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

Charlotte Booker 2026 Fish Hatchery Rd. # 3 Madison, WI 53713 Complainant vs. John B. Threlfall 5518 Barton Rd. Madison, WI 53711 Respondent A Mrs. John Threlfall 5518 Barton Rd. Madison, WI 53713 Respondent B Anna Threlfall N3438 Woodlawn Kennan, WI 54537 Respondent C Richard Baum N3438 Woodlawn Kennan, WI 54537 Respondent D	HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION FOR RECUSAL Case No. 1670

BACKGROUND

On July 13, 1995, the Complainant, Charlotte Booker, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint charged that the Respondent, John Threlfall, discriminated against her on the bases of marital status and family status when he failed or refused to rent an apartment to her. Efforts at early mediation failed to resolve the complaint. After an investigation, a Commission Investigator/Conciliator issued an Initial Determination on September 20, 1995, concluding that there was probable cause to believe that the Respondent discriminated against the Complainant on the basis of her family status and no probable cause to believe that the Respondent discriminated against the Complainant on the basis of her marital status. The Complainant did not appeal the finding of no probable cause. The complaint was transferred to the Hearing Examiner for a public hearing on the merits of the complaint. Subsequent to a Pre-Hearing Conference, the Hearing Examiner issued a Notice of Hearing and Scheduling Order on November 21, 1995, setting a date for hearing and establishing dates for various pre-hearing matters. At or about the end of the period for discovery, the Complainant, on February 28, 1996, filed a motion seeking leave to amend her complaint to add as respondents several additional parties including the Respondent's daughter who had been acting as the Respondent's attorney. Specifically, the Complainant wished to add as respondents, the Respondent's wife, Mrs. John Threlfall, the Respondent's daughter and attorney, Anna Threlfall Baum, the Respondent's son-in-law, Richard Baum and the Respondent's son, Robert Threlfall. After affording the parties the opportunity to submit written argument in support of their respective positions, the Hearing Examiner, on June 24, 1996, granted leave to amend the complaint and remanded the complaint to the Investigator/Conciliator for investigation of the amended allegations and issuance of an amended Initial Determination. Attempts to serve the complaint on Robert Threlfall proved unsuccessful. All other respondents were served. The Investigator/Conciliator investigated the allegations of the amended complaint except those dealing with Robert Threlfall. On December 17, 1996, the Investigator/Conciliator issued an amended Initial Determination finding that the additional parties were

subject to the complaint but not changing the substantive findings of the original Initial Determination i.e. probable cause on family status and no probable cause on marital status. The Complainant did not appeal the re-issued finding of no probable cause.

On, January 21, 1997, the Respondents filed a motion seeking the disqualification or recusal of the Hearing Examiner. On January 23, 1997, the Hearing Examiner declined to rule on the motion at the time because the appeal period had not expired and the complaint if not appealed would first be transferred to conciliation. If the allegations of the complaint could be successfully conciliated, there was no reason for the Hearing Examiner to address the motion. Efforts at conciliation were unsuccessful and the complaint was once again transferred to the Hearing Examiner on March 28, 1997.

DECISION

The Respondents request the Hearing Examiner to disqualify himself for two reasons. First, one of the attorneys for some of the Respondents believes that the Hearing Examiner, while in private practice prior to becoming the Hearing Examiner for the Commission, provided services to the Fair Housing Council of Dane County (FHC) including training of testers. It is apparently the Respondents' position that such involvement with the FHC prejudices the Hearing Examiner's ability to neutrally and impartially evaluate testing evidence which the Respondents expect to play an important part in the Complainant's case. The Respondents also contend that if this involvement does not actually prejudice the Hearing Examiner, it at a minimum creates an impression of prejudice. The second ground upon which the Respondents base their motion stems from the fact that while in private practice before becoming the Hearing Examiner, the Hearing Examiner represented several plaintiffs in housing discrimination complaints which utilized testing evidence as part of their proof. It is apparently the Respondents' position that utilization of testing evidence in the past by the Hearing Examiner will prevent the Hearing Examiner from being able to critically analyze testing evidence that may be presented in the current case. The Respondents set forth these facts and beliefs in the form of an affidavit of one of their attorneys, Thomas Crone. Mr. Crone represented the defendant in one of the cases in which the Hearing Examiner represented the plaintiff. Mr. Crone has also appeared before the Hearing Examiner in matters where testing evidence was utilized. While in private practice before taking the position as the Commission's Hearing Examiner, the Hearing Examiner provided three types of service to the FHC. First, the Hearing Examiner provided administrative and organizational information to the FHC staff. This information generally related to the FHC's tax status and annual audits required by the FHC's funding sources. Second, the Hearing Examiner occasionally provided advice about testing standards in general, and occasionally some case-specific advice about testing strategies and procedures. Both of these services were provided as a volunteer. The third type of service provided to the FHC involved being a contractor for the FHC in performing training and education to housing providers. This training generally covered the applicability of various fair housing laws and how housing providers could assure themselves of compliance with those laws. While in private practice, the Hearing Examiner litigated fair housing and other housing cases on behalf of a variety of parties. Some of these cases utilized testing evidence. The Hearing Examiner also advised clients including an occasional housing provider on fair housing and other housing issues.

For the moment, the Hearing Examiner will limit himself to the specific allegations of the Respondents' motion and supporting affidavit. The contention that the Hearing Examiner's familiarity with testing procedures, as evidenced by use of such procedures while in private practice, does nothing to prejudice the Respondents' defense. If anything, the Hearing Examiner believes that a knowledge of testing protocols and procedures helps the Hearing Examiner in evaluating whether a test has been conducted properly or not. As Mr. Crone is aware, the Hearing Examiner unfavorably evaluated a test conducted in an employment case. Reed v. PDQ, MEOC Case No. 21680 (Ex. Dec. 07/01/94). Simply because one has utilized a type of evidence does not mean that one automatically becomes blinded to its limitations or potential flaws.

The Respondents do not really indicate how the Hearing Examiner's past provision of services to the FHC is likely to lead to his inability to fairly judge testing evidence if it is utilized in this case. Most of the services provided by the Hearing Examiner were either more in the nature of those provided by a corporate counsel or were provided to housing providers as well as to FHC staff or volunteers. Those services provided strictly to staff or volunteers of the FHC on a volunteer basis that were not administrative or organizational in nature were intended to improve the FHC's testing program either in general or in specific cases. The Hearing Examiner did not review testing manuals or other programmatic material for the FHC. From the material in the record, the Hearing Examiner is not aware of any potential witness that he provided with services and is not likely to have any personal contact that could lead to a conflict. This record presents no evidence that there is any reason to question the Hearing Examiner's ability to neutrally judge the credibility of any witness or evidence likely to be utilized in this case.

