

***REPORT OF THE
BLUE RIBBON PANEL
TO STUDY THE
KENTUCKY COMMISSION ON HUMAN RIGHTS***

SECTION I – INTRODUCTION

The Blue Ribbon Panel (“Panel”) has been at work studying the Kentucky Commission on Human Rights (“KCHR” or “Commission”) for more than a year. Coming from various backgrounds and areas of the state, the members of the Panel have brought a wealth of experience and a tremendous depth of commitment to the task of evaluating the Commission. To be sure, the members of the Panel have been diligent and professional in conducting their work.

We are grateful for the confidence Governor Ernie Fletcher has shown in appointing us to study and evaluate the operation of the Commission. We believe this was an ideal time to review the past work of the Commission and to project the Commission’s future role here in Kentucky.

Kentucky is a state of expanding diversity. It is for this reason that protection of the rights of all citizens must remain a priority. In keeping with the theme “United We Stand, Divided We Fall,” the Panel has conducted its study and evaluation of the Commission through the activities of several subcommittees. The subcommittee reports are included in this report so that their findings will be readily available to Governor Fletcher and the general public.

We encourage all citizens in Kentucky, all public agencies, and private interests groups to support the goal of ensuring equal treatment for all jeopardized and marginalized Kentuckians.

Our appreciation is extended to the Governor's Office of Minority Empowerment for its assistance in facilitating our meetings, transmitting vital information to us, and for being a valuable resource for the contacts needed with the Governor's Office and other agencies in state government.

Ms. Tierra Kavanaugh Turner and her assistant, Ms. Seniors A. Burdette, were always supportive of our efforts, helpful in keeping records, efficient in communicating with us and other officials, and valuable in advising us. Likewise, we were greatly aided by the prompt response and detailed information provided by Executive Director Col. Linda Murnane and staff of the Commission.

This report is presented in six sections to make it easier to follow the volume of written material that documents the extensive study, evaluation, and recommendations of the Panel.

SECTION II - OVERVIEW

The Kentucky General assembly created the Commission in 1960. It was directed to encourage fair treatment, foster mutual understanding and respect, and discourage discrimination against any racial or ethnic group or its members. The Legislature expanded the role of the Commission in 1966 through the Kentucky Civil Rights Act found at chapter 344 of the Kentucky Revised Statutes. The passage of this act made it unlawful to discriminate. It also established the Commission as the statutory authority for the enforcement of civil rights throughout the state.

The Commission is made up of an executive director, up to 38 staff members, and 11 commissioners. It investigates, litigates, and administratively decides complaints of discrimination in the areas of employment, public accommodation, housing, and credit based on race, color, religion, national origin, age, disability, sex, and familial status. The

Commission has 4 branch units: General Administration and Support, Enforcement, Research and Information, and Legal Affairs. The Enforcement Branch consists of 2 sections: Employment/Public Accommodations and Housing. Employees assigned to these sections receive, investigate, and conciliate complaints of discrimination in the areas of employment, public accommodation, credit transactions, and housing.

In addition to its authority to enforce civil rights throughout the state, the Commission is mandated to educate the public in the area of civil rights. It conducts training outreach and public awareness initiatives in order to accomplish this goal.

The enforcement process consists of several stages from the time a complaint is filed until its final disposition. A complainant may assert an allegation of discrimination through a sworn complaint filed within 6 months of the incident relating to public accommodations, employment, financial transactions, and retaliation. For housing discrimination cases, complaints must be filed within a year.

Once a complaint has been filed, agency investigators conduct an investigation to determine whether there is probable cause to process the case to the next level. The investigators are employees of the Commission. They conduct interviews and gather other facts in a number of ways. They have wide latitude including the authority to subpoena documents. Commission staff has sole authority in deciding the conduct, scope, and course of the investigation.

Once it's determined that investigation of the complaint is complete, staff prepares a short summary of the evidence for presentation at the monthly commissioner's meeting. That summary also contains staff's recommendation as to whether there is probable cause to believe that actionable discrimination has occurred. The commissioners may accept, reject, or return for further investigation any or all of these summaries. Where commissioners agree with staff's determination of no probable cause, the complaint will

be dismissed. When this occurs, the complainant has no additional avenues of recourse. The complainant is notified of the disposition and the case is over. In those cases where Commission staff has found probable cause, the case is sent to the next level.

Not all cases result in a "probable cause" or "no probable cause" determination. During the investigation period, staff is required to seek conciliation whenever possible. Staff members basically act as arbitrators between the parties in an effort to settle the case, which may include a monetary award.

In those cases where probable cause has been determined, a staff attorney from the Commission acts as the complainant's lawyer. Conciliation efforts continue, but where they fail, staff attorneys continue to litigate the claim on behalf of the complainant at an administrative hearing. A hearing officer is selected to conduct the hearing. He or she may be one of the 11 commissioners or an administrative law judge from the office of administrative hearings. Defendants in civil rights cases brought before the Commission are represented by private counsel.

Where the Commission has determined the defending party has committed an act of discrimination, it may order the party to cease and desist from any further acts of discrimination. It may also order a remedy for any past discrimination which may include a monetary award, a policy change, employment reinstatement, or an accommodation in housing.

According to the 2005 Commission Annual Report, in the last two years, the Commission closed 656 complaints. Of that number, 520 were disposed of as having no probable cause. There were 66 conciliations and 47 complaints were withdrawn. There were 23 settlements and one hearing where there was a finding of discrimination. The Commission points out that in 2005, staff negotiated 26 conciliation agreements that

resulted in \$57,700 in compensation for complainants. During this time, two hearings were conducted.

SECTION III – EXECUTIVE ORDER

On March 1, 2005, Governor Ernie Fletcher issued Executive Order 2005-219 that established the Kentucky Blue Ribbon Panel to Study the Kentucky Commission on Human Rights (See Appendix A). The Panel was created “in an effort to strengthen the Commission so as to facilitate a more effective and efficient disposition of cases and other matters pending before the Commission pursuant to its statutory charge and responsibilities relating to enforcement of KRS Chapter 344.” The Panel also was to “explore the potential to elevate and enhance [the Commission] for even greater professionalism and more effective operation.” In addition, the Panel was charged with the responsibility of conducting an examination and review of the Commission’s current policies, operation and management, as well as the manner in which it carries out its significant adjudicatory function duties. An appropriate comparative analysis of other state agencies with similar adjudicatory function duties and a comparative analysis of the laws and enforcement mechanisms of civil rights agencies in other states was also required.

