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GOVERNMENT OF THE DISTRICT OF COLUMBIA
COMMISSION ON HUMAN RIGHTS

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COMPLAINANT **Complainant,** **v.** **INTERNATIONAL SPY MUSEUM,** **Respondent.**	**Docket No.: 16-653 (FCRSA)** **Brandes S.G. Ash** **Administrative Law Judge**

FINAL DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

Complainant alleges the Respondent, International Spy Museum ("Respondent" or "museum"), violated the Fair Criminal Record Screening Act ("FCRSA") by inquiring about his criminal history on a job application form ("application" or "application form") before making him a conditional offer of employment. After reviewing Complainant's claim, and for the reasons set forth more fully below, the Respondent's Motion to Dismiss is **GRANTED**.

I. BACKGROUND

Complainant contends that he intended to fill out a job application, on March 24, 2016, to work as a Guide at the International Spy Museum ("Respondent" or "museum") in Washington, D.C. Resp. Mot. to Dismiss. (September 7, 2018) ("Mot. to Dismiss" or "motion"); Opp. to Resp. Mot. to Dismiss. (October 4, 2018) ("Opp. to MTD"). Specifically, on that day, Complainant walked into the museum and asked a person at the front desk if Respondent was hiring. *Id.* The

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person at the front desk handed Complainant one of Respondent's blank employment application forms. *Id*. Thereafter, Complainant maintains that multiple people gathered inside the museum, and as a result, he walked outside holding the application form. *Id*. Complainant says that, ultimately, he looked at the blank application form and noticed the following inquiry: "have you pled guilty to, pled no contest to or been convicted of a felony crime within the last seven (7) years?" *Id*. Complainant contends that he was discouraged by this inquiry and, consequently, did not attempt to fill out the application form. *Id*. Five months later, on August 23, 2016, Complainant filed a Charge of Discrimination with the District of Columbia Office of Human Rights ("OHR"), alleging that Respondent's application form violated the Fair Criminal Record Screening Act ("FCRSA"). *Id*.

On April 2, 2018, OHR found probable cause to believe that Respondent violated the FCRSA because its application form—the one Complainant, admittedly, did not attempt to complete two years prior—contained the above-mentioned criminal background inquiry. Thereafter, OHR certified Complainant's case to the District of Columbia Commission on Human Rights ("Commission") for a public hearing.[1]

On September 7, 2018, Respondent filed a Motion to Dismiss ("motion"), pursuant to D.C. Code § 2-1403.13(b), requesting dismissal of Complainant's case. On October 4, 2018, Complainant and the D.C. Office of Human Rights ("OHR") filed an Opposition ("opposition" or "Opp. to MTD") to Respondent's motion. On October 19, 2018, the Respondent filed a Reply.

[1] Before the case was certified to the Commission, Respondent filed a Motion to Dismiss with OHR, among other things claiming that Complainant never applied for a job with Respondent and, thus, lacked standing to bring a claim under the FCRSA. OHR denied Respondent's motion, arguing instead that a broad interpretation of the word "applicant"—and, namely who can be considered a job applicant—is necessary so as not to contravene the purposes of the FCRSA. D.C. Office of Human Rights' Order Denying Respondent's Motion to Dismiss, March 15, 2017. *Id*.

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On March 12, 2021, Administrative Law Judge Brandes Ash ("Judge Ash"), issued a Proposed Decision and Order ("Proposed Order") in this case, recommending that the Commission grant the Respondent's Motion to Dismiss. Thereafter, Complainant and OHR filed Exceptions to Judge Ash's Proposed Order, asking the Commission to, instead, consider and adopt their arguments in any Final Decision and Order ("Final Order"). After taking into account the parties' respective arguments, and Complainant and OHR's Exceptions, Judge Ash issued a Final Proposed Decision and Order, yet again recommending that the Commission grant Respondent's Motion.

In its motion, Respondent contends that Complainant lacks standing to proceed in his case before the Commission because he is not an "applicant" under the FCRSA. Mot. to Dismiss. Along these lines, Respondent also argues that Complainant's claim of feeling *discouraged*, after allegedly noticing a criminal inquiry on Respondent's application form, does not give rise to Complainant being an "aggrieved" person under the FCRSA. *Id*. Finally, Respondent argues that even *if* the Commission were to determine that Complainant is, indeed, an "applicant", the museum is exempt from the FCRA's prohibitions in accordance with D.C. Code § 32-1342(c)(3). *Id*.

In their Opposition, Complainant and OHR first contend that dismissal under D.C. Code § 2-1403.13(b) is both inappropriate and premature because there has not been an evidentiary hearing. Opp. to MTD. Complainant and OHR further argue that dismissal is improper in this case because the Respondent failed to articulate any cognizable basis under 4 DCMR § 426. *Id*. Furthermore, Complainant and OHR ask the Commission to defer to its broad construction of the terms "applicant" and "aggrieved" under the FCRSA and, namely, their determination that Complainant is both an "applicant" and an "aggrieved" person, and thus afforded standing to proceed with his complaint. *Id*. Finally, Complainant and OHR maintain that a) dismissal is inappropriate

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at this stage of the case because the parties have not yet engaged in any discovery and b) the Respondent is *not* exempt from FCRSA prohibitions. *Id*.

In filing their Exceptions, Complainant and OHR renew their argument that dismissal of Complainant's case is inappropriate and unsubstantiated by law. OHR Exceptions at 2. They also insist that the plain language of the term "applicant" under the FCRSA includes individuals who *do not* actually submit an application for employment, and that this determination is supported by the legislative history of the statute. *Id*. Finally, Complainant and OHR argue that prevailing law in the District of Columbia *requires* deference to OHR's broad interpretation of the FCRSA, particularly as it relates to the terms "applicant" and "aggrieved [persons]". *Id*.

II. STANDARD OF REVIEW

First, it is important to note that Complainant and OHR correctly point out that D.C. Code § 2-1403.13(b) governs the dismissal of a case *after* an evidentiary hearing when, upon review of the evidence, the Commission has determined that a respondent has not engaged in unlawful discriminatory practice under the D.C. Human Rights Act ("DCHRA"). This case, however, does not fall under the DCHRA, and neither OHR nor the Commission has established any specific regulations to implement the FCRSA. Even still, despite the fact that Respondent improperly cited to D.C. Code § 2-1403.13(b) in requesting dismissal of Complainant's claim, there is additional authority upon which the Commission may rely in dismissing a case after it has been certified from OHR.