Though the Respondents do not specifically indicate that they believe that the Hearing Examiner's support of the idea of fair or open housing as evidenced by his past volunteer activities prevents him from neutrally judging this complaint, it would appear that this may be a subtext to the Respondents' motion. While the Hearing Examiner is proud to admit

his support of the concept of fair and open housing, he has not let this general philosophy interfere with the fair and impartial carrying out of his duties as the Hearing Examiner. As noted above, where the Hearing Examiner has found testing evidence to be flawed he has not been swayed by it and where it has been appropriately utilized he has given it the weight it deserves. Reed, supra, but see Williams and Oden v. Sinha et al. MEOC Case No. 1605 (Ex. Dec. 01/23/96).

For the foregoing reasons, the Hearing Examiner declines to disqualify himself.

ORDER

The Respondents' motion is hereby denied.

Signed and dated this 10th day of April, 1997.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

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

Charlotte Booker 2026 Fish Hatchery Rd. # 3 Madison, WI 53713 Complainant vs. John B. Threlfall 5518 Barton Rd. Madison, WI 53711 Mrs. John Threlfall 5518 Barton Rd. Madison, WI 53713 Anna Threlfall N3438 Woodlawn Kennan, WI 54537 Richard Baum N3438 Woodlawn Kennan, WI 54537 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENTS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT Case No. 1670

BACKGROUND

On July 13, 1995, the Complainant, Charlotte Booker, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondent, John Threlfall, denied her the opportunity to rent an apartment because of her family status and marital status in violation of Section 4 of the Madison Equal Opportunities Ordinance, 3.23 Mad. Gen. Ord. Subsequent to investigation, a Commission Investigator/Conciliator issued an Initial Determination on September 20, 1995 concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant on the basis of her family status but that there was no probable cause to believe that the Respondent had discriminated against her on the basis of her

marital status. The Complainant did not appeal the finding of no probable cause relating to her claim of housing discrimination on the basis of marital status.

Efforts to conciliate the complaint failed. The complaint was transferred to the Hearing Examiner for a public hearing on the remaining allegations of the complaint. A Pre-Hearing Conference was held on November 20, 1995. As part of the Pre-Hearing Conference, the parties and Hearing Examiner set a date for hearing of the complaint along with various interim dates. The hearing was set to commence on February 13, 1996.

In late January of 1996, several significant discovery disputes made it clear that the previously set date for the hearing could not be maintained and the Hearing Examiner took the hearing off the schedule pending decision on several discovery motions. On February 28, 1996, the Complainant filed a motion seeking leave to amend the complaint in this matter to add four individuals, Maarit Threlfall, Robert Threlfall, Anna Threlfall Baum and Richard Baum, as Respondents. The Complainant alleged that she had been unable to identify these individuals at an earlier date. The Respondent objected to the Complainant's motion to amend the complaint. After the opportunity to brief the issues, the Hearing Examiner granted the Complainant's motion and remanded the complaint to the Investigator/Conciliator for investigation of the new allegations and issuance of an Initial Determination with respect to these additional allegations. Efforts to serve the amended complaint on Robert Threlfall were unsuccessful. Processing of the complaint as to Robert Threlfall was ceased. Service of the amended complaint on the remaining individuals was complete and the allegations of the amended complaint were investigated. On December 17, 1996, the Investigator/Conciliator issued an Initial Determination relating to the allegations of the amended complaint. The Initial Determination concluded that there was probable cause to believe that the Respondents had discriminated against the Complainant on the basis of her family status.

Lengthy attempts to conciliate the complaint were once again unsuccessful and the complaint was transferred to the Hearing Examiner for a public hearing. At a Pre-Hearing Conference conducted telephonically on April 18, 1997, the parties and Hearing Examiner set September 16, 1997 for the commencement of hearing on the complaint as amended. During the Pre-Hearing Conference, dates were set for various interim events including the filing of dispositive motions. The Respondents have filed several different dispositive motions and the Complainant has responded to those motions.

DECISION

Pursuant to the various orders of the Hearing Examiner, the Respondents have filed several motions seeking dismissal of the complaint as to some or all of them. The Respondents have also filed a motion requesting stay of these proceedings and rescheduling of the hearing and certain discovery motions. This Decision and Order is intended to address the motions seeking dismissal of the complaint. Other motions will be separately addressed.

On or about April 11, 1997, the Respondents filed two motions. The first seeks dismissal of Maarit Threlfall as a Respondent for various reasons. The second seeks dismissal of the complaint as to all Respondents because the purposes of the Equal Opportunities Ordinance have already been served.

The Hearing Examiner will first address the motion concerning the status of Maarit Threlfall. She poses arguments in both the form of a Motion for Summary Judgment and simply as a Motion to Dismiss. The Hearing Examiner finds little difference in the two forms of motion and will treat all arguments as if they were part of a single motion. The crux of Maarit Threlfall's argument is that at the time of the acts of alleged discrimination, she was not an owner and had no cognizable interest in the property. In support of her contention, Maarit Threlfall provides a group of quit claim deeds showing transfers of various percentages of ownership interest to her son, Robert Threlfall, her daughter, Anna Threlfall, her son-in-law, Richard Baum, and to an entity identified as the John B. Threlfall trust. The deeds to Robert Threlfall, Anna Threlfall and Richard Baum indicate that there were earlier transfers of a part of Maarit Threlfall's ownership interest to these individuals. All transfers were made by John Threlfall and Maarit Threlfall jointly. The transfer to the John B. Threlfall trust was of a 5 percent interest. The deeds provided by Maarit Threlfall indicate that the transfers occurred well before the acts of alleged discrimination.

Maarit Threlfall contends that these deeds demonstrate that she had no ownership interest in the property in question on the date or dates upon which the acts of alleged discrimination occurred. If she had no ownership interest or took no part in the actual leasing of the property, she contends that she should not be a party to this complaint. The Complainant has little constructive to add in response to Maarit Threlfall's motion except to provide a brief assertion that Maarit Threlfall has some interest as a result of Wisconsin's marital property law.

