

February 21, 1996

CITY OF CHICAGO
COMMISSION ON HUMAN RELATIONS

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IN THE MATTER OF:)
G. Keith Richardson)
Complainant,)

v.)

No. 92-E-80

Chicago Area Council of the)
Boy Scouts of America and)
Nelson L. Carter,)
Respondents.)

TO: See Attached Service List

FINAL RULING ON LIABILITY AND DAMAGES

I. INTRODUCTION

While laws can be changed to reflect society's evolving views toward the treatment of minorities, personal beliefs cannot be legislated. Rather, it is hoped that as conduct is altered, stereotypes will be shattered and future generations of citizens will be raised to appreciate differences rather than fear them.

The concept that a particular class of citizens should be defined by a common characteristic and then isolated from the rest of society is, unfortunately, not foreign to our culture. Attempts to justify this type of treatment have long been based upon differing ideas of morality, religious doctrine, nationalism and, at times, genetics. Recognizing that modern society's most important endeavor is to strive to protect those who most need its protection, through our elected officials we have passed laws to regulate conduct while allowing personal beliefs the freedom to evolve. When those laws conflict with the sincere, though misguided, beliefs of certain citizens, we are faced with the delicate task of balancing competing rights.

The instant case concerns the legality, under the Chicago Human Rights Ordinance ("CHRO"), of the Chicago

Area Council of the Boy Scouts of America's ("CAC") employment policy prohibiting the employment of "known and avowed homosexuals" from certain positions within its organization. G. Keith Richardson, the Complainant, a gay man, claims to have been denied employment as a Professional Scouter as a result of his sexual orientation.

The Respondent⁽¹⁾ asserts several defenses. First, it claims it is exempt from coverage under the CHRO as a "religious organization." Next, it asserts that application of the CHRO to its organization would violate its rights to freedom of associational expression and of speech. Finally, the CAC asserts that the Complainant is not entitled to any relief since he was not qualified for employment regardless of his sexual orientation.

Having considered the evidence and arguments presented, including the Objections to the First Recommended Decision, the responses to those Objections, and all the memoranda of the parties, for the reasons set forth in this Final Ruling, the Commission finds that the employment policy of the Chicago Area Council of the Boy Scouts of America discriminates on the basis of sexual orientation in violation of the Chicago Human Rights Ordinance. The CAC is not a religious organization and thus is not exempt from coverage under the CHRO. The Respondent's right to associational expression has not been violated since opposition to homosexuality is not an expressive goal of the CAC and any impairment of its expression is far outweighed by the compelling governmental interest in outlawing discrimination in employment. And the Respondent's right of free speech has not been violated.

Mr. Richardson is awarded only nominal damages for being deprived of the right to seek employment from the CAC. The Complainant was not a *bona fide* job seeker. Rather, he was acting as a "tester" for the sole purpose of challenging the CAC's employment policy. He would have been rejected for employment regardless of his sexual orientation as a result of his prior job history had Respondent's discriminatory policy not disqualified him from consideration

II. PROCEDURAL HISTORY

Mr. Richardson's initial complaint of discrimination was filed with the Chicago Commission on Human Relations ("CCHR") on May 21, 1992. On July 30, 1992, an Amended Complaint was filed. Several Motions to Dismiss the Complaint were filed, briefed and decided by the Commission. By Order dated August 8, 1994, the Commission found Substantial Evidence and set forth the issues to be decided at the Administrative Hearing.

Seven days of hearing were held between April 5, 1995 and April 21, 1995 at which 23 witnesses gave testimony. In addition, several hundred exhibits were submitted into evidence by each party. Post-hearing briefs along with Proposed Findings of Fact and Conclusions of Law were submitted by both parties.

On September 18, 1995, the Hearing Officer issued a First Recommended Decision on Liability and Damages. Subsequently, each party filed Objections and Responses to each other's Objections. The Final Recommended Decision was issued on December 27, 1995.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW⁽²⁾

1. The Complainant, G. Keith Richardson, is a 34-year-old male resident of the City of Chicago. Mr. Richardson is gay. (Tr. 4/5/95 p. 35)⁽³⁾

2. The Chicago Area Council, Boy Scouts of America, Inc. ("CAC") is an Illinois not-for-profit corporation which was initially incorporated on June 6, 1912. The purpose of the CAC, as recited in its Amended Articles of Incorporation (Ex. C74) is as follows:

The corporation shall promote, within the territory covered by the charter from time to time granted it by the Boy Scouts of America and in accordance with the Congressional Charter, Bylaws, and Rules and Regulations of the Boy Scouts of America, the Scouting program of promoting the ability of boys and young men and women to do things for themselves and others, training them in Scoutcraft, and teaching them patriotism, courage, self-reliance and kindred virtues, using the methods which are now in common use by the Boy Scouts of America.

The Relationship Between the Boy Scouts of America and the CAC

3. The CAC receives its Charter from the Boy Scouts of America ("Boy Scouts" or "BSA") to carry out the above purpose and programs in the Chicago area. (Stipulated Facts ¶¶ 2-4) As part of its Charter, the CAC agrees to comply with the By-laws, Rules and Regulations of the Boy Scouts. The Boy Scouts are chartered by Congress:

to promote, through organization and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scoutcraft, to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which are now in common use by Boy Scouts.

4. Scouting runs different programs for boys of different ages. These consist of Cub Scouts for boys ages 7-9; Webelos for boys making the transition into Boy Scouts; and Boy Scouts for boys ages 11-18. There is also a coeducational program called Explorers for young people ages 14-20. (Ex. C92) In order to participate in each of these programs, the youth, the volunteers and the professionals must ascribe to various promises, oaths, laws and codes appropriate to each program. (Ex. C92 pp. 11-12; Exs. R6-9)

5. Organizations such as churches, civil groups or groups of citizens obtain a charter from the Boy Scouts to sponsor an individual Scouting "unit." (Ex. C92) Each chartered organization has a representative on the CAC. Members at large are also elected to the Council. (See testimony of CAC board member Thomas Allen, Tr. 4/7/95 pp. 109-110)

6. The CAC is governed by an Executive Board which consists of 85 persons. (Ex. C80) The Executive Board carries out the practices and policies of the CAC, consistent with the directives of the Boy Scouts.

7. The Scouting program relies heavily upon volunteers. There are over 1,200,000 adult volunteers currently involved in Scouting nationwide. (Ex. C93) To assist the volunteers, Scouting hires approximately 3,500 professional Scouters. The entry level professional Scouting position is the District Executive. Within the CAC, there are 35 professional Scouters who assist the 6,000-7,000 volunteer Scouters. (Tr. 4/7/95 p. 149)

Richardson's Qualifications for Employment

8. The Complainant was involved in Scouting from the time he was 7 years old through age 21. He began as a Cub Scout in the second grade. (Tr. 4/5/95 p. 39) He matriculated through Webelos and then Boy Scouts at age 11. (Tr. 4/5/95 p. 46) Mr. Richardson continued in the Scouting program, achieving the highest rank of Eagle Scout in the minimum amount of time necessary. (Tr. 4/5/95 p. 69)

9. Richardson's involvement in Scouting did not stop there. He became an Assistant Patrol Leader, a Senior Patrol Leader and a Junior Assistant Scout Master. (Tr. 4/5/95 p. 87) He entered the Explorer program and became a Vigil Honor member of the Order of the Arrow. This honor, bestowed on only a small percentage of Scouts, indicates that the Complainant was seen by his peers, and by Scouting, to exemplify the message that Scouting was attempting to instill in its members. (Tr. 4/5/95 p. 91-102)

10. Richardson attended Scouting's National Leadership seminars and conventions. (Tr. 4/5/95 p. 107) In 1980 or 1981, he became a Scout Camp Commissioner in charge of 4-5 counsellors and adults. In this capacity, he assisted troop committees and helped in the running of the camp. (Tr. 4/5/95 p. 121)

11. As an Explorer, Richardson was elected Regional Explorer Chairman and sat on the National Cabinet of the Explorer program and served as Administration Chairperson of the National Explorer Conference. (Tr. 4/5/95 146-155). It is safe to say that during this period of the Complainant's life, at age 20, Scouting was his principle activity.

12. Throughout the Complainant's many years in Scouting, from Cub Scout days through Explorers, the issue of homosexuality and Scouting was nonexistent. Nothing was ever conveyed to the Complainant, either directly or indirectly, which emphasized the importance of heterosexuality or which even touched upon the morality or immorality of homosexuality. (Tr. 4/5/95 pp. 41-44, 45, 49, 86, 110, 136 & 162) Sexual orientation was a non-issue in Scouting. Respondent points out in its Objections that references are made in several Scouting publications regarding how to deal with "sexual experimentation." Additionally, in the Boy Scout Handbook, emphasis is placed upon sexual responsibility through marriage between a man and a woman. While this is undoubtedly true, there is no Scouting document nor any testimony which suggests that Richardson was ever taught or counselled that Scouting considered homosexuality to be immoral.

13. By the time the Complainant had reached his early 20's, he had come to recognize and feel comfortable with the fact that he was gay. (Tr. 4/5/95 p. 170)

14. After college, Mr. Richardson chose to seek employment in restaurants or bars which catered to the gay community. His first employment was in a restaurant in St. Louis called "The Silly Goose." In 1987-88, the Complainant worked at a facility called "The Body Club." This facility had a sauna and bathhouse. The Complainant conceded that he was aware that there was sexual activity between patrons which took place at the Body Club while he was employed there. (Tr. 4/5/95 p. 312-313)

15. When the Complainant moved to Chicago, he continued his employment in what might conservatively be called "risqué jobs." For example, he worked at "Manhandlers Saloon," a bar which showed videos of sexual acts and nudity. (Tr. 4/5/95 p. 311-312) Thereafter, he worked as a bartender for the "A.A. Meat Market Bar and Grill." As described rather reluctantly by the Complainant at the Hearing, the A.A. Meat Market was a bar which showed graphic videos of nudity, including oral and anal intercourse, for its patrons. (Tr. 4/5/95 p. 294 et seq.) The bar sponsored a variety of shows involving nudity, exhibitionism, sado-masochism demonstrations and other such events. Live shows involving the exposure of genitals and simulated sex acts probably took place. (Tr. 4/5/95 p. 304)

16. The Complainant sometimes worked bare-chested at the A.A. Meat Market or wore "skimpy leather clothing." (Tr. 4/5/95 p. 69) He also appeared in at least one advertisement for the bar, along with other employees, one of whom wore a Boy Scout shirt. (Tr. 4/5/95 p. 304)(4)

17. It was immediately after his employment with the A. A. Meat Market that the Complainant allegedly decided to apply for employment with the CAC.

Richardson's Inquiries About Employment

18. In the spring of 1992, Mr. Richardson found himself without a job after ownership of the A.A. Meat Market changed hands. According to the Complainant, it was then that he decided to get out of the "food and beverage" industry and seek employment with a not-for-profit organization. (Tr. 4/5/95 p. 176)

19. Around this same time, the Complainant saw an advertisement in the Advocate, a magazine which focuses on gay and lesbian issues, which sought contact from persons who had been Scouts and who were gay. The ad mentioned the Boy Scouts' position against homosexuality. (Tr. 4/5/95 p. 178)

20. Complainant called the number listed in the ad and spoke with Ken McPherson, one of the founders of an organization entitled "Forgotten Scouts." (Tr.4/5/95 p. 179) One of the purposes of "Forgotten Scouts" is to demonstrate that the Boy Scouts' policy barring employment of homosexuals is "wrong...and should be changed." (Tr. 4/5/95 p. 278) Mr. McPherson sent the Complainant literature regarding what he believed was discrimination on the part of the Boy Scouts.

21. About a month before contacting the CAC, Mr. Richardson attended a meeting with the United Way, along with Alan Shorer, another co-founder of Forgotten Scouts and Elliot Welsh, who was challenging the Scouts' policy regarding membership of atheists or agnostics. A purpose of the meeting was to attempt to convince the United Way that it should not continue to fund the CAC unless the CAC changed its policies regarding homosexuality. (Tr. 4/5/95 p. 227)

22. On May 22, 1992, Mr. Richardson called the CAC and asked to speak with the CAC's "public relations person." (Tr. 4/5/95 pp. 222-223 & 289) He was told by the receptionist that Susan Teplinsky was the Council spokesperson. (Tr. 4/5/95 p. 186) Mr. Richardson testified that a memorandum prepared by Ms. Teplinski that day, (Ex. C508), accurately depicted the conversation. The memorandum states, in relevant part:

I received a call this morning from Keith Richardson, leader of the local Forgotten Scouts. ...I told him there was no way the CAC would ever break with national policy....We discussed conflicting methodology of the group Queer Nation with his group, and he offered his assistance in quelling any protest....Keith explained that in light of the Randall decision in California, the group will try to work new legal maneuvers. To begin with, he is on his way to the Human Rights Commission to file a grievance against us for not employing homosexuals.

(Tr. 4/5/95 p. 288)

23. According to his testimony, Mr. Richardson asked Teplinski if there was a policy, "would they [the Boy Scouts] give a job to a gay man." (Tr. 4/5/95 p. 184) Her response was "no way." In fact, Mr. Richardson was aware of the Boy Scouts stated policy well before this conversation. He had read an account of his meeting with the United Way in the April 9, 1992 edition of the Windy City Times. In that article, Richardson was identified as a "Forgotten Scout." The article further stated that "The Chicago Area Council of the Boy Scouts of America will not even consider a reversal of its ban on gay participation, said Chicago Boy Scouts spokeswoman Susan Teplinsky." (4/5/95 Tr. 223, Ex. R.101)

24. When Mr. Richardson filed his complaint with the CCHR, he announced a press conference in the name of "Forgotten Scouts." (Tr. 4/5/95 p. 189) On July 2, 1992,

Richardson appeared on the John Calloway show, and was identified as "Regional Spokesperson for Forgotten Scouts." (Tr. 4/5/95 p. 231)

25. Mr. Richardson was asked at the Administrative Hearing whether he had left Scouting because he was uncomfortable with its policy with respect to homosexuality. He said "No." (Tr. 4/5/95 p. 228) This answer was impeached by the videotape of the Calloway show. During that broadcast, Richardson stated, "I left Scouting because I realized that I was gay...and that the organization had a policy against homosexuals." (Ex. R127)

26. The Complainant would have us believe that he was a *bona fide* job seeker when he called Ms. Teplinsky at the CAC and that the purpose of his call was to see if there were any job openings. (Tr. 4/5/95 p. 289; 4/6/95 p. 65) The Commission does not find this to be the case. Mr. Richardson never attempted to submit an actual application for employment with the CAC. He never asked to speak with anyone responsible for hiring professional staff nor did he ask for a job application or inquire whether there were any specific job openings. He did not discuss his past experience in Scouting in his conversation with Ms. Teplinsky. And he waited almost ten years from the time he left Scouting until he first attempted to seek professional employment with the CAC. It is clear that in calling Susan Teplinsky on May 22, 1992 and in identifying himself as a leader of the local Forgotten Scouts organization, Richardson was merely acting as a "tester" for the purpose of asserting a legal challenge to the Boy Scouts' hiring policy.

