The Commonwealth of Massachusetts
Commission Against Discrimination
436 Dwight Street, Rm. 220, Springfield, MA 01103
Phone: (413) 739-2145 Fax: (413) 784-1056

Date: 2/12/2018

Carole Sakowski Lynch, Esq.
Fred P. Frangie, Esq.
Morrison Mahoney LLP
Tower Square
1500 Main St., Suite 2400
P. O. Box 15387
Springfield, MA 01115-5387

RE: Lynn Rivera v. Springfield Rescue Mission
MCAD Docket Number: 17SPA00221
EEOC/HUD Federal Charge Number:

Dear Counsel:

Enclosed, please find a copy of an Order issued in the above-referenced matter.

Very truly yours,

Matthew Marotta
Compliance Officer

Monserrate Quiñones
Investigating Commissioner

Enclosure

cc:

Allison W. Wright, Esq.
GLBTQ Legal Advocates, & Defenders
30 Winter Street, Suite #800
Boston, MA 02108

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COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

LYNN RIVERA,
Complainant

v.

Docket No. 17SPA00221

SPRINGFIELD RESCUE MISSION

Respondents

ORDER

This matter comes before me on Respondent's Motion to Dismiss filed on April 5, 2017. After consideration of the Motion and Opposition to the Motion to Dismiss filed on May 16, 2017, and for the reasons stated below, Respondent's Motion to Dismiss is hereby **Denied**, without prejudice to renew. The issues raised will be considered during the course of the investigation.

On January 30, 2017, Complainant filed a complaint alleging discrimination based on sex, gender identity (Transgender) and race/color (Hispanic), in violation of G.L. Chapter 272, § 98. Respondent moves to dismiss, arguing that the Commission lacks jurisdiction over Complainant's discrimination claims. Respondent argues that it is not a place of public accommodation because it is a religious and/or private organization that is not open to the public. Respondent states it is a "church corporation," and there are no religious associations, non-profit organizations and churches listed as examples of places of accommodation in G.L. Chapter 272, § 92A. Respondent does not assert a violation of First Amendment rights or that Respondent's freedom of religion is at issue. Rather, Respondent asserts "its status as a religious organization

and/or private organization renders the Massachusetts Public Accommodation statue inapplicable." Respondent also states it is not a place of public accommodation because it uses genuine selectivity regarding who may use its services.

The Commission investigates complaints of discrimination in places of public accommodation. It is within the Commission's jurisdiction to determine whether an entity is public or private, and the Commission "must be permitted to make its own finding of fact essential to its determination of jurisdiction." *East Chop Tennis Club v. MCAD*, 364 Mass. 444, 452 (1973). It is a violation of G.L. Chapter 272, § 98 to make any distinction, to discriminate, or to restrict a person's access to a place of public accommodation. The protections of the statute have been held to include the provision of certain services or benefits such as insurance, and the Commission has interpreted the statute broadly to extend beyond access to physical structures. *Samartin v. Metropolitan Life Insurance*, 27 MDLR 210, 213-214 (2005). "It has been long recognized in Massachusetts that the list of places of public accommodation set forth in M.G.L. c. 272, s. 98A is not exhaustive." *Samartin*, 27 MDLR at 213 (*citations omitted*).

The Commission recognizes that:

> [t]he law does not apply to a religious organization if subjecting the organization to the law would violate the organization's First Amendment rights. *See Donaldson v. Farrakhan*, 436 Mass. 94 (2002). However, a religious organization may be subject to the Commonwealth's public accommodations law if it engages in or its facilities are used for a "public, secular function." *Id. MCAD Gender Identity Guidance*, page 4 of 9.

Here, Complainant alleges Respondent is engaging in the public, secular function of providing clothing to those in need. Complainant alleges Complainant was not allowed access to the men's clothing section at the "give away center." "Under G.L. c. 272, § 92A, any place of public accommodation that lawfully separates access to a place or portion thereof based on a person's

sex, shall grant admission to that place, and the full enjoyment of that place or portion thereof, consistent with the person's gender identity." *MCAD Gender Identity Guidance*, page 5 of 9.[1]

A place or program may not be deemed to be open to the public if it uses genuine selectivity in its criteria for membership or participation. *Doran v. The R.O.S.E. Fund, Inc.*, 38 MDLR 187, 187 - 188 (2016) (Decision of the Full Commission affirming Hearing Officer Decision finding that a non-profit corporation that provided funds for plastic surgery to female victims of domestic violence employed genuine selectivity criteria and was not a place of public accommodation); *see also Donaldson*, 436 Mass. at 100 (202), *citing Concord Rod and Gun Club, Inc. v. MCAD*, 402 Mass. 716, 721 (1988). "This inquiry is performed as part of a larger effort to determine whether a[n] [entity] is truly a private entity that limits and restricts its membership or whether it 'is open to or solicits the patronage of the general public' within the meaning of G.L. c. 272, § 92A." *Doran*, 38 MDLR at 187.

Respondent asserts its recipients are selected by it after being screened during an intake process and its programs are offered free of charge. Respondent states an appointment must be made to gain access to the center, after passing the pre-screening process, and there is security that must be passed to enter the building. Respondent asserts a recipient must be low-income and "in-need." Respondent states that clothing for men is in more demand so it is easier for women to get services. Respondent also denies it discriminated against Complainant and further states that Complainant was informed it was okay for Complainant to take whatever clothing Complainant desired (men's or women's clothing). Respondent adds that Complainant

[1] G.L. 272 states in relevant part: "An owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement that lawfully segregates or separates access to such place of public accommodation, or a portion of such place of public accommodation, based on a person's sex shall grant all persons admission to, and the full enjoyment of, such place of public accommodation or portion thereof consistent with the person's gender identity."

continued to look for clothing, returned to the front desk with a bag of clothes, and then indicated that Complainant would not be taking anything that day.

Complainant denies Respondent uses genuine selectivity and states no prescreening questions were ever asked. This Commission has held, when determining whether entities are public, that the "mere fact that they solicit applications does not render them public entities for purposes of G.L. c. 272." *Doran v. The R.O.S.E. Fund, Inc.*, 36 MDLR 35, 37 (2014). In this matter, Complainant asserts that Respondent's prescreening is akin to the information asked for at a medical or hairdressing appointment, rather than Respondent exercising genuine selectivity in its policies that would render Respondent a private organization versus a place of public accommodation. Complainant argues that the "give away center" is not a private entity, and it is open to and solicits the patronage of the general public, including in advertising and on its webpage. Complainant cites to Respondent's website alleging the website states: in 1989, the "give away center" was established "for the purpose of distributing clothing, coats, shoes, toiletries, and household items to anyone who is in need." Complainant also states that anyone can make an appointment to shop and the appointments are not limited to a selective or exclusive group. Complainant states no prescreening questions were ever asked by Respondent to Ms. Mounton (the social worker who was with Complainant during the events in question, and who uses Respondent for clients, not just Complainant).

Given all of the above, it is not clear at this stage that as a matter of law Respondent is a private facility and that the Commission is therefore without jurisdiction. *East Chop Tennis Club*, 364 Mass. at 452. The Commission has jurisdiction to investigate whether Respondent is a place of public accommodation within the meaning of Chapter 272. Therefore, Respondent's

Motion to Dismiss is **denied**, without prejudice to renew, and the issues raised will be considered during the course of the investigation.

So Ordered, this 9th day of February, 2018.

Monserrate Quiñones
Investigating Commissioner