and impartial presiding official. In the case of judicial proceedings in Wisconsin, Wis. Stats. Sec. 757.19(2)(a) through (g) sets forth the circumstances in which a judge must disqualify himself or herself from acting in any particular proceeding. In addition, the Rule of the Supreme Court Sec. 60 sets forth standards of conduct for judicial officials (60.04(4) re: recusal). Violations of Rule 60 may be enforced through a complaint filed with the Judicial Commission and where warranted penalties may be imposed.

These requirements are limited to judges and other judicial authorities and are not directly related to the performance of quasi-judicial officials such as Administrative Law Judges or Hearing Examiners. However, the concepts embodied in Rule 60 and Wis. Stats. Sec. 757.19(2)(a) through (g) especially (g) establish a framework to consider issues of fairness and impartiality in the administrative context. As the Court in Guthrie v. WERC (111 Wis. 2d 447 (1983); 331 NW 2d 331 (1983)) recognizes, there is a due process consideration to administrative proceedings that permits the courts to exercise an oversight authority. In Guthrie, Justice Heffernan recognizes that Rule 60 and Wis. Stats. Section 757.19(2) do not apply to regulate the conduct of administrative officials, but concludes that there is a fundamental due process right in administrative proceedings to a fair and impartial process.

In Wisconsin, not only is there a common law due process right to a fair and impartial proceeding, but the Wisconsin Administrative Procedure Act (Wis. Stats. Sec. 227.46(6)) establishes a statutory right to a fair and impartial process. That same right is embodied in the Rules of the Equal Opportunities Commission at Rule 7.24. Given all of these provisions and the cases decided pursuant to them, the question comes down to what are the standards by which the Hearing Examiner must consider his or her conduct when it comes to the fairness and

impartiality of Commission proceedings. First, there is no question that where there is actual bias, be it of a financial, personal or philosophical nature, the Hearing Examiner must disqualify himself or herself. That is not the question presented by the Respondent's Motion for Disqualification. The heart of the Respondent's motion focuses on the question of whether there is a sufficient relationship between the Hearing Examiner and Complainant's counsel based upon an employment relationship from the late 1980s that a reasonable, well-informed person might have a reasonable concern for the impartiality of the proceedings.

The first step in this analysis is determining whether the presiding official believes that he or she is capable of being impartial. In the circumstances of this case, as noted by the parties, the Hearing Examiner, at the Pre-Hearing Conference, stated that he did not feel that his prior employment of Complainant's counsel required his disqualification. Nothing in the intervening time has altered the Hearing Examiner's determination that he will be able to act in an impartial manner in the present matter. Neither has the Respondent presented any evidence to indicate that there is an objective lack of impartiality.

In this regard, the Hearing Examiner states that his employment of Complainant's counsel ended approximately 25-30 years ago, that he's had only sporadic public contact with Complainant's counsel in the intervening years and that he's never had any professional relationship or contact with the Complainant's counsel since she left her employment with the present Hearing Examiner in the 1980s. To clarify, Complainant's counsel was employed on a part-time basis by the present Hearing Examiner when he was in private practice. Complainant's counsel left her employment as a secretary/reader for the Hearing Examiner to attend law school. Complainant's counsel has never held any relationship with the Hearing Examiner while he has been employed by the Department of Civil Rights or its predecessor, the Madison Equal Opportunities Commission.

Given the fact that the Hearing Examiner's employment of the Complainant's counsel ceased approximately 25-30 years ago and that the Hearing Examiner has had only sporadic social and public contact with the Complainant's counsel and has had no professional relationship with Complainant's counsel since she left the private employment of the Hearing Examiner, the Hearing Examiner sees no issue in presiding over this matter. There are many attorneys representing Complainants and/or Respondents, including several with Respondent's firm, that the Hearing Examiner has had more contact with during the period of his employment as Hearing Examiner than he has had with Complainant's counsel. As the Court of Appeals noted in Peterson v. Marquette University and Orman, Docket No. 94-2178(1995), any personal interest in a matter must be substantial and not remote. In Peterson, the plaintiff contended that the judge should have recused himself because he was a Marquette Law School graduate. In determining that there was no requirement for the judge to have recused himself, the Court of Appeals noted that the judge had graduated some 33 years prior and that the law school was not a party.

