



A Guide for the EOC Appeals Committee

Equal Opportunities Commission

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*This document was initially generated by Jane Morris, an assistant to the Hearing Examiner.
Though Jane has passed on, her work will endure.*

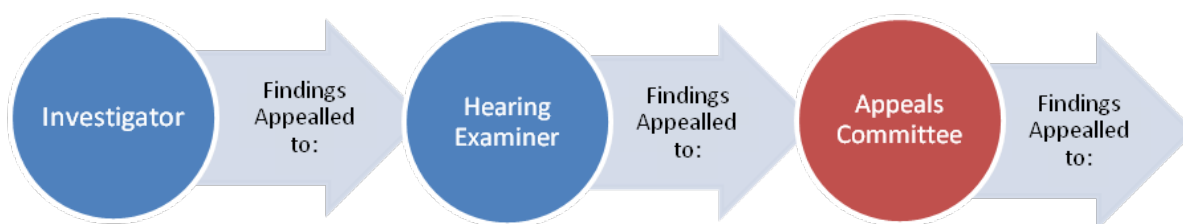
Introduction

This guide is meant to acquaint members of this Committee with the processes, rules, and general approaches necessary to make appellate decisions.

The appeals process is an extremely important component of Department of Civil Rights cases that allows involved parties the opportunity to contest previously given decisions. This happens through multiple levels of decision-making including the Equal Opportunities Commission's Appeals Committee. These procedures and proceedings have been developed and refined over the years to create the most accountable and efficient system possible.

Members of the Committee are reminded of the seriousness of their role and the consequences of their decisions. Such decisions are to be made with consideration of what was previously decided in similar cases, and in a way that gives effect to the purposes of the Equal Opportunities Ordinance. The determinations of the Appeals Committee are to be based upon the consideration of the ordinances and laws already in place after careful review and consideration of the materials and evidence described below. It should be noted that the Committee is not a jury, and personal convictions, beliefs and feelings are meant to be suspended.

The Committee may at any time call upon the Office of the City Attorney for help in determining legal arguments. The Madison Equal Opportunities Division ("MEOD") Decision Digest, an online compilation of past decisions and findings, is also a valuable resource that should be utilized. Lastly, a basic glossary has been provided at the end of this guide that attempts to explain many of the common terms you may encounter during the appeal process.



Overview of Complaint Process

The MEOD Discrimination Complaint process begins when a person (the Complainant) files a complaint with the Department of Civil Rights against another party (the Respondent), accusing them of discrimination. The Respondent may be an employer, housing provider, place of public accommodation or city facility or services. The complaint is first given a cursory review to determine if it meets three criteria for intake: 1) the complaint must have occurred or have a substantial impact within the City of Madison city limits; 2) the alleged discriminatory behavior must have taken place in the last 365 days for housing complaints or 300 days for public accommodation and employment complaints; and 3) the Complainant must belong to one of the protected classes identified in the Equal Opportunities Ordinance, and assert that the alleged discriminatory act occurred because of membership in said class.

PROTECTED CLASSES BY MADISON ORDINANCE

- Sex
- Race
- Religion
- Color
- National Origin/Ancstry
- Age (18 and older)
- Handicap/Disability
- Marital status
- Source of Income
- Arrest Record
- Conviction Record
- Less Than Honorable Discharge
- Physical Appearance
- Sexual Orientation
- Gender Identity
- Political Beliefs
- Familial Status
- Student Status
- Social Security Number Disclosure
- Domestic Partners
- Citizenship Status
- Credit History (employment only)
- Genetic Identity (employment and housing only)
- Victim of domestic abuse, sexual assault, or stalking (housing only)
- Retaliation
- Unemployment (employment only)
- Non-Religion
- Homelessness

Once these criteria are met, the case is scheduled for a voluntary mediation meeting between the Complainant and the Respondent. If either party waives mediation or a settlement cannot be reached, the case is referred for investigation and an initial determination will be made by the Investigator. The determination may be probable cause, no probable cause, or a combination of the two called a mixed determination. A mixed determination occurs when there are multiple allegations of discrimination by the Complainant, and not all are found to be probable cause by the Investigator, e.g., a Complainant charges discrimination based on sex and race but the Investigator rules there is only probable cause for discrimination based on race.