27. After the Respondent moved to dismiss the Complainant's complaint, and in an apparent attempt to cure a possible standing problem, the Complainant sent a new letter to the CAC, indicating that he was gay and attaching his resume which listed his Scouting experience in detail. (Tr. 4/5/95 pp. 291-293) Conspicuously absent from the resume was any information concerning his prior work experience. (Ex. C511; Tr. 4/5/95 pp. 292-293)

28. In response to the letter, CAC's Acting Director of Field Service, Mark L. Frankart, sent Complainant a copy of its revised policy regarding the hiring of "known and avowed homosexuals." (Ex. C510)

The Role of Religion in Scouting

29. It is undisputed that Scouting, as an organization, believes that its members should embrace religion as an important aspect of citizenship. Central to this belief is the Scouting Declaration of Religious Principles contained in the BSA By-Laws (Ex C91, Art. IX, Section 1, p. 17) which states:

The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God. In the first part of the Scout Oath or Promise the member declares, "On my honor I will do my best to do my duty to God and my country and to obey the Scout Law." The recognition of God as the ruling and leading power in the universe and the grateful acknowledgment of His favors and blessings are necessary to the best type of citizenship and are wholesome precepts in the education of the growing members. No matter what the religious faith of the members may be this fundamental need of good citizenship should be kept before them. The Boy Scouts of America, therefore, recognizes the religious element in the training of the member but it is absolutely nonsectarian in its attitude toward that religious training. Its policy is that the home and the organization or group with which the member is connected shall give definite attention to religious life.

30. To reinforce this belief in its youth participants, Scouting encourages its members to fully participate in the church, synagogue or mosque of their choice. This is done in a variety of ways, principle among which is the Religious Emblems program.

31. The Religious Emblems program provides Scouts with a merit badge type award for the successful completion of a program of religious endeavor designed by the Scout's religion. Although allowed to be worn on a Scout uniform, it is not a Scouting award. (Ex. C318 p. 624) It is administered not by the BSA but by the various religious organizations that sponsor Scout troops. (Ex. R51) The publications which set forth the religious study are designed, written and paid for privately by each religion. And a Scout need not participate in the Religious Emblems program in order to advance in Scouting.

32. Another way that Scouting encourages religious practice is by making it easy for Scouts to practice their faith during Scout camps or other Scouting events. This is done through the Chaplaincy program, which provides chaplains to minister to the spiritual needs of Scouts should they choose to avail themselves of them. Like the religious emblems program, the chaplains are provided by the religious organizations themselves, not by Scouting. And Scouts are not required to attend any religious service as a condition of Scouting. (Ex C227, p. 10)

33. Scouting has taken great pains to be officially nondenominational. Scouting literature makes it clear that Scouts are to respect all beliefs. Clause 2 in the Declaration of Religious Principles says that a Scout "respects the beliefs of others." Clause 3 says that when a unit is connected with a church or other religious organization, no member of another denomination should be required to take part in a religious ceremony unique to that organization.

34. Nondenominational invocations, benedictions and grace are often said at formal Scout functions such as camporees or jamborees. (Tr/ 4/6/95 pp. 155-156) However, no religious education is offered in any way as a formal part of Scouting. The Boy Scout Handbook instructs Scoutmasters that "it is not your role or responsibility to do religious counselling," suggesting that the Scoutmaster refer boys to their own religious leaders. (Ex. C325, p. 148)

35. There is no evidence that the CAC receives any direct funding from any religious organization. Rather, most all troops are funded locally by the sponsoring organizations. (See Exs. C521, C87, C88, C89, C94, C95, C96, C520)

36. Other than those activities set forth above, day-to-day Scouting programs are practically devoid of any religious content. Many witnesses testified that religion and religious practices were nonexistent throughout their Scouting careers. (See testimony of David Rice, 4/11/95 p. 229; Dr. Michael Cahn, 4/21/95 pp. 71-84; Judge Thomas Chiola, 4/11/95)

37. While almost 66% of all Scouting units in the Chicago area and nationwide are sponsored by religious organizations (see Ex. R159), a large number of units are sponsored by governmental organizations. For example, the Chicago Police Department sponsors 25 Scouting units with over 369 youth members. The Chicago Housing Authority sponsors 24 units representing 386 members. The Chicago Board of Education sponsors 24 units. The Chicago Fire Department, the City of Chicago Corporation Council's Office, and the State's Attorney's Office all sponsors units. (Ex. R159)

38. A considerable portion of the Administrative Hearing in this case consisted of representatives of various religions describing the role that Scouting plays in their individual ministries. (See testimony of the Boy Scouts National Executive Board member Jack H. Goaslind, a member of one of the governing bodies of the Church of the Latter Day Saints, Tr. 4/11/95 p. 11; John J. Thomas, former President of the National Association of Methodist Scouters, Tr. 4/7/95 p. 53; Father Roger Strebel, a member of the Executive Board of the National Catholic Committee on Scouting, Tr. 4/7/95 p. 100; and R. Chip Turner, a Baptist Minister and member of the Executive Board of the Association of Baptists for Scouting, Tr. 4/11/95 p. 76) Each of these witnesses opined that their religion viewed homosexuality as immoral and that they supported the Boy Scouts' employment policies which excluded homosexual persons from employment. Each offered his opinion that his religious organization's support for Scouting would be adversely affected if the CAC was required to comply with the Chicago Human Rights Ordinance.⁽⁵⁾

39. What became clear from the testimony is that certain religions have thoroughly embraced Scouting as a vehicle for assisting them in instilling values in youth. This does not, however, transform the nonreligious organization that they have embraced into a religious organization.⁽⁶⁾

40. Requiring the CAC to comply with the nondiscriminatory hiring requirements of the CHRO will have no effect whatsoever on the promulgation or advancement of any particular religion's beliefs or practices. If a particular religion decides not to sponsor a troop in the future because a District Executive might be gay, that religion is free to start its own Scout-like program and to carry on its beliefs and practices without any governmental intrusion.

41. The Commission rejects as speculative the notion that any of the large religious sponsors of Scouting, such as the Mormon

Church, the United Methodist Church or the Roman Catholic Church, would withdraw its sponsorship of Scouting units nationwide should the Chicago Area Council be required by local ordinance to refrain from discriminating on the basis of sexual orientation in the hiring of District Executives. (Testimony of John J. Thomas, Tr. 4/7/95 p. 78 and Goaslin, Tr. 4/11/95 p. 13) When Scouting allowed the admission of girls into the Explorer program, a move opposed by the Mormon church, there was no similar reaction from these sponsors. (Goaslin, Tr. 4/11/95 p. 17) Many of these same churches provide meeting areas and volunteers for the Girl Scouts -- an organization that openly includes homosexual individuals as both members and leaders.

42. There is no evidence that the CAC or the BSA holds itself out to its members, its funding sources, or the public at large as a religious organization. None of the Scout Handbooks describe the organization as "religious" in nature. There is nothing in the Articles of Incorporation or the By-Laws of the Boy Scouts or the CAC which describes itself as a religious organization. None of the recruiting materials which were introduced into evidence describe the organization as "religious" in nature. See, e.g., Ex. C167 "BSA Boy Scout Recruiting Video-1992"; Ex. C168 "BSA: The Time of Your Life"; Ex. C189 "Marketing to Today's Families."

43. In like manner, there is no evidence that the CAC's decision-making is controlled, or even influenced in any way, by any religious organization or organizations. The Respondent argues that the CAC is controlled by religious organizations because its Executive Board is made up of elected members from each chartered organization. According to Respondent, because 66% of the chartered organizations within the Council are religious organizations, the requisite religious control is established. This type of representation is also found at the national level. This argument, however, confuses the religious nature of the sponsoring units with the units themselves. The chartered organizations do not elect the executive board of the CAC, the membership of the CAC does. Clause 1 of By-Laws, Art. VI, sec. 7 (Ex. C91 p.15.) There is nothing in the By-Laws or Charter of the CAC or of the BSA that allows any religious organization to alter, control or formally influence CAC policies in any way.

The Respondent's Employment Policies and Practices

44. The Scouting program is made up of various components. At the local level, individual organizations such as churches, schools, fire departments, police departments or other groups of parents sponsor a troop. Sponsorship must be approved by the national organization. The troops within a particular geographic region are combined in what is known as a Local Council.

45. The hiring of District Executives is done on the Local Council level. (Rocus, Tr. 4/7/95 p. 8) The local Scout Executive reviews resumes and conducts a screening interview and an evaluation interview. Then, if the applicant is a viable candidate, an application is completed and forwarded, with references and a college transcript, to the regional office of the Boy Scouts of America. The applicant is further evaluated at that stage, given an SRI Interview and a criminal check is performed. If the applicant is found acceptable by the National organization, then he is eligible for possible employment with the local council. However, before becoming a "commissioned" employee, the candidate must successfully complete a 30-90 day probationary period and attend the BSA's National Executive Institute. (Rocus, Tr. 4/7/95 p. 11)

46. A uniform policy concerning the employment of professionals by local councils is set by the National Executive Board of the Boy Scouts of America. (Ex. R.13)

47. The BSA's current written policy concerning the hiring of homosexual individuals was promulgated in August 1993 and is as follows:

It is the policy of the [employing local council] to offer equal employment opportunity, training, development, advancement and pay on the basis of qualifications and ability without regard to race, color, national origin, sex, age, religious denomination, or handicap.

With respect to positions limited to professional Scouters or, because of their close relationship to the mission of Scouting, positions limited to registered members of the B S of A, acceptance of the Declaration of Religious Principle, the Scout Oath and the Scout Law is required.

Accordingly, in the exercise of its constitutional right to bring the values of Scouting to its youth members, B S of A will not employ atheists, agnostics, known or avowed homosexuals or others as professional Scouters or in other capacities in which such employment would tend to interfere with its mission of reinforcing the values of the Scout Oath and the Scout Law in young people.

The policy of the BS of A is to comply with nondiscrimination laws to the extent that they may constitutionally be applied to it.

(Ex. R13)

48. This policy was not in effect at the time the Complainant made his inquiry. The prior version of the BSA's employment policy (Ex. C357) which was in effect when Mr. Richardson called Susan Teplinsky, states as follows:

It is the policy of the [employing local council] to offer equal employment opportunity, training, development, advancement and pay on the basis of qualifications and ability without regard to race, color, national origin, sex, age religion, handicap, citizenship status (with respect to U.S. citizens or intending U.S. citizens) or any other criterion prohibited by applicable law.

An employee of the B S of A whose job requires direct involvement in its program must be willing to subscribe to the Declaration of Religious Principle, a fundamental precept of Scouting.

Total and continued adherence to this employment policy will guarantee compliance with the various laws against discrimination.

(Emphasis added.)

49. Prior to 1991, the BSA's written policy concerning homosexuals and Scouting was embodied in a March 17, 1978 internal memorandum (Ex. R10) to the Executive Committee Members only. It was in question and answer form and read, in relevant part:

March 17, 1978

To: Executive Committee Members

May an individual who openly declares himself to be a homosexual be a volunteer Scout leader?

A. No. We do not believe that homosexuality and leadership in Scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership

May an individual who openly declares himself to be a homosexual be employed by the BSA as a professional or non-professional?

A. BSA does not knowingly employ homosexuals as professionals or nonprofessional. We are unaware of any present laws which would prohibit this policy.

50. The above Memorandum was not openly distributed to the local councils or within the BSA.

51. Scouting has always required, as a condition of employment, that the Scouting professional agree to uphold and abide by the Scout Oath and the Scout Law.

52. The Scout oath is as follows:

On my honor I will do my best

To do my duty to God and my country

and to obey the Scout Law;

To help other people at all times;

To keep myself physically strong,
mentally awake, and morally straight.

(Ex. C90)

53. The Scout law states:

A Scout is TRUSTWORTHY. A Scout tells the truth. He keeps his promises. Honesty is a part of his code of conduct. People can always depend on him.

A Scout is LOYAL. A Scout is true to his family, friends, Scout leaders, school, national and world community.

A Scout is HELPFUL. A Scout is concerned about other people. He willingly volunteers to help others without expecting payment or reward.

A Scout is FRIENDLY. A Scout is a friend to all. He is a brother to other Scouts. He seeks to understand others. He respects those with ideas and customs that are different from his own.

A Scout is COURTEOUS. A Scout is polite to everyone regardless of age or position. He knows that good manners make it easier for people to get along.

A Scout is KIND. A Scout understands there is strength in being gentle. He treats others as he wants to be treated. He does not harm or kill anything without reason.

A Scout is OBEDIENT. A Scout follows the rules of his family, school and troop. He obeys the laws of his community and country. If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them.

A Scout is CHEERFUL. A Scout looks for the bright side of life. He cheerfully does tasks that come his way. He tries to make others happy.

A Scout is THRIFTY. A Scout works to pay his way and to help others. He saves for the future. He protects and conserves natural resources. He carefully uses time and property.

A Scout is BRAVE. A Scout can face danger even if he is afraid. He has the courage to stand for what he thinks is right even if others laugh at him or threaten him.

A Scout is CLEAN. A Scout keeps his body and mind fit and clean. He goes around with those who believe in living by these same ideals. He helps keep his home and community clean.

A Scout is REVERENT. A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others.

(Ex. C90)

54. Neither the Scout Oath nor the Scout Law make any reference to homosexuality. The Respondent's witnesses all rely upon their own personal interpretation of the words "morally straight" and "clean" which they believe proscribe homosexuality. These views were epitomized by the testimony of William McClaughlin, the Director of Personnel Administration for the National Council of Boy Scouts of America. Since

1983, Mr. McGlaughlin has been responsible for the administration of practices and procedures as they relate to the professional placement, selection and recruitment of professionals within Scouting. (Tr. 4/7/95 p. 7)

55. McCloughlin testified that the reference in the Scout Oath and Law to sexual orientation was in the words "morally straight" and "clean." (Tr. 4/7/95 p. 29) [\(7\)](#) He stated that in his opinion, as well as in his application of the BSA guidelines on a national level, all behavior related to homosexual orientation is "immoral or indecent." (Tr. 4/7/95 p. 39) He testified that he did not think that a gay man is able to devote himself to others, simply because he is gay. (Tr. 4/7/95 p. 59) When asked whether someone who said he was proud to lead a gay and lesbian parade and proud of the achievements of the members of the city's gay and lesbian communities should be affiliated with Scouting, he replied "I do not." (Tr. 4/7/95 p. 61) These remarks, unbeknownst at the time to Mr. McCloughlin, were made by Mayor Richard M. Daley, in 1989. Mayor Daley is on the Board of the Chicago Area Council of the Boy Scouts.

56. Like the words of the Constitution, or that of the Bible, the words of the Scout Oath and Scout Law take on different meanings for different people. The Respondent's witnesses equated the words contained in the Oath and Law with the status and practice of heterosexuality to the exclusion of all other sexual orientations. (Kulak testimony, Tr. 4/6/95 p. 168; McGlaughlin, Tr. 4/7/95 p. 29; Rocus, Tr. 4/7/95 p. 17; Thomas, Tr. 4/7/95 p. 71; and Strebel Tr. 4/7/95 p. 105) The Complainant and his witnesses (many of whom had been involved in Scouting for decades, both as volunteers and professionals) did not believe the words "morally straight" or "clean" to refer sexual orientation in any way. (Richardson, Tr. 4/5/95 p. 164; Chiola, Tr. 4/11/95 p. 216; Rice, Tr. 4/11/95 p. 239; and Kirkner, Tr. 4/20/95 p. 55)

57. All of the witnesses agreed, however, that there is no official Boy Scout publication which defines the terms "morally straight" and "clean" in the Scout Oath or the Scout Law to refer in any way to one's sexual orientation.

58. The official definition of these terms is found in the Boy Scout Handbook:

pages 550-551 - Meaning of the Scout Oath

...and morally straight

To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious

beliefs. The values you follow as a Scout will help you become virtuous and self-reliant.

Page 561 - Meaning of Scout Law

A Scout is clean. A scout keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals. He helps keep his home and community clean.

You never need to be ashamed of dirt that will wash off. If you play hard and work hard you can't help getting dirty. But when the game is over or the work is done, that kind of dirt disappears with soap and water.

There's another kind of dirt that won't come off by washing. It is the kind that shows up in foul language and harmful thoughts.

Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are targets of insults.

