



DEPARTMENT OF FAIR EMPLOYMENT & HOUSING
FAIR EMPLOYMENT & HOUSING COUNCIL
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DIRECTOR KEVIN KISH

FAIR EMPLOYMENT AND HOUSING COUNCIL

Meeting of October 30, 2017

Minutes

Elihu M. Harris State Building
1515 Clay Street, Room 2
Oakland, CA 94612

Councilmembers Present

Chaya Mandelbaum, Chairperson
Dale Brodsky, Councilmember
Lisa Cisneros, Councilmember
Mark T. Harris, Councilmember
Tim Iglesias, Councilmember
Kevin Kish, DFEH Director and Ex Officio member

DFEH Staff Present

Holly Thomas, DFEH Deputy Director of Executive Programs
Brian Sperber, DFEH Legislative and Regulatory Counsel
Paul Kennedy, DFEH Associate Business Management Analyst

Others Present

Kara Brodfuehrer, National Housing Law Project
Deborah Gettleman, Disability Rights California
Marianna Y. Harris, Ed.D
Zeenat Hassan, AIDS Legal Referral Panel
Noah Lebowitz, California Employment Lawyers Association
Marjorie Murray, Center for California Homeowner Association Law
Tessa Nevarez, California Association of Realtors
Catherine Ohaegbu, Business, Consumer Services and Housing Agency
Whitney Prout, California Apartment Association
Jenn Richard, Assembly Labor & Employment Committee
Sanjay Wagle, California Association of Realtors

I. Call to Order and Roll Call

Chair Mandelbaum welcomed guests to the FEH Council's 22nd meeting and called it to order at approximately 10:04 AM. He then turned the meeting over to DFEH Legislative and Regulatory Counsel, Brian Sperber, who conducted roll call.

II. Welcome and Introduction of Guests

Chair Mandelbaum announced that the Council meeting would be livestreamed on the Council's website and that the recording will be available later on the Council's website and YouTube channel. The public can participate in the meeting by emailing the Council and can find the Attachments to the Agenda on the website.

Chair Mandelbaum then acknowledged Department leaders and members, including: Holly Thomas, DFEH Deputy Director of Executive Programs; and Brian Sperber, DFEH Legislative and Regulatory Counsel.

Chair Mandelbaum then invited the guests in attendance to introduce themselves, on a voluntary basis.

III. Review of the Agenda

Chair Mandelbaum noted that hard copies of the agenda and associated materials were available for people in attendance and that copies are also available on the Council's webpage. He then reviewed the agenda for the meeting.

Chair Mandelbaum announced the highlights of the meeting, which included:

- Consideration of Unmodified "Additional Modifications to Text of Proposed Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals"
- Consideration of Further Modifications to Text of Proposed Housing Regulations Regarding Discriminatory Effect; Discriminatory Land Use Practices; and Use of Criminal History Information
- Consideration of Modifications to Text of Proposed Employment Regulations Regarding National Origin Discrimination
- Report from Subcommittee Regarding Potential Public Civil Rights Hearings
- Report from Subcommittee on Age and Religious Creed Discrimination
- Discussion Regarding Chaptered Legislation and Subcommittee Assignments

IV. Approval of the Minutes

Attachment A: Minutes from September 6, 2017 Meeting of the Fair Employment and Housing Council

Chair Mandelbaum reviewed the minutes of the September 6, 2017 meeting. During that meeting, the Council considered and adopted Further Modifications to the Text of Proposed Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistance Animals; considered and adopted Further Modifications to the Text of Proposed Housing Regulations Regarding Discriminatory Effect; Discriminatory Land Use Practices; and Use Of Criminal History Information; and considered and adopted Modifications to Text of Proposed Employment Regulations Regarding National Origin Discrimination. The Council approved the minutes unanimously, with one abstention.

V. Councilmembers' Reports

Chair Chaya Mandelbaum and Councilmembers

Councilmember Iglesias mentioned that Governor Brown signed AB 291, the Immigrant Tenant Protection Act, and that he and Councilmember Schur will be incorporating it into their work.

VI. Department of Fair Employment and Housing Report

Kevin Kish, Director, Department of Fair Employment and Housing

Director Kish announced that the implementation of DFEH’s new case management system, CCRS, is still scheduled to replace the current Houdini system in November 2017. He also announced that on October 1, 2017, DFEH’s procedural regulation overhaul package went into effect. He then turned the discussion over to Deputy Director Holly Thomas to comment on this topic.

Holly Thomas reported changes made in Executive Programs since the procedural regulations went into effect. Specifically, she reported a change to DFEH’s appeals process, which switched from a four-level process to a simpler, one-level process to be handled within Executive Programs. Ms. Thomas also reported that Executive Programs is now housing the Public Records Act (PRA) request unit, which will conduct business as usual.

Lastly, Director Kish discussed a few notable bills recently signed by Governor Brown, including: AB 168, AB 1556, AB 677, and SB 31. In addition, he discussed SB 491, which the Governor vetoed while instructing that DFEH form an advisory group to report back regarding the feasibility of local enforcement of civil rights laws.

VII. Consideration of Further Modifications to Text of Proposed Employment Regulations Regarding National Origin Discrimination

Chair Chaya Mandelbaum and Councilmember Dale Brodsky

Attachment B: Further Modified Text of Proposed Employment Regulations Regarding National Origin Discrimination

A. Discussion by Council

Chair Mandelbaum noted that the subcommittee made modifications to the regulations after receiving additional public comments. Modifications included moving the definition of “undocumented applicant or employee” to the general definition section and providing clarity on the standard for the exception regarding discrimination based on English proficiency. He then turned the discussion over to Councilmember Brodsky.

Councilmember Brodsky discussed additional modifications, including: under subsection (f) regarding immigration-related practices, the subcommittee deleted example (2) and added a section regarding retaliation under (4). Additionally, the subcommittee added examples of harassment under subsection (j), as well as simplified and clarified text under subsection (k) regarding height and/or weight requirements.

B. Public Comment

Noah Lebowitz, California Employment Lawyers Association

Noah Lebowitz stated concern with use of the word “policy” instead of “language restriction,” as stated in the statute, and suggested “language restriction” be used instead. Mr. Lebowitz then referred to subsection (h) regarding citizenship requirements and recommended “or retaliation” be added to instances where “discrimination” is used.

Mr. Lebowitz made a few suggestions under subsection (j) regarding harassment: adding language that states harassment can unreasonably interfere with an employee’s work performance, adding non-verbal examples of harassment, replacing “and mockery” with “or mockery,” and adding that the mockery can also be of an accent. Lastly, in subsection (k) regarding height and/or weight requirements, he suggested replacing the word “created” with “established.”

C. Action by Council

The Council moved, seconded, and unanimously voted to adopt Attachment B and initiate an additional 15-day comment period.

VIII. Consideration of Unmodified “Additional Modifications to Text of Proposed Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals”

Councilmembers Dara Schur and Tim Iglesias

Attachment C: Unmodified “Additional Modifications to Text of Proposed Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals”

A. Discussion by Council

Councilmember Iglesias announced that he and Councilmember Schur are recommending to the Council that these draft regulations be withdrawn because substantive revisions need to be made. Additionally, because of the relationship between these regulations and the second set of housing regulations (Housing Regulations Regarding Discriminatory Effect, Discriminatory Land Use Practices, and Use of Criminal History Information), Councilmember Iglesias recommended both sets of regulations be withdrawn and re-released as one, combined set of regulations, possibly as soon as December of 2017.

Councilmember Brodsky discussed and proposed modifying many terms and phrases, including: “severe enough,” “person,” “accommodation that works,” “strict liability,” and changing wording from “believe” to “believe is true.” Additionally, she thought the terms “original request” and “subsequent request” should be clarified.

Chair Mandelbaum suggested additional modifications of terms and phrases, including: fixing the numbering of section 12066, adding “of the Rehabilitation Act” to section 12056(c), changing “planned unit development” to “planned development,” and using consistent capitalization conventions.

B. Public Comment

The Council heard public comment from:

Whitney Prout, California Apartment Association:

Ms. Prout concurred with the decision to withdraw and re-release the regulations. She also asked for consideration of a verification process on establishing whether or not an animal is a service animal.

Sanjay Wagle, California Association of Realtors

Mr. Wagle similarly expressed concern regarding abuse of service animals and suggested that there are distinctions between the limitations on inquiry regarding service animals in the public accommodations context and the inquiry allowable in the housing context.

Kara Brodfuehrer, National Housing Law Project

Ms. Brodfuehrer suggested that the definition of adverse action be modified and sought clarification regarding the details of the Administrative Procedure Act process to come.

C. Action by Council

The Council moved, seconded, and unanimously voted to withdraw the rulemaking action related to the regulations in Attachment C.

IX. Consideration of Further Modifications to Text of Proposed Housing Regulations Regarding Discriminatory Effect; Discriminatory Land Use Practices; and Use of Criminal History Information

Councilmembers Dara Schur and Tim Iglesias

Attachment D: Further Modified Text of Proposed Housing Regulations Regarding Discriminatory Effect; Discriminatory Land Use Practices; and Use of Criminal History Information

A. Discussion by Council

Councilmember Brodsky discussed and asked for clarification regarding certain phrases, including “optional individualized assessment,” on page 15 and “part of a less discriminatory alternative,” on page 22.

Chair Mandelbaum suggested adding the phrase “unless a legally sufficient justification applies” after some of the references to “discriminatory effect” on page 9 and using consistent capitalization conventions.

B. Public Comment

The Council heard public comment from:

Sanjay Wagle, California Association of Realtors

Mr. Wagle requested clarification regarding housing decisions based on conduct witnessed at the residence that ultimately yielded criminal charges that stemmed from the conduct.

