City of Chicago
COMMISSION ON HUMAN RELATIONS
740 N. Sedgwick, Suite 400, Chicago, IL 60654
312/744-4111 (Voice), 312/744-1081 (Fax), 312/744-1088 (TDD)

IN THE MATTER OF:

Pamela Gardner
Complainant,
v.
Olaitan Ojo (Property Owner of 2524 Flournoy), New West Realty Group LLC, and Steven Barton
Respondents.

Case No.: 10-H-50

Date of Ruling: December 19, 2012
Date Mailed: December 21, 2012

TO:
Andrea J. Young
John Marshall Law School
Fair Housing Legal Clinic
55 E. Jackson Blvd., Suite 1020
Chicago, IL 60604

Olaitan Ojo
368 Meadowlark Dr.
Bolingbrook, IL 60440

Joseph Spillane
Law Offices of Joe Spillane
114 Gale Ave.
River Forest, IL 60305

Steven Barton
4716 Douglas Rd.
Downers Grove, IL 60515

FINAL ORDER

YOU ARE HEREBY NOTIFIED that, on December 19, 2012, the Chicago Commission on Human Relations entered a ruling in favor of Respondents in the above-captioned matter. The findings of fact and specific terms of the ruling are enclosed. Based on the ruling, this case is hereby DISMISSED.

Pursuant to Commission Regulations 100(15) and 250.150, Complainant may seek a review of this Order by filing a petition for a common law *writ of certiorari* with the Chancery Division of the Circuit Court of Cook County according to applicable law.

CHICAGO COMMISSION ON HUMAN RELATIONS
Entered: December 19, 2012

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FINAL RULING ON LIABILITY

I. Procedural History

On December 7, 2010, Complainant Pamela Gardner, a Housing Choice Voucher holder, filed her initial Complaint alleging that Niccarrah Blalock violated §5-08-030 of the Chicago Fair Housing Ordinance by discriminating against her based on her source of income in connection with her efforts to rent an apartment located at 2524 West Flournoy in Chicago. On February 4, 2011, Complainant filed her First Amended Complaint, which added the Property Owner of 2424 West Flournoy (later determined to be Olaitan Ojo) as an additional respondent. On April 18, 2011, Complainant filed her Second Amended Complaint (mistitled as the "Amended Complaint"), which added New West Realty Group, LLC ("New West")[1] and Steven Barton as new Respondents and removed Niccarrah Blalock as a Respondent pursuant to a private settlement agreement. By order of July 19, 2011, the Commission dismissed Blalock as a Respondent. By order of July 28, 2011, the Commission found substantial evidence of the alleged Ordinance violation of the Ordinance based upon Complainant's source of income.

The Commission conducted the administrative hearing on February 8, 2012. Complainant (who was represented by counsel)[2] and Respondent Barton (who proceeded *pro se*) appeared and testified, as did Niccarrah Blalock—whose appearance was secured by subpoena. Respondents New West and Ojo did not appear for the administrative hearing and the hearing officer entered an order of default against them pursuant to Regulation 240.398 at the beginning of the administrative hearing for the reasons stated below:

> The day for this administrative hearing was set on November 18th by the Commission's order, and it was scheduled for today, February 8th at 10:30. The Commission has issued at least three orders warning of the consequences that would come to any party who failed to appear for the administrative hearing. The

[1] The Second Amended Complaint identified New West as New West Realty, Inc. On August 2, 2012, the Commission granted Complainant's motion to conform and for leave to amend her Complaint to identify New West as New West Realty Group, LLC. On September 6, 2012, Complainant filed her Third Amended Complaint which incorporated this amendment.

[2] Complainant's legal team consisted of supervising attorneys Andrea Young and Lewis Powell from the John Marshall Legal Clinic and law students Mallory Littlejohn, Michael Newmann, and Louis Raymond, who were authorized to represent Complainant pursuant to Supreme Court Rule 711.

> Respondents were explicitly warned that they could be found to have a default judgment entered against them and that that would be a severe consequence. These orders are the Commission's orders of November 18, 2011, January 20, 2012, and January 31, 2012.

Transcript ("Tr.") 5. The hearing officer went on to advise the parties present as follows:

> Regarding the effects of the default, those are also specified by Commission Rule 235.320, which states in part [that] a defaulted respondent is deemed to have admitted the allegations of the complaint and to have waived any defenses to the allegations including defenses concerned in the complaint's sufficiency.
>
> An administrative hearing after an order of default shall be held only to allow the complainant to establish a prima facie case and to establish the nature and amount of relief to be awarded. A complainant may present a prima facie case [with] the complaint alone or may present additional evidence. Although the defaulted respondent may not contest the sufficiency of the complaint or present any evidence in defense, the Commission itself must determine whether there was an ordinance violation and so must determine whether the complainant has established a prima facie case and whether it has jurisdiction.

Tr. 6.

In its post-hearing order of February 15, 2012, the Commission ordered that the parties submit post-hearing briefs by April 2, 2012. Complainant and Respondent Barton timely filed their post-hearing briefs. On May 8, 2012, attorney Joseph Spillane filed an appearance for Respondent New West (hereafter "New West") and a post-hearing brief for New West without seeking leave from the Commission. Complainant filed a motion to strike New West's untimely filed post-hearing brief. The Commission denied Complainant's motion to strike by its order dated August 2, 2012, notwithstanding New West's lack of justification for its tardiness after it found that Complainant was not prejudiced by the late filing. On September 6, 2012, the Commission granted Complainant's motion for leave to file a response to New West's post-hearing brief and granted New West leave to file a reply by September 24, 2012. New West timely filed its reply brief and this matter is ripe for decision.

II. Findings of Fact

As set forth above, the Commission entered a default order against Respondents New West and Ojo, and they are therefore deemed to have admitted the allegations of the Third Amended Complaint.[3] However, the Commission did not enter a default against Respondent Barton. As a result, Complainant must prove her allegations that he engaged in source of income discrimination claim against her. See *Wiles v. The Woodlawn Organization & McNeil,* CCHR Case No. 96-H-1 (March 17, 1999), at 4, discussing how the findings of fact would be handled in a case where one respondent defaulted and the other did not. The factual findings set forth below

[3] At the time the Commission entered its default against New West and Ojo, Complainant's Second Amended Complaint was the operative pleading. However, the Third Amended Complaint is identical to the Second Amended Complaint with the exception of its correction of the manner in which Respondents New West and Ojo are identified and it will be treated as the operative complaint.

are based on the evidentiary record before the Commission following the administrative hearing and they apply to all three Respondents:

A. Findings of Fact Relating to the Claim Against Respondent Barton

1. Complainant Pamela Gardner is an unemployed person who is disabled by a neurological disorder which causes epileptic seizures. Tr., at 35-36. Complainant lives with family members including her mother (whom she cares for) and her 17-year-old daughter. Tr. 36.

2. Complainant currently resides at 108 N. Waller Street in a two-story unit that is not ideally configured for Complainant's family given Complainant's mobility issues and her need to provide care for her mother. Tr. 38-39.