(Ex. C318)

The Role Opposition to Homosexuality Plays in Scouting

59. Opposition to homosexuality is not a significant, expressive goal of the CAC or of the Boy Scouts of America. None of the documents setting forth the purpose and/or goals of Scouting make any mention of sexual orientation. (See Exs. C79, C90, C91, C79, C93-96, C94). None of the recruiting materials distributed to Scouts or their parents deal with sexual orientation. (See Exs. R6-9, C113, C167-170). Mention of heterosexuality or homosexuality is conspicuously absent from any of the materials used to train Boy Scout leaders. (See C187, C194). The witnesses who testified about their personal training, including the Respondent's witnesses, admitted that no mention of sexual orientation was made throughout their many leadership training sessions. (Rice, Tr. 4/11/95 p. 229; Cahn, Tr. 4/21/95 pp. 71-74; and Kirkner, Tr. 4/20/95 p. 29) Others testified that when they or their children joined Scouting, no mention of homosexuality was made. (See Greenough, Tr. 4/20/95 pp. 16; Chiola, Tr. 4/11/95 pp. 213-214, 219; and Knudsen, Tr. 4/21/95 p. 155.) Finally, none of the Boy Scouts recruiting videos mention homosexuality. (See Ex. C167-170)

60. Scouting literature emphasizes the fact that discussions concerning sexuality should take place within the family setting, not within Scouting. See the Scout Masters Handbook, Ex. R22 at p.22:

You do not undertake to instruct Scouts in any formalized manner in the subject of sex and family life. The reasons are that it is not construed to be Scouting's proper areas and that you are probably not all qualified to do this.

61. Not a single witness testified that opposition to homosexuality was communicated to any of Scouts' youth members as any part of Scouting's curriculum. While we heard about many of the Scout activities, such as troop meetings, camporees, Order of the Arrow ceremonies and Eagle Scout ceremonies, there was nothing which indicated that discussions about sexuality were a part and parcel of Scouting.

62. Where sexuality is mentioned in Scouting literature, its context is on sexual responsibility. (Ex. C307 at p. 3784; C308 p. 4396; C318 p. 527) Scout Masters are instructed to advise Scouts to discuss any questions they have with a family member, spiritual advisor or a doctor. (See Finding of Fact #60)

63. It is particularly compelling that prior to 1992, the BSA's official policy regarding the hiring of homosexuals as professionals as well as the admission of homosexual members was not officially communicated to anyone outside of the Executive Board of the BSA. Many of the witnesses who had spent their entire lives in Scouting learned for the first time about the Scout's formal policy against hiring homosexuals by reading a magazine article in 1992 on the subject. (Rice, Tr. 4/11/94 p. 240 and Wirkner, Tr. 4/20/95 p. 53)

64. It is clear from the testimony that there is no shared value system with regard to the issue of the morality of homosexuality among participants in the Scouting movement. Different religious organizations sponsoring Scout units have differing views. (Compare the testimony of John Thomas, former President of the Association of United Methodist Scouters. Tr. 4/7/95 p. 42 and Father Roger Strobel, Executive Board Member of the National Catholic Committee on Scouting Tr. 4/7/95 p. 90 with the testimony of Pastor Daniel Stern, Pastor of the Nazareth United Church of Christ Tr. 4/12/95 p. 82, and Rabbi Alan Bregman, Tr. 4/12/95 p. 143). Indeed, within individual religious organizations there is no unanimity of thought. (Knudson, Tr. 4/21/95 p. 149-151) And as evidenced from the testimony of persons involved in Scouting for many years, such as Mr. Rice, Dr. Cahn and Rev. Knudson, there are many who are opposed to the restrictive employment policies espoused by the governing body of the BSA.

65. Much time was spent during the administrative proceedings hearing testimony of witnesses on the topic of whether a homosexual orientation was a moral value system, and if so, whether homosexuality is moral or immoral. For the purpose of this proceeding, however, the Chicago City Council has closed debate on the employment issue. Regardless of an employer's personal feelings, one's sexual orientation **may not** be taken into consideration when making an employment decision unless the employer is exempt from coverage under the CHRO. Richardson v. Chicago Area Council of Boy Scouts of America, CCHR No. 92-E-80 (August 8, 1994) p. 37, fn. 13 (where the Commission found that it need not and will not consider or rule upon what particular religions believe concerning homosexuality).

Myth and Prejudice

66. Professional Scouters and volunteers serve as role models for the youth they work with. (Ronald Kulak, Tr. 4/6/95 p. 164; William McGlaughlin, Tr. 4/7/95 p. 11) They represent the values of the Scout Oath and Scout law. (Richardson, Tr. 4/6/95 p. 42)

67. The BSA's discriminatory employment policy concerning sexual orientation appears to be derived, at least in part, from the false myths that Professional Scouters who are homosexual will influence young men to change their sexual orientation and will pose a predatory threat to molest young boys. Thus, the Scoutmaster's Handbook makes reference to practicing homosexuals when it discusses predatory sexual conduct. (Ex. R.22 p. 74)

68. According to Dr. Bryant Welch, whose testimony is fully credited, the accepted research and literature in the scientific community accepts the fact that sexual orientation is most likely set early in life, prior to age six. (Welch, Tr. 4/12/95 pp. 53-54) The sexual orientation of boys entering Scouting will not be changed by the knowledge that a District Executive happens to be gay. And most Scouts will have little if any direct contact with their District Executive, whose work is more closely associated with the volunteer Scouters.[\(8\)](#)

69. Dr. Welch is a Harvard-educated clinical psychologist who has been employed as senior policy advisor for the American Psychological Association since 1986. Dr. Welch has been involved in the study research on psychology relating to gays and lesbians for over 20 years. (Tr. 4/11/95 p. 18) Dr. Welch testified that studies have shown that children raised by gay parents are no more likely to identify as homosexual than those raised by heterosexual parents. (Tr. 4/12/94 p. 24).

70. With regard to the fear that homosexual employees will molest children, a study of predatory sexual behavior and pedophilia has shown that these types of behaviors are overwhelmingly characteristic of men who are heterosexual and insecure in their own sexual identities as heterosexual, rather than of men who are homosexual. (Welch, Tr. 4/12/95 pp. 24-29) The Respondent's numerous objections to this conclusion are based upon scientific journal articles which were neither introduced into evidence nor utilized at the Hearing to attempt to impeach Dr. Welsh.[\(9\)](#)

71. In contrast to Dr. Welsh's testimony, the Commission rejects the testimony offered by Dr. Ricky L. Slavins on behalf of the Boy Scouts. Slavins, an Assistant Professor of Sociology at Radford University in Radford, Virginia, advanced his opinion that forcing the CAC to hire an avowed homosexual would minimize the "normative values" being advanced by Scouting and would somehow influence the sexual behavior of the Scouts. (Tr. 4/11/95 p. 134) Dr. Slavins' opinions were unsupported by any research studies or publications.[\(10\)](#)

The Compelling Governmental Interest

72. The City of Chicago has a compelling governmental interest in prohibiting discrimination in employment based upon sexual orientation. In 1994, according to its Director, Jerrilyn Fields, the Anti-Violence Project at Horizons Community Services reported 177 incidents of hate crimes against gays and lesbians in the Chicago area. (Ex. C465 p. D-1) Two of these hate crimes resulted in death. (Tr. 4/20/95 p. 179) In contrast, only 31 of these incidents were reported to the police.

73. Nationwide, violence against gays and lesbians is commonplace. Horizons reported over 4,195 incidents of hate crimes based upon sexual orientation in 1994, a 6% increase over the previous year. In Chicago, where a human rights ordinance is in place, Horizons reported 177 hate motivated incidents against homosexual individuals, a 13.2% decrease from 1993. (Ex. C465 p. 2) The large number of violent incidents against homosexual individuals may be attributable to the fact that a greater stigma has been placed on homosexuality by segments of society, there are fewer legal protections for gay people and fewer negative psychosocial reactions to the offenders. (Tr. 4/20/95 p. 239)

74. Dr. Anthony R. D'Augelli, professor of clinical and community psychology at Penn State University, is a recognized expert studying the effects of discrimination on gays and lesbians and on communities as a whole. His credentials were impressive as was his knowledge of the subject area. The Commission fully credits his testimony.

75. Dr. D'Augelli has published articles on the Victimization of Lesbian, Gay and Bisexual Youths, the Suicidology of Lesbian, Gay and Bisexual Youths and has reviewed other studies and writings on the same subject. (Tr. 4/20/95 p. 124).

76. The presence of a human rights ordinance which outlaws discrimination based upon sexual orientation will result in less crime and violence against gays by establishing a societal "norm" which condemns discrimination. (Tr. 4/20/95 p. 175).

77. Gay and lesbian individuals who experience discrimination are likely to suffer severe mental health consequences as a result of their victimization. The effect is even more profound upon adolescents. (Tr. 4/20/95 p. 189) A human rights ordinance gives these individuals greater access to employment and services, mitigates against the likelihood that they will be victims of hate crimes and thus enhances their mental health. (Tr. 4/20/95 p. 171)

78. In the absence of employment protections based upon sexual orientation, individuals become hypervigilant about their privacy, fearing exposure and the reaction of others. This creates a chronic stress syndrome and contributes to incidents of psychiatric problems. (Tr. 4/20/95 pp. 179 & 199)

79. The City of Chicago has a compelling interest in reducing violence, in reducing health care problems within the community and in providing employment opportunities for all of its citizens.

IV. DISCUSSION

In § 2-160-010 of the Chicago Human Rights Ordinance, the City Council declares and affirms:

that prejudice, intolerance, bigotry and discrimination occasioned thereby threaten the rights and proper privileges of the city's inhabitants and menace the institutions and foundation of a free and democratic society; and that behavior which denies equal treatment to any individual because of his or her race, color, sex, age, religion, disability, national origin, ancestry, sexual orientation, marital status, parental status, military discharge status, or source of income undermines civil order and deprives persons of the benefits of a free and open society.

Section 2-160-030 of the CHRO makes it unlawful to "directly or indirectly discriminate against any individual in hiring because of sexual orientation...."

A. Method of Proof

There are two ways in which a complainant may attempt to prove that he or she was discriminated against in an attempt to seek employment: through direct evidence or through indirect evidence of discriminatory animus. The latter approach has come to be known as the McDonnell Douglas "shifting burden" analysis. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

The shifting burden approach provides a fluid formula which is meant to assist the trier of fact in arriving at a conclusion as to whether or not a particular employment decision was "motivated" or "influenced" by a discriminatory factor, such as race, sex, national origin, or as in this case, sexual orientation. Under this indirect method of proof, the complainant must initially satisfy a threshold burden of showing a *prima facie* case. In a failure to hire case, that typically requires a showing that the complainant: (a) belongs to a protected class; (b) applied and was qualified for an available position; (c) was rejected; and (d) the employer filled the position with a person not in the protected class. Mark v. Truman Middle College, CCHR No. 91-E-7 (Sept. 9, 1992). The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the refusal to hire. Then, in order to prevail, the employee must show that the articulated reason is pretextual. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); R.R. Donnelly & Sons v. Human Rights Commission, 219 Ill.App.3d 789 (1991), appeal denied, 143 Ill.2d 648 (1992).

The purpose of the shifting burden analysis is to suggest, **in the absence of direct evidence**, that the decision-maker was biased. For, the reasoning goes, if the job applicant could show that he met the elements of the *prima facie* case, he should have been hired unless there was either discriminatory intent or some other legitimate, nondiscriminatory reason. Conversely, if a complainant cannot show that he met one of the elements of his *prima facie* case (for example, he never applied for the job or he was not qualified for the particular position), no inference of discrimination can be drawn since it is as or more likely that the failure to apply for the job or the failure to have a particular qualification caused the rejection. And if the reason that is articulated by the employer is false (meaning it did not truly motivate the refusal to hire), then the trier of fact may, but is not compelled to find, that the employer was motivated by the illegal reason. St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

Where there is direct evidence of discrimination, however, there is no need to employ a shifting burden analysis. Randle v. LaSalle Telecommunications, Inc., 876 F.2d 563, 568 (7th Cir. 1989); Kindred v. Human Rights Commission, 180 Ill.2d 766 (3rd Dist.

1987); Cooper & Ashmon v. Parkview Realty, CCHR No. 91-FHO-48-5633 (Aug. 26, 1992). If the direct evidence is believed, there is no need to resort to inferences. The illegality of the act is proved directly by reference to some policy, statement or action of the respondent. Thus, the failure of a complainant to prove one or more of the elements of a *prima facie* case is irrelevant to the ultimate determination of liability, though it may prove relevant to issues of standing or damages. See, e.g., EEOC v. G-K-G Inc., 39 F.3d 740 (7th Cir. 1994) (holding that a plaintiff need not prove he was meeting his employer's reasonable expectations at the time he was terminated since plaintiff presented direct evidence of discriminatory animus.)

Mr. Richardson has proven by direct evidence that he was not considered for employment by the Respondent solely because of his sexual orientation. Indeed, the evidence is overwhelming. When he inquired about being hired as a Professional Scouter and identified himself as being gay, according to Ms. Teplinsky's memo: "I told him there was no way the CAC would ever break with national policy." (Finding of Fact #22) She was obviously referring to the BSA's written policy excluding homosexual individuals from employment as District Executives.

When Richardson, fearful of a standing problem, made a written job inquiry of the CAC attaching his resume, the response from the CAC's Acting Director of Field Service,

Mark L. Frankart, was to send Complainant a copy of its revised policy regarding the refusal to hire "known and avowed homosexuals." (Finding of Fact #28)

The Respondent's argument at page three of its initial brief that Richardson failed to prove a *prima facie* is flawed. The cases cited by Respondent analyze liability under the shifting burden analysis (solely or as an alternative to direct evidence) and in that context state that a complainant must first satisfy each of the *prima facie* elements. See Akangbe v. 1428 West Fargo Condominium, CCHR No. 91-FHO-7-5595 (Mar. 25, 1992) at 13 (setting forth certain *prima facie* factors).

Since the instant case is based upon direct evidence, the McDonnell Douglas shifting burden analysis is inapposite. Accordingly, the *prima facie* evidence cases cited by Respondent, Lee v. Loyola University, 668 F. Supp. 1187 (N.D. Ill. 1987); Mister v. Illinois Central Gulf Railroad Co., 639 F. Supp. 1560 (S.D. Ill. 1986), aff'd in relevant part, 832 F.2d 1427 (7th Cir. 1987); R.R. Donnelley v. Human Rights Commission, 219 Ill.App.2d 789 (1991), appeal denied, 143 Ill.2d 648 (1992); and Village of Oak Lawn v. Human Rights Commission, 133 Ill.App.2d 221 (1st Dist. 1985) have no relevance. See King v. Houston/Taylor, CCHR No. 92-H-162 (March 16, 1994) p.11 (finding it

not necessary to use McDonnell-Douglas when there is direct evidence of discrimination). As noted above, the instant case does not deal with "presumptions" or "inferences." The Respondent's discriminatory motives are as plain as day and are not denied. Whether Mr. Richardson is entitled to any relief becomes a question of standing and defenses. These are addressed below.

B. Standing

Richardson claims that at the time he called Ms. Teplinsky, he had decided to get out of the "food and beverage industry" and seek employment with a not-for-profit organization such as the Boy Scouts. The Commission has rejected that contention. There was nothing about Mr. Richardson's testimony, his prior work history or even his background in the Boy Scouts ten years earlier which supports the proposition that he was actually seeking a job with the CAC. And there are plentiful facts in support of the theory that Mr. Richardson was merely attempting to set up the Boy Scouts for a challenge to its employment policy. (See Finding of Fact #26.)

