



DEPARTMENT OF FAIR EMPLOYMENT & HOUSING
FAIR EMPLOYMENT & HOUSING COUNCIL
2218 KAUSEN DRIVE, SUITE 100, ELK GROVE, CA 95758
(916) 478-7248 | www.dfeh.ca.gov | e-mail: fehcouncil@dfeh.ca.gov

DIRECTOR KEVIN KISH

FAIR EMPLOYMENT AND HOUSING COUNCIL

Meeting of June 27, 2016

Minutes

Ronald Reagan State Building
Auditorium (First Floor)
300 South Spring Street
Los Angeles, CA 90013

Councilmembers Present

Chaya Mandelbaum, Chairperson
Dale Brodsky, Councilmember
Tim Iglesias, Councilmember
Patricia Perez, Councilmember
Andrew Schneiderman, Councilmember
Dara Schur, Councilmember
Joan Keegan, DFEH Chief Deputy Director

DFEH Staff Present

Brian Sperber, Legislative and Regulatory Counsel
Jessica Neighbors, Summer Legal Scholar
Francisco Navarro, Summer Legal Scholar
Joel Sterkes, Legal Analyst
Melissa Alvarran, Legal Analyst
Paul Kennedy, Associate Business Management Analyst

Others Present

Madison Fairchild
Drian Juarez, Los Angeles LGBT Center's Transgender Economic Empowerment Project; Member of West Hollywood Transgender Advisory Board
Melissa Petrofsky, The Petrofsky Law Firm and California Employment Lawyers Association
Talin Kohl, Dean McCalla, Natalie Mercier, Mr. Vayay, Walt Disney Parks and Resorts
Denise McGranahan, Legal Aid Foundation Los Angeles
Courtney Fern, California City Director of the Humane Society of the United States

I. Call to Order and Roll Call

Chair Mandelbaum called the meeting to order at 10:06 a.m. and Summer Legal Scholar Jessica Neighbors conducted roll call.

II. Welcome and Introduction of Guests

Chair Mandelbaum invited the guests in attendance to introduce themselves. Chair Mandelbaum stated that the Council meeting is livestreamed on the Council's website and reminded guests viewing remotely that they could participate in the meeting by emailing the Council and could find the meeting attachments on the website. Chair Mandelbaum reminded the guests in attendance that hard copies of the attachments were available in the meeting room.

III. Review of the Agenda

Councilmember Schur proposed to change the agenda to discuss the "Report from Housing Regulations Subcommittee No. 2" before discussing the draft of the proposed text of "Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals." The Council moved, seconded, and approved changing the agenda. Chair Mandelbaum reviewed the Agenda and invited the guests to comment throughout the day.

IV. Approval of the Minutes

Attachment A: Minutes from the April 7, 2016 Meeting of the Fair Employment and Housing Council

Chair Mandelbaum reviewed the minutes of the April 7, 2016 Meeting. During that meeting, the Council discussed Proposed Housing Regulations Regarding Retaliation, Harassment, and Liability for Unlawful Harassment and heard public comments on the Proposed Regulations Concerning the Use of Criminal History in Employment Decisions.

Chair Mandelbaum asked for comments pertaining to the minutes. There being no comments, the Council moved, seconded, and all voting councilmembers approved the minutes unanimously with one abstention.

V. Councilmembers' Reports

Councilmember Iglesias told the Council that during Fair Housing Month, he spoke to the Project Sentinel Fair Housing Group in San Mateo and at the California Bar Fair Housing and Public Accommodations Symposium in Los Angeles. At these events, Councilmember Iglesias spoke about residential occupancy standards and the relationship between fair housing law and the affordable housing crisis.

Councilmember Perez talked about the Department's new Task Force on the Prevention of Sexual Harassment in the Workplace that will study the problem of sexual harassment, the effects of sexual harassment training in the state, and best practices to prevent harassment. The new Task Force on the Prevention of Sexual Harassment has different subcommittees, including a subcommittee looking at academic studies on the efficacy of harassment training, a subcommittee working on public outreach, and a subcommittee creating a final product for the task force containing a FAQ, model policies, or Best Practices for Sexual Harassment Prevention. Councilmember Perez stated that the new sexual harassment task force would be building on the work of the EEOC task force.

VI. Department of Fair Employment and Housing Report

DFEH Chief Deputy Director Joan Keegan outlined her talking points for the meeting: (1) the DFEH budget, (2) the 2015 annual report, and (3) the strategic plan for DFEH moving forward.

