



DEPARTMENT OF FAIR EMPLOYMENT & HOUSING
FAIR EMPLOYMENT & HOUSING COUNCIL
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FAIR EMPLOYMENT AND HOUSING COUNCIL

Meeting of January 7, 2016

Minutes

State Capitol
Room 127
Sacramento, CA 95814

Councilmembers Present

Chaya Mandelbaum, Chairperson
Dale Brodsky, Councilmember
Chanée Franklin Minor, Councilmember
Tim Iglesias, Councilmember
Patricia Perez, Councilmember
Andrew Schneiderman, Councilmember
Dara Schur, Councilmember
Kevin Kish, DFEH Director and Ex Officio member

DFEH Staff Present

Joan Keegan, Chief Deputy Director
Nelson Chan, Civil Rights Officer and Associate Chief Counsel for Educational Outreach and Education
Tom Gill, Attorney Mediator
Brian Sperber, Legislative and Regulatory Counsel
Jeanette Hawn, Civil Rights Fellow

Others Present

Jennifer Svec, California Association of Realtors
Jonathan Young, California Association of Realtors
Ron Kingston, California Political Consulting Group, Representing Five Regional Apartment Associations
Etan Zaitso, California Political Consulting Group, Representing Five Regional Apartment Associations

Endria Richardson, Legal Services for Prisoners with Children
Manuel La Fontaine, Legal Services for Prisoners with Children
Mark Reed, Legal Services for Prisoners with Children
Lonni Rivera, Capitol Television News Service
Linda Krause, Liaison to California Teachers Association
Noah Lebowitz, California Employment Lawyers Association
Mariko Yoshihara, California Employment Lawyers Association
Nayantara Mehta, National Employment Law Project

Emma Regidor, California Department of Corrections and Rehabilitation
Serena Ortega, Cal Fire
Nicole Placencia, Cal Fire
Michaeljit Sandhu, National Housing Law Project

I. Call to Order and Roll Call

Chair Mandelbaum called the meeting to order at 10:06 a.m. and DFEH Legislative and Regulatory Counsel Brian Sperber conducted roll call.

II. Welcome and Introduction of Guests

Chair Mandelbaum asked 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 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

Chair Mandelbaum reviewed the Agenda and invited the guests to comment on subjects addressed by the Council throughout the day.

IV. Approval of the Minutes

Attachment A: Minutes from the August 26, 2015 Meeting of the Fair Employment and Housing Council

Chair Mandelbaum reviewed the minutes of the August 26, 2015 Meeting. During that meeting, the Council discussed consideration of an additional 15-day comment period to the proposed employment regulations and adopting a final draft of the employment regulations for review and approval by the Office of Administrative Law. There was a presentation regarding the use of criminal history in employment decisions from guest speaker Maurice Emsellem, Program Director of the National Employment Law Project.

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 discussed an upcoming housing symposium sponsored and held at the University of San Francisco School of Law on January 29, 2016. The symposium will focus on the affordability of housing for low- and middle-income families in the state. More information can be obtained on the law school's website.

Councilmember Franklin Minor discussed her attendance at a recent town hall where the Alameda County Interim Presiding Judge announced the County's consideration of consolidating all Unlawful Detainer (Eviction) cases in Alameda County to hear them at the Hayward courthouse. Councilmember Minor expressed concern about this because a majority of rental housing is located in Oakland and moving all cases to the Hayward courthouse would pose an access to justice issue like that experienced in Los Angeles when a similar consolidation occurred. Councilmember Franklin Minor discussed the Council's consideration of issuing a comment and/or submitting a letter as other entities have at the next meeting. Councilmembers Brodsky, Franklin Minor, Director Kish, and Chair Mandelbaum discussed whether waiting until the next meeting would

be too late or if there was an alternative way to address the issue through the DFEH or a subcommittee. The entire consolidation process is set to begin in January 2016 with the consolidation of Unlawful Detainer cases scheduled in March 2016. The Council agreed that the issue will be further considered by the DFEH and a subcommittee of the Council.

VI. Department of Fair Employment and Housing Report

Director Kish discussed the updates given at the previous meeting regarding the DFEH posters and the website. Changes to the website are still in progress. Director Kish discussed initiatives and projects undertaken since the last meeting, including modestly updating Houdini.

Director Kish highlighted the successful launching of a pilot intake unit in Los Angeles which is intended to reduce the backlog and the delay between the date of a Complainant's first contact with the DFEH and the time that a Complaint is prepared by having a dedicated team of intake personnel that can quickly address jurisdictional issues and provide an immediate response to emergency cases. The DFEH intends to launch the intake unit for all of Southern California in February 2016.