Had Richardson been truly seeking employment as a Professional Scouter, he might have submitted a job application, prepared a resume and would have attempted to get his foot in the door before revealing his sexual orientation.⁽¹¹⁾ Mr. Richardson's call to Ms. Teplinsky seeking employment came only after he had seen an advertisement in the Advocate concerning the BSA's policy against homosexuality, talked with one of the founders of Forgotten Scouts and reviewed its literature. (Tr. 4/5/95 pp. 178-179) Then, a month before calling Teplinsky, Richardson met with Alan Shorer, another co-founder of Forgotten Scouts, and Elliot Welsh, who was already in litigation with the Boy Scouts regarding its policy of refusing to admit agnostics to Scouting. They then lobbied United Way to stop its funding of the CAC if its policies regarding homosexual individuals were not changed. (Tr. 4/5/95 pp. 191-195) He also asked to speak to the CAC's spokesperson, not the person in charge of hiring. (See Finding of Fact #22)

Despite his denials, the Commission finds that Mr. Richardson, who publicly identified himself as a "Regional Spokesperson for Forgotten Scouts" (Tr. 4/5/95 p. 231), had no true interest in working for the CAC. What he wanted was the right to be accepted or rejected based upon his qualifications or lack of qualification, not based upon his sexual orientation. Since he was well aware that once he revealed his sexual orientation he would not be considered for employment, his call to Ms. Teplinsky was designed solely as a vehicle to legally challenge the CAC's hiring policy. And it worked.

The Complainant has objected to the finding that he was acting as a "tester" when he

contacted the Chicago Area Council. He argues that, at a minimum, he was acting with the dual purpose of obtaining employment and challenging a discriminatory practice. Complainant's Objections at p. 3. However, this argument is undermined by the fact that there are few, if any, true indicia of a *bona fide* job applicant evident in the record. The determining factor in this regard, however, was the Complainant's lack of credibility as to this issue. His denial that he stated on the Calloway show that he left Scouting because he was uncomfortable with its policy toward gays, his lack of candor in disclosing his past work history and his denial that he was purporting to represent Forgotten Scouts when meeting with United Way all contribute to the conclusion that Mr. Richardson was hiding his true motives in contacting the CAC.[\(12\)](#)

Because the Complainant was not actually seeking employment with the CAC, the question must be raised whether he has standing to challenge the CAC's hiring policy.

In interpreting Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e), the federal equivalent of our Ordinance, the Equal Employment Opportunities Commission has concluded as follows:

The Commission concludes that testers are aggrieved parties under Title VII where they have been unlawfully discriminated against when applying for employment. Whether or not a person intends to accept a position for which he/she applied, he/she has a statutory right, pursuant to Title VII § 703(a)(1) not to have been rejected on the basis of race, color, religion, sex or national origin. **The discriminatory rejection itself constitutes an injury, even though the tester may not have suffered the loss of a real employment opportunity or any monetary loss.**

EEOC: Policy Guide on Use of 'Testers' in Employment Selection Process issued Nov. 20, 1990 (emphasis added).

Standing under civil rights statutes has always been broadly construed in order to effectuate the goals of those statutes. Complainants have been allowed to act not only on their own behalf, but also as private attorneys general to vindicate important societal policies embodied in the civil rights laws. See Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 211 (1972); Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir. 1990). The policies set forth in the CHRO by the City Council are no less important and should be equally interpreted for standing purposes.

The use of testers to challenge discriminatory employment practices as well as discriminatory housing practices is long standing. In Havens Realty Corp. v. Coleman,

455 U.S. 363, 373 (1982), the Supreme Court held that testers sent by civil rights organizations to apply for housing which they were not actually seeking had standing to sue when misrepresentations were made to them because of their race. Parents of African American students have been held to have standing to challenge the tax-exempt status of racially exclusive private school. Coit v. Green, 404 U.S. 997 (1971). African Americans have had standing to challenge a state's provision of textbooks to segregated schools. Norwood v. Harrison, 413 U.S. 554 (1974). These plaintiffs were not seeking a specific benefit for themselves. Rather, they were seeking to remedy the degrading, stigmatizing effects which the discriminatory practice had on a class of citizens, of which they were a part.

The instant case is similar to that of Lea v. Cone Mills Corp, 301 F. Supp. 97 (M.D.N.C. 1969), *affirmed in part*, 438 F.2d 86 (4th Cir. 1971). There, a group of African-American women were organized to apply for jobs with several manufacturing plants which were known to refuse to hire blacks. Two of the plaintiffs were told in their interview that the plant did not hire "Negro females." There were no job openings when they applied and the two plaintiffs were not actually seeking employment. Nevertheless,

the court concluded that the company had violated the plaintiffs' rights under Title VII because the plaintiffs had not been "considered" for employment because of their race. Id. This was a sufficient injury in fact to allow them to maintain the action and to warrant injunctive relief. The fact that they were not *bona fide* applicants was held relevant only to the remedy awarded.[\(13\)](#)

Mr. Richardson has suffered an injury by virtue of the Respondent's refusal to consider him for employment as a District Executive solely because of sexual orientation. By equating homosexuality with immorality, the CAC has effectively told Mr. Richardson, and all gay and lesbian citizens of Chicago, that they are third class citizens deserving of scorn rather than respect. The injury to one's self worth, as described both by the Complainant and as explained by Dr. Augelli, is certainly palpable enough to bestow standing upon Richardson to redress his own injury and, under the private attorney general theory, to bring this action to redress the rights of gay men as a class. As he has demonstrated, Richardson has a sufficient personal stake in the outcome of this controversy as to assure the concrete adverseness which sharpens the presentation of issues. Baker v. Carr, 369 U.S. 186, 204 (1962).

Once an employer openly communicates its unwillingness to hire someone because of his or her race, sex, sexual orientation or other protected characteristic, there is nothing

to be gained by requiring an applicant who is directly informed of the policy by the respondent to file a formal application and experience a more humiliating rejection. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 365-66 (1977). The Respondent's admitted employment policy acted as a signpost stating "No Gays Need Apply." Richardson didn't. Why should he? It would have been a futile gesture. See Richardson v. Chicago Area Council, CCHR No. 92-E-80 (Oct. 30, 1992)(finding Richardson's failure to formally apply and be rejected for employment was not fatal to his case under the "futile gesture" doctrine).

The Respondent argues in its Objections that tester standing is a creature of statute and is not conferred upon a complainant by the Chicago Human Rights Ordinance. In addition, while disagreeing with the EEOC's Guidelines on tester standing, the Respondent argues that at a minimum, a tester has the burden of "appearing" qualified in order to have standing to sue. Respondent also argues that unlike the Fair Housing Act, which confers upon both housing seekers and testers a statutory right to truthful information, the Chicago Human Rights Ordinance confers no such right.

Civil rights statutes are interpreted broadly in order to effectuate their remedial purpose. Trafficante v. Metropolitan Life Insurance Co. 409 U.S. 205 (1972). Our Ordinance is no exception. The CHRO explicitly states that it is to be "liberally construed for the accomplishment of the purpose hereof." CHRO § 2-160-110; see, e.g., Seyferth v. Peco, Inc. et al., CCHR No. 94-E-186 (Jan. 15, 1995). Moreover, the operative provision regarding unlawful discriminatory employment practices, Section 2-160-030, provides that "No person shall directly or indirectly discriminate against any individual" (Emphasis added.) Thus, where an individual is discriminated against and suffers an injury as a result, the fact that he or she was not actually seeking employment is not

relevant except for the purpose of damages. Also, many job applicants apply for work in order to "test the waters" so that they may decide whether or not to change jobs. Since the purpose of the CHRO, as stated by the City Council, is "to assure that all persons within its jurisdiction shall ... be protected in the enjoyment of civil rights, and to promote mutual understanding and respect among all who live and work within this city," § 2-160-010, it would defeat the purpose of the CHRO if its coverage was restricted to *bona fide* job seekers.

C. After-Acquired Information

The Respondent argues that Richardson is not entitled to any relief because information discovered by the CAC after the filing of his complaint (and arguably concealed by the

Complainant) would undoubtedly have resulted in Richardson being rejected as a candidate for employment by the Respondent. It is true that had the Respondent been aware of Mr. Richardson's seamy past employment in clubs where patrons engaged in sex acts and bars where pornographic videos were shown, it would never have hired him as a Professional Scouter. This information was bound to have been discovered sooner or later during the hiring process since each applicant's work history, including his responsibilities at each prior place of employment, is discussed in detail. (Tr. 4/7/95 pp. 142-143)(14) However, because of the Respondent's discriminatory hiring policy, it never even considered these factors because it preemptively rejects all gay applicants for Professional Scouting positions simply because of their sexual orientation.

In McKennon v. Nashville Banner Publishing Company, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995), the Supreme Court considered what the effect is on liability (assuming, as the Court did, that the employer had been motivated by discriminatory animus) when facts are discovered which, if previously known, would have resulted in the same challenged conduct. In McKennon, the employee was terminated allegedly because of her age. After the employee was fired, the employer learned of information which would have justified the discharge for non-discriminatory reasons. The employer claimed that it should not be found liable for having discriminated against the employee since the employee would have been terminated anyway had the disqualifying information been previously known and acted upon. The Supreme Court rejected this argument. Its reasoning would apply in a hiring case.

The Court began its analysis by examining the shared purpose of both the ADEA and Title VII which is "the elimination of discrimination in the workplace." Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979). The Court stated:

Congress designed the remedial measures in these statutes to serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate so far as possible, the last vestiges' of discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975).

McKennon, 115 S.Ct. at 756. The Court noted that these civil rights statutes contain two objectives: Deterrence of discriminatory conduct for oneself and others and compensation for injuries caused by the prohibited discrimination. The objectives of the law would not be furthered if after-acquired evidence of wrongdoing operates to bar all relief for an earlier violation of the Act.

Unlike a "mixed motive" case (see Mt. Healthy City Board of Education v. Doyle, 429

U.S. 274 (1977), where an employer actually relied on **both** an illegal reason and a legal reason), in a after-acquired evidence case, the employer violates the law before it ever knows of the facts which might have justified a similar decision. That is exactly the situation which is presented in the instant case. The Court rejected the conclusion that after-acquired evidence of wrongdoing, which would have resulted in discharge anyway, bars an employee for any relief under the ADEA. The Court held that "... a violation of the ADEA cannot be so altogether disregarded." McKennon, 115 S.Ct. at 884.

The Respondent's preemptive rejection of Mr. Richardson as an applicant had nothing to do with his past employment or his alleged activism with Forgotten Scouts. For all the CAC knew when it informed Richardson of its hiring restriction, he could have been a Nobel Peace Prize winner on leave from Mother Theresa's convent in India. It would defeat the purpose of the CHRO if an employer can escape liability by relying upon information it did not have in its possession when it made the decision. Accordingly, the Commission follows the Supreme Court's reasoning in McKennon: After-acquired evidence will affect damages but not liability. This does not mean, as we shall see in Section V of this opinion, that this information will not serve to limit the damages which Richardson may obtain.

The Respondent argues that McKennon does not apply to a situation, as here, where the employer would have discovered the disqualifying information outside of the litigation had the job application been processed. Citing Turnes v. AmSouth Bank, N.A. 36 F.3d 1057, 1062 n.9 (11th Cir. 1994), the Respondent argues that Richardson would not have been hired even absent discrimination and therefore his claims must fail because he has not been harmed by the illegal conduct. In Turnes, the employer was allowed to argue that had the plaintiff progressed through the hiring process, his bad credit history would have been discovered and he would have been rejected for employment. Thus, the employer argued that it could avoid liability entirely by showing that the plaintiff was not injured by its discriminatory conduct. But as we have seen, Mr. Richardson has been harmed by the Respondent's refusal to even *consider* him because of his sexual orientation -- a fact not presented in Turnes. Additionally, it is important to note that Turnes was decided before McKennon and did not have the benefit of the Supreme Court's reasoning. It would subvert the purpose of the CHRO to allow an employer to discriminate at the inception of the hiring process and then avoid liability by conducting a post-discrimination hiring inquiry in order to seek out disqualifying information.

The Respondent objects that, even if standing is granted to testers (a point it does not concede), "the tester must nevertheless be qualified in order to establish standing."

(Respondent's Objections at p.50) The purpose of the EEOC's statement that a tester must appear qualified has nothing to do with standing. Rather, its purpose is to ensure that the tester has controlled for the objective qualifications of a job so that, in an indirect evidence case, an inference can be drawn that the tester's race, and not his or her qualifications, resulted in the adverse job action. No such problem is presented in a case such as this where the employer does not even consider the qualifications of an applicant who is gay.

Finally, the Respondent contends that Richardson has no standing to pursue prospective injunctive relief since he cannot show that he will suffer cognizable injury from the continued application of the CAC's employment policies. (Respondent's Objections at p. 50) Unlike City of Los Angeles v. Lyons, 461 U.S. 95, 107 (1983), where it was speculative to project whether the plaintiff would be accosted by the police and out into an illegal choke hold in the future, here it is clear that Mr. Richardson's application for employment would be repeatedly rejected solely because of his sexual orientation if the CAC's employment policies remain in place. The CHRO grants the Commission specific authority to redress violations of the Ordinance with cease and desist orders where appropriate. Municipal Code of Chic., §2-120-510(l). This broad grant of authority does not depend upon a finding that the individual complainant will reapply and again be discriminated against. It is sufficient to find that in the absence of injunctive relief, the illegal conduct will continue. See Nash/Demby v. Sallas Realty & Sallas, CCHR No. 92-H-128 (May 18, 1995); see also City of Chicago et al. v. Matchmaker Realty Co., 982 F.2d 1086 (7th Cir. 1992).

We now turn to the defenses raised by the Respondent.

D. The Respondent Is Not a Religious Organization Exempt From Coverage under the CHRO

As the Commission held in its Order of August 8, 1994 in this case, an organization is a "religious organization" within the meaning of the CHRO if one of its "primary purposes" is religious or if it is "closely tied" to a religious organization, Richardson, CCHR No. 92-E-80 (Aug. 8, 1994) at p. 8, citing Ghoston v. Mercy Hospital, CCHR No. 91-E-219 (Dec. 30, 1992) and cases cited therein. See EEOC v. Townley Engineering and Manufacturing Co., 859 F.2d 610, 618 (9th Cir. 1988) ("All significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious. Only when that is the case will the corporation be able to avail itself of the exemption."). See also NLRB v. Hanna Boys Center, 940 F.2d 1295 (9th Cir. 1992); Speer v. Presbyterian Childrens Home, 824

S.W.2d 589 (Tex. App. Dallas 1991). The respondent has the burden of proving that it is exempt from the CHRO. Richardson, CCHR No. 92-E-80 (Aug. 8, 1994) pp. 6 & 7.

The fact that an organization may legally require as a condition of membership that its members believe in God does not transform that organization, without more, into an exempt religious organization. Neither Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir. 1993), *cert. denied*, USSC No. 93-597 (Dec. 6, 1993) nor Sherman v. Community Consolidated School District No. 21, 1993 U.S. App. LEXIS 27718 (7th Cir. October 25, 1993) hold otherwise.

Nevertheless, Respondent is correct when it argues that the nondenominational nature of an organization does not render it "nonreligious." See Lee v. Weisman, 112 S.Ct. 2649, 2656 (1992) and Engle v. Vitale, 370 U.S. 421 (1962). Thus, the Boy Scouts would be exempt as a "religious organization" if one of its primary purposes was "religious" in nature, though nondenominational in affiliation. However, none of the cases cited by Respondent requires that we accept an organization's self-designation as "religious" without further inquiry.