It is significant to point out that the scope of the Panel’s review was to be comprehensive. However, it was not to include an evaluation of the governance of the Commission. More specifically, the Panel was prohibited from exploring and evaluating the concept of reducing the appointed Commission membership from 11 part-time commissioners to 3 full-time commissioners.

Upon completion of the aforementioned tasks, the Order directed the Panel to submit a detailed report to the Governor with recommendations for executive and/or legislative implementation.

SECTION IV - DIVISION OF RESPONSIBILITY

The Commission first met on April 12, 2005. Under the leadership of Rev. Russell Awkard, the members divided into subcommittees, each with a separate assignment. Fr. David G. Sánchez and Mr. William E. Cofield comprised the subcommittee analyzing Budget and Personnel, with Fr. Sánchez as chairperson. Pat Feibert, P.G. Peeples and Judge Lawrence F. Smith comprised the subcommittee comparing other state boards and commissions, with Judge Smith as chairperson. David A. Friedman, Howard O. Mann, Sen. Gerald A. Neal and Dr. Doris Wilkinson comprised the subcommittee comparing state boards and commissions of other jurisdictions, with Mr. Friedman as chairperson. Sharon Fields, Marcia Ridings and Rev. Raynarldo M. Henderson comprised the subcommittee analyzing local community experiences with the Commission, with Rev. Henderson as chairperson.

Each committee was authorized to receive whatever support they needed from the Office of the Governor and from the Kentucky Commission on Human Rights. Each subcommittee was able to meet with members of the Commission as often as requested. In fact, the executive director not only met with the different subcommittees as often as requested, she provided detailed resource materials on a continuing basis which greatly assisted the work of the Panel.

There were 9 meetings where the Panel met as a group. However, each subcommittee conducted separate meetings as required. On May 31, 2005, the Panel asked the Finance and Administration Cabinet, Office of Policy and Audits, to conduct an audit of the Commission. The audit was completed on January 30, 2006. Its recommendations are included herein, together with the recommendations of each subcommittee. (See Appendix B)

SECTION V - SUBCOMMITTEE FINDINGS AND RECOMMENDATIONS

1. Subcommittee Conducting Public Hearings Analyzing Local Community Experience and the Effectiveness of the Kentucky Commission on Human Rights

The Public Hearing Committee was given the task of traveling to cities throughout the state that currently have human rights/human relations commissions to hear first hand the individual community thoughts on human rights in that particular area. In short, their task was to look at the effectiveness of the Commission throughout the state. In preparing for visits, the team learned that the state of Kentucky has over 874,000 persons with disabilities and 17 Commissions to serve over 120 counties, with an annual budget of 2.2 million dollars. Actually, it is safe to say that it is very likely that the cities without Commissions may not be represented in Human Rights issues.

There were a total of 17 public hearings which began in early July 2005 and ended with a repeat visit to Hopkinsville, Kentucky, later that year. It is important to mention that many communities were suspicious of the public hearing committee and the work of the Panel in particular. This was particularly true in Western Kentucky. There was a strong belief that the "real" agenda of the Panel was to do away with local Commissions and employ 3 full-time commissioners to serve the entire state and that these 3 persons would serve under the Governor's Office of Minority Empowerment. There was widespread belief that any contemplated structural change in the Commission would threaten diversity across the state and place human rights in the arena of politics rather than equal opportunity and equal treatment.

At the Lexington hearing, the timing of the creation of the Panel was questioned. It was believed that it would have been more beneficial to allow the new executive director

time to become familiar with the Commission, make changes and adjustments as needed and then determine if an investigation of the Commission was warranted.

The committee quickly learned that many communities were not aware of human rights/human relations commissions in their cities. People were unaware of state and local executive directors and commissioners. The repeated questions were, "Who are they and what do they do?" Perhaps funds for advertising can be included in local budgets to ensure that communities are informed and made aware of accomplishments in the name of human rights. It also was learned that, among those persons who were aware of human rights commissions, there was widespread belief that "human rights" refers only to black and white racial issues. Though these issues may be more commonly addressed, citizens also need to be aware of discrimination on the basis of color, religion, national origin, gender, age, disability, and familial status. Many citizens believe discrimination is alive and well. In Henderson, Kentucky, it was noted that discrimination has not decreased or disappeared; the world has gotten bigger. In Danville, Kentucky, people are concerned specifically about discrimination against Latinos. Whenever Latinos are pulled over by the police, their license is confiscated. A Mexican license is valid for one year after entry into the country. However, there is no way to determine when the year started or when it has elapsed. They are afraid to drive to work and, consequently, lose their jobs. Latinos in Lexington are experiencing a lot of discrimination, racism, and hatred even though they are an economic driving force, having paid \$30 million in sales taxes in 2002.

The length of time that it takes for cases to be resolved was also a concern. People are having to wait too long for a response and therefore lose interest and/or decide that it is not worth their time and ultimately decide to drop their cases. The executive director acknowledges that a backlog exists.

Training, or the lack thereof, for commissioners, human rights workers, and communities also makes the list of concerns. There is a need for the Commission to act as a resource by providing materials, providing direction, and possibly acting as a

clearinghouse to bring in experts. Local Commissions also are needed to assist communities in understanding what their rights are and what can be done when those rights are violated.

The population of individuals with hearing impairments is rapidly growing in Kentucky. However, many people feel that the needs of these Kentuckians are being overlooked, largely because Kentucky is understaffed with sufficient interpreters and skilled service providers in this area. This frustration can be seen in one family from Murray, Kentucky who has to travel to the National Deaf Academy in Mount Dora, Florida to receive the help they need. Though Kentucky furnishes airline tickets for the family's travel, the family receives little assistance for counseling, doctors, and therapists. In Covington, it was learned that children with hearing impairments, whose parents have no resources and no support system, attend school at a great disadvantage. Some of the hearing-impaired are not able to socialize and cannot associate with other people because of the limited resources available to them.

Many local commissions feel powerless to do an effective job because of what they consider to be interference from local officials or city councils. This was evident in the cities of Paducah and Mayfield. Though local officials do not interfere with individual cases, there seems to be an attempt to overrule and re-write budget requests and other matters relating to local commissions. This creates confusion and hard feelings. It has been suggested that a well thought out plan and system is already in place. Things will work well if this system is honored and local officials trust the persons they have appointed to the local commissions. Mayfield has somewhat of a different problem in that the commission's executive director is also the mayor's secretary. According to some citizens, this seems to be a conflict of interest. The prevailing thought is that the mayor determines what gets to the local commission, which is usually not much.

This report in no way outlines all the thoughts and concerns of citizens and local commissions relative to human rights. However, our conclusion is that discrimination on the basis of race, color, age and disability is alive and well throughout the state. Though not as blatant in many cases, it is still alive and well. Our state and local commissions have much work to do.

As mentioned earlier, Kentucky currently has over 874,000 individuals with disabilities, 120 counties with only 17 Commissions statewide and an annual state budget of 2.2 million dollars. At the same time, however, the present executive director of the Commission still faces staff shortages. She has hired 7 new employees, but a shortage still remains.

The Commission's executive director also has stated that her office cannot do the job without the assistance of local commissions. She has compared the Commission to human rights commissions in Ohio and Illinois. Ohio has \$5 million more in its budget than does Kentucky and has 162 more people on its staff. Illinois has \$7 million more in its budget and a larger staff. The Commission's executive director believes that she can accomplish the goals of the Commission if she has a total of 45 staff positions, plus an additional \$1 million. The Public Hearing Committee therefore recommends that the Commission be strengthened in this respect.

2. Subcommittee Examining the Operations of Other State Agencies with Adjudicatory Functions

Subsection A – Preamble

Throughout the review of the Commission, it has been abundantly clear that the present executive director is one of the best qualified agency heads in all of state government. Her education, training, and experience make her uniquely suited to lead this human services agency.

The shortcomings at the Commission were present before the present executive director arrived, and she has already begun to correct the problems that have accumulated over the years. Some of the deficiencies identified in the review and audit have been incorporated into her action plan for correction. It is recognized that additional written policies at the agency will help to insure stability and effectiveness into the future.

The recommendations of this Committee for improved procedures in no way reflect negatively on the new executive director. However, it should be noted that not all of the Committee's recommendations have been endorsed by the executive director.

Subsection B – Introduction

This subcommittee was assigned the task of comparing the functions of the Commission to those of other state agencies with similar responsibilities. In addition to its own research, on July 5, 2005, the committee received from Morgan Ransdell, Managing Attorney of the Commission, a detailed legal memorandum analyzing 10 Kentucky administrative bodies, their adjudicatory powers and their administrative procedures. This well-written and very instructive memorandum prepared by Imran Aslam, a legal intern, contained an exhaustive review of the organizational structure, the decision-making procedure, and the areas of jurisdiction. This memorandum has been extremely helpful in the preparation of this report. (See Appendix C)

The question for this Committee is how does the Commission compare with other state agencies that have similar adjudicatory functions.

Subsection C – Other State Agencies with Adjudicatory Functions

i.

The Kentucky Board of Claims

The Board of Claims/Crime Victims' Compensation Board has similar quasi-adjudicatory functions as the Commission. It is responsible for deciding claims filed against the state by citizens who believe their person or property has been damaged through negligent acts of the state. The mission of the Board of Claims is to ensure an impartial and fair review of all claims and compensate persons for damages caused as a result of the state's negligence. The Board is made up of 5 board members. In addition, there are 5 hearing officers assigned to conduct administrative hearings. Like the Commission, the Board meets once a month.

The Board accepts negligent claims filed against state agencies within 1 year of the date of the incident. For claims under \$1,000, the Board's investigator conducts an investigation and is required to reach a decision within 60 days of the date of acknowledgment of the claim. For claims in excess of \$1,000.00, the defending agency has a right to respond within 30 days of the filing of the complaint. An investigation is then conducted and, if the agency admits liability for the full amount of recoverable damages, the award is placed on the Board's agenda for approval. If there is a contest, the claim is assigned to a hearing officer who will schedule a hearing in the county in which the incident occurred.

The complainant has a right to be represented by counsel if he or she so chooses. After the hearing, the hearing officer makes a recommendation to the Board, which then makes a final decision on the claim. If the complainant is dissatisfied with the outcome of the hearing, they may appeal the claim to circuit court.

The Board of Claims/Crime Victims Compensation Board annual budget for fiscal year 2006 is \$3,401,200.

ii.

The Kentucky Office of Workers' Claims

The Office of Workers Claims adjudicates all work injury and occupational disease claims relating to workers in the workplace. Any employee alleging an injury may file a petition for benefits with the Office of Workers' Claims. Usually, an attorney, on behalf of the injured worker, files an Application for Resolution of Injury Claim and supporting documents with the Office of Workers' Claims. Thereafter, the claim is assigned to 1 of 16 administrative law judges for further adjudication. The employer is normally represented by an attorney retained by the workers' compensation insurance carrier. The claim then proceeds through the administrative judiciary process much the same as a civil claim would proceed through the civil litigation process.

If, after the time for taking proof has expired, the parties cannot reach complete settlement on all outstanding issues, the administrative law judge conducts a formal hearing and renders a decision within 60 days after that hearing. Any party who disagrees with the decision may seek reconsideration of that decision. The case then may be appealed to the Kentucky Workers Compensation Board, which consists of 3 members who are appointed by the Governor. Any party dissatisfied with the Board's decision may appeal the matter to the Kentucky Court of Appeals, and possibly further to the Kentucky Supreme Court.

iii.

The Kentucky Personnel Board

The Kentucky Personnel Board is an agency of the Kentucky Personnel Cabinet. Its major functions include the following:

A. Hearing appeals, pursuant to the provisions of KRS Chapter 18A, of Merit System ("classified") employees and Non-Merit System ("unclassified") employees who have been dismissed, demoted, suspended or otherwise penalized.