No Probable Cause

A NO PROBABLE CAUSE determination will be issued if the Investigator concludes that discrimination probably did not occur. (See Glossary for definition) If the Complainant does not appeal the no probable cause determination, the case will be closed. If the Complainant appeals the no probable cause determination, the Hearing Examiner will review the determination and the record compiled along with any additional submission provided by the parties on appeal. Either party may submit additional information to the Hearing Examiner to consider on appeal. The Examiner may affirm (agree with), reverse, or remand (send back) the Investigator's initial determination. If the Hearing Examiner affirms the finding of no probable cause, the Complainant may appeal the Hearing Examiner's decision to the Equal Opportunities Commission Appeals Committee for review. If there is no appeal, the case will be closed.

Probable Cause

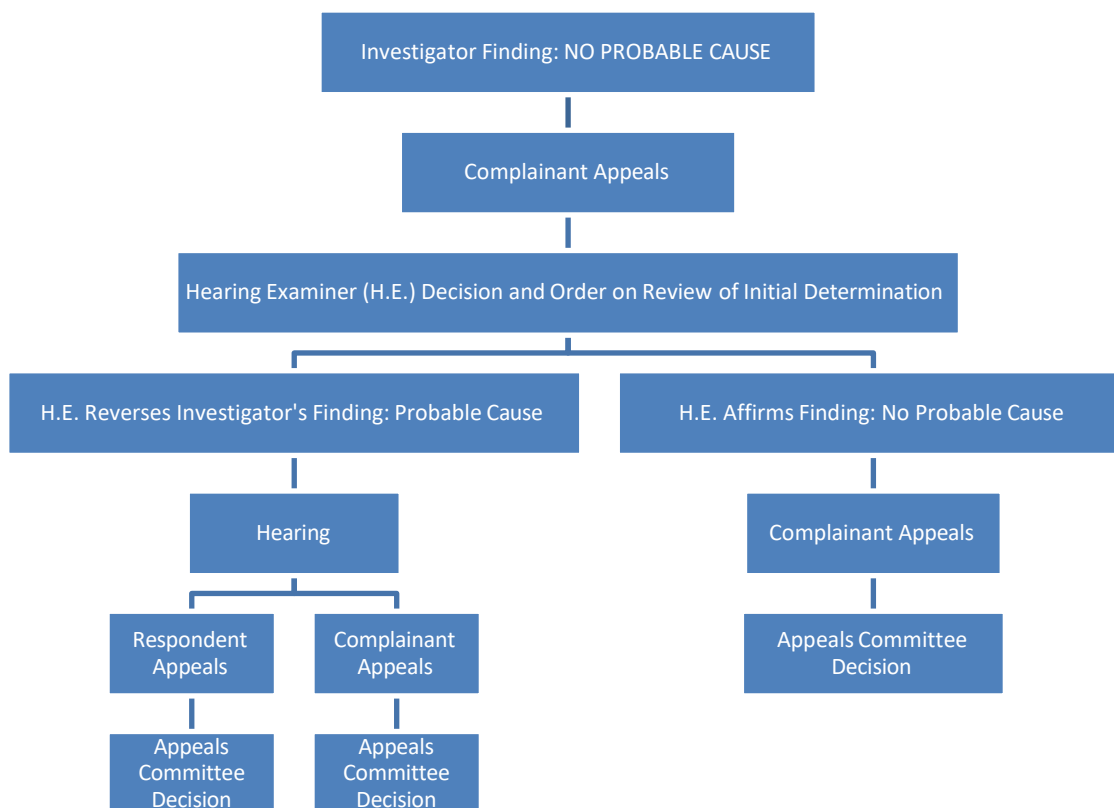
A PROBABLE CAUSE determination means that based on information collected, the Investigator concluded that discrimination may have occurred. There is no appeal process for a finding of probable cause. If the Investigator finds probable cause, the case then proceeds to a voluntary conciliation to attempt to settle the case. If conciliation is waived by either party or is unsuccessful, the case will be certified to a hearing on the merits.

