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MEMORANDUM

TO: Honorable Commissioners
Civil Service Commission

FROM: Buck Delventhal *BED*
Paul Zarefsky *PZ*
Deputy City Attorneys

DATE: March 31, 2009

RE: Civil Service Commission's Remedial Authority in Discrimination Appeals

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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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.

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III. BACKGROUND**A. Charter Section 10.101: Commission Powers**

The City Charter establishes and empowers the Commission. Section 10.101 of the Charter¹ describes the powers of the Commission regarding discrimination claims and appeals as follows:

The Commission shall by rule establish procedures to review and resolve allegations of discrimination as defined in Article XVII of this Charter or otherwise prohibited nepotism or favoritism appealed to it pursuant to this section. The determination reached under Commission procedures shall be final and shall forthwith be enforced by every employee and officer.

....

The Commission may hear appeals from an action of the Human Resources Director in accordance with its rules, including but not limited to:

1. Allegations of discrimination as defined in Article XVII of this Charter. Notwithstanding any other provisions of this Charter except the fiscal provisions hereof, the decision of the Commission regarding allegations of discrimination shall forthwith be enforced by every officer and employee.

Article XVII defines discrimination as

... violations of civil rights on account of race, color, religion, creed, sex, national origin, ethnicity, age, disability or medical condition, political affiliation, sexual orientation, ancestry, marital or domestic partners status, gender identity, parental status, other non-merit factors, or any category provided for by ordinance.

B. Charter Section 10.103: Powers of Human Resources Director

Section 10.103 addresses the role of the City's Human Resources Director (the "HR Director") in resolving allegations of discrimination in the first instance, subject to appeal to the Commission. In language paralleling the above-quoted language, Section 10.103 states:

The Human Resources Director shall review and resolve allegations of discrimination as defined in Article XVII of this Charter against employees or applicants, or otherwise prohibited nepotism or favoritism. Notwithstanding any other provisions of this Charter except the fiscal provisions hereof, the decision of the Human Resources Director shall forthwith be enforced by every employee and officer, unless the decision is appealed to the Commission in accordance with Section 10.101.

For employees of the Municipal Transportation Agency ("MTA"), Section 8A.104(f) transfers to the MTA the HR Director's authority to review and resolve allegations of discrimination. But the MTA's resolution of a discrimination claim remains appealable to the Commission.

C. Evolution of the Charter Provisions

¹ All section references indicate provisions in the Charter.

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1. Proposition B (November 1978)

Before Proposition B's adoption at the November 1978 election, the Charter did not empower the Commission to resolve claims of employment discrimination. An aggrieved employee was required to seek redress for a claim of discrimination in a court of law.

Proposition B amended the Charter's description of the "General Powers and Duties" of the Commission to add provisions giving the Commission authority to review and resolve employment discrimination claims:

Notwithstanding any other provisions of this Charter, the civil service commission shall by rule establish procedures to review and resolve allegations of discrimination on the basis of race, religion, sex, national origin, ethnicity, age, physical handicap, political affiliation, sexual orientation, ancestry, marital status, color, medical condition or other non-merit factors. The determination reached under civil service commission procedures shall be final and shall forthwith be enforced by every employee and officer.

Proposition B also amended the Charter's "Declaration of Personnel Policy" to state: "No person shall in any way be favored or discriminated against in employment or opportunity for employment because of race, color, sex, sexual orientation, political affiliation, age, religion, national origin or other non-merit factors." (This provision was superseded by the updated non-discrimination provisions that are now in the Charter.)

The ballot materials for Proposition B do not shed much light on the meaning of these new provisions. Proposition B included many other changes to rules governing the civil service system and Commission processes. Because its anti-discrimination provisions were only a part of these changes, the ballot digest for the measure only briefly discusses those provisions: "There is no anti-discrimination policy statement in the Charter.... A policy statement to prohibit discrimination would be added ..., and the Civil Service Commission would have to establish procedures for enforcing it." (*Voter Information Pamphlet for November 7, 1978 Election*, 65.) The official ballot argument for the measure likewise discusses the anti-discrimination provisions with brevity: "These amendments also clarify several Charter changes to ... set forth procedures to insure equal employment opportunities. This amendment also ... includes a policy statement as to equal employment opportunities in Civil Service Commission operations." (*Id.*, 66.)

The law then required – and still does require – the City, as an employer, to investigate and resolve complaints of discrimination. As this Office stated in Opinion No. 81-42 regarding Proposition B's anti-discrimination provisions:

The above-quoted amendment to the Charter was the result of federal and state requirements that the City establish an in-house procedure to resolve employment discrimination complaints without the employee having to resort to federal and state administrative agencies dealing with employment discrimination. The language of Section 3.661(c) authorizes the Civil Service Commission to act on discrimination complaints (1) "notwithstanding" any other provisions of the Charter and (2) its decision shall be final and shall be enforced by every employee and officer.

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(Attachment A, 2.) We also consulted with various former City officials involved in the late 1970's in developing Proposition B. During that period, the City was often in litigation over discrimination in employment. They informed us that the basic purpose of the Charter amendment authorizing the Commission to resolve discrimination claims binding on City departments was to create an internal administrative remedy that would enable the City to correct its own violations and forestall costly litigation and court-mandated decrees.

2. Proposition L (November 1993)

Proposition L, adopted at the November 1993 election, created the DHR as the City's comprehensive human resources office, while transforming the Commission into a policymaking body, with responsibilities for oversight and for handling appeals of certain disputes. For discrimination claims, Proposition L created the current two-tiered system, requiring claimants first to file with the HR Director, whose decision may be appealed to the Commission.

While Proposition L did not fundamentally alter the nature of the Charter's anti-discrimination provisions for employees, it made several noteworthy changes. It expanded the bases for a discrimination claim by (a) adding "otherwise prohibited nepotism or favoritism," (b) adding "gender identity," and (c) replacing the term "physical handicap" with the broader term "disability." It also qualified the clause limiting the Commission's remedial power over claims of discrimination "[n]otwithstanding any other provisions of this charter" with the phrase "except the fiscal provisions hereof." And it moved the "notwithstanding" clause from the sentence stating that the Commission "shall by rule establish procedures to review and resolve allegations of discrimination" to the sentence stating that "[t]he decision of the civil service commission regarding allegations of discrimination shall forthwith be enforced by every officer and employee." The new Charter provisions regarding the HR Director's authority over discrimination claims essentially paralleled the provisions regarding the Commission's authority over discrimination appeals.²

The only specific reference in the ballot materials to discrimination claims or appeals is then-Mayor Frank M. Jordan's statement in support of Proposition L, that "[t]he Civil Service Commission will continue to have the authority to set hiring rules, to investigate employee complaints, and deal with discrimination." (*Voter Information Pamphlet for November 2, 1993 Election*, 118.)