The issue presented by the Respondent is not whether the Hearing Examiner believes himself to be incapable of fairly presiding over these proceedings, but rather, from the Respondent's point of view, would a reasonable person believe the Hearing Examiner is able to fairly adjudicate the present matter. In this regard, the Hearing Examiner presumes that the Respondent holds itself out as an example of such a reasonable person. If that was all that was required there would be no need to discuss this matter further. By its filing of the motion to

disqualify, the Respondent is stating that it does not believe the Hearing Examiner is capable of acting fairly in this matter.

That either party can put itself in the position of the law's vaunted "reasonable person" does not provide for a framework in which to consider such questions. If that were the case, any party who was disappointed in an earlier outcome in a proceeding, as the Respondent appears to be having failed to successfully defend the Initial Determination's conclusion that there was no probable cause to believe that discrimination had occurred, could challenge a subsequent appearance in the same matter.

To determine whether a reasonable person might find the Hearing Examiner's participation in this matter a problem, the Hearing Examiner will fall back upon the burden of proof and various inferences mined from the case law. First, it seems clear that once the Hearing Examiner has stated his or her belief in his or her ability to proceed in a matter without prejudice, the burden falls upon the moving party, in this instance the Respondent, to demonstrate the likelihood of potential bias. It is not clear whether the standard of proof is by the greater weight of the credible evidence or some higher burden. In this matter, the Hearing Examiner will use the lesser standard, the greater weight of the credible evidence, to determine whether a reasonable person might be concerned over his continued participation.

Before examining the arguments forwarded by the Respondent, the Hearing Examiner notes that case law establishes that "(t)here is a presumption of honesty and integrity in those serving as adjudicators in state administrative proceedings." Nu-Roc Nursing Home, Inc. v. DHSS, (200 Wis. 2d 405, 415, 546 N.W.2d 562 (Ct. App. 1996)). Nothing in the record indicates that this presumption should not be applied in the present matter. It is the Respondent's burden to overcome that presumption.

The Respondent presents two arguments in furtherance of its contention that a reasonable person would find that there is an impermissibly high likelihood of bias on the part of the Hearing Examiner in this matter. The Hearing Examiner will address these arguments in the order presented in the Respondent's reply brief.

The first contention made by the Respondent is that the past employment relationship between the Hearing Examiner and Complainant's counsel presents the likelihood of bias. The Respondent does not indicate whether this would be bias favoring the Complainant because of the past relationship or against the Respondent due to the past relationship. The Respondent does not explain how the past relationship of employment is likely to favor the Complainant, i.e., by favoring the Complainant's legal positions contrary to the law, by favoring the Complainant in procedural rulings or by disregarding the arguments of the Respondent in favor of those propounded by the Complainant because of a past employment relationship. There is nothing in the record indicating why the fact of the relationship should or would create an unfair advantage favoring the Complainant other than mere personal familiarity. In its reply brief the Respondent contends that a reasonable person "could" conclude that the past employment relationship between the Hearing Examiner and Complainant's counsel might give rise to impermissible bias. Given an objective test, speculation that one "could" find impermissible bias falls short of the proof necessary to overcome the presumption of honesty and integrity.

The Respondent seems particularly disturbed by the fact that the Hearing Examiner may have signed a letter of fitness to practice law on behalf of Complainant's counsel and by the

mere fact that the Hearing Examiner appears to remember the employment of Complainant's counsel at all. As to the first point, certifying that one believes that one is sufficiently moral to practice law does not reveal anything about the nature of one's employment relationships or anything more than a belief in one's basic competency. The Hearing Examiner cannot conclude that such an endorsement demonstrates the kind of close personal or professional relationship that might reasonably be seen to motivate partiality on the part of the Hearing Examiner.

As to the second point, the Hearing Examiner sees nothing unusual or sinister in the fact of his remembering his employment of an individual from 25 or 30 years before. Had the Respondent inquired of the Hearing Examiner, he could recite the names of his secretaries dating back to 1976 and provide some details of each of their employments. The Hearing Examiner simply has a good memory for such details. Though the Respondent had the opportunity to conduct discovery with regard to this point, it did not. There is nothing in the record that indicates that the Respondent performed any investigation at all concerning its allegations of a potential bias or the scant facts upon which the Respondent rests its motion.