As to the first point, the Governor included two increases for the budget and they were both approved by the legislature. The first proposal will give 26 additional positions to the enforcement division and two to the legal

division. Beginning on July 1st, the Department will begin the process of hiring new investigators. The Governor also approved the proposal to replace Houdini with a new case management system.

Next, the annual report for the Department shows the number of people that contacted DFEH. The total number of people that contacted DFEH alleging discrimination was 23,770. The most commonly cited bases for employment complaints were retaliation and disability. In housing, the most commonly cited basis for discrimination was disability. A total of 17,915 complaints were ultimately filed with the department: 11,768 filed along with a request for an immediate Right to Sue letter and 6,147 complaints filed for investigation as the result of an intake interview conducted by a DFEH investigator. Of the total complaints filed, 91% of complainants filed alleging violations of employment provisions, about 7.5% filed alleging discrimination in housing and 1% filed alleging violations of the Unruh Act. Another .4% filed alleging violations of the Ralph Act and .1% filed alleging violation of the Disabled Persons Act. Overall, 130 cases were referred to the legal division after meeting the merit threshold.

Finally, the draft strategic plan was posted on the DFEH website on Friday, June 24. DFEH is welcoming public comment through July in hopes of incorporating public suggestions. The strategic plan was developed through anonymous input by staff and councilmembers. The plan includes specific actions DFEH plans to take in the 2016-17 fiscal year. Five overarching goals outlined in the plan include: (1) increasing access to information about rights and responsibilities; (2) preventing and combating discrimination and hate violence through proactive and strategic efforts; (3) providing excellent service to individuals and entities that interact with the Department; (4) ensuring that internal processes and systems effectively and efficiently meet business needs; and (5) giving employees information, tools, and support they need to thrive. Ms. Keegan highlighted several of the strategies that will support the realization of these goals, including improving outreach and access to services for individuals with limited English proficiency and individuals with disabilities. DFEH will also strive to make services more consistent and user friendly in order to improve service and increase efficiency.

VII. Public Hearing: Draft Proposed Regulations Regarding Transgender Identity and Expression

Attachment B: Notice of Proposed Rulemaking

Attachment C: Initial Statement of Reasons

Attachment D: Text of Proposed Regulations Regarding Transgender Identity and Expression

A. Introduction

Councilmembers Brodsky and Perez discussed the proposed Regulations Regarding Transgender Identity and Expression. They reiterated that the changes in the regulations were the phrases underlined and struck out. Councilmembers Brodsky and Perez stated that they wanted the regulations to explicitly state the word “transitioning” to emphasize a gender continuum, not a gender binary. They reiterated that the regulations discuss specific working conditions, especially concerning restrooms, dressing rooms, and locker rooms. The councilmembers described a provision obligating employers to recognize an employee’s preferred name and pronoun, rather than their legal name. Councilmembers Brodsky and Perez made it clear that discrimination under FEHA already encompassed transgender discrimination and these regulations would serve to provide clarification. Councilmembers Brodsky and Perez asked if there was any public comment.

B. Public Comment

Attorney Madison Fairchild started by stressing that the regulations are needed in order to ensure safe conditions for transgender individuals, to reduce violence, and to increase productivity and the value of businesses. Ms. Fairchild recommended that section 11030, subdivision (f), include a sentence making it clear that there is no finite amount of time that applies to the process of transitioning. Additionally, Ms. Fairchild expressed concerns

with section 11034, subdivision (i)(1). She stated that the wording of this section would allow an employer to make an employee show proof of gender body modification. Councilmember Brodsky stated that a previous subdivision makes it clear that employers cannot make you show medical proof of gender modification. Councilmember Perez stated that the point of the language is to open up dialogue between the employer and the employee, rather than to just shut down an individual's request for accommodation. Ms. Fairchild replied that the use of the term "unless" in the section makes it confusing.

Ms. Fairchild was also concerned about what proof would be required for the section. Councilmember Perez told Ms. Fairchild that they are open to any suggested language that she has. Councilmember Perez also noted that they could split up section 11031 to have two separate sections that explain BFOQ and then another section that encourages open discussion between employers and employees. Councilmember Schneiderman asked Ms. Fairchild why they should include in the regulations that transitioning does not have a finite amount of time. Ms. Fairchild stated that transitioning does not have a clear endpoint because there is a constant state of transitioning. She stated that she is particularly concerned with the use of the term "transitioning" in section 11034, subdivision (e). She was concerned that "transitioning" would not apply to someone who had completed the medical transition and seemingly the physical transformation involved in "transitioning." Ms. Fairchild did not want "transitioning" to merely apply to medical transitioning and the physical component of "transitioning." Councilmember Brodsky stated that they did not want transitioning to merely mean medical treatment. Councilmember Iglesias suggested changing the language of section 11030, subdivision (f), from "go through" to "choose."

Next, Drian Juarez recommended that the Council work with the transgender community to create the regulations. She noted that the Council should review the regulations with individuals in the transgender community in order to determine if the regulations are problematic for employees and if they can be changed to help the employees. Ms. Juarez thanked the Council for creating the regulations during a time of massive violence against the transgender community.

Melissa Petrofsky, on behalf of the California Employment Lawyers Association, proposed changes to the definition of transitioning in section 11030, subdivision (f). Ms. Petrofsky suggested adding language that shows transitioning does not take a finite amount of time. Ms. Petrofsky also suggested using a larger definition of transitioning to make it a more inclusive list. Ms. Petrofsky also stated that the definition should state that transitioning is a "multi-step process that is unlimited." Councilmember Perez questioned this language, because for some transitioning individuals, there is a start and an end time. Ms. Petrofsky then suggested changing the language to a "multiple-step process that is extended."

Chair Mandelbaum stated that there is no further public comment and no e-mailed comments. Chair Mandelbaum thanked the public for the comments and said they would accept written comments until 5:00 p.m. Chair Mandelbaum stated that the hearing portion of the meeting was adjourned.

VIII. Consideration of Modifications to Text of Proposed Regulations Concerning the Use of Criminal History in Employment Decisions

Attachment E: Modified Text of Proposed Regulations Concerning the Use of Criminal History in Employment Decisions

A. Discussion by Council

Chair Mandelbaum and Councilmember Schneiderman reviewed the Regulations Concerning the Use of Criminal History in Employment Decisions. Chair Mandelbaum stated that they received public comment from a wide variety of sources, including representatives from the EEOC and academic institutions. They used these

public comments to make changes to the regulations. Chair Mandelbaum pointed out the new provision on disparate treatment. The Subcommittee also looked at licensing requirements more closely, and made some changes, but ultimately determined that a comprehensive licensing regulation would need to be part of a separate rulemaking process.

Councilmember Brodsky recommended moving section 11017.1, subdivision (g), to section 11017.1, subdivision (b), to make the regulation more clear. Councilmember Brodsky also expressed concern with section 11017.1, subdivision (b), because it was unclear whether individuals who completed a diversion program would fall within this subdivision. Chair Mandelbaum stated that those individuals would most likely be covered in section 11017.1, subdivision (b)(3). Councilmember Brodsky also recommended changing the use of the pronouns to their plural form to keep it consistent with the transgender regulations. Councilmember Brodsky suggested replacing the word “expect” with the word “establish” in section 11017.1, subdivision (d).

Councilmember Iglesias suggested that section 11017.1, subdivision (d), be broken up into two sentences. He believed that breaking it up into two sentences would clear up any confusion on what individuals could use to show adverse impact. Councilmember Iglesias suggested that the term “business necessity” be taken out of section 11017.1, subdivision (e).

Councilmember Iglesias recommended that “bright-line” in section 11017.1, subdivision (e)(2)(A), be defined and that section 11017.1, subdivision (e)(2)(B), either begin with the term “or” or “and.” Chair Mandelbaum stated that they could put quotes around “bright-line” and create the definition for the term in the next draft. Councilmember Schur stated her apprehension regarding the term “persuasive” in section 11017.1, subdivision (e)(1). Councilmember Schur stated that the term “persuasive” will give the employer a defense to use against the employee. Councilmember Brodsky agreed that the term “persuasive” would be too lenient and give employers a defense. Councilmember Brodsky also noted that the regulations do not state an alternative means to establish adverse impact besides the use of state and national statistics. Chair Mandelbaum stated that if alternative means were in the regulations, then it would make the regulation softer. He also did not want to take out the text suggesting the use of statistics, because he wanted to give guidance on establishing adverse impact. The subcommittee included the exception to the employees’ use of state and national statistics because there are situations in which state- or national-level statistics do not work. Chair Mandelbaum suggested keeping the language and considering the public comment in the 15-day comment period.

B. Public Comment

No public comment was given.

C. Action by Council

Chair Mandelbaum moved to adopt the amendments to the Text of Proposed Consideration of Criminal History in Employment Decisions Regulations as modified during the meeting. Five members voted “yes” and Councilmember Brodsky abstained. The modified draft will be noticed for a 15-day comment period.