3. Proposition E (November 1995)

Proposition E, adopted at the November 1995 election, and operative beginning July 1996, was a wholesale Charter revision, replacing the 1932 Charter with the 1996 Charter. As with Proposition L, Proposition E did not fundamentally alter the nature of the Charter's anti-discrimination provisions for employees, but it made several noteworthy changes. It defined "[d]iscrimination" as "violations of civil rights" on account of the various characteristics that may form the basis of a claim. And it again expanded the bases for a discrimination claim by

² Proposition L's section on the HR Director omitted "otherwise prohibited nepotism or favoritism" and "gender identity" as characteristics that may form the basis of a discrimination claim. These oversights probably were of no legal import, and have been corrected in the current Charter provisions addressing the authority of the HR Director and Commission, which specify in identical terms the characteristics that may form the basis of a discrimination claim.

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(a) replacing the term "marital status" with the updated term "marital or domestic partner status," (b) adding "creed," and (c) adding "any category provided for by ordinance [of the Board of Supervisors]."

The ballot materials for Proposition E do not discuss discrimination claims or appeals. Since 1996, those provisions in Sections 10.101 and 10.103 have not changed.

D. Past Practice

It is difficult to comprehensively summarize the Commission's past practices regarding discrimination remedies, because 30 years of history is involved. In recent instances where the Commission has found discrimination, it has essentially "granted the appeal," without specifying a remedy that the department must follow. On occasion, even though not finding discrimination, the Commission has directed the department to review or change a problematic personnel practice that the Commission learned about from hearing the appeal. Also, on occasion, the Commission has remanded the matter to DHR for further investigation.

Based on our discussions with responsible City employees and officials, and our review of numerous historical records, there have been occasions when the Commission (pre-Proposition L, before the DHR was created) or the HR Director (post-Proposition L) have determined that departments make specific personnel decisions, such as hires, or take other actions, such as requiring training for employees. Sometimes these directives have been informal but nonetheless the affected departments have implemented them. In addition, DHR, or the Commission before the creation of DHR, have sometimes facilitated comprehensive settlements of discrimination claims.

IV. DISCUSSION**A. Principles of Statutory Construction**

In construing the Charter, we rely on principles of statutory construction established by the courts. (*Alesi v. Board of Retirement* (2000) 84 Cal.App.4th 597, 601.) Courts begin by looking at the plain language of a statute. "If the language of a statute is unambiguous, the plain meaning governs and it is unnecessary to resort to extrinsic sources to determine the legislative or voters' intent." (*Bostick v. Flex Equipment Company, Inc.* (2007) 147 Cal.App.4th 80, 107 (citations and quotation marks omitted).) But if the meaning of the language is not clear, courts examine other evidence to ascertain the intent and purpose of the law. "[A] court may consider extrinsic indicia of intent, including ... the analyses and arguments contained in the official ballot pamphlet of a statute enacted by voter initiative, and the historical circumstances of the statute's enactment." (*Id.*)

Even after examining the plain language and evidence of intent, courts may employ other principles of statutory construction to construe a law. For instance, courts may look to important public policies that the law seeks to achieve to avoid an interpretation that would lead to absurd practical results. "Finally, the court may consider the impact of an interpretation on public policy, for where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation." (*Bostick v. Flex Equipment Company, Inc.* (2007) 147 Cal.App.4th 80, 107 (citations and quotation marks omitted).) Courts favor "choos[ing] the construction that comports most closely with the lawmakers' apparent intent, with a view to promoting rather than defeating the general purpose of the statute. Any interpretation that would lead to absurd consequences is to be avoided." (*Allen v. Sully-Miller Contracting Company*

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(2002) 28 Cal. 4th 222, 227 (citations and quotation marks omitted.) In addition to these general guideposts, courts apply more specific principles of statutory construction in particular circumstances.

Here, consistent with these principles, we begin by looking at the plain language of the key Charter provisions and attempt to ascertain the intent of the voters, who adopted the Charter provisions in question. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901 (court's task in construing a voter initiative is to effectuate the intent of the electorate).) For ballot measures, the official ballot pamphlet distributed to the voters is the primary and often the only source of legislative history that courts will consult.³ (*Id.* at 903-905.)

B. Commission Power To "Resolve" Allegations of Discrimination

Consistent with state and federal law, Section 10.101 requires the Commission to "establish procedures to review and *resolve allegations* of discrimination." (Emphasis added.)⁴ The Charter does not define what it means to "resolve allegations" of discrimination. In view of this ambiguity, a court would likely examine related Charter language as well as case law regarding the duty of employers under federal and state law to resolve allegations of discrimination, and past practices in the City. The two most basic questions to consider are whether the Commission's power to resolve allegations of discrimination includes the power to impose remedies upon a finding of prohibited discrimination, and, if so, the nature and scope of possible remedies.

C. Commission Power To Impose Remedies For Discrimination

Generally, the Charter does not give the Commission overarching power to make personnel decisions for departments. But the Charter creates a special role for the Commission in discrimination appeals, conferring on the Commission powers that differ from its general powers over the merit system. Section 10.101 states: "The determination reached under Commission procedures [for reviewing and resolving allegations of discrimination] *shall be final and shall forthwith be enforced by every employee and officer.*" (Emphasis added.) And: "*Notwithstanding any other provisions of this Charter except the fiscal provisions hereof, the decision of the Commission regarding allegations of discrimination shall forthwith be enforced by every officer and employee.*" (Emphasis added.) Section 10.103 describes the HR Director's authority over discrimination claims in virtually identical terms.

1. The "Enforcement" Language

Section 10.101 says that the Commission's decision regarding allegations of discrimination "shall forthwith be enforced by every officer and employee." A strict reading of the "enforcement" language in these provisions suggests that the Commission has power to impose a remedy on City departments. The term "shall" "is a word of command [and] is generally imperative or mandatory." (*People v. O'Rourke* (1932) 124 Cal.App. 752, 758 (citation

³ We have reviewed the Board of Supervisors files for Propositions B and L (File Numbers 322-78 and 248-93 respectively), but did not find any information in them that further help interpret the legislative intent of these provisions.