A Hearing on the Merits functions much like a civil court trial. At the hearing, each party may present evidence, call witnesses, cross-examine witnesses, make objections, and make opening

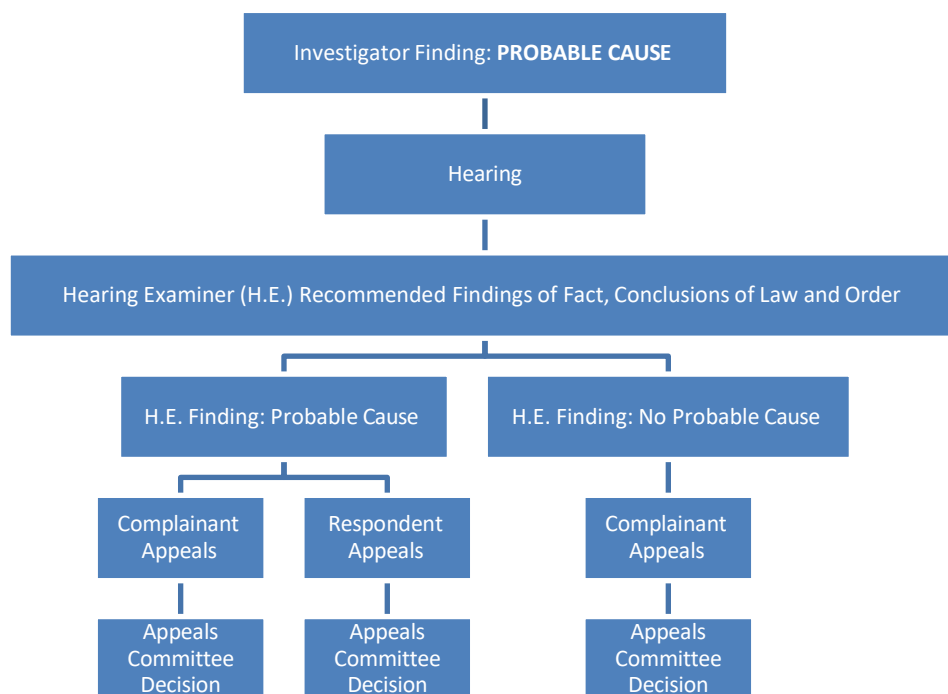
and closing statements--similar to a courtroom. The Hearing Examiner does not automatically consider information from the investigation. If the parties want that information to be considered, it must be submitted as evidence at the hearing. Based on the evidence presented at the hearing, the Hearing Examiner will make a decision as to whether or not discrimination occurred. This decision is called a Recommended Findings of Fact, Conclusions of Law and Order and will either include a finding of discrimination and a remedy, or will include a finding of no discrimination and reason why discrimination was not found. The Recommended Findings of Fact, Conclusions of Law and Order document can address many aspects of the case, from liability for discrimination, to damages awarded, attorney fees, or jurisdictional issues, among other things. This document also will include an explanation of the reasons for the Hearing Examiner's findings and conclusions.

Either party may appeal the Hearing Examiner's decision and essentially any aspect of it to the Equal Opportunities Commission Appeals Committee. The Appeals Committee reviews the record made at the hearing and any additional arguments submitted on appeal. If there is no appeal, the case will be closed or followed for possible enforcement of any orders.

No Probable Cause Case Flow



Probable Cause Case Flow



Note: Conciliation/mediation stage not shown in diagrams.

Types of Appeals

There are four different types of appeals that are brought to the Appeals Committee:

- Appeal of the Hearing Examiner's Decision and Order on Review of Initial Determination
- Appeal of Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order
- Administrative Dismissals
- Jurisdictional Determinations

These can be roughly divided into two classes. The first two types of appeals listed above are based upon a party's disagreement with the judgments of fact by the Hearing Examiner. The second two types of appeal are based upon the assertion of some sort of error, either by the parties or the Equal Opportunities Division.

APPEAL OF THE HEARING EXAMINER'S DECISION AND ORDER ON REVIEW OF INITIAL DETERMINATION

Purpose

- To determine whether the Hearing Examiner correctly applied the facts as set forth in the case record compiled during the investigation to the definition of probable cause to believe that discrimination occurred.

Documents to be Reviewed

- The Hearing Examiner's Decision and Order on Review of Initial Determination.
- The complete Investigator's file.
- The Complainant's written appeal of the Hearing Examiner's Decision and Order on Review of Initial Determination.
- The written arguments submitted by the parties on appeal.