The Hearing Examiner accepts the premise that if Maarit Threlfall had no ownership interest on the date of the acts of alleged discrimination and took no part in the rental decisions then, she can have no liability for the alleged discrimination. However, the Hearing Examiner finds that the record is not sufficiently complete to permit the Hearing

Examiner to reach the conclusion that Maarit Threlfall was not an owner of the property when the acts of alleged discrimination occurred.

For the Hearing Examiner, the question revolves around the transfer of a 5 percent ownership interest in the property from John Threlfall and Maarit Threlfall to the John B. Threlfall trust. There seems to be little question about the effect of the other transfers. The problem with the transfer to the trust is that neither party submitted a copy of the documents creating the trust or any documents amending the trust. Without this documentation, the Hearing Examiner is not in a position to identify the type of trust or to determine whether Maarit Threlfall maintains any interest in the trust properties either as a beneficiary, remainder or as an unnamed principal. A transfer of property to a trust does not necessarily eliminate all interests in the trust property of the grantors. The Internal Revenue Service treats property held in a revocable trust to be identical with the interests of the grantor. On the other hand, certain types of transfers to a trust within the State of Wisconsin will act as a termination of the grantor's interest in the property for eligibility for certain forms of financial assistance. Without the trust documents, the Hearing Examiner is unable to determine the proper treatment of the transfer of Maarit Threlfall's interest to the trust.

At this stage in the proceedings, the Hearing Examiner must view the record in the light most favorable to the Complainant. Maarit Threlfall makes a strong case for her dismissal, however, the absence of trust documents creates a gap in proof that the Hearing Examiner is unwilling to leap without the opportunity for explanation. It is not clear from this record whether the failure to present the trust documents was unwitting, or because one side or the other was concerned about what those documents might show or for some other legitimate reason. The Hearing Examiner is not willing to attribute any ill will on the part of either party at this time with respect to the failure to submit the trust documents. However, the Hearing Examiner must find that Maarit Threlfall has not presented sufficient unequivocal evidence of a lack of ownership to warrant dismissing the complaint as to her.

Maarit Threlfall makes two additional arguments in support of her request to be dismissed from this action. First, she contends that the principle of respondeat superior should not be applied to the circumstances of this claim. Her position rests on two specific arguments. She is not an owner and even if she possessed an ownership interest, she had no rights of management or control and therefore could not delegate authority to John Threlfall to act on her behalf.

While the discussions of marital property law by the parties are interesting, they appear to the Hearing Examiner to be irrelevant. The rule of respondeat superior as applied in fair housing cases would impose liability on any owner of an interest in the property for the acts of agents or employees. HUD v. Banai, HUD Office of ALJS, FHFL para. 25,095; Jankowski Lee & Associates v. Cisneros, 91 F.3d 891 (7th Cir. 1996); Hamilton v. Svatik, 779 F.2d 383 (7th Cir. 1985). This would result even where the owner expressly indicated that the agent or employee was not to discriminate. Walker v. Crigler, 976 F.2d 900 (4th Cir. 1992). Application of this principle does not depend upon the degree of ownership or the level of activity of an owner. The Hearing Examiner takes the guidance of these cases to require a finding that if Maarit Threlfall possessed an ownership interest in the property in question when the acts of alleged discrimination occurred, she can be held liable for the acts of John Threlfall who was actively managing the property.

The second additional claim for dismissal presented by Maarit Threlfall is that the complaint as amended fails to adequately state a claim of discrimination against her. She contends that the mere recitation that she is a landlord of the premises is insufficient to state a claim against her.

The Hearing Examiner agrees that the amended complaint is somewhat thin on its factual allegations. However, the Hearing Examiner concludes that there are sufficient facts alleged to give Maarit Threlfall notice of the claim against her to make her a proper party. The amendment to the complaint that named Maarit Threlfall as a respondent realleges the facts from the original complaint and further states that Maarit Threlfall, Anna Threlfall, Richard Baum and Robert Threlfall are also landlords of the property.

A fair reading of the complaint and amendment gives Maarit Threlfall, Anna Threlfall and Richard Baum notice that as landlords,, which the Hearing Examiner understands to mean owners, they are being held responsible for the actions of John Threlfall who is alleged to have discriminated against the Complainant. This reading of the complaint and amendment makes a claim against the additional respondent on an agency theory. It is not necessary to allege that each of the respondents is to have taken some affirmative action in discriminating against the Complainant. As noted above, liability may be premised upon one's ownership of a property and not his or her individual action.

Even if the amended complaint was somewhat defective in its statement of the claim against Maarit Threlfall, the complaint merely triggered an investigation and ultimately hearing process that provided more information about the claim against her. Subsequent to the amended complaint, there has been an amended Initial Determination and Notice of Hearing. The Initial Determination sets forth the basis of the finding of probable cause as to all of the Respondents. The Notice of Hearing was prepared after discussion with the parties or the representatives of the parties. Had Maarit Threlfall or her representative not understood the basis of the claim against her, that fact should have been made

known at the time of the Pre-Hearing Conference. The complaint or amended complaint of which Maarit Threlfall complains does not serve exactly the same purpose as a complaint in an action in Circuit Court. The complaint before the Commission initiates a process of inquiry and investigation. Failure to fully comply with the requirement to state a prima facie case may well be overcome by subsequent investigation and communication between the parties and the Commission.

The past decisions of the Commission express a preference that both parties be given the opportunity to present their positions and arguments at a hearing on the merits of the complaint. Rhone v. Marquip, MEOC Case No. 20967 (Ex. Dec. 04/05/89), Petzold v. Princeton Club, MEOC Case No. 3252 (Ex. Dec. 15/94, Ex. Dec. 05/10/94). Because of the lack of factual development that may be aided by a public hearing and for the reasons stated above, the Hearing Examiner denies Maarit Threlfall's Motion for Summary Judgment and her Motion to Dismiss.

The second motion filed on April 11, 1997 is intended to dismiss the complaint as to all of the Respondents. The Respondents assert that the purpose of the ordinance as set forth in Sec. 9(c)2b has already been accomplished and therefore the complaint should be dismissed. The section cited by the Respondents states, "If the Commission finds probable cause to believe that any discrimination has been or is being committed, it shall immediately endeavor to eliminate the practice by conference, conciliation or persuasion . . ."

