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October 25, 2022

Via Email Only: tsnell@milwaukee.gov

Tony Snell Rodriguez
Commissioner and Chair
City of Milwaukee Equal Rights Commission
City Hall, Room 606, 200 East Wells Street
Milwaukee, WI 53202

Re: Equal Rights Commission's obligation to take complaints and complaint procedures

Dear Chairperson Snell:

By email dated May 12, 2022 and forwarded to this office on May 18, 2022, you requested a legal opinion regarding the Equal Rights Commission's ("Commission" or "ERC") obligation to take complaints under MCO ch. 109 and how the ERC would administer its duties according to the complaint process set forth in MCO ch. 109.

A. Obligation to Take Complaints under MCO ch. 109

With regard to complaint jurisdiction, the ERC is governed by MCO §§ 109-7-4-b and -c, which provide that the Commission "shall:"

> b. Receive complaints alleging violation of this chapter and pursue remedies by means of mediation, conciliation, litigation or other appropriate means supported by findings of fact and conclusions of law. An aggrieved person may, not later than 300 days after an alleged discriminatory practice has occurred, file a written complaint to the commission alleging a discriminatory practice or violation. The commission shall not accept or investigate any complaint unless it is in writing and verified by the complainant.
>
> c. Not have or exercise jurisdiction over any complaint that sets forth or states any facts or allegations that are the subject matter within the

> jurisdiction of any state or federal equal rights agency, including, but not limited to the U.S. Equal Employment Opportunity Commission or the Wisconsin Department of Workforce Development, regardless of whether the complainant has chosen to file with that agency.

Under this framework, the ERC is required to receive and investigate a timely, written, and verified complaint alleging a violation of MCO ch. 109, except that the ERC has no jurisdiction over any complaint that falls under the jurisdiction of "any state or federal equal rights agency…regardless of whether the complainant has chosen to file with the agency." *Id.*

The obligation to receive and investigate a properly-filed complaint, over which the ERC has jurisdiction, is mandatory because of the ordinance's use of the term "shall." *Karow v. Milwaukee County Civil Serv. Comm'n*, 82 Wis. 2d 565, 570 263 N.W.2d 214 (1978). In *Karow*, the court explained:

> The general rule is that the word "shall" is presumed mandatory when it appears in a statute. *Scanlon v. Menasha*, 16 Wis. 2d 437, 443, 114 N.W.2d 791 (1962))…. However, the word "shall" can be construed as directory if necessary to carry out the legislature's clear intent. *Wauwatosa v. Milwaukee County*, 22 Wis. 2d 184, 191, 125 N.W.2d 386 (1963). Statutes setting time limits on various activities have often been held to be directory despite the use of the mandatory "shall," where such a construction is intended by the legislature….

82 Wis. 2d 570, 571.[1]

Here, however, the Commission's duty to receive and investigate complaints is not directed towards a particular timetable, but rather refers to the Commission's obligation to execute these functions to carry out the Common Council's intent that the Commission remedy certain, limited forms of discrimination. This conclusion is supported by the ordinance's use of "may" in the same section: "An aggrieved person *may*, not later than 300 days after an alleged discriminatory practice has occurred, file a written complaint to the commission alleging a discriminatory practice or violation." MCO § 109-7-4-b (emphasis added); *Karow*, 82 Wis. 2d 565, 571 ("When the words 'shall' and 'may' are used in the same section of a statute, one can infer that the legislature was aware of the different denotations and intended the words to have their precise meanings.").

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[1] "'The rules for the construction of statutes and municipal ordinances are the same.'" *Bruno v. Milwaukee County*, 2003 WI 28, ¶ 6, 260 Wis.2d 633 (citation omitted).

While the ERC is obligated to receive and investigate a timely, written, and verified complaint over which it has jurisdiction, the types of complaints subject to ERC jurisdiction are extremely limited. The attached Appendix A provides a summary comparison of protected classes under MCO § 109-5-12 with coverage under state and federal law. Appendix A identifies, in bold text, those categories of discrimination covered by MCO ch. 109 for which there is no coverage under state or federal law.