The second point raised by the Respondent concerns the timing of the Hearing Examiner's disclosure of his past relationship with Complainant's counsel. The Respondent appears to contend that the fact that the Hearing Examiner did not disclose his past employment of Complainant's counsel prior to his review of the Initial Determination's finding of no probable cause points to the likelihood of bias on the part of the Hearing Examiner. The Respondent professes to be troubled and disturbed by the failure of notice. In setting forth the grounds for its concern, the Respondent rests heavily on Wis. Stats Sec. 757.19(2). This is the same provision that it argues not to control the actions of the Hearing Examiner as argued for by the Complainant.

Though Sec. 757.19(2) applies to judicial and not administrative officials, it does provide reasonable guidance in determining the standards and procedures that represent a reasonable approach to these questions. The Hearing Examiner was undoubtedly wrong in not notifying the parties of the potential for a question of recusal prior to acting upon the Complainant's appeal of the Initial Determination. However, that failure of judgment does not equate with a lack of impartiality. The Decision and Order of the Hearing Examiner, though contrary to the interests of the Respondent, should have dispelled any notion of partiality on the part of the Hearing Examiner. It represents an analysis of the facts, the applicable law and the respective burdens of proof. For the Respondent to now cry foul, seems to be an attempt to take a second bite of the apple rather than acceptance of a decision with which it disagrees.

The Hearing Examiner has promptly rectified his earlier error by making a full disclosure on the record and giving the Respondent the opportunity to make further inquiry and argument with respect to the past employment relationship of the Hearing Examiner and Complainant's counsel. Though the Respondent may be unhappy about the Hearing Examiner's failure to timely notify the parties of what he saw as a relationship that should be disclosed, nothing in this record demonstrates that an earlier disclosure would have resulted in any other outcome.

The Hearing Examiner is sympathetic to the concerns of the Respondent in this matter. However, the record in this matter simply does not present any basis for determining that an employment relationship from 25 to 30 years ago presents an impermissibly high risk of partiality in the present matter. The Hearing Examiner has practiced law on his own, in office-sharing relationships with other attorneys and as the Hearing Examiner for 32 years, and as

with any attorney has a wide range of professional and personal relationships with other attorneys and individuals. Clearly, not every one of these relationships create the type of close personal bond that gives rise to the risk of partiality in the performance of the duties of Hearing Examiner. The law does not require its judges or quasi-judicial officials to have been isolated from other professionals either prior to coming to their offices or even since becoming a presiding official. What it does anticipate is that those who preside over the courts or administrative agencies will be able to preside fairly and where their relationships interfere with such impartial execution of their duties that judges and other presiding officials will act to preserve their integrity and independence. In this regard, whenever a former client or other individual with a past close relationship to the Hearing Examiner has appeared before him, the Hearing Examiner has disclosed the relationship, as he did here, and where appropriate, disqualified himself from further action.

The Hearing Examiner counts as friends and professional acquaintances and colleagues members of many different firms and offices representing both Complainants and Respondents. Some of those individuals are members of Respondent's counsel's own firm. That these relationships can coexist with the Hearing Examiner's duty to perform independently and without favoritism has, in the opinion of the Hearing Examiner, been demonstrated consistently over his years as a Hearing Examiner. They are no more unusual than Judges who preside over cases in which a former partner might appear or where a contributor to a judge's campaign appears as a party.

In the present matter, the Hearing Examiner disclosed a distant relationship because he believed that the parties, both the Respondent and the Complainant, had a right to know of the relationship. However, knowledge of that relationship or the relationship itself do not necessarily create the type of impermissibly close contact that might give rise to legitimate concerns over the Hearing Examiner's ability to perform his duties impartially.

Given the lack of any continuing contact between the Hearing Examiner and Complainant's counsel, and the passage of time since the employment relationship's termination, the Hearing Examiner concludes that a reasonable person with knowledge of the facts and circumstances would not believe that there is any likelihood of a lack of impartiality or of favoritism towards the Complainant given the record in this matter.

The Respondent's motion for disqualification is denied.

Signed and dated this 26th day of August, 2014.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III  
Hearing Examiner

cc: Amy F Scarr  
Jason A Kunschke