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

Lolita Green 2026 Fish Hatchery Rd., Apt. 11 Madison, WI 53713 Complainant vs. Atef Soliman 1 Basil Ct. Madison, WI 53704 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON COMPLAINANT'S MOTION TO PRECLUDE TESTIMONY Case No. 1679

BACKGROUND

On October 20, 1995, the Complainant, Lolita Green, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondent, Atef Soliman, discriminated against the Complainant on the basis of her race in the terms and conditions of her tenancy and ultimately caused her constructive eviction from that tenancy. On December 26, 1995 a Commission Investigator/Conciliator, after investigation of the allegations of the complaint, issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant on the basis of her race in the terms and conditions of her tenancy but that there was no probable cause to believe that the Respondent had discriminated against her on the basis of her race in causing her constructive eviction from her tenancy. The Complainant appealed from the conclusion that there was no probable cause.

On April 9, 1996, the Hearing Examiner issued a Decision and Order on Review of Initial Determination. The Hearing Examiner reversed the finding of no probable cause and entered a finding that there was probable cause to believe that the Respondent caused the constructive eviction of the Complainant because of her race. Efforts at conciliating the complaint proved unsuccessful. The complaint was returned to the Hearing Examiner for a public hearing on the merits of the complaint.

A Pre-Hearing Conference was held on July 22, 1996. The Pre-Hearing Conference was attended by Peggy Hurley, counsel for the Complainant, and John Moore, counsel for the Respondent. At the conference, a date was established for the public hearing along with several other interim dates. The Hearing Examiner reminded counsel for the Respondent of the obligation to file an answer in writing no later than 10 (ten) days after receipt of the Notice of Hearing by the Respondent. This requirement is set forth in Sec. 3.23(9)(c)2.a. Mad. Gen. Ord., Rules 7.44 and 7.101 of the Rules of the Madison Equal Opportunities Commission and in the Notice of Hearing itself.

The Notice of Hearing and Scheduling Order were mailed on July 29, 1996. Return Receipts for the Notice of Hearing and Scheduling Order indicate that they were received by the Respondent on August 5, 1996.

On February 13, 1996, the Complainant filed a motion with the Hearing Examiner seeking an order precluding the Respondent from presenting any evidence at the hearing scheduled to begin at 8:30 a.m. on February 19, 1997 or in the alternative, a default judgment. As grounds for her motion, the Complainant stated that the Respondent had failed to file a written answer as required by the ordinance, the rules of the Commission and the Notice of Hearing. The Complainant served the motion on counsel for the Respondent on the same day. The Hearing Examiner set a hearing on the Complainant's motion for 11:30 a.m. on February 17, 1997.

The Complainant appeared in person and by her attorney, Percy L. Julian, Jr. The Respondent appeared by attorney Scott McAndrew of the law firm of Bell, Metzner, Gierhart and Moore S.C. After an opportunity to discuss settlement of the claim, the parties were given the opportunity to present oral arguments in support of their respective positions. The attorneys both cordially answered questions posed by the Hearing Examiner. At the beginning of the Respondent's presentation, counsel for the Respondent filed a written answer to the Notice of Hearing.

At the end of the presentations by the attorneys the Hearing Examiner indicated that he would rule on the motion at 4:00 p.m. the same day after he had the opportunity to consider his options and the arguments of the parties.

Before adjourning the hearing, the Hearing Examiner dealt with a second motion filed by the Complainant. This motion filed on February 14, 1997 sought an order prohibiting the introduction into evidence at the public hearing, of any of the exhibits proposed by the Respondent. The grounds for this motion were that the exhibits were filed one day late and the Complainant accordingly had lost one day's preparation time and was therefore prejudiced. The Respondent's counsel asserted that because of an illness on the part of his secretary and his need to leave work to attend to a new family member that he had been unable to meet the time requirement set forth in the Scheduling Order. Respondent's attorney apologized for the delay and contended that there was little if any prejudice to the Complainant by the short delay in filing.

The Hearing Examiner denied this second motion of the Complainant. The Hearing Examiner found the explanation of the Respondent to be reasonable and that any prejudice was likely to be slight. Further the Hearing Examiner waived any prejudice to the Commission that the late filing might have caused.

At 4:00 p.m. on February 17, 1997, the Hearing Examiner conducted a telephone conference with counsel for the parties to set forth his ruling on the Complainant's motion. Appearing for the Complainant was Percy L. Julian, Jr. Scott McAndrew appeared for the Respondent. At the end of the conference the Hearing Examiner asked the counsel for the Complainant to prepare an order setting forth the Hearing Examiner's Decision and Order. The Hearing Examiner also believed that this Decision and Order was necessary to clearly establish the record.

