

MAINE HUMAN RIGHTS COMMISSION REVIEW PANEL

Final Comments by Panel Member James Clifford

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

Groucho Marx

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

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

“it should be noted that some—but not all—members of the Review Panel felt that the Executive Order creating the Review Panel represented an inappropriate intrusion on a separate, independent administrative agency, and that some of the charges in the Executive Order were not justified.”²

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

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

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

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

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

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

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

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

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

Those are very strong words that make very serious allegations.

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

So what did we find?

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

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

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

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

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

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

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

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

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

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

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

Thank you.

/s/ James A. Clifford
September 12, 2016