3. Complainant receives rental subsidies through the Housing Choice Voucher (Section 8) Program. Tr. 39; Exhibit E (Housing Choice Voucher Program Voucher for Complainant issued October 8, 2010). With the subsidy provided by her Housing Choice Voucher, Complainant is able to pay up to $1,410 a month for rent for a three-bedroom apartment. Tr. 39-40; Exhibit E.

4. Complainant began looking in the fall of 2010 for a three-bedroom apartment on the first floor that would better suit her needs. Tr. 41, 14. Complainant was interested in living in the medical district on the near west side of Chicago because it would greatly reduce the amount of time that she would need to spend to take her mother to her doctors' appointments. Tr. 46-47.

5. On September 10, 2010, Complainant called Landmark & Property Group to inquire about renting another unit. Third Amended Complaint, ¶5.[4] Complainant was referred to Niccarah Blalock to obtain Blalock's assistance with her apartment search. Tr. 43.

6. Blalock is a 27-year-old student who works part-time and is studying to be a real estate broker. Tr. 14. Complainant was referred to Blalock by Blalock's former managing broker. Tr. 14. In October 2010, Blalock was not a licensed agent but was instead working as a leasing associate under the supervision of a managing broker from New Urban Property Services, LLC, for a 90-day period of time. Tr. 16; Exhibit C (October 20, 2010 Blalock e-mail).

7. Blalock located the MLS (Multiple Listing Service) listing for the apartment at 2524 W. Flournoy Street (the "Flournoy apartment") with the assistance of her managing broker. Tr. 15-16. The Flournoy apartment, which was built in 2006, had three bedrooms and was located on the ground level in the medical district. Exhibit A (MLS listing for the Flournoy apartment); Tr. 14-15.

8. The MLS listing for the Flournoy apartment identified Barton as the listing agent and New West as the broker. Tr. 16-17; Exhibit A. The MLS listing also contained an office and cell phone number for Barton as well as an e-mail address (sbarton@nwrchicago.com). Exhibit A; Tr. 17.

9. Barton was a licensed real estate agent in October 2010. Tr. 69. He participated in continuing education and he was familiar with the Chicago Fair Housing Ordinance and its

[4] Complainant's Third Amended Complaint and the parties' other pleadings are part of the official record of the administrative hearing process notwithstanding that the pleadings were not referenced during the administrative hearing itself. Commission Regulation 240.510.

anti-discrimination provisions. Tr. 69, 98. Barton was also familiar with the Housing Choice Voucher program. Tr. 89.

10. Barton was employed by New West as a salaried employee through June 2010. Tr. 88. Although Barton was an independent contractor for New West from July 2010 through November 2010, he still viewed himself as "employed by New West" because New West was his broker, he "owned" his real estate license at New West, and New West continued to pay him his split of the proceeds generated from each rental transaction. Tr. 88, 93-95. Barton remained a listing/real estate agent for New West throughout his affiliation with the company. Tr. 95-96.

11. Ojo is the owner of the Flournoy apartment and she hired Barton to rent the apartment. Tr. 76; Exhibit O (special warranty deed). Ojo instructed Barton to find a tenant to rent the Flournoy apartment as soon as possible and Barton endeavored to comply with her instruction. Tr. 76, 74.

12. Barton prepared the MLS listing for the Flournoy apartment and posted it on May 14, 2010. Tr. 76; Exhibit A. The original rental price of $1,400 a month was reduced to $1,300 a month prior to October 2010. Exhibit A; Tr. 27.

13. Barton had the keys and security code for the Flournoy apartment and persons had to work through him to schedule a showing. Tr. 83.

14. To lease the Flournoy apartment, a prospective tenant needed to complete an application and undergo a credit check by New West. Tr. 91-93. The prospective tenant could submit an application after he or she viewed the apartment. Tr. 91.

15. Barton forwarded the applications of all prospective renters to Ojo and Barton processed the applications from prospective tenants on a "first come, first serve" basis. Tr. 83, 91, 99.

16. Ojo made the decision as to who would lease the Flournoy apartment. Tr. 83-84

17. On October 20, 2010, Blalock attempted to send an e-mail to Barton to schedule a showing of the Flournoy apartment, but she used the wrong e-mail address (barton@nwrchicago.com instead of sbarton@nwrchicago.com) and the e-mail never reached Barton. Exhibit C; Tr. 76, 107.

18. Blalock then unsuccessfully attempted to reach Barton by calling his office number from her cell phone (773-449-1888), and she ultimately spoke to him by calling his cell phone (312-952-2156). Tr. 17, 32; Exhibit N (telephone records for Barton's cell phone).

19. Barton's cell phone records reflect the following calls between Blalock's cell phone and his own on October 23, October 26, and October 29 of 2010:

10/23/10	2:51 p.m.	outgoing call	1 minute
10/26/10	12:46 p.m.	outgoing call	1 minute
10/26/10	12:54 p.m.	incoming call	3 minutes
10/29/10	9:37 a.m.	outgoing call	2 minutes
10/29/10	9:55 a.m.	incoming call	2 minutes
10/29/10	9:57 a.m.	incoming call	1 minute

10/29/10	3:29 p.m.	outgoing call	2 minutes
10/29/10	3:30 p.m.	outgoing call	3 minutes[5]

Exhibit N, at 6-7; Tr. 81.

20. During one of their calls, Blalock and Barton scheduled a showing of the Flournoy apartment for October 29, 2010. Tr. 18. The conversation between Blalock and Barton did not extend beyond making the showing arrangements. Tr. 27.

21. Barton was supposed to be present for the showing. Tr. 21. However, Complainant was running late so Barton unlocked the door to the Flournoy apartment for Blalock, deactivated the alarm system, and left a copy of the apartment lease application with her. Tr. 21-22. The lease application has a handwritten notation stating "Fax to Steve at: 773-826-7198" with the telephone number scratched out. Exhibit D (lease application). Blalock did not make the handwritten notations on the lease application. Tr. 23. Barton left before Complainant arrived and he has never met Complainant in person. Tr. 22, 78.

22. After Complainant arrived, she and Blalock spent 45 minutes to an hour viewing the Flournoy apartment. Tr. 29. The showing took place at some time between noon and 2:00 p.m. Tr. 29.

23. Complainant told Blalock that she was interested in renting the Flournoy apartment and Blalock gave her the lease application. Tr. 28, 30, 52. Blalock told Complainant to hold on to the application until Blalock followed up with Blalock's superiors or boss and got back to her. Tr. 53-54. Blalock locked the apartment door behind them as she and Complainant left. Tr. 25.

24. Complainant did not complete the application for the Flournoy apartment or submit any other materials to Respondents. Tr. 54.

25. Barton's cell phone records indicate that Barton placed a call to Blalock's cell phone number at 3:29 p.m. and that he placed a second call to her on 3:30 p.m. on October 29, 2010. Exhibit N, at 7. The latter call (hereafter the "October 29 call") lasted three minutes. Exhibit N, at 7.