Explanation

At the end of the investigation, the Investigator/Conciliator issues an Initial Determination of either probable cause or no probable cause to believe that discrimination has occurred or is occurring. If the complaint contains multiple allegations of discrimination, the initial determination may include mixed findings of both probable cause and no probable cause to believe that discrimination has occurred or is occurring. The Rules of the Equal Opportunities Commission provide that the Complainant may appeal any finding of no probable cause to the Hearing Examiner. During such an appeal, the processing of any findings of probable cause are stayed (stopped or suspended) pending resolution of the no probable cause issues on appeal.

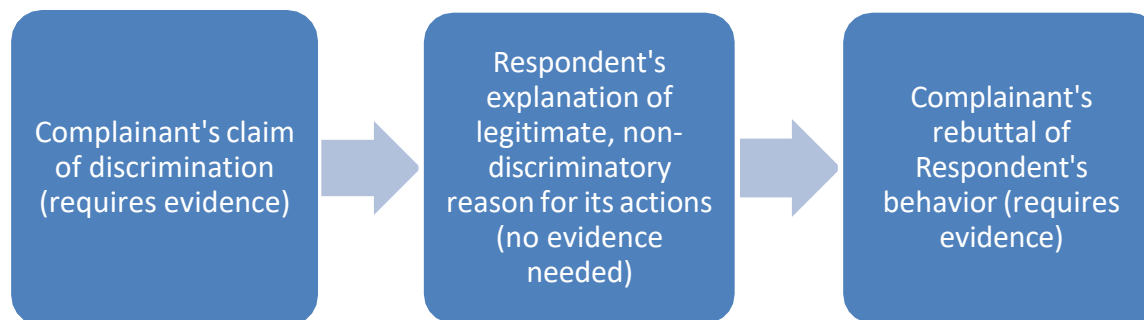
The Hearing Examiner, after giving the parties the opportunity to conduct discovery (obtain evidence from one another) if they request to do so, and to supplement the investigative file, conducts an independent review of the complaint file created by the Investigator. The focus is to determine whether the contents of the file as supplemented establish whether or not discrimination has occurred or is occurring for those allegations on appeal. At the end of the Hearing Examiner's review, the Hearing Examiner issues a Decision and Order on Review of Initial Determination setting forth their findings, along with an explanation of why the initial determination's finding of no probable cause was either affirmed or reversed.

The Complainant may appeal an affirmed finding of no probable cause entered by the Hearing Examiner. This appeal goes to the Equal Opportunities Commission Appeals Committee and represents a review of the file as it was at the time of the Hearing Examiner's decision and order along with any additional written arguments made by the parties on appeal. The Commission does not provide the parties with the opportunity to supplement the record with additional documentary evidence, but does permit the submission of written argument, and in some rare cases, a provision for oral argument of the parties (see text box below).

In conducting such a review, it is important to focus on the specific elements or issues appealed by the Complainant. The Complainant must point to some evidence or fact contained in the record establishing that: 1) the Complainant is a member of a protected class; 2) that the Complainant experienced some adverse action/ less favorable treatment; and 3) that there is some reason to believe that the Complainant's membership in a protected class played at least some part in the adverse action. It is not sufficient for the Complainant to rely on mere allegation at this stage. There must be some evidence or documentation of each claim of discrimination in the record.

The Respondent needs only to show that its actions were motivated by legitimate, non-discriminatory reasons. Presuming that the Respondent sets forth such an explanation, the Complainant may still obtain a finding of probable cause if the Complainant can point to evidence in the file sufficient to raise doubts about the Respondent's credibility or sufficient to lead to a finding that the Respondent's explanation represents a pretext for an otherwise discriminatory

motive. In other words, the Complainant, at all times, bears the responsibility for establishing the likelihood of discrimination.



Burden of Proof (for Complainant) and Production (for Respondent)

Commission's Role

In this type of appeal, the Commission is making judgments on whether or not there was probable cause for discrimination based upon the evidence presented. Probable cause exists “when there is reasonable ground for belief supported by facts and circumstances strong enough in themselves to warrant a prudent person in the belief that discrimination probably has been or is being committed.” This judgment relies upon evaluation of the evidence listed above using the process just described. Remember, the Commission does not weigh the credibility of either the witnesses or the evidence. Rather, it examines the file to determine whether it contains evidence sufficient to meet each party's burden of proof/production (shown in the diagram above).

Oral Arguments

During any appeal to the Appeals Committee, either party may request the opportunity for oral argument or oral presentation. The Rules of the Equal Opportunities Commission indicate that requests for oral argument or presentation must be accompanied by a written explanation of why such argument or presentation is either necessary or would help the Appeals Committee in its consideration of the appeal pending before it.

