

Assembly California Legislature

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SACRAMENTO ADDRESS
STATE CAPITOL
SACRAMENTO 95814
TELEPHONE: (916) 445-7333

DISTRICT OFFICE
CIVIC CENTER OFFICE BUILDING
11400 STANFORD AVENUE, SUITE B
GARDEN GROVE, CALIFORNIA 92640
TELEPHONE: (714) 530-7200

RICHARD ROBINSON
ASSEMBLYMAN, SEVENTY-SECOND DISTRICT

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WORKERS' COMPENSATION
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SUBCOMMITTEE ON
EMPLOYEE BENEFITS

January 31, 1979

Letter Report 737

The Honorable Speaker of the Assembly
The Honorable President pro Tempore of the Senate
The Honorable Members of the Senate and the
Assembly of the Legislature of California

Members of the Legislature:

Your Joint Legislative Audit Committee respectfully submits the
Auditor General's letter report on the Division of Fair Employment
Practices.

The auditors are William M. Zimmerling, Audit Supervisor and
J. Peter Bouvier.

Sincerely,

RICHARD ROBINSON
Assemblyman, 72nd District
Chairman, Joint Legislative
Audit Committee



Joint Legislative Audit Committee

OFFICE OF THE AUDITOR GENERAL

California Legislature



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January 25, 1979

Letter Report 737

Honorable Richard Robinson
Chairman, and Members of the
Joint Legislative Audit Committee
Room 4158, State Capitol
Sacramento, California 95814

Dear Mr. Chairman and Members:

In response to a resolution of the Joint Legislative Audit Committee and under the authority vested in the Auditor General by Section 10527 of the Government Code, we have reviewed the method by which the Division of Fair Employment Practices (DFEP), Department of Industrial Relations, screens docketed discrimination complaints.

We found that DFEP has no consistently applied criteria to ensure that marginal complaints or complaints better handled by other means do not enter its investigation system. The practice of investigating most of the complaints filed has contributed to: (1) wasted investigative effort, (2) a sizable complaint backlog, (3) delayed resolution of complaints and (4) many complaints being closed for lack of evidence or administrative reasons such as lack of jurisdiction.

Introduction

The Division of Fair Employment Practices (DFEP) is responsible for protecting the people of California from discriminatory practices in employment, housing and public accommodations. It is authorized to accomplish this through such means as education, affirmative action coordination and complaint resolution. DFEP's annual budget increased from \$1.6 million in fiscal year 1975 to \$5.7 million in fiscal year 1979. During this same period DFEP staff increased from 69 to 213 members.

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We reviewed DFEP's complaint resolution function because DFEP expends over 90 percent of its resources to process discrimination allegations. DFEP's caseload has increased greatly in the last several years as the Legislature has expanded DFEP's jurisdiction. Although DFEP has attempted to improve complaint handling procedures, little effort has been directed to set standards that would adequately screen complaints that do not warrant investigation. These marginal complaints, coupled with an expanded statutory mandate, contribute to the increasing backlog of unresolved complaints.

DFEP has recently been required to bring an unresolved charge of discrimination to written accusation within one year of filing the complaint; the public hearing enforcement remedy terminates after one year. This time limitation is complicated by two additional factors: (1) DFEP must be represented at judicial hearings by staff from the Attorney General's Office and (2) accusation hearings must be held before an officer from the State Office of Administrative Hearings. The time necessary to coordinate the services of these offices further emphasizes the need to establish effective complaint acceptance standards.

Early Resolution of Complaints Not
Warranting Investigation Would Make
DFEP More Responsive to Expanding Workload

DFEP enters docketed complaints into its investigation system without always determining whether it has (1) sufficient information to initiate an investigation, or (2) resources available to investigate the complaint to resolution. As a result many of the complaints investigated are neither conciliated nor brought to public hearing but rather are eventually dismissed.

During the period January 1, 1978 through July 25, 1978, 3,967 new complaints were added to the prior backlog of 4,006 complaints. During this period only 2,535 complaints were closed. In July, 1,065 complaints were filed at DFEP field offices and only 602 were closed.

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 Chairman, and Members of the
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INCREASES IN DFEP'S INVESTIGATION BACKLOG

<u>Month (1978)</u>	<u>Complaints Filed</u>	<u>Complaints Closed</u>	<u>Number of Complaints Added to Backlog</u>	<u>Cumulative Backlog</u>
Prior Years Backlog				4006
January	853	149	704	4710
February	711	161	550	5260
March	949	132	817	6077
April	982	338	644	6721
May	1025	437	588	7309
June	917	716	201	7510
July	<u>1065</u>	<u>602</u>	<u>463</u>	<u>7973</u>
Total	<u>6502</u>	<u>2537</u>	<u>3967</u>	<u>7973</u>

After docketing a complaint alleging discrimination, DFEP opens an investigation file. This procedure is based upon DFEP's interpretation of a 1976 California Appellate Court decision that states administrative procedures must be properly invoked and exhausted before a complainant may resort to judicial process. This procedure allows many cases of questionable merit to enter the investigation process. Dicta contained in a January 1977 California court decision indicated that DFEP has discretion over which filed complaints it processes for investigation and resolution based upon budget and staff limitations. Also, 1977 legislation permits DFEP to issue to a complainant the right to file a civil action in Superior Court (1) when DFEP determines it will not bring a complaint to accusation or (2) at the end of 150 days.

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DFEP should prepare standards to permit a more rapid determination of complaint merits. Standards written to conform with statutory and case law criteria would allow the screening, closing and issuing of right-to-sue letters for complaints more appropriately handled by other means such as civil action. Thus, more effective investigation and resolution of appropriate complaints would be permitted.

The problems caused by a lack of standards have been noted in four separate reports during the last four years. DFEP stated that complaint investigation standards are being developed; however, our review disclosed no substantial progress in this area.

Conclusion

Prior to entering filed complaints into its investigation system, DFEP does not determine whether it has (1) sufficient information to initiate an investigation, and (2) resources available to investigate the complaint to resolution. This has contributed to:

- Wasted investigative effort
- A sizable complaint backlog
- Delayed resolution of complaints
- Many complaints being closed for lack of evidence or administrative reasons.

Although the problem of an increasing backlog of unresolved complaints has been brought to the attention of and acknowledged by the Division of Fair Employment Practices, substantial steps have not been taken to remedy the problem. With limited staffing and an increasing workload, we believe DFEP's considerable backlog may continue to grow. This may prevent complaints from taking timely civil action. Further, because DFEP cannot bring an accusation after one year, it may be unable to resolve worthwhile complaints that are not acted upon in a timely manner.

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Recommendation

We recommend that the Division of Fair Employment Practices prepare investigation standards within the statutory latitude provided by the Legislature and the scope of administrative discretion recognized by the California courts. Such standards could be established to control the number of marginal complaints investigated and yet protect the rights of the individual to seek administrative or civil relief from discriminatory practices. We also recommend DFEP implement a program to ensure that all field personnel are adequately trained to apply the new standards.

Matters for Consideration
By the Legislature

The need for standards has been brought to the attention of DFEP several times in the recent past. Because no substantial action has been taken, we suggest the Legislature consider requiring DFEP to report to the Senate Industrial Relations Committee and Assembly Labor, Employment and Consumer Affairs Committee six months after the release of this report on its progress in preparing and implementing the new standards.

Respectfully submitted,



THOMAS W. HAYES
Acting Auditor General

Staff: William M. Zimmerling, Audit Supervisor
Peter Bouvier

Attachments

Auditor General Comments on the Division
of Fair Employment Practices' Response
Agency's Response dated December 12, 1978
Agency's Response dated January 15, 1979

AUDITOR GENERAL COMMENTS ON THE
DIVISION OF FAIR EMPLOYMENT PRACTICES' RESPONSE

The attached responses by the Division of Fair Employment Practices (DFEP) do not accurately address the problem we identify in our report. At the time of our field work, DFEP had a large and growing backlog of cases. We recommended establishing standards to reduce the number of docketed cases entering DFEP's investigation system.

DFEP's first response (dated December 11, 1978) misinterpreted this report as recommending that DFEP not docket all cases. The report does not recommend that. It does, however, recommend that DFEP establish standards for screening cases after they are docketed to ensure that marginal complaints or complaints better handled by other means do not enter its investigation system. Specifically, DFEP presently does not determine whether it has (1) sufficient information and (2) resources available to reasonably expect to investigate the case to resolution.

DFEP's second response (dated January 15, 1979) states that the existence of administrative closures does not necessarily mean that these cases all lacked merit. We agree. We do not contend that there should be no administrative closures. However, we believe that proper standards could reduce the backlog by screening out certain docketed cases before they are entered into DFEP's investigation system.

Although we did not analyze the backlog or the administrative closures, we did find indications that some cases might not have been entered into the investigation system if DFEP had better screening standards. For example, of the 174 cases ratified closed by the DFEP Chief on June 16, 1978, 15 were closed because DFEP did not have jurisdiction and 58 were closed because of insufficient evidence. Of the 187 cases ratified closed on July 10, 1978, 9 were closed due to lack of jurisdiction and 57 were closed because of insufficient evidence.

Our report states that DFEP had a large and growing backlog of cases. Any cases which could be screened out before entering DFEP's investigation system would reduce that backlog. Proper screening could also reduce the amount of wasted investigative effort, reduce the delay in resolving complaints, and to some degree lessen the number of complaints being closed for lack of evidence or administrative reasons.



DEPARTMENT OF INDUSTRIAL RELATIONS

455 GOLDEN GATE AVENUE
SAN FRANCISCO 94102

ADDRESS REPLY TO:
P.O. Box 603
San Francisco 94101

December 12, 1978

John H. Williams
Auditor General
925 L Street, Suite 750
Sacramento, CA 95814

Dear Mr. Williams:

You will find enclosed the response to the draft report from the Auditor General prepared by the Division of Fair Employment Practices. You will note that the response is accompanied by attachments which serve to elaborate on some of the points made in the report.

The response is somewhat lengthy, but I felt it was important that the Division respond to the points raised in the Auditor General's report with some specificity. If you have any additional questions with regard to this response, please don't hesitate to contact me.

Sincerely,

DONALD VIAL
DIRECTOR

DV/lmk

Attachments

**DEPARTMENT OF INDUSTRIAL RELATIONS**455 GOLDEN GATE AVENUE
SAN FRANCISCO 94102ADDRESS REPLY TO:
P.O. Box 603
San Francisco 94101**DIVISION OF FAIR EMPLOYMENT PRACTICES**

December 11, 1978

John H. Williams
Auditor General
925 L Street, Suite 750
Sacramento, CA 95814

Dear Mr. Williams:

Some preliminary general remarks are appropriate before the Division can address the specific points made in the draft Auditor General's report. For example, it is important to describe the legal responsibilities of the Division to the protected groups it was created to serve. The mandate of the Division is to prevent and eliminate discrimination. The legislature has been given the Division tools to accomplish this monumental purpose--class and individual complaint resolution powers, conciliation authority and education. The history of the Civil Rights Movement and the record of the Congressional debates of the 1972 amendments to Title VII established the inefficacy of voluntary and educational efforts as a means of eliminating discrimination. The Division, therefore, expends the largest percentage of its resources investigating complaints and recently increasing the number of cases that go to public hearing.

In creating procedures for implementing its mandate, the Division cannot be guided exclusively by fiscal and staffing considerations. A balance must be struck between the need to provide members of the protected classes with an opportunity to have their claims examined and the need for the Division to operate within the perimeters of its resource capability. All governmental agencies must operate efficiently and within the limits of their budgets. However, where public service is subordinated to administrative efficiency, a government entity, and indeed the government itself, has lost its reason for existence.

It is acknowledged that much improvement is needed in the management of the Division. For most of the twenty year history of the Division, there have been funding deficiencies that in large

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part explain the inability of the Division to effectively manage its staff and caseload. Periodic expansions of the jurisdiction of the Division were neither accompanied by additional staffing to enable staff to handle the increased caseload, or provisions for training to enable staff to effectively interpret and enforce the new laws. Division staff are actively engaged in bringing about the changes necessary to create an effective enforcement agency.

It is unfortunate that this audit was done during a time when the Division had not been given the opportunity to fully address some of the serious management problems legitimately addressed in previous reports. The Chief of the Division did not assume her responsibilities until September 1977. Four months later, AB 738 became effective requiring fundamental changes in the procedural operations of the Division. During the same period of time, 51% of the Division investigators consisted of new hires. Thus, during the months covered by the audit, the Division was struggling to train and orient a significant percentage of new personnel. During this same period of time in an attempt to train new investigators and refine the case screening skills of veteran investigators, the Division took advantage of an EEOC-sponsored week-long training course conducted in Washington, D.C. This training was required by EEOC as a condition of receiving funds although the Division would have taken advantage of the opportunity in any case. Most of the staff, including attorneys and investigators, were gone for one week during staggered periods of time. This reduced our ability to handle cases coming in during that period. The net result is that we lost 1.84 consultant years since we could not cease accepting cases during this period. Moreover, it was imperative that the Division provide training since previous reports consistently noted the need for such training. It is certainly not surprising that during the months from January to April 1978, many cases were taken in that under other circumstances would not have been accepted.

Two more points must be made before addressing the specifics of the report. The report notes an increase from 1.6 million in 1975 to 5.7 million in 1979. These figures are misleading because they fail to identify the source of the funding. The Division's 5.7 million budget includes 1.6 million of Title II monies, \$642,720 in EEOC monies and \$175,000 in funding from the Office of Criminal Justice Planning. These funds are subject to specific uses. Title II funding, for example, was given to the Division in order to reduce

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the backlog and is subject to cancellation in October, 1979. It is, therefore, not available for use in training, to establish permanent positions or to acquire the mid-management personnel the Division so desperately needs. The EEOC funding is dependent upon the Division meeting certain standards and is subject to reduction if those standards are not maintained. Funding from the Office of Criminal Justice Planning is no longer available as the Division eliminated the project for which the funding was given upon determining that it was not cost effective.

While the Division does not quarrel with the essential accuracy of the caseload figures noted on Page 3 of the report, they are misleading in that they are not sufficiently refined to give a comprehensive picture of the existing caseload or of the Division's projections for reduction of the caseload by the end of the year. The rest of this letter will address the specifics of the report.

Early Resolution of Complaints Not Warranting Investigation Would Make DFEP more Responsive to Expanding Workload

The report states the Division accepts more cases than it can handle with existing resources, explaining that this is due to a failure to develop and implement case acceptance standards. The report is not clear on just what these standards should be but does imply that whatever they are they should operate to reduce the caseload to a number that can be handled within existing resources. Thus, decisions to accept cases should be premised not on interpretations of existing statutory coverage, but on a recognition of fiscal constraints. The Division would find this acceptable, and indeed engages in some determinations of this type. However, the report fails to note one vital fact. Under the Fair Employment Practices Act as amended by Stats. 1977, Ch. 1188, a complainant whose case is not filed (or docketed) with the Division never acquires a right to sue in state court. Thus, Division decisions made at the intake stage are crucial.

The report seems to recognize this fact, but implies that the Division, by virtue of an unnamed "unpublished" opinion has the power to refuse to docket a case notwithstanding. A call to the writer of the report elicited the information that the allusion was to Bennett v. Borden, which is published at 56 Cal.App. 3d 706 (Third District 1976). The opinion does hold that a plaintiff seeking to go to Superior Court under the FEP Act (as it stood in 1976) must first exhaust the administrative remedy provided by

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the FEPC complaint process. The report claims that our "interpretation" of this holding underlies our practice of "opening a file on complaints alleging discrimination." It seems self-evident that the Division opens files on discrimination complaints because that is what the FEP Act permits and requires the Division to do. The Division is reluctant to prejudice a complainant's ability to get into court by refusing to take complaints altogether, merely on the basis of our own opinion that the charge is weak. Given the failure of the Division to definitively interpret the law and the heavy burden on investigators, it is not beyond the realm of possibility that the Division may be wrong. Again, the legal basis for this practice is the FEPA itself, which now explicitly requires that a complainant going to Superior Court come to the Division first. At the time Bennett was decided, there was not an explicit (nor, probably, an implicit) private right of action under the FEP Act in state court, so it is doubtful that the agency worried much about protecting complainants' court rights before January 1, 1978, under Bennett or any other case.

The report goes on to say that "dicta contained in a January 1977 California court decision" gives the Division discretion whether to investigate complaints that have been filed. This statement appears to say that, even assuming the Division takes all complaints that do allege discrimination sufficiently, the Division has discretion not to do any investigation on some of them (presumably those of "questionable merit"). This discretion is exercised explicitly in the Division's policy to refuse to prosecute only certain specifically defined Unruh, class action, and sex/grooming standard cases (See Attachments A, B and C). The report appears to recommend a policy of refusing to do any investigation on certain complaints because they are borderline, not because they fall in substantive areas that we choose not to pursue.

The report also refers to Mahdavi v. FEPC, 67 Cal. App. 3d 326 (First Dist. 1977). The dictum referred to occurs at pages 335-36 of the opinion, and in fact is the language of the court in a previous case, Marshall v. FEPC, 21 Cal.App.3d 680,685 (Second Dist. 1971). In Marshall and Mahdavi, the courts were ruling on the question of whether the Commission's pre-accusation closures of complaints rested on sufficient investigations of the complaints. In both cases, the Commission's consultants had made some investigation, and the precise ruling of both opinions on this issue was that both investigations were sufficient, or that it was not an abuse of administrative discretion not to have done more thorough

investigations and go on to hearing. 21 Cal.App.3d at 685; 67 Cal.App.3d at 337. In the course of making these rulings, both courts addressed statistical arguments made by petitioners/complainants that the FEPC closed a very large proportion of its complaints for insufficient evidence. The thrust of these arguments appears to have been that the agency was bowing too much to caseload pressures and should be doing a more thorough job on its complaints. Both courts stated that they were not sure what to infer from the statistics, but that it was surely within the discretion of the agency to fully prosecute only promising cases because of resource pressures, as long as the agency's "legislative mandate" was not violated.

Several aspects of both cases must be noted. First, the plain implication of Mahdavi, at least, is that the agency has no discretion not to take a complaint at all on charges that sufficiently allege discrimination. Whatever Mahdavi may have said about the nature and scope of the investigation of a complaint, it leaves little doubt that a complaint sufficient on its face must be taken. Thus, Mahdavi is additional support for the "practice" of docketing even potentially weak complaints that the report attacks when it cites Bennett.

Second, neither the rulings nor the dicta of Mahdavi and Marshall indicate in any way that the agency does not have an obligation to make some kind of investigation of any complaint it is required to take. Both opinions explicitly point out that some investigation was done, and both opinions merely say that this investigation was enough. Indeed, Mahdavi states that "the FEPC fulfilled its obligation to investigate appellant's complaint." 67 Cal.App.3d at 337(emphasis added). The dicta, moreover, indicate only that it would be open to the agency not to do full investigations and hearing of weak cases. The implication is that failure to do some investigation on any case might "violate the legislative mandate," an implication consistent with the actual rulings in the cases and with the statutory language of present Section 1422:

After the filing of any complaint alleging facts sufficient to constitute a violation of any of the provisions of Section 1420 or 1420.1, the Division shall make prompt investigation in connection therewith. (emphasis added)

Finally, the report implies that a court decision that rejects the Division's ability to issue right-to-sue letters is on appeal

in the Supreme Court. Not so. The decision referred to is Howard v. East Texas Motor Freight, an action brought in Superior Court on FEPA and tort claims. That court granted East Texas Motor Freight's demurrer (in effect, a move to have the court throw out the case) as to the FEPA claim. East Texas Motor Freight's claim was 1) that the complaint was filed with DFEP late in 1977 and the private right of action was not available then, whether or not DFEP has since issued a right-to-sue letter, and 2) that in any event, the right-to-sue letter we did issue was improperly issued before the 150 days had elapsed. The plaintiff appealed and lost in the appellate court. The plaintiff took it to the California Supreme Court and the Division filed an amicus brief. It appears the Supreme Court and probably also the appellate court denied the appeal only on the grounds that the appeal was premature, since there was still to be a trial on the tort claim. Thus, the appeal did not decide the issues bearing on the Division's ability to issue right-to-sue letters. Even if it had, however, adverse rulings on both issues would not produce the result the report claims, since East Texas Motor Freight was asserting only that no pre-1978 private right of action exists and that the Division must wait 150 days before issuing right-to-sue letters. Neither assertion would prevent us from issuing the letters after 150 days, and that practice would not drain resources during the 150-day period, since we could simply sit on weak cases during that period and issue the letter after the period had run. Furthermore, the Division's issuance of a right-to-sue letter does not somehow stimulate more court actions and, thus, relieve us of cases; in general a complainant will have decided to go to court long before the letter is issued.

Statistics on DFEP's Increases in Investigation Backlog

The Division accepts the essential accuracy of the statistics quoted on Page 3 of the report. However, these statistics are misleading due to their lack of refinement. For example, the statistics do not note the differences among offices. With respect to establishing efficient case processing procedures, the San Francisco office presents the most serious problem to the Division. It is inappropriate and unfair to the constituent community the DFEP was created to serve to institute statewide screening procedures that cut off the possibility of an investigation of a complaint because of management difficulties in one office (Refer to Department of Finance Report D78-8, March 1978).

These statistics are also misleading in that they fail to reflect the worksharing arrangement between the Division and EEOC.

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The Committee is probably aware of the fact that under Title VII law, the EEOC is required to defer to the State DFEP all cases alleging discrimination under Title VII. The worksharing agreement between the Division and EEOC provides among other things, for a division of labor between the two agencies. Cases that are initially filed with the EEOC are handled by that agency. Those initially filed with DFEP are handled by the Division. The figures on Page 3 of the report fail to reflect the percentage of cases filed that are being processed by EEOC. For the period April to July, 1978, 15% of the FEP caseload is being processed by the EEOC. In January, 1979, these case closures will be reflected in the Division statistics, thus reducing the Division caseload inventory.

In addition, the report fails to analyze caseload statistics within the framework of the new procedures the Division is developing using the San Francisco office as a model office. The Division expects that significant caseload reductions will be effected through these changes without penalizing the complainant by failing to docket complaints. (see Attachment D for a description of new procedures being developed by the San Francisco office). These procedures reflect the Division's attempt to balance the legitimate concerns of the Auditor General with regard to production levels and the requirement of the law that jurisdictionally sufficient complaints be examined by the Division.

The report seems to imply a causal relationship between the docketing of "too many" complaints and the fact that many of the case closures are for administrative reasons or for lack of evidence. At the outset it is not clear to the Division how such causal relationship can be drawn. Especially, in view of the fact that the report fails to define administrative closures. 21.3 percent of administrative closures are because the complainant elected court action, specifically requesting no investigation, only a right-to-sue, or because for one reason or another the complainant wishes to withdraw the complaint. Many of these cases are the result of the respondent and complainant resolving their differences privately. This figure also includes a small percentage of complainants who cannot be found when the case is ready for investigation, thus, resulting in an administrative closure. Approximately 14.10% of the administrative closures are based on a preliminary determination that the case cannot be proved. This may or may not mean the case lacks merit. It represents the decision of the Division that within the framework of our existing resources, the Division cannot find merit. The Division is not so assured of its investigative infallibility that it is willing to make this determination before docketing, thus, depriving the complainant of at least the possibility of some judicial scrutiny

of this administrative decision.

It is simply not true to state, as the report does, that the division fails to screen cases for jurisdictional purposes. The fact that some subsequent dismissals of docketed cases are based on lack of jurisdiction does not belie this claim. Some of these dismissals are the result of mistaken interpretations of the law.* Other non-jurisdictional cases may be docketed because the information necessary to determine jurisdiction at the intake stage is not available to the complainant and some preliminary contact with the respondent is required in order to make the determination (See Attachment E - Directive on Screening Procedures). All such determinations do not involve the clear-cut issues the report suggests. An example is the situation where a respondent claims employment of less than 5 persons, but there is evidence of ownership of other entities with ties so close to the entity complained against that respondent may in fact come within Division jurisdiction. In such a close question it would be unfair of the Division to cut off the possibility of judicial scrutiny through an administrative decision not to docket the case.

In addition to jurisdictional screening, the report fails to note the general intake screening mechanisms. In the month of October 53.84 percent of intake interviews did not result in a docketed complaint. This is either because the complaint does not come within our jurisdiction, it is self-disproving, or the complainant fails to give information relative to the allegations which he or she can be legitimately expected to have. The whole purpose of the case processing procedure being developed in the San Francisco office is to provide for early screening of cases that are of dubious merit at the intake stage in order to avoid a "full" investigation of cases that do not merit such.

Conclusion

The Auditor General's draft report does not accurately or comprehensively address what are legitimate and serious concerns Division personnel share. Moreover, the report fails to provide

*The Division staff have been called upon to enforce a law that has never been definitively interpreted. It is not surprising, therefore, that mistakes are made. Indeed, the staff is to be commended for its success in enforcing the law notwithstanding lack of guidelines and regulations explaining the law.

the Division or the Committee a clear analysis of what these problems are or useful recommendations for resolving them. This is due in large part to the fact that the report is premised on some erroneous assumptions about the approach the Division should take to its legislative mandate. Any examination of the law would make it clear that the purpose of the Division is not to keep abreast of its caseload. The Division was created by the Legislature to "prevent and eliminate" discrimination. To lose sight of that overriding purpose defeats the intent of the Legislature. While it is clear that the Division must operate efficiently, that efficiency must not be at the expense of the class of persons for whom the legislative protections were devised. The focus of the Division is to provide within the framework of existing resources as much protection to as many people as possible. The focus of the report appears to be to create an optimal number of case filings and case closures, even if to do so arbitrarily limits the protections provided by the law. Although fiscal considerations will be taken into account in devising Division policy, the Division refuses to make merit determinations based upon fiscal considerations alone.

The report suggests that the increased caseload leading to backlogs may prevent complainants from taking timely civil action. This is unlikely since the FEPA mandates notice to all complainants of their right to sue upon the passage of 150 days or earlier if the Division determines within that time that an accusation will not issue. Moreover, the Division has made an administrative decision to provide for a second notification if the case does not proceed to accusation within one year. It is ironic that the report would express this concern for the possible loss of a complainant's right to sue while at the same time urging adoption of a screening procedure that would jeopardize that very right.

The report incorrectly states that the Division does not screen for jurisdiction. The Division screens for jurisdiction prior to docketing and for merit after docketing in order to protect the right to sue and to provide for some preliminary examination of the substantive allegations.

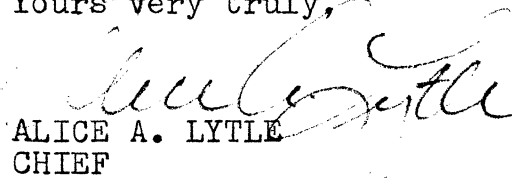
Administrative agencies are given discretion to make certain workload adjustments to meet the exigencies of budgetary constraints. They are not permitted to ignore their clear legislative purpose, however.

It is the hope of the Division that the Legislature will see fit to fund this agency to an extent consistent with its workload

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and not adjust its workload to meet the funding. The State general revenue portion of the Division's budget is 2.9 million. This does not evidence sufficient commitment to the goal of eliminating discrimination in all its forms.

Yours very truly,



ALICE A. LYTLE
CHIEF

AAL/lmk

Attachments



DIRECTIVE TRANSMITTAL

Transmittal Number

44

Date of Distribution

September 15, 1960

ATTACHMENT A

1. SUBJECT. UNRUH ACT CASES.
 2. PURPOSE. To provide guidelines for accepting cases alleging violations of the Unruh Act (Civil Code Section 51).
 3. ORIGINATOR. Office of the General Counsel.
 4. RESPONSIBILITIES. Consultants, senior consultants and lawyers share the responsibility for implementing this directive.
 5. DISTRIBUTION. Consultants, senior consultants, area administrators, clerical office supervisors, legal staff and headquarters administrative staff.
-
6. BACKGROUND. The Unruh Civil Rights Act (Civil Code Section 51) expressly prohibits discrimination by business establishments, including those selling or renting real property, on the basis of sex, race, color, religion, ancestry, and national origin. The Act has been interpreted to prohibit, in addition, discrimination on any arbitrary basis. The Division does not have the personnel or resources to enforce the Act against any and all arbitrary discrimination, and must therefore establish some priorities for exercising its jurisdiction under the Act. That is the purpose of these guidelines.
 7. CASES TO BE ACCEPTED.
 - a. Grounds Specifically Enumerated in the Act. We will accept Unruh complaints based on the Act's specifically enumerated grounds (sex, race, color, religion, ancestry or national origin), except that complaints involving grooming restrictions alleged to discriminate on the ground of sex will not be accepted unless Division legal counsel has determined that the harm involved makes appropriate our exercise of jurisdiction.
 - b. Other Grounds. We will also accept Unruh complaints of discrimination on the ground of marital status, medical condition and age

(expressly listed as protected classes in the Rumford or FEP Acts). However, after initial investigation sufficient to determine the defense asserted by the respondent, legal counsel should be consulted to determine whether the case should be pursued. Legal counsel will determine whether the defense is sufficiently rational so that arbitrary discrimination could not be proved.

3. CASES NOT TO BE ACCEPTED.

- a. Physical Handicap. We will not accept Unruh Act complaints based on physical handicap. Instead, prospective complainants will be informed that their rights are protected under Section 54.1 of the Civil Code. They should be advised (give each prospective complainant a copy of Attachment A) that they may bring suit under Section 55, or attempt to get the Department of Rehabilitation (through the Attorney General), the city attorney, the district attorney or the Attorney General to sue for an injunction against the discrimination.

Note that this applies only to non-employment cases. The Division will continue to accept complaints of discrimination on the basis of physical handicap in employment, under the FEP Act.

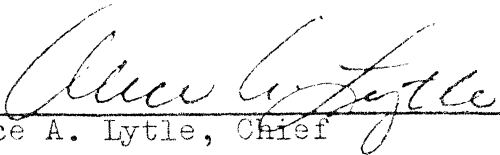
- b. Other Cases. We will not accept other complaints within our Unruh Act jurisdiction, i.e., complaints alleging discrimination on bases other than those enumerated in the Act or in the FEP Act or Rumford Act. This excludes, for example, complaints alleging discrimination in housing against families with children, discrimination in housing against gay people, discrimination in restaurants against barefoot people, discrimination in housing against people who are welfare recipients, are mentally retarded or have pets, and discrimination in housing against people with criminal records or poor credit ratings. However, consultants should be alert to identify cases in which the respondent's asserted basis for discrimination is a pretext for exclusion on the basis of race, national origin, etc.

In all cases not accepted, an Inquiry Report should be filled out and forwarded to the headquarters EDP coordinator. The Division wishes to identify the

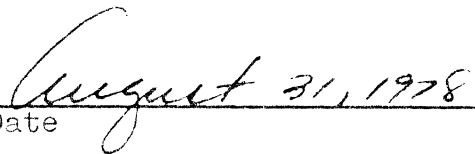
kinds of people, discrimination and facilities involved in potential Unruh Act cases.

Finally, the prospective complainants should be given Attachment B, which explains that our limited personnel and resources require us to concentrate on the persons expressly enumerated in the statutes we enforce.

9. APPROVAL.



Alice A. Lytle, Chief



Date

- ATTACHMENTS: A - To Physically Disabled Persons
Experiencing Discrimination in
Housing or Public Accommodations.
- B - To Persons Wishing to File Unruh Act
Complaints.

ATTACHMENT A

TO PHYSICALLY DISABLED PERSONS EXPERIENCING
DISCRIMINATION IN HOUSING OR PUBLIC ACCOMMODATIONS

Section 54.1 of the California Civil Code prohibits discrimination against physically disabled persons. A California court of appeal has determined that Section 55 is the exclusive remedy for such persons. The Division of Fair Employment Practices therefore does not pursue complaints of such discrimination.

Accordingly, you may bring suit for damages under Civil Code Section 55 against the person who discriminated against you, or you may under Section 55.1, attempt to get the Department of Rehabilitation (through the Attorney General), the city attorney, the district attorney, or the Attorney General to sue for an injunction against the discrimination.

ATTACHMENT B

TO PERSONS WISHING TO FILE UNRUH ACT COMPLAINTS

Although the Unruh Civil Rights Act, California Civil Code Section 51, has been interpreted to prohibit any arbitrary discrimination by business establishments, the Division of Fair Employment Practices lacks the personnel and resources to pursue all such complaints other than those alleging discrimination based on sex, race, color, religion, ancestry, national origin, age, medical condition or marital status. Accordingly, we are unable to accept your complaint.

Under Civil Code Section 52, however, you may bring suit against the person who has discriminated against you on an arbitrary basis.

DIVISION OF FAIR EMPLOYMENT PRACTICES

Transmittal No. 018

ORDER NO. xvi *

January 1, 1978

ATTACHMENT B

1. SUBJECT. INTERIM HANDLING OF CLASS COMPLAINTS.
2. PURPOSE. To instruct regarding how to process class complaints and what to advise parties wishing to file class complaints.
3. ORIGINATOR. Office of the Chief.
4. RESPONSIBILITIES. Members of the enforcement staff who perform intake.
5. EFFECTIVE DATE. January 1, 1978
6. CANCELLATION. On the effective date of the "permanent" procedures for class complaints, which will be subsequently issued, this order is to be considered cancelled and is to be destroyed.
7. DISTRIBUTION. Area administrators, senior consultants, consultants, clerical office supervisors.

8. INTERIM PROCEDURES.

As you know, the new DFEP legislation permits the agency to handle "class" complaints, in which one or several complainants represent an entire group of individuals who are claimed to be aggrieved in the same way as the specific complainant or complainants. Because of the more urgent need to reorganize the individual complaint process to meet the requirements of the new legislation, we will be unable to develop and implement new standard class complaint procedures until a later time, possibly well after the point at which new standard individual complaint procedures go into effect.

At the same time, the new legislation requires us, starting January 1, 1978, to accept and investigate a class complaint when the charging party asks to file one. In order to satisfy this requirement before the new standard class complaint procedures are put into effect, we will operate under the following instructions:

- a. No Referral to Legal Staff. The current procedure in some compliance offices of referring class charges to the legal staff for review will cease on January 1, 1978. No referral of class complaints of any kind to the legal staff will be necessary.
- b. No Expansion of Individual Complaints. No individual charge will be expanded to class dimensions on the initiative of the Division. Where a charging party wants to file a complaint covering only the charging party, the complaint should be taken in that form, even if the fact situation would support a promising class complaint. A

* Consecutive Roman numerals identify orders issued prior to development of a standard identification scheme.

class complaint should be taken only when the charging party voluntarily expresses a desire to file such a complaint.

- c. Choice of Individual or Class Treatment. When a charging party asks an interviewing consultant to file a class complaint and the consultant decides the complaint meets all other requirements for filing, the charging party should be advised that he or she has the option of having the complaint handled on an individual basis until the Division is able to begin a full, class-wide investigation.

The consultant should then explain to the charging party that the agency will not have standard class complaint procedures in effect until at least mid-1978. The consultant should also explain that, even under the regular class action procedures in the future, the agency will simply not be able to prosecute every class complaint all the way to a hearing. The law permits the Division Chief to choose, after some investigation of a class complaint, whether to proceed further on a class-wide basis or only on an individual basis. Due to limited resources, the Chief will be forced to exercise this discretion on many class complaints.

The complainant should be advised that every effort will be made to complete the processing of individual complaints within the 12 month period permitted. The consultant should explain that interim treatment may produce a conciliation offer that would remedy the charging party's own complaint but give no relief to the class complaint, which would then be dismissed unless another complainant came forward to take the remedied complainant's place.

Attachment B is a handout explaining this choice. It should be given to any charging party requesting a class complaint, and the consultant should use it to guide his or her statements to the charging party during the interview.

Simply posing this choice to charging parties will obviously discourage filing of class complaints and encourage charging parties to give the agency permission to resolve class complaints on an individual basis only. Although the agency is forced into this situation by a shortage of resources, it is by no means hostile to class complaints in general. In handling this problem, then, consultants should not actively discourage class complaints, but should confine themselves to spelling out the options and letting charging parties make their own decisions.

- d. Form of Class Complaints. When a charging party does ask to file a class complaint, the complaint should be drafted in the usual way, with numbered allegations in which the charging party states what happened to him or her. To these numbered allegations there should then be added a final, unnumbered paragraph stating:

I am making this Complaint on behalf of myself and all individuals who have been, are now, or will in the future be similarly aggrieved.

A sample complaint is attached to these instructions (see Attachment A).

- e. Disposition of Class Complaints. If the charging party decides to have his or her complaint handled on an individual basis before standard class treatment can be implemented, the compliance staff should treat the complaint in the same fashion as any individual complaint. The only exceptions to this rule are 1) that the complaint should be docketed and served in full class form (as in point "d" above), and 2) that if the Respondent for some reason volunteers to conciliate as to the entire class, such an offer should be considered.

Respondent contact should be made, if otherwise appropriate, and should address only the individual allegations in the complaint. If, after docketing and service of the complaint, a consultant is assigned and can begin investigation of the complaint, the investigation and any efforts at field resolution should address only the individual allegations in the complaint. If the respondent queries as to why the class aspects of the complaint are not being dealt with, simply explain that "the agency has decided to deal only with the individual aspects of the complaint at this time." No further explanation is necessary or should be offered.

If the charging party does not want his or her complaint handled on an individual basis but prefers to wait for a class investigation, there should be no respondent contact. The case file should be given to the OD Senior with a note indicating that the case involves a class complaint and that the complainant wants only a full class investigation. These complaints should be docketed and served in class form and then filed separately to await class treatment.

- f. Disposition of EEOC Referrals. No EEOC referral that comes to the Division in individual form will be expanded to class dimensions on the initiative of the Division. If such an EEOC charging party responds to a Division call-in letter by requesting a DFEF class complaint, that request should be handled in the manner set out in points a through e above.

If an EEOC referral comes to the Division in class form, the Division must take the class complaint. A call-in letter should be sent to the charging party. If the charging party responds and continues to desire a class complaint, such a complaint should be taken and handled in the manner set out in points a through e above.

- g. Identification System and Tickler System for Class Complaints.

Case numbers assigned to class complaints will include the following codes on their right ends:

DIVISION OF FAIR EMPLOYMENT PRACTICES

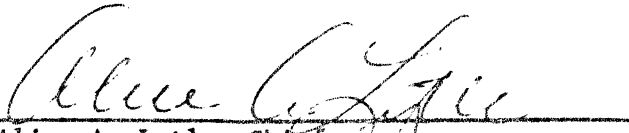
Transmittal No. 018
ORDER NO. xvi
January 1, 1978

CCI - Class complaints to be treated as individual complaints on an interim basis.


CCO - Class complaints to be treated only as class complaints.

Each enforcement office is to set up a 3"x 5" card file for all class complaints. This file is to be used as the basis of a tickler system to be set up by each office to ensure that a notice of right to sue ("right-to-sue letter") is sent out at the appropriate time for each case.

9. OBSOLETE MATERIAL. Notice No. 1, 9-15-77, "Selection of the Initial Class action complaints." (Distributed to San Francisco complaint unit only.)
10. APPROVAL.



Alice A. Lytle, Chief



Date

ATTACHMENTS:

- A - Sample complaint with class language added
- B - Division of Fair Employment Practices Procedures for Class Complaints

DIVISION OF FAIR EMPLOYMENT PRACTICES

Transmittal No. 018

ORDER NO. xvi

January 1, 1978

Attachment A (Sample)

COMPLAINT OF EMPLOYMENT DISCRIMINATION

UNDER CALIFORNIA FAIR EMPLOYMENT PRACTICE ACT

File: FEP _____

TO: FAIR EMPLOYMENT PRACTICE COMMISSION, State of California — Agriculture and Services Agency

COMPLAINANT'S NAME _____

STREET ADDRESS _____ APT. OR ROOM NO. _____

CITY AND ZIP CODE _____ COUNTY _____ PHONE _____

I WISH TO COMPLAIN AGAINST _____

STREET ADDRESS _____

CITY AND ZIP CODE _____ COUNTY _____ PHONE _____

AND (OTHER PARTIES, IF ANY) _____

Describe incident or reasons on which you base your complaint that discrimination was practiced because of your race or color;

religious creed; national origin; ancestry; sex; age; physical handicap.

Include date and place of alleged discrimination.

1. On September 15, 1977, I called the respondent in reply to an advertisement in the Modesto Bee for a "receptionist" position with the respondent.
2. The woman who answered the telephone said "Modesto Construction Company". I asked if the receptionist position advertised was still open, and she replied that it was. She asked me if I had any experience as a receptionist or in other kinds of office work.
3. When I replied that I have 25-30 years of experience as a secretary and receptionist, the woman on the telephone asked my age. When I told her that I am 51, she said that she was sorry but the company had set a maximum age limit of 35 years for the job and I was therefore too old.
4. I understand that on the day after my telephone call the respondent hired for the receptionist position a person who is 19 years old and who has less than two years of office experience.
5. I believe I have been discriminated against because of my age.

I am making this Complaint on behalf of myself and all individuals who have been, are now, or will in the future be similarly aggrieved.

I declare under penalty of perjury that the foregoing is true and correct of my own knowledge except as to matters stated on my information and belief, and as to those matters I believe it to be true.

Dated _____ at _____

INTERVIEWER:
COMMISSIONER:
CONSULTANT:

X _____

(COMPLAINANT'S SIGNATURE)

ATTACHMENT B

DIVISION OF FAIR EMPLOYMENT PRACTICES PROCEDURES FOR CLASS COMPLAINTS

Due to limited staff resources and the need to revise both individual and class complaint procedures, the Division of Fair Employment Practices (DFEP) may not be able to devote full attention to class complaints until possibly mid 1978.

If you wish to file a class complaint and wait until the new class complaint procedures go into effect, the DFEP will accept your complaint, file it, and act upon it as soon as possible after the new procedures begin. However, you should know that a shortage of enforcement resources will force the agency to take the action of handling many class complaints on an individual basis only, even after the new class complaint procedures go into effect. This could mean that your class complaint will never be prosecuted on a full class-wide basis. In addition, since the DFEP now has by law only one year to act on any complaint after it is filed, you should be aware that only a fraction of that year may remain by the time your class complaint is acted upon.

As an alternative, you may file a class complaint now and have it handled under regular procedures as an individual complaint until such time as the new class complaint procedures go into effect. Under this arrangement, the DFEP will investigate the charges in your complaint only as they affect you personally. It is possible that the party against whom you file the complaint will wish to resolve it at some point during this investigation, but will offer relief only to you and not to the rest of the class. If you decide to accept such an offer, the class-wide elements of your complaint will be dismissed by the DFEP unless another complainant comes forward to take your place.

If your individual charges have not been resolved by the time the new class complaint procedures go into effect, the class aspects of the complaint will then be considered for DFEP action as soon as possible.

Before making this choice, ask the person interviewing you for an estimate of how long it will take to begin investigation of your individual charges if you elect to have the DFEP investigate those.

DIRECTIVE ON SCREENING OF SEX/GROOMING EMPLOYMENT CASES

1. SUBJECT: SEX DISCRIMINATION CASES INVOLVING GROOMING STANDARDS

. . . .

6. BACKGROUND: In November, 1977, the Commission determined that it would exercise jurisdiction over sex discrimination cases involving grooming standards based on male and female ~~stereotypic~~ stereotypes. Examples of such grooming standards are requirements that women wear bras or dresses, and requirements that men have short ~~hair~~ hair or not wear beards or ~~mustaches~~ mustaches. The Division has determined that it does not have the personnel or resources to pursue all such cases to their conclusion, but recognizes that some such cases involve serious discriminatory practices, in light of the underlying purposes of the FEP Act, and therefore warrant full prosecution. This directive creates a procedure for screening grooming standard cases to identify those requiring active ~~involvement~~ involvement by the ~~Division~~ Division.

7. PROCEDURE ON NEW CASES: This section governs all ~~charges~~ ~~brought to the Division~~ charges brought to the Division ^{on or} after the effective date of this directive.

a. Intake and Referral. All charges of sex discrimination under the Fair Employment Practice Act involving grooming standards ~~based on sex stereotypes~~ based on sex stereotypes should be taken in and docketed in the regular fashion. The complaint should be given Attachment A, ~~explaining that~~ explaining that the ~~complaint~~ complaint may be closed after legal review under an administrative policy of the Division. The intake consultant can ~~represent~~ report the substance of

Attachment A to the complaint, if necessary. The complaint should be served on the ~~xxx~~ respondent with the short form of the service letter (Form F-100-68, ~~xxxx~~ Attachment A to Directive No. 32). A regular case file should be made up and sent immediately to the assigned attorney, with a memo indicating that the case is to be reviewed subject to this directive.

b. Screening. The assigned attorney should review the case and give an oral ~~summary~~ summary and recommendation to the General Counsel, who will make a final ~~decision~~ decision whether the case should be pursued or not.

In the absence of the General Counsel, the ~~assigned~~ assigned attorney should put the case on the agenda of the next legal staff meeting, with ~~an~~ an advance written summary ~~of~~ and recommendation on the case to each member of the legal staff. The legal staff should review the case and make a recommendation to the Chief, who will make a final decision whether to pursue the case. The assigned attorney will return the ~~case~~ case to the compliance office, indicating whether it is to be pursued or closed.

c. Further Action. If the case is to be kept open, the ~~compliance~~ compliance office should proceed with the case (and notify the complainant that this is being done.) in the usual fashion. If the case is ~~not~~ not to be kept open, it should be closed under ~~closure~~ closure category ~~K-14~~ K-14, and the complainant should be (by regular first class mail, sent the closure letter in attachment I to this directive.

B. PROCEDURE ON CURRENT CASES. This section governs all ~~charges~~ ~~complaints~~ ~~doctored~~ before the effective date of this directive. Any complaint that ~~is~~ is about to be submitted for pre-conciliation review or has already been submitted need not be referred to the legal staff for review subject to this ~~directive~~ directive. Any complaint that has not yet reached this ~~stage~~ stage should immediately be submitted for review in the manner set forth in sections 7.a and 7.b above. After review, ~~the~~ ~~investigation~~ either the investigation should continue or the ~~complaint~~ complaint should be closed in the manner set forth in section 7.c above, as appropriate.

9. APPROVAL.

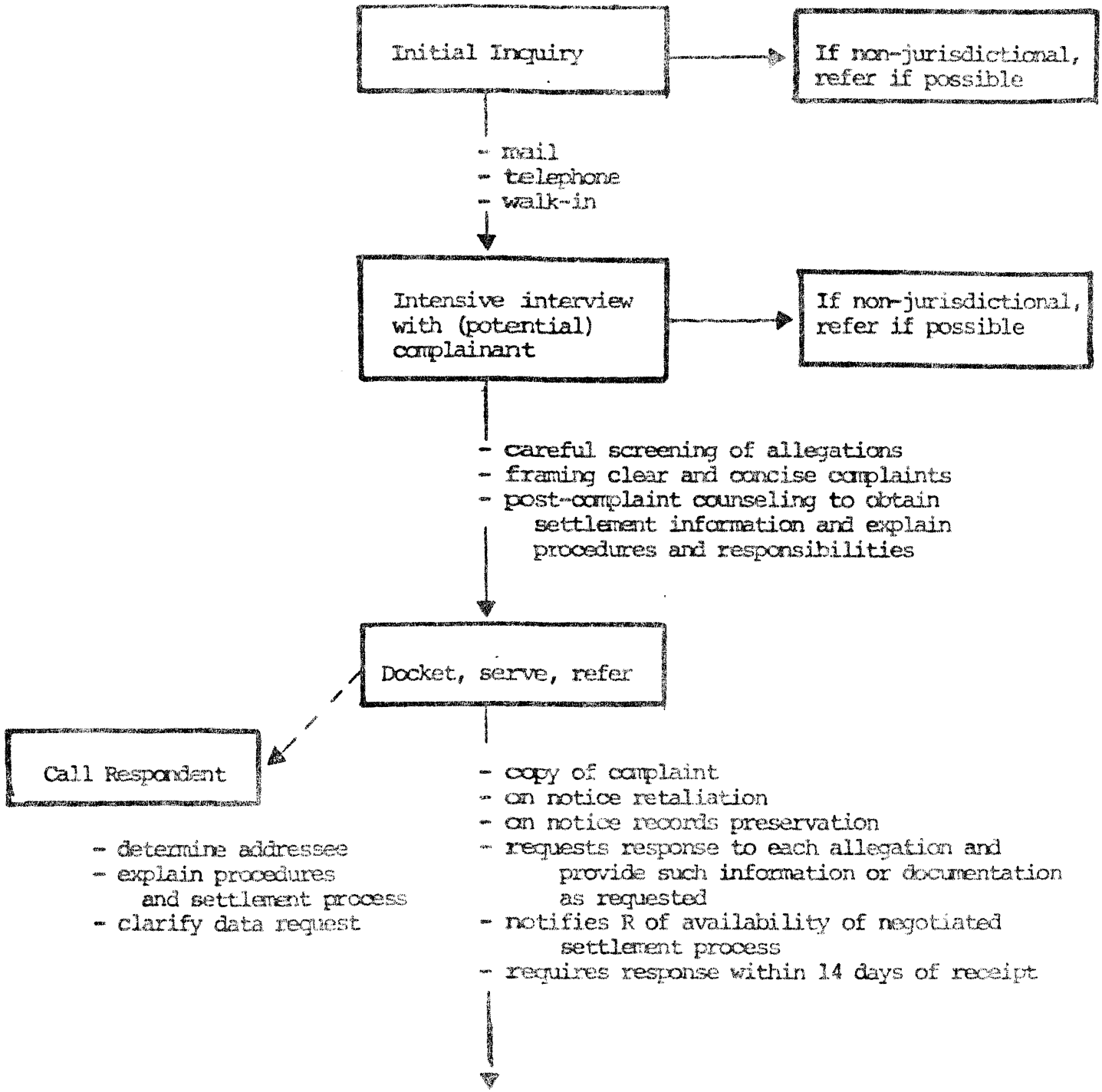
ATTACHMENT A

TO COMPLAINANTS ALLEGING SEX DISCRIMINATION BASED ON
GROOMING STANDARDS

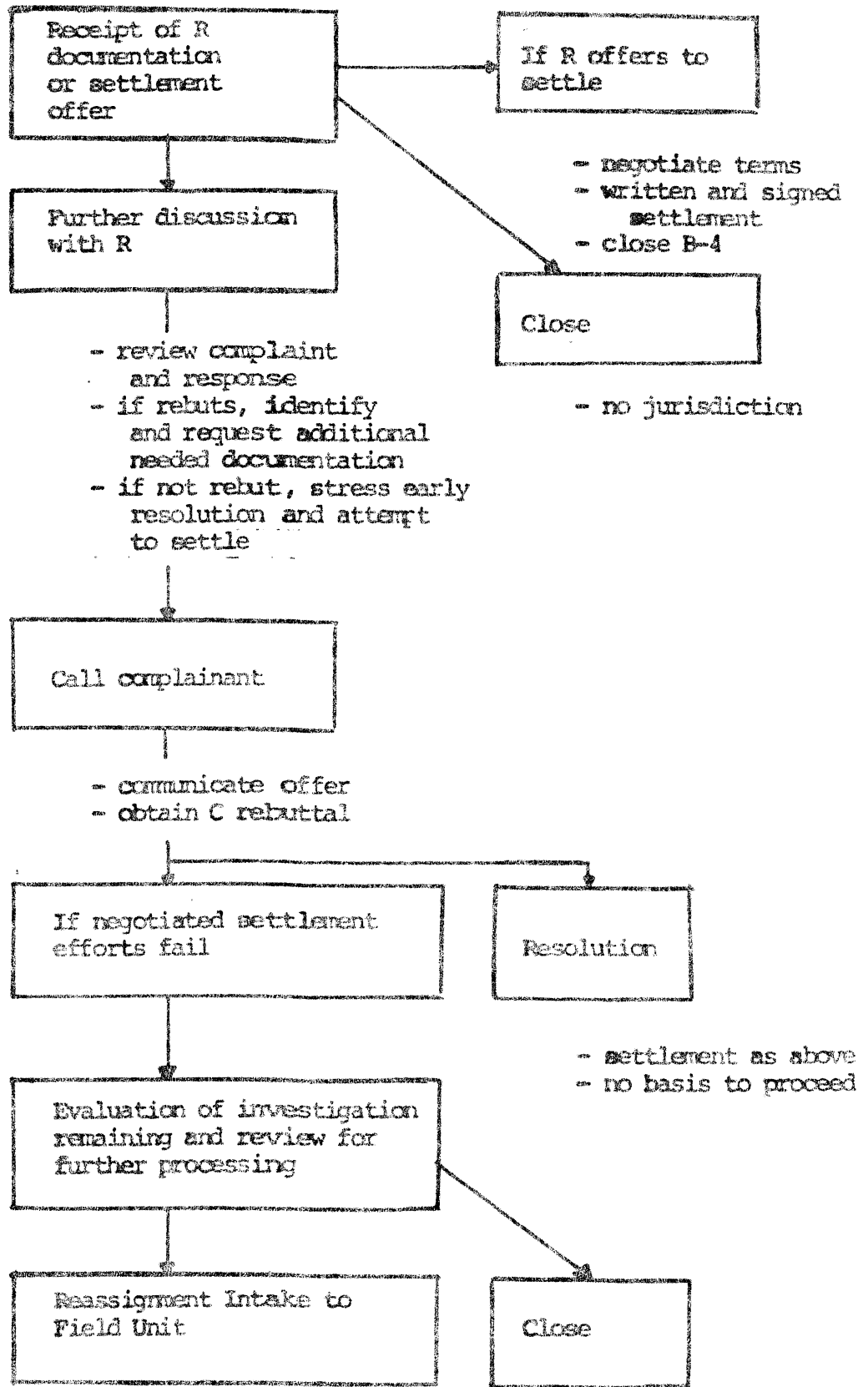
Although the Division of Fair Employment Practices ~~take~~ believes that employers' use of male and female grooming standards based on sex stereotypes is often unlawful sex discrimination under the Fair Employment Practice Act, the Division lacks the personnel and resources to pursue all such complaints. The complaint you have filed will be reviewed by the Division staff and a decision will be made whether the Division will take further action on the complaint, based on the seriousness of the charge and the severity of the harm involved. You will be notified as soon as that decision is made.

If the Division decides that it will take no further action on your complaint, the complaint will be closed and you will be sent a formal notification that you have the right to bring ^{in court} suit ~~on~~ your claim within a year following your receipt of that notification. The fact that the Division may have closed your complaint ^{cannot} ~~in~~ no way prejudice your right to take the matter to court.

I. INTAKE/INVESTIGATION (Phase I)



INTAKE/INVESTIGATION (Phase II)



DIVISION OF FAIR EMPLOYMENT PRACTICES

TRANSMITTAL NO. 025

ORDER NO. xxiii*

JANUARY 1, 1978

1. SUBJECT. INTERIM COMPLAINT DOCKETING PROCESS AND PROCEDURE FOR CLOSING CASES AFTER A PRELIMINARY INVESTIGATION.
 2. PURPOSE. This order prescribes the procedure to be followed in the complaint taking process until a formal process is established at a later date. This interim process is designed to protect the right of action ("right-to-sue") of the complainant.
 3. ORIGINATOR. Office of the Chief.
 4. RESPONSIBILITIES. Consultants and other DFEP personnel involved in the intake process are directly responsible for following this order.
 5. EFFECTIVE DATE. January 1, 1978.
-
6. BACKGROUND. The pre-complaint process now in effect will be discontinued. An interim process will be implemented effective January 1, 1978. A formal process is now being developed for implementation at a later date.
 7. POLICY. The policy of the Division is as follows:
 - a. The existing pre-complaint process is effectively terminated upon receipt of this directive.
 - b. Any person whose allegations meet the statutory jurisdiction standards for filing shall be permitted to file a complaint and the complaint shall be docketed.
 - c. Except as noted in Section 8 below, no respondent shall be contacted prior to serving the complaint.
 - d. Every effort shall be made to secure a signed complaint prior to the aggrieved person's leaving a Division office.
 - e. The filing and docketing of a complaint does not mean that a full investigation will be required.
 8. THE INTAKE PROCESS WILL BE AS FOLLOWS.
 - a. At the initial interview, the consultant will not reject any complaint on its merits or on insufficient evidence that a violation of the law might have occurred. The only complaint that will be rejected is one where there is lack of jurisdiction.
 - b. The pre-complaint forms may be retained to gather intake information.
 - c. Information Control Cards shall continue in use.

*Consecutive Roman numerals identify orders issued prior to the establishing of a standard identification scheme.

- d. The EDP forms shall be completed at the close of the intake interview where statutory jurisdiction is assumed and at the completion of each case.
- e. Each complainant must provide the following:
 - (1) The full name and address of the respondent;
 - (2) A plain and concise statement of the facts constituting the alleged violation;
 - (3) The date or dates of the alleged unlawful practice(s);
 - (4) If appropriate, a statement indicating that the complaint is brought as a class action;
 - (5) A statement as to whether any other action, either civil or criminal, has been instituted in any other forum or agency based upon the same facts alleged in the complaint, together with a statement as to the status of the action or its final outcome.
- f. It is the duty of the interviewer to assist citizens in framing and perfecting their complaint.
- g. DFEP staff may not contact respondents prior to the drafting and filing of a complaint except for the following purposes:
 - (1) To verify the place, telephone number, and contact person of the respondent;
 - (2) To appraise the respondent, a) that a complaint will be accepted by the Division and docketed, and b) that the DFEP will seek certain remedies for the complainant;
 - (3) To suggest to the respondent (and to gather feedback) that an early settlement of this matter might be advantageous for both parties (pre-determination settlement).
- h. All respondent contact must be noted in the case file.
- i. All pre-complainants who will be pending as of December 31, 1977, shall be contacted and encouraged to file complaints before January 1, 1978. Complaints arising from pre-complaints will be accepted after January 1, 1978, if still timely. Refer complaints to the assigned attorney where the statute of limitations would have run out.
- j. ~~The letter of service shall follow Form 20-30 and 20-30H,~~
 (A sample letter of the new letter of service to be used will be sent in the immediate future.)

9. THE CLOSING OF COMPLAINTS AFTER A PRELIMINARY INVESTIGATION WILL BE AS FOLLOWS.

- (a) The sufficiency of evidence will be reviewed after the case is docketed.
- (b) The consultant must decide if respondent contact should be made, using the same criteria formerly used on P-1 and P-2 complaints.
- (c) After initial information is gathered (as formerly done with P-1 and P-2 complaints), the consultant must determine the merits of the case (again using the former pre-complaint criteria).
- (d) If the consultant determines that the complaint would formerly have been closed under a P-1 or P-2 category, the consultant will close the case using the following procedures:
 - (1) an abbreviated closing report outlining the investigation done and reason for closure (under P-1 or P-2 categories)
 - (2) the closure recommendation is to be processed, according to Section 7.a. of Transmittal No. 025
- (e) If the consultant determines that further investigation is necessary, the case should be scheduled for investigation.

IMPORTANT: Please refer to Transmittal No. 014 for additional instructions regarding case closure procedures.

10. APPROVAL

Alice A. Lytle
Alice A. Lytle, Chief

December 23, 1977
Date

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF FAIR EMPLOYMENT PRACTICES

455 GOLDEN GATE AVENUE, SAN FRANCISCO

Address reply to: FEPC, P.O. Box 603, San Francisco, CA 94101

Administrative Office 557-2000

Complaint Section 557-2005



January 15, 1979

John H. Williams
Auditor General
925 L Street
Sacramento, CA 95814

Dear Mr. Williams:

This is the second submission from the Division of Fair Employment Practices in response to the slightly revised draft of Letter Report 737 (hereafter "Report.") This response will be considerably briefer than the first submission since all the points raised in the Division's first response are equally pertinent and responsive to the points raised in the first Report. This submission will strive to briefly reiterate the general points made with the addition of a few points that arose from the discussion between division staff and staff of the Auditor General's office in Sacramento on January 8, 1979.

Most of the errors noted in the first Report are the result of the poor timing of the audit which covered the period January to August 1978. A number of circumstances explain why observations during this period are unreliable. They consist of the following:

- (1) The Chief had begun her tenure only three months before the beginning of the audit period;
- (2) The Assistant Chief was hired during the month of January 1978;
- (3) Beginning in January approximately 50% of the Division staff consisted of new hires;
- (4) For staggered one-week periods during the months February to May 1978, investigative staff were in Washington, D.C. receiving training in rapid processing techniques;
- (5) AB 738 became effective January 1978, mandating fundamental changes in Division procedures. The Division

JOHN H. WILLIAMS
JANUARY 15, 1979
PAGE 2

had had insufficient time to develop and implement procedures to bring the Division into compliance with these changes.

These circumstances distort the picture of the Division. Since the period of observation ended August 1978, the Auditor lacked the opportunity to observe and evaluate the model case processing procedures described in Attachment D of the Division's first response. The statistics noted in the first draft Report failed to mention the reduction in the percentage of cases being accepted in the area offices. These changing figures are a direct result of the increased expertise of consultants due to training made available to them and the experience gained through increased exposure to case processing. Staff also benefited from management clarification of the interim procedures adopted to bring the Division into compliance with AB 738 especially as they related to case acceptance standards.

In several places in the first and second draft Reports, the assertion is made that the Division has failed to develop and implement case acceptance standards with the result that a large proportion of cases are accepted that should not be. The Division acknowledges that a small percentage of cases were accepted early in 1978 that would now be considered totally unacceptable. The circumstances described earlier in this response explains this phenomenon. However, beyond the question of mistakes being made, it should be clearly understood that the development and implementation of case acceptance standards offer no panacea for the problem of increasing workload. Standards are, of necessity, very broad, general guidelines drawn from the express words of the statute or derived through case law interpretation. Each case contains distinctly different facts making it impossible to give staff a set of detailed guidelines that fit every conceivable factual situation. The key to proper case acceptance techniques is training in the analytical skills necessary to make the factual and legal judgments required at the intake stage of any investigation.

Both draft Reports point to the existence of administrative closures as supporting the contention that cases are not properly screened. This assertion is based on a total lack of understanding of these type of closures. These closures are distinguished from other types because they do not rest on a finding of merit. This failure to make a merit finding does not necessarily mean that the case lacked merit. It simply means the Division was able to resolve it without the necessity of making such a determination. Indeed, in many cases the respondent's incentive to settle is premised on the understanding that he or she can resolve the matter

JOHN H. WILLIAMS
JANUARY 15, 1979
PAGE 3

without admitting liability. In this respect they are much like consent decrees. This point would have been made clear if either Report had outlined and discussed the administrative case closure categories and given examples of factual case situations covered by the categories.

Both draft Reports point to the existence of case closures based on lack of jurisdiction as indicative of the Division's failure to properly screen for jurisdiction. Even with the improved screening presently taking place occasional cases will be accepted that will later be found to be jurisdictionally insufficient. This fact only proves the humanity of the investigators and the difficulty of making the complicated judgments necessary at the intake stage. The Reports fail to note the small percentage (2.1%) of cases closed on this basis.


Presently, the Division can categorically state that all cases are screened for jurisdiction. Indeed, this was the policy during the period of the audit. For the reasons stated earlier in this memo the policy was not consistently followed.

CONCLUSION

The Division has been in existence since 1959--underfunded and understaffed. The management deficiencies noted in earlier audit reports are the result of this and a complex of other factors that cannot be discussed in a memo of this sort. To conduct another in a series of audits before new management has had an adequate opportunity to deal with twenty years worth of problems is unproductive and unfair to present management. Complicating the problems traceable to the historical legacy of the Division is the fact of the recently enacted laws radically changing the jurisdiction and procedures of the Division. It is respectfully suggested that the Division be allowed a reasonable period of time within which to improve its procedures and comply with the rapidly changing laws. After such a time an audit would be productive, fair and welcome.

Yours very truly,

ALICE A. LYTLE, CHIEF

BY 
JOANNE A. LEWIS
ASSISTANT CHIEF

cc: Donald Vial, Director