26. Complainant and Barton dispute what was said during this October 29 afternoon call. Complainant relies on Blalock, who testified as follows: after she showed the Flournoy apartment to Complainant, Blalock called Barton. Tr. 28. During this call, Blalock told Barton that Complainant was interested in renting the apartment, she had given Complainant the lease application, and that Complainant was interested in moving forward. Tr. 29, 30-31. Blalock also told Barton that Complainant "would probably be submitting additional paperwork, which was her [housing choice] voucher paperwork." Tr. 28.[6]

In response, Barton told Blalock that he would have to check with his client. Tr. 31.

[5] The duration of each call as listed in the cell phone records appears to be an approximation as shown by the fact that the records list an outgoing call at 3:29 p.m. (with a stated duration of two minutes) and another outgoing call at 3:30 p.m. with a stated duration of three minutes.

[6] Blalock did not use the phrase "Section 8" to refer to Complainant's voucher because she assumed at the time that a Section 8 voucher was different from a Housing Choice Voucher. Tr. 28.

Blalock understood that things were placed on "hold." Tr. 31. Barton (who was "fielding calls non-stop" during this time) testified that he recalls speaking with Blalock and that he may have done so once or twice on October 29 after the showing but he did not specifically recall doing so. Tr. 77, 78, 82. Barton denies that he ever told Blalock that he needed to check with the owner (Ojo) about Housing Choice Voucher program and he does not recall ever placing Complainant "on hold." Tr. 32, 100, 110. Barton does not deny that Blalock told him that Complainant was a Housing Choice Voucher holder.

27. Resolving the question of what was said during the October 29 call turns on the credibility of the testimony of Blalock and Barton. In assessing the credibility of a witness, the Commission considers a number of factors including: (a) the witness' demeanor; (b) the clarity, certainty, and plausibility of the testimony; (c) whether the testimony has been impeached or contradicted by other testimony or documentary evidence; (d) whether the testimony has been corroborated by other testimony and documentary evidence; and (e) the witness' interest or disinterest in the outcome of the proceedings. *See Hodges v. Hua & Chao,* CCHR Case No. 06-H-11, at 4 (May 21, 2008) (citing multiple cases).

28. In consideration of these factors, the Commission finds, based on the hearing officer's recommendation, that Barton's testimony that he never told Blalock during the October 29 call that he needed to check with Ojo regarding Complainant's Housing Choice Voucher to be more credible notwithstanding the fact he has a clear interest in the resolution of this case and that he had no specific recollection of this brief conversation with Blalock. See *Hodges v. Hua & Chao, supra,* at 6 n.6, holding that "[t]here is nothing inherently implausible about a person not recalling every detail of a conversation but nonetheless recalling that he or she did not say a certain thing."

In particular, Barton's denial that he placed Complainant on hold to check with Ojo about the Housing Choice Voucher program is consistent with the status of Respondents' efforts to rent the Flournoy apartment and the rental procedure that they had put in place. As of October 29, the Flournoy apartment had been available for rent for over five months and Ojo had already reduced the monthly rent (from $1,400 to $1,300) to induce prospective tenants. Finding of Fact #12, *supra.* Ojo (according to Barton's assertions at the administrative hearing) was already aware of the Housing Choice Voucher program and she would have "taken any renter." Tr. 33, 110.[7] Moreover, under Respondents' rental procedure, a prospective tenant needed to submit an application to rent the Flournoy apartment and it was Ojo—and not Barton—who was to select a tenant after the application was completed and a credit check was performed. Findings of Fact ##14, 16. Finally, Barton had a financial incentive to expedite the rental process because he would receive no payment for his efforts until the Flournoy apartment was actually rented. Finding of Fact #10. In view of these factors, the hearing officer determined it was not reasonable to find that Barton would have told Blalock that he was placing Complainant "on hold" to ask Ojo what he believed to be an unnecessary question about the Housing Choice Voucher program.

Furthermore, Barton was an experienced licensed real estate agent at the time and he was familiar with the Housing Choice Voucher program and understood that the City's Fair Housing Ordinance barred housing discrimination. Finding of Fact #9. There is no evidence that Barton

[7] Although the Commission does not accept Barton's statements as to Ojo's knowledge and intentions for the truth of the matters asserted (*i.e.*, that Ojo was in fact aware of the Housing Choice Voucher program and that she would have taken "any" tenant), it does credit the statements as being reflective of Barton's state of mind about Ojo.

harbored any discriminatory animus towards Housing Choice Voucher holders. To the contrary, Barton testified without contradiction that at the time of the incident in question he was assisting another Housing Choice Voucher holder with her ultimately successful effort to rent an apartment located at 2518 Flournoy, which is two doors down from the Flournoy apartment. Tr. 85, 89. The Commission has previously found that a respondent's willingness to rent to other persons with a complainant's same source of income undercuts the claim that the respondent has acted with a discriminatory motivation.[8] In addition, Barton (who at that time was a resident of Chicago's west side) forthrightly testified to his commitment to "helping people get into homes" as part of the "affordable housing program on the west side" and he adamantly denied discriminating against Complainant or anyone one else. Tr. 85, 98, 100. This evidence shows that it is more likely than not that Barton did not placing Complainant "on hold" with the intent of deterring her from submitting an application because of her status as a Housing Choice Voucher holder, as Complainant asserts.

By contrast, the Commission finds that Blalock's account of the October 29 call is not credible for the following reasons:

First, Blalock's testimony regarding the call is inconsistent with Complainant's Third Amended Complaint (which is based in pertinent part on Blalock's prior affidavit). In her Third Amended Complaint, Complainant alleges the following regarding the October 29 call:

> Blalock contacted Barton and informed him that [Complainant], a Voucher recipient was interested in the unit. Barton stated that he was 'not familiar with the voucher program and also indicated that he was not sure whether his client, the building owner (Ojo), would want to incur additional expenses to make repairs that might be required by the City.'

Third Amended Complaint, ¶7 (quoting Blalock's affidavit dated March 8, 2011). At the administrative hearing, Blalock did not testify that Barton told her that he was not familiar with the Housing Choice Voucher program or that Barton told her that Ojo might not want to incur additional expenses that might be required by the City. Instead, Blalock testified only that Barton said he would have to check with his client and that she understood that things were "on hold" until he did so. Finding of Fact #26.

Second, Blalock's testimony that she initiated the October 29 call by calling Barton is contradicted by the phone records which show that Barton called Blalock (Compare Tr. 29 with Exhibit N at 7).