DECISION

It is uncontested that the Respondent failed to file a written answer to the Notice of Hearing as required by Sec. 3.23(9)(c)2.a. of the ordinance, the rules of the Commission and the Notice of Hearing. The Respondent offers no explanation other than a straightforward admission of negligence. Given this admitted set of facts, the Hearing Examiner is faced with two questions: by what standard should this default be judged and what are the consequences of this default.

Not unexpectedly, the parties differ on their views of the answers to these questions. The Complainant asserts that because of the seriousness of the default and the prejudice to her preparation that the consequences, whatever the standard, should be severe. The Complainant suggests either an order of default or at a minimum, an order precluding the Respondent from putting into evidence any testimony or documentary evidence contradicting the issues as set forth in the notice of hearing.

The Respondent contends that the default is de minimis in its consequences and there is no need for any remedial measures. In the alternative, the Respondent argues that if there has been some prejudice to the Complainant as a result of the default that the remedy should be to postpone the hearing to allow the Complainant to prepare adequately now that the Respondent has provided a written answer. It must be noted that the Respondent hotly denies the existence of any prejudice to the Complainant.

Neither the ordinance nor the rules of the Commission give any great guidance about how to proceed in such a case. Review of the decisions of the Commission reveal no cases decided on this issue. There are numerous circumstances where one party or another has defaulted by failing to appear at the Pre-Hearing Conference or the public hearing. These decisions are not particularly helpful in the current circumstance.

It can be argued that the ordinance sets a "bright line" test for judging a default of this kind. Nothing in the ordinance indicates that the Respondent need only file an answer if failure to do so would work a hardship on the Complainant or the Commission. Sec. 3.23(9)(c)2.a. simply states that the Respondent must file a response to the Notice of Hearing within ten (10) days of its receipt by the Respondent. In the definiteness of this statement, the provision is similar to the requirement in Sec. 3.23(9)(c)1. that the Commission will not process any complaint filed later than 300 days from the act of discrimination. The consequence of failing to meet the 300 day limit is a favorite of respondents. In that circumstance, respondents universally and loudly proclaim that the Complainant may not proceed.

It is well within the possible interpretations of the ordinance that as with the 300 day requirement, failure to comply with the ten (10) day answer requirement must result in a denial of the opportunity to proceed. For a Respondent this can only take the form of a preclusion of any material in support of the Respondent's position. While this represents a harsh result, it may be warranted given the serious nature of such a default.

Such a default must be taken seriously given the structure and history of the ordinance. The Common Council undoubtedly considered the requirement to answer the Notice of Hearing to be serious since it represents one of a very few procedural requirements set forth in the ordinance. That the requirement is significant is also reflected by the fact

that it is the only procedural requirement imposed upon the Respondent by the ordinance. If the Common Council had wished the Commission to take a relaxed approach to application of the answer requirement, it could have stated so in the ordinance or write in sufficient safeguards to protect against overzealous enforcement of the requirement. The Council did not do so.

The Respondent points out that the 300 day requirement includes the penalty for failure to comply, i.e., that the complaint may not be processed. The answer requirement, while stating a requirement, does not include any indication of the expected penalty for a failure to comply. While this point is well taken, it does not follow that a breach of the obligation to answer is necessarily without consequences. The Respondent seeks to impose a requirement that there must be a showing of prejudice by the Complainant in order for the Commission to enforce the answer requirement. Nothing in the ordinance even remotely hints at such a requirement. The requirement to answer is stated in absolute terms without establishing any prerequisites for enforcement of the requirement.

If, however, the Common Council did not wish the Commission to utilize a "bright line" test, it is not clear what test the Hearing Examiner should now apply. Rule 7.1023 of the Rules of the Commission indicates that under some circumstances, a party may receive relief from a default judgment that has been entered against that party. The rule contemplates that in order to be relieved from the consequences of a default judgment there must be a showing of good cause. Once good cause is demonstrated, the Hearing Examiner may impose any reasonable requirements to redress any problems arising from the default.

The Respondent makes no showing of good cause for failing to file a written answer. The Respondent simply states that he acknowledges his negligence. Further he contends that there was no prejudice to the Complainant and therefore, no sanction can be applied.