The D.C. Administrative Procedure Act, D.C. Code § 2-501 *et seq.*, and the Commission Rules of Procedure for Contested Cases, 4 DCMR § 400 *et seq*., guide the Commission's proceedings. If any additional guidance is needed, the Commission may also look to the rules of the Superior Court of the District of Columbia ("Superior Court"). Specifically, under 4 DCMR

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§ 405(g), an [Administrative Law Judge] may recommend rulings to a Hearing Tribunal on motions, like the Respondent's in this case, that will determine the outcome of a hearing process. Along these lines, the Commission may also dismiss a claim certified from OHR *sua sponte* or upon motion or recommendation of [an Administrative Law Judge. 4 DCMR § 426.1. Finally, a case may be dismissed for lack of jurisdiction over the subject matter, or, for example, at the end of a Complainant's case in chief because of the Complainant's failure to present a prima facie case of unlawful discriminatory practice. 4 DCMR § 426.2-426.4.

To the extent, then, that any additional guidance is needed in this case, after considering the above-referenced Commission Rules, the Superior Court rules permit dismissal of a case if a pleading fails to state a claim upon which relief can be granted. D.C. Super. Ct. R. Civ. P. 12(b)(6).

III. DISCUSSION

A. Dismissal of Complainant's complaint is appropriate.

In opposing Respondent's motion, and filing Exceptions to Judge Ash's Proposed Order, Complainant and OHR spend a significant amount of time arguing that a) the Respondent erroneously sought dismissal of Complainant's case under D.C. Code § 2-1403.13(b) and b) that dismissal of this case pursuant to *any other* governing statutory or regulatory provision and agency practice is improper. OHR Exceptions at 4. As to their first point, in the very first draft of Judge Ash's Proposed Order, she agreed with Complainant and OHR, that Respondent sought dismissal of Complainant's case under the wrong statute. (Indeed, as referenced above in Paragraph II, the only time a case should be dismissed pursuant to D.C. Code § 2-1403.13(b) is after an evidentiary hearing, and after the Commission has determined that a respondent has not engaged in any unlawful discriminatory practice. Opp. to MTD; OHR Exceptions at 4.) Even so, in filing their Exceptions, Complainant and OHR switched course, and challenged Judge Ash's determination

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that Complainant's claim cannot be dismissed pursuant to D.C. Code § 2-1403.13(b) simply because she found no credence in their argument that the FCRSA "falls under the DCHRA."[2] OHR Exceptions at 4.

Moreover, Complainant and OHR improperly suggest that "dismiss[al] of a complaint prior to the commencement of a hearing . . . [is only allowed in five scenarios]: (a) [when the Commission lacks] jurisdiction over the subject matter; (b) [when the Commission lacks] jurisdiction over the respondent; (c) when there is untimely filing of [a] complaint; (d) [when there has been a p]rior filing in court; or (e) [when there has been p]rior settlement of the complaint." OHR Exceptions at 4. Simply put, this contention is misleading and not in accordance with the law. As set forth above in Paragraph II, Chapter 4 of Title 4 of the District of Columbia Municipal Regulations ("DCMR") is quite clear: a hearing examiner [or Administrative Law Judge] may recommend rulings to a Hearing Tribunal on motions—like the Respondent's—that determine the outcome of a hearing process. 4 DCMR § 405(g). To that effect, the Commission may dismiss a claim certified from OHR *sua sponte*, upon motion of a party, or upon recommendation of the [Administrative Law Judge]. 4 DCMR § 426.1.

[2] On one hand, Complainant and OHR acknowledge that Judge Ash agrees with them, that Respondent erroneously cited to D.C. Code § 2-1403.13(b) in its Motion to Dismiss. Opp. to MTD; OHR Exceptions at 3. Then, only a few sentences later, they ineptly skew this same point, to argue that dismissal of Complainant's claim, at this stage of the case, is premature. OHR Exceptions at 3. Specifically, Complainant and OHR hastily and unsuccessfully make two points—that **1)** because D.C. Code § 2-1403.13(b) is included under Subchapter III of the DCHRA, Complainant's case, and presumably any other FCRSA case, also falls under the DCHRA *and* **2)** because the Respondent sought dismissal under D.C. Code § 2-1403.13(b), the Respondent was "contemplat[ing] an evidentiary hearing…" which hasn't yet occurred, thus dismissal [, at this stage,] is inappropriate… *Id*. These points are nonsensical. Again, requesting dismissal of this case pursuant to D.C. Code § 2-1403.13(b) is inappropriate because there has been no evidentiary hearing. Be that as it may, Complainant's and OHR's conclusion about what Respondent may have been contemplating when citing to D.C. Code § 2-1403.13(b) is mere postulation. More important, considering the authority upon which dismissal *is* appropriate in this case, there is no reason to hold an evidentiary hearing.

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B. The FCRSA was enacted in an effort to remove unfair barriers to gainful employment for persons with criminal histories.

On December 17, 2014, Bill 20-642 was enacted into law as the Fair Criminal Records Screening Amendment Act ("FCRSA"). Specifically, the Bill served as an amendment to the Returning Citizen Public Employment Inclusion Amendment Act of 2010 ("Returning Citizen Act" or "RCA"), a law that had previously established procedures governing inquiries into the criminal history of applicants seeking employment with District of Columbia government. Under the FCRSA, an employer may only inquire about or require an applicant to disclose a criminal conviction *after* making the applicant a conditional offer of employment. D.C. Code § 32-1342(b). Otherwise, any such inquiry is unlawful, including questions about an applicant's arrests or any criminal accusations made against the applicant that are not pending and/or have not resulted in conviction. D.C. Code § 32-1342(a).

In the Introduction of the D.C. Council's Committee on the Judiciary and Public Safety Report ("report"), presented on May 28, 2014, then Judiciary and Public Safety Committee Chair, Tommy Wells ("Chairman Wells"), described the FCRSA as a means to remove unfair barriers to gainful employment for individuals with criminal records, including prohibiting employers from making any criminal history inquiry until after the first interview. D.C. Council Comm. on Judiciary and Public Safety Report on Bill 20-642 at 1 (May 28, 2014). Up until that point, there had also been discussion about establishing financial penalties for non-compliant employers in the District, and giving authority for enforcement of the law to the District of Columbia Office of Human Rights, all in an effort to assist with reintegrating previously incarcerated persons successfully into the community. *Id.* To that end, Chairman Wells discussed at length in his report the need for the bill, noting that a criminal record "functions as a label that, once affixed, subjects

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an individual to a life-long stigma…[, one that] is particularly problematic when seeking employment. *Id.* at 3.