Kara Brodfuehrer, National Housing Law Project

Ms. Brodfuehrer expressed confusion over the use of “optional” in section § 11098.18.2 and asked that it be removed, as well as expressed concern over the word “reliable” in section § 11098.18.3(e). Lastly, Ms. Brodfuehrer gave rationale for support regarding the inclusion of the phrase “or may be part of a less discriminatory alternative,” in section § 11098.18.6(b).

Ms. Brodfuehrer then read several comments submitted to her by advocates in the Central Valley.

Whitney Prout, California Apartment Association:

Ms. Prout expressed concern over the phrase “directly related conviction” and suggested it be reworked.

C. Action by Council

The Council moved, seconded, and unanimously voted to withdraw the rulemaking action related to the regulations in Attachment D.

At this point the Council took a five minute break before continuing with the agenda

X. Report from Subcommittee Regarding Potential Public Civil Rights Hearings
Councilmembers Tim Iglesias and Mark Harris

A. Discussion by Council

Councilmember Harris suggested holding an event on topics specific to the Central Valley and shared suggestions he and Councilmember Iglesias received regarding locations to hold the event, including Clovis Community College in Fresno.

Councilmember Harris then turned the meeting over to Councilmember Iglesias. Councilmember Iglesias reported that they are considering holding an event in April 2018 and reiterated that they have a list of individuals who have expressed interest in helping brainstorm an appropriate location, topics, and potential speakers.

Councilmember Cisneros commented on various groups that she believes will take interest in this event, including farmworkers, the LGBT community, and the African American community.

Chair Mandelbaum suggested holding a Fair Employment and Housing Council meeting a day before or after the event for efficiency. He also suggested considering the intersection of immigration and discrimination at the meeting. Councilmember Cisneros added religion as a topic of consideration.

Director Kish added that demographic change in the community is typically a predictor of hate violence and said he believed April was a good date for the event.

B. Public Comment

Deborah Gettleman, Disability Rights California

Ms. Gettleman commented on the previously discussed housing regulations, “Additional Modifications to Text of Proposed Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals” and discussed the verification process for service animals. Ms. Gettleman also discussed the importance of the regulations and thanked the Council.

XI. Report on Emergency Regulations Regarding Gender-Neutral Facility Signage
Councilmember Dale Brodsky and Lisa Cisneros

A. Discussion by Council

Chair Mandelbaum turned the meeting over to Councilmember Brodsky and Councilmember Cisneros. Councilmember Cisneros noted that the subcommittee met with the legal unit of the California Division of Occupational Safety and Health (Cal/OSHA) to discuss regulatory language to harmonize the regulations under the occupational safety laws, the FEHA, and the new legislation regarding gender neutral bathrooms for single occupancy restrooms. Councilmembers Cisneros and Brodsky noted that the language is not finalized yet.

Director Kish asked Deputy Director Holly Thomas to comment on any procedural effects this may have on the Council and any actions the Council may need to take. Ms. Thomas explained that the Council’s emergency regulations are in effect until February 2018, so if the Council does not take action before then, the regulations

would lapse. However Ms. Thomas noted that with two potential 90-day extensions, the Council would effectively have until October 2018 to resolve the issue with Cal/OSHA.

B. Public Comment

None.

XII. Report from Subcommittee on Age and Religious Creed Discrimination

Councilmembers Lisa Cisneros and Joseph Ortiz

A. Discussion by Council

Chair Mandelbaum turned the meeting over to Councilmember Cisneros. Councilmember Cisneros reported that the regulations are not quite ready but that the subcommittee is actively working on them.

B. Public Comment

None.

XIII. Discussion Regarding Chaptered Legislation and Subcommittee Assignments

Chair Chaya Mandelbaum and Councilmembers

A. Discussion by Council

Chair Mandelbaum asked the Council for recommendations regarding subcommittees for recently chaptered legislation that may require new or updated regulations. The Council discussed and agreed upon having one subcommittee that will propose regulations for some or all of the following: SB 396 (Gender Identity, Gender Expression, and Sexual Orientation – Poster and Sexual Harassment Prevention Training) and an additional subcommittee that will handle legislation for AB 1556 (Pregnancy Discrimination & Gender-Neutral Language), SB 63 (New Parent Leave Act), and AB 1008 (Conviction History).

B. Public Comment

None.

C. Action by Council

The Council moved, seconded, and unanimously voted to form subcommittees that will address recently chaptered legislation.

XIV. Further Public Comment

Zeenat Hassan, Aids Legal Referral Panel

Ms. Hassan thanked the Council for their hard work on the housing regulations.

XV. Adjournment

Chair Mandelbaum adjourned the meeting at approximately 12:28 p.m.

Date: November 30, 2017

CHAYA MANDELBAUM
Chair

RENEE RONDINONE
DFEH Outreach and Education Specialist

CHAYA MANDELBAUM
CHAIRPERSON

DALE BRODSKY
COUNCILMEMBER

LISA CISNEROS
COUNCILMEMBER

MARK T HARRIS
COUNCILMEMBER

TIM IGLESIAS
COUNCILMEMBER

JOSEPH ORTIZ
COUNCILMEMBER

DARA L SCHUR
COUNCILMEMBER