

Executive Summary

Department of Fair Employment and Housing: Underfunding and Misguided Policies Compromise Civil Rights Mission

A report prepared for the Senate Rules Committee

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In order to eliminate discrimination, it is necessary to provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons.

– California Fair Employment Practices Act, 1959

A half-century ago, when the California Legislature drafted its fair employment act, the nation was in the throes of an epic struggle for civil rights. The Legislature took a lead in this fight for justice, declaring that job discrimination “fosters domestic strife” and hurts employee and employer alike. Today, the Fair Employment and Housing Act still stands – but years of tight budgets have whittled away the state’s ability to protect workers and enforce the law.

At the center of this inquiry by the Senate Office of Oversight and Outcomes is California’s civil rights agency, the Department of Fair Employment and Housing (DFEH). We found that dwindling resources and poor policy choices have compromised the department’s investigations—including a procedure that allows the governor to veto any claim against a public agency.

Over the long run, DFEH and state leaders must come to grips

Principal Findings

- 1) California has the strongest anti-discrimination law in the nation. But the agency charged with enforcement is so underfunded that the law cannot be fully carried out.
- 2) Under a secret policy, the Department of Fair Employment and Housing must get the approval of the Governor’s Office before pursuing a discrimination claim against a public agency. Private workers face no such hurdle. This constitutes unequal treatment for public employees, and may be an unlawful underground regulation.
- 3) Top management at the DFEH degraded the quality of housing discrimination investigations and ignored clear warnings from their own housing experts, putting a multimillion-dollar federal contract in jeopardy.
- 4) Employment discrimination investigations suffer from understaffing, poor quality, intake confusion, and premature case grading. And a statewide training program fails to meet legal standards.
- 5) DFEH has made strides to modernize, placing new emphasis on class actions and mediation.

with the chasm between the broad legal mandate to provide effective remedies – including full investigations into all proper claims alleging discrimination – and the relatively miniscule allotment of resources appropriated for that purpose in the state budget. The problem has grown more acute with each passing decade, although the department itself has not championed the cause of adequate funding. (Lately, in fact, it has returned millions of unused funds to the state treasury.) The number of complaints has continued to grow while the budget for personnel to handle them has continued to shrink. Now, most of the top veterans of the department who spoke with the Senate Oversight Office believe that only a small fraction of the work required by law can actually be accomplished.

Some experts said that if funding is not significantly increased, then the overall mission of DFEH should be reexamined. Ideas for a new, less ambitious mission include converting the department into an agency focusing primarily on settlements, rather than enforcement. Others argue that the focus should be on systemic discrimination through class action litigation. This kind of radical adjustment would represent a retreat from the law's historic promise that each alleged victim is entitled to a fair consideration of a claim of discrimination. Nevertheless, as things stand, that promise is already compromised.

The Senate Oversight Office has also identified policy choices by the department that further erode its effectiveness. Current and former managers, lawyers, and investigators from DFEH expressed frustration with initiatives, not directly related to underfunding, that compromise the civil rights mission.

We uncovered a secret policy that gives the Governor's Office the final say on whether a discrimination case will be pursued against any public agency – state or local. This takes the decision from the hands of the DFEH, which by law has an independent duty to prosecute discrimination claims. The policy raises the issue of equity, since government workers must clear an extra hurdle not faced by private employees. Taken to its extreme, it allows a California governor, in effect, to exempt public agencies from the state's anti-discrimination law.

We found that, despite warnings and foreseeable consequences, DFEH nearly destroyed a 19-year relationship with the federal Department of Housing and Urban Development by directing necessary resources away from housing discrimination investigations. Meanwhile, employment discrimination investigations – the main work of the department – are too often cursory. DFEH veterans complain of a precipitous drop in the quality of customer service, made worse by a new computer system that

has yet to meet its promise after more than a year in operation. Other questionable policies have resulted in incoherently drafted complaints, premature case analysis, and barriers to non-English speaking claimants. Finally, we discovered that thousands of state supervisors have attended sexual-harassment training webinars offered by DFEH that fail to comply with the statute mandating such training – or the department’s own regulations.

Enforcing the law is a herculean duty for the small department that receives more than 20,000 new discrimination claims each year. About half of the claims bypass the system by requesting “right-to-sue” letters. Most of the rest must be vetted to make sure they are within the department’s jurisdiction and then investigated to determine if the Fair Employment and Housing Act (FEHA) has been violated. All this is accomplished in a statutorily defined timeframe – the department has 365 days to decide whether a claim has merit and should be litigated, if it is not settled.

In early 2010, a comprehensive study of DFEH was completed by the joint research center of the UCLA Law School and RAND Corporation. The report looked at 212,414 discrimination cases filed between 1997 and 2008, using sophisticated statistical analysis. The findings – which the department disputed – judged enforcement of the FEHA to be unfair and ineffective. According to the report: “We found sufficient reasons to be concerned that our antidiscrimination system may itself discriminate, perhaps against people in the very groups that it was designed to protect.”

Aware of these criticisms, the Senate Oversight Office embarked on its own scrutiny of DFEH. We started by interviewing two key players: Phyllis Cheng, director of the department since January 2008, and UCLA law professor Gary Blasi, an author of the 2010 report. Then we interviewed more than three dozen others, including current and former DFEH managers, experts in civil rights law, and stakeholders in the system. Up to this point, we focused on the department’s response to Blasi’s report – and on the anti-harassment training DFEH provided to some 10,000 state workers.

Then, in June 2013, three former employees from DFEH contacted the Senate Oversight Office. They had become aware of our investigation and brought us a sheaf of letters from their colleagues. These insiders, mostly veteran leaders at DFEH, raised serious new issues about the functioning of the department, including the handling of housing discrimination complaints. They described low morale and high turnover. They also told us about a little-known state policy that requires the department to get the approval of the Governor’s Office before pursuing cases against public agencies.

What the Senate Oversight Office found

DFEH has the independent power and duty to receive and help draft discrimination complaints, investigate those cases thoroughly, and provide remedies for violations of the Fair Employment and Housing Act. The five-decade-old department has been through big changes recently, including statutory revisions, internal reforms, downsizing and modernization. The Senate Oversight Office found that the department's management, while admirably focused on change and reform with meager resources, has mishandled some of these transitions. Here are highlights of the report's findings:

- DFEH is critically underfunded for its current statutory mandate. As the decades have seen a growing number of employment and housing discrimination cases filed with the state, its budget has been routinely shortchanged. Money problems resulted in mass office closings, reduced services, and an attempt by department leaders to find more efficient systems. Nevertheless, the fact remains that the budget for personnel to handle ever-increasing case filings has resulted in workloads that guarantee a failure to provide “effective remedies” to victims of discrimination, as required by law. Unless state leaders match the high-minded goals of the Fair Employment and Housing Act with sufficient resources, a newly defined mission – representing a less ambitious set of priorities – will need to be determined.
- DFEH has compromised its independence when considering claims against public agencies by turning over final approval for enforcement to the Governor's Office. Claims against private employers face no such requirement. This policy lacks transparency, and constitutes unequal treatment for public employees. It creates the potential for abuse by past, current, and future administrations. And its secrecy may make it an unlawful underground regulation, although the department vigorously disputes this. Since it was instituted, formal accusations against public employers plummeted from 15 percent of the total to just 1 percent. It also hurts morale in the department. As one disillusioned former DFEH supervisor told us: “I struggled with this. Since when is it somebody's discretion about whether or not we are going to enforce the law? If there's a violation, there's a violation.” And an authority on California civil rights law said the policy “violates the [FEHA] statute” and is based on “politics, not law.”
- Public employees have faced other unique hurdles as well, with their cases funneled into early mediation and given shortened

timeframes in a system that already has tight deadlines.

- Ignoring its own housing experts, DFEH violated its agreement with the federal Department of Housing and Urban Development, thus damaging the national reputation of its fair housing program and threatening a multimillion-dollar contract. The goal had been to equalize caseloads between housing and employment investigators; the result was that case files became so lax that HUD said it was impossible to tell if the law had been violated. As a result, the California department was placed under a Performance Improvement Plan, one of only three agencies nationwide to face this federal sanction. This occurred despite clear and repeated warnings from HUD – and from DFEH’s own housing administrators. “I repeatedly pointed out to the DFEH planners the unique features of the housing program,” the department’s former top housing official told us. “These suggestions were disregarded.” Only after HUD’s insistence – and threats of cutting off funds – has the department now moved to restore the housing program.
- The serious deficiencies in housing investigations cited by HUD also exist in employment investigations. In fact, HUD’s objections to the housing program were a direct result of the department’s “equalizing” the resources and care devoted to housing and employment cases.
- In one cost-cutting move, the department eliminated face-to-face interviews and most meaningful telephone service for Californians trying to file discrimination claims. Now most claimants are expected to draft their own complaints online. These often poorly written complaints are then served on employers without advice or editing by qualified DFEH staff. This policy ignores the department’s basic responsibility and statutory duty to assist complainants in understanding their rights – and to submit concise and understandable complaints. The result is a flood of nonsensical, rambling complaints being served on perplexed employers. According to one of those employers: “The new complaints include lots of irrelevant matter that has no relation to the FEHA.”
- Even complaints clearly outside the department’s jurisdiction are now served on confused employers – with “the admonition that no action is necessary,” according to a memo from the department director. The case is then closed. DFEH justifies this practice by pointing to the statutory requirement that all verified complaints be served. Under previous policy, however, such non-jurisdictional complaints were caught at intake by qualified DFEH staff.

- DFEH investigators are now encouraged to prioritize or “grade” cases before employers have responded to the complaint. Case grading at this early stage could be influenced by the poor quality of these complaints, hurting unsophisticated claimants who are often the most vulnerable to discrimination.
- Current and former DFEH staffers, including long-term veterans and top managers, expressed frustration with the department’s management. There were complaints about office closings, the new computer system, poor customer service, squelching of public employee claims, and issues surrounding the HUD fiasco. One group of 10 investigators in Los Angeles said they have been instructed to prematurely close cases in order to get undeserved federal funds.
- In 2011 DFEH began offering free sexual-harassment prevention webinars for supervisors. The training is mandated by California law and enforced by DFEH. But the webinars did not comply with the law or with the department’s own regulations – they were too short, not sufficiently interactive, failed to cover all the required subject matter, and attendance was not monitored. Even so, DFEH sent out certificates of compliance to 10,000 state employees. The department, in response to suggestions from the Senate Office of Oversight, has addressed several of these shortcomings, but has declined to revamp the training to make it fully compliant.

This report also recognizes that DFEH has made strides to modernize and to save taxpayer dollars during difficult budget times. In particular, the department has placed additional focus on class actions, improved its mediation and settlement functions, and introduced a computerized system for tracking claims. The department’s former chief counsel had very high praise for DFEH’s recent initiatives, telling us: “I am proud of things we accomplished: the case grading system, having the consultants work more closely with lawyers, which results in larger settlements, and the push toward class-action settlements.”

Department management does deserve praise for tackling so many reforms. But the execution was sometimes faulty. As a result, DFEH veterans told us that morale is extremely low and turnover high. They say the civil rights mission has suffered under new policies. “To be placed in a position of constant confusion, flux and disorganization was stressful,” said one investigator who has since left the department. “To have complaints that could not be adequately investigated due to the new department policies was frustrating. . . . It became pointless and depressing to know that you were now creating more harm than good.”

The detrimental consequences of some recent changes, documented in this report, demonstrate that a more careful approach is warranted – including seeking input from staff and building consensus within the department’s ranks.

The Senate Oversight Office recommends:

There are 18 million working people in California. For many who are victims of discrimination, their only recourse is the Department of Fair Employment and Housing. Mindful of that, these are our recommendations:

- The Legislature should either budget sufficient resources to support the lofty mandates of the Fair Employment and Housing Act – or amend the law to reflect a more modest mission. A recommendation for the best answer is beyond the scope of this report. But the solution should be crafted with great care by state leaders to avoid abandoning the state’s commitment to preventing and remedying discrimination. We suggest convening a task force – including attorneys, professors, and other civil rights experts – to weigh the proper cost of funding the current law or the possibility of a less ambitious mission.
- The Department of Fair Employment and Housing should stop treating discrimination claims by public employees differently than private claims. This means ending the secret practice of allowing the Governor’s Office to dictate whether a case against a public agency is pursued.
- If the administration declines to stop the practice, however, the DFEH should promptly draft a regulation to be reviewed by the California Office of Administrative Law. This will test the legality of the practice and shed sunshine on it, removing the taint of a possible underground regulation. A draft regulation should, include both public and private cases and not discriminate against public employee claims. Finally, the Governor’s Office should in any event, recuse itself from making determinations on state agency claims to avoid decisions that are biased – or appear to be biased – in favor of the administration.
- The Senate should consider investigating whether the Governor’s Office is requiring approval of other enforcement actions by independent agencies beyond the Department of Fair Employment and Housing. This would focus on any department or agency with a legislative mandate to enforce state law, such as labor, safety and environmental statutes.

- The Senate should consider monitoring the relationship between HUD and the DFEH, at least until HUD is satisfied that the department is meeting its previous high standard of compliance.
- The serious deficiencies in housing investigations cited by HUD apply equally to investigations of employment discrimination. To some extent, these shortcomings reflect poor policy choices, heavy workload, tight budgets, and issues stemming from a new computer system. Whatever the cause, we recommend that the department make these issues the subject of honest analysis to find a solution. DFEH should also look into a charge raised by some of its staff that cases are sometimes closed prematurely, but nevertheless counted as fully investigated cases, eligible for federal funds.
- The department should revisit changes in the intake process that have resulted in incoherently drafted complaints being served on employers, as well as moot complaints that don't even fall within the department's jurisdiction.
- Cases should not be graded before some relevant evidence has been gathered.
- The department's sexual-harassment webinars must be revamped to meet all statutory and regulatory requirements.