Chairman Wells' report also highlighted many employers' concerns, including whether the FCRSA would inhibit their abilities to identify and select the best candidates for employment. To that effect, the legislature determined that a compromise to both enacting the FCRSA and addressing employers' concerns would involve granting employers exemptions. *Id.* at 11. Specifically, employers would receive exemptions for positions they designated as part of federal or local government programs and obligations that encouraged the hiring of persons with criminal records because, in such instances, the goals of the federal and local programs were consistent with the goals of the FCRSA. *Id.*

C. Whether Complainant is an "Applicant" as defined by the FCRSA?

A foremost issue in this case is whether Complainant is an "applicant" under the FCRSA. Specifically, **the D.C. Council defined "applicant" in D.C. Code § 32-1341(1) as: "any person considered for employment [by an employer] *or* who requests to be considered for employment by an employer."** Importantly, the term ("applicant") is also defined in the FCRSA's predecessor legislation, the Returning Citizen Act, as "an individual who has *filed* an application for employment with a public employer or who has *filed* an application or made a verbal request to serve in a volunteer position with a public employer." D.C. Code § 1-620.41. (*italics* added). The term "applicant" is also defined under the District's Criminal Background Checks for Government Services to Children statute ("Children's Statute").

A statute comparable in purpose and execution to both the Returning Citizen Act and FCRSA, the Children's Statute establishes procedures governing inquiries into the criminal background of applicants seeking employment and volunteer work with any covered child or youth

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services provider in the District of Columbia.[3] In this statute, an "applicant" is defined as "an individual who has filed a *written* application for employment with a covered child or youth services provider or an individual who has made an affirmative effort through a *written* application or a verbal request to serve in an unsupervised volunteer position with a covered child or youth services provider." D.C. Code § 4-1501.02. (*italics* added).

Nonetheless, in short, Complainant and OHR contend that their much broader interpretation of the FCRSA, and particularly the term "applicant," is the only plausible interpretation because OHR says so. They further contend that "applicants" include individuals like Complainant who, in this case, never submitted or even attempted to fill out an employment application[4] but, instead,

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[3] Complainant and OHR maintain that any reference to the definition of "applicant" according to the Children's Statute belies the point that the term is unambiguous under the FCRSA. OHR Exceptions at 19-20. OHR also argues that [considering] the definition of applicant under the Children's Statute is inappropriate [in this case] because [the purpose of the Children's Statute] is entirely different than that of the FCRSA. The Commission does not agree with either position. Moreover, any reference to the definition of "applicant" under the Children's Statute (as well as the Returning Citizen Act) is merely to point out that the word "applicant" has been used and similarly defined in comparable criminal background check statutes, particularly since Complainant and OHR have requested the adoption of OHR's overly broad interpretation of the term. As such, Complainant's and OHR's attempt to make relevant the distinction between the Children's Statute being enacted to effectuate criminal background checks specifically for persons requesting to work only with children compared to the FCRSA, which applies to an individual requesting to work at any job located in the District, is a red herring.

[4] Complainant and OHR contend that Complainant is within his right to bring a claim as an applicant under the FCRSA because OHR investigated Complainant's complaint and made probable cause determinations as instructed by law. OHR Exceptions at 13. They also point out—by backtracking, in part, from OHR's argument in another case currently pending before the Commission (*[REDACTED] v. Chipotle Mexican Grill, Inc.*("*Chipotle*"))— that D.C. Code § 32-1341(1) categorizes two types of individuals as applicants. *Id*. at 14. Specifically, the first category of applicants—persons "considered" for employment—includes "[persons] who complete and submit applications." *Id*. As for the second type of "applicant"— those who request to be considered for employment—Complainant and OHR contend that this category "include[s] individuals [, like Complainant, who] do *not* submit an application." *Id*. (However, in *Chipotle*, OHR argued that the complainant in that case fell into the second category of "'request[ing] to be considered for employment'" because he started to apply online for a position with Respondent, and *almost* completed the application... OHR Exceptions at 9, *[REDACTED] v. Chipotle Mexican Grill, Inc.*.)

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"walked into [the International Spy Museum], approached [a museum employee and] asked for an application…" OHR Exceptions at 15.[5] At least—according to Complainant and OHR—Complainant "meets the definition of an "applicant" since he entered the premises of Respondent, asked if Respondent was hiring for any jobs, and was provided with an application form." Specifically, they argue that Complainant's question about hiring "easily fits within the scope of 'requests to be considered for employment after which the Respondent's agent provid[ing] him… [an application form is the equivalent] of'" Respondent considering Complainant for employment. Opp. to MTD. Even more so, Complainant and OHR argue that a Court *cannot* substitute its interpretation for that of [OHR's], even if it is a reasonable and plausible one and, instead, *must* sustain the agency's interpretation even if a petitioner advances another reasonable interpretation of the same statute or if it might have been persuaded by the alternate interpretation had it been construing the statue in the first place. OHR Exceptions at 9. (*Smith v. D.C. Dep't of Emp. Services*, 548 A.2d 95, 97 (D.C. 1988).

It is worth pointing out that Complainant and OHR exaggerate OHR's role and authority in this case. To that end, while OHR may request and/or genuinely believe that the agency is entitled to deference for its interpretation of the FCRSA, a court will only accord such deference in the event that OHR's interpretation is reasonable and consistent with the language, legislative history and purpose of the statute. Otherwise, without question, the Court has the final authority. *D.C. Off. of Tax & Revenue v. BAE Sys. Enter. Sys., Inc.*, 56 A.3d 477, 481 (D.C. 2012); *D.C. Off. of Hum. Rts. v. D.C. Dep't of Corr.*, 40 A.3d 917, 923 (D.C. 2012). Simply put, just because a

[5] Complainant and OHR contend that Complainant's actions fit within the scope of the definition of applicant under D.C. Code § 32-1341(1), which is "any person considered or who requests to be considered for employment by an employer." Opp. to MTD.

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Court generally accords deference to an agency's interpretation, does not mean it is required to do so.

