

REPORT: Governor's Panel to Review and Make Recommendations for Improvement of the Maine Human Rights Commission and Its Operations

September 27, 2016

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INTRODUCTION

Governor Paul LePage established the Maine Human Rights Commission Review Panel by Executive Order No. 2015-009, dated October 14, 2015. The Review Panel consists of eight members representing various constituent groups, or interested parties, as follows:

1. One attorney who regularly represents respondents before the MHRC: Eric Uhl.
2. One attorney who regularly represents complainants before the MHRC: James Clifford.
3. One person from or recommended by the National Federation of Independent Businesses: Colleen Bailey.
4. One person from or recommended by the Maine Apartment Owners and Managers Association: Chris McMorrow.
5. One person from or recommended by Pine Tree Legal: Frank D'Alessandro.
6. One person with a working knowledge of and familiarity with best administrative investigative practices: Patricia Peard.
7. One person recommended by the MHRC: Zach Heiden.

In addition, the Governor's Office appointed a member to serve as administrative liaison to the Review Panel, Joyce Oreskovich, Director the Maine Bureau of Human Resources. Eric Uhl served as chair, and James Clifford served as secretary. All members of the Review Panel devoted countless hours in meetings, deliberations, interviews, and investigations. The members represented a diverse and comprehensive spectrum of opinions, experiences, and perspectives. All members served very capably and contributed greatly to the Review Panel's mission.

The Executive Order instructed the Review Panel to:

- Conduct a review of the structure and operation of the MHRC;
- Identify factors causing and/or contributing to the perceptions of prejudice against respondents and bias in favor of complainants;
- Identify rules, practices, and procedures that are unduly and unnecessarily burdensome to participants in the MHRC administrative process;

- Identify rules, practices, and/or proceedings that are unfair to respondents and/or complainants; and
- Issue a report to the Governor which includes the results of its review in each of the above-listed areas as well as recommendations for improvement in laws, rules, practices, and/or procedures identified as causing or contributing to the problems identified.

The Review Panel met 13 times, approximately monthly, alternating meetings between Portland and Augusta. The Review Panel met with and interviewed MHRC Commissioner Sallie Chandler, MHRC Executive Director Amy Sneirson, and MHRC Counsel Barbara Hirsch. In addition, Review Panel members met separately with, and obtained information and input from, members of their respective constituencies, including members of the defense bar, members of the plaintiffs' bar, business owners and representatives, apartment owners, tenants and tenants groups, and another MHRC Commissioner, Mavourneen Thompson. Pat Peard devoted many hours interviewing and meeting with all staff members of the MHRC and a former chief investigator. The Review Panel kept minutes of its meetings and maintained copies of documents that it examined in connection with its review. The minutes and other documents are available to the public under the Freedom of Access Act.

As discussed in more detail in the sections to follow, the Review Panel unanimously agreed that the MHRC, its Commissioners, and its staff are not actually prejudiced, biased, or unfair toward respondents or complainants. The vast majority of cases that are heard by the Commission are decided in favor of respondents. A precise empirical review of perceptions of biases and prejudices was beyond the capacity of the Review Panel. Some members recounted many examples of perceptions or biases and prejudices against both complainants and respondents, while other members maintained they were not convinced of such perceptions, or that any purported perceptions were attributable to other factors, such as lack of information,

misunderstanding of processes, or over-worked and misunderstood staff. In any event, it is important to emphasize that the Review Panel, in all of its diverse representations, found the MHRC to be devoted to its mission and to have a desire to be fair and unbiased toward all parties. Even if different members of the Review Panel found that the outside perception of those efforts varied, all members agreed that there was no evidence that the MHRC or its staff ever intentionally meant to be unfair or biased toward any party. In many cases, the reports of bias or unfairness were directly attributable to the Maine Human Rights Act itself, or the requirements imposed on the MHRC by federal employment and housing laws and regulations. Of course, the MHRC is charged with investigating all alleged violations as required by the applicable laws.

In this regard, it should be noted that some—but not all—members of the Review Panel felt that the Executive Order creating the Review Panel represented an inappropriate intrusion on a separate, independent administrative agency, and that some of the charges in the Executive Order were not justified. Other members felt just as strongly that the charges were justified and that changes needed to be made. However, despite these different perspectives (which made the work of the Review Panel fair and balanced in any event) all of the members of the Review Panel agreed to work together to overcome these different perspectives and to focus on recommendations that would make the MHRC and its processes more efficient and fair to all participants, complainants and respondents. In fact, notably, most of the recommendations made in this report have the approval of *all members* of the Review Panel. The fact that such a diverse group of members, representing diverse interests, unanimously agreed to substantially all of the recommendations for improvements gives great weight to those recommendations.

In general, the members of the Review Panel agreed that—given the statutory mandate of the MHRC and its powers and duties under the Maine Human Rights Act—an organization that is efficient, well-staffed, well-funded, and well-trained is imminently more desirable than an organization that is ineffective or generates false perceptions of bias or unfairness because it is under-funded, inefficient, and over-worked. It is in this spirit that the Review Panel submits its findings and recommendations, with the hope that implementing these recommendations will provide the people of Maine with an agency that is well-respected and effective.

A. REVIEW OF THE STRUCTURE AND OPERATION OF THE MHRC

Introduction

Before going into specifics of this review it is important to have some context for the overall operation of the Commission. In the Annual Report of the Commission for 2015 which is the most recent report the following information is noteworthy.