Third, Blalock's testimony was internally inconsistent on two other points. See *Buckner v. Verbon*, CCHR Case No. 94-H-82 (May 21, 1997) at 12, finding a party's testimony not

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[8] *See, e.g., Hodges v. Hua and Chao, supra,* at 6, where the Commission determined that a respondent's "willingness to proceed with the rental process *after* learning of this prospective tenant's status as a Section 8 Housing Choice Voucher holder suggests that he would not disqualify a prospective tenant for this reason" [emphasis in original]; *Marshall v. Gleason*, CCHR Case No. 00-H-1 (April 21, 2004) at 13, holding that evidence that a respondent landlord continued to rent to Section 8 tenants after he dealt with the complainant—a Section 8 voucher holder—helped rebut the assertion that the respondent discriminated against complainant based on his source of income; *Cooper & Ashmon v. Parkview Realty*, CCHR Case No. 91-FHO-5633 (Sept. 8, 1992) at 9, holding that evidence that a respondent had other tenants in its building with complainant's source of income "by itself does not vitiate the claim that discrimination occurred...[b]ut it does make it appear that [r]espondent more likely did not discriminate based on 'source of income' and it further serves to reduce the credibility of [c]omplainants that the incident occurred as alleged."

credible where she contradicted herself throughout the hearing. In particular, Blalock testified that she sent Barton an e-mail after October 29, 2010 to follow up with him. Tr. 18. Blalock retracted this testimony after reviewing her affidavit (which indicated that she exchanged e-mails with Complainant at this time) and admitted that she had gotten confused. Tr. 19. Later in the hearing, Blalock testified that she did not recall whether she spoke with Barton after the October 29 call but then she immediately thereafter testified that she believes that she made contact with him after the October 29 call even though the phone records indicate that this was the last call between the two of them and there is no evidence that she ever successfully e-mailed Barton. Tr. 31; Exhibit N.

Finally, although Blalock is no longer a party to this case, she was not a disinterested witness. Blalock was the sole person identified in the initial Complaint as discriminating against Complainant based on her source of income. In her Complaint, Complainant alleged that Blalock told her that "she will confirm with her boss, Thomas Brown, if the owner of the building accepts Section 8 Housing Voucher[s]." Complaint, ¶2. This allegation is consistent with Complainant's testimony at the administrative hearing; see Tr. 54 ("She asked me to hold onto an application, a rental application and that she would follow up with her—I want to say superiors or her boss and she'll get back to me"). However, in the Second Amended Complaint (which Complainant filed after reaching a settlement with Blalock and receiving Blalock's affidavit), Complainant amended the above allegation as follows: "After viewing the apartment, Blalock informed Ms. Gardner that she will confirm with (her boss *and*) *the listing agent* if Ms. Gardner could use her Voucher to rent the apartment." Second Amended Complaint, ¶6 (emphasis added). This amendment shifts the responsibility for Blalock's decision to advise Complainant to hold on to her application from Blalock alone to include Barton. The only apparent explanation for this amendment is the input that Complainant received from Blalock. The Commission does not discount the possibility that Blalock attempted to shape Complainant's perception of what transpired in order to avoid the blame for the fact that Complainant did not complete and submit an application for the Flournoy apartment.

29. The October 29 call was the last call between Blalock and Barton and the two had no further contact. Exhibit N; Tr. 31, 107.

30. There were a couple of other potential tenants who applied for the Flournoy apartment around the time Complainant went in for her October 29 showing. Tr. 85. Barton forwarded all applications for potential tenants to Ojo. Tr. 83.

31. Barton does not recall speaking with Ojo regarding Complainant or any other persons who applied to lease the Flournoy apartment (including the individuals who ultimately leased the apartment). Tr. 83.

32. After the October 29 showing, Complainant contacted Blalock by phone and e-mail. Tr. 54. In particular, on October 31, 2010, Complainant sent to Blalock an e-mail in which she stated that she was following up regarding the Flournoy apartment and that she was willing to view other apartments in the near west side area that had the same rental price and a similar floor plan. Exhibit H. Later that same day, Blalock e-mailed a response to Complainant which stated: "Hello Pamela. I was waiting for the listing agent to confirm if the condo owner is willing to accept your housing voucher. I'm glad you are willing to look at other places. I will get back to you this week." Exhibit H. On November 3, 2010, Blalock responded to Complainant's October 31 e-mail as follows:

> Hello Pamela. I wanted to inform you that I have not heard back from the listing agent for the Flournoy unit, so I went ahead and began researching homes for rent that specifically accept your housing voucher for the rent amount you would like to pay in the Near West Side[] area. Rentals are limited in the area, but I have suitable properties and I will be contracting the listing agents for showings.
>
> Please confirm the next dates and times you would like for me to schedule showings and I will make those arrangements. I appreciate your patience in advance.

Exhibit I.

33. Despite the fact that there were many apartments for rent in the near west side Medical District area, Blalock never showed Complainant any other apartments. Tr. 67, 99.

34. Between October 29 and December 16, 2010, Barton prepared a couple of other leases for prospective tenants that fizzled out before the leases could be finalized. Tr. 85, 87.

35. On December 16, 2010, two tenants executed a one-year lease for the Flournoy apartment. Exhibit M (lease). The tenants submitted an application to Barton after they attended a showing of the Flournoy apartment and they also underwent a credit check. Tr. 91-93. The tenants were not Housing Choice Voucher holders. Exhibit M.

36. Complainant continues to reside at 108 N. Waller, where she was living when the incident which sparked this case occurred in October 2010. Tr. 46.

III. Conclusions of Law

1. Section 5-08-030 of the Chicago Fair Housing Ordinance provides in relevant part as follows:

> It shall be an unfair housing practice and unlawful for any owner, lessee, sublessee, assignee, managing agent, or other person, firm or corporation having the right to sell, rent, lease or sublease any housing accommodation, within the City of Chicago, or any agent of any of these, or any real estate broker licensed as such:
>
> A. To make any distinction, discrimination or restriction against any person in the price, terms, conditions or privileges of any kind relating to the sale, rental, lease or occupancy of any real estate used for residential purposes in the City of Chicago or in the furnishing of any facilities or services in connection therewith, predicated upon the race, color, sex, gender identity, age, religion, disability, national origin, ancestry, marital status, parental status, military discharge status or source of income of the prospective or actual buyer or tenant thereof....

2. "A respondent violates the CFHO when s/he refuses to consider an applicant to rent an apartment due to his/her protected status under the Ordinance." *Jones v. Shaheed,* CCHR Case No. 00-H-82, at 7 (March 17, 2004). Also, it is well-settled that the "refus[al] to rent complainant an apartment because of her desire to use her Section 8 voucher to pay a portion of the rent" is an ordinance violation. *Sullivan-Lackey v. Godinez,* CCHR Case No. 99-H-99 (July

18, 2001), aff'd, 352 Ill.App.3d 87, 815 N.E.2d 822 (1st Dist. 2004); *Hodges v. Hua & Chao, supra* at 8; *McGee v. Sims*, CCHR Case No. 94-H-131 (Oct. 18, 1995) at 8.