Significantly, the ERC's jurisdiction over gender identity and expression discrimination claims in employment has been recently limited as a result of the United States Supreme Court decision in *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020). Prior to *Bostock*, gender identity and expression was one of the few categories protected under MCO ch. 109 that was not protected at either the state or federal level.

In *Bostock*, the Court held that Title VII's proscription against employment discrimination based on "sex" includes sexual orientation and gender identity and expression. Accordingly, an "employer who fires an individual merely for being gay or transgender defies the law." *Id.*, at 1754. Because Title VII only applies to employers with 15 or more employees, the ERC may have jurisdiction over a gender identity or expression complaint filed by an employee of an employer not covered by Title VII.

Further, it appears that the ERC may no longer assert jurisdiction over housing discrimination claims based on gender identity and expression. Pursuant to *Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, the U.S. Department of Housing and Urban Development ("HUD") issued guidance providing that gender identity and sexual orientation are protected under the federal Fair Housing Act. *See* HUD, *Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act* (Feb. 11, 2021) ("Effective immediately, FHEO shall accept for filing and investigate all complaints of sex discrimination, including discrimination because of gender identity or sexual orientation, that meet other jurisdictional requirements.").

B. How the Commission Would Administer Its Duties Under MCO ch. 109's Complaint Procedure

In terms of administering the complaint process, MCO ch. 109 tasks the Commission itself with investigating complaints (§§ 109-13, 109-15); determining whether probable cause exists (§ 109-15); conducting hearings, except where the Commission appoints a hearing examiner (§ 109-17); and making the determination on the merits (§ 109-19). The Department of Administration ("DOA") is tasked with the following responsibilities:

> **5.** The department of administration shall assign staff and provide support to the commission as necessary and appropriate to assist the commission in fulfilling its mission and responsibilities.
>
> **6.** The department of administration shall assist the commission by staffing its meetings, drafting reports and other documents, maintaining commission documents, initial processing of complaints, and providing resources necessary for the proper hearing of complaints.

MCO §§ 109-7-5 and -6.

DOA staff's responsibility for "initial processing of complaints" appears to extend only to determining whether the complaint is acceptable (i.e., written and verified) and within the Commission's jurisdiction under MCO § 109-7-4-c. Thus, the "initial processing of complaints" appears limited to the pre-investigation phase. In addition, when read in context with DOA's obligations under § 109-7-5, DOA staff's responsibility for "drafting reports *and other documents*" (emphasis added) could arguably extend to the preparation of documents such as: the Commission's written notice of no probable cause (§ 109-15); the Commission's probable cause determination, including preliminary findings of fact and conclusions (§ 109-15); subpoenas (§§ 109-13, 109-17); and the Commission's determinations on the merits of complaints (§ 109-19). However, the ordinance is not at all conclusive on this aspect of DOA's responsibilities.

MCO ch. 109 provides only a bare-bones framework for handling complaints. The Commission has authority to adopt rules and regulations "consistent with" MCO ch. 109 "to carry out…the powers and duties of the commission" and therefore fill some of these gaps in procedure in a way that does not violate the ordinance. § 109-7-4-e. First, however, MCO ch. 109 should be revised to address the following concerns.

1. <u>MCO ch. 109 Likely Violates Wis. Stat. ch. 68 and MCO § 320-11 because it Lacks a Procedure for Administrative Review of the Commission's Determination</u>.

Wis. Stat. ch. 68 provides procedures for review of determinations by municipal authorities, including "commissions." Wis. Stat. §§ 68.01 and 68.05. Pursuant to Wis. Stat. § 68.16, "[t]he governing body of any municipality may elect not to be governed by [ch. 68] in whole or in part by an ordinance or resolution which provides procedures for administrative review of municipal determinations." To elect not to be governed by ch. 68, in whole or in part, "the municipality must enact an ordinance or resolution which shows that it chooses to 'opt out' of [ch. 68 or] that particular section." *Tee & Bee, Inc. v. City of West Allis*, 214 Wis. 2d 194, 198, 571 N.W.2d 438 (Ct. App. 1997).