A lack of prejudice does not represent a demonstration of good cause for the Respondent's default. Under some circumstances, lack of prejudice may assist the Hearing Examiner in assessing what if any conditions should be set for relief from the default. However, the Respondent's explanation of simply failing to file does nothing to meet the requirement of a showing of good cause. The Respondent was provided with a copy of the ordinance and the Rules of the Commission which set forth the requirement to file a written answer. The Respondent received the Notice of Hearing which also sets forth the requirement to answer and was reminded by the Hearing Examiner at the Pre-Hearing Conference of the requirement. It is difficult to accept that after being provided with these four statements of the need to answer that a law firm experienced in the representation of persons before this Commission would simply forget the answer requirement. While there is nothing in the record to suggest that the Respondent refused to file an answer in order to gain an unfair advantage over the Complainant, the Respondent provides no reasonable explanation for his default.

The Respondent asserts that the only circumstance warranting any form of default order by the Commission is where the Complainant has suffered unfair surprise or has been prejudiced in some way by the lack of an answer. While it appears that this is the approach taken by the Equal Rights Division at the state level, there is nothing in the record to indicate that the ordinance favors such an approach. Even if this approach were supported by the ordinance, the burden of proof should rest on the person seeking to avoid the effect of the default. To impose the burden of proof of prejudice on the party seeking the default judgment diminishes the culpability of the defaulting party and fails to give effect to the orders and requirements of the Commission and the ordinance. The burden should be one of demonstrating a lack of prejudice and should be placed upon the party wishing to avoid or be relieved of a default judgment.

In the current case, assuming that the Respondent's position is justified, the Respondent must demonstrate that his default did not prejudice or cause unfair surprise to the Complainant. The Respondent asserts this to be the case but presents no evidence in any form to support this contention. Essentially, it is the Respondent's position that the Complainant had effective notice of the Respondent's position as a result of the Respondent's questions asked during discovery and as a result of discussions between counsel that are not part of this record. On the other hand, the Complainant in her supporting materials demonstrates how she has been hampered in preparation of her case in chief by the lack of an answer on the part of the Respondent. For example, the Complainant is uncertain whether the Respondent claims a general denial or is likely to present evidence to support some specific defense. Without advanced knowledge of the tack to be taken by the Respondent, the Complainant is unable to prepare properly. This lack of certainty presents a particularly difficult problem for the Hearing Examiner. Should the Complainant object to an offered exhibit or to a particular question posed by the Respondent on the grounds of surprise, on the state of this record the Hearing Examiner would be unable to ascertain whether there were actual surprise or not without a potentially lengthy offer of proof and rebuttal in the midst of the hearing on the merits. The presence of a timely filed answer, even one containing only a general denial, would prevent such a problem at hearing. Such problems might be isolated or may occur with great frequency. The more frequently an objection based upon surprise is raised, the longer and more complex the hearing is likely to be. The Hearing Examiner believes that such mini-trials in the record could

result in confusion on appeal and work a significant economic hardship on this particular complainant and the Commission because of the time needlessly spent trying to clarify what the Complainant might have gleaned of the Respondent's defense from the Respondent's discovery efforts.

The Respondent next asserts that even if some prejudice or surprise to the Complainant exists, the appropriate remedy is to postpone the hearing to allow the Complainant to conduct discovery in order to eliminate the prejudice or surprise. The Complainant points out that she has already expended scarce economic resources in preparation for hearing including witness fees, expenses for an investigator and attorney's fees. She arranged to take time off from work that may or may not be rescheduled if the hearing did not proceed as scheduled. Additionally, there is a risk that difficult-to-find witnesses or evidence that is available at this time may not be available at some future date. Given the economic realities facing potential witnesses in this matter, such concerns appear to be justified. While the Hearing Examiner under different circumstances might favor a postponement of the hearing as a solution to the issue of prejudice or surprise, the apparent circumstances of this case, unrebutted by the Respondent, convince the Hearing Examiner that a postponement would likely work a hardship on the Complainant and perhaps create difficulties in preserving testimony and evidence that could compromise the fairness of the proceeding. The Hearing Examiner is especially concerned about the possibility of the loss of testimonial evidence as a result of witnesses moving from the area. The Complainant is a low income woman without the economic resources to preserve a witness' testimony through an evidentiary deposition. The Respondent appeared unwilling to take steps to lessen the impact of a postponement on the Complainant. During oral argument, when the Hearing Examiner inquired of the Respondent if the Respondent would take steps to assure that the Complainant was made economically whole for the costs related to a delay, the Respondent scoffed at the notion and indicated that the Complainant should be willing to make the Respondent whole for any costs occasioned by a postponement. The Respondent's position seems particularly unreasonable given the fact that a postponement if granted would be necessitated by the Respondent's own conduct.