B. Revision of administrative regulations as needed.

C. Zealous protection of equitable treatment and due process of all state employees.

D. Participation by hearing officers, executive director and general counsel in intensive hearing officer training conducted by the Office of the Attorney General and other professional organizations as mandated by KRS Chapter 13B of the Administrative Hearing Procedures Act.

E. Training state personnel on the activities of the Board and the provisions of KRS Chapter 18A.

F. Conducting investigations of merit system violations.

The Kentucky Personnel Board consists of 5 members appointed by the Governor and 2 Merit System (classified) employees who are elected by their peers. All members serve a term of 4 years.

The Board has 6 full-time employees. The Board employs the executive director who is responsible for hiring additional staff with the Board's approval.

The Board employs 8 independent hearing officers. They are private attorneys who are not state employees, but work under contract. They are selected through the electronic solicitation process used by Kentucky through the Finance and Administration

Cabinet's e-procurement website. Their contracts are renewable each biennium, subject to the selection process.

Classified state employees who have been dismissed, suspended, demoted, laid off, or who allege merit system violations may file an appeal to the Board. In addition, unclassified employees who are dismissed, suspended, demoted or otherwise penalized for cause may also file an appeal. Each appeal is scheduled for a prehearing conference to determine the issues and to address any additional matters that need to be clarified before an evidentiary hearing. The hearing officer conducts the evidentiary hearings. The hearing officer then issues findings of fact, conclusions of law, and a recommendation to the Personnel Board.

After the hearing officer completes his or her recommended order, either party may file exceptions or request oral arguments within 15 days. Any response to exceptions must be filed within 5 days of the date the exceptions are filed with the Board. Thereafter, each party has 30 days after the date the Personnel Board issues a Final Order to appeal to the Franklin Circuit Court.

In fiscal year 2005, the Personnel Board received 488 appeals alleging violations of KRS Chapter 18A. The Board held approximately 400 prehearing conferences and conducted 146 evidentiary hearings. Prehearings are scheduled within 10-20 days and full hearings are scheduled within 45-60 days. The Personnel Boards 2005 Budget was \$583,000.

iv.

Kentucky Cabinet for Health and Family Services,

Division of Administrative Hearings

The Division of Administrative Hearings, part of the Office of Legislative and Public Affairs, conducts fair and impartial hearings for recipients and applicants who are not satisfied with decisions or policies affecting benefits provided by CHFS programs and services. The division has two branches - Families and Children Administrative Hearings Branch and Health Services Administrative Hearings Branch

A. The Families and Children Administrative Hearings Branch conducts administrative hearings for individuals who are dissatisfied with decisions about their eligibility for income maintenance, food stamps, medicaid, and child support activities, as well as denial of services from the Division of Protection and Permanency.

Branch Functions

1. Conducts hearings for the Kentucky Transitional Assistance Program (K-TAP) including initial and ongoing eligibility for monthly payments, eligibility as an incapacitated individual, "good cause" for non-participation in the Kentucky Works Program (KWP), and eligibility for other services provided by the Department for Community Based Services.

2. Conducts hearings for the Food Stamp Program including initial and ongoing eligibility for program benefits, participation in the employment and training program, and recovery of over-issuance of benefits.

3. Conducts hearings for individuals who allegedly have committed an intentional program violation.

4. Conducts hearings for medicaid including initial and ongoing eligibility for medical benefits, eligibility as a permanent and totally disabled individual, and monthly personal obligations for cost of nursing facility care.

5. Conducts hearings for the Division of Child Support including obligation amounts, tax intercept, payment arrearages, and suspension of driver's licenses.

Conducts hearings for the Division of Protection and Permanency including program issues about services for and treatment of families, children and vulnerable adults.

B. Health Services Administrative Hearings Branch conducts hearings and renders findings of fact, conclusions of law, and recommended orders for final decisions on matters involving the Office of Certificate of Need, Office of Inspector General, Division of Licensing and Regulation, Department for Medicaid Services, Department for Public Health, and the Department for Mental Health and Mental Retardation Services. Branch Hearing Officers preside over certain settlement conferences for the above departments, as well as handle all other administrative hearing needs for health services programs.

Branch Functions

1. Process and schedule hearing requests in a timely manner and in accordance with applicable laws and regulations;

2. Conduct pre-hearing conferences in a timely manner and in accordance with appropriate laws and regulations;

3. Conduct hearings in accordance with KRS 13B requirements or in accordance with hearing procedures approved by the Attorney General and the Legislature;
4. Render decisions or reports in a timely manner in accordance with appropriate laws and regulations;
5. Maintain hearing records in accordance with federal and state statutes;
6. Conduct mediation settlements;
7. Issue subpoenas;
8. Review proposed regulations that address the hearings process; and
9. Assist the CHFS Secretary on appeals and hearings when requested.

v.

Kentucky Unemployment Insurance Commission

The Unemployment Insurance Commission (“Commission”) is part of the Cabinet for Workforce Development. In general, an unemployment insurance program provides unemployment benefits to eligible workers who are unemployed through no fault of their own (as determined under state law), and meet other eligibility requirements of state law. When benefits are denied, a person may appeal.

When a person wishes to appeal from a notice of determination where benefits are denied, or from a notice of income tax refund intercept issued by the Revenue Cabinet in full or partial satisfaction of an outstanding benefit overpayment, he or she may do so by filing with the Division of Unemployment Insurance a written statement that clearly indicates a party's intention to appeal. All hearings are scheduled promptly and notices

are mailed to all interested parties at least 7 days before the date of the hearing. The complainant or any other party may present pertinent evidence and question the opposing party and any witnesses of the opposing party. The parties may or may not be represented by counsel. In addition, the hearing may take place by telephone.

The hearing is conducted by a referee, who may take additional evidence if he or she deems it necessary. The parties may also, with the consent of the referee, stipulate in writing to the facts involved. The referee may then decide the appeal on the basis of this stipulation or may schedule a hearing to take further evidence.

At the conclusion of the hearing, the referee sets forth in writing his or her findings of fact on the issues involved and his decision and the rationale for that decision. A party may appeal the decision to the Commission. The Commission may grant or deny the application for appeal without a hearing; it may also notify the parties to appear at a specified place and time for argument on the application. The Commission has the discretion to allow oral argument or may require only written appeals. A party adversely affected by a decision of the Commission may file for reconsideration. Any party wishing further relief may pursue an appeal to the circuit court.