In *Tee & Bee*, the City of West Allis's Licensing and Health Committee recommended denial of an adult-oriented establishment license application and the West Allis Common Council adopted that recommendation. *Id.*, at 196-97. Tee & Bee filed an appeal with the common council and the city scheduled an administrative appeal hearing to be held by the council. *Id.* at 197. Tee & Bee objected to the form of the hearing, arguing that allowing the council to review its own determination violated Wis. Stat. § 68.11(2), which required that appeals be heard by "an impartial decision maker who 'did not participate in ….making or reviewing…the initial determination.'" *Id.* at 197 (quoting § 68.11(2)). The council dismissed the objection, held the hearing, and voted to uphold the license denial. *Id.*

On appeal, the city argued that several ordinance provisions demonstrated its intent to opt out of § 68.11(2). *Id.* at 198. However, the court found that the ordinances provided for appeals to be held pursuant to § 68.11 and, "while providing procedures for administrative review of municipal determinations, do not even come close to providing clear evidence that the City actually 'elected' not to be governed by § 68.11(2)." *Id.* at 204.

In MCO § 320-11, the City of Milwaukee adopted Wis. Stat. ch. 68 with express exceptions. MCO § 320-11 provides, in pertinent part,:

> **1.** DUE PROCESS. The purpose of this section is to afford a constitutionally sufficient, fair and orderly administrative procedure and review in connection with determinations by municipal authorities which involve constitutionally protected rights of specific persons who are entitled to due process protection under the 14th amendment to the United States constitution. *In order to insure that such rights are protected in the administration of the affairs, ordinances, regulations and by-laws of the city it is declared and required that the provisions of ch. 68, Wis. Stats., relating to municipal administrative review procedure shall be in full force and effect in this city, except as provided in subs. 5 and 6.*
>
> **2.** COMPLIANCE. All officers, employees, agents, agencies, committees, boards and commissions of this city shall comply with the requirements of ch. 68, Wis. Stats., and shall conduct initial administrative reviews of their own determinations in accordance with s. 68.09, Wis. Stats., upon filing of a proper written request therefor.
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> * * *
>
> **5.** CITY LAW. This section shall not be deemed to repeal or supersede any other ordinance or resolution in conflict herewith which specifically provide other procedures for review of administrative determinations within the city.

(emphasis added).[2]

Accordingly, the Commission must follow the administrative review procedures in Wis. Stat. ch. 68 and MCO § 320-11-2 unless its enabling ordinance "specifically provide[s] other procedures for review of administrative determinations...." MCO §§ 320-11-1, -2, and -5. However, MCO ch. 109 does not provide for any review of the Commission's determination on the merits of the complaint. *See* MCO §§ 109-17, 109-19. Prior to the repeal and re-creation of MCO ch. 109 in 2017 (Common Council File No. ("CCFN") 170093), MCO ch. 109 expressly provided administrative review of the Commission's determinations pursuant to Wis. Stat. ch. 68 and MCO § 320-11. *See, e.g.* CCFN 081017.

Now, however, the absence of an express "opt-out" provision in MCO ch. 109 and any procedures for review of the Commission's determination render MCO ch. 109 vulnerable to a claim that it violates both Wis. Stat. ch. 68 and MCO § 320-11-2. We offer some potential ways to bring MCO ch. 109 under the "opt-out" exception in Wis. Stat. § 68.16 and MCO § 320-11-5:

a. The Common Council could amend MCO ch. 109 to expressly provide that Wis. Stat. ch. 68 and MCO § 320-11 shall not apply to the Commission's complaint process, except that the Commission's determination under MCO § 109-19 shall be a final determination and subject to judicial review by certiorari.

b. Alternatively, the Common Council could amend ch. 109 to provide for an initial determination by a Hearing Committee as set forth in the Commission's "Complaint Policy and Procedures" ("the Policy"), discussed below.[3] The ordinance could authorize a three-member Hearing Committee[4] to make the initial determination on the merits, which shall become the final determination unless appealed to the full Commission. An appeal to the full Commission could be conducted by written briefs rather than an additional in-person hearing.

In addition, MCO § 109-17 (Hearing Procedure) should be amended to require the Commission to ensure that a hearing record is created so that the Commission's final determination may be reviewed by a court in a certiorari action. *See* Wis. Stat. § 68.11(3). Moreover, MCO § 109-19 should be amended to state that the Commission's determination under MCO § 109-19 shall be a final determination for purposes of judicial review and that

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[2] In MCO § 320-11-6-a, the City opted out of that portion of § 68.11(2) that requires that the decision maker on appeal be one "who did not participate in making or reviewing the initial determination."

[3] For the reasons explained below, the Commission cannot on its own, through the Policy, establish the Hearing Committee to render initial determinations on whether a violation of ch. 109 has occurred.

[4] The five-member quorum requirement for conducting business would need to be amended. § 109-7-3.

any party to a proceeding resulting in a final determination may seek judicial review by certiorari within 30 days of receipt of the final determination.

2. MCO ch. 109 Presents Procedural Due Process Concerns.

MCO ch. 109 contains no requirement that the Commission provide the respondent with notice of the existence of the complaint until after the Commission concludes "its investigation" and makes a determination as to whether probable cause exists. *See* § 109-15. Under § 109-15, the first notice that a respondent may receive is the notice of hearing compelling the respondent's attendance at a hearing to be commenced within 30 days unless the Commission grants the respondent's request for a later date.[5] Even at that point, however, § 109-15 does not expressly require that the Commission serve the respondent with the actual complaint. Instead, the Commission must issue "its preliminary findings of fact and conclusions" along with the hearing notice. *Id.* We recommend that the ordinance require that the Commission provide respondent with timely notice of the complaint, including a copy of the complaint, within a set number of days of filing.

"'The elements of procedural due process are notice and an opportunity to be heard, or to defend or respond, in an orderly proceeding, adapted to the nature of the case in accord with established rules.'" *Milewski v. Town of Dover*, 2017 WI 79, ¶ 23, 377 Wis. 2d 38, 56–57, 899 N.W.2d 303, 311 (citations omitted). "The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). As the Court explained in *Mathews*:

> "(D)ue process is flexible and calls for such procedural protections as the particular situation demands." .... Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected....More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any,

[5] Prior to the 2017 revisions, § 109-51-4-b required that no later than 10 days after the filing of the complaint, the Commission shall serve the respondent with a "notice identifying the alleged discriminatory housing or employment practice and advising the respondent of the procedural rights and obligations of respondents under [ch. 109], together with a copy of the original complaint." (CCFN 081017).

> of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail....

424 U.S. 319, 334–35 (citations omitted).

Because the respondent will receive notice of the complaint prior to a hearing on the merits, it is conceivable that a respondent would be unable to establish a procedural due process violation, notwithstanding the failure to provide notice prior to the probable cause determination. In other words, there is arguably still a meaningful opportunity to be heard at the hearing on the merits.

However, other factors could impact this determination. For example, under MCO § 109-13, the Commission may issue a subpoena *duces tecum* compelling the respondent to provide testimony and produce documents "relating to the *investigation* or hearing *being conducted*" (emphasis added) without having provided respondent with notice of the complaint. Moreover, without notice of the complaint, the respondent has no opportunity to respond prior to the Commission's probable cause determination. At a minimum, it is odd that the Commission would make a "determination of whether probable cause exists" without even offering the accused the opportunity to respond to the allegations in the complaint. Applying *Mathews*, offering the opportunity to respond prior to the probable cause determination would seem to provide value to the process in terms of informing the Commission's probable cause determination. 424 U.S. 319, 334–35. Further, the "fiscal and administrative burdens" of providing the respondent with notice of the complaint at an earlier stage appear nonexistent. *Id.*

In addition to the notice concerns, the ordinance guarantees discovery rights that appear to conflict with the hearing procedure. MCO § 109-15 provides that the "parties shall be entitled to full discovery rights" including depositions before the hearing. Yet, the hearing "shall be commenced" within 30 days of the notice of hearing unless the Commission grants the *accused's* request for a later date. It is difficult to see how the Commission can guarantee "full discovery rights" to both parties according to this timeframe.

3. <u>The ERC's "Complaint Policy and Procedures" Conflict with MCO ch. 109</u>.

MCO § 109-7-4-e authorizes the Commission to "[a]dopt rules and regulations *consistent with this chapter* and the laws of the state to carry out the policy and provisions of this chapter, and the powers and duties of the commission." (emphasis added). It is our understanding that the Commission used its rulemaking authority to adopt the Policy, *supra* at 6, at its January 19, 2022 meeting. In light of the minimal procedures established in ch. 109, the Commission must use its rulemaking authority to "fill the gaps" left by the

ordinance. To that end, the Policy is comprehensive and detailed. However, we identified several Policy provisions that are not consistent with MCO ch. 109 and that therefore cannot be implemented without revisions to the ordinance. The following list is not exhaustive and may include other conflicts with the authorizing ordinance.

a. Under the Policy, if the Equal Rights Specialist[6] determines that the ERC has jurisdiction over the complaint, the Equal Rights Specialist must conduct an investigation and issue an initial probable cause determination. *See* Policy, at Sections 2.g and 4. However, the ordinance assigns those responsibilities to the Commission. *See supra,* at 3-4.

b. The Policy gives complainants the right to appeal the denial of probable cause but MCO ch. 109 provides no such appeal rights. Further, the Policy creates other appeal rights pursuant to Wis. Stat. ch. 68 that, as explained above, must be addressed by the Common Council in the ordinance.

c. Section 3.d of the Policy provides for a three-member Special Review Committee and a three-member Hearing Committee. But, MCO § 109-7-3 provides that "[f]ive members shall constitute a quorum for conducting business…"

d. Section 5 of the Policy provides that the Hearing Committee shall conduct the hearing, provided that the Commission may appoint a hearing examiner to conduct hearings in cases where the Commission deems it necessary. Section 5 further provides that the hearing examiner shall have the same authority and duties as the Hearing Committee, including the authority to "make and file a decision on the merits." *See also* Policy, at Section 7.a.i. ("The Hearing Committee, or the hearing examiner that presided at the hearing on the merits under Rule 6.b., shall issue the Findings of Fact, Conclusions of Law and Order after completion of the hearing.").

   However, nothing in MCO § 109-17 authorizes the Commission to create a Hearing Committee to conduct hearings and decide the merits of the complaint. Under MCO §§ 109-17, "the commission shall" conduct the hearing, provided that the Commission shall appoint a hearing examiner to conduct the hearing "where the commission deems it necessary." Moreover, even where the Commission appoints a hearing examiner, the Commission deliberates and determines whether the respondent has violated the ordinance; the hearing examiner has no authority to decide the merits of the complaint under the ordinance. § 109-17-3.

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[6] Pursuant to the City's Positions Ordinance and the 2022 City Budget, the Equal Rights Specialist is an employee within the City's Department of Administration – Office of the Director – Office of Equity and Inclusion.

e. Section 8 of the Policy authorizes the Hearing Committee to impose the remedies provided in MCO §§ 109-19 and 109-25. However, only the Commission may impose remedies under MCO §§ 109-19 and 109-25.

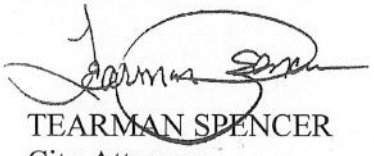
f. The Policy requires the party to pay witness fees when serving subpoenas served by the Commission. *See* Policy, at Section 6.a.vi.2. However, MCO § 109-13 requires the Commission to pay witness and mileage fees (MCO § 109-13-4).

g. Section 10.b of the Policy provides that a party may be represented by (1) an attorney authorized to practice in Wisconsin; (2) an attorney entitled to practice before the highest court of record of any other state; or (3) any lay representative. However, MCO § 109-17 provides that "the parties may be represented by counsel of their own choosing…" and does not provide for lay representatives.

C. <u>Conclusion</u>

The scope of the ERC's complaint jurisdiction is restricted by MCO § 109-7-4-c to avoid duplication of services and protections already provided by federal and state laws and agencies. Nonetheless, if the City wishes to provide the protections offered in MCO ch. 109 and hold offenders accountable, it must provide procedures adequate to ensure the respondents' rights to procedural due process and to produce determinations that can be enforced and defended in court.

Very truly yours,



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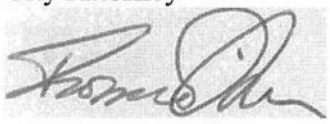

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Attachment

c: Sharon Robinson, Director, Department of Administration (via email only: srobins@milwaukee.gov)

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