Oral argument or presentation can be a good way for the Appeals Committee to better understand the position of the parties and to ask questions to clarify the issues on appeal. However, oral arguments present the risk of a party, particularly an unrepresented party, trying to introduce evidence into the record that was not present at the time of the underlying decision. This supplementation of the record is not permitted on appeal to the Appeals Committee and must be guarded against carefully. It is for this reason that a party wishing the opportunity for oral presentation must explain why it is necessary or why it will assist the Committee in considering the appeal, and the oral argument or presentation must be strictly limited to those issues.

Some of the reasons why the Committee might wish to grant the opportunity for oral argument are a lack of familiarity with the English language or an inability to convey ideas in writing. Another reason for granting oral argument is whether the issues on appeal are unique or unusual and the Committee might benefit from the ability to question the parties or their counsel, if any.

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

Purpose

To determine whether the Hearing Examiner appropriately applied the facts presented at the hearing to the appropriate statement of the law and reached the correct result, including an award of damages, if any.

Documents to be Reviewed

- Initial Complaint of Discrimination.
- Notice of Hearing.
- Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order.
- Stipulations of the parties, if any.
- The record of the proceedings, which includes all documentary evidence and exhibits presented at the time of hearing, and the audio or video tapes or a transcript of the hearing.
- The parties post-hearing briefs.
- The appeal and/or cross-appeal filed by the party/parties.
- The briefs/written arguments filed by the parties on the appeal.
- Oral argument, if permitted by the Appeals Committee.

Explanation

This type of appeal happens only when there is a finding of probable cause, either after the initial determination or after a reversal on appeal and review by the Hearing Examiner or Commission of a no probable cause finding. The Complainant is then entitled to a public hearing on the merits of each allegation with a probable cause finding. This hearing is conducted before the Hearing Examiner and is a quasi-judicial proceeding. While not all of the rules of evidence are applied, some basic ones relating to fairness, relevance and credibility are applied. The proceedings are voice or video recorded unless the parties agree to have a court reporter create a contemporaneous transcript.

At the end of such a hearing, the parties are afforded the opportunity to submit briefs/written arguments in support of their respective positions. Subsequent to receipt and review of these briefs/written arguments, the Hearing Examiner issues a Recommended Findings of Fact, Conclusions of Law and Order. This document includes a memorandum decision explaining how the Hearing Examiner made their findings, reached their conclusions, and how the facts were applied to those conclusions of law. It may also explain why the Hearing Examiner found certain witnesses more credible than others. Where the Hearing Examiner finds that discrimination has occurred, the Hearing Examiner must also make a recommendation with respect to a remedy intended to make the Complainant whole. For each allegation where there is a finding of no discrimination, the Hearing Examiner will recommend dismissal of the complaint.

Either party may appeal any element of the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order. In a complaint where there are multiple allegations of discrimination for which there is a hearing, the Hearing Examiner may find discrimination as to some allegations and no discrimination as to others. In such a case, the Respondent may appeal the findings of discrimination and the Complainant may appeal the findings of no discrimination. Even in a case where the Hearing Examiner finds discrimination, the Complainant may appeal

the Hearing Examiner's recommended remedy, for example if they disagree with the amount of damages awarded. There have even been examples of a Respondent—after receiving a finding of no discrimination—appealing because the Respondent was not satisfied with the Hearing Examiner's findings even though they led to a conclusion of no discrimination.

Commission's Role

On appeal of the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order, the Appeals Committee is presented with the materials upon which the Hearing Examiner based their decision. The Appeals Committee does not receive the entire contents of the Commission's file. Though the record provided the Commission may be large, such appeals often turn on relatively small portions of the record. It is important for the Commission when reviewing such an appeal to have a clear understanding of the appealing party's concerns. Generally speaking, it is inappropriate for an appealing party to merely allege that all aspects of the Hearing Examiner's findings and conclusions are erroneous. The parties' written appeal must include the elements of the Recommended Findings of Fact, Conclusions of Law and Order that it wishes the Commission to consider on appeal.