Finally, Complainant and OHR claim they considered the statutory language and legislative history of the FCRSA, as well as relied upon OHR's "expert agency insight," in determining that Complainant is an applicant. OHR Exceptions at 11.

i. Statutory Construction

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language the [the lawmaker] used." *Clyburn v. United States*, 48 A.3d 147, 151 (D.C. 2012) (internal citations omitted). To that end, the plain meaning of a statute is examined first, "construing words according to their ordinary meaning." *Id*. However, "[t]he literal words of [a] statute are not the sole index to legislative intent, rather [they] are to be read in the light of the statute taken as a whole, and are to be given a sensible construction, one that would not work an obvious injustice." *Id.* (quotation marks omitted and alteration in original). For this reason, "… in appropriate cases, [the] legislative history of a statute" is also considered. *Id.* (quotation marks omitted).

When the plain meaning of statutory language is unambiguous, the intent of the legislature is clear, and judicial inquiry need go no further." *1618 Twenty-First St. Tenants' Ass'n, Inc. v. The Phillips Collection*, 829 A.2d 201, 203 (D.C. 2003). In other words, if a statute's language is "plain," and allows for no other meaning, courts generally look no further and will give the "words used the meaning ordinarily attributed to them." *Whitfield v. United States*, 99 A.3d 650, 656 (D.C. 2014). Nonetheless, the District of Columbia Court of Appeals has cautioned that in some instances, it "may refuse to adhere strictly to the plain language of a statute in order to effectuate its legislative purpose, as determined by a reading of the legislative history or by an

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examination of the statute as a whole." *Id.* (citations and internal quotation marks omitted). Specifically, the plain meaning of the words of a statute may be disregarded only when the application of their literal meaning would inevitably (1) produce absurd consequences, which the legislature clearly did not intend, or (2) frustrate the manifest purposes which appear from the provisions of the statute when considered as a whole in light of its legislative history.

Along these lines, it is well established that courts generally defer to an agency's interpretation of its own regulations unless that interpretation is "plainly erroneous or inconsistent with statutory purpose." *D.C. Office of Human Rights v D.C. Dept. of Corr.*, 40 A.3d 917 (D.C. 2012).[6] (In this case, it is not OHR's regulations that are being interpreted; rather, it is OHR's interpretation of a statute passed by the Council of the District of Columbia for which it has been charged with enforcement.) However, even when agency regulations are not at issue, the D.C. Court of Appeals will also accord significant deference to an expert agency's interpretation of a statutory provision the agency administers, except when the interpretation is unreasonable in light of a [statute's] text, history, and purpose."*;* see, *e.g., Washington Gas Light Co. v. Public Serv. Comm'n*, 982 A.2d 691, 710–11 (D.C. 2009) (court will defer to agency interpretation that is "reasonable in light of the statutory language, the legislative history, and judicial precedent"). *Id.*

In this case, Complainant and OHR argue that OHR's interpretation of the FCRSA should be accorded deference for two reasons: 1) because it is supported by thorough analysis, is reasonable, and accords with the FCRSA's statutory purpose and 2) [because] OHR has

[6] "When construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *D.C. Off. of Hum. Rts. v. D.C. Dep't of Corr.*, 40 A.3d 917, 923 (D.C. 2012); see also *1330 Connecticut Ave. Inc. v. District of Columbia Zoning Comm'n*, 669 A.2d 708, 714–15 (D.C.1995) (internal quotation marks omitted); *see Schonberger v. District of Columbia Bd. of Zoning Adjustment*, 940 A.2d 159, 162 (D.C.2008) (deferring to agency interpretation where regulations were ambiguous or silent).

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consistently interpreted the FCRSA to apply to individuals who did not submit an application because of a respondent's illegal inquiry into their criminal backgrounds. OHR Exceptions at 9-10.

As to the former reason, Complainant and OHR contend that OHR relied upon its "expert agency insight [in] determin[ing the] interpretation [that] would effectuate the FCRSA's purpose and goals"—[particularly, expertise acquired from the agency's] research on FCRSA's impact on communities, outreach, [the] analysis of FCRSA data and the processing of FCSRA complaints…]" OHR Exceptions at 11. In reality, however, since the FCRSA passed nearly eight years ago, OHR has acknowledged that its data is actually *limited* to complaint figures, such that it has *not* been able to truly scrutinize the impact of the FCRSA in the District. The District of Columbia Fair Criminal Record Screening Amendment Act of 2014: The Work and Enforcement by the DC Office of Human Rights ("OHR FCRSA Report" or "Report"). https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/OHR_Report_FCRSA_May2019_FINAL.pdf. Perhaps not surprisingly, then, in the agency's official Report, which highlighted the impact of the FCRSA from its enactment through the end of the year in 2018, OHR's "community outreach" embodied that of just six testimonials—mere opinions, really—all summarizing indisputable benefits of having the FCRSA in the District, as well as the importance of hiring returning citizens.[7] As for any further impact the FCSRA has had on the community, including the agency's efforts to engage in outreach, OHR's Report detailed the agency's 149 trainings, offered over the course of nearly 4 years after the law was implemented—although, notably, there are no details about the trainings included in the Report.

[7] OHR's official Report on the FCRSA included a total of six testimonials from employers (Ben and Jerry's, the Marriott, and a construction company), two returning citizens, and a government agency and non-profit, that assist returning citizens seeking employment.

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OHR also summarized its analysis of FCRSA data and FCSRA complaints in its Report, remarking that the agency processed 1,709 FCRSA complaints within 4 years of the enactment of the law. OHR Report. At the same time, out of these complaints, nearly half of the cases closed at the time of the drafting of the Report (45%), resulted from OHR determining that a) there was no probable cause to believe that a violation of the FCRSA occurred or b) deciding, absent any investigation, to close a case solely for administrative convenience. OHR FCRSA Report. (The remaining half of the FCRSA cases that were closed at the time of drafting the Report, had been settled via conciliation or mutual agreements by the persons involved.) *Id*.

In support of its argument in this case, that the agency has consistently interpreted the FCRSA to apply to individuals who do *not* actually submit job applications, in its Exceptions, Complainant and OHR reference Letters of Determination issued by OHR in four cases in October 2016, September 2017, August 2018 and November 2018. *Id*. Indeed, in each case's Letter of Determination, OHR argued that an "applicant" under the FCRSA is an individual who obtains *and begins to fill out* an application, but does not actually submit it [to the employer] because the application contains an unlawful inquiry. Similarly, in another matter currently pending before the Commission, *[REDACTED] v. Chipotle Mexican Grill, Inc.* (OHR Docket No. 15-1034-P(N)), see also Footnote 4), OHR defines "applicant" as an individual *who begins applying* for a position, but who does not complete and submit the application because the application contains an unlawful criminal background inquiry. OHR Opposition to Respondent's Mot. for Summary Judgement, *[REDACTED] v. Chipotle Mexican Grill, Inc*., at 2.