As stated in the Commission's August 8, 1994 decision on the Motion to Dismiss, the case cited by Respondent most relevant to our inquiry is E.E.O.C. v. Kamehameha Schools, 990 F.2d 458 (9th Cir.), *cert. denied*, 114 S.Ct. 439, 126 L.Ed.2d 372 (1993). The focus of inquiry in Kamehameha was whether the general picture of the Schools reflected a primarily secular or a primarily religious orientation. Only if the latter was true did Title VII's religious exemption apply. [\(15\)](#)

The Kamehameha court stated that the schools were not exempt under Title VII because the religious characteristics of the schools consisted of "minimal, largely comparative religious studies, scheduled prayers and services, quotations of Bible verses in school publications and the employment of nominally Protestant teachers for secular purposes." Kamehameha, 990 F.2d at 461. It thus concluded that the schools were essentially secular institutions operating within an historical tradition that includes Protestantism and that the schools' purpose and character was primarily secular, not primarily religious.

Similarly, in Ghoston, the Commission ruled that Mercy Hospital was not a religious organization because its primary purpose was secular -- the provision of health services. CCHR No. 91-E-219 (Dec. 30, 1992). This, despite the fact that Mercy referred to itself as a "healing community of Jesus Christ" and held Mass twice per day for those who wanted to attend. Id.

We must make a similar inquiry here as was made in Ghoston and Kamehameha to determine whether CAC is a religious organization exempt under our Ordinance.

1. The CAC's Primary Purpose Is Not Religious.

a. None of the CAC's Articles of Incorporation, By-Laws, Handbooks, Rules or Regulations nor its Declaration of Religious Principles

Demonstrates that Its Purpose Is Primarily Religious or that It Adheres to a Primarily Religious Mission.

None of the documents which describe the purpose or mission of Scouting emphasize the primacy of religious training or content. Rather, the BSA Charter, the CAC By-laws and the myriad of Scouting publications emphasize promoting the ability of boys and young men and women to do things for themselves and others, training them in Scoutcraft, and teaching them patriotism, courage, self-reliance and kindred virtues. (Finding of Fact #42)

The CAC's "Declaration of Religious Principles" does require that a Scout recognize a belief in God. However, it is explicitly nonsectarian, teaches tolerance and freedom of choice and emphasizes that "the home and the organization or group with which the member is connected shall give definite attention to religious life." Nothing in the CAC's (or the BSA's) documents indicate that religion is a primary focus. (Findings of Fact #29, 31, 32, 42 & 43)

b. Religion Plays a Minimal Role in the CAC's Daily Activities.

An occasional invocation and benediction during special ceremonies, Grace before meals and the availability of a chaplain during Camporees or Jamborees -- that is the primary role that religion plays in the regular activities of Scouting. In terms of relative time spent on matters which could even arguably be called religious during official Scouting functions, it appears safe to say that this time does not constitute more than a minimal percentage of the activity time of a Scout. (Findings of Fact #34 & 36)

The Respondent makes much of the fact that the Religious Emblems program requires religious study and achievement. However, this program is clearly not run by Scouting. It is a creature of each individual religion. Its publications are created and paid for by the individual religion, as are the emblems themselves. Advancement through the ranks of Scouting is not dependent upon achievement of a religious emblem. Indeed, Scouting

appears to have gone out of its way to leave the promotion of religious activities to the Scout's family and church, synagogue or mosque. There appears to be no danger that government sponsorship of a Scouting unit will result in constitutional entanglement with religion.

What is conspicuously absent are any of the traditional indicia of a religious organization, many of which were present in the Kamehameha Schools case. For example, Scouting engages in no religious instruction. Attendance at religious services is not mandatory. Secular songs, hymns or prayers do not play a role in membership meetings. And religious symbols are not made a part of Scouting ritual.

c. Scouting Does Not Hold Itself Out to be a Religious Organization.

None of Scouting's legal documents, such as its Charter, Articles of Incorporation, By-laws or Annual Reports describe itself as a religious organization. And its recruitment pamphlets and videos make no mention of Scouting as a primarily religious organization. And Scoutmasters are told that they may not hold themselves out as religious counsellors. (Finding of Fact #34)

d. Professional Scouters Do Not have Religious Duties.

Unlike the hiring of a clergyman or even a lay teacher within a religious school, the role of a Professional Scouter has little to do with any religious mission. District Executives must work with Scouts and primarily with the adult volunteers in all aspects of Scouting. Yet they need no other religious training or commitment other than a basic commitment to Scoutings Declaration of Religious Principles.

2. The CAC is Not Closely Tied to Religious Organizations So As to Render It Exempt As a Religious Organization.

In three sentences in its initial brief, Respondent argues that it is "closely tied" to religious organizations so as to render it exempt from the CHRO by virtue of the fact that a majority of the Scout units in the CAC are sponsored by a religious organization and because a Religious Relationships Committee is allowed to review Scouting literature and publications. Utilizing similar reasoning, one could argue that Scouting is an educational institution, a housing authority or a police department.

Because of the admirable virtues which Scouting embodies, many religions have promoted Scouting to their youth. Religious organizations sponsor 66% of Scouting units in the CAC. Of course, that means that 34% of all Scouting units are sponsored by

organizations totally removed (sometimes as required by law) from religious activities.

Despite the attractiveness of Scouting to religious organizations, for the reasons set forth below, the Commission does not find that Scouting is so closely tied to any or all of these religions as to render it exempt under the CHRO. Accord Pool v. Boy Scouts of America and the National Capital Area Council, No. 93-030-PA, Department of Human Rights and Minority Business Development of the District of Columbia, April 18, 1995 (holding that the Boy Scouts are not exempt as a religious organization). As described in Ghoston (and the cases cited therein) an entity is "closely tied" to a religious organization if it is controlled by that organization, funded by it or affiliated with it. See also Steen v. Episcopal Charities, CCHR No. 94-E-96 (Apr. 25, 1995).

a. The CAC is Not Controlled by Religious Organizations.

When a District Executive is hired, he is employed by the Chicago Area Council, not by a local sponsoring Scouting unit (which may or may not be a religious organization). The CAC is made up of representatives of each sponsoring unit who elect an Executive Council from its members. There is no requirement, however, that the representative from a unit sponsored by a church, synagogue or other religious organization be affiliated in any way with the religious organization or that it promote the views or agenda of that organization.

While the CAC is obviously sensitive to the official views of the various religions which sponsor its units (as evidenced by its concern that certain religions might withdraw sponsorship if it was required to comply with the CHRO), that sensitivity does not equate to control.⁽¹⁶⁾ As noted in Finding of Fact #43, nothing in the By-laws or Charter of the CAC or the BSA demonstrates that any religious organization can alter, control or formally influence the CAC.

b. The CAC is Not Funded by Religious Organizations.

The Respondent did not present any evidence to demonstrate that it receives funding, in whole or in part, from religious organizations. Testimony and exhibits revealed that the CAC's funding comes primarily from foundations and corporate and community fund raisers. On a local level, each sponsoring unit is responsible for raising its own funds through a variety of sources.

c. The CAC is Not Affiliated with any Particular Religious Organization.

The Respondent is admittedly a nonsectarian organization. It is neither an arm of any

church nor does it purport to reflect the views of any particular denomination.

3. The Application of the CHRO Would Have No Effect on the Definition, Promulgating or Advancement of a Religious Organization's Mission, Practices or Beliefs.

Since the CAC is not a religious organization nor is it closely tied to a religious organization, it is not necessary to reach the second part of the test for religious exemption.

Accordingly, the CAC is not exempt from coverage under the Chicago Human Rights Ordinance as a religious organization.

E. The "Role Model" Defense Does Not Bar Liability

The Respondent wishes to reargue the applicability of the "role model" defense that a gay person cannot be a role model for youth merely because of his status of being gay. This argument was rejected by the Commission as a defense to this case in its ruling of August 8, 1994. Richardson, CCHR No. 92-E-80 (Aug. 8, 1994) at p. 23. We need not revisit that ruling.

However, in ruling on the Motion to Dismiss in this case, the Commission left open the possibility that the Respondent could prove that Richardson's "public advocacy" of issues contrary to the interests of the CAC rendered him unqualified for employment. The Commission stated:

If the facts at an Administrative Hearing establish that the Complainant wishes to pursue an on-the-job social agenda which conflicts with the legitimate duties of the position he has applied for, then he may not be qualified for the position. If, however, such facts are not established, Respondents will not prevail by arguing their failure to hire Complainant was due to his status alone.

Richardson, CCHR No. 92-H-80 (Aug. 8, 1994) at p. 22.

As a preliminary matter, having found that Richardson was not really seeking employment, any finding with regard to Richardson's lack of qualifications due to his own social agenda would be relevant only to damages and not to liability. That is, the fact that Richardson might not have been hired does not mean he lacks standing. (See Standing, IV B supra). This purported "public advocacy" issue, if proved, would only demonstrate another reason why Richardson may not be qualified to be hired. There

was simply no evidence, however, suggesting that the Respondent refused to consider Richardson for employment because he was associated with Forgotten Scouts, because he lobbied United Way on behalf of Forgotten Scouts or because he advocated any position, one way or the other, concerning Scouting's views concerning the morality of homosexuality. Respondent refused to consider Richardson for employment because of his "status" of being a homosexual man.

Even if Richardson was actually seeking employment, the Commission specifically finds that he was willing to comport himself in accordance with Scouting's goals and precepts. It was his understanding, and a correct one at that, that one's sexuality was not a topic for discussion within Scouting. He stated:

The only people who will probably make my employment with the Boy Scouts of America an issue would be the BSA. I certainly wouldn't raise the issue and it is certainly not appropriate to discuss it with the kids in the organization.

(Tr. 4/6/95 p. 42)

When asked whether he would be willing to communicate that homosexuality was inconsistent with the Scout oath or law if he was required to do so by his employer, he stated: "I could follow the policies of the organization, if the policy required me to say that, I could." (Tr. 4/6/95 p. 4)[\(17\)](#)

The Commission finds no reason to doubt Mr. Richardson's sincerity in that regard. While Richardson had strong feelings about the morality of his own sexual orientation and about the illegality of the Respondent's hiring policy, he has also adequately demonstrated his commitment to the goals and policies of Scouting over the years. In his contact with Ms. Teplinsky, for example, he voiced his opposition to the methodology of the advocacy group Queer Nation and offered his assistance in quelling any future protests. (See Teplinsky Memo, Ex. C508, at Finding of Fact #22)

Unlike the plaintiff in Harvey v. YWCA, 533 F. Supp 949, 955 (W.D.N.C. 1982), Mr. Richardson was not seeking employment in order to offer himself up as an "alternative lifestyle" for the youth engaged in Scouting. Like the Complainant, the Commission finds the suggestion implicit in the Respondent's argument that Richardson wanted to advocate "homosexuality over heterosexuality" to youth engaged in Scouting to be offensive. And to the extent his presence would have expressed an unspoken tolerance of differences (assuming his sexual orientation became public), then this goal is perfectly consistent with one of the moral lessons which Scouting strives to teach. See

Finding of Fact #33.

The Respondent states at p. 8 of its initial Brief that "Scouting's policy does not exclude persons who have unexpressed homosexual desires; it excludes only those who have 'manifest views' with which Scouting disagrees," citing Hurley v. Irish-American, Gay, Lesbian & Bisexual Group, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). In Hurley, the Court allowed the organizers of the St. Patrick's Day parade in Boston to exclude gay men and lesbians who wanted to march under a banner which stated their sexual orientation. The Court in Hurley thought it significant that the parade organizers did not exclude homosexuals as such; their opposition was to a gay group marching under its own banner. Hurley, 115 S.Ct. at 2347. Presumably, then, a known homosexual individual would have been allowed to march in the parade under the banner "Irish Plumbers" without tainting the message of the parade organizers.

In contrast to Hurley, and to the factual proposition set forth by the Respondent, Scouting's employment policy **does** exclude from employment all persons who are "known and avowed" to be homosexuals regardless of any expression of their homosexuality. To argue, in effect, that "we let them in if we don't know they are gay" and therefore "we don't discriminate," is ridiculous. If they know an applicant is gay, they exclude that person.

Finally, the Respondent has not proved that adherence to any particular moral view concerning homosexuality was ever considered to be a qualification for employment as a Professional Scouter. Applicants are not questioned about their own sexuality or their views towards homosexuality during the interview process. (Frankhart, Tr. 4/7/95 p. 162) And the public support of gay and lesbian rights has not been a disqualifying factor with regard to membership on the Executive Council of the Chicago Area Council -- at least not for the Mayor of Chicago. (See Finding of Fact #55) Moreover, there is insufficient evidence that opposition to homosexuality is a significant goal of the CAC. (See Findings of Fact #59-65)

Respondent objects that Mr. Richardson is in the same position as the gay and lesbian marchers who wished to express pride in their homosexuality by marching in the parade in Hurley. However, the CAC's employment policy is not geared toward preventing the expression of any particular views. If it were, it would exclude from employment those who supported equal rights for gay people whether the person applying for the job was gay or not. And Mr. Richardson never indicated that he was seeking a forum in which to waive the banner of gay and lesbian rights. The CAC's policy was barring employees who had the status of being homosexuals, nothing more. If the goals of its employment

policies were more narrow, as they now conveniently contend, then there are less discriminatory ways to accomplish the same goal.

The Respondent has not met its burden of proving that adherence to a view that homosexuality is immoral is a *bona fide* occupational qualification for employment with the CAC or that Complainant could not or would not have held that position had he been hired.

F. The Application of the CHRO Does Not Violate the CAC's First Amendment Rights under the BFOQ Exemption of the Ordinance

1. Freedom of Expressive Association

The Respondent argues that the application of the Chicago Human Rights Ordinance to its policy against hiring homosexual persons undermines its expressive activities.⁽¹⁸⁾ It is true, as the Respondent argues, that the freedom to associate presupposes a freedom not to associate. Roberts, 468 U.S. at 623. Organizations may exclude persons whose views differ from its own views. Id. at 627. However, the freedom to associate is not absolute. It protects only the expressive goals of an organization from unwarranted governmental intrusion. We turn first to the Supreme Court's most recent discussion of this issue.

In Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 115 S.Ct. 2338 (1995), the United States Supreme Court held that the State of Massachusetts could not apply its human rights statute to force a private organization to admit a gay and lesbian rights organization to march in its parade. The Court ruled that "Parades are [thus] a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches." Hurley, 115 S.Ct. at 2345 citing Gregory v. Chicago, 394 U.S. 111 (1969) (peaceful and orderly marches are protected by the constitution); and Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (carrying placards and singing in a protest march are basic constitutional rights). The Court held that because marching in a parade is a constitutionally protected expression, the selection of contingents to make a parade is entitled to protection similar to that afforded the selection of cable programmers and operators, see Turner Broadcasting Systems Inc. v. FCC, 114 S.Ct. 2445 (1994), and the selection of edited speeches to be included in a newspaper, see Miami Herald Publishing Co. v. Tornillo, 714 U.S. 241, 258 (1974). Hurley, 115 S.Ct. at 2345.

The Court in Hurley recognized that Massachusetts had an interest in regulating access

to public accommodations. "Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." Hurley, 115 S.Ct. at 2351; see also New York State Club Assn., v. City of New York, 487 U.S. 1 (1988); Roberts v. United States Jaycees, 468 U.S. 609, 624-626 (1988).

The Court noted, however, that the Massachusetts law was being applied in a "peculiar way":

Its enforcement does not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade. The petitioners disclaim any intent to exclude homosexuals as such and no individual member of GLIB [Gay and Lesbian Irish-American Group] claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner.

Hurley, 115 S.Ct. at 2347.

Speaking for a unanimous Court, Justice Souter concludes that:

While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened the purpose may strike the government.

Hurley, 115 S.Ct. at 2350.

The act of selecting an employee, unlike the act of selecting a parade contingent, has little, if any, expressive qualities inherent in it. And the behavior sought to be regulated, employment, is behavior which has traditionally been regulated by the government in order to remedy the destructive effects of discrimination. Therefore, the analysis to be performed in this case to determine whether the CAC's First Amendment rights have been unreasonably trammled upon requires us to examine the standards set forth in Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1986); Roberts v. United States Jaycees, 468 U.S. 609 (1984); and Hishon v. King & Spalding, 467 U.S. 69 (1984), rather than Hurley.⁽¹⁹⁾

a. Opposition to Homosexuality Is Not an Expressive

Goal of the CAC.