Director Kish also discussed the addition of two assistant chief counsel positions and a training academy for all investigators using internal resources, noting that the DFEH is considering conducting similar training for new investigators. The DFEH also conducted a successful leadership training program for all department managers and Director Kish expressed appreciation for Deputy Director Joan Keegan's involvement in the training program.

Director Kish discussed the launching of the DFEH's strategic planning process. Thus far, 386 ideas have been generated in various areas such as Improving Operational Efficiency, Enhancing Outreach, and Becoming Thought Leaders in Civil Rights. The DFEH is on track to have final a strategic plan in place by the new fiscal year on July 1, 2016.

Director Kish highlighted the DFEH's recent successes in its legal and mediation divisions and that the DFEH prevailed in the *Escueta* trial, a sex and race-based discrimination case, in which the DFEH was represented by Associate Chief Counsel Nelson Chan and Staff Attorney Roya Ladan, with support from Civil Rights Fellow Jeanette Hawn.

Director Kish noted that Governor Brown's recently released proposed budget will enable the DFEH to hire 28 new employees for various positions. Director Kish expressed appreciation to the Governor, the Department of Finance, and the Business, Consumer Services and Housing Agency and is looking forward to working with the legislature to ensure enactment.

VII. Draft Proposed Regulation Concerning the Use of Criminal History in Employment Decisions

Attachment B: Draft Consideration of Criminal History in Employment Decisions Regulations

A. Discussion by Council

Chair Mandelbaum noted that the proposed regulation (§ 11017.1) is the product of extensive research by Chair Mandelbaum and Councilmember Schneiderman. Chair Mandelbaum reviewed subdivisions (b) and (c), which cover prohibitions and limitations on the use of criminal history and highlight applicable provisions from the Labor Code. Chair Mandelbaum stated that although the provisions from the Labor Code are not part of the FEHA, they offer guidance to businesses regarding the law, especially the business necessity defense. Chair Mandelbaum discussed the proposed regulation's clarification of "disparate impact" in subdivision (d) as being

the same as the interpretation of that term under federal law and the Uniform Guidelines on Employee Selection and Procedures. He also discussed the proposed regulation's outlining of factors in subdivision (e) that should be considered by employers when developing policies or practices. Chair Mandelbaum reviewed the rebuttable presumption regarding conviction related information that is seven or more years old located in subdivision (e) and stated that this is consistent with local and other states' laws and derives from a similar seven year limit in the Civil Code. Chair Mandelbaum reviewed the provision in subsection (e) that allows individuals who would otherwise be adversely impacted by their conviction history to present evidence that the employer's information is factually inaccurate. He also reviewed subdivision (f), which states that compliance with other federal or state laws or regulations is sufficient to establish job-relatedness and business necessity as a defense to a disparate impact claim. Chair Mandelbaum reviewed subdivision (g) and discussed an adversely impacted individual's ability to prevail under the FEHA if he or she demonstrates that there is a less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice.

Councilmember Schneiderman reminded the councilmembers and public that the proposed regulation only applies to employment related decisions, not housing discrimination. He asked for clarification on what date the rebuttable presumption regarding conviction related information is measured from. Chair Mandelbaum clarified that the language in the regulation mirrors the language in the Civil and Labor Code and therefore it would apply to any dates falling outside the seven year period.

1. Section 11017.1, subdivision (a)

Councilmember Schur discussed her concern that some specifically prohibited practices from section 11071 subdivisions (d)(1)(B) and (d)(1)(C) did not carry over to the proposed section 11071.1, subdivisions (b) and (c) and asked for clarification. Chair Mandelbaum and Councilmember Schneiderman stated that the subcommittee did not intend to decrease any of the prohibited practices in the proposed regulation. Chair Mandelbaum stated that convictions where a pretrial diversion program has been successfully completed (§ 11071 (d)(1)(C)) should be covered under proposed section 11071.1, subdivision (b)(2), and he and Councilmember Brodsky stated that misdemeanor convictions that have been judicially dismissed or for which probation has been successfully completed (§ 11017 (d)(1)(B)) should be covered under proposed section 11071.1, subdivision (b)(3). Councilmembers Franklin Minor and Schur discussed the need for more clarity by adding examples of the types of criminal records that employers are prohibited from considering pursuant to proposed section 11071.1, subdivision (b). Councilmember Franklin Minor discussed the need to be very clear that misdemeanors constitute convictions and Councilmember Schur expressed concern that an employer may think the initial misdemeanor conviction could be reported after the successful completion of probation based on the language of the proposed regulation. Councilmembers Brodsky and Schneiderman and Chair Mandelbaum stated that the language of proposed section 11071.1, subdivision (b)(3) covers the initial misdemeanor conviction once it has been dismissed. Chair Mandelbaum and Councilmember Schur discussed the need for the regulation to track state law and add language regarding conviction records that have been expunged or eradicated.

Councilmember Brodsky made several suggestions regarding word usage in the regulations. She expressed concern about the need for consistency in the usage of "protected basis" or "enumerated in the Act" and a preference for "enumerated in the Act." Councilmember Brodsky also expressed concern that the use of the terms "adverse" and "disparate" together as in "adverse disparate impact" is redundant and could have a negative effect on the meaning of the words when they are used separately as they are in other areas of the Act and other regulations; Councilmember Schur agreed. Chair Mandelbaum, Director Kish, and Councilmembers Brodsky, Iglesias, Schur, and Franklin Minor discussed the interchangeable use of the terms and their preferences for each term. Chair Mandelbaum stated that the Uniform Guidelines on Employee Selection Procedures, which is a referenced source for the proposed regulation, uses the term "adverse."

Councilmember Iglesias discussed the need to consistently include “other covered entity” when a provision states that it applies to “employers.” He also stated that reference to applicants must likewise be made anytime a provision references “employees” because the proposed regulations are meant to protect both. Councilmember Iglesias recommended the last sentence to be changed to add “or if the employee has demonstrated” before “there is a less discriminatory alternative” and change “mean” to “means” to clarify where the burden of proof lies.

Councilmember Brodsky discussed the use of the word “sufficiently” in relation to the business necessity defense and expressed concern that “*sufficiently* related to an essential function of the job” is a lower standard than what the law requires to demonstrate business necessity. Chair Mandelbaum stated that the term “sufficiently” came from the existing regulation and Councilmember Brodsky suggested that the Council consider referencing the definition of “business necessity” provided in 2 CCR 11010(b) to clarify the meaning of the term “sufficiently.”

Councilmember Schur discussed the need for the proposed regulation to refer to information about criminal records as well as the records themselves to ensure that the regulations cover the information about and/or from criminal records held and transmitted by third parties. This would include, for example, information about convictions contained in credit reports. Councilmembers Brodsky and Franklin Minor discussed the possibility of including a separate definition to define “record” to include information about and/or from criminal records.

B. Public Comment

Chair Mandelbaum opened the discussion to the public.

Nayantara Mehta from the National Employment Law Project in Oakland expressed appreciation to the Council and noted that it is important to provide guidance to employers and employees regarding the consideration of criminal records. She further stated that her organization has engaged in internal discussions and plans to submit written comments to the Council. Ms. Mehta indicated that the EEOC guidelines use the term “disparate impact.” She also expressed appreciation to the Council on behalf of the Lawyers’ Committee for Civil Rights of the San Francisco Bay Area.

Endria Richardson, Staff Attorney with Legal Services for Prisoners with Children expressed appreciation and stated that Legal Services for Prisoners with Children intends to submit written comments to the Council. Ms. Richardson discussed the importance of the Ban the Box movement and the need for policies to be driven by formerly incarcerated people who understand how criminal records impact their ability to secure employment and move forward with their lives. She further urged the Council to provide as much clarity as possible regarding the proposed regulation’s applicability to misdemeanors, felonies, and arrests that have been dismissed because employers do not give applicants and employees the benefit of the doubt and therefore vagueness is problematic.

Manuel La Fontaine from Legal Services for Prisoners with Children and the All of Us or None initiative stated that he was happy with the progress of the Ban the Box movement and discussed the need for the Council to think about how people who are directly impacted will be benefitted by the proposed regulation. Mr. La Fontaine also expressed interest in seeing formerly incarcerated people involved in the process of developing the regulations.

Councilmember Franklin Minor thanked Ms. Mehta, Ms. Richardson, and Mr. La Fontaine for sharing their comments and acknowledged that it is important to hear from the people who are most affected by the proposed regulations in addition to their advocates. She also urged them to encourage others to share their comments with the Council as well.

There being no further comments from those in attendance and no comments via email, Chair Mandelbaum closed the public comment period.

C. Further Discussion by Council

1. Further Discussion by Council Regarding Section 11017.1, subdivision (a)

Chair Mandelbaum returned to the discussion regarding the use of the term “disparate adverse impact” citing the use of different terms in the Uniform Guidelines on Employee Selection Procedures and the EEOC guidelines referenced by Ms. Mehta. Chair Mandelbaum, Director Kish, and Councilmembers Brodsky and Schur discussed dropping the term “disparate” and instead using the term “adverse impact” and clarifying that the meaning of “adverse impact” is the same as that of “disparate impact” as used in the EEOC guidelines.

Chair Mandelbaum and Councilmember Perez discussed changing the term “described” in Section 11017, subdivision (e) to “defined” to be consistent with the proposed 11017.1.

2. Section 11017.1, subdivision (b)

There being no further discussion by Council or public comment regarding subdivision (a), Chair Mandelbaum opened the discussion on subdivision (b).

Councilmember Schur discussed the need to ensure that all specifically prohibited practices from section 11071 are carried over to the proposed section 11071.1 and references to “criminal records” here also include the information about and/or from such records as previously mentioned during the discussion regarding subdivision (a). Councilmember Schur also expressed concern that other people, namely reporting agencies, should be covered by the Act. She noted that Government Code section 12940, subdivision (i), provides that it is a violation for any person to aid, abet, incite, or compel a violation of the Act and inquired whether the Council could specify that reporting agencies are entities for purposes of the Act and therefore conduct such as reporting information about and/or from criminal records would constitute a violation of the Act. Chair Mandelbaum acknowledged that there are statutory prohibitions applicable to reporting agencies but that complications could arise when regulating the interaction between reporting agencies and employers because it would impose a duty on reporting agencies to evaluate when the employer’s use of the records would be unlawful. He also highlighted that a violation of the FEHA requires the existence of an adverse impact even though it would constitute a violation of the Civil Code. Councilmember Schur suggested the Council consider the issue at the next Council meeting.

Councilmembers Iglesias and Franklin Minor discussed retitling proposed subdivision (b) because it is misleading because employers are prohibited from *seeking*, as well as *considering*, criminal history information from third parties but the title only states that “employers are prohibited from considering” criminal history information. The Council agrees that the title of subdivision (b) should include “seeking or considering” to accurately reflect the prohibited conduct.

3. Section 11017.1, subdivision (c):

Councilmember Iglesias discussed retitling proposed subdivision (c) to include “seeking” for the same reasons as those previously cited with regards to subdivision (b).

Councilmembers Brodsky, Iglesias, Minor, Perez, Schur, and Chair Mandelbaum discussed whether “seeking” covers the act of going online to third party reporting businesses. Councilmember Brodsky stated that “seeking” should mean “obtaining information.” Councilmember Franklin Minor suggested that the Council provide

examples in the proposed regulation of what constitutes “seeking” and that it should include going online to snoop, not just making a formal request to a third party to search for criminal records. Councilmember Perez expressed concern that accidentally stumbling upon a criminal record or conducting a search for permissible information and unintentionally obtaining unlawful information would be prohibited conduct if “seeking” includes “obtaining information.” Chair Mandelbaum agreed that “obtaining” would cover accidentally acquired information. Councilmember Franklin Minor suggested providing examples in the proposed regulation that would exclude accidentally obtaining unlawful information during a search for permissible information from the prohibited conduct. Chair Mandelbaum suggested looking to the Labor Code for examples of “seeking” because the term came from the Labor Code. Councilmember Schur acknowledged that it may be difficult to prove when someone is “seeking” information in some instances but using the word “seeking” may serve as a deterrent. Chair Mandelbaum suggested changing the title to “Additional Criminal History Limitations” and Councilmember Iglesias agreed.

Councilmember Brodsky expressed concern about the use of the term “conviction” with regards to the juvenile justice system in proposed subdivision (c)(2) and suggested the Council replace that term with “disposition.” Chair Mandelbaum stated that the use of the term “conviction” mirrors the referenced San Francisco ordinance and clarified that the proposed regulation only cross-references existing law and does not constitute a change in the law.

4. Section 11017.1, subdivision (d):

Councilmember Schur noted that research presented to the Council indicates that employment questionnaire boxes with blanket criminal history questions have a disparate impact but that the burden is still placed on the employee to prove disparate impact. She asked whether the subcommittee considered creating a presumption of disparate impact where such questions are used, which would serve to deter employers from using such questions. Chair Mandelbaum responded that the subcommittee did consider creating such a presumption but that such a bright-line rule is unworkable given the wide-range of jobs, requirements, and applicant pools. He also noted that there are cases where adverse impact is not found because of factors like geography, the applicant pool, and job requirements. Councilmember Schneiderman pointed to the lack of case law to support such a presumption.

Councilmember Perez expressed concern that subdivisions (d) and (e) are more detailed regarding the burden shifting than other regulations on the topic have been because when a similar elemental approach was suggested with regards to the sexual harassment regulations, the Council was told that the regulations are not supposed to include such detail and providing the elements could constitute the Council overstepping its authority. Councilmember Brodsky agreed. Chair Mandelbaum and Councilmember Schneiderman stated that the intent was to provide guidance and present the factors that must be considered in the wide-range of situations in which this comes up. Councilmember Perez expressed concern that the Office of Administrative Law (OAL) would reject the proposed subdivisions (d) and (e). Councilmember Perez also expressed concern that it would be financially burdensome to require an employer to prove that the employer underwent an individualized assessment of the circumstances or qualifications of the applicants or employees excluded by the conviction screen. Chair Mandelbaum noted that the proposed regulation follows the federal guidelines and Title VII law, therefore the burden is law that is already applicable to employers. He also noted that the proposed regulation does not mandate an individualized assessment. An individualized assessment is one of the ways an employer can demonstrate the business necessity defense.

Councilmember Brodsky suggested that the burden-shifting language be removed because it could create a narrow view of how to prove and rebut a claim of adverse impact. She also acknowledged that promulgating the framework for burden shifting is in the purview of the courts and expressed concern that the proposed regulation oversteps the Council’s authority.

Councilmember Iglesias suggested that direct cites be added for each factor in order to clarify that the regulations do not create new law but reference existing law. Chair Mandelbaum discussed his concern that adding citations would make the regulations difficult to read.

Councilmember Schur stated that she finds the proposed regulation's detailing of the law helpful and noted that the federal regulations are similarly detailed. DFEH Legislative and Regulatory Counsel Sperber indicated that the proposed regulation would be reviewed before the comment period begins and that the subcommittee was more thorough in this draft because this is a new frontier in the regulations.

Councilmember Perez expressed concern that placing the "individualized assessment" as the first alternative for the employer to use to rebut the disparate impact presumption places emphasis on it as if an employer must undertake an individualized assessment. Instead, Councilmember Perez suggested swapping the "individualized assessment" clause with the "bright-line disqualification" clause. The Council agreed.

Councilmember Iglesias asked whether the subcommittee considered whether "seeking" information and not just the "consideration" of records can have an adverse impact. Chair Mandelbaum noted that "seeking" information does not have adverse impact. Councilmember Brodsky suggested replacing "considering" with the term "using." Councilmember Schur expressed concern that "using" could create a higher standard of proof. Chair Mandelbaum suggested including a clarification that "considering" means "consider in the employment decision," and the Council agreed to the addition of that clarification.

Councilmember Iglesias suggested breaking up the factors in subdivision (d) into separate paragraphs. Chair Mandelbaum and Councilmembers Brodsky and Iglesias discussed changing the word "appropriately" to "properly" in the sentence that reads "or be able to demonstrate that any bright-line, across the board, conviction disqualification can appropriately distinguish between applicants or employees that do and do not pose an unacceptable level of risk . . ." Councilmember Iglesias also suggested adding "or otherwise adversely affect an employee or applicant" after "that the convictions being used to disqualify . . ." Councilmember Iglesias further suggested the addition of externally generated research to the last sentence and Chair Mandelbaum suggested adding externally generated research, such as a credit report, as an example. Councilmember Iglesias agreed.

Councilmember Iglesias suggested adding a clause at the end of subdivision (d) to clarify that if an employee demonstrates that there is an inaccuracy in the employer's information then it cannot be used in the employment decision. The Council agreed. Councilmember Perez and Chair Mandelbaum discussed the employer's obligation to conduct an individualized assessment in the event that an employee or applicant wants to explain their criminal history when that information is accurate and disqualifies them for the job. The employer would not be required to undertake an individualized assessment.

Councilmember Brodsky pointed out that licensing and credentialing rules are not discussed in the regulation and should be added to the examples under the business necessity defense. Councilmember Schneiderman and Chair Mandelbaum agreed because there will be situations in which someone cannot be hired for a job because they cannot obtain the necessary license or credential due to a criminal history.

Councilmembers Iglesias and Brodsky suggested minor changes to the terminology in subdivisions (f) and (g).

Chair Mandelbaum reviewed the Council's changes to the subdivisions of the proposed regulation in Attachment B as modified by the Council during the meeting.

D. Public Comment

Chair Mandelbaum invited public comment on the pending motion to approve Attachment B as amended at the meeting, adopt new regulations as embodied in Attachment B as amended at the meeting, and authorize the DFEH to prepare a rulemaking package and the regulations for approval. There being no public comments, Chair Mandelbaum closed the public comment period.

E. Action by Council

The Council moved, seconded, and unanimously approved the motion to adopt the regulations with amendments and to authorize the Department to prepare a rulemaking package and notice the regulations for public comment.

VIII. Recess

Chair Mandelbaum called recess for lunch at 12:15 p.m. Chair Mandelbaum called the Council back to order at 1:32 p.m.

IX. Report from the Housing Regulations Subcommittee No. 2

A. Discussion by Council

Councilmember Iglesias spoke on behalf of the Housing Regulations Subcommittee No. 2. The subcommittee was charged with drafting regulations on four distinct issues. At the last meeting, the subcommittee stated that it intended to collect information and it has since received that data and gathered data based on recent action by HUD on the use of background checks in subsidized housing. The subcommittee hopes to be in a position to provide a draft of the proposed regulations by Spring 2016.

Councilmember Schneiderman discussed Assembly Bill 396 by Assemblymember Jones-Sawyer that would prohibit the use of criminal records in the initial applications for housing.

B. Public Comment

Jennifer Svec, on behalf of the California Association of Realtors, stated that the bill is stalled in its first house on the Assembly side and that the California Association of Realtors has been conversing with the Assemblymember's office about getting the bill through the house.

X. Report from Subcommittee on Preventing and Eliminating Workplace Sexual Harassment

A. Discussion by Council

Councilmember Perez, on behalf of the subcommittee, discussed the EEOC's formation of a taskforce in 2015 that is similar to the Subcommittee on Preventing and Eliminating Workplace Sexual Harassment. The subcommittee is in touch with the EEOC representatives in California. Councilmember Perez gave testimony at a meeting in Los Angeles that provided outlines of examples of best practices and case studies where employers have done a good job of preventing and addressing harassment. Councilmember Perez further indicated that the goal is to start with hearings, then conduct research and analysis to produce a tangible work product such as FAQs, guidelines, etc. on best practices to avoid litigation. Chair Mandelbaum will participate in the taskforce.

B. Public Comment

Chair Mandelbaum opened the floor to public comment. There were no comments from the guests in attendance or via email regarding formation of the taskforce.

C. Action by Council

The Council moved, seconded, and unanimously approved the motion to form the taskforce as described.

XI. Report from Subcommittee to Liaise with Human and Civil Rights Groups

Councilmember Franklin Minor discussed the subcommittee's progress. The subcommittee has met to determine what it can accomplish. She also discussed the creation of a possible taskforce that would issue a report on California with regards to civil and human rights inspired by the report cards issued by the UN Human Rights Council. Such a taskforce would focus on each county's performance, especially with regards to hate crimes, police brutality, housing issues, access to justice issues, and other areas including those where the FEHC cannot issue regulations but where it could at least publicize the issues. Councilmember Franklin Minor noted that such a taskforce would give the subcommittee an opportunity to receive input from stakeholders.

Councilmember Brodsky discussed the purpose of the subcommittee. The subcommittee will consider the possibility of promulgating regulations, Unruh Civil Rights Act and Ralph Act issues such as police brutality, re-segregation and job loss, and the relationship between the Equal Pay Act and the FEHA. The subcommittee will consider the possibility of building a coalition of groups to inform future regulations or a report to the legislature.

XII. Report from Fair Employment and Housing Act Employment Regulations Subcommittee

Councilmember Brodsky discussed beginning to draft regulations regarding transgender issues. Councilmember Brodsky mentioned that specific topics have arisen where employers and employees need guidance on employer responsibilities and obligations and employee rights such as bathroom use, privacy, and pronoun usage.

Councilmembers Perez and Brodsky noted that the last set of regulations that were voted on by the Council were approved by OAL in December and become effective on April 1, 2016. These regulations are available on the Council's website.

XIII. Public Workshop and Review of Working Draft of Fair Employment and Housing Act Housing Regulations From Housing Regulations Subcommittee No. 1

Attachment C: Working Draft of Fair Employment and Housing Act Housing Regulations

A. Discussion by Council

Chair Mandelbaum clarified that the housing regulations are still being developed and that Attachment C is not a final draft and has not previously been presented to the full Council yet. Once the regulations are finalized, they will be voted on by the Council to initiate the rulemaking process, starting with a public comment period.

Councilmember Franklin Minor stated that the goal at this stage is to receive feedback from the Council and the public on global issues and the subcommittee will tackle details in the next working draft.

Councilmember Schneiderman identified some discrete issues where the subcommittee is interested in getting feedback, such as the definitions of "gender identity" and "gender expression." Councilmembers Schneiderman and Franklin Minor also desired feedback on whether occupancy standards should appear in a standalone section instead of placing it within the section covering familial status discrimination. Councilmember Schneiderman also stated that the subcommittee has received a considerable number of comments, and seeks input from the Council and public, regarding support animals and whether there is a need for definitional clarification and

criteria regarding species, the number of animals, and the type of certification and/or documentation with respect to the need for a service animal. The subcommittee also seeks input on the draft regulations regarding the Compassionate Use Act and whether medical marijuana should be permitted by a landlord if a tenant has a prescription.

B. Public Comment

Jennifer Svec, on behalf of the California Association of Realtors, discussed the draft regulations regarding occupancy standards, service animals, and medical marijuana. Ms. Svec expressed appreciation for the Council giving the public the opportunity to provide input and stated that the California Association of Realtors would like to serve as a resource on behalf of landlords. A formal letter regarding concerns with the draft was provided. Ms. Svec expressed concerns about the draft regulations regarding occupancy standards because of the potential for health and safety violations. The California Association of Realtors prefers an earlier version of the draft regulations that would allow for local control or a 2+1 occupancy standard where there is no local control. Ms. Svec stated that “support animals” are not “service animals” under the current definition. Ms. Svec also expressed concern about the definition of multi-family structures because the definition generally includes those that contain 5 units or more and this definition includes those that contain 4 units or more. She stated that condos are single family homes. Ms. Svec expressed concern about competing interests when a reasonable accommodation for the use of medical marijuana is requested because there is the potential for someone with severe allergies to be impacted by the use of medical marijuana.

Ron Kingston, of the California Political Consulting Group, representing landlords in five regional areas, discussed the draft regulations on support animals, occupancy standards, and medical marijuana. Mr. Kingston discussed the topic of emotional support animals. He stated that emotional support animals are not critical the same way that service animals are and that the legislature has not been able to fully address the issue of emotional support animals because it is too complex. Mr. Kingston then discussed occupancy standards. He stated that local entities such as fire, planning, and health departments have interests that must be considered with regards to occupancy standards. He also expressed concern that, under the draft regulations, the dining room and living room are treated as bedrooms for the purposes of the occupancy standard and that children under two are not counted, which raises an issue when the child becomes older but the family does not move. On the issue of medical marijuana, Mr. Kingston stated that most landlords have lease agreements that either preclude or permit the use of marijuana and those that permit the use of marijuana require that it be ingested and not inhaled. Mr. Kingston stated that requiring ingestion is a safer and more logical reasonable accommodation.

D. Further Discussion by Council

Councilmember Franklin Minor stated that the draft occupancy standard is based upon building and housing codes that are used by local fire departments and other local entities. Councilmember Franklin Minor clarified that the draft occupancy standard is based upon square footage and not the number of bedrooms; the bedroom figure was only meant to serve as an example and can be removed if it causes confusion. She also thanked Mr. Kingston for suggesting ingestion of medical marijuana as an alternative.

Councilmembers Perez and Brodsky suggested that the public, including Ms. Svec and Mr. Kingston, provide sample regulation language to the Council.

E. Recess

Chair Mandelbaum called for a brief recess at 2:50 p. m. and called the Council back to order at 3:03 p.m.

F. Further Public Comment

Chair Mandelbaum invited further public comment.

Michaeljit Sandhu of the National Housing Law Project expressed appreciation to the Council for incorporating their comments into the draft regulations and stated that the National Housing Law Project intends to submit new written comments. Mr. Sandhu asked the Council if a timeline could be provided regarding the incorporation of comments into the next version of the draft. Chair Mandelbaum stated that the subcommittees begin working on the drafts immediately after the FEHC meetings.

G. Further Discussion by Council

Councilmember Schur expressed concern that it is overwhelming to tackle every area of the draft housing regulations at the same time and suggested drafting and submitting the draft regulations to the Council and public for comments in chunks. Councilmember Schur suggested starting with the definitions and suggested developing a complete set of definitions. She expressed concern that some definitions appear in the beginning of the draft regulations while other definitions appear elsewhere. Councilmember Schur discussed using similar definitions across the employment and housing regulations for key concepts.

Councilmember Schur discussed the list of discriminatory acts. She noted that it currently appears in the definition section of the regulations when it appears to be a substantive provision and expressed concern that it is not a complete list of the discriminatory acts. Councilmember Schur also noted that some conduct described is only unlawful in certain circumstances. She discussed discriminatory acts in the lending and banking context that are currently missing from the draft regulations and encouraged the subcommittee to ensure that the draft regulations track the statute. Councilmember Schur acknowledged that the issue of occupancy standards is extremely difficult because overly restrictive standards have an enormous adverse impact on families with children and other protected classes. She noted that cultural differences exist regarding what people consider to be sufficient space and there are health and safety concerns based on the housing code. Councilmember Schur recommended dealing with occupancy standards at a later date because it is so complex. Councilmember Schur acknowledged that the area of service and support animals has been an area of inconsistency and confusion but noted that the HUD and DOJ guidelines are helpful. She stated that it is important to keep in mind that the standards for support animals under the Fair Housing Act is different than the standard under the Americans with Disabilities Act and housing providers are governed by both standards. Councilmember Schur discussed coverage of service animals and emotional support animals under federal anti-discrimination law and the need for the state regulations to be consistent so that service animals and emotional support animals are covered.

Director Kish proposed a piecemeal approach to move sections of the proposed regulations to the rulemaking stage. Councilmember Schur suggested developing the definitions first and suggested the use of a side-by-side chart containing the federal and state regulations and statutes. Councilmember Franklin Minor discussed prioritizing occupancy standards and service animals because of the public comments regarding those areas.

Councilmember Iglesias discussed the lack of housing regulations in other states. California would be the first state with regulations for its state fair housing law. Councilmember Iglesias stated that regulations would clarify differences between the state and federal law, the application of state law, and developing areas of state law. He also expressed interest in receiving input from regulated parties, DFEH attorneys, private attorneys, among others, regarding needed regulations to enable the FEHC to be responsive in drafting the regulations. Councilmember Schur stated that detailed, specific comments, including sample language, from people in the public who actually deal with these issues would be helpful. Councilmember Iglesias also agreed with approaching the draft regulations in chunks and agreed that occupancy standards is a hot issue but suggested addressing it a little later in the process.

Councilmembers Iglesias and Franklin Minor discussed the Council's consideration of addressing whether

“temporary housing” refers to AirBnB in light of *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*.

Councilmember Schur directed the subcommittee’s attention to the definitions that implicate construction standards starting on page 21. Councilmember Schur stated that there are interactions between construction standards and federal law and the ADA and suggested that the regulations pertaining to construction standards be a separate section because they only relate to construction and building standards which is highly regulated and it is not an area of discrimination but rather an area of building standards.

Councilmember Perez expressed concern regarding the draft regulations on the topic of support animals. Councilmember Perez stated that emotional support animals are distinct from service animals. She also expressed concern about having bright-line rules in the housing context that creates a presumption that a request for a support animal is a reasonable request. Councilmember Perez discussed the need for an emotional support animal being a need for the animal’s presence rather than a specific skill and expressed concern about completely untrained animals. She also inquired about the requirements and restrictions that would apply to support animals and how conflicting interests in the reasonable accommodation context would be reconciled. Councilmember Franklin Minor acknowledged that there will always be competing interests in the housing context that landlords and tenants will have to work out. Councilmember Perez stated that it appears, according to the draft language, that the support animal would trump everything. She also expressed concern about the occupancy standard examples and stated that it would be helpful to provide total square footage. She inquired whether the 2+1 standard is law that the FEHC can deviate from.

Councilmember Brodsky discussed the need to consistently use the term “discrimination on a basis enumerated in the act” rather than “protected class” or “protected basis.” She also expressed concern about defining “race,” “color,” “religion,” etc. and noted that the employment regulations do not define those terms. Councilmember Brodsky urged consistency between the housing and employment regulations in the absence of a good reason for a different approach in the housing context. Councilmember Brodsky also inquired why the interactive process in the housing context is different than in the employment context. Councilmember Franklin Minor clarified that there are cases in which the aforementioned issues have been treated differently in the housing and employment contexts.

Chair Mandelbaum discussed the statement of policy. He expressed concern about the FEHC’s ability to make the statement that other state laws are invalid if they conflict with the FEHA. Chair Mandelbaum also expressed concern that there are three areas of the draft regulations that state religious exemptions do not apply when the discrimination is because of any protected basis other than religion because Section 12955.4 of the FEHA provides that the religious exemption does not apply only when membership is restricted on account of race, color, or national origin.

Chair Mandelbaum also discussed the need to consistently refer to “membership, perceived membership, or association with members” together or clarify that reference to one encompasses the others. Councilmember Brodsky suggested making such a clarification in the definition section.

Councilmember Schur proposed that the Council address Article 1 through exemptions ending on page 7 during the next meeting. The Council would skip Section 11098.4.1 regarding occupancy standards. Councilmember Schur proposed addressing Article 2 from Section 11098.5 through Section 11098.8 at the following meeting. Councilmember Iglesias suggested addressing Article 2, Section 11098.9 through the end of Article 2 during the third meeting.

XIV. Further Public Comment

No further public comment.

XV. Adjournment

Chair Mandelbaum adjourned the meeting at 4:30 p.m.

Date: February 10, 2016

CHAYA MANDELBAUM

Chair

JEANETTE HAWN

Civil Rights Fellow