Of note, however, in this case, there is no dispute that Complainant did *not* complete or even "begin to fill out" an application for employment. Thus, in arguing Complainant's standing under the FCRSA, and whether he is an applicant, Complainant and OHR conveniently eliminate

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the aforementioned "begins applying" element of OHR's otherwise purportedly longstanding definition, and advocate for even broader construction in Complainant's case, so that an **applicant is *also* "a person who merely asks about a job and subsequently receives an application for employment."** Opp. To MTD.

In consequence, it is clear that OHR will attempt to adapt and expand, in as many ways possible, its construction of the term "applicant," depending upon the facts of a given case—actions that certainly do not and cannot warrant any significant deference from the Commission or Court.

ii. Complainant cannot be considered an 'applicant' under the FCRSA. Respondent relies upon the plain-language interpretation of the term "applicant" in D.C. Code § 32-1341(1)[8] to support its contention that Complainant's case should be dismissed. Mot. to Dismiss. On the other hand, Complainant and OHR consider as appropriate the above-mentioned broader designation of applicant: "'any person considered for employment or (any person) who requests to be considered for employment by an employer'", including individuals who "[enter] the premises of [an employer], ask if the employer has any jobs, and receive an application form." Opp. to MTD.

At the same time, Complainant and OHR also recognize "it is appropriate to look to dictionary definitions" in determining the ordinary meaning of the words in a statute.[9] OHR

[8] The FCRSA defines an applicant as "any person considered for employment or who requests to be considered for employment by an employer." *See* D.C. Code § 32-1341(1).

[9] Complainant and OHR use the Merriam-Webster dictionary to define part of the FCRSA definition of applicant, namely those persons who "*request* to be considered for employment by an employer." Specifically, Complainant and OHR point out that "the plain meaning of the word "request" is to "ask for." OHR Exceptions at 15. They also emphasize the following D.C. Court of Appeals' definition, "'[asking] for something… or for the opportunity to do something." *Id*. As follows, Complainant and OHR argue that Complainant walking into the museum,

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Exceptions at 15. We could not agree more. According to the Merriam-Webster dictionary, an "applicant" is defined as "one who applies." https://www.merriam-webster.com/dictionary/applicant. Taking it one step further, the word apply means "to make an appeal or request in the form of a written application" or "to request something, usually officially, especially in writing or by sending in a form." https://www.merriam-webster.com/dictionary/apply; Cambridge English Dictionary. Similarly, the phrases "apply for a job" and "job application" are described and/or defined respectively in the dictionary as follows: "if you apply for… a job… you write a letter or email, or fill in a form in order to ask formally for it…."; [likewise, a "job application" is defined as:] "a letter or form containing details of [an individual's] qualifications, skills, experience, etc., [sent in] to an organization when [the person is] applying for a job with [the organization]." Cambridge English Dictionary; Collins Dictionary. In each of the above-referenced instances, written communication and/or the submission of a form is required.

Accordingly, in this instance, Respondent contends that the plain language of the FCRSA could not be any clearer. In the literal sense, D.C. Code § 32-1341(1) recognizes an essential element of a potential employer - employee relationship: *awareness*[10], and more specifically the

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approach[ing] a museum employee and asking for an application and the opportunity to apply and be considered for employment " is the equivalent of Complainant "applying" for a position at the museum. *Id*. Notably, however, Complainant and OHR very inaccurately describe what actually happened in this case, as by Complainant's own account, he did not ask the employee at the front desk for an application for employment, and he certainly did not ask to be considered for employment. Complainant simply walked into the museum and asked an individual at the front desk if the Spy Museum was hiring.

[10] This concept of "awareness" was first raised in Judge Ash's Proposed Decision and Order Granting Respondent's Motion to Dismiss. In response, Complainant and OHR misguidedly argue in their Exceptions that Judge Ash's characterization of the employer—employee relationship was, somehow, an attempt to create a new "standard" that is not recognized by law. OHR Exceptions

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communication of some sort between an employer and an individual related to the individual's desire for employment with the employer. (As follows, in determining whether an individual has actually requested consideration for employment, the individual must have taken some positive step,[11] or made some affirmative effort, to demonstrate an application for employment and/or request that an employer consider her/him/them for employment.)

Considering the plain-language meaning of "applicant,", as discussed above, in this case there is no evidence that anyone at the museum ever considered Complainant for employment before, during or even after March 2016 when he says he was discouraged from filling out an application form. There is also no evidence to support Complainant asking the Respondent —i.e. someone who actually worked inside the museum in D.C., or, perhaps, an individual who worked for the museum's parent company—to consider him for employment museum. Accordingly, the Commission does not agree with Complainant and OHR that "as a factual matter, Complainant meets the definition of an "applicant" [by the mere fact that] he entered the premises [of the museum], asked if the museum was hiring and, in turn, was provided an application form." Opp. to MTD. Indeed, Complainant asked someone at the front desk inside the museum about hiring, but this action does not "easily fit within the scope of [a] 'request to be considered for employment'". *Id*.

To be clear, asking if an employer is hiring is not the same as asking to be considered for a job with the employer. For one, it is not clear if the person at the front desk was a museum

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at 13, 19. However, the Commission finds that Judge Ash's use of the word "awareness" was merely her own description of an element of the employer-employee relationship11.

[11] Unsurprisingly, this same "*positive step or action*" can be easily identified in the above-referenced D.C. Children's Statute, where, among other things, an "applicant" is "an individual who has made an *affirmative effort* through a *written* application or a verbal request [for employment] with a covered child or youth services provider." D.C. Code § 4-1501.02.

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employee or volunteer, or what role, if any, this person may or could have had in the employment/hiring process. Assuming arguendo, that the person at the front desk was the hiring manager, that would still not change the fact that Complainant asking if the museum was hiring was just that, a basic query. Along these lines, "are you hiring" does not signify to the person on the receiving end (e.g. an employer) that the person actually asking the question wants to be considered for employment. (For instance, the person asking this question could be asking for a friend or family member, or purely for general knowledge.)

Similarly, as it relates to the person at the front desk, handing Complainant a blank application form did not establish any understanding or expectation on part of that person that Complainant was asking to be considered for employment, or that Complainant would be submitting an application. On the other hand, for example, had Complainant returned to the museum and handed a completed application form to that same person at the front desk—albeit an application containing a criminal background inquiry—Complainant would have been communicating to that person that he wanted to be considered for employment at the museum. Instead, Complainant claims he was discouraged from completing the application because of the criminal background inquiry and, as a result, filed a Charge of Discrimination five months later, attaching one of Respondent's *blank* application forms as his supporting document. (Whether this blank form was the same application form that Complainant claims to have been discouraged from completing several months earlier, or one that he obtained elsewhere, at a different time, is unclear.)