In reviewing the record of proceedings, the Appeals Committee may not reverse the Hearing Examiner's finding of credibility with respect to any individual witness unless the Appeals Committee has first called the Hearing Examiner to explain their credibility determinations. If the Appeals Committee determines that it wishes to reverse a finding or conclusion of the Hearing Examiner, the Commission must clearly set forth the evidence and reason upon which it relies in setting aside the Hearing Examiner's finding/conclusion.

The Appeals Committee may affirm, reverse, modify, or remand the complaint at the end of its review. Virtually any aspect of the Hearing Examiner's decision, such as damages and attorney fees (see *Steele v. Highlander Motor Inn*, MEOD Case No. 3326), can be modified. Remanding the complaint represents a finding that the Hearing Examiner must make additional findings or conclusions, or must further explain their decision in some way. In some limited circumstances, the Hearing Examiner may need to hold additional proceedings to resolve the Commission's concerns.

ADMINISTRATIVE DISMISSAL

Purpose

- To determine whether the Complainant has "good cause" for not doing something required of them during the processing of the complaint;
- To determine whether the Equal Opportunities Commission staff acted arbitrarily or capriciously in dismissing the complaint; or
- To determine whether application of the principles of justice require reinstatement of the complaint.

Documents to be Reviewed

- Any document evidencing the obligation of the Complainant to do something, i.e., sign for certified mail, respond to correspondence, appear at required conferences, etc.
- The Complainant's submission setting forth why the complaint should not have been dismissed and should be reopened.

- Any response from the Respondent to the Complainant's initial submission.
- Complainant's response to any response submission made by the Respondent.

Explanation

Complaints may be administratively dismissed during any part of the complaint process for a variety of reasons. Basically, a complaint is administratively dismissed when the Hearing Examiner, Investigator, or anyone else involved in the case finds or believes that the Complainant (or Respondent, though this is much less common) has failed to perform a requirement of the complaint process. This failure must somehow have an adverse impact upon the processing of the complaint.

Some examples of reasons why complaints may be administratively dismissed include the following:

- The Complainant fails to accept receipt of certified mail.
- The Complainant fails to appear at a pre-hearing conference.
- The Complainant fails to do some required action during the complaint investigation process.

Upon one of these events happening, any member of the case process—commonly the Investigator—may recommend dismissing the complaint and thus stop the investigation from continuing. The Department of Civil Rights Director would issue the administrative dismissal.

Commission's Role

After a complaint is administratively dismissed, the Complainant has the right to appeal this decision to the Commission. It is the Appeals Committee's responsibility to determine whether the Complainant had "good cause" for their failure to meet the requirements of the complaint process.

In determining whether the Complainant's explanation represents good cause, the Commission should review the above-indicated documents and apply its judgment as to the reasonableness of the Commission's requirement and Complainant's explanation. The Commission has decided many cases involving administrative dismissals in the past, and results of these Commission reviews can be found in the Decision Digest. The digest can be found online at www.cityofmadison.com/civil-rights/find-help/decision-digest. These past decisions (see Duff v. J.C. Penney, MEOD Case No. 20032069) may be helpful in determining whether or not the complaint should be re-opened.

JURISDICTIONAL DETERMINATIONS

Purpose

- To determine whether the Commission has the legal authority to process the complaint; or
- To determine whether the complaint meets the minimal jurisdictional requirements imposed by the ordinance.

Documents to be Reviewed

- Respondent's motion/request for the complaint to be dismissed.

- Documentary evidence submitted by the parties with respect to the claim of jurisdiction/no jurisdiction.
- Respondent's brief/written argument in support of a finding of no jurisdiction.
 - Complainant's response to the Respondent's brief/written argument.
 - Respondent's final brief/written argument.

Explanation

Jurisdiction represents the limitations on the authority of the Commission to act. As a municipal administrative agency, the Commission's powers and authority are limited to the areas and subject matter set forth in the Madison General Ordinance 39.03. Respondents will occasionally challenge whether a specific complaint falls within the Commission's area of authority.

If a jurisdictional question is raised during the investigation period, the investigation stops until the jurisdiction issue is decided. The Hearing Examiner will examine the case and determine whether or not the Commission has jurisdiction. This decision on the Commission's jurisdiction is appealable to the Commission by the Complainant in a finding of No Jurisdiction.