3. It is undisputed that Complainant relies upon a Housing Choice Voucher as a source of income to pay her rent. Nonetheless, "Complainant bears the burden of proving by a preponderance of the evidence that Respondent[s] did in fact refuse to rent to her because of her source of income." *McGee v. Sims, supra* at 8. A housing discrimination case may be proved through either the direct or indirect methods of proof. See, e.g., *Pierce v. New Jerusalem Christian Development Corp.*, CCHR Case No. 07-H-12/13, at 5 (Feb. 16, 2011).

4. Complainant relies on the indirect method of proof in this case. See Complainant's Post-Hearing Brief, at 5. To establish a *prima facie* case for intentional housing discrimination under the indirect method, Complainant must establish: (1) she is a member of a protected class covered by the Ordinance; (2) the Respondents were aware that Complainant was a member of the protected class; (3) Complainant was ready and able to rent the property at issue; and (4) Complainant was not allowed to rent the property. *Pierce v. New Jerusalem Christian Development Corp., supra,* at 5. If Complainant establishes a *prima facie* case, the burden shifts to Respondents to articulate a legitimate, nondiscriminatory reason for the refusal to rent. *Hutchison v. Iftekaruddin,* CCHR Case No. 09-H-21, at 6 (Feb. 17, 2010). If the Respondents satisfy this burden, Complainant may still prevail if she shows that the articulated reason is a pretext for discrimination. *Id.*

5. The Commission will first determine whether Complainant has proven her case against Barton. Complainant has satisfied the first, second, and fourth elements of her *prima facie* case with respect to her claim against Barton by showing that she is a Housing Choice Voucher holder; Blalock informed Barton of her status as a Housing Choice Voucher holder; and she was not able to rent the Flournoy apartment. The parties dispute whether Complainant has satisfied the third element of her *prima facie* case which requires a showing that she was ready and able to rent the property. Respondents argue that Complainant has not proven this element because she did not submit an application to rent the Flournoy apartment. Complainant argues that she satisfied this element of her *prima facie* case merely by showing that her Housing Choice Voucher provided enough funds to cover the $1,300 rent for the Flournoy apartment. Complainant further asserts that Respondents' focus on her failure to submit a rental application goes to the question of whether Respondents have articulated a legitimate, non-discriminatory reason for failing to rent to her and that Respondents cannot rely on her failure to submit an application as a legitimate, non-discriminatory reason because it would have been a "futile gesture" for her to submit an application. Complainant's Post-Hearing Brief, at 6-9.

6. The Commission finds that the submission of an application is an element of a complainant's *prima facie* case in a failure to rent case where—as here—the evidence shows that an application is a necessary precondition to rent unless the complainant can show that it would have been a "futile gesture" for him or her to have applied. See *Richardson v. Chicago Area Council of Boy Scouts*, CCHR Case No. 92-E-80, at 8 (Oct. 30, 1992), an employment discrimination case involving refusal to hire which explains that a *prima facie* case of intentional discrimination under the indirect method requires a showing that the complainant applied for an available position unless submission of an application would be a "futile gesture." This is so because rental applications typically require the provision of information aside from income that a reasonable landlord would rely upon to determine an applicant's eligibility for tenancy. For example, Respondent Ojo's application (Exhibit D) requires that an applicant disclose whether they have been, or are in the process of being, evicted and what type of pets (if any) that they

have. An applicant could presumably be disqualified for a tenancy because of a history of evictions or their ownership of a menagerie of pets even if they had sufficient income to pay the rent for the apartment in question.

7. It is undisputed that Complainant did not submit an application to rent the Flournoy apartment. Consequently, the contested issue is whether the "futile gesture" doctrine applies here. The Commission has held that "[w]hen a complainant does not complete the application process to rent an apartment because a respondent has made it clear that it will not rent to the complainant because of a protected status, the completion of the process is excused as a futile gesture." *Rankin v. 6954 N. Sheridan Inc.*, CCHR Case No. 08-H-49 (Aug. 18, 2010), at 7-8 (citing cases). To rely on the futile gesture doctrine, Complainant must show: (a) that she is a member of a protected class who was a bona fide renter of the property and financially able to rent the apartment at the time it was available; (b) that the owner of the apartment (Ojo), or alternatively Barton as Ojo's rental agent, discriminated against people with her source of income; (c) that she was reliably informed of this policy of discrimination and would have taken steps to rent the apartment but for the discrimination; and (d) that Ojo or Barton would have discriminated against Complainant had Complainant applied for the property. *Jones v. Shaheed, supra*, at 14-16; *Pudelek and Weinmann v. Bridgeview Garden Condominium Association et al.*, CCHR Case No. 99-H-39/53 (April 18, 2001), at 20-21.

8. Complainant has clearly satisfied the first element of the futile gesture doctrine and she argues that evidence that Barton never got back to Blalock about the use of Complainant's voucher provides the remaining proof she needs. Complainant's Post-Hearing Brief, at 7. The Commission disagrees. There is no evidence in the record to indicate that any of the Respondents had a policy of discriminating against persons who rely on Housing Choice Vouchers to help pay their rent. There is likewise no evidence to support a finding that Ojo would have refused to rent to Complainant if she had actually applied.

Furthermore, Complainant never met or had any direct communications with any of the Respondents. Complainant's only information about Respondents came from Blalock, who informed her that Barton had never gotten back to her about her use of a voucher. Even if Blalock were a "reliable" source of information about Respondents (and she was not),[9] her statement to Complainant that Barton did not get back to her about the voucher is not the communication of a policy of discrimination within the meaning of the futile gesture doctrine. Not returning a call is an ambiguous gesture that could be accounted for by any number of innocent, non-discriminatory explanations. For example, presuming that Barton had in fact stated that he would check with Ojo, his failure to respond to Blalock could be explained by the possibility that he was busy working on leases for the other prospective tenants who had applied for the Flournoy apartment around the time of Complainant's showing on October 29, or by the simple possibility that he forgot to return the call, or even by Ojo's unavailability to respond.[10]

[9] As discussed above at Finding of Fact #28, the Commission finds that Barton did not, in fact, tell Blalock that he would need to check with his client (Ojo) about whether she would accept Complainant's voucher.

[10] The Commission does not doubt that Complainant was disappointed and discouraged after she received Blalock's November 3 e-mail. Tr. 58. Nonetheless, Complainant's sincerely held belief that her "housing choice voucher was not going to be accepted" (*id.*) does not warrant the application of the futile gesture doctrine when the elements needed to apply the doctrine have not been established. See *Cooper & Ashmon v. Parkview Realty, supra*, at 11: "[t]he Commission feels that Complainants truly believed that the incident happened as was testified to by them, but, this belief by the Complainants alone is not sufficient to prove their cases by the preponderance of the evidence."