As previously mentioned, when the plain meaning of statutory language is unambiguous—as is the case here—judicial inquiry need go no further. *1618 Twenty-First St. Tenants' Ass'n, Inc. v. The Phillips Collection,* 829 A.2d at 203. Thus, in considering the plain language interpretation of D.C. Code § 32-1341(1), there is simply no evidence in the record that Complainant ever

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"applied" for a position with Respondent, which means we cannot find that Complainant is an "applicant" as defined according to the FCRSA. Nonetheless, for a complete record, we will discuss Complainant's and OHR's argument that a broad interpretation of "applicant" is warranted considering the legislative history and purposes of the FCRSA. Opp. to MTD.

iii. Considering the intent and legislative history of the FCRSA, the Commission cannot defer to Complainant's and OHR's interpretation of "applicant."

As discussed above, the FCRSA was passed as an amendment to the Returning Citizen Public Employment Inclusion Amendment Act of 2010 ("Returning Citizen Act" or "RCA"), a law that established procedures governing inquiries into the criminal history of applicants seeking employment with D.C. ("District") government. D.C. Council Comm. on Judiciary and Public Safety Report on Bill 20-642 at 6 (May 28, 2014). Specifically, the RCA prohibited District government employers from investigating the criminal background of applicants for certain 'non-covered positions' until after the initial screening of applications. *Id*. The D.C. Government Office of Human Resources ("Human Resources") was charged with monitoring the progress of RCA, and by the time D.C. Council voted to pass the FCRSA, had determined that because of RCA, 76% of applicants with a criminal record were still suitable for District government employment. *Id*. Presumably by then, considering the Council's work to define and give substance to the purpose of the FCRSA, it became readily apparent (to the Council as well as RCA and FCRSA supporters) that, at least for persons with criminal records, there is a clear advantage to employers learning more about them as people, before learning about their criminal histories. *Id*.

Ultimately, the Council decided that non-compliant employers would pay penalty fines to D.C. Government for violating the FCRSA; thus, in due course, some FCRSA supporters began advocating for the payment of, at least, a portion of penalty fines directly to applicants—individuals who, in light of their criminal backgrounds may have already been experiencing

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difficulty earning a living. *Id*. at 10. The Council agreed with these supporters and voted to amend draft FCRSA legislation to provide for the payment of half of all fines levied against non-compliant employers directly to job applicants who filed complaints with OHR. *Id*. This amendment was, indeed, a compensatory measure, and aligned with the true intent and purpose of the FCRSA: to assist an already vulnerable population by, among other things, acknowledging the discriminatory experiences persons with criminal histories may encounter when actively applying for employment while, at the same time, incentivizing and encouraging these applicants' efforts to successfully reintegrate society. The Council did *not*, however, vote to implement direct payment measures with the anticipation of opening the floodgates of litigation to potentially *anyone and everyone* who wishes to file a claim against a District employer, including persons with no criminal records[12] who simply have no intention of productively re-integrating society and, instead, deem reporting and being paid for FCRSA violations as a form of "work" itself.

In 2008, the plaintiffs in *Starbucks Corporation v. Superior Court* filed a lawsuit claiming that Starbucks violated California Labor Code Section 423.8 ("Section 423.8") which, absent a few exemptions, prohibits California employers from asking job applicants (including employees seeking promotion) about convictions for minor marijuana offenses that are more than two years old. 168 Cal. App. 4th 1436, 1440–41 (2008). The sole basis of the lawsuit was that the plaintiffs

[12] Complainant and OHR argue that any reference to persons who do not have criminal records, as well as the California case, *Starbucks Corporation v. Superior Court* where the complainants did not have criminal records, is irrelevant in this case because Complainant does have a criminal record. OHR Exceptions at 21-22. However, they are missing the point. The reference to "persons without criminal records" is not misplaced or irrelevant. Consider the entire first half of the sentence in which the phrase rests: "[t]he Council did *not*, however, vote to implement direct payment measures with the anticipation of opening the floodgates of litigation to potentially *anyone and everyone* who wishes to file a claim against a District employer…" The phrase "persons without criminal records" directly refers to the "anyone and everyone" group. The phrase also introduces the comparable *Starbucks* case.

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had been given a 2-page job application form containing a criminal inquiry when they applied for employment. *Id*. at 1443. Specifically, the offending question asked: "Have you been convicted of a crime in the last seven (7) years? If 'Yes,' list convictions that are a matter of public record (arrests are not convictions). A conviction will not necessarily disqualify you for employment." *Id.* at 1441. None of the plaintiffs had ever been convicted or even arrested for marijuana-related charges, they simply filled out the application, filed suit, and claimed entitlement to statutory damages that, if awarded, would have totaled $26 million dollars.

After analyzing the statute, the court held that it "decline[d] to adopt an interpretation of the statute that would turn it into a veritable financial bonanza [including] for litigants, like the plaintiffs, who had no fear of stigmatizing marijuana convictions." *Id*. at 1449. The court further indicated that "[w]here civil liability is predicated upon a legislative provision ... plaintiffs must establish that they fall within the class of persons for whose protection the legislative provision was enacted." *Id.* at 1448. Moreover, the court found that "the [law] must protect against the kind of harm that had occurred… because had the legislatures who enacted [Section 423.8] intended to confer a right to automatic damages on any and *all* job applicants, it doubted they would have been so opaque in their draftsmanship." *Id*.

Such is the risk in adopting Complainant's and OHR's flexible interpretation of "applicant" under D.C. Code § 32-1341(1)—any and every person having heard about the law, notwithstanding said persons' criminal background, could simply hunt around for job applications from D.C. employers containing questions about criminal history and file claims endlessly with OHR for a chance at collecting penalty fees. It is unreasonable to believe that in drafting the FCRSA, D.C. Council was willing to assume a risk of this magnitude by remaining open to a flexible and possibly ever-changing definition of the term "applicant." This risk, and particularly

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the opportunity it provides for an unrestricted number of persons to file claims alleging employers' violations of FCRSA—including when they never actually submitted or attempted to submit an application—is impossible to reconcile with the legislative history and purpose of the FCRSA, as, among other implications, opportunities and potentially helpful resources are sure to be taken away from the targeted group of persons who were truly intended to benefit from FRCRA's enactment.