Most generally, these challenges to the Commission's authority are premised upon an argument that the Complainant's allegations, even if true, are not subject to the Commission's authority. An extreme example of this might be that a Complainant contends that they were terminated from employment because of their support of the Chicago Cubs. Nothing in the ordinance protects any person from discrimination based upon an individual's support for a given professional sports franchise. This complaint would be outside of the Commission's subject matter jurisdiction.

Another common ground for claims of a lack of jurisdiction on the part of the Commission is that the requirements of the ordinance are superseded or pre-empted by other county, state, or federal laws. Due to notions of "supremacy," enactments by "higher" levels of government that are contrary to City of Madison laws will deprive the Commission of jurisdiction. An example of this is a federal law requiring federal grant-funded nursing homes to do arrest/conviction checks on their employees, something that Madison ordinance specifically prohibits. However, because this is federal law, any complaints brought to the Department of Civil Rights regarding this could be challenged on jurisdictional grounds.

Claims of a lack of jurisdiction also arise from the argument that the act of discrimination occurred outside of the geographic limits of the City of Madison, or occurred outside of the period of time set forth in the ordinance for the filing of a complaint, i.e., 365 days for complaints of housing discrimination, 300 days for all other complaints. The Commission has addressed these issues in several prior cases; entries in the Decision Digest may be helpful in making such determinations.

Commission's Role

In an appeal of a jurisdictional decision, it is important that the Appeals Committee note exactly which aspects of the decision the appeal references. These aspects must be addressed in the Appeals Committee decision. Other aspects may be addressed as the Appeals Committee sees fit.

It is the Commission's responsibility to understand both Madison General Ordinance 39.03 and the arguments given by both parties. When reviewing a jurisdictional claim, the Appeals Committee's review generally does not involve substantial appraisal of the material facts of the

case, e.g. how the ruling of probable cause or no probable cause was reached. Instead, judgment relies on an understanding and analysis of the purposes and limitations of the ordinance and the application of general legal principles. Application of the judgment of the Appeals Committee to the legal arguments presented by both sides is essential to resolving a claim of a lack of jurisdiction.

Once again, it is worth mentioning that the Appeals Committee has access to the Office of the City Attorney, and any questionable legal arguments are worth bringing up with them.

Structure of Appeals Process

If the Appeals Committee decides to retain jurisdiction, the members of the panel will complete their reviews of the record as promptly as possible with the goal of meeting to resolve the appeal within 45 days of receipt of the record. While the Appeals Committee is meeting or deliberating, a representative from the Office of the City Attorney should always be present.

Upon resolution of the appeal, the Appeals Committee will provide its decision and an explanation of the grounds for its decision to the Office of the City Attorney, who will draft the decision of the Appeals Committee and Notice of Right to Appeal, if any, for the signature of the Appeals Committee Chairperson.

After the documents are signed by the Appeals Committee Chairperson, the decision will be sent to the parties and counsel, and becomes part of the public record. Depending upon the decision of the Appeals Committee, the case will be closed or transferred to the appropriate individual for further processing or proceedings.

It is worth noting that the case does not necessarily end with the Appeals Committee, as one of the parties may appeal the Committee's decision, thus sending it to the Dane County Circuit Court. This, in turn, can be appealed to the Wisconsin Supreme Court and finally make it to the Supreme Court of the United States.

Glossary

Complainant: The party who files a discrimination complaint with the Department of Civil Rights.

Hearing Examiner: The “judge” of all cases that come before the Department of Civil Rights.

Investigator: The staff member of the Department of Civil Rights who examines claims of discrimination and makes an initial determination of Probable Cause, No Probable Cause, or a mixed determination of Probable Cause/No Probable Cause.

Mediator/Conciliator: The staff member of the Department of Civil Rights who assists parties to a discrimination complaint in reaching a resolution to that complaint outside of the hearing process.

Prima facie: A Latin term meaning “on its face”, used to describe cases and claims that have met a certain threshold of proof.

Probable cause: Exists “when there is reasonable ground for belief supported by facts and circumstances strong enough in themselves to warrant a prudent person in the belief that discrimination probably has been or is being committed.”

Recommended Findings of Fact, Conclusions of Law and Order: A post-hearing decision document issued by the Hearing Examiner that includes how they reached their findings.

Remand: To send a case back to the previous stage of the process, for example from the Commission back to the Hearing Examiner.

Respondent: The party who has been accused of discriminating against the Complainant.

Stay: The temporary stoppage of case proceedings to resolve a different dispute.