⁴ We assume the Commission will continue to hear appeals from the HR Director's decisions of discrimination claims, and thus do not address whether the Charter requires the Commission to hear such appeals.

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and quotation marks omitted).) The term "forthwith" means "[i]mmediately; without delay; directly; within a reasonable time under the circumstances of the case; promptly and with reasonable dispatch." (*Black's Law Dictionary* (5th ed. 1979) 588.) And the term "enforce" means "[t]o put into execution; to cause to take effect; to make effective; as, to enforce a particular law, a writ, a judgment, or the collection of a debt or fine; to compel obedience to." (*Black's Law Dictionary* (5th ed. 1979) 474.)

This plain reading is consistent with earlier published opinions of this Office. In Opinion No. 81-42 (Attachment A), rendered in 1981, this Office concluded that the Commission could order the department to appoint the complainant to a position, that the employee's seniority in the position date back to the date he would have been appointed but for the discrimination, and that the department give the employee back pay as remedies for unlawful employment discrimination.⁵ Another legal opinion of this Office (Opinion No. 82-45; Attachment B), rendered in 1982, reinforces the conclusion that the Commission has authority to direct a department to take action to remedy discrimination. The 1982 opinion addresses whether the Commission may order appointment of a claimant to a position when there has been no finding of discrimination. This Office concluded no. The implicit premise of the opinion is that if a claimant had been denied the appointment because of discrimination, the Commission would have the power to order an appointment. Further, the opinion quotes the Commission's Rule 1.03(F)(5), in effect at that time: "The sole purpose of complaints, informal resolution proceedings, investigations and appeals under this Rule is to determine whether the complainant has been discriminated against in violation of these Rules *and to provide a remedy for complainant where appropriate.*" (Attachment B, 2; emphasis added.)⁶

These two opinions, and the Commission rule referenced in the second, were issued shortly after the adoption of Proposition B. In ascertaining a law's meaning, courts often give great weight to a contemporaneous construction of that law by agencies charged with its administration and enforcement. (*Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Board* (1999) 70 Cal.App.4th 281, 290.) Here, the contemporaneous construction is consistent with a plain reading of the Charter language and appears persuasive. And as noted above Proposition B did not make any material changes in the relevant language.

A third public legal opinion of this Office, unnumbered but dated August 1, 1997 (Attachment C), is consistent with the first two. The opinion addresses whether the Human Rights Commission (the "HRC") has jurisdiction over employment discrimination complaints brought by City employees. This Office concluded no. That opinion relied on the powers of the HR Director with respect to discrimination claims:

[W]hile the HRC could investigate employee complaints, it does not have the same powers as the Director [of] DHR to resolve these complaints. *Under Charter Section 10.103 the [HR Director] can require the department heads*

⁵ This opinion predated Proposition L, which imposed the proviso that the Commission's power is subject to the fiscal provisions of the Charter. See discussion at Section IV.C.2. and IV.H., below, which explains the limitation on ordering monetary awards.

⁶ The Commission's current rules do not contain such a statement. Rather, they parrot the Charter's language: "The determination reached under Commission procedures shall be final and shall be enforced by every employee and officer." (Rule 103.3.2.)

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and appointing officers enforce her personnel decisions necessary to remedy discriminatory employment practices. The HRC, however, is not authorized to take such action. The City and complainants are better served where a swift and definite remedy can bring complaints to closure.

(Attachment C, 2; emphasis added.) While this opinion addresses the powers of the HR Director over discrimination claims, by parity of reasoning it would apply to the Commission's power to resolve discrimination claims on appeal.

In sum, these three legal opinions reinforce a plain reading of Section 10.101's "enforcement" language, that the Commission may generally award appropriate remedies for discrimination if it determines, on appeal, that prohibited discrimination has occurred.

2. The "Notwithstanding" Clause

The "notwithstanding" clause in sections 10.101 and 10.103 preceding the enforcement language – i.e., "notwithstanding any other provisions of the Charter except the fiscal provisions hereof" – highlights the scope of the Commission's remedial powers in discrimination appeals. The phrase demonstrates that the voters intended to empower the Commission to compel other City departments to comply with Commission-imposed remedies for discrimination, even if that remedy contrasted with the Charter's ordinary distribution of powers between the Commission and departments.

A law's use of the term "notwithstanding" generally changes the rules that would otherwise apply. "Notwithstanding any other provision of law" ... has been called a term of art that declares the legislative intent to override all contrary law." (*Faulder v. Mendocino County Bd. of Sup'rs* (2006) 144 Cal.App.4th 1362, 1373 (internal quotations and citations omitted).) Here, given the "notwithstanding" clause preceding the enforcement language, the Commission's decision regarding a discrimination appeal may override other provisions of the Charter that ordinarily would limit the Commission's authority – except for "fiscal provisions," which the "notwithstanding" clause does not override.

Our 1981 legal opinion (Attachment A) addresses the meaning of the "notwithstanding" clause as it appeared in Proposition B:

The use of the phrase "notwithstanding any other provisions of this charter" ... gives the ... Commission broad authority to remedy discrimination where found to exist. However, the authority granted to the Commission, in my opinion, is limited to a form of remedy notwithstanding other provisions of the Charter relating only to civil service matters. For example, notwithstanding other civil service provisions of the Charter, the Commission can fashion any remedy within its jurisdiction regardless of civil service restrictions in the Charter. In my opinion, the "notwithstanding" language ... does not empower the ... Commission to supersede the powers and responsibilities of other officers and departments of the city and county. Thus, the ... Commission is not authorized to usurp the powers of the Board of Supervisors to create or abolish positions (Section 8.200, Charter), to establish rates of compensation (Section 8.401, Charter), or to appropriate funds (section 6.205, Charter); nor can it assume any other powers reserved

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to the mayor, the Controller or other officers, boards and commissions of the City and County of San Francisco.

(Attachment A, 2-3 (emphasis added).) This passage emphasizes the breadth of the "notwithstanding" clause and of the Commission's remedial powers – it has "broad authority to remedy discrimination where found to exist" and "can fashion any remedy within its jurisdiction regardless of civil service restrictions in the Charter." The passage also notes specific Charter limits on the Commission's remedial powers – it may not create or abolish positions, establish rates of compensation, or appropriate funds. Finally, the passage draws a line between Charter provisions "relating only to civil service matters," which the Commission may override, and "the powers and responsibilities ... reserved to the mayor, the Controller or other officers, boards and commissions," which the Commission must leave intact.