The Respondents contend that subsequent to the Commission's efforts, they offered the Complainant rental of the apartment she had been interested in and ultimately sold the building. Apparently the Complainant declined the offer of the apartment. The Respondents argue that the purpose of the ordinance has been met by their offer of the apartment and the act of alleged discrimination will not be repeated because they no longer own the apartment building. While somewhat appealing, the Respondents' argument goes too far. In addition to eliminating the allegedly discriminatory conduct, the ordinance requires the Commission to do what it can to make the Complainant whole again. Section 9(b) 4a represents a more complete statement of the Commission's obligation, "9(b) The Commission has the following powers and duties: . . . 4.a. to receive and initiate complaints alleging violation of this ordinance and to attempt to eliminate or remedy any violation by means of conciliation, persuasion, education, litigation, or any other means, to make the complainant whole again." Section 9(c)3b sets forth the types of measures that may be necessary to make a complainant whole again. These include injunctive relief, the payment of out-of-pocket expenses and compensation for emotional injuries that may have occurred as a result of discrimination. Ossia v. Rush, MEOC Case No. 1377 (Ex. Dec. 06/07/88), Sprague v. Rowe and Hacklander-Ready, MEOC Case No. 1462 (Comm'n. Dec. 02/10/94), State of Wisconsin ex. rel. Caryl Sprague v. City of Madison and City of Madison Equal Opportunities Commission, Dane County Circuit Court Case No. 93 CV 113 (September 30, 1994), Williams and Oden v. Sinha et al., MEOC Case No. 1605 (Comm'n. Dec. 07/25/96, Ex. Dec. 01/23/96) Also included in the concept of a make-whole remedy is the payment of costs and reasonable attorney's fees necessary to bring the complaint forward. Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W.2d 482 (1984), Nelson v. Weight Loss Clinic of America, Inc. et al., MEOC Case No. 20684 (Ex. Dec. 09/29/89), Ossia v. Rush, MEOC Case No. 1377 (Ex. Dec. 06/07/88), Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. 2/6/93, Ex. Dec. on fees 7/29/93, Ex. Dec. on fees 9/23/93), Harris v. Paragon Restaurant Group, Inc. et al., MEOC Case No. 20947 (on liability/damages: Comm'n Dec. 02/14/90, 05/12/94, Ex. Dec. 06/28/89, 11/08/93; on atty. fees: Comm'n Dec. 02/27/95, Ex. Dec. 08/08/94). The Respondents' offer of the apartment to the Complainant addresses one of the several possible factors that must be considered when determining whether any complainant and this Complainant in particular, has been made whole. Had the Complainant felt that the offer made her whole, she could have accepted the Respondents' offer. The fact that the Complainant declined the offer is a clear indication that the Respondents' belated offer was insufficient to place the Complainant in at least as good a position as she would have been absent the act of alleged discrimination.

If Respondents were permitted to eliminate any liability by simply offering what was earlier denied to a complainant, they would be able to circumvent the purpose and effect of the ordinance or virtually any other civil rights enactment. The Respondents' offer may serve to cut off liability for some forms of damages but their offer cannot be permitted to end the Commission's process. The offer of the apartment should be viewed and treated as a bona fide offer of employment is treated in an employment discrimination claim. See Harris, supra. The Hearing Examiner concludes that the basis for the Respondents' April 11, 1997 motion does not support the requested relief and therefore denies the motion.

The final motion to dismiss to be addressed by the Hearing Examiner is dated May 12, 1997 and is filed on behalf of Maarit Threlfall, Anna Threlfall and Richard Baum. The motion states six grounds for these Respondents' belief that the complaint should be dismissed as to them. The first three grounds, identified in sections enumerated as 1a, 1b and 2 are essentially repetitive of a portion of Maarit Threlfall's motion to dismiss dated April 11, 1997, but are intended to apply to all three of the Respondents added by amendment. The final three grounds represent new arguments for dismissal.

The first three arguments essentially allege a deficiency in the pleadings found in the amended complaint. Variously, the added Respondents contend that they do not meet the definition of a respondent, that the pleadings do not set forth a prima facie case of discrimination against them and do not place them on notice of what they have done wrong. From these Respondents' perspective, the problems stem from the fact that the amended complaint identifies them as landlords of the building in question but does not spell out explicitly how this status is alleged to bring about liability for a violation of the ordinance.

From the Hearing Examiner's point of view, these arguments are no more persuasive because they are made by three Respondents instead of one. For example, the added Respondents assert that they cannot be held liable for the act of discrimination allegedly committed by John Threlfall simply because they are owners of the building in question. The theory of respondeat superior leads directly to that conclusion assuming that the underlying act of discrimination is proved. Any owner of an interest in a property where an act of discrimination is alleged to have occurred may be held liable for that act of discrimination even if it was contrary to the owner's wishes or instructions. Walker, supra. If testimony at hearing demonstrates that any or all of the added Respondents held an ownership interest in the property at a time when discrimination actually occurred, then they can be held liable for the acts of their agent. Respondeat superior also answers the Respondents' claim that they do not meet the definition of a "respondent."

While the amended complaint is not so clearly drafted as one might like, it nevertheless gives the added Respondents sufficient notice of their potential liability to be able to properly defend against the claim. The fact that the theory of liability is not specified does not prevent the added Respondents from being able to determine why they received the complaint, or the Commission from taking appropriate action with respect to the complaint. Besides, beyond the amended complaint, there has been an amended Initial Determination and Notice of Hearing that set forth the basis of the complaint against the additional Respondents. In the context of this administrative process, grafting of requirements applicable to a complaint in Circuit Court is not always possible or appropriate. Where one must have some precise notice of the allegations against them to be able to answer at the circuit court level, a complaint before the Commission only triggers a process of investigation and determination. A named respondent is not deprived of due process because of a certain lack of elegance in the drafting of a complaint before the Commission. The deficiencies of notice in the original complaint are more than made up for by the opportunity to provide information on a continuing basis and the ability to suggest to the Investigator/Conciliator questions that must or should be answered as part of the investigation. Similarly, once a complaint reaches the stage of a hearing on the merits, both parties are given the opportunity to frame the issues for hearing. In the current complaint, none of the Respondents or their authorized representatives objected to the issues for hearing framed at the Pre-Hearing Conference. Even if the original complaint were defective, it would appear that those defects have been sufficiently remedied to permit the added Respondents to fully participate in the investigation and hearing process.