In 2015 the number of new complaints filed with the Commission was 739 which was an increase of 13% from 2014 (654). The 654 complaints filed in 2014 was an increase from the previous year of only three complaints. However, in 2013 there was an increase of 2% in the number of complaints filed, and in 2012 there had been a 16% increase in complaints filed. Going back to 2009 there has been a steady increase in complaints filed. By comparison, New Hampshire and Rhode Island have considerably fewer filings on average. New Hampshire has 200 to 225 cases a year, and Rhode Island has approximately 400. New Hampshire has 4 investigators and Rhode Island has 7.

Maine operated during much of this past year (2016) with five investigators. A new investigator has recently been hired so the roster will return to 6. There is no administrative support for the Maine investigators who each can have a case load at any time of up to 80 cases.

Of all of the cases coming into the Commission, approximately 25% are disposed of through settlement through dispute resolution. Another 36.5 % are resolved because a Right to Sue letter is issued to the complainant upon request after 180 days. This represents two-thirds of the cases. The remaining one-third of the cases is managed by the investigators through a report. Approximately 50% of the complaints filed come from *pro se* complainants, which increases the work that must be undertaken by Commission staff.

By any measure this is a very heavy workload.¹ In 2015 the investigators wrote reports in 227² cases. The Commissioners actually heard argument in only 78 of those cases. The rest were uncontested. In 15% of the 227 cases, the Commission found “reasonable grounds” to believe discrimination had taken place. Despite best efforts, at the end of Fiscal Year 2015, 756 cases were still pending at the Commission. This represented a 10.5% increase from the number of pending cases at the end of the previous fiscal year.

The average number of days a case is with the Commission is 388, and the average number of days a case is with an investigator is 174 days. By the time a case actually gets to an investigator, the case has generally already been at the Commission an average of 7 months. Each investigator attempts to complete 4.75 reports a month. A thorough review of the statistics in the Annual Reports of the Commission from 2008 through the present makes it clear that a very hard working staff is running in place just to continuously fall behind.³

It is only within the context of this ratio of work coming in to the number of staff that one can properly review the actual procedures and practices used by the Commission to accomplish its work.

¹ Despite this level of steadily increasing work the Commission operates on an annual budget of less than \$1,000,000. The State of Maine budgets approximately \$500,000 for the Commission and the remaining funds come from the Federal Equal Employment Opportunity Commission (EEOC) and the Federal office of Housing and Urban Development (HUD). The EEOC pays \$700.00 for a closed case, and HUD pays \$2600. Each agency requires its own separate proprietary electronic reporting system.

² It is important to remember that most cases do not involve only one issue. During Fiscal Year 2014, on average each case involved 8.5 separate issues that each needed to be addressed in the investigator’s report.

³ In addition to all of the work outlined here required to handle complaints filed with the Commission, the staff, investigators, Executive Director and Commission Counsel participate in approximately 34 or 35 educational programs a year.

Methodology

The Review Panel conducted the following interviews in order to assess the procedures utilized at the Commission: (1) Interview with all of the investigators in November 2015; (2) Amy Sneirson, Executive Director of the MHRC, and Barbara Hirsch, Esquire, MHRC Commission Counsel, met with the Review Panel on December 9, 2015; (3) Amy Sneirson was interviewed at the Commission offices on January 13, 2016; (4) Barbara Lelli, a former MHRC Chief Investigator was interviewed in February 2015; (5) MHRC Commissioner Sally Chandler met with the Review Panel on February 4, 2016; (6) MHRC Commissioner Mavourneen Thompson met separately with members of the Review Panel.

Overview of Procedure and Process at the Commission

When we began this review, the procedure that was in place can best be described as labyrinthine. As Ms. Sneirson has stated, the Commission was founded 44 years ago and very little has changed in the process utilized from that point until today or in the level of staffing despite a steady increase in cases.⁴

The Commission Intake form may be accessed on-line, but it cannot be filed on-line. The Complaint does not become formally accepted as a Charge until the Complainant signs the Complaint and the signature is notarized. These on-line forms are sent to the intake officer. The intake officer reviews the intake form to see if there is enough information to go forward with a *prima facie* case. If so, the intake officer drafts the complaint. If not, then the intake officer has

⁴ Ms. Sneirson made some changes in May 2015 which will be discussed at a later point in this section.

to call the person back to see if there is more information. In order to save some time the process was changed from using the phone⁵ to trying to get additional information by e-mail.

The complaint is supposed to be drawn up within 10 days of the intake form coming in. In actuality the time required to finalize may be as long as 4 weeks. At one point there were 160 intake forms waiting to be finalized. They are dealt with in the order they are received, except that HUD complaints, education complaints and current employees are given priority. Each Charge is reviewed by the intake officer to see if it is timely. The 300 day limitation period runs from the first date the complainant contacts the Commission, not from the date of the notarized signature.

Currently, the Commission cannot accept electronic signatures. They must all be originals. The Commission, by statute, cannot refuse to accept a complaint even if it is from a “serial filer.” The Commission does not now have the authority to mete out any sanctions for those complainants or respondents who abuse the process. The intake process was described as creating a “bottleneck” for the whole investigation process.

At the beginning of May 2015, Ms. Sneirson made some changes to the intake process in order to make it move more efficiently. There is no longer one dedicated intake officer. Rather, the investigators, except for the senior investigator,⁶ now take turns as the intake officer of the day. With this new procedure, three front office staff have the same job description, which enables them to help with whatever task is required at the time. At the same time, the compliance officer position was eliminated and this position became a paralegal position. This

⁵ The phone at the Commission has now been automated which certainly saves staff time. As is true with the courts, the Commission has the situation where persons are calling all day, every day. Having the phone automated assists in better screening calls so they can be prioritized.

⁶ There is no longer a Chief investigator position.

person is tasked with answering questions from the public and assisting with FOAA requests and litigation. The purpose of these changes in the intake process was to have a more flexible staff who can work interchangeably.

Once the complaint is drafted, it must be sent out to the complainant and then it must be signed and sent back with the required notarization. This process is, of course, faster when the complainant is represented by counsel and the complaint is drafted by counsel. However, it bears repeating that approximately 50% of the complainants are not represented by an attorney. The date each draft complaint is sent out is logged into the system for either EEOC or HUD. Their current goal is to produce 40 draft complaints a month and to get each one out within 30 days of its receipt. The Commission staff members have never been able to meet this goal.

When the complaint is returned, it, along with any other materials, is placed in a mail slot that is marked "new charges." At this point the senior investigator looks at the complaint and drafts questions and requests for information to be sent to the respondent. The investigator may also put together questions for the complainant related to any issues of jurisdiction or concerns that there is not a *prima facie* case. After review, the senior investigator may also forward cases to Ms. Sneirson at this point in time if it appears the case should be administratively dismissed. This is the first place in the process where the complaint can be dismissed.

When the complaint is finalized, it is sent to the respondent along with questions. The questions that go out to respondents are not tailored to the specific case but are taken off of templates. The senior investigator is allowed to change the template but this is not frequently done. The goal at this point is to get the questions out as quickly as possible. The Commission rules require that respondents be notified within ten (10) days of the complaint becoming a charge but this requirement is almost never met.

After the questions and requests for information are drafted the new charge and the questions go to Commission legal counsel for a final legal review. Currently, Commission Counsel is actually drafting the questions herself. When legal counsel review is completed, the packet of the new charge and the questions goes back to the staff. At this point the case has to be opened in the computer system so that EEOC or HUD filing requirements are met. The file is also checked to make sure that the case has been properly put in the intake system, and at this point it is assigned a case number and labels are printed for the necessary file folders.

At this point, the case is now officially opened. The person who inputs the data for the EEOC or HUD must have knowledge of state and federal law because the filing with either agency is very detailed and very time consuming. After this input process, the computer will print out the notification documents for EEOC or HUD. These documents go with the New Charge, the questions and requests for information and the Non-Disclosure notice, which is sent to respondents. Before this packet can actually go out, if there is a disability discrimination claim alleged, there also needs to be an authorization from the complainant to permit access to health information. In such a case, the Charge must be copied and all information relating to the specifics of the disability must be redacted by hand. Once all of this is done, the staff is still required to enter notes in the computer system as to exactly what they have done.

The staff then determines when the respondent's answer is due. The staff then actually places a post-it note on the file folder indicating this due date. The file is then placed on a shelf in the office. When the answer from the respondent is received, if it is late, another 30 days is allowed and noted in a letter. There are no more extensions permitted by request of counsel except in extraordinary circumstances because these requests from respondents' counsel have

also really clogged-up the system. The respondent now has 60 days to respond unless it is a “red dot” case,⁷ in which case the deadline is 45 days for the respondent to answer.

Once the folder is placed on the shelf, the senior investigator will review the file and decide whether it should be assigned to an investigator or whether there should be an attempt at early mediation. Most cases go to an investigator, and they are lined up on the shelf by date. The experienced investigators are allowed to go to the shelf and pick the cases to which they want to be assigned. HUD cases only go to investigators specifically trained for those cases.⁸ With new investigators who are being trained, the senior investigator has more control over which cases are assigned to the new investigator.

The case load for each investigator is up to 80 cases. The senior investigator is responsible to check to see if an investigator needs more cases. The staff and the investigator all track the statute of limitations on a case. The date for the running of the statute is noted on the inside of the file folder. The investigator also sends out a letter to the parties telling them he or she has been assigned to the case. This letter is not a legal requirement but it does make it clear to the parties that it will be a while (often several months) before the investigator can actually get to consideration of the case.

The investigators put their cases in order according to the statute of limitations date. Once they have a case, the investigator is required to develop a case plan for each case, which is the road map from which they work as the case goes forward. Usually, an investigator is

⁷ A “red dot” case includes a case where an employee complainant is still working for the company, education cases, cases where a reasonable grounds case is thought to be likely, a case where there may be irreparable harm or a case involving a repeat offender.

⁸ This discussion of process does not focus on HUD cases because they are a small percentage of the cases and they have different and very demanding deadlines. There are approximately 100 HUD cases a year. They are very burdensome and time consuming for the staff.

actively working on about 10 cases at a time. The investigators can also make the decision on their own as to whether or not they will schedule a fact-finding conference. Each month the investigator works to meet the standard for their annual review of closing nine (9) cases through any means or writing 4.5 reports.⁹ If this standard was not met previously, there were no consequences. Now, if an investigator does not meet the standard, it will impact their ability to work from home. Even if a case settles that an investigator thought would be part of their 4.5 report requirement, they must find something else to replace it.

When there is a settlement, the investigator will ask once for the parties to supply the information about the amount of the settlement. This information is required by the EEOC. If the parties do not respond, the matter is given to Ms. Sneirson to try to get the required data.

After 180 days, an attorney or a party may request that a Right to Sue letter be issued. All of these requests go to Ms. Sneirson, who reviews them and then directs the staff to issue the letter, if it is appropriate.

When an investigator finishes a report based on a review of all the material submitted by the parties and the evidence taken at a fact-finding conference, if any, it is sent to Commission counsel to be reviewed for legal sufficiency. Counsel reads the entire file. If Counsel signs off, then the decision and the file are sent to Ms. Sneirson. She then skims the file and reads the report and reviews any edits that may have been made by Counsel. More than 50% of the time, if there are problems with the reports, Counsel just fixes them with the investigator. Ms. Sneirson reviews the report with redline changes, and she can make additional changes. Then the report goes back to the investigator in redline with all of the edits. The investigator also receives comments from Ms. Sneirson and Counsel. There is a specific comment sheet that is

⁹ This standard has been changed because of the new job duty assigned to investigators to be intake officers.

used for this purpose. The investigator accepts the changes and prints out a final version of the report. It is then signed. The signed report and file are then sent to Ms. Sneirson yet again. Ms. Sneirson signs and then the report and recommended decision and file go back to staff. The decision is sent out to the parties, and the case is assigned on the Commission agenda. There is no limit on how many cases can be on an agenda. The number is really controlled by the statute of limitations on the cases and how many reports Counsel can actually review.

After all of this takes place, the staff then have to go into the EEOC or HUD data base and indicate the report was issued. The staff person also has to produce the letter that goes to each party telling them that they have 17 days to file objections to the report. If there are submissions by a party, the submission must also be sent to the other party. The parties are not required to provide copies to the other party. These steps clearly present another bottleneck and a procedural flaw. When the submissions come in, the investigator must review the submission for new evidence, and if there is new evidence, decide if it impacts the decision in the report. If the new evidence makes no difference for the decision, which is true in most cases, then Ms. Sneirson redacts that information before it goes out to the other party.

The material—including the investigator's report and submissions from the parties contesting the report—used to be delivered to the Commissioners by mail before their scheduled meeting. Now, all of the Commissioners have been provided with tablets, and they receive the information electronically. This has greatly eased the burden on staff and the Commissioners.

B. IDENTIFY FACTORS CAUSING AND/OR CONTRIBUTING TO THE PERCEPTIONS OF PREJUDICE AGAINST RESPONDENTS AND BIAS IN FAVOR OF COMPLAINANTS

The Governor directed the Review Panel to “identify factors causing and/or contributing to the perceptions of prejudice against Respondents and bias in favor of Complainants.”

The Review Panel did not identify any evidence of actual prejudice against Respondents or bias in favor of Complainants. The perception of prejudice or bias is based, at least in part, on misunderstandings regarding why the MHRC does its work, what the MHRC’s work is, and how the MHRC performs its role. The perception is also based on organizational and procedural issues, identified in this report, that lead one side or the other to believe that they are being treated unfairly. In the end, the statistics show that Respondents prevail in a substantial majority of the cases brought before the MHRC. In FY2014, approximately two-thirds of the complaints (62%) filed with the MHRC resulted in settlement (25.8%) or administrative dismissals (36.5%). Of the remaining 1/3 (38%) of the cases, which resulted in an investigator’s report and recommendation, the MHRC found reasonable grounds to support a violation in only 15% of the cases (representing 13% of the various claims brought in those cases). Overall, for all cases filed in FY2014, the MHRC found reasonable grounds to support a violation in only 5% of the cases filed.

For example, the Panel encountered widespread misunderstanding concerning why the MHRC conducts investigations of complaints, with some believing that the MHRC conducts investigations of people or entities that it believes have committed discrimination. In reality, the MHRC is legally required to investigate all complaints filed with it, so long as they are made within the proper statutory time period—not more than 300 days after the alleged act of discrimination. See 5 M.R.S.A. §4611 (delineating the proper statute of limitations on

allegations of unlawful discrimination); 5 M.R.S.A. §4612 (setting forth the obligation of the Commission to investigate). Mandatory investigation of complaints—even complaints that the Respondent believes are unjustified—is not a “prejudice against Respondents,” but rather the legal obligation of the MHRC, as required by the underlying Maine Human Rights Act.

In addition, the Panel encountered misunderstanding concerning what the MHRC’s work is, with some confusing the Commission with a court of law, including the capacity to demand that Respondents pay damages or enter settlements. The MHRC is charged, by statute, with conducting investigations and making recommendations. 5 M.R.S.A. §4566. It is also permitted to appear in court and before other administrative bodies. 5 M.R.S.A. §4566(8). The Commission does not have enforcement authority. If, after investigating, the Commission concludes that there were no reasonable grounds to believe that unlawful discrimination has occurred, it is required to dismiss the complaint. 5 M.R.S.A. §4612(2).

If the Commission concludes that there are reasonable grounds to believe that unlawful discrimination has occurred, it has only three options: (1) it can attempt “to eliminate such discrimination by informal means, such as conference, conciliation, and persuasion,” 5 M.R.S.A. §4612(3); (2) it can file a civil action in Superior Court on behalf of the complainant, 5 M.R.S.A. §4612(4); or (3) it can issue an order denoting its conclusion, which is not accompanied by any injunctive or monetary sanctions of any kind. In other words, despite the common misperception, the Commission does not impose punishment.

The Panel also encountered misunderstanding concerning how the Commission carries out its responsibilities. Some were under the impression that the Commission forced Respondents to pay large amounts of money to settle cases, when in reality the Commission, through its staff, only serves as a mediator to help Complainants and Respondents resolve

disputes informally. Some also believed that the Commission makes demands for information from Respondents because of vindictiveness, when in reality the Commission is legally obligated by its own rules, as well as the rules of the EEOC and HUD, to ask about specific issues (the Commission might be in a position to make more targeted requests of Respondents as well as Complainants if it had more staff). And, some Respondents, who were not represented by lawyers at the Commission, were confused about the presentation of evidence and the development of the record.

The panel also found that in some cases, the perception of bias or prejudice appears to result from an understaffed and underfunded organization struggling to keep pace with the case load. These staffing and funding challenges can result in organizational deficiencies and procedural delays that also contribute to the misperceptions.

In general, terms, the perceptions of prejudice against Respondents or bias in favor of Petitioners were not the fault of the Commission or its staff. In addition to the recommendations in this report, public education and outreach about the Commission, and its mission and procedures, may alleviate some of these misperceptions.

C & D. IDENTIFY RULES, PRACTICES, AND PROCEDURES THAT ARE UNDULY BURDENSOME TO PARTICIPANTS IN THE MHRC ADMINISTRATIVE PROCESS AND/OR ARE UNFAIR TO RESPONDENTS AND/OR COMPLAINANTS

The Review Panel found a number of rules, practices, procedures that were unduly burdensome to participants and could lead to a perception of unfairness. The overall process of the intake, file preparation, request for information to Respondents, investigation, review, report writing process, submission to parties for objections, and involvement of the Commissioners, as discussed in part B. above is inherently inefficient and burdensome, both to the MHRC staff and to the parties. The specific rules, practices, and procedures that the Review Panel found to be unduly burdensome are addressed in the next section of this report, regarding recommendations.

RECOMMENDATIONS TO IMPROVE PRACTICES AND PROCEDURES

It is important to emphasize that many of the recommendations outlined below are inter-dependent and should be considered as a whole. In other words, the Review Panel believed that implementing these recommendations together would be most effective. That is not to say, however, that implementing one or more of these recommendations would not be effective or would not help to promote efficiency and perceptions of fairness. Certainly, implementing any of these recommendations would help to address these issues.

Recommendation #1: Hire a management consultant/efficiency expert. The Review Panel strongly recommends engaging a professional consultant with an expertise in organizational development workflow analysis to follow up with MHRC on many of the issues raised in our review of the processes and procedures of the MHRC set forth above. Such a report would enable the legislature to make informed decisions on whether to increase funding or dedicate additional resources to MHRC, and would lay the groundwork for improvements in the efficiencies of the MHRC's procedures and operations.

Recommendation #2: Hire more investigators – to investigate. The Panel was very concerned that MHRC investigators were required to assist pro se complainants draft charges. Even if “firewalls” were established to prevent conflicts or bias, the investigators should be spending their time investigating cases rather than drafting charges. It would greatly aid in the efficiency of the process—and mitigate perceptions of unfairness—to provide the MHRC with enough investigators to actually conduct thorough and sufficient investigations, rather than spend so much time on administrative functions. In any case, the Review Panels agrees that additional investigators are needed to address and resolve the increasing number of charges filed with the MHRC every year.

Recommendation #3: Use “intake specialists” (advocates). This recommendation was supported by most of the Panel members, with the exception of one member, who reported that the Maine Employment Lawyers Association and other plaintiffs’ lawyers opposed hiring “advocates” similar to those employed by the Workers Compensation Board. However, all members of the Review Panel unanimously supported the idea of an “intake specialist” who would be responsible for screening, intake, and initial charge drafting, as well as providing information on the MHRC processes at each step of the procedure, especially in light of the staffing shortage with investigators. These “intake specialists” would *not* provide legal advice. Given the fact that many of the concerns regarding perceptions of unfairness stem from misunderstandings about the process, intake specialists would serve a vital role in educating and leading unrepresented parties through the process. These specialists would assist both complainants and respondents. The Review Panel understands that these additional staff members would present a budget and operations issue, but in the Panel’s view, it would be wise to train and hire one or more intake specialists to assist unrepresented parties on both sides.

Recommendation #4: Increase education and training for MHRC staff and MHRC Commissioners. The Review Panel found that devoting additional training resources to the investigators, particularly tailored to conducting interviews and investigations with neutrality, would be favorable for all parties and would address perceptions of unfairness. In addition, the Review Panel found that at least in some circumstances, the Commissioners themselves did not fully understand their roles or even the overall responsibilities, and limitations, of the MHRC. Providing more training and promoting a better understanding and expertise in the investigators and Commissioners themselves is important. This recommendation was unanimously favored by the Panel.

Recommendation #5: Increase number of administrative staff. The Review Panel also agreed that hiring one administrative support staff would give the investigators more time to investigate, alleviate some of the administrative delays, and help eliminate the backlog that is frustrating to participants. The Review Panel is also hopeful that the management consultant recommended in #1 above could work with the MHRC to come up with additional ways to improve the process and increase efficiencies.

Recommendation #6: Modernize computer and technology systems to permit electronic filing, electronic signatures. The Review Panel realizes that such improvements would be costly and would not be as easy to implement. But the current system is highly inefficient and outdated, and this is likely behind many of the perceptions of unfairness that results from a sense of a lack of responsiveness. In the long run, a modernized infrastructure would go a long way to addressing many of the problems relating to unnecessarily burdensome procedures for both complainants and respondents.

Recommendation #7: Expand mediation program. The Review Panel believes that additional mediators should be added to the roster and that the MHRC should consider an early neutral evaluation program, comprised of volunteers from the bar or other resources to avoid additional budget increases, to analyze certain cases. Parties from both sides expressed a desire for early conciliation if possible. Members of bar—from both sides, respondents and complainants—have expressed a willingness to volunteer as mediators to help this program.

Recommendation #8: Develop a “dual track” system; consider changing state law requiring 180 days before right to sue letter issued. All Review Panel members supported the idea of developing dual tracks, i.e., one alternate, “fast” track for represented parties who wish to pursue it, and another for cases involving one or more pro se litigants or parties who do not wish

to pursue the fast track. This idea was also supported by attorneys representing both sides. The Review Panel believes that this “dual track system” would allow the MHRC to focus on contested matters involving pro se litigants or those choosing to remain active in the process outlined in 5 M.R.S. § 4612. The Review Panel recognizes that this process would require a statutory change to the mandatory 180 day waiting period under the MHRA. Accordingly, the Review Panel recommends an appropriate amendment to 5 M.R.S. § 4612 to provide for this additional track.¹⁰ To pursue the alternate track, both parties would have to consent. Members of the Review Panel would be willing to work with Commission Counsel to explore these issues and develop a more detailed recommendation for this dual track procedure.¹¹

Recommendation #9: Improve and streamline the requests from the MHRC for information, discovery, and document requests. A majority of Review Panel members believe that the MHRC should address and revise the current system in which Respondents are required to respond to a number of burdensome and potentially irrelevant questions and requests for production of information and documents. Many Review Panel members found these requests for information and documents, especially so early in the process, to be a significant source of frustration, an undue burden, and a basis for a perception of unfairness. Two panel members noted the objections of their constituents but remained open to changes so long as they

¹⁰ The Panel recognizes that this change in the current 180 day requirement may also involve negotiations with the EEOC.

¹¹ If parties agree to the fast track, the MHRC could provide a “checklist” of sorts as conditions precedent to obtaining the so-called “right-to-sue” letter. For example, a right-to-sue letter could be issued within 60 or 90 days, or some other time period, if the Executive Director or Commission Counsel, in their discretion, are satisfied that (i) the represented parties have met or conferred at least once in good faith, (ii) the parties exchanged certain documents (i.e., personnel file, medical records in disability cases, documents and reasons to support the allegations in the Charge), (iii) the parties provided certain basic information (i.e., basis for claims, written reason for termination, number of employees, and other information required by the MHRC to satisfy its obligations), (iv) there was a minimal substantive response to the charge, and (v) the parties have either discussed settlement options or exchanged written settlement demands and counteroffers.

did not compromise due process or the ability for complainants to discover relevant information and documents. In this regard, the Review Panel was hopeful that increased staffing would permit the investigators to use fewer and more specifically tailored requests for information and documents from respondents.

Recommendation #10: Increase and improve public relations and outreach. The Review Panel spent a considerable amount of time on this topic throughout the many monthly meetings. This recommendation is intended to address the “perceptions” of bias and unnecessary rules or practices noted repeatedly throughout the Executive Order and voiced by certain Panel members and as addressed in this report above. In other words, if—as the majority of the Review Panel seems to agree—there is no evidence that the MHRC actually is biased or unfair, but if the business community or other sectors continue to perceive that such bias exists, it would be entirely appropriate for the legislature to explore developing a community outreach and education program and for the MHRC to respond accordingly. Some Review Panel members noted that it would be encouraging for the MHRC to work in conjunction with state and local chambers of commerce in this regard.

Recommendation #11: Commissioners should be appointed in timely fashion. The Review Panel found frustration from staff and Commissioners that some Commissioners were required to serve beyond their designated term, and the Panel agreed that it is important to maintain fresh and engaged Commissioners to review and act on cases. In addition, the organizational development expert could work with the MHRC on improving work flow for the Commissioners.

Recommendation #12: Filing Fees. A suggestion was raised, by one member, and explored to invoke a modest filing fee for Complainants. Most members took the position that

many Complainants could not afford to pay even a modest filing fee of \$50, for example. The suggested recommendation was revised so that a Complainant could pursue a waiver of the filing fee if the Complainant states, and demonstrates, that he or she is unable to afford the fee.

Several Panel Members noted objections to this recommendation on behalf of Complainants and the MHRC, respectively. However, in the interests of providing perspectives from all members of the Review Panel, this recommendation from one of the members is included in this report.

Recommendation #13: Increase the MHRC's budget to implement these recommendations. This recommendation was unanimously favored, although one member differed on the timing of the budget increases. In any event, when fiscally feasible, more funding is required to pay for more staff, training, outreach, and the other recommendations noted above. The Review Panel was surprised to learn of the relatively small amount of state funding supporting the day-to-day operations of the MHRC.

Respectfully submitted,

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APPENDIX

EXCERPTS FROM THE MAINE HUMAN RIGHTS ACT

Any interested person should be familiar with the full scope of the MHRC as established by the Maine Human Right Act. Here is a sampling of some, but not all, of the MHRC's mission, powers, and duties:

Members

The Maine Human Rights Commission, established by section 12004-G, subsection 15, shall be an independent commission of no more than 5 members. No more than 3 of the members may be of the same political party. The members shall be appointed by the Governor, subject to review by the joint standing committee of the Legislature having jurisdiction over judiciary matters and confirmation by the Legislature. The Governor shall designate one member to be the chair.

5 M.R.S.A. § 4561.

Powers and Duties of the Commission

The commission has the duty of investigating all conditions and practices within the State which allegedly detract from the enjoyment, by each inhabitant of the State, of full human rights and personal dignity. Without limiting the generality of the foregoing, it has the duty of investigating all forms of invidious discrimination, whether carried out legally or illegally, and whether by public agencies or private persons. Based on its investigations, it has the further duty to recommend measures calculated to promote the full enjoyment of human rights and personal dignity by all the inhabitants of this State.

To carry out these duties, the commission shall have the power:

1. Office. To establish and maintain a principal office, and such other offices within the State as it may deem necessary;

2. Meetings. To meet and function at any place within the State;

3. Personnel. To appoint a full-time executive secretary and counsel to the commission, not subject to the Civil Service Law, and determine their remuneration; and to appoint, subject to the Civil Service Law, other personnel including, but not limited to, investigators, attorneys, compliance personnel and secretaries, as it shall deem necessary to effectuate the purposes of this Act;

4. Hearings. To hold hearings, administer oaths and to take the testimony of any person under oath. There shall be no executive privilege in such investigations and hearings, but law enforcement officers, prosecution officers and judges of this State and of the United States shall be privileged from compulsory testimony or production of documents before the commission. Such hearings and testimony may relate to general

investigations concerning the effectiveness of this Act and the existence of practices of discrimination not prohibited by it, as well as to investigations of other alleged infringements upon human rights and personal dignity. The commission may make rules as to the administration of oaths, and the holding of preliminary and general investigations by panels of commissioners and by the executive secretary;

4-A. Subpoena power. Pursuant to a complaint which has been filed in accordance with section 4611 by a person who has been subject to unlawful discrimination, the commission may issue subpoenas; as provided in subsection 4-B, to compel access to or production of premises, records, documents and other evidence or possible sources of evidence or the appearance of persons, provided that there is reasonable cause to believe that those materials or the testimony of the persons are material to the complaint. The commission may not issue subpoenas except as provided in this subsection.

4-B. Subpoenas; contest of validity. If a subpoena is issued, notice must be given to the person who is alleged to have engaged in the unlawful discrimination. The person upon whom the subpoena is served may contest its validity. A judicial review of the subpoenas is permissible in any Superior Court;

5. Services. To utilize voluntary and uncompensated services of private individuals and organizations as may from time to time be offered and needed;

6. Advisory groups. To create local or statewide advisory agencies and conciliation councils to aid in effectuating the purposes of this Act. The commission may study or may empower these agencies and councils to study the problems of discrimination in all or specific fields of human relationships when based on race or color, sex, sexual orientation, physical or mental disability, religion, age, ancestry or national origin, and foster good will among the groups and elements of the population of the State. Agencies and councils may make recommendations to the commission for the development of policies and procedures. Advisory agencies and conciliation councils created by the commission must be composed of representative citizens serving without pay, but with reimbursement for actual and necessary traveling expenses;

7. Rules and regulations. To adopt, amend and rescind rules and regulations to effectuate this Act, such adoption, amendment and rescission to be made in the manner provided by chapter 375, subchapter 2. Rules adopted to implement section 4553-A are major substantive rules as defined in chapter 375, subchapter 2-A;

8. Appearance. To appear in court and before other administrative bodies by its own attorneys;

9. Notices and forms. To require the posting of notices or the adoption of forms by businesses subject to this Act, to effectuate the purposes of this Act;

10. Publications. To publish results of investigations and research to promote good will and minimize or eliminate discrimination based on race or color, sex, sexual orientation, physical or mental disability, religion, age, ancestry or national origin;

11. Reports. To report to the Legislature and the Governor at least once a year describing the investigations, proceedings and hearings the commission has conducted and the outcome and other work performed by the commission, and to make recommendations for further legislation or executive action concerning abuses and discrimination based on race or color, sex, sexual orientation, physical or mental disability, religion, age, ancestry or national origin, or other infringements on human rights or personal dignity; and

12. Other acts. To do such other things as are set out in the other subchapters, and everything reasonably necessary to perform its duties under this Act.

5 M.R.S.A. § 4566.

Complaint

Any aggrieved person, or any employee of the commission, may file a complaint under oath with the commission stating the facts concerning the alleged discrimination, except that a complaint must be filed with the commission not more than 300 days after the alleged act of unlawful discrimination. In addition, any person may file a complaint pursuant to section 4632.