Proposition L's amendment of the "notwithstanding" clause to include the limiting phrase, "except the fiscal provisions [of the Charter]," further clarifies the scope of the "notwithstanding" clause. Under the principle of statutory construction courts refer to as *expressio unius est exclusio alterius* (i.e., the expression of one thing is the exclusion of the other), if a law specifies one exception to a general rule, the implication is that there are no other exceptions. (*Good v. Superior Court* (2008) 158 Cal.App.4th 1494, 1512.) Here, the "notwithstanding" language circumscribes the Commission's powers by making them subject to the fiscal provisions of the Charter, but not to other Charter provisions. Those fiscal limitations include the availability of appropriated funds (Section 9.113) and an approved requisition (Section A8.329, and Section 1.1 of the Administrative Provisions of the Annual Salary Ordinance).

But a caution is in order. While courts generally give broad effect to a "notwithstanding" clause such as the one in section 10.101, in particular contexts the legal force of such a clause may be blunted by other principles of statutory construction. For example, the principle that when two statutory provisions are irreconcilable, the more recently enacted provision governs, may conflict with the literal meaning of a "notwithstanding" clause that is in the earlier enacted provision. (*Cf. Klajic v. Castaic Lake Water Agency* (2004) 121 Cal.App.4th 5, 13 (noting that "notwithstanding" clause was enacted after a conflicting provision it was deemed to override).) If such a case presented itself, we would have to examine the possible tension between Section 10.101 and the newer Charter provision to determine the Commission's remedial powers. (*Cf. People v. Moody* (2002) 96 Cal.App.4th 987, 992-93 (later-enacted, more specific provision prevails over more general "notwithstanding" clause enacted earlier).)

D. Commission Discretion Regarding Discrimination Remedies

While the Charter gives the Commission authority to award an appropriate remedy if it sustains a claim of prohibited discrimination on appeal, the Charter does not delineate the types of relief the Commission may award. State and federal statutory schemes, under which administrative agencies or courts award remedies for employment discrimination, may be instructive on the types of remedies that are typically applied in these cases. As explained in *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379:

[Under section 12970, subdivision (a) of the California Fair Employment and Housing Act:] "If the commission finds that a respondent has engaged in any unlawful practice under this part, it ... shall issue ... an order requiring such respondent ... to take such action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, and

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restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this part, and including a requirement for report of the manner of compliance."

(*Id.* at 1385.) The court interpreted this remedial language broadly, to include unspecified remedial action that, among other things, in the judgment of the California Fair Employment and Housing Commission, "seems appropriate to redress a particular unlawful employment practice." (*Id.* at 1390.) But the court drew a sharp distinction between corrective remedies, which that commission was empowered to impose, and punitive actions, which were beyond its authority. (*Id.* at 1386-93.)

Here, the Commission should ordinarily have the same sorts of powers to award appropriate remedies, though its ability to award relief is not as broad as a court's powers, particularly in light of the fiscal limitations on the Commission's authority. In deciding an appropriate award in a particular case, the Commission may want to review judicial decisions in the context of employment discrimination on the proper exercise of administrative or judicial discretion in fashioning remedies. For example, typically courts will not require that an innocent beneficiary of discrimination suffer a loss to provide a remedy to the claimant. (*Kidd v. State of California* (1998) 62 Cal.App.4th 386, 410-11; *San Francisco Police Officers v. San Francisco* (9th Cir. 1989) 869 F.2d 1182, 1184.)

In addition to possible remedies awarded by the Commission, a claimant may have relief under state and federal administrative or legal proceedings. For example, the California Fair Employment and Housing Act (FEHA) and Title VII of the Civil Rights Act of 1964 (Title VII) provide rights to victims of employment discrimination that are independent of the Charter's provisions regarding discrimination. The Commission's award to a discrimination claimant may also affect such state and federal proceedings. Accordingly, where the Commission sustains on appeal an allegation of discrimination, it may encourage the department to take appropriate remedial measures in consultation with the claimant, and DHR if appropriate. Or it may suggest a range of remedies without initially imposing one, again expecting the department to follow through with an appropriate remedy. Indeed, the department and the claimant may have incentives to reach a mutually acceptable settlement in these circumstances. But in such instances the Commission retains ultimate authority over the adequacy of any remedy chosen by the department if not agreed to by the claimant.

The affected department is entitled to provide information to the Commission that demonstrates a particular remedy or its equivalent already has been implemented or is not appropriate. For example, the claimant may have obtained another position, or reinstatement or promotion would be unduly disruptive to the department if the claimant and others would be unable to effectively work together. Likewise, the Commission could request the claimant to provide information regarding mitigation of lost wages, consistent with a generally recognized duty to mitigate loss of pay flowing from an adverse employment action. Therefore, consistent with these legal principles, before awarding a remedy for discrimination, the Commission may choose to consult with the affected department, to understand the department's practical concerns with prospective remedies and to pursue information from the claimant which is relevant to this determination.

Finally, the Commission may play a role in facilitating a voluntary and comprehensive settlement of the discrimination claim. "Resolv[ing]" allegations of discrimination can mean

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working out a solution that is satisfactory to all parties. So long as the solution is otherwise lawful, the Commission's power to act in this mediating role does not even depend on its having made a finding of prohibited discrimination. The HR Director, whose Charter power to resolve discrimination claims generally parallels the Commission's, sometimes facilitates settlement of discrimination claims to comprehensively resolve the claimant's dispute with the City. The Commission may elect in some discrimination appeals to attempt to facilitate a comprehensive settlement of the claim before hearing or deciding the appeal.

E. Causal Connection Element For Claimant-Specific Relief

Consistent with federal and state discrimination laws, the Charter requires that there be a "causal connection" between a claim of discrimination and an adverse employment decision. (*Mixon v. Fair Employment & Housing Comm'n* (1987) 192 Cal.App.3d 1306, 1309.) This principle reflects the limited scope of the Commission's powers generally under the Charter. As mentioned above, the Charter does not empower the Commission to manage departments or make personnel decisions for departments. Regarding the appointment example, Section A8.329 empowers a department's appointing officer to make appointments from civil service eligibility lists. The Charter does not authorize the Commission to assess the relative merits of candidates and order appointment of a particular candidate because it believes that person should have been appointed. But if the Commission makes a finding supported by evidence in the record that, but for discrimination, the claimant would have been appointed, a Commission-imposed remedy would not intrude into the appointing officer's lawful exercise of Charter authority to evaluate candidates for appointment. Rather, the Commission would be removing unlawful discrimination from the appointment calculus and making a retrospective judgment of what would have happened absent that discrimination.

Accordingly, the Commission's remedies must be claimant-specific – that is, the remedy must redress the discrimination claimant's injury. And each remedy requires a Commission finding that discrimination caused the claimant's injury. For example, if a claimant alleges that she was not appointed to a position due to discrimination, and seeks a specific remedy, it is not sufficient that the Commission find that discrimination in the appointment process occurred. The Commission must also find that had the discrimination not occurred, she would have received the appointment. Still, as discussed below, the Commission's ability to award claimant-specific relief may be significantly limited by the fiscal provisions of the Charter.

F. Overriding Civil Service Rules To Effectuate A Discrimination Remedy

The Commission has a uniquely authoritative role under the Charter regarding its own rules. Section 10.101 gives the Commission broad power to adopt "rules, policies, and procedures to carry out the civil service merit system provisions of the Charter." By contrast, the HR Director has no power to override or ignore a Commission rule. Thus, absent authorization from the Commission, the HR Director may not exercise power under Section 10.103 to resolve allegations of discrimination in a manner that conflicts with a Commission rule.

You have asked whether the Commission could in a particular case disregard any of its rules. The Charter does not specify whether the Commission may award a discrimination remedy that would otherwise contravene a civil service rule. Nor do the Commission's rules address that question.

Memorandum

TO: Honorable Commissioners
Civil Service Commission

DATE: March 31, 2009

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RE: Civil Service Commission's Remedial Authority in Discrimination Appeals

On the one hand, the statutory history suggests that the Commission may have authority to override its rules. Many provisions in the Commission's rules were initially in the Charter. That system was cumbersome because changes in the civil service rules, even if minor, required voter-approved Charter amendments. Proposition C (November 1991), a Charter amendment, changed this system by transferring many merit system Charter provisions to the Commission's rules. Proposition C covered provisions dealing with qualifications of applicants, examinations, protests of examinations and eligible lists, examination procedures for veterans and employees on military leave, duration of eligible lists, limited tenure appointments, temporary and emergency appointments, and dismissals during the probationary period. These types of rules had all been in the Charter in 1978, when Proposition B first gave the Commission authority to adjudicate and remedy discrimination "[n]otwithstanding any other provisions of this Charter." Proposition C does not indicate an intent to narrow the scope of the Commission's remedial powers relating to discrimination appeals.

On the other hand, the Commission has established a rulemaking process that allows interested parties an opportunity to comment on proposed rules before the Commission adopts them. Should the Commission wish to provide for exceptions to its rules in order to effectuate remedies in discrimination appeals, the legally safest course is for the Commission to follow this process, and amend its rules in advance of hearing any particular appeal to expressly recognize its authority to depart from its rules for this purpose. This approach is preferable to the Commission's making case-by-case determinations to disregard its rules in particular appeals without the rules themselves expressly authorizing such actions.

G. Remediating Discrimination That Is Based On "Other Non-Merit Factors"

Article XVII defines discrimination as "*violations of civil rights* on account of race, color, religion, creed, sex, national origin, ethnicity, age, disability or medical condition, political affiliation, sexual orientation, ancestry, marital or domestic partners status, gender identity, parental status, *other non-merit factors*, or any category provided for by ordinance." (Emphasis added.) Classifying discrimination on the basis of enumerated factors as "*violations of civil rights*" connotes a characteristic, such as race or religion, that the law protects by banning discrimination based on the characteristic.

In addition, Section 10.101 requires the Commission to "establish procedures to review and resolve allegations of discrimination as defined in Article XVII of this Charter or *otherwise prohibited nepotism or favoritism* appealed to it pursuant to this section."⁷ (Emphasis added.) Confining the Commission's authority over discrimination appeals where the claim is based on nepotism or favoritism to that which is "*otherwise prohibited*" indicates that the Charter treats as discriminatory only those forms of nepotism or favoritism that are unlawful.

The common theme in these two phrases – "*violations of civil rights*" and "*otherwise prohibited nepotism or favoritism*" – is that the Commission's jurisdiction to resolve discrimination claims extends only to actions based on characteristics that the law bans City

⁷ See also Section 10.103, which includes claims based on "*otherwise prohibited nepotism or favoritism*" as subject to appeal to the Commission; and Section 8A.104(f), which includes "allegations of nepotism or *other prohibited* forms of favoritism" as subject to resolution by the MTA when assuming the HR Director's powers to review and resolve allegations of discrimination. (Emphasis added.)

Memorandum

TO: Honorable Commissioners
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DATE: March 31, 2009

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officials from considering in employment decisions. The term "other non-merit factors" thus is a catch-all term for characteristics that local, state, or federal law prohibits employers from considering but that neither Article XVII nor Section 10.101 enumerates. That term does not enable the Commission to find an employment decision discriminatory if it was based on a factor that is not prohibited by law but that the Commission concludes is unrelated to merit.

Many types of favoritism are not based on merit factors but are not prohibited by law. Limiting "other non-merit factors" to those that the law prohibits avoids a conflict with the Charter provision that a claim based on favoritism is cognizable only if the favoritism is "otherwise prohibited" and ensures that the "otherwise prohibited" language retains meaning. (*Elsenheimer v. Elsenheimer* (2004) 124 Cal.App.4th 1532, 1540 (potentially conflicting provisions in a law should be harmonized if possible to avoid the conflict); *Smith v. Novato Unified School District* (2007) 150 Cal.App.4th 1439, 1455 (a law should be interpreted to give meaning to each of its terms).)

H. The "Fiscal Provisions" Limitation on Discrimination Remedies

As noted earlier, the Charter requires the Commission remedies be in accordance with the "fiscal provisions" of the Charter.⁸ The Charter's "fiscal provisions" are found in Section 9.113, which is entitled "General Fiscal Provisions," as well as in other Charter provisions addressing financial matters.

The "fiscal provisions" limitation is a significant restraint on the Commission's power to award remedies in discrimination appeals. This limitation means that the Commission's remedial authority does not include the power to direct or authorize the expenditure of City funds that the City has not appropriated through the budgetary process. Thus, for example, the Commission may not order that a department appoint a successful discrimination claimant to a position for which there is no open requisition. Further, even if the position exists, the Department's obligation to comply will not arise until budgeted funds are available.

I. The Commission Lacks Power To Impose Employee Discipline

Generally, the Commission does not have the power to discipline an employee or official responsible for discrimination. Disciplining employees for discrimination is distinct from "resolving" an "allegation of discrimination." Further the Charter vests disciplinary powers in department heads and commissions (Sections A8.341-343), subject in many cases to procedures established in Memoranda of Understanding with employee unions (Section A8.409). In particular cases, as circumstances warrant, the Commission may recommend that the appropriate authority investigate or review a discrimination case to consider whether discipline is warranted.

J. Remedies For At-Will Employees

The Charter protects all City employees from discrimination. But not all employees have the same general employment rights. For example, exempt employees and probationary employees are at-will, and may be terminated or released from employment without cause. In addition, some exempt employees hold positions in which a relationship of trust, loyalty, or confidentiality is critical to the capacity to perform the job. Dissatisfaction with an employee

⁸ The "fiscal provisions" limitation also applies to the HR Director's resolution of discrimination claims under Section 10.103.

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DATE: March 31, 2009
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over personal issues or matters of style that may be critical to the trust and confidence that are needed in some at-will relationships does not constitute prohibited discrimination. And, even if discrimination is determined to have occurred in such a situation, the courts will not ordinarily order reinstatement or another injunctive remedy that would result in an obviously ineffective working relationship.

V. GENERAL CAVEAT

The Commission's request for a legal opinion on its authority in discrimination appeals was general. This opinion provides guidance about generally applicable legal principles that responds to the request. But we emphasize that this opinion does not, and cannot, provide a comprehensive response. Discrimination claims present many different fact patterns and may raise different legal issues. We can advise on specific legal issues and fact patterns as they arise.

VI. SUMMARY

In sum, if the Commission finds that a department discriminated causing an injury that would not have occurred but for the discrimination, then the Commission may, consistent with the fiscal provisions of the charter, award the aggrieved employee a remedy tailored to redress the discrimination. The Commission may not discipline the person accused of discrimination. Still, the Commission is not required to award a remedy, even if it finds discrimination. As previously noted, this does not necessarily leave the claimant without remedy, as FEHA and Title VII are available to provide remedies in a meritorious case. The Commission can provide for the department and claimant to work out a mutually acceptable solution, including with the assistance of the HR Director. In such circumstances, the Commission retains authority to order a remedy if the parties cannot reach a solution.

B.D.

P.Z.

cc: Anita Sanchez, Executive Officer

CITY AND COUNTY OF SAN FRANCISCO

GEORGE AGNOST
CITY ATTORNEY
CITY HALL

July 8, 1981

OPINION NO. 81-42

SUBJECT: Extent of Remedy that may be Granted by
Civil Service Commission After a Finding
of Employment Discrimination under
Section 3.661(c) of the Charter

REQUESTED BY: JOHN J. WALSH
General Manager, Personnel
Civil Service Commission

PREPARED BY: MICHAEL C. KILLELEA
Deputy City Attorney

QUESTION PRESENTED

Whether the Civil Service Commission can order that an employee be retroactively appointed to a position and be paid back salary as a remedy for employment discrimination after a hearing under Rule 1.03 of the Civil Service Rules enacted in accordance with Section 3.661(c) of the Charter.

CONCLUSION

Yes, under the facts presented in this matter.

FACTUAL BACKGROUND

A minority employee of the Public Utilities Commission in Class 1840 Junior Management Assistant, brought a charge of employment discrimination under Rule 1.03(f) of the Civil Service Rules. He claimed, inter alia, that the failure to appoint him as a temporary 1823 Senior Administrative Analyst in December 1979 was the result of discriminatory practices.

After investigation and hearing on the complaint pursuant to Rule 1.03(f) of the Civil Service Rules, the Civil Service Commission ruled that the complainant had been discriminated against. It ordered that the complainant be (1) appointed to a temporary position as an 1823 Senior Administrative Analyst and (2) paid retroactive salary to December 1979 computed on the difference between the salary

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of the position of an 1R27 and the salary of an 1R40 Junior Management Assistant which he held at the time of the hearing.

ANALYSIS

Section 3.661(c) of the Charter provides that the Civil Service Commission shall by rule establish procedures to review and resolve allegations of employment discrimination. Section 3.661(c) provides as follows:

"(c) Notwithstanding any other provisions of this Charter, the civil service commission shall by rule establish procedures to review and resolve allegations of discrimination on the basis of race, religion, sex, national origin, ethnicity, age, physical handicap, political affiliation, sexual orientation, ancestry, marital status, color, medical condition or other non-merit factors. The determination reached under civil service commission procedures shall be final and shall forthwith be enforced by every employee and officer."

In accordance with Section 3.661(c), the Civil Service Commission enacted Rule 1.03 of the Civil Service Rules providing for a hearing procedure of employment discrimination complaints. It was under Rule 1.03 that the hearing in this matter was conducted.

The above-quoted amendment to the Charter was the result of federal and state requirements that the City establish an in-house procedure to resolve employment discrimination complaints without the employee having to resort to federal and state administrative agencies dealing with employment discrimination. The language of Section 3.661(c) authorizes the Civil Service Commission to act on discrimination complaints (1) "notwithstanding" any other provisions of the Charter and (2) its decision shall be final and shall be enforced by every employee and officer.

The use of the phrase "notwithstanding any other provisions of this charter" in Section 3.661(c) gives the

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Civil Service Commission broad authority to remedy discrimination where found to exist. However, the authority granted to the Commission, in my opinion, is limited to a form of remedy notwithstanding other provisions of the Charter relating only to civil service matters. For example, notwithstanding other civil service provisions of the Charter, the Commission can fashion any remedy within its jurisdiction regardless of civil service restrictions in the Charter. In my opinion, the "notwithstanding" language of Section 3.661(c) does not empower the Civil Service Commission to supersede the powers and responsibilities of other officers and departments of the city and county. Thus, the Civil Service Commission is not authorized to usurp the powers of the Board of Supervisors to create or abolish positions (Section 8.200, Charter), to establish rates of compensation (Section 8.401, Charter), or to appropriate funds (Section 6.205, Charter); nor can it assume any other powers reserved to the Mayor, the Controller or other officers, boards and commissions of the City and County of San Francisco.

REMEDY IN THE SUBJECT MATTER

The Civil Service Commission ordered that the employee be appointed to a temporary position of 1823 Senior Administrative Analyst as of December 1979 and that he be paid at the 1823 rate retroactively to that date. The record of the hearing shows that the employee performed the duties of an 1823 position on and after December 1979. That testimony was corroborated by the employee's supervisor.

The civil service staff reviewed the requisition for an 1823 position which was submitted by the department and determined that the work should more properly be classified as an 1844 Senior Management Assistant. It was during this dispute that the employee filed his employment discrimination complaint.

The issue which came before the Commission on the discrimination issue basically concerned a classification question. The employee and his supervisor claimed that he performed work as an 1823 and the civil service staff disagreed. The Commission has authority, under the Charter, to classify and to reclassify all civil service positions

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"in accordance with duties and responsibilities of the employment, and training and experience required" (Section 3.661(a), Charter). Even though the question of classification of the work being performed by the subject employee was raised in the context of an employment discrimination complaint, the Commission acted under its authority in Section 3.661(a) of the Charter to classify the job duties of the complainant as an 1823 Senior Administrative Analyst. The facts showed that the complainant was performing the duties of an 1823 position and the Commission determined that his failure to receive the temporary appointment was due to discrimination. Thus, the Commission acted in a dual capacity in its role of adjudicating the discrimination complaint under Section 3.661(c) and its power to classify and reclassify all positions in accordance with the duties and responsibilities of the position pursuant to Section 3.661(a).

RETROACTIVE APPOINTMENT

Inasmuch as the evidence before the Civil Service Commission supported a finding that the complainant was performing 1823 duties in December 1979, the Commission can properly order that the employee receive the compensation of that position from December 1979 to present. Since the employee was actually doing the work of an 1823, as determined by the Civil Service Commission, there is no issue presented that the City would be paying "extra compensation" for services already rendered in violation of Article XI, Section 10(a) of the State Constitution.^{1/} The constitutional provision prohibits the payment of "extra compensation" to a local public employee after services have been rendered where there is no statute or ordinance

^{1/}Article XI, Section 10(a) provides:

"(a) A local government body may not grant extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part, or pay a claim under an agreement made without authority of law."

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authorizing such additional compensation (Longshore v. County of Ventura, 25 Cal.3d 14; Jarvis v. Cory, 98 Cal.App.3d 150). In the instant matter, the Civil Service Commission determined that the employee was performing the services of the 1823 position in December 1979 and thereafter. Therefore, the retroactive salary which was ordered by the Civil Service Commission was established under the appropriate salary ordinance for the 1823 position during the time that services were rendered. Thus, the Civil Service Commission order does not constitute the granting of "extra compensation" to the complainant employee in violation of the constitutional proscription because the salary ordered to be paid is the established salary ordinance rate for Class 1823 for services actually performed during the applicable period.

The Civil Service Commission found that the employee was not appointed to the temporary 1823 position by reason of discrimination and the failure to properly classify the position. As a remedy, it ordered that the employee be appointed to the 1823 position. This action did not intrude into the authority of the Board of Supervisors because the Commission ordered that the employee be appointed to a temporary position as distinguished from a permanent position. The Board of Supervisors does not "create" temporary positions but rather it appropriates salaries to each department in the budget for funding any temporary positions that may be needed for that department. The department, in this case, requested that the temporary position be classified as an 1823. Since a temporary requisition was made against temporary funds already appropriated, no action of the Board of Supervisors was necessary to authorize a temporary appointment as would be the case if a permanent 1823 was to be established. In the latter event, only the Board of Supervisors could create the permanent position (see Section 8.200, Charter) and the Civil Service Commission would not, in my opinion, be authorized to supersede the powers of the Board of Supervisors to establish permanent positions.

Section 3.661(c) of the Charter does provide that the determination reached by the Civil Service Commission on employment discrimination matters shall be final and shall be enforced by every officer and employee. It appears that this requirement is intended to assure that the decision of

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the Civil Service Commission on discrimination complaints will be final and not subject to appeal by officers or employees which are subject to or affected by the decision. The provision does not, in my opinion, authorize the Civil Service Commission to override the charter powers granted to officers, employees and departments in matters under their authority and jurisdiction. Thus, for example, the Civil Service Commission could recommend to a department that a position be created as a remedy for employment discrimination. However, the actual creation of the position could be accomplished only through the regularly established procedures of the Charter, i.e., the appointing officer of the department would have to request the Board of Supervisors to create the position by enactment of an appropriation ordinance (Section 8.200, Charter). Even though the Civil Service Commission cannot supersede the powers of other officers or departments in providing a remedy for employment discrimination, the decision of the Civil Service Commission in such matters should be given great weight and carried out by such officers where legally and practically possible.

In summary, the Civil Service Commission has determined by reason of a discrimination complaint and hearing under Section 1.03 of the Civil Service Rules that an employee was in fact performing the duties of an 1823 Senior Administrative Analyst from December 1979 and that he was denied a temporary appointment to that position by reason of employment discrimination. The Civil Service Commission, under its broad powers of classifying positions (Section 3.661(a), Charter), did find that the employee was performing the duties of an 1823 position from December 1979; and it could therefore order the temporary position classified and filled by the incumbent employee with back salary for the period that the employee performed the work of the classified position. The Civil Service Commission actually classified the temporary position and merely authorized backdating of the requisition upon evidence that the incumbent employee had been performing the work for the entire period.

The retroactive salary payment is not "extra compensation" which would be prohibited by Article XI, Section 10(a) of the State Constitution because the subject employee actually performed the work of the 1823 classification during the period in question and the compensation for such work is in accordance with the salary ordinance applicable during the period of service.

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In my opinion, the Civil Service Commission can properly order that the temporary position occupied by the subject employee be reclassified to the higher position of 1823 Senior Administrative Analyst and the requisition submitted for that temporary appointment can be legally backdated to December 1979 when the Civil Service Commission found that the incumbent was performing the duties of the 1823 position.

Very truly yours,

GEORGE AGNOST
City Attorney

By: Michael C. Killelea
MICHAEL C. KILLELEA
Deputy City Attorney

APPROVED:

George Agnost
City Attorney

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CITY AND COUNTY OF SAN FRANCISCO

GEORGE AGNOST
CITY ATTORNEY
CITY HALL

August 5, 1982

OPINION NO. 82-45

SUBJECT: Discrimination Complaint of Rafael Ramirez

REQUESTED BY: JEFFREY LEE
Director of Public Works
and Clean Water Program

PREPARED BY: STEPHANIE M. CHANG
Deputy City Attorney

QUESTION PRESENTED

Whether, in a complaint of discrimination under Civil Service Commission Rule §1.03, the Civil Service Commission can order that a complainant be appointed to a position where there has been no finding of discrimination in violation of the Civil Service Commission Rules.

CONCLUSION

No.