There are numerous organizations whose very existence depends upon the expression of a particular viewpoint. Thus, when you think of the Ku Klux Klan, you immediately envision its views on racial segregation. Members of the "Procrastinator's Club" approach life with a rather singular message. These organizations have clearly defined messages which form the basis for their being.

Having examined literally thousands of pages of Scouting literature, recruiting brochures and videos, handbooks, and correspondence and having listened to intelligent, articulate and sincere witnesses presented by both sides of this controversy, most of whom have devoted the greater part of their lives to the Scouting movement, the Commission agrees that ideas about the morality or immorality of one's sexual orientation are absent from the vision of what Scouting stands for.

The Boy Scouts of America's policy against hiring homosexuals, as adopted by the CAC, is nothing more than a discriminatory hiring policy.

The Commission finds no evidence that opposition to homosexuality was an expressive goal, significant or otherwise, [\(20\)](#) of Scouting. Inherent in the term "expressive goal" as applied to this case, is the requirement that opposition to homosexuality be embodied in some writing or oral statement which is identified as a goal, philosophy, belief or value of Scouting and further it must be *expressed* as one of Scouting's goals. See Roberts, 468 U.S. at 626-627.

Scouting's literature is replete with expressed goals and values which it tries to instill in the youth which participate in its many programs. Patriotism, courage and self-reliance are but a few of the stated values of Scouting. However, nowhere in Scouting's literature will you find "heterosexuality" as a value sought to be instilled in youth. Not a single witness testified that as part of his Scouting experience, he was taught that homosexuality was immoral. In contrast, numerous witnesses testified that the issue of sexual orientation was never mentioned throughout their Scouting experience; not in their weekly Scout meetings nor at Jamborees, Camporees or other ceremonies. (See Finding of Fact #51)

It is highly significant that opposition to homosexuality is not mentioned in any of Scouting's Charters, Mission Statements, By-Laws, Annual Reports or Scout Handbooks. If there are any training materials which instruct volunteers to

communicate Scouting's opposition to homosexuality, they were not introduced into evidence.

The few documents which do mention sexuality, instruct Scout leaders to "keep private the details of those areas of your life that are nobody's business but your own." (Ex. C426 at p. 8825) Scouting leaders are instructed to refer Scouts with concerns about sex to their family, religious leaders, doctors or other professionals: "Rule #1: You do not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life. The reasons are that it is not construed to be Scouting's proper area, and that you are probably not well qualified to do this." (Ex. R22 p. 74)

At the time that the Complainant applied for employment, the BSA's written employment policy did not, by its terms, expressly prohibit the hiring of homosexual persons. It was only in the face of some well publicized legal actions that the BSA changed its written employment policy to refer to sexual orientation. Prior to 1993, the sum total of Scouting's expression of its opposition to homosexuality was a secret internal memorandum dated March 17, 1978 and distributed solely to BSA Executive Committee members. There is no evidence that this memorandum was ever distributed to anyone at the CAC.

The Respondent argues that the Scout Oath and the Scout Law, both central expressions of Scouting's goals, have always stood for traditional values of "heterosexuality" and, therefore, opposition to "homosexuality." Respondent arrives at this conclusion through an interpretation of the word "clean" in the Scout Law and the term "morally straight" in the Scout Oath. Respondent's witnesses all testified that they understood the terms clean and morally straight to refer to being heterosexual. While not doubting the sincerity of each of these witnesses' beliefs, their personal interpretations have no basis in Scouting doctrine.

We are not writing on a blank slate with regard to the meaning of the words "morally straight" and "clean." The best indicator of their meaning is the definition of those terms contained within the Scout Handbook. As the Findings of Fact indicate, nowhere in the definition is there even a hint that these terms are referring to sexual orientation. (See Finding of Fact 52-58) It denigrates the very principles of Scouting to take the positive, hopeful message instilled in millions of young boys who have absorbed not just the words but the lifelong meaning of the Scout Oath and Scout Law, and turn those words into a condemnation of an entire class of individuals.

The Respondent makes the argument that "only Scouting can speak for Scouting."

(Respondent's Reply Brief at p. 12) In other words, the goals of the CAC of the BSA are whatever the leadership of the CAC says they are. Respondent argues that since the leadership of the CAC has taken the position that the words "morally straight" and "clean" mean that you must be heterosexual, then it is irrelevant what others within Scouting believe or what the Handbook states.

At first blush, this argument appears to have merit. However, an organization with a defined body of doctrine cannot just choose to interpret its goals differently from their stated meaning merely to justify a discriminatory hiring policy. There must be an element of "*bona fideness*" in the interpretation.

What if the Executive body of the Chicago Area Council suddenly decided that Jewish employees were not trustworthy, or that job applicants over 40 were not loyal, or that persons with disabilities were not helpful? Could the CAC's Executive Council pass a resolution interpreting the Scout Law in such a way as to justify a hiring policy which refused to consider job applicants in these groups? Of course not. Nor can they attribute a discriminatory meaning to the Scout Oath or Scout Law which it does not possess. The Respondent's attempt to assert a First Amendment associational defense by characterizing its hiring practice as a "goal" of Scouting is similar to the attempt made by the defendant in Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063, 98 S.Ct. 1235, 55 L.Ed.2d 763 (1978), to justify its refusal to accept black students into its school. In Brown, a secular school asserted that it would violate its First Amendment right of Free Exercise of Religion to force it to integrate its school. The court found, however, that the defendant's policy of segregation was not the result of the exercise of religion. None of the defendant's written tenets related to segregation of schools or anything related to separation of races. The court stated:

the absence of references to school segregation in written literature stating the church's beliefs, distributed to members of the church and the public by leaders of the church and administrators of the school, is strong evidence that school segregation is not the exercise of religion.

Brown, 556 F.2d at 312.

The court acknowledged that there were individuals within the Church who had sincerely held beliefs concerning segregation. Nevertheless, it held:

However, the refusal by the Dade Christian School to admit a black child was an

institutional action taken by an institution whose patrons are, according to the evidence, divided in their beliefs on the religious justification for racial segregation. In such a situation the only practical course open to a Court is to examine the corporate beliefs of the institution involved, as adopted or promulgated or carried forward as an institutional concept. To do otherwise would allow the institution to pick and choose which of its members' potentially conflicting beliefs it wished to assert at any given time. Thus, an avowedly secular school should not be permitted to interpose a free exercise defense to a § 1981 action merely because it can find some of its patrons who have a sincere religiously based belief in racial segregation.

Brown, 556 F.2d at 313. Recognizing the divergence of views inherent in an institution, the court concluded:

Our opinion today is not to be taken as requiring or suggesting that religious beliefs be institutionalized in order to be eligible for First Amendment protection. Indeed they need not be. Yet, congregational churches recognizing no dogma other than the priesthood of the individual do institutionalize many activities sponsored or supported by them. Scout troops, hospitals, colleges and universities are but a few. When the lawfulness of an activity of any such institution is in question, the focus of the inquiry must be upon the basis for the institution's activity. Whether it be the troop's policy for the award of merit badges, the hospital's requirements for staff privileges, or the college's admission principles, the basis is that particular institution's basis. Whether or not it is the exercise of religion or simply a policy of the institution not presenting constitutional issues is a question of fact.

Id. at p. 313.

The court found that the school's policy of refusing to admit black children was a recent policy developed in response to changing social conditions and not related to the religious beliefs of the school. In like manner, the Commission finds that the expressive goals of the Chicago Area Council must be determined by reference to the stated institutional goals of the Respondent and its parent organization. Examining all of the evidence, the Commission is left with the conclusion that the discriminatory hiring policy is unrelated to those goals -- even if there are individuals within the CAC or their sponsoring agencies who personally hold those beliefs.

The Respondent's Objections to the First Recommended Decision regarding its expressive rights lack merit. The Respondent argues that the mere fact of hiring a gay man is itself expressive. Because a gay job applicant does not wear his sexual

orientation on his sleeve, the hiring of a homosexual Professional Scouter is no more expressive than the hiring of a stockroom employee.

The Respondent argues that Scouting has taken the position that homosexual conduct is immoral. This, despite the absence of a handbook, brochure or other document specifically dealing with the subject of homosexuality. The Respondent argues that homosexual conduct is not mentioned in its official literature in the same manner that "other illegal or immoral acts" are not mentioned. This circular conclusion assumes that scouts and their families recognize that the absence of specific reference to homosexuality is somehow an expression of some policy.

The Commission finds that the absence of an reference to sexual orientation reflects the true role that Scouting has given to issues of sexuality. These issues are to be dealt with in the home or in church but not within Scouting. Had Scouting wished to express a specific moral belief with regard to sexuality, it would have confronted the issue in a similar manner to the way it has dealt with issues of patriotism, reverence and knot tying.

Respondent's arguments that it was unnecessary for Scouting to express its opposition to homosexual conduct because of the moral climate of the 1970s and its companion argument that its disapproval of homosexual conduct was widely know due to the Curran litigation are perplexing. Is opposition to abortion a significant expressive view of Scouting? Would the hiring of a Professional Scouter who, unbeknownst to participating members and volunteers, is an abortion rights activist be an expressive act? To make this determination, we would have to explore whether or not Scouting had previously expressed a viewpoint on this subject and whether that viewpoint would be undermined by the hiring of someone who held an opposing viewpoint *even if others were unaware of that viewpoint*. We cannot assume that Scouting has as its expressive goals whatever the moral climate of the times dictates. Remember, there was a time when opposition to integration and miscegenation were values shared by American society.

Respondent's argument that its employment policy is not a "status-based exclusion" is sophistry. Respondent's hiring policy is a blanket exclusion of a class of individuals based not upon any conduct but upon their acknowledgment that their sexual desires are directed toward members of their own gender, regardless of whether they ever acted upon those desires or whether they plan to promote or even discuss them in connection with Scouting.

b. Enforcement of the Chicago Human Rights Ordinance Will Not Interfere with Scouting's Associational Expression.

Respondent argues that if the CAC were forced to hire a District Executive who happened to be homosexual, it would "hamper the organization's ability to express its views" and, under the reasoning of Roberts, 468 U.S. at 623-24, would result in the unconstitutional suppression of ideas. In support of this proposition, the CAC refers to the testimony of Elder Goaslind, John Thomas and Rev. Turner that the Mormon Church, the Methodist Church and the Baptist Church respectively would withdraw their support from Scouting if Scouting employed an avowed homosexual. See Respondent's Brief at p. 15, fn. 6.(21)

There is nothing associated with the hiring of an openly gay man which would require the CAC to alter anything other than its discriminatory hiring policy.(22) The CAC would still be entitled to require its employees to communicate BSA policy, restrict its employees' expression of personal opinions contrary to BSA policy, and fully regulate the terms and conditions of each person's employment within the CAC. A gay applicant who is hired as a District Executive is no more a spokesperson for all gay and lesbian individuals than an African-American employee would be for all African-Americans.

The hiring of a gay District Executive would not require the CAC to eliminate, modify or alter any of its activities or programs. Individual troop activities would be unaffected. Camporees, jamborees and Klondike Derbies would proceed without modification. Outstanding Scouts would continue to attain recognition as Eagle Scouts and Order of the Arrow members. Scouts could still be taught to be of "strong character," to "respect and defend the rights of all people," to have "open and honest relationships" and to keep their body and mind "fit and clean." In short, Scouting would continue to flourish as it has for over 85 years without change.(23)

The Respondent argues that the very presence of a homosexual employee forces it to abandon its stated view that homosexuality is immoral. The Commission is not convinced. First of all, as previously stated, Scouting's policy is an employment policy, not an expressive goal of the BSA. Secondly, the government often forces employers to act in a way that they would not otherwise have acted if their personal prejudices were allowed to run unchecked. Non-discrimination laws, by definition, curtail choices an employer may make. Race-neutral hiring policies, like sex-neutral, religion-neutral and sexual orientation-neutral hiring policies, do not constitute a ringing endorsement of any particular religious, ethnic or sexual class of individuals or those individuals' lifestyles. Third, this argument presupposes that an employee's sexual orientation is evident to

others and that the employer's hiring of a gay person would be known to all. Finally, even if the CHRO interferes with the Respondent's moral view of homosexuality, the City of Chicago's compelling interests override that view. (See Section F3 below.)

In reaching this conclusion, the Commission specifically rejects the reasoning of Curran v. Mount Diablo Council of the Boy Scouts of America, 23 Cal. App. 4th 1307, 29 Cal. Rptr. 2d 580, review granted, 31 Cal. Rptr. 2d 126, 874 P.2d 901 (Cal. 1994). The plaintiff in Curran was an openly gay youth who sought to be a volunteer assistant Scoutmaster. The Curran court, after trial, made two findings of fact which formed the basis of its conclusion that forcing the Mt. Diablo Council to admit a gay volunteer would violate its rights of associational expression. First, the court found, based upon uncontradicted evidence, that "since its inception, Scouting has sincerely viewed homosexuality as immoral behavior inconsistent with the Scout Oath and ... Scout Law." (Curran, Slip Opinion at p. 7). Second, the court found that application of California's Unruh Act to force the inclusion of a gay volunteer would substantially interfere with Mt. Diablo Council's ability to achieve its "expressive goals." Curran, Slip Opinion at p. 8. The Commission's factual findings differ on both of these issues.

Also, there is a difference between the forced inclusion of a volunteer Scoutmaster and that of an employee. The Curran court held that:

The Scoutmaster may be the most influential adult in a boy's life other than the boy's own parents. Even after the scouts leave the troop, scouts often remain close to the Scoutmaster and continue to discuss ethical issues with him.

Curran, Slip Opinion at p. 28.

In contrast, the evidence established that a paid District Executive is more akin to a professional administrator than to a parent figure. He has considerably less direct contact with youth than a volunteer leader has. Any influence that he might have over a scout troop will be more than offset by the direct influence of a Scoutmaster or his assistant.

The Curran court found that:

The undisputed evidence showed that an avowed homosexual Scoutmaster would cause the boys to be more likely to believe that homosexual conduct is morally straight and more likely to engage in homosexual conduct

Curran, Slip Opinion at p. 28. In contrast, the uncontested evidence before our

Commission clearly and convincingly established that the presence of a homosexual employee would have no influence whatsoever on a youth's sexual orientation or his desire to engage in homosexual conduct. (See Finding of Fact #69)

The Curran court found that adult leaders have a definite role in counseling boys on sexual matters and communicating to them the Boy Scouts' view of sexual morality. In contrast, there was no evidence introduced which supported this finding with regard to a District Executive. Indeed, the preponderance of the evidence established that when boys brought up matters relating to sex and morality, they were to be referred to their parents or clergy. (See Finding of Fact #60)

Mr. Curran testified that he wished to be a Scoutmaster so that he could advise scouts that homosexual acts are or can be moral. Curran, Slip Opinion at p. 29. However, Mr. Richardson testified that he would abide by the principles of Scouting and would communicate the policies he was required to communicate, regardless of his personal beliefs. The California Court concluded that it was Curran's conduct and advocacy, rather than his status, that caused his exclusion. Here, however, Scouting's written employment policy makes clear, however, that it was Richardson's status alone which prevented him from being considered for employment.

Finally, the compelling governmental interest in regulating economic activity, found present in Roberts, was absent in Curran. Citing Roberts, Rotary, and New York Club Association, the Curran court agrees that "the state has a compelling interest in ensuring equal access to such advantages and business and professional opportunities and skills." While the Commission may disagree with the Curran court's conclusion that the state does not have a compelling interest in protecting the "personal dignity" of its citizens, it cannot be questioned that the City of Chicago has a compelling interest in preventing employment discrimination. Thus, the result of Curran would have been different if Mr. Curran had been seeking paid employment as was Mr. Richardson.