By contrast, the Commission has applied the futile gesture doctrine only where respondents have unambiguously communicated their discriminatory policies to complainants. See, e.g., *Jones v. Shaheed, supra,* at 4-5, 16, where a non-working, disabled complainant who relied on Social Security Disability Income was told by respondent three times that he would not rent to her because she was not working; *Pudelek and Weinmann v. Bridgeview Garden Condominium Association et al., supra,* at 4-6, 21, where the complainants were informed orally and in writing about the respondents' discriminatory "adults-only" policy; see also *Cooper v. Park Management and Investment, Ltd.*, CCHR Case No. 03-H-48 (Nov. 17, 2003), at 2, denying a motion to dismiss and holding that the complainant had invoked the futile gesture doctrine by alleging, among other things, that the respondents' agent stated to her that respondents would not accept a Section 8 voucher.[11]

9. In sum, for the reasons stated above, Complainant has failed to establish a *prima facie* case for intentional housing discrimination under the indirect method and she has likewise failed to prove that she is entitled to rely on the futile gesture doctrine. These conclusions of law entitle Respondent Barton to a ruling in his favor.

10. Two further issues remain with respect to Respondents New West and Ojo. First, the parties dispute whether Complainant has proven that Barton acted as an agent of New West and Ojo. This issue is potentially dispositive. New West and Ojo had no contact at all with either Complainant or her agent Blalock, and the only connection between these two Respondents and Complainant are the communications that Barton had with Blalock. Given these facts, there is no possibility that New West and Ojo could face liability to Complainant unless they are responsible for Barton's actions through agency principles. Not surprisingly, the parties' post-hearing briefs devoted much time and attention to the agency issue.[12] Nonetheless, the Commission need not definitively resolve this issue because it has already concluded that Barton did not discriminate against Complainant. Consequently, even presuming that Barton was acting as the agent of New West and Ojo when he dealt with Blalock (and the evidence and Commission precedent strongly suggests that he was), New West and Ojo face no liability based on Barton's actions because Barton did not violate the Ordinance.

11. The second issue concerns the fact that the Commission has found both New West and Ojo in default. Under CCHR Reg. 235.320, Ojo and New West, as defaulted respondents, are "deemed to have admitted the allegations of the complaint and to have waived any defenses to the allegations including defenses concerning the complaint's sufficiency." In the typical default case in which the only (or every) respondent defaults, "the respondent shall not be able to cross-examine the complainant or present other evidence (via testimony or documents) which addresses the merits of the complainant's allegations" although the

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[11] The cases cited by Complainant are inapposite. In *Rankin*, the complainant proved her case with direct evidence, namely, the respondent's statement to the complainant that Section 8 recipients would not be accepted to rent at the building in question. *Rankin, supra,* at 8. However, there is no direct evidence in this case. In the other two cases, all respondents either stipulated that they failed to rent to complainants based on their source of income or they defaulted and the administrative hearings focused on complainants' damages. *Sercye v. Reppen,* CCHR Case No. 08-H-42 (Oct. 21, 2009), at 1; *Draft v. Jercich,* CCHR Case No. 05-H-20 (July 16, 2008), at 1-2.

[12] In a twist of irony, Barton assists Complainant on this point by cataloging the pertinent evidence and forcefully arguing that he *was* the agent for New West (who in turn was the broker/agent for Ojo) in a misguided effort to escape liability. Barton Post-Hearing Brief, at 1-2. In particular, Barton contends that he cannot be held liable for discriminating against Complainant because he acted as a disclosed agent for a disclosed principal. *Id.* Barton's argument has no merit because Section 5-8-020 of the Fair Housing Ordinance clearly prohibits "any agent"—whether disclosed or not—from engaging in housing discrimination.

administrative hearing officer "may ask questions about the complainant's case, if necessary, to ensure that he or she can establish that the respondent violated the ordinance in question." *Wiles v. The Woodlawn Organization and McNeil, supra,* at 33.

12. However, where one or more respondents have defaulted and another respondent has not, a full administrative hearing must be held during which the non-defaulted respondent may present his or her defenses to the complainant's allegations and cross-examine the complainant and complainant's witnesses. *Id.*, at 32. The facts as proven through the testimony and evidence admitted at the administrative hearing dictate the Commission's factual findings and trump any contrary allegations of the complainant's complaint. *Id.*, at 32 & n.8. The decision in *Wiles,* where the Commission explicitly rejected findings of fact against the defaulted respondent that were based on the complaint given that they were "contrary to the evidence presented at the hearing," applies this principle. *Id.*, at 5 (rejecting factual finding number 9). Thus, the evidence presented at the administrative hearing controls the factual findings against both Barton *and* the defaulted Respondents Ojo and New West to the extent that there is any conflict between the hearing evidence and the allegations of the Third Amended Complaint.

13. The Commission "require[s] that a complainant in a default case establish a *prima facie* case in order to establish damages." *Wiles v. The Woodlawn Organization and McNeil, supra,* at 32; *Lawrence v. Multicorp Co.*, CCHR Case No. 97-PA-65 (July 22, 1998), at 5. This is so because "the Commission cannot assess liability and damages against a respondent unless the record demonstrates it has jurisdiction and supports a finding that a violation of the Ordinance occurred, and that the complainant is entitled to damages." *Lawrence v. Multicorp Co., supra,* at 5, 7-8 (citing cases); *Wiles v. The Woodlawn Organization and McNeil, supra,* at 33 (explaining that "the Commission cannot award damages for any reason other than a violation of an ordinance which it enforces"). Consequently, the Commission has refused to enter a finding of liability and order relief against defaulted respondents where complainants have failed to present sufficient evidence of a *prima facie* case. See, e.g., *Lawrence v. Multicorp Co., supra,* at 7-8, 12; *Wiles v. The Woodlawn Organization and McNeil, supra,* at 32-33.

14. The Commission is troubled by the manner in which Respondents Ojo and New West have conducted themselves in this case. Ojo has completely failed to comply with the Commission's Regulations and orders by entirely failing to participate in the Commission's proceedings. New West has likewise failed to comply with the Commission's Regulations and orders by failing to appear for the administrative hearing. The Commission does not condone such conduct and it has sanctioned both Respondents by entering an order of default against them. See also *Lawrence v. Multicorp Co., supra,* at 7.

Nonetheless, Complainant is not entitled to a finding of liability and orders of relief against Ojo and New West because she has failed to establish a *prima facie* against them. To reiterate, the evidence adduced at the administrative hearing shows that Complainant and her agent Blalock had no contact with either Ojo or New West. Moreover, the Third Amended Complaint alleges only that Ojo is the owner of the Flournoy apartment and that New West had Barton as one of its real estate agents. Third Amended Complaint, ¶¶2, 4. The only plausible theory through which Ojo and New West could be held liable is through the actions of their agent Barton. However, as stated above, the evidence at the administrative hearing establishes that Barton did not engage in source of income discrimination against Complainant. Consequently, the evidence is insufficient as a matter of law to support a finding that Ojo and New West violated the Fair Housing Ordinance by engaging in source of income discrimination against Complainant. See *Lawrence v. Multicorp Co., supra,* at 7.