The Respondent's final argument against the imposition of some sanction for failing to timely file a written answer is that the Complainant has exacerbated the problems or least failed to mitigate the problems by waiting to file her motion until six days before the hearing. In part, the Respondent contends that the Complainant's motion represents a dispositive motion and should have been filed on or before September 15, 1996 pursuant to the Scheduling Order issued on July 29, 1996. It must be conceded that many of the problems presented at this time could have been minimized had the Complainant filed her motion at an earlier date. However, nothing in this record demonstrates that the Complainant was obligated to file her motion at an earlier date. While the Respondent may feel ambushed, the ambush was made possible by the Respondent's own inaction. To the extent that the Complainant's motion seeks an order for default judgment and entry of an order in favor of the Complainant on liability, then this may be considered a dispositive motion subject to the time limits set forth in the Scheduling Order. However the Complainant's motion is stated in the alternative. The motion seeks either a default judgment or an order precluding the Respondent from introducing any evidence in support of his position at hearing. Even if the default judgment portion of the Complainant's motion is eliminated, the preclusion portion remains. The preclusion portion of the Complainant's motion is really more like a motion in limine than a dispositive motion. Motions in limine are not covered by the Scheduling Order's requirement to file dispositive motions.

The remedy sought by the Complainant, preclusion of testimony or of evidence submitted by the Respondent, is an appropriate remedy for the Respondent's failure to submit a written answer. The Complainant must still produce evidence sufficient to make out a prima facie case of discrimination, In this sense the Complainant is not being given a "free ride." The Respondent may still attack the Complainant's testimony and evidence through cross examination. The imposition of an order prohibiting the Respondent from introducing evidence or testimony in the liability phase, though harsh, punishes the Respondent by precluding that material which the Complainant would have had some knowledge of had the Respondent timely filed a written answer. At a minimum, the Complainant would have been placed on some notice of the Respondent's defense so that she could have decided to conduct discovery in a reasonable manner and focused her preparation on issues actually in controversy. The Respondent would be allowed to present testimony or evidence in opposition to the Complainant's case on damages.

To summarize, the Respondent admits failing to timely file a written answer to the Notice of Hearing as required by the ordinance, rules of the Commission and the Notice of Hearing. The Respondent offers no good explanation for his failure. It is not clear by which of three standards this failure should be judged. The most stringent of these standards would find the Respondent subject to a default simply for failing to file the written answer as required by the ordinance. The next most stringent of these standards would impose a default judgment if the Respondent were unable to demonstrate good cause for the Respondent's failure. If the Respondent demonstrates good cause, the Hearing Examiner may excuse the default and impose any appropriate conditions to do justice between the parties. The final standard imposes sanctions upon the Respondent only if there is prejudice to the Complainant resulting from the Respondent‘s default. Even if the Hearing Examiner were to accept the Respondent's contention that the least stringent of these standards should be applied to the Respondent's default, the Respondent is still subject to sanctions because he has failed to demonstrate that there is a lack of prejudice or surprise to the Complainant and the record indicates

that there is a likelihood that prejudice or surprise to the Complainant exists. Under these circumstances, the Hearing Examiner will impose a sanction that prevents the Respondent from benefiting from his default while not relieving the Complainant of her responsibility to carry her ultimate burden of proof.

The Hearing Examiner was troubled by the Respondent's position throughout this proceeding on the Complainant's motion. Though the Respondent openly admitted failing to comply with the requirement to file a written answer, the Respondent consistently argued that he should not suffer any consequence for his failure. The Respondent either denied that his breach had any adverse effect upon the Complainant or the proceeding, or simply contended that violation of the answer requirement should bear no sanction. As a general matter, it appeared that the Respondent did not take the Commission or its complaint process seriously. While the Commission tries to make its process as user-friendly as possible, it believes that it is engaged in carrying out an important public policy in a fair and orderly manner. Parties should know that failure to comply with the requirements of the ordinance or the orders of the Commission can have significant results and are not to be taken lightly.

ORDER

The Respondent is hereby prohibited from introducing any testimony or evidence in support of his position during the liability portion of the public hearing. The Respondent will be permitted to cross-examine any witness called by the Complainant during the liability portion of the hearing and may oppose any exhibit offered by the Complainant. The Respondent may call witnesses and introduce evidence in opposition to any testimony or evidence submitted by the Complainant during the damage portion of the hearing.

Signed and dated this 28th day of February, 1997.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner