



DENNIS J. HERRERA
City Attorney

PAUL ZAREFSKY
Deputy City Attorney

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MEMORANDUM

TO: Honorable Commissioners
Civil Service Commission
FROM: Buck Delventhal *BD*
Paul Zarefsky *PZ*
Deputy City Attorneys
DATE: March 31, 2009
RE: Civil Service Commission's Remedial Authority in Discrimination Appeals

RECEIVED
EXECUTIVE OFFICER
CIVIL SERVICE COMMISSION
SAN FRANCISCO
2009 MAR 31 PM 3: 27

I. QUESTION PRESENTED

The Commission has requested a written opinion on the scope of its remedial powers in discrimination appeals.

II. SHORT ANSWER

1. Consistent with state and federal law that requires employers to investigate and resolve claims of discrimination – and the longstanding past opinions of this Office – the Commission's authority under the City's Charter to resolve allegations of discrimination includes the power to decide whether discrimination occurred and to award an appropriate remedy to the claimant. While that power is binding on City commissions, departments, and officials, it is subject to significant limitations as summarized in No. 3 below.

2. The Charter does not specify the types of remedies that the Commission may award to a claimant in instances where the Commission sustains an allegation of prohibited discrimination. State and federal statutory schemes, under which administrative agencies or courts award remedies for employment discrimination, are instructive on the types of remedies that are typical in these instances. Those general remedies may include an award of back pay, hiring or appointment, promotion, reinstatement of employees, reporting, or instructions to cease certain conduct. But, the Commission's ability to award relief is not as broad as a court's powers, particularly in light of the limitations on the Commission's authority described below.

3. The Commission's authority to award an appropriate remedy to a claimant, where it determines that prohibited discrimination has occurred, is subject to five main limitations:

- The Commission may impose a remedy only where it finds the occurrence of specific categories of discrimination enumerated in the Charter or otherwise prohibited in local, state, or federal law. This remedial authority does not reach conduct that the Commission may consider arbitrary or unfair but that is not unlawful.
- Regarding any claimant-specific relief – that is, a remedy that directly benefits the discrimination claimant – the Commission should find, before ordering any such remedy, that but for the prohibited discrimination, the

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PAGE: 2

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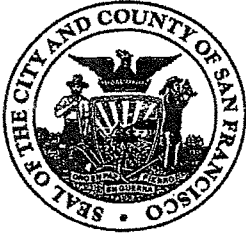
claimant would not have suffered the injury that the remedy is intended to address.

- The Charter expressly makes the Commission's authority subject to the fiscal provisions of the Charter. Accordingly, the Commission may not, for example, order appointment to a position that does not exist, for which the City has not appropriated funds, or for which there is no approved requisition. Nor, for instance, may the Commission order back pay in the absence of appropriated funds.
- The Commission's remedy may not go beyond redressing the prohibited discrimination.
- The Commission does not have power to discipline an official or employee for discriminatory conduct. But it may recommend investigation or the imposition of discipline to the appropriate authority.

4. The Commission has broad rulemaking authority, but the Commission's rules do not specify whether the Commission may award a discrimination remedy in a particular case that may otherwise contravene its own rules. Should the Commission wish to provide for any exceptions to its rules in such circumstances, the legally safest course is for the Commission to follow its established rulemaking process, and amend its rules in advance of hearing any particular appeal, rather than make case-by-case determinations to override its own rules in particular appeals without express authority in the rules to do so.

5. The Charter does not require the Commission to impose a remedy each time it finds discrimination occurred. Discrimination claimants may have other relief under state and federal law. The Commission's findings and orders may bear on those proceedings. Upon finding discrimination, the Commission may request that the claimant and the department attempt to reach a mutually acceptable resolution, or it may request the department to resolve the matter, with assistance from the Department of Human Resources ("DHR") as appropriate. Still, the Commission retains final City authority to award a remedy to a claimant when it has sustained on appeal a claim of prohibited discrimination.

This opinion provides general legal guidance on the scope of the Commission's remedial powers in discrimination appeals. It does not address the Commission's remedial powers in matters other than discrimination appeals. Also, resolution of individual discrimination appeals is fact-intensive and in particular contexts may present legal issues that we cannot address in this general discussion. This Office can respond to more specific questions as they arise on a case-by-case basis.



CIVIL SERVICE COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

GAVIN NEWSOM
MAYOR

MEMORANDUM
CSC NO. 2009 - 04

DONALD A. CASPER
PRESIDENT

MORGAN R. GORRONO
VICE PRESIDENT

JOY Y. BOATWRIGHT
COMMISSIONER

MARY Y. JUNG
COMMISSIONER

E. DENNIS NORMANDY
COMMISSIONER

ANITA SANCHEZ
EXECUTIVE OFFICER

Date: May 7, 2009

To: Department Heads
Departmental Personnel Officers
Employee Organization Representatives

From: Anita Sanchez
Executive Officer

Subject: **Notice of Posting: Proposed Amendments to Rule 003 Series – Equal Employment Opportunity Applicable to All Employees to provide the Civil Service Commission Authority to Depart from Civil Service Rules to Effectuate a Discrimination Remedy**

The Civil Service Commission acted at its regular meeting of May 4, 2009 to post for adoption following meet and confer proposed amendments to Civil Service Commission Rules 003 Series – Equal Employment Opportunity applicable to all employees.

The Commission's authority to provide appropriate remedy where it has determined prohibited discrimination has occurred is limited to the authority and powers granted the Commission by the Charter. The Commission has broad rulemaking authority; however, the Commission's Rules do not address whether the Commission may award a discrimination remedy in a particular case that is an exception to its Rules.

The proposed amendments provide the Commission authority to override or depart from Civil Service Rules in order to effectuate an appropriate remedy for discrimination in an appeal heard by the Commission. The proposed amendments also clarify the authority of the Human Resources Director and MTA Director of Transportation in reviewing or resolving employment discrimination complaints. Specifically, that neither has the authority to depart from provisions of the Civil Service Rules without specific authorization from the Commission in a particular case, following a request for such authority from either.

May 7, 2009

Page 2

Attached is a copy of the proposed amendment to Civil Service Commission Rule Series 003 - Equal Employment Opportunity applicable to all employees.

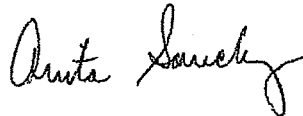
Requests to meet and confer by recognized employee organizations or requests to consult by other parties on these proposed Rules changes must be submitted in writing to:

Anita Sanchez, Executive Officer
Civil Service Commission
25 Van Ness Avenue, Suite 720
San Francisco, CA 94102

Requests may be sent by fax to (415) 252-3260 by *Friday, May 22, 2009*. Should any recognized employee organization or other party fail to request meet and confer or consultation on the proposed amendments by *5 p.m. Friday, May 22, 2009*, such failure shall be deemed an unequivocal waiver of the right to meet and confer or consultation.

Sincerely,

CIVIL SERVICE COMMISSION



ANITA SANCHEZ
Executive Officer

Attachments

- c: Donald A. Casper, President
Morgan R. Gorrone, Vice President
Joy Y. Boatwright, Commissioner
Mary Y. Jung, Commissioner
E. Dennis Normandy, Commissioner
Micki Callahan, Human Resources Director, DHR
Nathaniel P. Ford, Sr., Executive Director/CEO, MTA

Deletions in strikethrough, Additions in underline**Sec. 003.3 Discrimination Complaints (cont.)****003.3.3 Procedures for Complaints of Discrimination**

Pursuant to the provisions of the Charter and this Rule, the Human Resources Director shall promulgate procedures for the review and resolution of employment discrimination complaints.

003.3.4 Appeal of the Human Resources Director decision may be filed in writing with the Executive Officer to the Civil Service Commission in accordance with Section 103.3.2 of this Rule.

003.3.5 Discrimination Complaints Involving Employees of the Municipal Transportation Agency (MTA)

Within the MTA, complaints shall be addressed within the Agency based on procedures promulgated by the Agency. The MTA Director of Transportation Resolution of a discrimination complaint shall be subject to the review and resolve approval of the City's Human Resources Director, with employment discrimination complaints. The decision of the MTA Director of Transportation may be appealed to the Civil Service Commission.

Sec. 003.4 Authority to Override Civil Service Rules to Effectuate a Discrimination Remedy**003.4.1 Commission Authority**

In its discretion, the Commission may depart from any provision of these Rules in order to effectuate an appropriate remedy for discrimination in an appeal heard by the Commission.

003.4.2 Authority of Human Resources Director and MTA Director of Transportation

The Human Resources Director and MTA Director of Transportation may not depart from a provision of these Rules in order to effectuate an appropriate remedy for discrimination when reviewing and resolving an employment discrimination complaint, without specific authorization from the Commission in a particular case, following a request for such authority in that case from the Human Resources Director or MTA Director of Transportation.