This conclusion is bolstered by the Supreme Court's decisions in Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984); and New York Association of Clubs v. New York, 487 U.S. 1 (1988). In each of those cases, the Supreme Court found that the organizations at issue were all "civic" groups. It also found that those clubs had service to men as their centerpiece. Nevertheless, in all three of these cases, the court found that enforcing a law prohibiting sex discrimination was properly applied to each organization's membership.

Here, the Boy Scouts are a civic club. However, any opposition to homosexuality isn't nearly as central to Scouting as limiting membership to men was to the Rotary Club, the Jaycees or the New York Association of Clubs. Accordingly, Respondent's legal position in opposing the application of this hiring restriction is considerably weaker than the legal positions previously rejected by the Court.

c. Enforcement of the Chicago Human Rights Ordinance Would Not Interfere with Scouting's Free Speech.

Respondent argues that forcing it to hire Complainant would infringe upon its right of free speech under the Ordinance's BFOQ exemption -- Muni. Code of Chic., §2-160-030(b). For this argument to prevail, the mere hiring of a known homosexual individual must be seen as "expressive conduct."

A person need not utter words in order for his or her actions to be considered expressive. Thus, the refusal to salute a flag, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) and the refusal to display a particular motto on your license plate, Wooley v. Marynard, 430 U.S. 705 (1977), have both been considered "speech" entitled to First Amendment protection.

It is certainly possible that the hiring or the refusal to hire a particular individual because of that person's known views could be considered an expressive act. Had the CAC refused to consider Mr. Richardson for employment *because* he was a spokesman for "Forgotten Scouts," then the Respondent's free speech argument would merit attention. However, its rejection of Keith Richardson had nothing to do with any message Mr. Richardson was associated with. It had to do solely with his *status* as a homosexual individual.

The Respondent does not argue that it would hire a person who acknowledges his homosexuality but who is unassociated with any gay rights organization. Rather, it argues that a "message" is conveyed merely by the fact that an applicant admits he is gay or the fact Respondent hires a gay applicant. By adopting this reasoning we would expand the definition of speech well beyond the communication of ideas, allowing litigants to eviscerate civil rights statutes, as well as other government regulations, by claiming that a hiring decision equates to speech.

Finally, even if there was an element of "speech" in the hiring of a homosexual employee, "when speech and non-speech elements are combined in the same course of conduct, a sufficiently compelling governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." United States

v. O'Brien, 391 U.S. 367, 376 (1967); see also Dallas v. Stenglin, 490 U.S. 19,25 (1989) (a "kernel" of expressive activity does not warrant First Amendment protection). In this case, as shown below, any infringement upon the CAC's expressive goals are more than justified by the City's compelling interests.

3. The City's Compelling Interests Override Any Infringement upon the Respondent's Right to Discriminate in Employment

The First Amendment does not insulate all arguably expressive behavior from regulation. Thus, courts have recognized that governmental bodies may regulate the employment arena where there is a compelling interest to do so. And the elimination of discriminatory employment practices has been found to be such an interest. See Ohralik v. Ohio State Bar Association, 436 U.S. 447, 460 (1978); Guesby v. Kennedy, 580 F. Supp. 1280 (D.Kan. 1984); Bohemian Club v. Fair Employment & Housing Commission, 187 Cal. App. 2d 1231 (Cal. Ct. App. 1986), *cert. denied*, 108 S.Ct. 51 (1987).

Even Hurley recognizes that in some areas, the state has a compelling interest to infringe upon certain freedoms. Hurley, 115 S.Ct. at 2346-47. Employment is one of those areas. No case has been cited in which an individual's desire to discriminate has been held more important than the State's desire to end discriminatory treatment.

The testimony of Dr. Anthony R. D'Augelli shows that enforcement of the Chicago Human Rights Ordinance to prevent discrimination in employment based upon sexual orientation will have a profound effect on the citizens of Chicago by opening up access to employment and services, mitigating against the likelihood that homosexual individuals would be the victims of hate crimes and enhancing the mental health of those persons who otherwise would be likely to suffer victimization based upon their sexual orientation. (Tr. 4/21/95 p. 171) See Findings of Fact #76-78.

Within the employment context, in the absence of an effective civil rights ordinance, homosexual citizens are more likely to conceal their sexual orientation, fear exposure and reprisal and suffer adverse physical and mental health consequences as a result. (Tr. 4/21/95 pp. 179-181) Fear of exposure [on the job] may cause a chronic stress syndrome in gay employees. (Tr. 4/21/95 p. 191)

Government has no greater duty than to protect the dignity, safety and self-worth of its least popular citizens. The residents of Chicago have chosen to implement the Chicago Human Rights Ordinance which extends the guarantee of equal employment

opportunity to all of its inhabitants regardless of their sexual orientation. It is the duty and legal obligation of the Chicago Area Council of the Boy Scouts of America to conform its conduct to that law.

The Supreme Court has repeatedly made it clear that the government has an overwhelmingly compelling interest in eliminating discriminatory practices, especially those which take place within the commercial marketplace. This interest overrides assertions of affirmative constitutional protection. In Runyon v. McCrary, 427 U.S. 160 (1975), the Court held that:

[while it] may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions ... it does not follow that the [practice] of excluding racial minorities from such institutions is also protected by the same principle

[T]he Constitution places no value on discrimination, and while [i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment ... it has never been accorded affirmative constitutional protections.

Id. at 176. The Court also noted that, in any event, there was no showing that discontinuance of the discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogmas. Runyon, 427 U.S. at 176.

Because the exclusion of black children from a school which teaches racially discriminatory dogma is not constitutionally protected expression, the hiring of a gay employee by the Boy Scouts cannot unreasonably infringe upon their First Amendment rights.

More recently, in R.A.V. v. City of St. Paul, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), the Court distinguished between the government's interest in curtailing discriminatory (or even repulsive) ideas and its compelling interest in prohibiting discriminatory conduct. Writing for the majority, Justice Scalia invalidated a local ordinance which criminalized expressive conduct which arouses anger based upon race, color, creed, religion or gender (such as a cross burning) while not criminalizing other similar expressions. He then distinguished such "content based" regulation, which was found violative of the First Amendment, with the regulation of discriminatory conduct which might have a secondary effect or regulating certain speech:

Thus, for example, sexually derogatory "fighting words" among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices. [Citations omitted] Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

R.A.V., 112 S.Ct. at 2546.

This reasoning is consistent with the reasoning of Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 442 U.S. 942, 995 S.Ct. 2885, 61 L.Ed.2d. 312 (1973), in which the government's interests in outlawing discrimination in employment (in this case, the grouping of job advertisements under male and female headings) was found to be more compelling than the right to express a discriminatory idea. See also Roberts, 468 U.S. at 624 (upholding Minnesota's anti-discrimination law in the face of a First Amendment challenge); and Rotary Club, 481 U.S. at 549 (upholding California's anti-discrimination law in the face of a First Amendment challenge).

Any interest that the Chicago Area Council of the Boy Scouts of American might have in expressing a viewpoint that homosexuality is immoral by refusing to hire employees based upon their sexual orientation is overridden by the City of Chicago's interest in eradicating the debilitating effects of employment discrimination against its gay and lesbian population.

Respondent argues that while the CHRO may be constitutional on its face, when applied to the hiring of "a teacher of moral values by an organization which holds that homosexual conduct is morally wrong" the Ordinance becomes unconstitutional as applied. One of the fallacies of this argument is the fact that we have specifically found that the District Executive is more akin to an administrator than to a teacher of moral values (see Finding of Fact # 68), that the CAC does not have as an expressive goal the opposition to homosexuality (see Findings of Fact # 59 *et seq.*) and that hiring a gay District Executive would not cause an undue interference with the CAC's operations or goals. (See Findings of Fact #40 & 59). Additionally, contrary to Respondent's assertion, unlike Young v. Northern Illinois Conf. of United Methodist Church, 21 F.3d 184 (7th Cir. 1994), this case does not involve a clash between the free exercise of religion and governmental interests in ending discrimination. (See Part IV D above.)

V. REMEDIES

1. Compensatory Damages

The Commission has found that Mr. Richardson was not actually seeking employment with the CAC when he contacted Ms. Teplinsky but was instead acting as a tester. Accordingly, he will be treated as such for the purpose of damages.

a) Back Pay: Mr. Richardson is not entitled to an award of back pay for several reasons. First, since he was not actually seeking employment with the CAC, the Respondent's refusal to consider him for employment because of its discriminatory employment policy did not deprive him of any income. Second, even if the Complainant had been seeking employment, we have found that he would not have been hired as a result of his past disqualifying employment. Therefore, he has not suffered any economic loss as a result of the discriminatory conduct. See McKennon v. Nashville Banner Publishing Company, 115 S.Ct. 879 (1995).

The Complainant argues that McKennon should not serve to limit back pay because the Respondent did not discover the disqualifying information until after Richardson had already found another job. Complainant's Objections at p. 13. For the purposes of damages, however, we must ask ourselves what would have happened had the Respondent not discriminated against Complainant by refusing to even consider him for employment. The answer is he would still not have been hired.

Complainant also argues that under McKennon the employer bears a heavy burden of proving that the after-acquired evidence reveals sufficiently severe wrongdoing to demonstrate that it would have taken the same action anyway. The Complainant does not believe that the Respondent has sustained its burden in this regard. Having considered Complainant's arguments, the Commission agrees that, for damages purposes, this is not an "after-acquired evidence case." The only reason that the evidence concerning the Complainant's prior job history was not discovered until well after a complaint was filed here was that the Respondent's employment policies did not allow it to consider anything concerning Mr. Richardson's qualifications once it learned he was homosexual man. That does not, however, mean that it would not have discovered it had Respondent not preemptively disqualified Richardson from consideration due to his sexual orientation.

This is not a situation where the employer may not have discovered the allegedly disqualifying information. Unless the Complainant concealed the nature of his previous work history, this information would have been discovered. And the Commission is convinced, based upon the testimony of Mr. Frankhart, that the Respondent has satisfied its burden of establishing that the information would have disqualified Complainant from employment. [\(24\)](#)

b) Emotional Injury Damages: The Complainant presented evidence that he experienced stress and humiliation as a result of being out of work. He was short tempered. He was extremely tired and seemed depressed. (Tr. 4/6/95 p. 90) He did not want to socialize and appeared angry and in a state of dejection. He testified that, "It seemed to me that everything in my life all of a sudden always pointed back to the fact that I didn't have a job and that things were pretty bad." (Tr. 4/5/95 p. 208) Richardson stated that after he obtained full-time employment, his symptoms gradually diminished. (Tr. 4/5/95 p. 221)

Because the Complainant's lack of employment was not caused by the Respondent's discriminatory conduct, however, these damages are not compensable. Irrespective of the Respondent's policy, Mr. Richardson would have remained unemployed for some period of time. However, even a tester is entitled to damages for emotional injuries if the discriminatory conduct caused actual damage. See, e.g., City of Chicago et. al. v. Matchmaker Realty Co., 982 F.2d 1086 (7th Cir. 1992); HUD v. Jancik, ¶ 25,058 Prentice Hall Inc. Fair Housing-Fair Lending Reporter (Oct. 1, 1993). It is difficult to insulate oneself from the sting of discrimination. However, Richardson was well aware at the time he called Ms. Teplinsky that the CAC would not hire him. He had already met with Forgotten Scouts. He had already lobbied the United Way. And he had read about the Boy Scouts employment policy in the newspaper.

The Commission agrees that Richardson's emotional reaction while testifying about how he felt after he had spoken with Teplinsky shows that he experienced some level of emotional pain when the realization struck home that his sexual orientation really was a barrier to employment with the organization to which he had devoted a substantial portion of his youth.

Richardson testified:

When you've grown up through a program and you've been paraded around the country as a product of that program, you've done all the things they say you're supposed to do, you've been an Eagle Scout, you're a Vigil Honor member of the Order of the Arrow, you've done more than most any kid around has done, and then you just get told there is no way because you're gay that you can get a job.

It's just not employment. Your whole life starts to really -- I mean you start questioning everything.

(Tr. 4/5/95 pp. 187-188)

Complicating an award of compensatory damages is the appearance that Richardson was much less than candid when it came to presenting his true motives in contacting the CAC. He did not acknowledge that he was acting as a representative of Forgotten Scouts when he met with United Way, when he contacted Teplinsky, when he called a press conference to announce the filing of his complaint and when he went on the John Calloway show. His credibility was greatly impeached, in this regard. And he intentionally concealed his prior work history from the Respondent with the apparent knowledge that as soon as the CAC learned of it, his application for employment would be rejected. These actions appear related to Richardson's effort to falsely prove that he was entitled to much greater damages than he would be entitled to had he acknowledged that he was acting as a tester in order to challenge the discriminatory hiring policy of the Respondent.

Therefore, the Commission awards Complainant only nominal damages of \$500.00 for his emotional injury.

2. Punitive Damages

The Commission has awarded punitive damages in cases where the respondent's actions are shown to be motivated by evil motives or intent or when it involves a reckless or callous indifference to the protected rights of others. E.g., Osswald v. Yvette Wintergarden Restaurant et. al., CCHR No. 93-E-93 (June 19, 1995); McCall v. Cook County Sheriff's Office, CCHR No. 92-E-122 (Dec. 21, 1994); Collins and Ali v. Magdenovski, CCHR No. 91-FHO-70-5655 (Sep. 16, 1992) at 29. Factors to be considered in deciding whether to award punitive damages include similar past discriminatory practices or policies, Johnson v. City Realty, CCHR No. 91-FHO-165-5750 (March 17, 1993), attempts to cover up relevant information, Akangbe v. 1428 W. Fargo Condominium Association, CCHR No. 91-FHO-18-5630 (July 29, 1992), and a cynical attitude toward the judicial process, Nash & Demby v. Sallas Realty Co., CCHR No. 92-H-128 (May 18, 1995).

The Commission does not believe that punitive damages are warranted in this case. Testimony showed that the CAC was implementing a national policy which was legal in all but a few jurisdictions where state or local law includes sexual orientation as a protected characteristic. Throughout this litigation, and at the time the Respondent disseminated its discriminatory hiring policy to Complainant, the Respondent held the sincere, though mistaken, belief that its conduct was constitutionally protected.

More importantly, the Commission does not believe that punitive damages in this case

are necessary in order to deter similar future conduct or to punish past conduct. Smith v. Wade, 461 U.S. 30, 56 (1983). Nothing in the Complainant's Objections convinces the Commission otherwise.

3. Injunctive Relief

Having found that the CAC's written employment policy violates the CHRO, the Commission orders that injunctive relief as follows:

A. That the Respondent be enjoined from considering the sexual orientation of applicants for employment with the CAC; and

B. That the Respondent be enjoined from publishing on its application, brochures or literature, which are distributed within the City of Chicago, any employment criteria which indicates a preference or limitation on the basis of sexual orientation.

4. Fine

Section 2-160-120 of the Chicago Human Rights Ordinance states that:

Any person who violates any provision of this ordinance shall be fined not less than \$100 and not more than \$500 for each offense. Every day that a violation shall continue shall constitute a separate and distinct offense.

Accordingly, the CAC is hereby fined \$100.00.

5. Attorneys' Fees

Section 2-120-510(1) of the Ordinance provides that the Commission has the power to order respondents to pay all or part of the complainant's costs, including reasonable attorneys' fees. The Commission has routinely found that a prevailing Complainant is entitled to reasonable attorneys' fees and costs. See, e.g., Huerdo v. St. James Properties, CCHR No. 90-E-44 (Oct. 4, 1991). Therefore, the Commission awards Complainant his reasonable attorneys' fees and costs. Complainant's fee petition and all subsequent pleadings related to such petition shall be filed as described below.