The fourth ground presented by the added Respondents for the dismissal of the complaint is that the Commission process deprives them of their right to a jury trial. This issue has been decided for the Commission in State of Wisconsin ex. rel. Caryl Sprague v. City of Madison and City of Madison Equal Opportunities Commission, Dane County Circuit Court Case No. 93 CV 113 (September 30, 1994). The court held that the federal right to a jury trial has not been made applicable to the states through the 14th amendment. Additionally, the court determined that at the state level, the right of jury trial applies only to those actions that were commonly accepted at the time of the adoption of the Wisconsin Constitution, and actions contemplated by the ordinance are not such actions. The decision in Sprague binds the Commission as a party until there is a contrary ruling.

The fifth argument put forth by the added Respondents for dismissal is that the claim as to them depends upon the interpretation of agency principles and such analysis is outside of the expertise and jurisdiction of the Commission. The Respondents contend that the Commission is limited to determining issues of discrimination. The Commission is empowered to make all decisions, be they direct or collateral, to a claim of discrimination in furtherance of its duties and obligations. To hold otherwise would limit the Commission's ability to function in all but the most obvious of circumstances. Even if one were to take an extremely limited view of the Commission's authority, determination of questions of agency would clearly be contemplated by the ordinance. The definition of "person" includes an individual who acts as an agent for another. In order to effectuate the purposes of the ordinance, the Commission from time to time will have to determine the coverage of the ordinance including coverage of those who act as an agent for another. In this case, it is alleged that John Threlfall acted on his own and as an agent for the other Respondents in allegedly discriminating against the Complainant. It is necessary and appropriate for the Commission to make such determinations in furtherance of its duties.

The final objection stated by the added Respondents is to the amendment that brought them as parties into this action. The primary contention is that the amendment was not timely and secondarily that the Hearing Examiner lacked the authority to permit the amendment of the complaint at the time. Most of the issues raised by the added Respondents have been previously addressed by the Hearing Examiner in his Decision and Order granting the Complainant leave to

amend her complaint dated June 24, 1996. A copy of that Decision and Order is attached hereto and is incorporated by reference herein as if fully set forth.

Even if the amendment had occurred more than one year after the incident, the amendment would have involved the same transaction and core of facts so that the amendment would relate back to the original filing date. Schlumpf v. Yellick, 94 Wis. 2d 504, 288 N.W.2d 834 (1980). The Respondents carry the timeliness argument somewhat further though. They assert that because the Rules of the Commission only address amendment of a complaint as a matter of right that permissive amendment is not allowed. In essence, the Respondents contend that Rule 6.13 (now Rule 3.2) creates an administrative statute of limitations ending with the issuance of the Notice of Hearing. The Respondents argue that the Hearing Examiner is without authority to permit amendment based upon his general authority to regulate hearings.

The Respondents' view of the Rules of the Commission and the role of the Hearing Examiner are unrealistically rigid. The Rules of the Commission as with the ordinance must be interpreted broadly so as to effectuate the important remedial purposes of the ordinance. Among these purposes of the ordinance are to eliminate, redress and prevent discrimination. As with many important pieces of social welfare legislation, the ordinance depends on individuals serving as private attorneys general by encouraging them to bring complaints of discrimination to the Commission. The Commission does not have the administrative resources to investigate and prosecute claims of discrimination independent of the efforts of individual complainants. In order to encourage individuals to bring complaints under the ordinance, the Commission has adopted procedures that permit flexibility on the part of the parties and the Commission while protecting the rights of both parties.

The process utilized by the commission is one of increasing formality for both parties and burden for the complainant. At the stage of filing a complaint, the complainant's burden is to make mere allegations from which one can identify the basic elements of a claim of discrimination. The purpose of the investigation phase is to refine these broad allegations and gather facts or evidence that if true would lead one to the conclusion that discrimination has occurred or is probably occurring. The investigation is not intended to dig deeply into all possible claims but tends to focus and refine the claims that have been already stated. The parties are limited to suggesting areas of investigation or questions for the Investigator/Conciliator to pursue and are not permitted to engage in independent discovery. It is only at the hearing stage that parties are freed to conduct their own discovery pursuant to the provisions of Wis. Stats. 804. The burden also once again climbs from merely pointing to untested facts or evidence to proof by the greater weight of the credible evidence. Because the Commission's role in investigation is limited, it is not reasonable to absolutely limit a complainant's opportunity to amend the complaint as of the issuance of the Notice of Hearing. It is a reasonable exercise of the Hearing Examiner's discretion to make determinations regarding permissive amendment of the complaint subsequent to the issuance of the Notice of Hearing. The Hearing Examiner is in a good position to judge whether the potential amendment is being proposed in good faith or is likely to be an unreasonable burden on the parties. Of course, any party added at any time through the process is likely to believe that they are being unreasonably burdened by their inclusion. In the current complaint, the Hearing Examiner gave the parties the opportunity to present arguments regarding amendment of the complaint. The Hearing Examiner weighed the arguments made by the parties and permitted amendment of the complaint with some reservation. While it is true that the added parties did not have the opportunity to make their feelings known prior to the amendment, it must be noted that the original Respondent was not asked about being named as the Respondent prior to the filing of the complaint. Additionally, the added parties are all related to the original Respondent and it may be assumed that their views are to some extent reflected in the submission of the Respondent.

To not permit permissive amendment could result in the filing and processing of two complaints arising from the same transaction and facts. Such a result could lead to inconsistent outcomes and the duplication of effort on the part of the Commission and parties. And while an amended complaint does have to be remanded for investigation of the new claims, the Investigator/Conciliator may adopt by reference the contents of the existing file. If processed as a separate complaint, the Investigator/Conciliator would likely need to recreate the investigatory file all over again in order to assure a proper record for review. The additional expense in time and resources can be avoided and the process made somewhat more efficient and responsive to the needs of the parties.

Finally, establishing an absolute bar as argued for by the Respondents does not promote the ultimate goals and purposes of the ordinance. To preclude a complainant from amending a complaint based upon information obtained during the usual processing of a complaint but subsequent to the issuance of the Notice of Hearing fails to recognize the needs of the parties and would encourage respondents to refuse to cooperate with the Commission's investigation. Under the ordinance, a respondent is under no affirmative obligation to provide any information to the Investigator/Conciliator. The only reasonable leverage held by the Investigator/Conciliator to gain a respondent's cooperation is the fact that an Initial Determination of either probable cause or no probable cause will be issued without reference to the respondent's position. An obstructive respondent can limit his, her or its liability by refusing to cooperate and then preventing an amendment of the complaint if discovery reveals facts that the respondent withheld

from the Investigator/Conciliator. Such a system rewards a respondent that ignores the Commission when it should reward a respondent that helps to bring facts to light that may resolve a complaint through some means short of a full hearing. The ordinance and procedures of the Commission encourage resolution of complaints at the earliest possible stage. To encourage a system that rewards a respondent for a lack of cooperation does not further the beneficial goals of the ordinance and Commission.