5 M.R.S.A. § 4611.

Procedure on Complaints

1. Predetermination resolution; investigation. Upon receipt of such a complaint, the commission or its delegated single commissioner or investigator shall take the following actions.

A. The commission or its delegated single commissioner or investigator shall provide an opportunity for the complainant and respondent to resolve the matter by settlement agreement prior to a determination of whether there are reasonable grounds to believe that unlawful discrimination has occurred. Evidence of conduct or statements made in compromise settlement negotiations, offers of settlement and any final agreement are confidential and may not be disclosed without the written consent of the parties to the proceeding nor used as evidence in any subsequent proceeding, civil or criminal, except in a civil action alleging a breach of agreement filed by the commission or a party. Notwithstanding this paragraph, the commission and its employees have discretion to disclose such information to a party as is reasonably necessary to facilitate settlement. The commission may adopt rules providing for a 3rd-party neutral mediation program. The rules may permit one or more parties to a proceeding to agree to pay the costs of mediation. The

commission may receive funds from any source for the purposes of implementing a 3rd-party neutral mediation program.

B. The commission or its delegated commissioner or investigator shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred. In conducting an investigation, the commission, or its designated representative, must have access at all reasonable times to premises, records, documents, individuals and other evidence or possible sources of evidence and may examine, record and copy those materials and take and record the testimony or statements of such persons as are reasonably necessary for the furtherance of the investigation. The commission may issue subpoenas to compel access to or production of those materials or the appearance of those persons, subject to section 4566, subsections 4-A and 4-B, and may serve interrogatories on a respondent to the same extent as interrogatories served in aid of a civil action in the Superior Court. The commission may administer oaths. The complaint and evidence collected during the investigation of the complaint, other than data identifying persons not parties to the complaint, is a matter of public record at the conclusion of the investigation of the complaint prior to a determination by the commission. An investigation is concluded upon issuance of a letter of dismissal or upon listing of the complaint on a published commission meeting agenda, whichever first occurs. Prior to the conclusion of an investigation, all information possessed by the commission relating to the investigation is confidential and may not be disclosed, except that the commission and its employees have discretion to disclose such information as is reasonably necessary to further the investigation. Notwithstanding any other provision of this section, the complaint and evidence collected during the investigation of the complaint may be used as evidence in any subsequent proceeding, civil or criminal. The commission must conclude an investigation under this paragraph within 2 years after the complaint is filed with the commission.

2. Order of dismissal. If the commission does not find reasonable grounds to believe that unlawful discrimination has occurred, it shall enter an order so finding, and dismiss the proceeding.

3. Informal methods, conciliation. If the commission finds reasonable grounds to believe that unlawful discrimination has occurred, but finds no emergency of the sort contemplated in subsection 4, paragraph B, it shall endeavor to eliminate such discrimination by informal means such as conference, conciliation and persuasion. Everything said or done as part of such endeavors is confidential and may not be disclosed without the written consent of the parties to the proceeding, nor used as evidence in any subsequent proceeding, civil or criminal, except in a civil action alleging a breach of agreement filed by the commission or a party. Notwithstanding this subsection, the commission and its employees have discretion to disclose such information to a party as is reasonably necessary to facilitate conciliation. If the case is disposed of by such informal means in a manner satisfactory to a majority of the commission, it shall dismiss the proceeding.

4. Civil action by commission.

A. If the commission finds reasonable grounds to believe that unlawful discrimination has occurred, and further believes that irreparable injury or great inconvenience will be caused the victim of such discrimination or to members of a racial, color, sex, sexual orientation, physical or mental disability, religious or nationality group or age group if relief is not immediately granted, or if conciliation efforts under subsection 3 have not succeeded, the commission may file in the Superior Court a civil action seeking such relief as is appropriate, including temporary restraining orders. In a complaint investigated pursuant to a memorandum of understanding between the commission and the United States Department of Housing and Urban Development that results in a reasonable grounds determination, the commission shall file a civil action for the use of complainant if conciliation efforts under subsection 3 are unsuccessful.

B. Grounds for the filing of such an action before attempting conciliation include, but are not limited to:

(1) In unlawful housing discrimination, that the housing accommodation sought is likely to be sold or rented to another during the pendency of proceedings, or that an unlawful eviction is about to occur;

(2) In unlawful employment discrimination, that the victim of the discrimination has lost or is threatened with the loss of job and income as a result of such discrimination;

(3) In unlawful public accommodations discrimination, that such discrimination is causing inconvenience to many persons;

(4) In any unlawful discrimination, that the victim of the discrimination is suffering or is in danger of suffering severe financial loss in relation to circumstances, severe hardship or personal danger as a result of such discrimination.

5. Confidentiality of 3rd-party records. The Legislature finds that persons who are not parties to a complaint under this chapter as a complainant or a respondent have a right to privacy. Any records of the commission that are open to the public under Title 1, chapter 13, must be kept in such a manner as to ensure that data identifying these 3rd parties is not reflected in the record. Only data reflecting the identity of these persons may be kept confidential.

6. Right to sue. If, within 180 days of a complaint being filed with the commission, the commission has not filed a civil action in the case or has not entered into a conciliation agreement in the case, the complainant may request a right-to-sue letter, and, if a letter is given, the commission shall end its investigation.

5 M.R.S.A. § 4612.