IX. Report from Housing Regulations Subcommittee No. 2

Councilmember Iglesias read into the public record the subcommittee’s principles for drafting fair housing regulations include implementing federal law, ensuring the regulations do not afford fewer rights or remedies than federal law, and that the regulations maintain California’s substantial equivalency with the federal Fair Housing Act. Councilmember Iglesias stated that the first drafts of the regulations will start with federal law’s language and that it may need revision if California’s housing and anti-discrimination laws are more protective or provide additional rights. If there is no equivalent federal statute, regulation, or guidance, the subcommittee

will consider whether a regulation is necessary to implement California’s housing anti-discrimination laws. Councilmember Schur added that the subcommittee hoped to be able to produce some draft language at the next meeting for consideration on disparate impact.

X. Draft Proposed Text of Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals

Attachment F: Proposed Text of Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals

A. Discussion by Council

Councilmember Schneiderman discussed the regulations regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals. Councilmember Schneiderman highlighted regulations that involved undue hardship and the interactive process. The subcommittee had received written comments on revisions to previous drafts and suggested that the Council review the proposed regulations section by section.

Councilmember Schur proposed a significant restructuring of the draft. Councilmember Schur mentioned that many sections are interrelated and certain terms are not defined. Councilmember Schur also mentioned how she found it challenging to reconcile these regulations to HUD’s regulations. She suggested substantive and organizational changes to the regulations. Councilmember Schneiderman proposed the Council use the Subcommittee’s draft to start and propose changes as they went along. He then began by going through the definition and harassment sections.

Councilmember Brodsky suggested that cross referencing the Government Code does not usually provide enough guidance and it would be more useful to spell out certain definitions more explicitly. Councilmember Schur expanded on this point and stressed how the term “housing provider” does not appear in statute or in the HUD regulations. Councilmember Schur elaborated that the term may be more limiting than what the Subcommittee was attempting to accomplish. Additionally, she added that the Council should go back to define a “person,” as well as define an “owner.” Councilmember Schur recommended that the Council start with these definitions, because they have been consistently defined and construed by the courts. In comparison, she said “housing provider” is unclear.

Councilmember Schneiderman described the intent behind using housing provider was to create a broad word that encompassed a lot of different categories of individuals covered by the regulations. Councilmember Schur replied that the use of the word “person” would more efficiently capture the Subcommittee’s intent and cover everyone. She also recommended that the Council use the term “protective basis” and not “classes.” Councilmember Schur proceeded to expand on other words that need defining, including “dwelling” and “modification.” Councilmember Schur suggested that the Council may want to put the definition of each basis in the housing regulations. Councilmember Brodsky added that it may be more convenient to put definitions in alphabetical order.

The Council then proceeded to the harassment section. Chair Mandelbaum expressed that “without their consent” should be added to section 11098.6, subdivision (b)(7), along with “because of a protected basis.”

Councilmember Brodsky suggested not starting a sentence with “when.” Additionally, Councilmember Brodsky added that the Subcommittee should track the employment regulations’ language whenever possible and accurate.

Councilmember Schur then made several recommendations. Councilmember Schur recommended that the Council mirror HUD’s harassment language because they have already taken public comments and revised the regulations accordingly. Councilmember Schur also suggested that the regulations’ structure mirror HUD’s structure. Councilmember Schur then read her extensive revisions into the record so that the Subcommittee and public would have access to them and also gave the reasoning behind each change.

B. Public Comment

Courtney Fern, the California City Director with the Humane Society of the United States, had concerns about section 11098.29, subdivision (d). Ms. Fern asked why this language was put into the regulations and felt that it may have the effect of limiting individuals in an unintended manner. For example, if a doctor arbitrarily wrote that the patient needed a cat, when the doctor meant pet in general, but the patient wanted dog, then the patient should not be forced to get a cat. Ms. Fern did show support for the language if it was meant for exotic animals or wildlife. Ms. Fern then suggested adding qualifying language or changing “must” to “may” so that individuals are not unfairly restricted.

XI. Presentation Regarding the Background and History of Residential Occupancy Standards

Due to time constraints, this section was postponed to a subsequent meeting.

XII. Further Public Comment

There was no further public comment.

XIII. Adjournment

Chair Mandelbaum adjourned the meeting at 4:55 p.m.

Date: August 2, 2016

Chaya Mandelbaum
Chair

Jessica Neighbors
Summer Legal Scholar

Francisco Navarro
Summer Legal Scholar