For the reasons stated above, the Hearing Examiner denies the Respondents' two motions dated April 11, 1997 and their motion dated May 12, 1997 in their entirety.

Signed and dated this 19th day of November, 1997.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

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

Charlotte Booker 2026 Fish Hatchery Rd. # 3 Madison, WI 53713 Complainant vs. Threfall, John E 5518 Barton Rd. Madison WI 53711 Anna M. Threlfall 135 N. Lake Ave. Phillips, WI 54555 Mrs. John E. Threlfall 5518 Barton Rd. Madison, WI 53711 Mr. Richard Baum N3438 Woodlawn Kennan, WI 54537 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTIONS FOR DISCOVERY Case No. 1670

BACKGROUND

The Complainant, Charlotte Booker, filed a complaint of discrimination with the Madison Equal Opportunities Commission on July 13, 1995. The complaint charged that the Respondent, John Threlfall, discriminated against the Complainant on the bases of race and marital status when he declined to rent the Complainant an apartment. The Respondent denies the allegations of the complaint.

Subsequent to investigation of the allegations of the complaint, the Commission's Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent discriminated against the Complainant on the basis of her marital status and no probable cause to believe that the Respondent discriminated against the Complainant on the basis of her race. Efforts at conciliation failed and the complaint was transferred to the Hearing Examiner. On November 20, 1995, the Hearing Examiner held

a Pre-Hearing Conference and subsequently issued a Notice of Hearing and Scheduling Order. As part of the Scheduling Order, a date for the completion of discovery was established.

After several attempts to schedule the deposition of the Complainant outside of Madison, the Respondent noticed the Complainant's deposition for January 30, 1996. Once the attorneys were present, counsel for the Complainant notified counsel for the Respondent that the Complainant was unavailable for the deposition. At about the same time, the Complainant filed a motion with the Hearing Examiner seeking leave to amend the complaint by adding several additional Respondents. The hearing had been previously scheduled to begin on February 13, 1996.

The parties immediately contacted the Hearing Examiner by telephone in an attempt to resolve the impasse over the Complainant's deposition. As a result of the obvious tension and discord between the counsel for the parties, the Hearing Examiner quashed the Notice of Deposition for January 30, 1996, but gave leave for the Respondent to file another notice. At the same time, the Hearing Examiner took the scheduled hearing off the calendar so that the parties could adequately address the Complainant's motion for leave to amend the complaint.

After oral argument by the parties, on June 24, 1996, the Hearing Examiner issued a Decision and Order giving the Complainant leave to amend the complaint. The Complainant added several parties as Respondents. The complaint was remanded to the Investigator/Conciliator for investigation with respect to the new parties and issuance of an Amended Initial Determination. The complaint was transferred back to the Hearing Examiner on March 28, 1997, after efforts at conciliation failed.

In August of 1997, several of the Respondents sought to be excluded from the action by filing a Writ of Prohibition in Circuit Court for Dane County. In October of 1997, Judge O'Brien quashed the Writ. The Respondents appealed Judge O'Brien's action to the Court of Appeals.

In April of 1998, the Hearing Examiner held a status and scheduling conference over the strenuous objections of the Respondents. The Respondents did not want to continue processing of the complaint if the Court of Appeals was going to grant the relief they requested. The Hearing Examiner set a schedule for the filing of the motions that are the subject of this Decision and Order.

In October of 1998, the Court of Appeals rejected the Respondents' appeal. The Respondents promptly sought review in the Wisconsin Supreme Court. In mid-1999, the Supreme Court declined to accept the Respondents' petition.

DECISION

The Respondents have filed multiple motions relating to various alleged deficiencies in the Complainant's response to the Respondent's discovery requests. For relief, the Respondents seek a variety of remedies running from an order compelling discovery to imposition of sanctions including dismissal of the complaint.

The Complainant asserts that she, through her counsel, has properly and appropriately responded to each and every item of discovery. The Complainant denies that any sanctions are appropriate and asks that this matter be set for hearing.

These motions have gone unaddressed by the Hearing Examiner for a number of reasons. Primarily, the Hearing Examiner wished the Respondents to be satisfied that their appeal rights were being recognized and protected. Secondarily, the Hearing Examiner held the hope that the parties might be able to resolve this matter short of litigation. Rarely has the Hearing Examiner seen such strong emotions on either side, not to mention both sides of a complaint. It is the Hearing Examiner's belief that a mutually resolved end to this controversy would be in the interests of both parties as well as the Commission. It is unfortunate that the parties have not taken the opportunity afforded them to look seriously at settlement. The Commission remains available and ready to assist the parties should they wish to attempt to resolve this matter short of hearing.

The Respondents set their motions forth in separate items. For ease of reference, the Hearing Examiner will attempt to address the motions in the order presented by the Respondents. Some of the Respondent's discovery requests predate the Complainant's amendment of the complaint. In those cases, the discovery came technically from one Respondent, John Threlfall. It seems that many of the items have importance to all of the Respondents and to avoid conflicts based on an artificial reading of the time line in this litigation, the

Hearing Examiner will address the items of discovery as if made by all the Respondents. If in individual items, this approach is inapplicable the Hearing Examiner will make note of that fact.

The first item for which the Respondents seek relief relates to the Respondent's First Set of Interrogatories. In question 1, the Respondents request that the Complainant provide an exact statement of what the Respondent, John Threlfall, said to her when she applied for a rental unit. The Complainant has responded by stating that since Threlfall was a party to the conversation, he knows what he said and the Complainant need not provide any description of what Threlfall told her or what she told Threlfall.

The Hearing Examiner is mystified by the Complainant's position. It is entirely appropriate that the Respondents would want to have the Complainant's version of events in her own words committed to writing under oath. Such information is routinely the subject of discovery and can form the basis of later attacks on credibility or on the sufficiency of the evidence for making out a prima facie claim of discrimination. That a Respondent might wish to use a Complainant's own words against him or her is not a basis for refusing to provide such a statement.