Subsection D – Findings

1. The Commission is the only agency where adversarial functions and adjudicatory functions reside in the same office. This makes for a serious conflict of interest at several levels. First, when a complainant files a complaint, it is investigated by an agency employee who probably already feels overworked. An argument can be made that the investigator also knows that, if he or she finds probable cause that a discriminatory act has been committed, the result will be additional work for him or her or a colleague. Investigative functions should be completed by an entirely different entity that has no connection with the individuals who will hear the action.

2. The Commission is the only agency where the complainant is not allowed to obtain his own counsel. Notwithstanding the rationale behind the Commission supplying the complainant with counsel, the complainant should have the opportunity to choose his own counsel. If the case results in a financial award for the complainant, his lawyer should be allowed a fee similar to what is done in the workers' compensation system. The quality of evidence and investigation might be improved if lawyers were allowed to be paid for their work. The practice of allowing lawyers to represent the complainant will ultimately sift out many frivolous cases.

3. The Commission is the only agency that makes a decision to dismiss the complainant's case without the participation of the complainant. In a great majority of cases, the Commission unilaterally finds that there is no probable cause to support the complainant's allegations. The complainant is not allowed an opportunity to offer rebuttal evidence. Additionally, dismissal of the complainant's case by the Commission is with prejudice. In summary, the Commission determines the degree of investigation, the scope of the investigation, the result of the investigation and, in most cases, dismisses the complainant's action, leaving him with no other recourse. This should be changed. First, the complainant should be given the opportunity to participate in the investigation. Secondly, a finding of no probable cause should not result in a dismissal with prejudice. The complainant should be allowed the opportunity to file his action in civil court.

4. The Commission should not act as both an adjudicatory agency and an advocacy agency. This creates, as previously noted, an inherent and unavoidable conflict of interest. For example, while investigators may be tempted to marginalize and minimize the worth of a claim brought by a complainant, the opposite may occur if the claim is brought by an actual Commission member. The Commission staff should be solely an advocacy group. The actual members of the Commission, completely separate and apart from Commission staff, could then perform the adjudicatory functions of the agency. In

other words, bifurcation of responsibilities between investigation and adjudication is essential to achieve fundamental due process.

5. Having commissioners to sit as hearing officers without appropriate and meaningful compensation should be discontinued. Most commissioners are very busy working men and women. A hearing may take as long as 1 day or 2 weeks depending upon the body of evidence to be presented. Although the commissioners are very capable, and those who are statutorily qualified should have the opportunity to serve as hearing officers, they should be paid accordingly. Otherwise, a commissioner who has elected to sit as a hearing officer may be tempted to devote less time to a case because of other priorities and stresses, both economic and professional.

Subsection E – Recommendations

1. Establish a true firewall.
2. Ensure that every claim goes through a prehearing process.
3. Commissioners should have an expanded role. They should be able to interact with each complainant at a prehearing/conciliation mediation conference. Those who are 13B qualified should act as hearing officers and be paid accordingly.
4. Rules should be established to ensure that improvements made by Executive Director Linda Murnane and implemented changes resulting from this Panel will be permanent.
5. Allow the complainant to proceed to the court under certain circumstances when their cases have been dismissed.

6. Because the backlog of cases is too extensive, schedule prehearings within 20 days and full hearings within 45-60 days.

7. Because the present system is unable to track cases, address comprehensive training/cross-training for the IT employees at the Commission.

3. Subcommittee Comparing KCHR With Similar Agencies in Other States

This committee's task was to assess how the Commission compares with similar agencies in other states. To assist the committee, Commission staff furnished a state-by-state (and District of Columbia) analysis of civil rights agencies, supplied copies and analysis of relevant Kentucky judicial decisions, and provided useful oral information and opinions. (See Appendix D) The committee also independently researched relevant state statutes and judicial decisions, sought input from current and former Commission officials, and compared Kentucky's statutory mandate for the Commission's investigative and adjudicative functions with similar mandates in other states.

The review revealed an enormous range in key variables among the states, making comparisons of similarly situated agencies difficult. Differences in the following key factors were identified:

- Size and scope: State agencies had wide differences in funding, resulting in great differences in staffing levels. Some of these budgetary differences are attributable to population — larger populations can be expected to generate more claims; some are attributable to geographic size — decentralization of offices, hearings and on-site investigation is more difficult and more costly in large states than small ones; others may reflect political commitment to anti-discrimination laws; still others reflect the substantive breadth of state laws within the agency's jurisdiction.

- Agency function: Some state agencies perform only investigative roles, while others also perform an adjudicative role. Among state agencies that perform an adjudicative role, the scope of judicial review varies. Some provide for *de novo* review, similar to federal claims brought after exhaustion of administrative proceedings before the Equal Employment Opportunity Commission (EEOC). Others, like Kentucky, provide limited judicial review, ensuring only that the agency process and substantive decision does not exceed appropriate limits (defined alternatively as “abuse of discretion,” “supported by substantial evidence,” or “arbitrary and capricious.”) The effect of limited judicial review is to concentrate substantive, decision-making, statutory enforcement power and responsibility at the agency level. This concentration of power and responsibility also increases the importance of structural integrity in an agency’s adjudicative role.
- Number of commissioners: Some states have relatively few commissioners, compared to Kentucky’s 11. Advantages of having a smaller number of commissioners include administrative streamlining and consistency of policy. Advantages of having a larger number of commissioners include allowing decentralization (investigation and hearings throughout the state, rather than in the state capitol or largest city) and maximizing diverse backgrounds and familiarity with different parts of the state. Having few commissioners also increases the workload and time pressures on each and may require use of paid, professional officers rather than civic-minded volunteers.
- Role of commissioners and hearing officers: Commissioners and hearing officers play different roles, of course, in states that allow *de novo* judicial

review than they do in states with final decision-making authority (subject only to limited to judicial review). Even among the latter, the relative role of hearing officers and commissioners varies. Some states provide for hearing officers to make recommendations to the commissioners, who then make the final decision. Other states provide for hearing officers to make decisions, with administrative appeals (of varying scope) to commissioners.