IV. Complainant's Objections

On November 13, 2012, Complainant timely filed Objections to the Recommended Ruling ("Objections"). Pursuant to CCHR Reg. 240.610(b), objections to a recommended ruling must include (i) relevant legal analysis for any objections to legal conclusions, (ii) specific grounds for reversal or modification of any findings of fact including specific references to the record and transcript, and (iii) specific grounds for reversal or modification of any recommended relief. The Commission has previously held that a party objecting to a hearing officer's recommendation may not simply argue that the evidence and the hearing officer's determination of credibility should be reweighed. Findings of fact will not be set aside unless they are "contrary to the evidence presented at the hearing" (Chic. Muni. Code, §2-120-510(l)) or it appears from the record that an opposite conclusion is clearly warranted. Similarly, a party cannot meet its burden merely by showing that there is another plausible interpretation of the evidence. *Claudio v. Chicago Baking Co.*, CCHR Case No. 99-E-76 (July 17, 2002), at 9; *Mahaffey v. University of Chicago Hospitals*, CCHR Case No. 93-E-221 (July 22, 1998), at 10.

Complainant's Objections here focus on Finding of Fact #28 and on Conclusion of Law #8 of the recommended ruling. As explained in detail below, the Commission overrules Complainant's objections to Finding of Fact #28 because they are either unsupported by the factual record or they merely seek to have the Commission reweigh the evidence. Furthermore, the Commission overrules Complainant's objection to Conclusion of Law #8 because Complainant's argument is contrary to well-settled Commission precedent.

A. Complainant's objection that Finding of Fact #28 does not recognize that both Barton and Blalock had the same financial incentive to expedite the rental of the Flournoy apartment

The hearing officer found that Barton had a financial incentive to expedite the rental process because he would receive no payment for his efforts until the Flournoy apartment was actually rented. Findings of Fact ##10, 28. Complainant asserts that Finding of Fact #28 is flawed because Barton and Blalock share the "same [financial] incentive" to make sure that the Flournoy apartment was promptly rented because Blalock "worked on commission and would not receive monetary compensation if the unit remained vacant." Objections, at 2. However, there is no evidence in the record to support Complainant's assertion as to how (if at all) Blalock would have been compensated upon the successful rental of the Flournoy apartment.

Unlike Barton, who was a "licensed real estate agent" and who provided clear testimony about the manner in which he was compensated (Findings of Fact ##9, 10), Blalock was an unlicensed "leasing associate" under the supervision of a managing broker for a 90-day period of time when Complainant viewed the Flournoy apartment. Finding of Fact #6. Blalock provided no testimony as to how (if at all) she would have been compensated if she had played a role in the successful leasing of the Flournoy apartment. Moreover, Complainant has failed to point to any other evidence in the record that explains how Blalock was compensated during her finite stint as a "leasing agent." Consequently, Complainant's objection is rejected because Commission has no basis to find that an unlicensed, temporary leasing associate like Blalock was compensated on the same basis as a licensed real estate agent like Barton.

B. Complainant's objection that Finding of Fact #28 does not recognize that Barton's testimony at the administrative hearing differed from his Response to the Amended Complaint and Position Statement

Complainant objects in a conclusory fashion to Finding of Fact #28, in which the hearing officer found Barton to be more credible than Blalock, because of asserted "change[s]" between Barton's Response to the Complaint (dated May 12, 2011) and his testimony at the administrative hearing. Objections, at 2. The Commission overrules this objection because it finds, for the reasons explained below, that any minor variances between Barton's Response to the Complaint and his testimony at the administrative hearing do not undermine his credibility.

In his Response to the Amended Complaint, Barton stated that he did "not recognize the names Niccarrah Blalock or Pamela (Patrica) Gardner nor recall speaking to Blalock and Gardner." Response to Complaint (Exhibit L), at 2. In his Response, Barton also stated that he stands "firmly by my statement that Blalock did not discuss this tenant with me." Response to Complaint (Exhibit L), at 3. At the administrative hearing, Barton testified that although he did not recognize the names of Complainant or Blalock at the time he prepared his Response, his memory became "a little bit more clearer" after he "got the paperwork" connected to this case. Tr. 70, 73. Barton also testified that he had no specific recollection of the October 29 call with Blalock and he did not reiterate at the administrative hearing his denial that Blalock never discussed Complainant with him. See Findings of Fact ##26, 27.

Given that Barton was "fielding calls nonstop" while working as a real estate agent part time and searching for a full time job at the time of the incident (Tr. 78-79), it is plausible and understandable that Barton would have little recollection of his fleeting contact with Blalock. Moreover, it is undisputed that Barton never met Complainant in person, talked with her on the phone, or received any documentation with her name on it until after Complainant filed her Complaint. Given this, it is understandable that Barton's recollection could be refreshed to some degree by reviewing documents related to this case. Moreover, the fact that Barton did not reiterate at the administrative hearing his initial denial that Blalock discussed Complainant with him is a subtle variation in position that if anything favors Complainant because Barton did not dispute Blalock's testimony that she mentioned to him that Complainant was a Housing Choice Voucher holder. See Finding of Fact #26.

C. Complainant's objection that Finding of Fact #28 does not recognize that Barton destroyed documents that might have corroborated his testimony

Complainant asserts that Barton's credibility should be questioned because "he admitted at the hearing that he destroyed boxes of documents that might have supported his statements at trial." Objections, at 2-3. Specifically, Barton testified that he destroyed "two boxes full of old documents, leases and whatnot" related to his work at New West. Tr. 87. Barton explained that he did not submit the documents to the Commission because he told New West what happened and New West told him they "were taking care of it [i.e., the case]" and he also testified that he "had no idea" the Commission was looking for documentation of potential contracts to lease the Flournoy apartment. Tr. 87, 74. Barton threw away the two boxes of documents because he had left the real estate business and he was "trying to just clean [his] garage out." Tr. 87.

Although Barton had a duty under CCHR Reg. 210.270(a), once he learned of the Complaint, to "preserve all records and other materials which may be relevant to the case until

the matter is closed," the Commission does not find that his destruction of these documents undercuts his credibility for three reasons. First, Barton offered an innocent explanation for his destruction of documents which Complainant does not challenge and which would not warrant the imposition of a negative inference or any other kind of sanction under Regulation 210.270(a).[13] Second, the destroyed documents (which may have included potential leases for the Flournoy apartment) have no relationship to Barton's defense, namely, that he never put Complainant "on hold" to check with Ojo about the Housing Choice Voucher program. Finally, Complainant does *not* argue that the destroyed documents would have supported her case.

D. Complainant's objection that Finding of Fact #28 considers as relevant that Barton contemporaneously assisted another Housing Choice Voucher holder with her rental of a neighboring apartment

Barton testified without contradiction at the administrative hearing that he assisted another Housing Choice Voucher holder (Drya Holt) with her ultimately successful effort to rent a nearby apartment located at 2518 Flournoy around the same time as when Complainant was trying to rent the Flournoy apartment. Tr. 85, 89; Finding of Fact #28, *supra*, at 11. The hearing officer found—consistent with Commission precedent—that Barton's willingness to rent to other persons with Complainant's same source of income undercuts the claim that he acted with a discriminatory motivation towards Complainant. Finding of Fact #28 (citing Commission precedent).