To the extent that the Complainant no longer has total recall of the conversation, it is sufficient to indicate the limitations in the response. If the Complainant has taken the precaution of memorializing her conversation with Threlfall in writing, she may use that writing to refresh her recollection. But a failing memory is no reason to avoid the Respondents question. Certainly at hearing the Respondents will ask the Complainant for the same information and it would seem that without it, the Complainant might have significant difficulty in setting forth her prima facie case. The Hearing Examiner will not state that it would be impossible to meet the Complainant's burden of proof, but it would certainly be difficult were the Complainant not able to indicate what Threlfall said to her and what she said in response.

The Hearing Examiner directs the Complainant to provide the information requested in Respondent's First Set of Interrogatories question 1. The Hearing Examiner will set forth a schedule at the end of this Decision and Order for response to this and any other items.

The second general item raised by the Respondents is the failure to obtain the Complainant's deposition. As noted above, the Respondents noticed a deposition for the Complainant on January 30, 1996. Without belaboring the history of that event, the Hearing Examiner notes that he quashed the notice of deposition at the time and it is inappropriate for the Respondents to seek to reopen that issue. As to any other dates for which depositions have been noticed and cancelled, the record appears to indicate that the depositions were set aside with the consent of the noticing party. The Respondents describe in some detail, Attorney Kaufman's failure to cooperate in the scheduling of this second effort at deposing the Complainant. This includes Kaufman's filing of a motion seeking a protective order at the last minute. The Respondents' motion properly recounts that the Hearing Examiner was contacted by Daniel Snyder about the motion. The Hearing Examiner emphasizes his response that he had not ruled on the motion. While the Hearing Examiner is generally disposed towards granting such motions, such decisions must be made on a case by case basis. The Respondents, presupposing the outcome of the Motion for Protective Order, withdrew their notice. This leaves the Hearing Examiner without a proper record for determining whether the Complainant has attempted to impermissibly evade discovery.

The recitation, on the part of both parties of the personal merits of who was more inconvenienced or slighted, shall not be examined here. It is, however, a good example of the level of emotion that has replaced professional judgment on both sides.

The fact that the Hearing Examiner is unwilling to reopen old wounds by imposing some form of sanction at this time does not reduce the Respondents' legitimate right to depose the Complainant at a time and, with some reasonable limitation, place of their choosing. The limitation as to place stems from the Respondents' wish to depose the Complainant at a point at the outer limit of a subpoena's jurisdictional limit. The Hearing Examiner indicated that he was dubious about his ability to enforce a subpoena outside of the geographic limitations of the City of Madison. The Respondents have provided no legal support for the Hearing Examiner's authority to act beyond the limits of the City of Madison. The Hearing Examiner directs the Complainant to make herself available to the Respondents for the taking of her deposition as noted below. The Hearing Examiner will not impose any sanctions for any alleged refusal to submit to a deposition in the past, however, future attempts to avoid deposition may have serious consequences.

The Complainant has interposed a defense with respect to the Respondents' motions that is appropriately addressed at this point. The Complainant asserts that because the Respondents have not obtained an order compelling the Complainant to submit to some forms of discovery, it is premature for the Respondents to seek

sanctions at this point. Reluctantly, the Hearing Examiner agrees. The rules established by the Commission contemplate that it is only the continued noncompliance after the Hearing Examiner has issued an order compelling compliance that is sanctionable. Rule 7.61 The Hearing Examiner understands this to be the general framework set forth in Wis. Stats. Chapter 804. With respect to the remaining items wherein the Respondents allege that the Complainant has failed to adequately or fully answer or object to individual interrogatories, the Hearing Examiner concludes that the most that is available to him at this point is the ability to order the Complainant to complete discovery. It is the Complainant's failure to comply with this order that might be sanctionable in the future.

The remaining items that the Respondents contend have been wrongfully withheld cannot easily be classified by type of question or interrogatory. Rather the Complainant's responses seem to fall into broad categories. These are general objections interposed by the Complainant to questions put in various interrogatories. The first, and most broadly interposed objection is that the interrogatory seeks material that is privileged as attorney work product. The Complainant in her response to the Respondents' motion fails to explain how the requested material is attorney work product. The Hearing Examiner will attempt to address the questions and responses as set forth in the Respondents' motion.

The first time where the Complainant asserts the work product privilege is in response to question 16 of the Respondent's First Set of Interrogatories dated December 27, 1995. The question inquires about the Complainant's knowledge of any "tests" that may have been conducted. The Complainant objected to this question claiming the work product privilege.

It is possible that the Complainant's counsel conducted a test or directed someone else to conduct a test on behalf of his client and in that case the privilege might well attach. However, from the Hearing Examiner's experience in private practice prior to becoming the Hearing Examiner, tests are not normally conducted at the request or under the direction of an individual's attorney. It is more likely that the testing agency performed a test and then referred the Complainant to an attorney. In this circumstance, the test is not the attorney's work product, but merely evidence that has come with the client.

A brief description of testing might be helpful for the record. "Testing" is a technique for assisting in determining whether discrimination may have been a factor in a housing or employment transaction. Individuals who closely match the complaining individual's protected characteristic and those who do not are sent to the alleged discriminator's premises to make the same inquiry as the complaining individual. It may be necessary to create a persona to properly match characteristics and other factors of a tester and a complaining individual. If "testers" having the same protected characteristic as the complaining individual receive less favorable treatment than that given the "testers" not sharing the protected characteristic, it is evidence that a discriminatory motive may have been present. Tests may be conducted in person or by telephone or through different methods. Tests may be conducted for one or several protected characteristics. Generally tests must be well considered, planned and documented. They are often recorded if the test is conducted in person. The Hearing Examiner does not wish to give the impression that this description is extensive or all inclusive. It is merely that the Hearing Examiner wishes any reviewing body to have some basic concepts of testing when reviewing this record.

Because the Complainant does not explain how the test, if any, that is the subject of question 16 and the follow up questions was arranged, it is impossible to determine on this record whether such material is work product or not. The Hearing Examiner directs the Complainant to answer question 16 and appropriate follow up questions or provide a particularized description of how the requested information is work product.

The next general area for which the Complainant interposes a work product objection is identification of anticipated witnesses along with the witnesses' anticipated testimony. These items are found in questions 18 and 19 of the Respondent's First Set of Interrogatories. The Respondents also contend that the information which the Complainant provided is incomplete and is now subject to supplementation.

As to the witnesses' testimony being work product, the Hearing Examiner disagrees. The testimony is not something generated by the Complainant's counsel and except in its whole does not reflect strategy or a protected theory of the case. As to the requirement to supplement the response, there is no evidence in this record to indicate that the Complainant possesses the information necessary to supplement the record. To the extent that the Complainant has in her possession and control the information requested by the Respondents in questions 18 and 19 of the Respondent's First Set of Interrogatories, she is directed to provide that information. This includes the information applicable to the Complainant to the extent that the Complainant is likely to testify at hearing.