Nonetheless, in further support of its claim that a *broad* interpretation of "applicant" under the FCRSA is warranted, Complainant and OHR also characterizes Complainant as an "aggrieved party" under the law, sufficient to confer upon him, in this case, the right to bring suit under the FCRSA. Opp. to MTD. Accordingly, notwithstanding our belief that we cannot defer to any broad construction of the word "applicant" under the FCRSA, we will, nonetheless, consider Complainant's and OHR's interpretation of an "aggrieved party" and standing below.

D. Complainant's and OHR's broad interpretation of "aggrieved" and "aggrieved party" (under D.C. Code § 32-1343(a)) is unsupported.

In addressing the issue of standing in this case, Complainant and OHR rely upon the word "aggrieved," as defined in D.C. Code § 32-1343(a), to support its claim that any person *aggrieved* by a violation of the FCRSA—including Complainant—is entitled to recover under the FCRSA. Opp. to MTD. Specifically, Complainant and OHR contend that the legislature's choice to use the word "aggrieved" under the FCRSA requires deference to the D.C. Court of Appeals' (expansive) definition of an "aggrieved party" under the D.C. Human Rights Act ("DCHRA"), which states that: "an aggrieved party may extend to individuals whose rights are not directly infringed because limiting standing to only those whose rights were directly infringed upon would "hamstring efforts to effect [a] statute's broad purpose." *Id.*[13] Nonetheless, the Commission does not see the need

[13] Considering Complainant's and OHR's argument that it is appropriate to look to dictionary definitions in determining the ordinary meaning of a word in a statute, an "aggrieved person" is

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to explore further, whether or not Complainant was "aggrieved," or if he is an "aggrieved party," because the Courts simply have not adopted such a broad construction of the word "aggrieved" in defining standing requirements under the FCRSA.

The question of standing in any court [or administrative proceeding] is significant and thus, can even be raised *sua sponte* by [a finder of fact]. *Riverside Hosp. v. D.C. Dep't of Health*, 944 A.2d 1098, 1103 (D.C. 2008). Specifically, the Supreme Court generally requires a litigant to "assert his [or her] own legal rights and interests" in order to promote the "fundamental purpose[s] of standing: a) [ensuring] that courts hear only concrete disputes between interested litigants who will frame the issues properly," and b) reducing the likelihood [that courts will] "adjudicate [third parties'] rights unnecessarily, [particularly since the] holders of such rights [may] not wish to assert them, or [can] enjoy them regardless of whether or not in-court litigants [are] successful." *Id*. at 1104-1105.

In determining whether a party has standing to file suit in the District of Columbia, the D.C. Court of Appeals typically requires a party asserting his or her own legal rights to demonstrate an actual or imminent threat of injury caused by the defendant, and that the injury is redressable through adjudication. *Id*. at 1104. If a party brings a claim on behalf of someone else (a third party), the Court of Appeals generally requires the party to have "suffered an 'injury in fact', such that he or she has a 'sufficiently concrete interest' in the outcome of the issue in dispute". *Id*. The party must also be able to demonstrate a close relationship with the third party as well as some reason the third party was unable to protect his or her own interests." *Id*.; *see also Powers v. Ohio*, 499 U.S. 400, 411 (1991).

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commonly defined as a person *sufficiently harmed* by a legal judgment, decree, or order to have *standing* to prosecute…," a definition which is not applicable in this case. OHR Exceptions at 15; see also Merriam-Webster, https://www.merriam-webster.com/dictionary/.

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In this case, Complainant maintains that Respondent violated the FCRSA by unlawfully inquiring about his criminal history on an application form he reviewed that contained an inquiry about criminal history. Most apparently, Complainant cannot articulate any injury directly attributable to his person that was caused by Respondent. (On the contrary, if Complainant *had* actually filled out and returned to Respondent an application form containing unlawful criminal history inquiries and, for example, Complainant was not hired, there would not likely be any question regarding whether Complainant has standing in this case.) Complainant has also not articulated that he filed his Charge of Discrimination with OHR "on behalf" of any third party.

Nonetheless, Complainant and OHR attempt to draw a parallel between the facts in Complainant's case and *Executive Sandwich Shoppe, Inc. v. Carr Realty Corporation*, wherein a leaseholder alleged it had suffered monetary losses because of its landlord's discrimination against two prospective sub-lessees. 749 A.2d 724, 733 (D.C. 2000). Specifically, the leaseholder filed several claims against the landlord, including two that alleged a violation of the "DCHRA", after the landlord refused to rent to the two prospective sub-lessees because they were Asian. *Id.* The landlord challenged the leaseholder's right to file suit on behalf of the sub-lessees and, ultimately, the trial court dismissed the DCHRA-related claims. On appeal, however, the D.C. Court of Appeals held that standing under the DCHRA only requires a plaintiff to allege "a minim[um] of injury in fact." *Id.* However, *Executive Sandwich Shoppe* is distinguishable from the facts in Complainant's case in that the DCHRA is a much broader statute than the FCRSA as, most certainly, the same rights and issues are not at stake.[14] Moreover, Complainant has not alleged that he suffered any "injury in fact" such that he would have an actual interest in the outcome of this matter.

[14] A criminal record is not listed as a protected basis under the DCHRA.

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In light of this analysis, the Commission cannot adopt Complainant's and OHR's broad interpretation of "aggrieved" and "aggrieved party" in D.C. Code § 32-1343(a), or in this case, because the courts simply have not adopted such a broad construction of the word "aggrieved" in defining standing requirements under the FCRSA.