For the reasons listed above, it is difficult to compare the Commission with similar agencies in other states. Nor does any such comparison reflect easily discernable patterns or trends. It is fair (and easy) to say that agencies with larger budgets have larger staffs and handle more cases. But even that self-evident statement does not necessarily mean that the agency is more effective and efficient; population and geographic size, statutory mandate, and adjudicative role (or not) greatly influence the effective and efficient use of the agency's budget. With that said, it is clear that the Commission, like its counterparts in other states, can do more — and do it better — with better funding.

It was not the committee's task to critique the Commission's general statutory mandate and adjudicative role. The legislature has defined the range of protected classes (e.g., race, gender, religion) and the range of protected functions (e.g., housing, employment, public accommodation). Taking those as givens, the committee assessed the number and role of commissioners and hearing officers.

The committee *does not* recommend reducing the number of commissioners. The use of 11 commissioners has served the Commonwealth well. There are sound historic roots for having commissioners familiar with different geographic portions of Kentucky and the committee can discern no correlation between the number of commissioners and either the number of hearings or quality of a state agency's performance. Kentucky is a largely rural state with its population spread throughout many smaller communities. One of the Commission's great strengths is its ability to decentralize its investigations, on-site

inspections, and hearing process. That strength is best served by having commissioners from different regions of the state, who bring divergent knowledge and background to their work. Reducing the number of commissioners would risk losing that range. In addition, reducing the number of commissioners may well require compensation incompatible with scarce resources and public service. To the extent that the Commission itself deems any reorganization advisable, the committee recommends that it be addressed internally, not imposed structurally.

The committee, however, finds that the current adjudicative structure may raise potential conflict of interest concerns.¹ Addressing those concerns likely requires statutory change. Specifically, the committee finds that the current structure for processing commissioner-initiated charges may be flawed. In saying so, the committee recognizes the historical reasons for allowing commissioner-initiated charges: potential complainants' fear of retaliation may deter them from challenging unlawful behavior, and the public's interest in combating unlawful discrimination warrants a loosening of traditional "standing" rules. Nevertheless, the commissioners are the ultimate decision-makers under Kentucky's statutory scheme. It may raise questions of propriety for some members of that body to sit in judgment of a claim (even one asserted not for personal benefit, but in the public interest) filed by one of their colleagues.

In addition, because Kentucky law provides for limited judicial review of Commission decisions, it is imperative that the adjudicative structure avoid any risk or appearance of impropriety. Commissioners must be, and must be perceived to be, neutral and independent. To the extent that they serve, or are perceived to serve, an

¹ In so saying, the committee does not revisit structural issues already resolved by Kentucky's courts, nor suggest any conflict between the Commission's investigative and adjudicative roles. See, e.g., *Whispering Hills County Club, Inc. v. Kentucky Com. on Human Rights*, 475 S.W.2d 645 (Ky. 1972) (rejecting due process challenge to Commission's combined investigative, evidentiary and adjudicative functions); *Kentucky Com. on Human Rights v. Fraser*, 625 S.W.2d 852 (Ky. 1981) (rejecting claimed right to jury trial; rejecting argument that Commission's adjudicative function usurps judicial power); *Kentucky Com. on Human Rights v. Barbour*, 625 S.W.2d 860 (Ky. 1981) (rejecting challenge to Commission's statutory authority to award embarrassment and humiliation damages).

“administrative” function — either as “supervisors” of the executive director or “colleagues” with hearing officers or staff — their neutrality and independence may be compromised. Once the Commission’s staff finds probable cause, their role changes from investigators to advocates. They advocate for one side in a legal dispute, not for the Commonwealth or Commission as a neutral party. If the commissioners are, or are perceived to be, the Commission staff’s supervisors or colleagues, they jeopardize their quasi-judicial role.

Recommendations

The committee makes the following recommendations:

1. Increase the Commission’s budget to the greatest extent possible, consistent with sound budgetary management.

2. Commission staff should be aware of the potential for, or appearance of, conflict of interest in commissioner-initiated complaints. Staff should assess whether the Commission can correct this potential conflict internally and, if not, should make recommendations for legislative change.

4. **Subcommittee on Budget and Personnel**

The Subcommittee on Budget and Personnel was tasked to evaluate the efficiency of the budget and personnel at the Commission. In addition, it was tasked to report the results of an audit of the Commission conducted by the Finance and Administration Cabinet, which report is fully incorporated herein and made a part hereof by reference. (See Appendix A)

The Commission is comprised of the General Administration and Support, Legal Affairs, Research and Information, and Enforcement branches. Listed below are the responsibilities of each branch.

General Administration and Support Branch

The General Administration and Support Branch is responsible for performing the personnel and fiscal activities of the Commission. It also serves as a liaison with the Governor's Office, legislators, and other agencies in state government. This branch is also responsible for the development of internal policy directives and legislative initiatives.

Legal Affairs Branch

The Legal Affairs Branch litigates discrimination cases before administrative hearing officers, provides legal advice to inquiries, sworn complaints, and file closures. The legal staff takes depositions of witnesses, prepares legal briefs and appeals, and serves as in-house counsel.

Research and Information

The Research and Information Branch is responsible for providing technical assistance and education to local citizen groups, employers, public accommodations staff, educational institutions, local human rights commissions, and government officials.

Enforcement Branch

The Enforcement Branch consists of two sections: Employment and Public Accommodations and Housing. This branch is responsible for in-taking, processing, filing, investigating, conciliating, analyzing, documenting, and making determinations on allegations of discrimination in the employment, public accommodation, housing, and financial transactions in the context of enforcing the Kentucky Civil Rights Act. They are also responsible for serving as liaison with the United States Department of Housing and Urban Development (HUD) and the Equal Employment Opportunity Commission (EEOC). Additional responsibilities include completing and filing all required reports to these federal agencies as well as vouchering for the federal funds earned under their programs.

Commission

The Commission includes 11 commissioners who are part-time volunteers that serve in many different capacities. On dates of Commission meetings, and dates they serve as hearing officers, they are compensated and paid mileage and per diem expenses.