In question 21 of the Respondent's First Set of Interrogatories, the Respondents inquire about the damages suffered by the Complainant. The Complainant indicated that she did not possess that information at the time of her response. The Respondents find such a response to be incredible given the response's proximity to the originally scheduled hearing date. Given the lapse in time since this question was initially posed, the Hearing Examiner directs the Complainant to respond to the question as posed. The proper remedy for a failure such as this is to exclude the evidence at the time of hearing for failure to supplement the original answer. It seems unproductive to speculate about the state of the Complainant's knowledge at the time.

The Respondents followed up their question about monetary damages in question 22 with a request for the facts or evidence supporting the damage claim. The Complainant once again asserts the work product privilege. On this record, there is no indication of why this information should be considered work product. Accordingly, the Complainant is directed to respond to the question as posed or provide an explanation as to why this material is work product. The facts by themselves do not demonstrate strategy or reveal a protected theory of litigation.

The next area of objections stem from discovery requests made by the Respondent on June 30, 1997 and July 3, 1997. These requests included Interrogatories, Demands for Production of Documents and Requests to Admit.

The first area in controversy in these discovery requests relate to the Complainant's past employment. The Complainant asserts that the information is irrelevant without limitation.

To the extent that the Complainant is seeking damages for emotional distress all aspects of her life that might contribute to her emotional distress are fair game for discovery. While the requested four years of data may be somewhat broad, but the Complainant did not interpose an objection as to the scope of the request though a claim of a lack of relevancy could be interpreted as such. The Hearing Examiner directs the Complainant to provide the information requested in questions 1 and 2 for an appropriate two year period rather than the four year period requested. Should evidence indicate that an expansion of this period is warranted, the Hearing Examiner will consider a modification of this time limitation.

The next question, question 3, essentially inquires about information that has been discussed above. The Complainant is directed to provide the information requested. The Complainant does not have standing as claimed to protect a privacy interest in one of her witnesses. That witnesses may seek an appropriate protective order if the circumstances warrant it. The Respondents' claim that they would be punished by having to take the witnesses' depositions after two thwarted attempts is nonsense. The Respondents have chosen to represent themselves or to retain counsel who reside at a substantial distance from Madison. Many of the problems in discovery are directly related to the Respondents' own choices about representation. The Hearing Examiner cannot give the Respondents an advantage by their choice of counsel any more than he can give the Complainant a benefit for her choice. The Respondents will have to make the best of the situation as it is presented.

The next questions, 14, 15 and 16, address the claim or theory of liability for Anna Baum, Richard Baum and Mrs. John (Merrit) Threlfall. The questions pose a combination of legal and factual inquiries. The Complainant's response to the effect that the Respondents have been named as Respondents because they are recorded owners of the property in question appears to be entirely responsive. Additionally, much of the independent litigation generated by the Respondents through their ill fated Writ of Prohibition and its subsequent appeals make clear the potential theory of liability for these parties. The Hearing Examiner will not direct a further response on the part of the Complainant.

In question 20, the Respondents inquire about the reasons for the Complainant's late knowledge of the ownership interests of Anna Baum, Richard Baum and Mrs. John Threlfall. The Complainant objected to the question as being irrelevant. The Hearing Examiner agrees with the Complainant. This question was appropriate back in 1996 when the Complainant sought to amend the complaint in the first place. The Hearing Examiner will not revisit this issue particularly in light of the Respondents' unsuccessful petition for a Writ of Prohibition in which this could have been an issue.

The same response is appropriate to question 21. As noted above, the issues surrounding the aborted January 30, 1996 deposition have been appropriately dealt with. The reasons for the Complainant's and her counsel's nonappearance are irrelevant to the issues set forth for hearing.

In question 27, the Respondents ask for the Complainant to describe each incident of John Threlfall's alleged rudeness to her. The Complainant asserts that such material is irrelevant. The Respondents' explanation that

Threlfall's alleged conduct has apparently affected the Complainant's willingness to accept housing from him is relevant. However, to the extent that the question inquires of rudeness subsequent to the filing of the complaint, that information would seem to be irrelevant. The Hearing Examiner directs the Complainant to provide the requested information for any period of time prior to the filing of the complaint. If Threlfall's alleged conduct subsequent to the filing of the complaint is to be considered as an element of damages, the Hearing Examiner will address modification of this order when the issue arises.

The Respondents seek an order limiting introduction of evidence on the issue of their ownership interest in the property in question to the material provided by the Complainant. The Hearing Examiner will not issue such an order at this time. This question is more appropriately addressed at hearing when an item is sought to be introduced or testimony given. The context of the offer is critical to determine its admissibility and the potential prejudice to the opposing party. At this stage, the record is insufficient to properly address this issue.

The Respondents ask that the Complainant's failure to admit or deny the Request to Admit relating to who terminated a telephone conversation, the Complainant or John Threlfall, stand as an admission. The Complainant's failure to admit stands as an admission since there is no attempt to explain the failure.

Requests to Admit 12 and 13 seek information about the Complainant's failure to appear at the January 30, 1996 deposition. Such material is irrelevant to any issue pending before the Hearing Examiner and the Hearing Examiner will make no inference from any answer or failure to answer these Requests to Admit.

As to the Respondent's' Requests to Admit 14 through 17, at this stage, the information could be potentially relevant to the extent that John Threlfall knew it at the time of his alleged telephone conversation with the Complainant. The record is not sufficiently complete for the Hearing Examiner to determine the extent of the potential relevance so the Hearing Examiner will direct the Complainant to respond to these Requests to Admit.

As noted above, both parties have taken actions that have significantly delayed the proceedings in this matter, Additionally, the conduct of the attorneys has occasioned bitterness and conflict that is not necessary and represents a bar to a civil resolution of this matter. The delays in this matter whether occasioned by the Complainant, the Respondents or the Hearing Examiner will ultimately make hearing of this complaint difficult for all. The Hearing Examiner renews his request of the counsel to attempt to work together professionally to overcome the potential problems in bringing this complaint to hearing or other resolution.

ORDER

The Complainant shall respond to the above indicated items on or before April 28, 2000. Once these items have been provided, further proceedings shall be scheduled.

Signed and dated this 28th day of March, 2000.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner