



HAWAII CIVIL RIGHTS COMMISSION

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MINUTES

Hawai'i Civil Rights Commission Office
January 13, 2014
3:00 p.m.

Present: Linda Krieger, Raymund Liongson, Kim Coco Iwamoto, and Wally Fukunaga, Commissioners; Livia Wang, Bill Hoshijo, and Marcus Kawatachi, Staff.

Artemio Baxa, Commissioner, excused.

Chair Linda Krieger called the meeting to order.

Approval of Minutes

The minutes of the December 16, 2013, meeting were approved. (m/s/p Iwamoto/Fukunaga; all in favor).

Executive Director's Report

Deputy Executive Director (DED) Marcus Kawatachi presented an FY 2014 HCRC Mediation Program Year-to-Date Summary.

Summary & Details (7/1/13 through 1/13/14)

| | |
|-------------------------------------|------|
| Referrals: | 12 |
| Dispositions: | 12 |
| Settlements: | 9 |
| Non-agreements: | 3 |
| Settlement Rate: | 75 % |
| Employment cases settled: | 9 |
| Non-employment cases settled: | 0 |
| Dual-filed (EEOC/HCRC) settlements: | 9 |
| State-only settlements: | 0 |

Primary Bases for Complaints Settled in Mediation

| | |
|--------------------------|---|
| Disability | 2 |
| Ancestry/National Origin | 2 |
| Retaliation | 2 |
| Age | 2 |
| Race | 1 |

Dispositions by Mediation Center

| | | |
|---------------------------------|-----|--------------------------|
| Mediation Center of the Pacific | 5/6 | (settlement rate 83.3 %) |
|---------------------------------|-----|--------------------------|

| | | |
|------------------------------------|-------------|------------------------------|
| Private Mediators | 4/4 | (settlement rate 100 %) |
| West Hawaii Mediation Center | 0/1 | (settlement rate 0 %) |
| Ku'ikahi Mediation Services (Hilo) | 0/1 | (settlement rate 0 %) |
| OVERALL | 9/12 | (settlement rate 75%) |

DED Kawatachi noted that there was little change from the December 2013 mediation report. Chair Krieger asked what pool of cases are offered mediation. DED Kawatachi explained that because the HCRC mediation program is voluntary program, complainants are offered mediation, and in cases that the complainant opts for mediation, respondents are then offered mediation and urged to consider it. Chair Krieger suggested that it would be productive to let either side initiate mediation, as they can in civil litigation, so a respondent could opt for mediation even if a complainant does not opt for it. DED Kawatachi and Executive Director (ED) Bill Hoshijo agreed that either party could initiate the discussion of mediation, as long as it is understood that both parties have to agree to opt for mediation, because the HCRC does not have statutory or rule authority to mandate mediation.

DED Kawatachi presented a data and production report showing caseload data through January 13, 2014.

As of January 13, 2014, the report showed 415 open cases, an increase of 3 cases from the number reported as of December 16, 2013. Of those, 19 (4.6%) were filed in 2009, 44 (10.6%) filed in 2010, 43 (10.4%) filed in 2011, 69 (16.6%) in 2012, 235 (56.6%) in 2013, and 5 (1.2%) in 2014.

The report also showed a breakdown of the status of the open cases by investigation stage.

| | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | Total |
|----------------------|-----------|-----------|-----------|-----------|------------|----------|------------|
| Housing Cases | 0 | 0 | 1 | 12 | 13 | 0 | 26 |
| Intake Stage | 0 | 0 | 3 | 1 | 158 | 5 | 167 |
| Mediation | 0 | 0 | 1 | 2 | 24 | 0 | 27 |
| Pending Assignment | 4 | 37 | 33 | 44 | 34 | 0 | 152 |
| Active Investigation | 15 | 7 | 5 | 10 | 6 | 0 | 43 |
| TOTAL | 19 | 44 | 43 | 69 | 235 | 5 | 415 |

It was reported that: 25.8% of all investigation cases were 2 years old or older (from date of filing); 7.9% were over 18 months but less than 2 years old; 9.1 % were over 12 months but less than 18 months old; 22.7% were over 6 months but less than 12 months old, and 34.5% were 6 months old or less.

DED Kawatachi and ED Hoshijo requested an extension of time to investigate all cases from January 31, 2014, through July 31, 2014.

Commissioner Wally Fukunaga moved that the request for extension of time be approved. Commissioner Raymund Liongson seconded the motion.

Chair Krieger opened discussion of the motion.

Commissioner Kim Coco Iwamoto stated that she would be voting no on the extension, on the principle "Justice Delayed is Justice Denied." She asked what would happen if the Commission did not approve an extension of time to investigate complaints. ED Hoshijo responded that it would directly result in administrative dismissal of complaints older than 180 days old, from time of filing, that the dismissals would be indiscriminate, without regard to the merits of complaints, and would lead to dismissal of strong, likely cause cases. He noted that the loss of capacity due to budget cuts and loss of investigator positions had a heavy impact on investigation of likely cause cases, that the HCRC continued to assess and more timely dismiss cases involving weaker complaints, so the indiscriminate dismissal of complaints would have a heavier impact on stronger cases on the merits. He also worried that it would reward respondents for delay and noncooperation. And, he noted that a large number of administrative dismissals without investigation would compliance problems under the HCRC's EEOC and HUD worksharing and cooperative agreements.

ED Hoshijo suggested that if the Commissioners were considering administrative dismissals of complaints, that criteria and standards should be developed, so that the dismissals would not be seen as arbitrary. Commissioner Iwamoto said the Commissioners had asked staff to suggest a plan for selective dismissals, suggesting that it would give the staff a clean start and the ability to conduct timely investigations with a smaller investigation caseload.