Commissioners are more accurately described as "gubernatorial appointees." They are appointed by the Governor and generally serve 3 year terms. The commissioners are responsible for reviewing reports, publications, and case recommendations in preparation for regular and special meetings. They meet monthly for their regular business meeting. During the regular meetings, the enforcement manager presents various cases to the commissioners. The Commission body votes on whether they will accept the determination of probable cause, non-probable cause, and whether to dismiss cases. Commissioners hold special meetings as needed for the following purposes: 1) to interview and discuss application materials for executive director candidates; 2) to attend training; and 3) to prepare final orders following the issuance of a recommended order in actions pending before the Commission. Additional

responsibilities include overseeing the finances of the Commission, filing commissioner-initiated cases, and serving as hearing officers.

In addition to its authority to enforce civil rights in the state, the Commission is mandated to educate the public in the area of civil rights. It conducts training, outreach, and public awareness initiatives in order to accomplish this goal.

The fiscal year 2006 budget for the Commission is \$2,141,000. In the 2005 budget, consisting of \$1,933,700 in general funds, and \$342,700 in federal funds, all but \$797,740 was needed to cover salaries and wages. The federal funds component of the Commission budget in some areas was use-restricted. (The projected budget for salary and wages for 2005 was \$1,478,660). Fringe benefits—excluding the tuition assistance program—accounted for an additional \$276,800 of the projected budget. For each of the last 3 years, the Commission has been expected to absorb cost-of-living and benefits increases without any increase in appropriations. Rental for facilities used by the agency takes up an additional \$117,000 of the remaining budget.

Excluding the fixed expenses of salaries, wages, fringe benefits, and facilities, the actual functional budget for this 38-person agency is \$403,940. Within that \$400,000, the 5-year trend has been to spend between \$93,000 and \$115,000 annually in travel. Because the Commission is an agency servicing the entire state, travel is necessary. The travel figures include travel for the commissioners for scheduled meetings. When the current executive director joined the Commission in February 2005, nearly 90 per cent of the year's travel budget had been expended through agency travel and travel of the previous executive director.

An additional \$50,000 was budgeted annually from the remaining \$289,000 to cover the payments made by the Commission to the Commonwealth Office of

Technology for on-line and communications services. An additional \$150,000 was budgeted or allocated for commodities purchased by the agency, including important programs like the bookmark and poster series, printing costs for Commission books, archiving and storage fees, etc.

After reviewing the expenditures of the agency, it was clear that the executive director needed to realign priorities. She moved funds from travel to training - making a February 2005 to July 2005 commitment of \$25,000 to fund training programs for employees. This was very well received in the agency as people within the agency had been asking for training opportunities apparently for a long time. The executive director dedicated \$5,000 from travel to the annual retreat - previously budgeted at between \$135 and \$250. This is the single event at which the Commission's employees have a chance to consider the strategic direction of the Commission. The director hopes to fund speakers and events that will foster teamwork and build cohesion in the agency at the annual retreat. She also plans to dedicate more funds out of travel to employee training and she plans to restore the tuition assistance program for Commission staff.

To ensure a better managed budget for the July 2005 to June 2006 budget period, the director started holding a four-hour budget planning session with all managers. She was told that this had never been done during the tenure of any of the Commission's current employees. Among the training programs she has brought into focus, the Commission employees now will be considered for mediation training, customer service training, writing skills training—for which there is great demand—and similar projects. She funded a needed computer upgrade using the personnel account savings that resulted from the Commission being understaffed by 25% of its manpower for over a year. She believes that the computer upgrade will improve office efficiency and employee morale, as there was intense frustration over lost data, computer crashes, and the wasted work hours used to repair outdated computer hardware and software. She also was able to use the personnel cost savings to fund a much needed stamp machine and

scale for the Commission's Northern Kentucky office—the only item it asked for this year to assist the employees in performing their vital functions in a part of Kentucky where some of the most significant violations of civil rights occur.

Recommendations

After having critically reviewed the budget, interviewed the personnel, and analyzed the report of the audit conducted by the Finance and Administration Cabinet, the committee on Budget and Personnel finds that the Commission should continue to fill vacant authorized positions and provide adequate funds for training. The Commission should continue its strong commitment to professional development of staff and cover the costs by training every staff member at a level of \$1,500 per person and training for educational assistance of \$3,500 per person per year. The Commission also should be funded to establish a mediation unit as recommended in detail in the audit report.

The following figures represent the minimum amounts necessary to keep the Commission on the path to full efficiency for fiscal year 2007.

	<u>Annual Salary</u>
Employment Public Accommodations Supervisor	\$47,500.00
Western Kentucky Field Representative	\$41,600.00
*Enforcement Officer I	\$38,300.00
Enforcement Officer I	\$38,300.00
*Staff Attorney II	\$54,500.00
*Paralegal	\$29,500.00
*Research Specialist	\$34,000.00
Administrative Specialist II (Intake) x 2 (\$26403 ea)	\$55,000.00
Procedures Development Specialist	\$32,000.00
Contract Specialist Reclassification (Difference)	\$10,000.00

FY 2007 Budget Increase to Fill Vacancies Only

\$380,700.00

- Positions identified with an asterisk have been filled and currently have an employee in place.

Training Budget added amounts for 10 additional employees @ \$1,500 = \$15,000.00

Education Assistance Budget for 10 additional employees @ \$3,500 = \$35,000.00

Total Additional Allocation Required for FY 2007 to fill all vacant positions and train all staff \$430,700.00.

FY 2008 - Increments for 10 additional positions (assuming 5% \$21,535.00 using last year's increments)

FY 2008 Training Expenses for 10 positions @ \$1,500 = 15,000.00

FY 2008 Education Assistance for 10 positions @ \$3,500 = 35,000.00

Total Additional Allocation Required for FY 2008 to keep all positions filled and train all staff = \$380,700.00 in salaries + \$17,533.49 in increments + \$50,000 in training and budget for a total additional amount needed in FY 2008 of \$448,233.49.

Because the Commission expends \$117,000 per year on renting office space, it is recommended that the Commission relocate to a public building that may provide the Commission with free office space.

The Commission further finds and adopts in its entirety the following Financial Management and Internal Controls Recommendations of the Finance and Administration Cabinet Audit Report:

1. Establish procedures to ensure that all documents, including contracts and travel payments, are accurate and complete before they are approved and processed.
2. Develop and implement procedures that will ensure that supporting documentation is properly retained in accordance with the Records Retention Schedule for State Agencies and FAP 120-21-00.
3. Create an avenue for employees that will allow them to speak freely about concerns and issues affecting them and the agency without the worry of future repercussions to them personally. This can become a means to foster good communication between the staff, managers, and commissioners presently and in the future.
4. Ensure that proper authorization is provided for all transactions (e.g., purchases, contracts, etc.).
5. Create policies and procedures that define reporting requirements (i.e., funding source and object codes) and incorporate them into the policy and procedures manual.
6. Develop appropriate substantiation and evaluation techniques which ensure that each transaction is carefully reviewed for accuracy prior to its approval and processing.
7. Provide KCHR employees adequate training to effectively and efficiently perform their jobs.

8. Consider using the object code E114-Per Diem (Boards and Comms) instead of using E361-Instate Travel, E362-Out-of-State Travel, E565-Per Diem Expense or E569-Subsistence for Commissioners per diem expenses. E114-Per Diem (Boards and Comms) can be used as a means of tracking commissioners' per diem costs and as a budgetary tool to compare commissioners' per diem costs versus KCHR staff per diem costs.
9. Obtain a copy of the General Records Retention Schedule for State Agencies and train on its requirements.
10. Obtain assistance from the Department for Libraries and Archives to create an updated agency-specific records retention schedule.
11. Develop policies and procedures that will ensure that there is sufficient supporting documentation maintained to validate expenditure transactions.
12. Ensure that adequate supporting documentation is collected and thoroughly reviewed for accuracy before entering and processing the transactions into the accounting system.
13. Refer to the Internal Control Guidelines for State Agencies in the Pre-Audit Manual at <http://mars.ky.ciov/MARSPreauditManual.doc>.
14. Realign job duties based on proper segregation of duties. If the Commission is unable to accomplish this recommendation, it should assign duties that will prevent a single individual from having control of a transaction from beginning to end. For example, ensure that one person is not involved in the complete control of approving the transaction, maintaining custody of the item or document, and preparing the document. Ideally, the same person

should not be performing job duties in two or more of the following areas: authorization, custody, and accounting functions. Also, personnel and payroll duties should be separated.

Conclusion

The Commission is an important and vital agency for the Commonwealth of Kentucky. This agency has been charged with helping to ensure that the civil rights of its citizens are protected, which is an important and vital responsibility. Formally addressing the concerns in this committee report will help the Commission meet the Commonwealth's needs in this important and vital area.

In addition, recent actions taken by the current management team relating to enhanced training, improved financial management and internal controls, as well as its requests for additional funding regarding a mediation program will help the Commission accomplish its goals. This commitment is a vital and ongoing component in making substantive improvements within the Commission.

SECTION VI - RECOMMENDATIONS OF THE BLUE RIBBON PANEL

Having studied the Kentucky Commission on Human Rights for more than a year, the Blue Ribbon Panel makes the following conclusions and recommendations:

1. The Panel recognizes that discrimination is still alive throughout the Commonwealth of Kentucky. Therefore, there is a strong need for the Commission to continue and expand its efforts on behalf of all Kentucky citizens. The Panel affirms the Commission's authority to encourage fair treatment, foster mutual understanding and respect, and discourage discrimination. In order to

adequately fulfill its mission, the Panel affirms the long-standing relationship of the Commission to the Governor's Office.

2. The Panel also recognizes the importance of having an agency with statewide identity, representation, and location to protect several classes of jeopardized citizens. The Panel believes that the Commission is better equipped to accomplish its work when its membership is representative of the entire Commonwealth and the classes of citizens needing protection.
3. After reviewing the audit report, organizational structure, and budgetary challenges, it is clear that there is an urgent need for increased funding. An expanded budget would enable the Commission to upgrade its technology system, hire and train adequate staff, and expedite the process of responding to the large number complaints that are filed each year. In addition, the Panel recommends that commissioner per diem pay should be further reviewed, and that commission members should receive salary consideration and/or remuneration commensurate with members of other boards with similar adjudicatory responsibilities within the Commonwealth.
4. Support of local human rights commissions, financial and otherwise, is essential to the statewide mission. The Commission should encourage local support wherever possible and appropriate. Consistent with that objective, the Commission should design a program, a grant program for example, that will provide appropriate financial support to local commissions. The allocations from such a program should be discretionary. In addition, any such initiative should be deemed subordinate to the Commission's budgetary request and financial needs. Such a program should be in effect if and when the budgetary needs of the Commission are otherwise fully addressed.

5. We are concerned about several aspects of the citizen complaint resolution process. The Panel's study of the Commission reveals a need to improve the efficiency of the present system in several ways. The Panel recommends:
- a. More detailed job descriptions and guidelines for supervising staff.
 - b. That the Commission develop written policies and procedures on delegation of authority in order to provide reasonable assurance that the agency will operate in the most effective and efficient manner.
 - c. Establishment of "firewalls" to eliminate the appearance of any possible conflict of interest from investigation to final ruling, especially as it relates to commissioner-initiated complaints, etc.
 - d. With each complaint, the Commission be required to decide probable cause within 120 days after receiving a discrimination complaint. Otherwise, the executive director should be required to report the case findings to the Commission and explain why the probable cause in that case could not be determined within the 120 day period.
 - e. When the Commission has determined that no probable cause exists to further prosecute a complaint, it should provide notice to the complainant at least 10 days prior to the entering of a final determination. The notice should advise the complainant that he or she may either provide additional evidence or withdraw the complaint in lieu of a "no probable cause determination" so as to preserve the complainant's right to proceed in court.
6. The recommendations of the 2006 audit by the Finance and Administration Cabinet of the Commission should be implemented to the extent practicable and appropriate. The progress for implementation should be documented. Adequate funding should be provided by the State, in addition to other budgetary needs of the Commission, to ensure implementation. The rationale for modifying or delaying the implementation of a recommendation should be documented.

7. The Blue Ribbon Panel commends Executive Director Murnane for her efforts in improving the morale and operation of the Commission.