ANALYSIS

Your inquiry arises out of the complaint of Rafael Ramirez which was filed with the Civil Service Commission pursuant to Civil Service Commission Rule §1.03. Mr. Ramirez alleged that he was denied promotive non-civil service appointments to the positions of Senior Civil Engineer, Class 5210, and Building Plans Engineer, Class 5214, on the basis of his age, race and national origin

On June 11, 1981 the Civil Service Hearing Panel held a hearing on Mr. Ramirez' complaint. The Panel determined that the Department of Public Works had not discriminated against Mr. Ramirez in denying him the appointments but recommended certain affirmative action procedures for non-civil service and limited tenure appointments. By letter of December 21, 1981 this office advised you that the

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Panel had acted in excess of its jurisdiction and that its recommendation was therefore not binding on your department.

Mr. Ramirez filed an appeal from the Panel's decision pursuant to Civil Service Commission Rule §1.03(F)(2)(d). On April 5, 1982 the Civil Service Commission held a hearing on the matter. At the hearing Mr. Ramirez limited his claims to discrimination on the basis of race and national origin and further contended that the Department's failure to give any consideration to race or national origin in its selection process constituted a failure to consider affirmative action for the engineering profession as a group within the City service. The Civil Service Commission found that Mr. Ramirez had not been discriminated against but ordered that the Department of Public Works appoint Mr. Ramirez to a temporary Senior Civil Engineer, Class 5210, or a Building Plans Engineer, Class 5214, position.

You have asked whether the Civil Service Commission's decision was appropriate and binding on the Department of Public Works.

San Francisco Charter §8.310(a) mandates that,

"No person shall in any way be favored or discriminated against in employment or opportunity for employment because of race, color, sex, sexual orientation, political affiliation, age, religion, national origin or other non-merit factors."

The same prohibition is found at Civil Service Commission Rule §1.03(A)(3).

Mr. Ramirez filed his complaint with the Civil Service Commission pursuant to Civil Service Commission Rule §1.03. Section 1.03(F)(5) of the Civil Service Commission Rules provides that,

"The sole purpose of complaints, informal resolution proceedings, investigations and appeals under this Rule is to determine whether the complainant has been discriminated against in violation of these Rules and to provide a remedy for complainant where appropriate." [Emphasis added.]

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Jeffrey Lee

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August 5, 1982

Under Civil Service Commission Rule §1.03(F)(5), supra, the Civil Service Commission's authority to award relief is limited to situations where there is a finding that the complainant has been discriminated against. The Civil Service Commission made no finding that Mr. Ramirez had been discriminated against and therefore had no authority under Civil Service Commission Rule §1.03(F)(5), supra, to order that Mr. Ramirez be appointed to the positions in question.

You are so advised.

Very truly yours,

GEORGE AGNOST
City Attorney

By: Stephanie M. Chang
STEPHANIE M. CHANG
Deputy City Attorney

APPROVED:

George Agnost
GEORGE AGNOST
City Attorney

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City and County of San Francisco

Office of the City Attorney



LOUISE H. RENNE
City Attorney

LORETTA GIORGI
Deputy City Attorney

DIRECT DIAL: (415) 554-4222

MEMORANDUM
PRIVILEGED & CONFIDENTIAL

TO: MARIVIC BAMBA, EXECUTIVE DIRECTOR, HUMAN RIGHTS COMMISSION

FROM: LORETTA M. GIORGI, DEPUTY CITY ATTORNEY

DATE: AUGUST 1, 1997

RE: JURISDICTION OVER CITY EMPLOYEE DISCRIMINATION COMPLAINTS

You have requested that I memorialize my oral advise regarding the Human Rights Commission's ("HRC") jurisdiction over employment discrimination complaints brought by City employees. We conclude that the Department of Human Resources ("DHR") has exclusive authority to investigate and resolve such discrimination complaints.

San Francisco Charter Section 10.102 makes the DHR the personnel department for the City and County of San Francisco and requires it to perform all functions related to personnel activities. Section 10.103 requires the Director of DHR to "review and resolve allegations of discrimination against employees or applicants."

While the HRC is also empowered under the Charter to "investigate all complaints of discrimination", there are legal and policy reasons why City employee discrimination complaints should be investigated and resolved by the DHR.

Statutes must be given a reasonable and commonsense construction in accordance with the apparent purpose and intent of the lawmakers - one that is practical rather than technical. *Costa Mesa v. McKenzie*, 30 Cal.App.3d 763 (1973). A specific provision relating to a particular subject will govern with respect to that subject, as against a general provision, though the latter standing alone would be broad enough to include the subject. *Long Beach School District v. Payne*, 219 C.598 (1933), *Bekiaris v. Board of Education*, 6 C.3d 575 (1972). And where two provisions treat a matter, one specifically and the other merely incidental, the former will prevail. *Id.*

City and County of San Francisco Office of the City Attorney

Memorandum
Privileged & Confidential

To: Marivic Bamba

July 30, 1997

Re: City Employee Discrimination Complaints

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A municipal Charter is like a constitution and similar rules of construction must be applied. If it is impossible to reconcile portions of a Charter, specific provisions control over more general provisions. *Diamond International Corp. v. Boas*, 92 Cal.App.3d 1015 (1979).

The Charter authorizes both the HRC and DHR to investigate discrimination complaints. However, DHR's mandate is very specific - to investigate and resolve discrimination complaints of City employees or applicants for employment. Whereas the HRC's authority is very general. Under the rules of construction discussed above, the provision vesting specific authority in the DHR to investigate employee discrimination complaints controls over the general duties of the HRC to investigate discrimination complaints.

This construction is further supported by several policy considerations. First, public resources, staff and time would be wasted by duplicate investigations of the same complaint.

Second, DHR and the HRC are both entities of the City and County of San Francisco. The City should speak with one voice. Duplicate investigations of the same incident could lead to conflicting results. Inconsistency would impair the City's capacity to credibly resolve employee complaints to the satisfaction of the parties.

Finally, while the HRC could investigate employee complaints, it does not have the same powers as the Director the DHR to resolve these complaints. Under Charter Section 10.103 the Director of the DHR can require the department heads and appointing officers enforce her personnel decisions necessary to remedy discriminatory employment practices. The HRC, however, is not authorized to take such action. The City and complainants are better served where a swift and definite remedy can bring complaints to closure.

Based on the above analysis, we conclude that the DHR has the exclusive authority to investigate and resolve discrimination complaints by City employees.

If you have any further questions or concerns, please do not hesitate to contact me.

Note: Chris Iglesias, Executive Director of the Human Rights Commission, agreed to waive confidentiality of this memorandum.

- Deputy City Attorney Paul Zarefsky