Pursuant to Regulation 240.120(c), Complainant shall serve the Hearing Officer and all other parties a statement of attorneys' fees and costs supported by arguments and affidavits within 21 days after receipt of this Order. Accordingly, Complainant's statement of attorneys' fees and costs in the instant case must be served by March ,

1996. Two copies of this statement shall also be filed with the Commission. The supporting documentation shall include the following:

1. The number of hours for which compensation is sought, itemized according to the work that was performed and the individual who performed the work;
2. The hourly rate customarily charged by each individual for whom compensation is sought, or in the case of a public law office which does not charge fees or which charges fees at less than market rates, documentation of the rates prevalent in the practice of law for attorneys in the same locale with comparable experience and expertise; and
3. Documentation of costs for which the party seeks reimbursement.

The Respondent shall file any responses/objections to the statement of fees within 14 calendar days after service of such statement. Such response shall be served upon the Administrative Hearing Officer, the Complainant, and shall be filed with the Commission (two copies). Complainant may serve a reply brief, within five calendar days after receipt of the response, on the Hearing Officer and Respondent and file it with the Commission (two copies).

VI. CONCLUSION

Judgment is granted in favor of the Complainant and against the Respondent. The Complainant, acting as a tester, has proven by a preponderance of the evidence that the Respondent refused to even consider him for employment based solely upon his sexual orientation and that he was damaged as a result of Respondent's discriminatory employment policy. Application of the CHRO to the Respondent does not violate its rights to associational expression or free speech. The CAC is not a religious organization exempt from coverage under the CHRO.

We award the Complainant \$500.00 in compensatory damages for his emotional injuries and embarrassment, grant reasonable attorneys' fees and costs and fine the Respondent \$100.00 pursuant to the Ordinance. Respondent is enjoined, within the City of Chicago, from considering the sexual orientation of applicants for employment and from publishing any employment criteria which indicates a preference or limitation on the basis of sexual orientation.

By:

Rouhy Shalabi, Commissioner

For: CHICAGO COMMISSION ON HUMAN RELATIONS

Dated: February 21 , 1996

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1. ¹ There are two Respondents in this case: The Chicago Area Council of the Boy Scouts of America and Nelson Carter, its former Executive Director. No evidence was introduced at the Administrative Hearing which would suggest that Mr. Carter was being sued in his capacity as anything more than titular head of the CAC. No evidence was adduced with regard to Mr. Carter's decision-making role within the CAC or his continuing involvement, if any, with the CAC. Therefore, the Commission dismisses Mr. Carter as a party Respondent. Throughout this Ruling, the Respondent will be referred to in the singular to mean the Chicago Area Council of the Boy Scouts of America.

2. ² The parties have made numerous objections to the First Recommended Decision's Findings of Fact on the basis that a particular Finding was "incomplete" or unsupported by the record. Those Objections have been thoroughly considered. Where additional facts requested for inclusion were found to be relevant to the issues presented in this case, they have been added. Where those proposed additional facts were either unsupported by the record or irrelevant to the ultimate issues herein, they have been left out without further comment.

3. ³ References to the transcript of proceeding in this case will be made by the date of each day of the Administrative Hearing and page number of that day's transcript. References to exhibits will be made to Complainant's Exhibits as "Ex.C __" and Respondent's Exhibits as "Ex.R__".

4. ⁴ Contrary to Respondent's assertion, there is no evidence that the Complainant was associated in any way with any organization which periodically held "uniform parties" at the A.A. Meat Market. Nor is there any evidence that the Complainant ever did anything to publically denigrate Scouting or bring Scouting into disrepute.

5. ⁵ The CHRO has already held, in its August 8, 1994 ruling on Respondent's Motion to Dismiss that this case does not and may not concern itself with what different religions or scriptures say about homosexuality. See Richardson v. Chicago Area Council of Boy Scouts of America, CCHR No. 92-E-80 (Aug. 8, 1994) p. 37, fn. 13.

6. ⁶ The Respondent's Objections to these Findings have focused upon its requirement that Scouts believe in God and the manner in which it encourages Scouts to cooperate with their families and religious organizations to develop this belief. In that regard, Cub Scouts are required to talk to their parents and clergy about God. Scout camps hold vespers, have campers say grace and make

church

services available during camporees. The Respondent's witnesses testified that, in their opinions, the requirement that a Scout live a reverent life was essential to Scouting. Even taking all of the Respondent's factual observations about the role of religion in Scouting to be true, the Commission does not find the role of religion in Scouting to even approach the level where the CAC itself could be considered a "religious organization." See Section IV D infra.

7. ⁷ A similar interpretation of the words "morally straight" and "clean" was given by all of Respondent's witnesses including Mr. Goaslind, Tr. 4/11/95 p. 12; Thomas Allen, Tr. 4/7/95 pp. 115-116; Mr. Frankart, Tr. 4/6/95 p. 29; and Mr. Kulak, Tr. 4/6/95 p. 58.

8. ⁸ Respondent argues that District Executives have significant contact with Scouting youth. It is uncontested that District Executives attend numerous District sponsored youth events such as camporees, Klondike Derbies and award ceremonies. However, the testimony of Mark Frankart, the Director of Field Services of the Chicago Area Council, makes it clear that the primary responsibility of the District Directors is to work with the adult Scouting volunteers. (Tr. 4/7/95 p. 136)

9. ⁹ The Commission rejects the notion that Respondent was taken by surprise and therefore should have been allowed to call Dr. Park Dietz as a surrebuttal witness for the purpose of impeaching Dr. Welch. Dr. Dietz was never disclosed as a possible witnesses and was not immediately available to testify. The Respondent's witness, Dr. Slavins, was the witness who initially raised the issue of how sexual values are transmitted to young boys. Had the Respondent desired to interpose an argument regarding the risks of pedophilia resulting from a nondiscriminatory hiring policy, it had ample opportunity to do so in its defense.

10. ¹⁰ Dr. Slavins' opinions were undermined by the fact that he has never done any research in the area of gay and lesbian issues, in child or adolescent psychology or in any other related field. (Tr.

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4/11/95 p. 156) When questioned about research into the area of homosexual parents as role models, he was unable to name any of the studies or remember their conclusions. (Tr. 4/11/95 p. 194) He has never been the lead author of any publications. His resume, and direct testimony, was guilty of "puffing" his professional experience with respect to working with groups of adolescents. For example, his work as a "consultant" for the Boys Club turned out to be helping a friend, who was a summer camp counsellor, run a

winter camping trip. (Tr. 4/11/95 p. 168) His unsupported opinion that parents are no more significant role models for their children than a child's "Scoutmaster" is ludicrous. Finally, Slavins, who has testified in at least six other cases for the Boy Scouts, appeared to be far from an independent witness.

11. ¹¹ An example of this approach was demonstrated by Ms. Shannon Faulkner in her celebrated, and successful, legal challenge to the admission policy of the Citadel, which excluded women. She initially gained admission by deleting all reference to her gender in her application. See Faulkner v. The Citadel, 51 F.3d 440 (1995). The Complainant objects that a homosexual job applicant should not be required to conceal his or her sexual orientation in order to obtain employment. The Commission agrees. However, looking at the totality of circumstances surrounding Complainant's contact with CAC, the Commission believes he was not genuinely seeking employment.

12. ¹² The Complainant argues that the Finding of Fact regarding his lack of true interest in obtaining employment with the CAC was contrary to an evidentiary ruling regarding a hearsay statement solicited from Mr. Bergfalk. (Complainant's Objections p. 12) The question, "What did Richardson tell you about his employment search?" (Tr. 4/6/95 Tr. 88) sought inadmissible hearsay in the absence of any claim of "recent" fabrication. The Hearing Officer's statement that "there was no reason to doubt the genuineness of Richardson's interest" proved not to be true. The statement was not determinative with regard to the evidentiary ruling and, contrary to the Complainant's assertion, was not a ruling on the *bona fideness* of the job search. In any case, since there was no offer of proof as to the testimony to be offered, any error was waived.

13. ¹³ In Fair Employment Council of Greater Washington v. BMC Marketing Corporation, 28 F.3d 1268 (D.C. Cir. 1994), the court rejected the claims of two black testers who sought employment referrals from the defendant. The decision was based, in part, upon the fact that the testers had made material misrepresentations of fact and had presented fictitious credentials and therefore, any resulting contract would have been voidable. Unlike the plaintiffs in that case, Mr. Richardson did not present fictitious credentials nor did he make any material misrepresentations to the CAC. Additionally, the BMC Marketing Co. case involved the application of the pre-1991 version of Title VII of the Civil Rights Act which did not authorize emotional injury damages. Once such damages became recover-able under Title VII, it is just as likely that an employment "tester" could be injured by discriminatory statements and actions as it would be for a housing tester to be injured by a discriminatory practice. See United States v. Balistreri, 981 F.2d 916 (7th Cir. 1992), *cert denied*, 114 S.Ct. 58 (1993); City of Chicago v. Matchmaker Real Estate Sales Ctr. Inc., 982 F.2d 1086 (7th Cir. 1992).

14. ¹⁴ The Commission has credited the testimony of Mr. Mark Frankhart, Director of Field Services of the CAC, who testified that as part of the hiring process, he would review the cover letter and resume of a District Executive applicant looking at, among other items, the applicant's work background. (Tr. 4/7/95 p. 141) During the screening interview, he would ask questions driven by what was in the resume. The screening interview focuses on three things: the applicants' educational background, their work history and their other outside activities. During the third stage of the hiring process, the personnel secretary would conduct a reference check on one or more of the references that were listed in the application. (Tr. 4/7/95 p. 148) Mr. Frankhart testified that the CAC would not hire anyone who worked in a topless bar or a bar where x-rated videos were shown. (Tr. 4/7/95 pp. 149-152) Indeed, he testified that if it was known to him at the time of application that a candidate "appeared in a topless bar," "then I would not consider them for employment." (Tr. 4/7/95 p. 163)

15. ¹⁵ The Kamehameha Schools court looked at the following factors in making its determination:

1. Whether a religious organization has ever controlled or supported the school;
2. Whether the school was affiliated with any denomination;
3. Whether its advertised purpose was essentially religious;
4. The extent to which it required its faculty to be religiously affiliated;
5. The extent to which it required its members [students] to be religiously affiliated;
6. The extent to which its activities had religious overtones; and
7. Whether the curriculum was taught from a secular perspective or a religious one.

Kamehameha, 990 F.2d at 461. We have modified these factors and used them as guidance to determine whether the CAC is a religious organization.

16. ¹⁶ No inferences have been drawn from the fact that the Respondent withdrew several proposed witnesses regarding the views of specific religious organizations concerning the hiring of homosexual individuals. Given the cumulative nature of this evidence, the decision to withdraw the witnesses could easily have been a litigation decision designed to streamline the presentation of its case.

17. ¹⁷ In his testimony on April 6, 1995 at pp. 75-76, Richardson said that if the Boy Scouts were to say that the Boy Scout Oath stands for the proposition that homosexual conduct is immoral, then "I wouldn't take the code." From this, the Respondent argues that Richardson is not qualified to be hired. The Commission agrees with the interpretation of Richardson's comments, in light of his testimony that he could follow the policies of the organization, to mean that if hired, he could communicate the party line even though his personal beliefs would remain unchanged.

18. ¹⁸ In its August 8, 1994 Order denying Respondent's Motion to Dismiss, the Commission found the First Amendment's constitutional protections of free speech and association were part of the BFOQ provisions of the CHRO. Muni. Code of Chic. § 2-160-030(b). The Commission ruled that "the CHRO's protection for free association is coterminous with the United State's Constitution's and, because this issue is one of first impression for the Commission, we look to Supreme Court precedent for guidance in outlining the standards to be applied." Richardson, CCHR No. 92-E-80 (Aug. 8, 1994) at p. 26. The Supreme Court precedent we will consider includes Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 115 S.Ct. 2338 (1995); New York Club Assoc. v. City of New York, 487 U.S. 1 (1988); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1986); Roberts v. United States Jaycees, 468 U.S. 609 (1984); and Hishon v. King & Spalding, 467 U.S. 69 (1984).

19. ¹⁹ Unlike Duarte and Roberts, which dealt with governmental regulation of an organization's core membership requirement, here we are regulating employment without interfering in any way with the organization's ability to select its own members. Thus, the associational rights which are being violated are limited. See Ohralik v. Ohio State Bar Association, 436 U.S. 447, 460 (1978); Guesby v. Kennedy, 580 F. Supp. 1280 (D.Kan. 1984); Bohemian Club v. Fair Employment & Housing Commission, 187 Cal. App. 2d 1231, *cert. denied*, 108 S.Ct. 51 (1987).

20. ²⁰ Pursuant to Hurley, it appears that in certain instances, the State cannot enforce legislation which burdens an organization's expressive goals even if that goal is not considered a "significant" goal of the organization.

21. ²¹ As a point of fact, the Respondent mischaracterizes this testimony. Mr. Thomas, a past president of the National Association of United Methodist Scouters, was asked whether the church would end its ties with the BSA if the CAC hired a gay man. (Tr. 4/7/95 p. 78) He responded that he did not know. He opined that there would be United Methodist churches that would withdraw support. He also admitted that there was a segment of the Methodist church which was lobbying for changes in the church's position regarding homosexuality. And he admitted that the church allows Girl Scout troops to meet in some of its churches. This, despite the fact that the Girl Scouts employ and admit as members openly homosexual youth and adults. (Tr. 4/7/95 p. 87)

Goaslind, a leader of the Mormon Church, testified that the church would "withdraw our charter membership in the BSA" if Respondent was forced to hire a qualified homosexual employee. (Tr. 4/11/95 p. 13) And yet, he admitted that while the Mormon Church opposed the admission of girls into the Explorer program, it did not withdraw its support for Scouting when they were allowed into the program. (Tr. 4/11/95 p. 17)

Reverend Turner, a Baptist Minister from Louisiana, testified only that in his "personal opinion" it would be devastating if the CAC was required to hire a homosexual employee and that his church would have to "seriously consider" its partnership with the BSA. (Tr. 4/11/95 p. 84)

The above witnesses were all from outside the Chicago Area Council area and were generally unfamiliar with the Council. The Commission has not credited their testimony that their churches would abandon their support for Scouting if a jurisdiction such as Chicago required by its municipal laws that a local council eliminate discrimination based upon sexual orientation. This testimony was neither credible nor consistent with these churches' documented prior actions.

22. ²² Respondent is correct in stating that the "wisdom" of Scouting's beliefs concerning homosexuality is irrelevant to its First Amendment rights under Roberts v. United States Jaycees, 468

U.S. 609 (1984) and Board of Directors of Rotary International v. Rotary Club, 481 U.S. 537 (1987). To the extent that evidence was introduced which concerns the morality or immorality of homosexuality, that evidence was considered solely to determine whether the CAC's viewpoint, if any, was an expressive goal and whether that goal would be adversely impacted if a homosexual person was hired as a District Executive.

23. ²³ Arguably, the only change which would be necessitated by application of the CHRO to the CAC would be an alteration in the discriminatory language contained on the current job application.

24. ²⁴ Complainant mischaracterizes the testimony of Mr. Frankhart. No testimony suggests that he "frequents" topless clubs. His testimony was that he had been in a topless bar (at some point in his life). (Tr. 4/7/95 p. 164) This is a far cry from having a prior work history at bars which showed sexually graphic videos. The Commission rejects the argument that regarding Richardson's employment history as a disqualifier reflects a double standard against gay men and lesbians. It takes no great leap of logic to postulate what would happen if a heterosexual job applicant with an immediate prior job history of working in bars which showed heterosexual anal and oral intercourse applied for a job as a District Executive with the CAC. He would not be hired. There is no double standard being applied.