In further support of its argument that Complainant has standing to file suit under the FCRSA, he and OHR cite to a Supreme Court employment discrimination case interpreting Title VII of the Civil Rights Act, *International Brotherhood of Teamsters v. United States*. In *International Brotherhood*, the Supreme Court spoke to the broad equitable powers in Title VII courts "'to [facilitate] the most complete relief possible,' in an effort to eliminate the discriminatory effects of the past and bar the likes of such discrimination in the future." 431 U.S. 324, 364-365 (1977) (citing to *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421, 418 (1975). Specifically, the Court determined that [in Title VII cases] the effects of and the injuries suffered from discriminatory employment practices are not always confined to the individuals who [are] expressly denied a requested employment opportunity. *Id*. Thus, a consistently enforced discriminatory policy [could] deter job applications from those who are aware of it [as well as those who are] simply unwilling to subject themselves to the humiliation of and…rejection from the policy. *Id*. The Court ultimately concluded that when a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture [that person] is just as much a victim of discrimination as is [the person] who goes through the motions of submitting an application. *Id*. at 366. However, the D.C. Circuit and others have held this doctrine is only available "in the rare case where an employer has essentially foreclosed the interactive process through its policies or explicit actions." *Id.* at 1333 (applying futility doctrine to excuse failure to request accommodations where plaintiff was aware of city's policy against

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reassignment and "was also explicitly told by [her Superior] that the city would not help her find another position."). *Pappas v. Dist. of Columbia*, CV 19-2800 (RC), 2021 WL 106468, at *11 (D.D.C. Jan. 12, 2021); *see also Tartt v. Wilson County, Tenn.*, 982 F. Supp. 2d 810, 821 (M.D. Tenn. 2013) (holding that this exemption from the usual application requirement comes into play where the circumstances "reveal overwhelming evidence of pervasive discrimination in all aspects of the employer's [hiring] practices, and that any application would have been futile and perhaps foolhardy").

Both Title VII and the more expansive DCHRA were enacted to assist in the prevention and prohibition of many kinds of discrimination. However—notwithstanding the possible similarity between Complainant's failure to submit an application to Respondent and the "non-applicants" in *International Brotherhood* who declined to submit applications for promotions—the case at hand is distinguishable from both *Executive Sandwich Shoppe* and *International Brotherhood* cases, because a criminal record is not listed as a protected basis under Title VIII [or DCHRA]. U.S. Equal Employment Commission, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act (April 25, 2012). Accordingly, any reliance on Title VII or DCHRA authority, in claiming criminal history as being the reason for denied employment, depends, first, on whether the criminal history claim derives from a claim of (employment) discrimination on the basis of race, color, religion, sex, national origin and/or any other relevant protected class. *Id*. In this instance, while the *Executive Sandwich Shoppe* and *International Brotherhood* cases may offer some authoritative support for Complainant's and OHR's argument that Complainant was within his right to file a claim with OHR, the fact is, as previously stated, the Courts have not yet adopted any similar broad, flexible construction of standing for persons deemed "applicants" under the FCRSA.

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Even *if* the Commission were to accept as persuasive Complainant's and OHR's broad interpretation of standing under the FCRSA, it is worth noting that the *aggrieved parties* in both *Executive Sandwich Shoppe* and *International Brotherhood* were not automatically entitled to relief. Quite the contrary, in *International Brotherhood*, the Supreme Court determined that it is not easy for a person to prove that he or she was deterred from applying for a job because of an employer's [unlawful] practices and that is because doing so requires actual proof that the person *would* have applied for the job had it not been for those practices. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 367–68 (1977). In applying this same construct to this case, Complainant merely alleging that reviewing Respondent's application discouraged and prevented him from filling out and submitting the application is, in itself, insufficient. Simply put, even a known prospect of discriminatory rejection from a job shows only that a potential employee may have been deterred from applying for the job, but it does not show that a non-applicant actually wanted the job, or that a non-applicant even possessed the requisite qualifications for the job. *Id*. at 369. To that end, even if a finder of fact determines that a potential job applicant was a victim of a company's discriminatory practices, the fact finder must still engage, as nearly as possible, in a process that "recreates the conditions and relationships that *would have been* had there been no unlawful discrimination," a difficult, if not absolutely impossible, process that unavoidably involves varying degrees of approximation and imprecision. *Id*. at 371-372.

In light of this analysis, the Commission cannot adopt Complainant's and OHR's proposed broad interpretation of "aggrieved" and an "aggrieved party" under D.C. Code § 32-1343(a) to support its argument that Complainant is an applicant under the FCRSA and has standing in this case.

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E. Whether Respondent is exempt from FCRSA prohibitions, or the parties have engaged in discovery is irrelevant, because Complainant is not entitled to relief under the FCRSA.

The parties do not agree about Respondent's exemption status under D.C. Code § 32-1342(c)(3), or whether the Guide position at the museum, at issue in this case, is exempt from FCRSA prohibitions considering Respondent's argument that it provides programs, services, or direct care to minors or vulnerable adults. Even so, given that Complainant cannot demonstrate that he is an applicant under the FCRSA, it is unnecessary to consider further argument on this issue.

Similarly, Complainant and OHR contend that dismissal is improper because the parties have not had an opportunity to engage in discovery; however, there is no rule *requiring* that a party be allowed to conduct discovery before entry of a Motion to Dismiss. In fact, a primary reason to file a Motion to Dismiss is to avoid unnecessary and, potentially, costly discovery. Moreover, whether the parties have engaged in discovery is irrelevant as Complainant has not met the threshold of standing in this case.

V. CONCLUSIONS OF LAW AND RECOMMENDATION

The Commission has deliberated, at length, regarding the parties' respective positions on standing, and whether Complainant is an "aggrieved party" under D.C. Code § 32-1343(a), as well as considered Complainant's and OHR's request that the Commission adopt its broad construction of the word "applicant" under D.C. Code § 32-1341(1). Accordingly, we are unpersuaded that Complainant has standing in this case.

While, ultimately, this case should not have been certified to the Commission, given Complainant's lack of standing, we recommend that OHR consider, among other things, more expansive remedies to potential FCRSA violations, and particularly in instances like this one,

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where there could be opportunity to issue a probable cause finding but, for example, the intended Complainant lacks standing. Additional measures may include the Director of OHR utilizing the Director's Inquiry tool, a proactive enforcement initiative afforded by OHR, to carry out public inquiry measures against alleged violators of the FCRSA. This tool, for example, may provide opportunities for the agency to engage directly with employers about reports of discrimination, including reviewing said employers' hiring policies and procedures. Thereafter, there may be additional opportunities for continuous investigation and monitoring for any areas of non-compliance. Along these lines, OHR may also wish to consider proposing to D.C. Council a formal amendment of the FCRSA, and more specifically the definition of applicant.

Nonetheless, in light of the foregoing, and for the reasons set forth herein, it is hereby

ORDERED that **Respondent's Motion to Dismiss is GRANTED;** and it is further

ORDERED that the reconsideration and appeal rights of any party aggrieved by this Order are attached.

So ORDERED this **7th** day of **January 2022**.

_[redacted] 2:14 PM PST
Commissioner **Date**

[redacted]
Commissioner **Date**

_[redacted]022 | 4:21 M EST____
Commissioner **Date**