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# 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.<sup>1</sup> In 2015 the investigators wrote reports in 227<sup>2</sup> 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.<sup>3</sup>

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.

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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.<sup>4</sup>

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

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<sup>4</sup> 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 phone<sup>5</sup> 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,<sup>6</sup> 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

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<sup>5</sup> 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.

<sup>6</sup> 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,<sup>7</sup> 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.<sup>8</sup> 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

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<sup>7</sup> 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.

<sup>8</sup> 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.<sup>9</sup> 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

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<sup>9</sup> 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 interdependent 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.<sup>10</sup> 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.<sup>11</sup>

**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

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

<sup>11</sup> 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,

Colleen Bailey  
James Clifford  
Frank D'Alessandro  
Zach Heiden  
Chris McMorrow  
Patricia Peard  
Eric Uhl

## 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.







**MAINE HUMAN RIGHTS COMMISSION REVIEW PANEL**  
**Panel Work Product**

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- A. Executive Order 2015-007 (4/21/15)
- B. Email dated 10/7/15 re: establishment of Review Panel
- C. Executive Order 2015-009 (10/14/15)
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**II. Meeting Minutes (some with attachments)**

- A. Panel Meeting 10/21/15 (Augusta)
- B. Panel Meeting 11/5/15 (Portland)
- C. Panel Meeting 12/3/15 (Portland)
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**III. Relevant Correspondence and Attachments**

- A. Correspondence/documents regarding constituent outreach (various emails, letters, and notes to or from individuals and groups in response to request for input from Review Panel)
- B. Correspondence/documents from MHRC Executive Director
  - 1) Chart comparing various state human rights commissions
  - 2) Letter dated 3/5/15 to Maine Legislative Judiciary Committee
- C. Pat Peard's notes regarding MHRC Process and Procedures,
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**IV. Recommendations to Improve Charge Processing**



OFFICE OF  
THE GOVERNOR

NO. 2015-007  
DATE April 21, 2015

**AN ORDER ESTABLISHING THE GOVERNOR'S PANEL TO REVIEW AND MAKE  
RECOMMENDATIONS FOR IMPROVEMENT OF  
THE MAINE HUMAN RIGHTS COMMISSION AND ITS OPERATIONS**

**WHEREAS**, the Maine Human Rights Commission ("MHRC") is the administrative, governmental agency charged with enforcing the Maine Human Rights Act ("MHRA"), 5 MRS §§4551, *et. seq.*;

**WHEREAS**, the MHRA protects the opportunity for an individual to secure employment without discrimination because of race, color, sex, sexual orientation, physical or mental disability, religion, age, ancestry or national origin;

**WHEREAS**, the MHRA protects the opportunity for an individual to secure housing in accordance with the individual's ability to pay, and without discrimination because of race, color, sex, sexual orientation, physical or mental disability, religion, ancestry, national origin or familial status;

**WHEREAS**, the MHRA protects the opportunity for every individual to have equal access to places of public accommodation without discrimination because of race, color, sex, sexual orientation, physical or mental disability, religion, ancestry or national origin;

**WHEREAS**, the MHRA protects the opportunity for every individual to be extended credit without discrimination solely because of any one or more of the following factors: age; race; color; sex; sexual orientation; marital status; ancestry; religion or national origin;

**WHEREAS**, the MHRA protects the opportunity for an individual at an educational institution to participate in all educational, counseling and vocational guidance programs and all apprenticeship and on-the-job training programs without discrimination because of sex, sexual orientation, a physical or mental disability, national origin or race;

**WHEREAS**, there is perception in the Maine business community that the MHRC generally views respondents as culpable before any investigation has been conducted;

**WHEREAS**, there is perception in the Maine business community that the MHRC generally views complainants as truthful without affording respondents the same consideration;

**WHEREAS**, there is a perception in the Maine business community that the MHRC investigatory procedures, fact finding conferences, and settlement conferences are generally unfair to respondents, holding them to a higher standard of proof than complainants;

**WHEREAS**, there is a perception in the Maine business community that the MHRC unduly pressures respondents to settle complaints regardless of their culpability;

**WHEREAS**, there is a perception in the Maine business community that the MHRC, through its agents, is more flexible in the application of its rules toward complainants than toward respondents;

**WHEREAS**, the MHRC, through its agents, has implemented investigatory procedures that are overly and unnecessarily burdensome to respondents, particularly during the early stages of the investigatory process;

**WHEREAS**, the MHRC has upheld a finding of reasonable grounds upon which to find discrimination in at least one case where it had actual knowledge that the evidence it relied on and considered "critical" to the investigation was incomplete and inaccurate;

**WHEREAS**, it is necessary to undertake a review of the MHRC's structure and operation to identify factors causing and/or contributing to the perceptions of prejudice against respondents and bias in favor of complainants, to identify rules, practices, and procedures that are unduly and unnecessarily burdensome, and to identify rules, practices, and/or procedures that are unfair;

**WHEREAS**, it is necessary to undertake this review in order to identify problems areas and make recommendations for change in order to ensure fairness and impartiality in the administrative process;

**NOW, THEREFORE**, I, Paul R. LePage, Governor of the State of Maine, hereby order as follows:

1. The Governor's Maine Human Rights Commission Review Panel is hereby established;
2. The membership of the Review Panel shall consist of seven (7) persons appointed by the Governor including:
  - a. One attorney who regularly represents respondents before the MHRC
  - b. One attorney who regularly represents complainants before the MHRC
  - c. One (1) person from or recommended by the National Federation of Independent Business;

- d. One (1) person from or recommended by the Maine Apartment Owners and Managers Association
- e. One (1) person from or recommended by Pine Tree Legal
- f. One (1) person with a working knowledge of and familiarity with best administrative investigation practices
- g. One (1) person recommended by the MHRC

The Governor shall appoint one member of the Review Panel to serve as Chair. All Review Panel members shall serve at the pleasure of the Governor and all members shall serve without compensation.

3. The Review Panel shall:

- a. conduct a review of the structure and operation of the MHRC
- b. identify factors causing and/or contributing to the perceptions of prejudice against respondents and bias in favor of complainants
- c. identify rules, practices, and procedures that are unduly and unnecessarily burdensome to participants in the MHRC administrative process
- d. identify rules, practices, and/or procedures that are unfair to respondents and/or complainants
- e. issue a report to the Governor on or before November 1, 2015, 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.

4. Pursuant to Title 1, section 402, subsection 2, paragraph F, the meetings of this Review Panel are not "public proceedings" subject to Maine's Freedom of Access Act.

The effective date of this Executive order is 4.20, 2015.

  
Paul R. LePage, Governor

**From:** Montgomery, Cynthia L. Cynth a.L.Montgomery@ma ne.gov

**Subject:** MHRC Task Force Introductory Meet ng

**Date:** October 7, 2015 at 5:54 PM

**To:** euh @ tter.com, james@c ffordc fford.com, bobseavey@myfa rpo nt.net, easts der123@gma .com, D A essandro, Frank (fd a essandro@pt a.org) fd a essandro@pt a.org, ppearard@bernste nshur.com, Zachary He den (zhe den@ac uma ne.org) zhe den@ac uma ne.org

**Cc:** Oreskov ch, Joyce A Joyce.A.Oreskov ch@ma ne.gov

MC

Dear Panel Members:

Although I've said it once, I want to again thank all of you for your willingness to serve on the MHRC Task Force.

For your information, the panel members are:

1. **An attorney who regularly represents respondents before the MHRC:** Attorney Eric Uhl.
2. **An attorney who regularly represents complainants before the MHRC:** Attorney Jim Clifford.
3. **An individual recommended by the National Federation of Independent Business:** Bob Seavey.
4. **An individual recommended by the Maine Apartment Owners and Managers Association:** Chris McMorrow.
5. **An individual recommended by Pine Tree Legal:** Attorney Frank D'Alessandro.
6. **An individual with a working knowledge of and familiarity with best administrative investigation practices:** Attorney Patricia Peard.
7. **An individual recommended by the MHRC:** Attorney Zach Heiden.

Attorney Eric Uhl has graciously agreed to serve as Chair of the Task Force, and it will be staffed by State BHR Director Joyce Oreskovich.

With this email, I will attempt to schedule the introductory meeting, which I expect will last a half hour or so. I will reserve a room for us, so please report to the Governor's Office unless otherwise notified. Here are three date/time options. Please indicate whether you can make any/all of them.

Friday, October 16, 2015 @ 1:00 p.m.;

Monday, October 19, 2015 @ 10:00 or 1:00;

Wednesday, October 21, 2015 @ 3:00.

Thank you.

**Cynthia L. Montgomery, Esq.**

Chief Legal Counsel

Office of the Governor

1 State House Station

Augusta, Maine 04333

(207) 287-3531

[cynthia.l.montgomery@maine.gov](mailto:cynthia.l.montgomery@maine.gov)



OFFICE OF  
THE GOVERNOR

NO. 2015-009  
DATE October 14, 2015

**AN ORDER ESTABLISHING THE GOVERNOR'S PANEL TO REVIEW AND MAKE  
RECOMMENDATIONS FOR IMPROVEMENT OF THE MAINE HUMAN RIGHTS  
COMMISSION AND ITS OPERATIONS**

WHEREAS, the Maine Human Rights Commission ("MHRC") is the administrative, governmental agency charged with enforcing the Maine Human Rights Act ("MHRA"), 5 MRS 4551, et. seq.;

WHEREAS, the MHRA protects the opportunity for an individual to secure employment without discrimination because of race, color, sex, sexual orientation, physical or mental disability, religion, age, ancestry or national origin;

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WHEREAS, the MHRA protects the opportunity for an individual at an educational institution to participate in all educational, counseling and vocational guidance programs and all apprenticeship and on-the-job training programs without discrimination because of sex, sexual orientation, a physical or mental disability, national origin or race;

WHEREAS, there is perception in the Maine business community that the MHRC generally views respondents as culpable before any investigation has been conducted;

WHEREAS, there is perception in the Maine business community that the MHRC generally views complainants as truthful without affording respondents the same consideration;

WHEREAS, there is a perception in the Maine business community that the MHRC investigatory procedures, fact finding conferences, and settlement conferences are generally unfair to respondents, holding them to a higher standard of proof than complainants;

WHEREAS, there is a perception in the Maine business community that the MHRC unduly pressures respondents to settle complaints regardless of their culpability;

WHEREAS, there is a perception in the Maine business community that the MHRC, through its agents, is more flexible in the application of its rules toward complainants than toward respondents;

WHEREAS, the MHRC, through its agents, has implemented investigatory procedures that are overly and unnecessarily burdensome to respondents, particularly during the early stages of the investigatory process;

WHEREAS, the MHRC has upheld a finding of reasonable grounds upon which to find discrimination in at least one case where it had actual knowledge that the evidence it relied on and considered "critical" to the investigation was incomplete and inaccurate;

WHEREAS, it appears that the MHRC, through its agents, has, in at least one case, unfairly excluded and refused to consider evidence properly submitted for consideration by the MHRC;

WHEREAS, it is necessary to undertake a review of the MHRC's structure and operation to identify factors causing and/or contributing to the perceptions of prejudice against respondents and bias in favor of complainants, to identify rules, practices, and procedures that are unduly and unnecessarily burdensome, and to identify rules, practices, and/or procedures that are unfair;

WHEREAS, it is necessary to undertake this review in order to identify problem areas and make recommendations for change in order to ensure fairness and impartiality in the administrative process;

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  - d. One (1) person from or recommended by the Maine Apartment Owners and Managers Association



e. One (1) person from or recommended by Pine Tree Legal

f. One (1) person with a working knowledge of and familiarity with best administrative investigation practices

g. One (1) person recommended by the MHRC

The Governor shall appoint one member of the Review Panel to serve as Chair. All Review Panel members shall serve at the pleasure of the Governor and all members shall serve without compensation.

3. The Review Panel shall:

a. conduct a review of the structure and operation of the MHRC

b. identify factors causing and/or contributing to the perceptions of prejudice against respondents and bias in favor of complainants

c. identify rules, practices, and procedures that are unduly and unnecessarily burdensome to participants in the MHRC administrative process

d. identify rules, practices, and/or procedures that are unfair to respondents and/or complainants

e. issue a report to the Governor on or before April 15, 2016, 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. If the Panel requires more time in which to finalize the report, then the members may have a two (2) month extension in which to complete the report.

This Executive Order is effective October 14, 2015.

  
Paul R. LePage, Governor

**From:** **Montgomery, Cynthia L** Cynthia.L.Montgomery@maine.gov  
**Subject:** MHRC Task Force Introductory Meeting  
**Date:** October 7, 2015 at 5:54 PM  
**To:** euhl@littler.com, james@cliffordclifford.com, bobseavey@myfairpoint.net, eastsider123@gmail.com, D'Alessandro, Frank (fd'alessandro@ptla.org) fd'alessandro@ptla.org, ppeard@bernsteinshur.com, Zachary Heiden (zheiden@aclumaine.org) zheiden@aclumaine.org  
**Cc:** Oreskovich, Joyce A Joyce.A.Oreskovich@maine.gov



Dear Panel Members:

Although I've said it once, I want to again thank all of you for your willingness to serve on the MHRC Task Force.

For your information, the panel members are:

1. **An attorney who regularly represents respondents before the MHRC:** Attorney Eric Uhl.
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3. **An individual recommended by the National Federation of Independent Business:** Bob Seavey.
4. **An individual recommended by the Maine Apartment Owners and Managers Association:** Chris McMorrow.
5. **An individual recommended by Pine Tree Legal:** Attorney Frank D'Alessandro.
6. **An individual with a working knowledge of and familiarity with best administrative investigation practices:** Attorney Patricia Peard.
7. **An individual recommended by the MHRC:** Attorney Zach Heiden.

Attorney Eric Uhl has graciously agreed to serve as Chair of the Task Force, and it will be staffed by State BHR Director Joyce Oreskovich.

With this email, I will attempt to schedule the introductory meeting, which I expect will last a half hour or so. I will reserve a room for us, so please report to the Governor's Office unless otherwise notified. Here are three date/time options. Please indicate whether you can make any/all of them.

Friday, October 16, 2015 @ 1:00 p.m.;

Monday, October 19, 2015 @ 10:00 or 1:00;

Wednesday, October 21, 2015 @ 3:00.

Thank you.

**Cynthia L. Montgomery, Esq.**  
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**Maine Human Rights Commission Review Panel**  
**October 21, 2015**  
**Governor's Conference Room**  
**Augusta, Maine**

**Meeting Minutes**

**Present:**     **Eric Uhl**, Esq. (Chair), Littler Medelson, P.C. (Respondent designee)  
                  **Zachary Heiden**, Esq., Maine ACLU (MHRC designee)  
                  **Patricia Peard**, Esq., Bernstein Shur (designated as person with knowledge of  
                  and familiarity with best investigative practices)  
                  **Frank D'Alessandro**, Esq., Pine Tree Legal (PTLA designee)  
                  **James Clifford**, Esq., Clifford & Clifford, LLC (Complainant designee)  
                  **Joyce Oreskovich**, Esq., State of Maine Bureau of Human Resources  
                  **Cynthia Montgomery**, Esq., Legal Counsel to the Governor of Maine

**Absent:**     **Chris McMorro**w (Maine Apartment Owners and Managers designee)

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**Proceedings:** Meeting called to order at 3:00 p.m. / Introductions

*Introductory comments* by Ms. Montgomery. Ms. Montgomery distributed a revised Executive Order (No. 2015-009 dated 10/14/15) to replace the original Executive Order (No. 2015-007 dated 4/21/15). The revised version may need to be amended to include Paragraph 4 of Order No. 2015-007, e.g., that the proceedings of the Panel shall not be "public proceedings" per Freedom of Access Act, 1 M.R.S. § 402(2)(F).

*Introductory comments* by Panel Chair Eric Uhl. After distributing the Agenda and a draft workflow chart (attached), Mr. Uhl initiated a discussion about the revised Executive Order. Panel members were in agreement that the minutes and other publications of the Review Panel should be made available to the public. Panel members were also in agreement that meetings would be attended by Panel members and invited parties only, but the Meeting minutes, agendas, and other Panel documents or publications would be available to the public.

Panel members agreed to meet on a regular basis over the next 4-6 months. Meetings will alternate between Augusta and Portland

Ms. Peard agreed to draft a *press release* describing the purpose of the Review Panel and the nature of the Panel meetings. Ms. Peard agreed to circulate the release to Panel members, and once approved, Ms. Montgomery will coordinate with her staff for immediate release.

Panel members and Ms. Oreskovich and Ms. Montgomery engaged in a lengthy discussion about the work done by the Maine Human Rights Commission and the policies, procedures, rules, regulations, and statutes governing such work.

Among other topics, the Panel discussed the following:

**Maine Human Rights Commission Review Panel  
November 5, 2015  
One Monument Way, Portland ME**

**Meeting Minutes**

**Present:**     **Eric Uhl**, Esq. (Chair), Littler Medelson, P.C. (Respondent designee)  
                  **Zachary Heiden**, Esq., Maine ACLU (MHRC designee)  
                  **Patricia Peard**, Esq., Bernstein Shur (designated as person with knowledge of  
                  and familiarity with best administrative practices)  
                  **Frank D’Alessandro**, Esq., Pine Tree Legal (PTLA designee)  
                  **Chris McMorro**w (Maine Apartment Owners and Managers designee)  
                  **James Clifford**, Esq., Clifford & Clifford, LLC (Complainant designee)  
                  **Joyce Oreskovich**, Esq., State of Maine Bureau of Human Resources

**Absent:**     **Colleen Bailey** (National Business Federation)

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**Proceedings:** Meeting called to order at 4:30 p.m. / Introductions

***Approval of Minutes:*** The minutes of the October 21, 2015 meeting were approved.

***Introductory comments*** by Panel Chair Eric Uhl. After distributing the Agenda and a draft workflow chart (attached), Mr. Uhl initiated a discussion about the amending the Executive Order that had been discussed at length at the October 21, 2015 Panel meeting<sup>1</sup>. He proposed a vote on the matter. A majority (4-2) of Panel members voted to recommend that the Executive Order be amended to clarify that the Panel proceedings were not “public proceedings”. Voting in favor of the proposal were Mr. Uhl, Ms. Peard, Mr. McMorro, and Mr. Clifford. Voting against the proposal were Mr. D’Alessandro and Mr. Heiden. Ms. Oreskovich did not vote.

***Constituents:*** Panel members and Ms. Oreskovich engaged in a lengthy discussion about how the Panel could or should gather and express the views of our respective “constituents”, i.e., the entities or parties Panel members were designated to represent. Panel members agreed to initiate discussions with their constituents and report back to the Panel by the next scheduled meeting.<sup>2</sup>

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<sup>1</sup> See 10/21/15 meeting minutes. At the meeting on 10/21, Ms. Montgomery distributed a revised Executive Order (No. 2015-009 dated 10/14/15) to replace the original Executive Order (No. 2015-007 dated 4/21/15). A discussion followed about whether the revised version should be amended to clarify that the proceedings of the Panel shall not be “public proceedings” per Freedom of Access Act, 1 M.R.S. § 402(2)(F). The Panel was generally in agreement that while the work product and recommendations stemming from the proceedings should be made available to the public, the meetings and proceedings should not be “public proceedings”.

<sup>2</sup> With in put from the MSBA Employment Section co-chairs Dan Rose and Roberta de Araujo and Mr. Clifford, Mr. Uhl drafted a memo and distributed it to MSBA Employment Section members seeking their input. A copy of the email and memo are attached to these minutes.

Mr. McMorrow (Apartment Owners designee) reported that he had already engaged in discussions with various apartment owners and managers. Among other concerns expressed by colleagues, Mr. McMorrow reported the following:

- One apartment owner reported that he/she had been to the Commission to respond to housing charges on three or four occasions. Each time the issue related to service animals. This owner reported that in each case the Investigator told the owner that the case could be settled for “between \$3,000-\$5,000”. This owner was concerned that the Investigators were “negotiating on behalf of tenants” and felt that the entire process seemed abusive or hostile toward landlords
- Another apartment owner reported about his or her negative experience regarding a charge by a tenant who wanted to board a therapy horse on a lot of a very small apartment complex. The owner reported that an Investigator advised the owner that he or she “had no choice but to take the horse”. The owner was troubled by the comments and expressed her frustration with the system.
- Mr. McMorrow reported about his own concerns that the roles of MHRC staff were unclear to him and his colleagues and asked questions about the process. A general discussion followed. Panel members Ms. Peard, Mr. Uhl, Mr. D’Alessandro, and Mr. Clifford attempted to clarify the process (i.e., Investigators do not “negotiate” but are sometimes involved in “conciliation” efforts; MHRC staff most likely did not “issue legal advice” to complainants or respondents but could and often do assist parties with the particulars of intake, pleading, etc.)
- Mr. McMorrow agreed to gather additional comments and information and would report back at the next meeting. Panel members agreed that it would be very helpful for Mr. McMorrow to forward emails and other correspondence from his colleagues to the Panel to supplement the record, subject of course to ensuring that all personally identifying information of parties and MHRC staff would be redacted

Ms. Peard reported that she would be meeting with MHRC Investigators prior to the next scheduled Panel meeting on December 3 to better understand the Commission’s investigative practices. She agreed it would be appropriate for Mr. Heiden (as the Panel’s MHRC designee) to attend the meeting with her.

**Workflow:** Mr. Uhl reported briefly about his discussions with MHRC Executive Director Amy Snierson, particularly with respect to her willingness to meet with the Panel at an upcoming meeting. She and MHRC General Counsel Barbara Hirsch accepted the invitation to attend the December 9, 2015 meeting.

**Adjourn:** 6:00 p.m.

**Next Meeting:** December 3, 2015 at Clifford & Clifford, One Monument Way

- 1) The MHRC Executive Director and her staff worked hard and were committed to fulfilling the statutory purpose of the Commission, to wit: to protect the public health, safety, and welfare of Maine citizens as set forth in the MHRA, 5 M.R.S. § 4552 (Policy);
- 2) The Commission is necessary, does important work, and is underfunded;
- 3) There has been a growing perception among Respondents (particularly employers) that the investigation and enforcement procedures employed by the MHRC were inconsistent, unpredictable, and at times inequitable;
- 4) There has been a growing perception among lawyers for both Respondents and Complainants that the investigation and enforcement procedures employed by the MHRC are inefficient and outdated;
- 5) The Panel agreed it would be prudent to invite the Executive Director and members of her staff to attend an upcoming meeting and offer their perspectives in addition to providing information and documents. The Panel also agreed that Ms. Peard, as the Panel member designated with knowledge of and familiarity with best investigatory practices, should meet with MHRC investigators and other staff to discuss MHRC investigation practices and procedures and report back to the Panel at an upcoming meeting;
- 6) The Panel agreed it would be prudent for each Panel member to reach out to and/or meet with their “constituents” to better understand the interests, goals, objectives, or recommendations of each such constituency. For example, the Maine Apartment Owners designee would reach out to its members and others in the Maine real estate community and the Complainant’s designee would reach out to Disability Rights Maine. After further discussion and a possible format for questions to these stakeholders, each Panel member will report back about their “constituent” perspectives and concerns for further consideration at one of the Panel meetings; and
- 7) Mr. Clifford agreed to serve as Panel Secretary.

A general discussion followed. Panel members discussed their experiences at the Commission, some of the problems faced by their “constituents” and colleagues, and possible topics for discussion in the future, including but not limited to: (i) funding considerations, (ii) modernizing current paper-driven case management practices (i.e., electronic filing); (iii) expanding the current mediation program; (iv) developing separate “tracks” for certain types of cases similar to other states (Connecticut); and (v) creating positions for MHRC Advocates similar to the Workers’ Compensation Board Advocates. These topics were not meant to be exhaustive or comprehensive, but represented some initial input from the members.

**Adjourn:** 4:25 p.m.

**Next Meeting:** 11/5/15 at Clifford & Clifford, LLC One Monument Way, Portland

## Maine Human Rights Commission Review Panel

### Meeting Minutes of December 3, 2015 Meeting at Bernstein Shur (Portland)

**Present:**     **Eric Uhl**, Esq. (Chair), Littler Medelson, P.C. (Respondent designee)  
                  **Zachary Heiden**, Esq., Maine ACLU (MHRC designee)  
                  **Patricia Peard**, Esq., Bernstein Shur (designated as person with knowledge of  
                  and familiarity with best administrative practices)  
                  **Frank D'Alessandro**, Esq., Pine Tree Legal (PTLA designee)  
                  **Chris McMorrow** (Maine Apartment Owners and Managers designee)  
                  **James Clifford**, Esq., Clifford & Clifford, LLC (Complainant designee)

**Absent:**     **Colleen Bailey** (National Federation of Independent Businesses designee)

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**Proceedings:** Meeting called to order at 4:30 p.m.

**Approval of Minutes:** The minutes of the November 5, 2015 meeting were approved.

**Introductory comments** by Panel Chair Eric Uhl. Mr. Uhl initiated a discussion about the various feedback from the meetings and discussion between panel members and their respective "constituents".

**Mr. Uhl** (Respondents' designee) reported that he met with a number of defense lawyers at Drummond Woodsum in Portland on November 19. The meeting was well-attended. Among other concerns expressed by his colleagues, Mr. Uhl reported the following:

- One of the "themes" arising from the discussion was that MHRC should play a stronger "gatekeeping" role (i.e., reject cases with no merit and discourage complainants from pursuing claims where it is clear no violation occurred)
- Another theme was whether MHRC should assign certain cases to certain "tracks". For example, would a "right to sue track" be appropriate for cases where the complainant and respondent are each represented by counsel and each side indicates an interest in bypassing an investigation, fact finding, conciliation, etc? Likewise, would a "mediation track" or "early intervention track" make sense in cases involving current employees, students, pro se litigants, and/or parties mutually interested in early resolution?
- Most of the defense lawyers agreed that MHRC needed additional funding, more resources, and more training for investigators; and
- The defense bar reported that many employers viewed the MHRC investigation process as an unfair process where they needed to disprove the complainant's case rather than placing the burden of proof on complainant

**Mr. D'Allesandro** (Pine Tree) reported that many of the complainants filing housing charges with MHRC did so on a *pro se* basis and most did not understand the MHRC process or the MHRA. He reported that many *pro se* complainants (and some lawyers) found the MHRA housing process to be confusing and intimidating. Mr. D'Allesandro thought an MHRC Advocate, similar to the Workers' Compensation Board Advocates, would be helpful to *pro se* litigants (including *pro se* landlords).

**Ms. Peard** (Best Investigative Practices) reported that she met with MHRC Investigators at MHRC on November 9. She took detailed notes, a copy of which are attached to these minutes. Ms. Peard reported that she met with all five of the Commission's investigative staff and engaged in a lengthy and productive discussion. Among other topics discussed by the investigators, Ms. Peard reported the following:

- **Cheryl** (Intake Coordinator) is the "gatekeeper". Cheryl wears many hats and performs many duties, including assisting *pro se* complainants fill out the intake sheets and follow up with them as the charge becomes final
- **Vicky** (Chief Investigator) also wears many hats and performs many duties. Cheryl processes the charge as it is docketed. Vicky drafts the requests for documents and information, which are then sent to Barbara (Commission Counsel) for review. Once reviewed, Barbara sends the requests to Cindy (Case Manager). Vicky may also flag cases for potential administrative dismissal
- **Cindy** (Case Manager) manages the flow of paper. She is described as the "traffic cop". Vicky and Cindy seem to do much of the "busy work" necessary as the charge, response, and replies are docketed. She also manages email (all of which is printed), "green sheets" (nondisclosure forms), medical records, and requests for medical information.
- There are currently five **Investigators**. Each investigator usually manages 80 cases at a time. They typically handle 350-400 cases annually. Vicky manages the investigators. There are certain benchmarks, goals, and objectives (see Pat's report for details). The Investigators manage fact finding, conciliation, issues & resolution (I&R) conferences, and (in some cases) mediation. They are responsible for writing the "Investigator's Report" and for making a recommendation to the Commissioners.
- Recommendations by investigators and staff: (i) hire more investigators, (ii) hire more administrative staff, (iii) go "paperless", (iv) decrease caseloads, and (v) do away with repetitive steps like multiple "checks"



**Mr. Heiden** (MHRC designee) did not have much time to report back but noted he would provide more detailed feedback at the December 16 panel meeting. Mr. Heiden briefly reported that he has been in regular contact with MHRC Executive Director Amy Sneirson and that he contacted two lawyers to discuss their views about the MHRC: (i) David Webbert of Johnson Webbert & Young in Augusta, and (ii) Kristen Aiello of Disability Rights Maine. Both Mr. Webbert and Ms. Aiello frequently appear before the Commission on behalf of complainants. Ms. Aiello formerly served on the Commission.

**Mr. Clifford** (Complainants' designee) reported that he has not yet had an opportunity to fully discuss matters with his constituents. He reported that he would be meeting with the Maine Employment Lawyers Association (MELA) in Portland on December 4 and was awaiting feedback from legal staff and the Executive Director of Disability Rights Maine (DRM). He will report back to the panel at the next opportunity in December or January.

**Adjourn:** 6:30 p.m.

**Next Meeting:** December 9, 2015 at Clifford & Clifford, One Monument Way

## Maine Human Rights Commission Review Panel

### Meeting Minutes of December 9, 2015 Meeting at Clifford & Clifford (Portland)

**Present:** **Eric Uhl**, Esq. (Chair), Littler Medelson, P.C. (Respondent designee)  
**Zachary Heiden**, Esq., Maine ACLU (MHRC designee)  
**Patricia Peard**, Esq., Bernstein Shur (designated as person with knowledge of and familiarity with best administrative practices)  
**Frank D'Alessandro**, Esq., Pine Tree Legal (PTLA designee)  
**Chris McMorrow** (Maine Apartment Owners and Managers designee)  
**Colleen Bailey** (National Federation of Independent Businesses designee)  
**James Clifford**, Esq., Clifford & Clifford, LLC (Complainant designee)

**Also present:** **Joyce Oreskovich**, Esq., State of Maine Bureau of Human Resources  
**Amy Sneirson**, Esq., Executive Director, Maine Human Rights Commission  
**Barbara Hirsch**, Esq., MHRC Commission Counsel

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**Proceedings:** Meeting called to order at 4:30 p.m.

**Introductory comments** by Panel Chair Eric Uhl. Mr. Uhl initiated a brief discussion about the Executive Order, which in several places references that there is a “perception in the business community” that MHRC is biased in favor of complainants and against respondents. There was some discussion among Panel members about the basis for the stated “perception”. For example, Ms. Bailey and Mr. McMorrow noted that several of their colleagues in the business community strongly agreed with the language in the Executive Order. They agreed to provide additional information and documents at the next meeting. Mr. Clifford questioned the “depth” of this perception (i.e., have employers actually complained?) and objected to the Executive Order’s tone, substance, and allegations of the Commission’s bias and favoritism. Mr. Uhl suggested that the debate be tabled and noted that the Panel has not yet heard from all interested parties. He then introduced MHRC Executive Director Amy Sneirson and MHRC Commission Counsel Barbara Hirsch, who made presentations and answered questions for the remainder of the meeting (5:00 p.m. – 6:45 p.m.).

Amy Sneirson spoke for approximately 15 minutes. She provided a handout (see attached) and discussed the history, purpose, and role of the MHRC. She drew comparisons between the MHRC and other state human rights or EEO offices, including those in neighboring New England states and New York state and New York City. Her point was that MHRC often did “more with less”. She pointed out that 50% of complainants were *pro se* and noted many of the challenges that go along with managing *pro se* cases.

Ms. Sneirson discussed funding and federal oversight (EEOC/HUD). She believes MHRC is seriously short-staffed and underfunded.

Ms. Sneirson took issue with the Executive Order. She objected to any suggestion that the Commission was biased in favor of complainants. She said that the evidence would contradict the perception that MHRC favored complainants.

Ms. Sneirson referenced the March 2015 letter she wrote to the Maine Legislature that has been discussed at a prior meeting (see 11/5/15 minutes). Her letter contains many key statistics and metrics about the types of cases filed with MHRC, the life span of and average time spent on each case, and outcomes of the cases. For example, she noted that 80-85% of all fully contested cases resulted in a “no reasonable grounds” decision. She said that of the 750 charges filed in 2014, the Commission voted on 227 and of these, only 42 resulted with a “reasonable grounds” decision (15%).

Ms. Sneirson finished her initial comments by providing a “bucket list” and goals

- Get Commissioners appointed right away
- Leave politics out of the budget and rulemaking process
- Hire more investigators and spread intake to investigators
- More administrative dismissals for failure to substantiate
- Shorter list of questions and requests for information to employer
- Electronic case filing and allowing electronic signatures
- Automated phone lines
- Issue right to sue letters without a specific request
- More and better outreach/public relations
- Levy sanctions for misrepresentations and failure to cooperate

Ms. Hirsch and Ms. Sneirson then answered many questions and participated in a very general discussion about ways to improve the MHRC. For example, Barbara and Amy seemed receptive to different tracks for *pro se* and fully represented parties.

**Adjourn:** 6:45 p.m.

**Next Meeting:** January 7, 2016 at 4:00 p.m. at the Cross Building in Augusta

## Maine Human Rights Commission Review Panel

### Meeting Minutes of January 7, 2016 Meeting at Cross State Office Building Augusta

**Present:** **Eric Uhl**, Esq. (Chair), Littler Medelson, P.C. (Respondent designee)  
**Zachary Heiden**, Esq., Maine ACLU (MHRC designee)  
**Patricia Peard**, Esq., Bernstein Shur (designated as person with knowledge of and familiarity with best administrative practices)  
**Frank D'Alessandro**, Esq., Pine Tree Legal (PTLA designee)  
**Chris McMorrow** (Maine Apartment Owners and Managers designee)  
**Colleen Bailey** (National Federation of Independent Businesses designee)  
**James Clifford**, Esq., Clifford & Clifford, LLC (Complainant designee)

**Also present:** **Joyce Oreskovich**, Esq., State of Maine Bureau of Human Resources

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**Proceedings:** Meeting called to order at 4:30 p.m.

**Introductory comments** by Panel Chair Eric Uhl. Mr. Uhl initiated a brief discussion about the goals and objectives of the Panel. The Panel was in general agreement that it would meet two or three more times (in February, March, and April) and would draft a final report thereafter.

**Report** by Colleen Bailey. Ms. Bailey presented the Panel with a summary of her discussions with members of the independent business community in Maine. One franchisee expressed his/her frustration with a recent experience at MHRC in which the assigned investigator asked the franchise to pay \$3,000 to settle a case. Ms. Bailey reported that the franchisee felt the investigator overstepped his/her bounds. Another franchisee reported a negative experience with respect to a service animal case a customer brought against the franchise. Ms. Bailey reported that several of her colleagues felt the "system was rigged" against employers and that the employers felt pressured to settle cases by MHRC. Finally, she suggested that MHRC assign an "employer advocate" to assist pro se employers. Ms. Bailey agreed to provide copies of emails she received with the understanding that names and contact information would be redacted. Copies of the emails will be attached to these minutes upon receipt.

**Report** by James Clifford. Mr. Clifford presented the Panel with a summary of his discussions with members of the plaintiff's bar and representatives of Disability Rights Maine. Copies of correspondence from lawyers is attached hereto.

- **Maine Employment Lawyers Association (MELA):** Mr. Clifford, who is a member of MELA, attended the quarterly MELA meeting at Murray Plumb & Murray in Portland on December 4, 2015. Nearly all MELA members in attendance at the meeting expressed their strong objection to the Executive Order creating the Panel. Generally speaking, MELA members believe that there is no authority or legal basis to create the Panel. Some members were concerned with the language of the Executive Order, which implied that the Commission was biased in favor of employees and tenants. Other members pointed to MHRC reports,

including Ms. Snierson's March 2015 report to the Legislature which demonstrates that the Commission found "no reasonable grounds" in the vast majority of cases, cast doubt on any assertion that the Commission was biased in favor of employees.

Mr. Clifford then asked MELA members to provide feedback on some of the proposals outlined in prior Panel meetings. Four particular issues were discussed. First, MELA was generally supportive of potential separate "tracks" for charge processing and review. Second, MELA was generally opposed to the prospect of an "advocate" program similar to the one implemented by the Workers' Compensation Board. Third, MELA members supported any attempts to improve the efficiencies at MHRC (improve the intake process, move toward electronic case filing, streamline exchange of documents and information, etc.). Finally, several MELA members expressed concern that the charging process neglected important employee privacy issues, particularly the fact that employees' protected health information from their medical or mental health records could be inadvertently disclosed and that the MHRC should do a better job to protect any release of this information

- *Disability Rights Maine (DRM)* – DRM Staff Attorney (and former MHRC Commissioner) Kristin Aiello's response to the November 16, 2015 memo to the MSBA Employment Law Section from Mr. Uhl and Mr. Clifford is attached
- *Attorney A.J. Greif* (Gilbert & Greif, Bangor) – Mr. Greif's December 2, 2015 response to the MSBA memo to from Mr. Uhl and Mr. Clifford is attached
- *Attorney James Hunt* (Robinson Krieger) – Mr. Hunt's November 30, 2015 letter to Mr. Uhl and Mr. Clifford is attached
- *Attorney Curt Webber* (Linnell, Choate & Webber, Auburn) – Mr. Webber's November 30, 2015 email is attached

**Adjourn:** 6:00 p.m.

**Next Meeting:** February 4, 2016 at 4:00 p.m. at Clifford & Clifford in Portland

## Maine Human Rights Commission Review Panel

### Meeting Minutes of February 4, 2016 Meeting at One Monument Way, Portland

**Present:** **Eric Uhl**, Esq. (Chair), Littler Medelson, P.C. (Respondent designee)  
**Zachary Heiden**, Esq., Maine ACLU (MHRC designee)  
**Patricia Peard**, Esq., Bernstein Shur (designated as person with knowledge of and familiarity with best administrative practices)  
**Frank D'Alessandro**, Esq., Pine Tree Legal (PTLA designee)  
**Chris McMorrow** (Maine Apartment Owners and Managers designee)  
**Colleen Bailey** (National Federation of Independent Businesses designee)  
**James Clifford**, Esq., Clifford & Clifford, LLC (Complainant designee)

**Also Present:** MHRC Commissioner Sally Chandler (with her husband)

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**Proceedings:** Meeting called to order at 4:30 p.m.

**Introductory comments** by Panel Chair Eric Uhl. Mr. Uhl introduced Commissioner Chandler and engaged a very brief discussion about timing and priorities of the Panel.

**Report by Commissioner Chandler.** Commissioner Chandler described her experiences on the MHRC since her appointment in 2006. She talked about the documents reviewed by the Commissioners in advance of a Commission meeting, how and why Commissioners were to base decisions on the “four corners” of the Investigation Report, and some of the frustrations she and other Commissioners shared with respect to attempts by parties or counsel to go “outside the four corners” of the Investigation Report. She also echoed Executive Director Amy Sneirson’s comments about commonly viewed perceptions and misperceptions, i.e., her belief that “9 out of 10 complainants lose” and that the MHRC was designed to meet the needs of pro se litigants. Commissioner Chandler expressed her fondness for Commission Counsel Barbara Hirsch and her belief that Executive Director Amy Sneirson was “very respectful” of the Commissioners and all parties appearing before the Commission. Among other topics and anecdotes, Commissioner Chandler offered the following:

- Not enough time for parties to present their cases before the Commission
- Discussions following presentations can “get messy”
- The Investigators “get it right most of the time” although there are times when “not enough information is contained in the report”
- There should be more training for Investigators, staff, and Commissioners, and she is surprised EEOC doesn’t provide more outreach or services

Commissioner Chandler reported that she will be resigning from MHRC on 3/15/16

**Report by Eric Uhl** concerning his discussions with former **Commissioner Mavourneen Thompson**. Mr. Uhl summarized Ms. Thompson’s comments:

- She prefers discussion prior to votes (not currently permitted)
- More training needed for Commissioners
- There is a "lot of paper" and a "heavy workload" for Commissioners prior to every meeting (and many cases are not actually voted on)
- Investigation reports need to be cleaner and clearer

A very brief exchange took place following Mr. Uhl's report. Most topics related to assigning "tasks" and delegating responsibility as the Panel begins to wind up affairs.

**Adjourn:** 6:00 p.m.

**Next Meeting:** March 31, 2016 at 4:00 p.m. at Cross Building, Augusta

## Maine Human Rights Commission Review Panel

### Meeting Minutes of March 31, 2016 Meeting at Cross State Office Building Augusta

**Present:** **Eric Uhl**, Esq. (Chair), Littler Medelson, P.C. (Respondent designee)  
**Zachary Heiden**, Esq., Maine ACLU (MHRC designee)  
**Patricia Peard**, Esq., Bernstein Shur (designated as person with knowledge of and familiarity with best administrative practices)  
**Frank D'Alessandro**, Esq., Pine Tree Legal (PTLA designee)  
**Chris McMorrow** (Maine Apartment Owners and Managers designee)  
**Colleen Bailey** (National Federation of Independent Businesses designee)  
**James Clifford**, Esq., Clifford & Clifford, LLC (Complainant designee)

**Also present:** **Joyce Oreskovich**, Esq., State of Maine Bureau of Human Resources

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**Proceedings:** Meeting called to order at 4:00 p.m.

**Report** by Pat Peard. Ms. Peard reported back on her second meeting with MHRC Investigators and staff. Her notes (along with those from her first meeting in November) will be included in the Review Panel's supplementary materials. As set forth more fully in her notes, Pat met with Executive Director Amy Sneirson on January 13. A summary of her discussion follows:

- Commission formed 44 years ago to address pro se litigants; same size and same (low budget). The mission has remained the same
- MHRC relies on HUD and EEOC for most of its funding
- 50% of litigants are pro se
- The Commission is without binding authority
- The intake process is slow, outdated, and very time-consuming
- An average case takes 345 days to resolve
- Only 15% of cases have "reasonable grounds" finding
- 67% of cases end up on a consent agenda; only 30% of cases make it to Commission

Amy's "Wish List" includes:

- Adjudicatory power, just as WCB and Unemployment hearing officers have
- More timely approval of Commissioners
- More money to hire more staff
- Greater efficiency and more scrutiny over facially insufficient cases
- Ability to levy sanctions for breaches of confidentiality, lying, etc.
- Electronic filing
- Automated phone system
- More outreach and training
- Less "hands on" assistance with pro se litigants (she agrees that MHRC should not draft charges)



- Amy feels attacked by the Governor's office and feels that MHRC, as an independent agency, should not be subject to interference

**Adjourn:** 5:30 p.m.

**Next Meeting:** May 3, 2016 at 4:00 p.m. at Clifford & Clifford in Portland

## **Maine Human Rights Commission Review Panel**

### **Meeting Minutes of May 3, 2016 Meeting at One Monument Way, Portland**

**Present:**     **Eric Uhl**, Esq. (Chair), Littler Medelson, P.C. (Respondent designee)  
                  **Zachary Heiden**, Esq., Maine ACLU (MHRC designee)  
                  **Patricia Peard**, Esq., Bernstein Shur (designated as person with knowledge of  
                  and familiarity with best administrative practices)  
                  **Frank D'Alessandro**, Esq., Pine Tree Legal (PTLA designee)  
                  **Chris McMorrow** (Maine Apartment Owners and Managers designee)  
                  **Colleen Bailey** (National Federation of Independent Businesses designee)  
                  **James Clifford**, Esq., Clifford & Clifford, LLC (Complainant designee)

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**Proceedings:** Meeting called to order at 4:30 p.m.

The Review Panel discussed the process and substance of its forthcoming report. A lively discussion took place over 90 minutes. Among other subjects, members discussed the following topics and issues:

- The language of the October 2015 Executive Order (e.g., the “declarations” giving rise to the formation of the Review Panel and a list of “perceptions” by the Maine Business Community);
- Whether and how to reach consensus;
- The prospect of drafting a survey to understand views of the Panel members;
- Status and next steps

Panel members agreed (i) that Jim Clifford would draft and distribute a survey to members seeking input and responses to the October 2015 Executive Order, (ii) that Pat Peard would summarize her notes and distribute a summary of her interviews and findings with respect to the “MHRC process” (the subject of at least two prior Panel meetings), and (iii) to meet again on May 26 in Augusta.

See Survey attached hereto.

**Adjourn:**       6:00 p.m.

**Next Meeting:** May 26, 2016 at 4:00 p.m. at Cross Building, Augusta

## **Maine Human Rights Commission Review Panel**

### **Meeting Minutes of May 26, 2016 Meeting at Cross Building, Augusta ME**

**Present:**     **Eric Uhl**, Esq. (Chair), Littler Medelson, P.C. (Respondent designee)  
                  **Zachary Heiden**, Esq., Maine ACLU (MHRC designee)  
                  **Patricia Peard**, Esq., Bernstein Shur (designated as person with knowledge of  
                  and familiarity with best administrative practices)  
                  **Frank D'Alessandro**, Esq., Pine Tree Legal (PTLA designee)  
                  **Chris McMorrow** (Maine Apartment Owners and Managers designee)  
                  **Colleen Bailey** (National Federation of Independent Businesses designee)  
                  **James Clifford**, Esq., Clifford & Clifford, LLC (Complainant designee)

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**Proceedings:** Meeting called to order at 4:00 p.m.

The Review Panel continued the discussed about the process and substance of its forthcoming report. Among other subjects, members discussed the following topics and issues:

- Feedback from Chris McMorrow, Pat Peard, and Colleen Bailey regarding surveys sent to Panel members (which will be included in the work product notebook);
- Panel findings and recommendations in response to the Executive Order
- Status and next steps

The survey responses will not be summarized in this report. Interested parties can review the contents of the survey results on their own. Panel members discussed a number of possible recommendations intended to improve the internal processes at MHRC, including:

- (i)     Separate tracks for pro se and represented parties
- (ii)    Increased training/development for MHRC staff and Commissioners
- (iii)   Hiring one or more “advocates”, or “navigators” to assist pro se parties from the intake process through resolution
- (iv)    Mandatory mediation
- (v)     Increased funding to hire more staff and pay for training and development
- (vi)    Hiring a management consultant to provide more formal and thorough review and analysis of the inner workings of MHRC staff
- (vii)   Separating certain roles and duties by MHRC staff
- (viii)  Developing a system to accommodate electronic filing

Panel members agreed to meet again on July 11 in Portland.

See Survey responses attached hereto.

**Adjourn:**     6:00 p.m.

**Next Meeting:** July 11, 2016 at One Monument Way Portland

**ATTACHMENTS: SURVEY RESPONSES PEARED, MCMORROW, BAILEY**

## Maine Human Rights Commission Review Panel

### Meeting Minutes of July 11, 2016 Meeting at One Monument Way, Portland

**Present:** Eric Uhl, Esq. (Chair), Littler Medelson, P.C. (Respondent designee)  
Zachary Heiden, Esq., Maine ACLU (MHRC designee)  
Frank D'Alessandro, Esq., Pine Tree Legal (PTLA designee)  
Chris McMorrow (Maine Apartment Owners and Managers designee)  
Colleen Bailey (National Federation of Independent Businesses designee)  
James Clifford, Esq., Clifford & Clifford, LLC (Complainant designee)  
Joyce Oreskovich, Esq., State of Maine Bureau of Human Resources (liaison)

**Absent:** Patricia Peard, Esq., Bernstein Shur (designated as person with knowledge of and familiarity with best administrative practices) – *Pat was on vacation*

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**Proceedings:** Meeting called to order at 4:00 p.m.

The Review Panel discussed the process and substance of its forthcoming report.

Panel Member Zach Heiden presented a report intended to serve as the Panel's response to Paragraph 3(b) of the October 21 Executive Order, which states:

3. "The Review Panel Shall....(b) identify factors causing and/or contributing to the perceptions of prejudice against Respondents in favor of Complainants".

A copy of Zach's report is attached. Interested parties should refer to the report. Panel members discussed the report for the remainder of the meeting. With limited exception, the Panel agreed that the evidence strongly rejects any conclusion that the Commission is ACTUALLY biased in favor of Complainants. For example, the vast majority of cases that are fully investigated at the MHRC result in a "No Reasonable Grounds to Find Discrimination" decision. The breakdown of numbers and findings of the Commission cases was discussed in several prior meetings and was presented in great detail by Ms. Sneirson and Ms. Hirsch in earlier Panel meetings. Ms. Bailey and Mr. McMorrow remained skeptical about the Commission's actual and/or perceived biases. They maintain that members of the business community continue to believe the Commission has a pro-Complainant bias.

Panel members were then polled individually on two questions.

The first question asked members whether they believed there was any factual basis to support a conclusion that the Commission was biased in favor of Complainants. Results below

Yea: McMorrow, Bailey      Nay: Clifford, Heiden, Peard, D'Alessandro, Uhl

The second question asked Panel members whether they favored or opposed certain recommendations for improving efficiencies and performance at MHRC, using those recommendations raised on May 26:

- (i) Separate tracks for pro se and represented parties (all or nearly all in favor, though it was generally agreed that any “opt out” provision for represented parties may require legislation and/or amendments to MHRC rules)
- (ii) Increased training/development for MHRC staff and Commissioners (all in favor)
- (iii) Hiring one or more “advocates”, or “navigators” to assist pro se parties from the intake process through resolution (most in favor, although Clifford noted MELA’s objections to this based on its collective belief that lawyers, rather than “lay” advocates, should provide this advice to employees)
- (iv) Mandatory mediation (some in favor, some against; most favored mediation generally but some viewed it as an unnecessary burden for represented parties)
- (v) Increased funding to hire more staff and pay for training and development (all in favor, though mixed feelings on raising salaries and many skeptical that the money could or would be appropriated)
- (vi) Hiring a management consultant to provide more formal and thorough review and analysis of the inner workings of MHRC staff (most in favor, though some noted that the Panel has made and will make a number of valid recommendations after a very thorough review of the MHRC process by Pat Peard)
- (vii) Separating certain roles and duties by MHRC staff (for example, most opposed the idea of investigators doing intake and drafting complaints) (most in favor)
- (viii) Developing better computerized systems (e.g., electronic filing (all in favor))

OTHER SUGGESTIONS/COMMENTS FROM PANEL MEMBERS:

D’Alessandro: Favors advocates for pro se parties (though he and many others would prefer to come up with another name to reflect a conveyance of information rather than truly “advocating” for the pro se litigant; favors members of the bar serving as volunteers to provide general advice pro se parties)

Heiden: Favors hiring more mediators and investigators; favors better pay for staff; favors upgrades to computer systems and electronic filing; favors hiring a management consultant to improve efficiencies

Bailey: Favors more training and education for staff but also stressed the need for a better informed public (e.g., outreach/public relations); favors simplifying processes; disfavors the practice of limiting parties to 10 minutes per side before Commission

McMorrow: Proposed a filing fee for complainants subject to “in pauperis” waivers; favors more or better training for investigators

Clifford: Favors hiring a management consultant to thoroughly analyze intake and case management processes; supports the idea of “dual tracks” (i.e., permitting parties to opt

out of MHRC investigation process and issuing a right to sue letter), so long as certain steps are taken or criteria are met, including but not limited to developing a checklist whereby reasons for termination expressly stated, personnel files produced, key documents identified and exchanged, possibility of mediation or settlements discussed, and ensuring that other relevant facts or information are disclosed; favors more and better training and education for MHRC staff

Uhl: Favors dual tracks (with similar conditions noted by Clifford); favors hiring a management consultant; favors employing advocates or “advisors” for pro se parties; strongly favors more narrowly tailoring the information and documents requests from MHRC (this sentiment was echoed by Ms. Peard (absent on 7/11) in earlier discussions)

The parties agreed to meet in Augusta on August 22.

**Adjourn:** 6:00 p.m.

**Next Meeting:** August 22, 2016 at 4:00 p.m. at Cross Building, Augusta

**ATTACHMENTS: ZACH HEIDEN MEMO DATED 7/11/16**

## Maine Human Rights Commission Review Panel

### Meeting Minutes of August 22, 2016 Meeting at Cross Building, Augusta

**Present:** **Eric Uhl**, Esq. (Chair), Littler Medelson, P.C. (Respondent designee)  
**Zachary Heiden**, Esq., Maine ACLU (MHRC designee)  
**Patricia Peard**, Esq., Bernstein Shur (designated as person with knowledge of and familiarity with best administrative practices)  
**Frank D'Alessandro**, Esq., Pine Tree Legal (PTLA designee)  
**Chris McMorrow** (Maine Apartment Owners and Managers designee)  
**Colleen Bailey** (National Federation of Independent Businesses designee)  
**James Clifford**, Esq., Clifford & Clifford, LLC (Complainant designee)

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**Proceedings:** Meeting called to order at 4:00 p.m.

The Review Panel discussed the process and substance of its forthcoming report. Most of the discussion centered on two topics:

- 1) Ms. Peard's draft report in response to Paragraph 3(a) of the October 2015 Executive Order, which reads "The Panel shall....conduct a review of the structure and operation of the MHRC"; and
- 2) Drafting and issuing the Panel's final report and recommendations

Panel members reviewed and discussed Ms. Peard's report for approximately 60 minutes. A copy of the draft is attached to these minutes. Interested parties can review the draft. The discussion was led by Ms. Peard and the general consensus was that the report was diligent and well-drafted. However, the Panel also agreed that the final section of Ms. Peard's report, entitled "Recommendations" would be edited to more accurately reflect the discussions and positions of Panel members as reflected in the May 26 and July 11 minutes. Mr. Clifford agreed to draft and circulate by September 12.

The Panel then spent the remainder of the meeting discussing the organization and substance of the final report. The parties agreed that the report would be written to respond to the "charge" set forth in Paragraph 3 of the Executive Order. The parties agreed to draft the following sections and delegated drafting responsibilities to the following Panel members:

Introduction (Eric Uhl) overview of the Executive Order, summary of what the Panel did, when the Panel met, with whom the Panel met and from whom the Panel heard; and a brief overview of the general findings and recommendations of the Panel

Substantive Findings Corresponding to Paragraph 3 of Executive Order

¶3(a) Review of structure and operation of MHRC (PEARD)

¶ 3(b) Identify factors causing or contributing to the perceptions of prejudice against respondents and in favor of complainants (HEIDEN)

¶ 3(c) and (d) Identify rules, practices and procedures that are unduly burdensome or unfair to participants in the MHRC process (PEARL, but note this will be addressed along with response to ¶ 3(a))

¶ 3(e) Recommendations for improvements in laws, rules, practices, or procedures identified as causing or contributing to the problems identified [in ¶¶ 3(a)-3(d)]

**THE PANEL FURTHER AGREED THAT EACH PANEL MEMBER MAY DRAFT AND SUBMIT THEIR PERSONAL CONCURRENCES/DISSENTS**

**Adjourn:** 6:00 p.m.

**Next Meeting:** September 21, 2016 at 4:00 p.m. at Cross Building, Augusta

***ATTACHMENTS: DRAFT REPORT RE PARAGRAPH 3(a) OF EXECUTIVE ORDER***







First, I would like to thank Governor LePage for establishing this Review Panel and his efforts to investigate the allegations of bias by MHRC. Second, I am honored to represent the National Federation of Independent Business Owners.

As the representative of the business community, I believe that their belief is that bias does exist because they feel that the burden of proof is on them when accused of discrimination and that they are being held hostage by a system that expects an unfair amount of paperwork to be submitted and a monetary settlement for possibly an unintentional mistake of verbiage or a trumped up allegation. The feeling is that the process isn't fair for all. The business communitie's sole purpose is to provide jobs for the communities where they operate. We are expected to educate the working population about the discrimination laws and to monitor their behaviors. It will take generations of education and outreach to change beliefs and ideologies. Where else are these laws being taught? Are they taught in schools or churches? I know that generations ago these laws were not ever mentioned anywhere. So, many businesses are expected to pick up the slack of educating their employees and the general public. I believe the perception of bias is because of the lack of the business owners being aware of the process and proceeedures of the MHRC. MHRC is an antiquated system and needs to be brought into the 21st century by being computerized and becoming more user friendly , streamlined and have consultants help MHRC become more efficient and therefor become fairer for both parties involved. I believe there is a perception of bias in the business community which I feel is exasperated by the lack of education of the rules, processes and proceeedures of MHRC. Education is essential at all levels for the business community, employees and the general public.

Thank you Governor LePage for gathering together an exemplary panel to execute the task of following your Executive Order.

All of us on your panel put in alot of our personal time and efforts with our suggestions to make improvements and I hope that you will take them under advisement so that our time and efforts will not be in vain.

Sincerely, Colleen Bailey, S.M.K. Donuts Inc. DBA/Dunkin Donuts  
123 Madison Rd. Norridgewock, Me. 04957 207-653-4073



# MAINE HUMAN RIGHTS COMMISSION REVIEW PANEL

## Final Comments by Panel Member James Clifford

*“Politics is the art of looking for trouble, finding it everywhere, diagnosing it incorrectly, and applying the wrong remedies.”*

Groucho Marx

I was appointed to serve on the MHRC Review Panel as the “person who regularly represents Complainants before the MHRC”. I consider it my responsibility to represent the best interests of Complainants, i.e., employees students, and tenants, as well as the lawyers who represent them. I attended all twelve meetings of the Review Panel meetings to date (9/12/16) and served as the Review Panel Secretary.<sup>1</sup>

In his introductory notes to the Final Report, Panel Chair Eric Uhl wrote:

*“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.”<sup>2</sup>*

Let’s be clear: I am one of the Panel members who strongly believes that the Executive Order “inappropriately intruded on the independence of the MHRC.” I also strongly believe that the language in the Executive Order characterizing the MHRC as a biased and overreaching agency was highly inappropriate, but more importantly, it was flatly contradicted by the evidence.<sup>3</sup> I

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<sup>1</sup> I was responsible for drafting meeting minutes and maintaining the Review Panel’s “work product” notebook, which includes the Executive Orders (April and October 2015), our meeting minutes, and key documents such as Panel member surveys, correspondence, MHRC publications, etc. I have provided a hard copy of the work product notebook to accompany the Final Report. I have also maintained an electronic copy of the work product notebook and am happy to provide electronic copies to interested parties.

<sup>2</sup> Mr. Uhl’s introductory comments go on to correctly note that despite the differing perspectives concerning the reasons behind the formation of the Review Panel, all of the members of the Review Panel agreed to work together to focus on recommendations that would make the MHRC and its processes more efficient and fair to all participants. I agree that we were able to work quite well together as a group on addressing ways to improve the charging and investigation process at MHRC.

<sup>3</sup> The Panel was presented with undisputed data showing that the MHRC resolves charges in favor of the Respondent (i.e., employers or landlords) over 80% of the time!

urge any interested party to review the October 21, 2015 Executive Order to determine for themselves if the Order overstepped the bounds between advocacy for the business community and improper interference with an independent government agency.

The Executive Order contains several “whereas” clauses, which, for those unfamiliar with formal boring legalese, means “when in fact”. See Black’s Law Dictionary (West 4<sup>th</sup> Ed.). Among other “facts” asserted in the whereas clauses, the Executive Order proclaims that there is a “perception” in the “Maine business community” that...

- the MHRC generally views complainants as truthful **without affording respondents the same consideration**;
- MHRC investigatory procedures are generally unfair to respondents, holding them to a **higher standard of proof** than complainants;
- the MHRC **unduly pressures respondents** to settle complaints regardless of their culpability;
- the MHRC, through its agents, is **more flexible in the application of its rules** toward complainants than toward respondents;
- the MHRC has implemented investigatory procedures that are **overly and unnecessarily burdensome to respondents**;
- the MHRC has upheld a finding of reasonable grounds **in at least one case** where the evidence it relied on was incomplete and inaccurate, and that the MHRC unfairly excluded and refused to consider evidence properly submitted to the MHRC

(emphasis added). See 10/21/15 Executive Order.

The Executive Order goes on to proclaim that it is “necessary to undertake a review of the MHRC’s structure and operation to identify factors causing and/or contributing to the perceptions of prejudice against respondents and bias in favor of complainants, to identify rules, practices, and/or procedures that are unfair” and that it is “necessary to undertake this review in order to identify problem areas and make recommendations for change in order to ensure fairness and impartiality in the administrative process”. See 10/21/15 Executive Order.

Those are very strong words that make very serious allegations.

Over the course of several months, we as a Panel met with the MHRC Executive Director, Commission Counsel, and a former Commissioner. In addition, Ms. Peard, on our behalf, met with several current and former MHRC staffers over many hours. She produced a very thorough report which was discussed at length by the Review Panel. In my opinion, we learned as much about how the Maine Human Rights Commission operates as any group of busy professionals could learn over the course of 11 months.

So what did we find?

We found **no evidence** to support the contention that the MHRC was biased in favor of respondents. In fact, the evidence we saw showed that the Commission found in over 80% of the cases that there are no reasonable grounds to believe discrimination or retaliation occurred.

We found **no evidence** to support the contention that the MHRC imposed unfair or unduly burdensome rules or practices. While we did find that MHRC operations were hampered by inefficiencies and outdated systems, there is no basis to conclude that the rules or practices employed by the MHRC were unreasonably burdensome or otherwise unfair to any party.

We found **no evidence** to support the contention that the MHRC held respondents to a higher burden of proof. I would certainly like to know more about where or how this perception originated because it makes no sense to me.

We found **no evidence** to support the contention that the MHRC unduly pressured respondents to settle complaints. I heard several vague examples from a fellow Panelist but nothing of substance.

And we did not hear anything about or discuss the case referenced in the Executive Order where the MHRC allegedly relied on inaccurate evidence or otherwise neglected to fulfill its obligations to conduct an unbiased investigation.<sup>4</sup>

It is undisputed that the vast majority of cases filed with MHRC are either settled, withdrawn, or resolved in favor of the employer or landlord. Based on the data we observed, all of which had been published and available on the MHRC web site, how could anyone possibly allege -- or conclude -- that the MHRC is biased or overreaching?

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<sup>4</sup> I believe that the Executive Order was referring to the December 2014 "Moody's Diner case", which, for those unfamiliar with the facts or circumstances of the case, involved an employee's claim of religious discrimination against her employer resulting in a unanimous (5-0) finding by the MHRC that there were "reasonable grounds" to believe religious discrimination occurred. If for some reason I'm mistaken about this, perhaps the Governor's office could clarify.

I understand that landlords and businesses do not appreciate receiving charges of discrimination alleging they engaged in any form of discrimination, harassment, or retaliation. Who would? And who wants to spend time or money responding to these allegations, particularly when the Respondent believes the allegations are meritless? Nobody does. But this doesn't mean the MHRC, an independent government agency responsible for investigating all allegations of discrimination or harassment and for enforcing the Maine Human Rights Act, is biased or imposes unfair practices or procedures.

If the business community or any other special interest group truly believes that there is bias or an unequal playing field at the MHRC or any other government agency, it would be very helpful for their representatives to look at the statistics and results before making such bold and unfounded proclamations and to find ways to engage the Commission other than issuing an Executive Order and forming a Review Panel.

In my opinion, the main objective of the Review Panel was to take a good look at how the Commission operates on a day-to-day basis and to identify problems or areas in which the process could be improved. Reduced to its essence, the Review Panel found that the major problems at the MHRC stem from underfunding, understaffing, and limited and outdated resources. I'm confident that our Final Report will accurately express the Review Panel's findings and recommendations.

Finally, despite my objections to and misgivings surrounding the formation of the Review Panel, it was truly a pleasure to serve with my fellow Panelists. Each member brought a unique and informative perspective and I truly enjoyed working with and getting to know everyone. A special acknowledgement to Pat Peard, who spent a considerable amount of time interviewing current and former MHRC staff. Her investigation and report sparked some very productive discussions and form the basis of our recommendations.

Thank you.

/s/ James A. Clifford  
September 12, 2016



Chris McMorrow  
Waterville, ME  
649-7898

My Thoughts from experience on Maine Human Rights Commission Task Force  
assembled by Governor Paul LePage

It was a privilege to work with the Maine Human Rights Commission review panel. I found the group committed to the task at hand, patient in explaining some of the legal talk and flexible in both location and timing of the meetings. I learned a great deal throughout the process. However I have a few concerns with the report the group has written:

1. Perception of Bias

The perception among businesses that the Human Rights Commission has bias is contributing to many businesses settling cases rather than asking for a hearing. In 2015 65% of the settlements resulted in monetary benefits to the Complainant and in 2014 68/% of settlements reported Complainants receiving monetary benefits.. I do not see this a pro-business outcome but rather a “let’s not have this cost us any more \$ situation”. Legal Counsel from Maine Human Rights Commission said to a group of us at an educational seminar I attended in 2015, “You do not want to come before the Human Rights Commission”. This made a big impression on me – I believed her! A fellow landlord told me she attended an educational conference where an administrator from MHRC stated “It isn’t if you will be in front of the Human Rights Commission, but when”. These comments are intimidating.

2. The Basic Structure of the Human Rights Commission

The Maine Human Rights Commission is intended to perform both an advocacy role and a decision making role. How can the same person or office do both as there seems to be a conflict of interest in combining those 2 roles. The 2 roles should be separated thereby reducing the perception of bias and if there is real bias, likely reduce it! By necessity, these 2 entities would not answer to the same boss.

Imagine a system where the district attorney’s office also acted as judge in the criminal case!

3. Too Easy to File a Complaint

To sue someone for small claims court, you have to pay a \$55 filing fee. If you want to take someone in front of the Human Rights Commission, you just write a

letter complaining with some allegations. There is NO filing fee currently. A filing fee would eliminate some frivolous complaints. A filing fee would also help reduce serial filers – in 2015 one person filed 12 separate complaints. Currently a peer is working to defend herself where the complainant has accumulated over 600 complaints through multiple filings....the landlord has hired an attorney, the case is considered frivolous however the time spent responding and money spent on legal counsel are very real costs.

There could be some waiver for people who legitimately cannot afford the filing fee – possibly modeled after systems currently in the court system. Possibly the filing fee could help fund separating the advocacy role from the decision making role.

4. Intention – currently not considered relevant

A business can be found in violation of the Maine Human Rights Act simply because they did not phrase something properly. For example: a prospective tenant calls about a 1 bedroom apt. The tenant wanted to put for 2 adults and 3 children in the 1 bedroom apt. The prospective tenant is told (and I paraphrase) no, that is too many “children”. If the landlord said “No, too many people”, he would not be considered in violation. He would be found at fault in this case. Currently INTENT does not matter – despite evidence that the landlord does not discriminate against children as children occupy his other apartments.

5. Law or Guidelines seem vague

Most business people want to be successful as well as work within the legal system. Could the guidelines be written more clearly so we can all understand their meaning and not have the guideline subject to interpretation?

*In summary, there is much to value, respect and appreciate in the Human Rights Act. I feel however that the current climate at the Maine Human Rights Commission is litigious. I prefer there be an atmosphere of cooperation, education, negotiation saving the litigious instances to repeat offenders, blatant acts of discrimination etc.*

Thank you and again, I appreciate the opportunity to work with this esteemed committee assembled to study and comment on the Maine Human Rights Commission.