ED Hoshijo indicated that the staff had considered increased use of existing authority to dismiss cases for administrative reasons, but had concerns about the impact it would have on the credibility of the HCRC. Chair Krieger suggested that the credibility of the HCRC was already diminished because of the growth of the investigation caseload and the impact on the length of time to investigate.

Chair Krieger said she understood that in the past the Commission had approved requests for extensions of time to investigate with conditions and milestones to ensure that progress was made to reduce investigation case inventory and length of time to investigate. With that in mind, she suggested a friendly amendment, that the extension of time be approved conditioned on 3 things occurring: A) the Chair be authorized by the Commission to audit the investigation process by reviewing open and closed cases; B) the Chair and ED solicit the technical assistance of EEOC, asking for help from EEOC in reviewing cases older than 3 years and for suggested changes in investigation process; and, C) the ED and Chair report on this review and audit with recommendations before the next extension request, and that staff propose a plan for dismissal of complaints older than 3 years.

Commissioner Fukunaga made a renewed motion for approval of the request for extension of time to investigate, with the friendly amendment offered by Chair Krieger. Commissioner Liongson seconded the renewed motion.

ED Hoshijo and Chief Counsel Livia Wang advised that the Chair's review of cases should be limited to closed cases, to avoid violation of HCRC rule prohibiting ex parte communication and maintaining the integrity of the wall separating enforcement and adjudication.

Commissioner Fukunaga renewed his motion for approval of the request, with the friendly amendment offered by the Chair, with the change that the Chair's review of cases be limited only to closed cases. Commissioner Liongson seconded the motion as amended with this change.

The amended motion was for approval of the request for an extension of time to investigate all open cases, through July 31, 2014, with 3 conditions: A) the Chair be authorized by the Commission to audit the investigation process by reviewing closed cases; B) the Chair and ED solicit the technical assistance of EEOC , asking for help from EEOC in reviewing cases older than 3 years and for suggested changes in investigation process; and, C) the ED and Chair report on this review and audit with recommendations before the next extension request, and that staff propose a plan for dismissal of complaints older than 3 years.

The Commissioners approved an extension of time to investigate all cases through July 31, 2014, with those three conditions. (m/s/p Fukunaga/Liongson; 3-1, Iwamoto opposed).

ED Hoshijo reported that briefing was complete in *Cervelli v. Aloha Bed & Breakfast*, on appeal to the Intermediate Court of Appeals.

He also reported that arguments on a motion to dismiss were held in federal district court on the McDonough case, in which the ED had submitted an amicus brief.

Chief Counsel's Report

Chief Counsel (CC) Livia Wang reported that there was nothing new to report on the *Lales* case pending before the Hawai'i Supreme Court.

CC Wang reported that the hearing in a docketed case, the Bate case, had been completed, that post-hearing briefs were submitted, and that the Hearings Examiner then would have 60 days to write his proposed decision. The parties would then file any exceptions to the proposed decision, which would be heard by the Commissioners, with oral arguments in March or April 2014.

Legislation -2014 Session

The Commissioners reviewed Legislative Summary 1, with staff recommendations prepared by CC Wang, and decided on HCRC positions as follows:

PUBLIC ACCOMMODATIONS

HB 1621 Public Accommodations – adds homelessness, receipt of public assistance and receipt of unemployment benefits as bases of protection

Discussion: Chair Krieger and ED Hoshijo discussed the significance of extension of civil rights protections based on economic class, after 1970s legal strategies to protect the equal protection rights of the poor were rejected by the courts. Commissioner Iwamoto pointed out that the federal McKinney-Vento Act protects the right of homeless children to equal access to public schools.

HCRC position: Support, with request for additional resources. (m/s/p Iwamoto/Liongson; all).

OTHER CIVIL RIGHTS ISSUES

HB 1624 State Religious Freedom Restoration Act

Requires the government to show a compelling state interest/least restrictive means of furthering compelling state interest where state laws or actions substantially burden a person's exercise of religion

Staff recommendation: Oppose – this is the strictest standard used to justify burdens on religious exercise imposed by neutral laws (such as non-discrimination laws) and would be used to strike down many laws against discrimination.

Discussion: Chair Krieger noted that the bill targeted sexual orientation.

HCRC position: Oppose. (m/s/p Krieger/Fukunaga; all).

It was agreed that the meeting would be continued to a date after the legislative bill introduction deadline, so the Commissioners can review and act on staff recommendations. The date and time for the continued meeting was set for January 24, 2014, at 3:15 p.m.

ED Hoshijo reviewed the roles of commissioners and staff, and the process of Commission reviewing bills and making policy decisions which staff implement. Based on the timing of the meeting, to be continued on January 24, 2014, he indicated that hearings could be scheduled in the interim on bills that the Commission had not yet reviewed or taken positions on.

Staff requested a motion to partially address the scheduling issue:

On bills introduced between January 13-23, 2014, which the Commission has not had the opportunity to review and take action on during this January 13 meeting, staff is authorized to identify bills set for hearing before the continued meeting is convened, which are similar to bills introduced during the 2013 session which the Commissioners acted on, and to submit testimonies consistent with those positions. Any such testimony will be reported to the Commission at its January 24 continuation meeting, and the position will be subject to Commission review and action at that time.

The motion was approved. (m/s/p Iwamoto/Krieger; all in favor).

Announcements

ED Hoshijo reminded the Commissioners that the HCRC would have a contingent in the January 20, 2014, Martin Luther King, Jr. Parade, meeting at Magic Island before the 9 a.m. start of the parade.

Continued Meeting

The meeting was continued to January 24, 2014 at 3:15 p.m.

Recess