Complainant nonetheless asserts that the Commission should treat this portion of Barton's testimony as irrelevant because Ojo did not own the apartment rented by Ms. Holt and "[i]t is reasonable to believe that Barton follows separate guidelines and rules while renting apartments based on the preferences of the various landlords who contract his work." Objections, at 3. In effect, Complainant urges the Commission to find that Barton would effectuate the underlying motivations of the owners of the apartments that he was engaged to lease even if those motivations were discriminatory. Objections, at 3 ("Presumably [Barton] would acquiesce to Ojo's preferences when trying to rent her unit"). The Commission rejects Complainant's proposed inference for two reasons.

First, Barton credibly testified that he understood the City's Fair Housing Ordinance and its anti-discrimination provisions. Finding of Fact #9. In view of his knowledge, if Barton acquiesced to the discriminatory motivations of a property owner by discriminating against prospective tenants who were Housing Choice Voucher holders, he would be deliberately subjecting himself to liability under the Ordinance. There is no basis in the evidence to support the inference that Barton would engage in such illegal action. To the contrary, Barton adamantly denied discriminating against Complainant or anyone else and he forthrightly testified to his commitment to "helping people get into homes" as part of the "affordable housing program on the west side." Finding of Fact #28. Barton also testified that it was up to Ojo (and not up to him) to decide who would lease the Flournoy apartment. Finding of Fact #16, *supra*, at 7. Thus, there is no basis in the factual records to find that Barton was Ojo's gatekeeper as Complainant would seek to have the Commission infer.

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[13] Regulation 210.270(a) provides in pertinent part that: "If a respondent knowingly destroys or fails to maintain records and other materials (i) in anticipation of the filing of the complaint, (ii) due to the filing of the complaint or the Commission's investigation, or (iii) otherwise with intent to defeat the purposes of the ordinances, the Commission or hearing officer, as applicable, may impose appropriate sanctions including those set forth in Subpart 235."

Second, there is likewise no evidence in the record before the Commission as to Ojo's preferences regarding prospective tenants aside from Barton's testimony as to his belief that Ojo was familiar with the Housing Choice Voucher program and that she would have "taken any renter." Finding of Fact #28. While the Commission does not accept Barton's testimony regarding Ojo's knowledge and intentions as *proof* that Ojo would have accepted a prospective tenant who was a Housing Choice Voucher holder (Finding of Fact #28, *supra*, at 10 n.7), Barton's testimony certainly provides no basis to infer that Ojo would or did discriminate against Housing Choice Voucher holders.

E. Complainant's objection that Conclusion of Law #8 does apply the "futile gesture" doctrine based solely on her reasonable belief that Respondents had a discriminatory policy towards Housing Choice Voucher holders

The Commission applies the "futile gesture" doctrine only when the evidence shows that it would have, in fact, been futile for the complainant to apply. See Conclusions of Law ##7-8. Complainant seeks to expand the scope of the "futile gesture" doctrine by focusing exclusively on Complainant's reasonable belief about the futility of submitting an application. Complainant's Objections, at 3-4. Under Complainant's proposed approach, whether it would have in fact been futile for Complainant to submit an application is irrelevant so long as Complainant had a reasonable belief that doing so would have been futile. See Complainant's Objections, at 3, stating, "In considering the futile gesture doctrine, the Proposed Ruling makes no concessions for what Ms. Gardner *believed* to be true, not just what may be true in hindsight" [emphasis in original].

Thus, under Complainant's theory, a complainant who reasonably believed that it would have been futile to apply could establish a *prima facie* case against a respondent even where—as here—it is unknown how the respondents would have treated complainant's application or (more incredibly) where the respondent provided evidence that it would have leased to complainant if he or she had actually submitted an application. Either of these results would defeat the purpose of the "futility" doctrine, which is designed to relieve complainants of the necessity of showing that they have engaged in unquestionably futile actions in order to prove their cases.

Complainant's proposed expansion of the "futile gesture" doctrine is further flawed because it would allow a complainant to develop his or her belief about a respondent's policy and practices solely from information provided by a third party (here, Blalock) and not by respondent itself. Complainant's Objections, at 4. Information from a third party regarding the policies and practices of an unrelated respondent is often unreliable. Moreover, in every case where the Commission has applied the "futile gesture" doctrine, complainants have derived their belief as to the futility of submitting an application from the respondents themselves. See Conclusion of Law #8. The decision in *Cooper v. Park Management and Investment, Ltd.*, CCHR Case No. 03-H-48 (Nov. 17, 2003), which Complainant cites on pages three and four of her Objections, illustrates this point. In *Cooper*, the Commission denied a motion to dismiss on the ground that the question of whether the futile gesture doctrine applied turned on "disputed facts" where complainant alleged that *respondent's agent* stated to her that respondents would not accept her Section 8 Voucher. *Cooper, supra*, at 2. For these reasons, the Commission overrules Complainant's objection and respectfully declines adopt her proposed expansion of the futile gesture doctrine. As explained by the hearing officer, Complainant did not prove by a preponderance of credible evidence that it would have been a futile gesture to have submitted her application to Barton.

V. Conclusion

In weighing evidence and making findings of fact, a hearing officer must determine the credibility of witnesses. *Poole v Perry & Associates*, CCHR No. 02-E-161 (Feb. 15, 2006); *Claudio v. Chicago Baking Co.*, CCHR No. 99-E-76 (July 17, 2002). The Commission reviews a hearing officer's proposed findings of fact pursuant to Section 2-120-510(l) of the Chicago Municipal Code, which provides in pertinent part: "The commission shall adopt the findings of fact recommended by a hearing officer...if the recommended findings are not contrary to the evidence presented at the hearing." This standard of review takes into account that the hearing officer has had the opportunity to observe the testimony and demeanor of witnesses. *Poole, supra*; see also *McGee v. Cichon*, CCHR No. 96-H-26 (Dec. 30, 1997). The Commission will not re-weigh a hearing officer's recommended findings of fact unless they are against the manifest weight of the evidence. *Stovall v. Metroplex et al.*, CCHR No. 94-H-87 (Oct. 16, 1996); *Wiles v. The Woodlawn Organization et al.*, CCHR No. 96-H-1 (Mar. 17, 1999).

Applying these standards, the Commission finds that the recommended findings of fact of the hearing officer, including his credibility determinations, are fully supported by the evidence received at the administrative hearing. Therefore, the Commission adopts them without modification. The Commission has also reviewed the hearing officer's recommended conclusions of law and finds them well-founded.

For all of the above reasons, the Commission finds in favor of Respondents Olaitan Ojo, New West Realty Group, LLC, and Steven Barton and against Complainant Pamela Gardner on Complainant's source of income discrimination claim. The Complaint is hereby DISMISSED.

CHICAGO COMMISSION ON HUMAN RELATIONS

By: _____

Mona Noriega, Chair and Commissioner
Entered: December 19, 2012