



HAWAI‘I CIVIL RIGHTS COMMISSION

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March 2, 2016
Rm. 016, 10:01 a.m.

To: The Honorable Gilbert Keith-Agaran, Chair
Members of the Senate Committee on Judiciary and Labor

From: Linda Hamilton Krieger, Chair
and Commissioners of the Hawai‘i Civil Rights Commission

Re: S.B. No. 2895

The Hawai‘i Civil Rights Commission (HCRC) has enforcement jurisdiction over Hawai‘i’s laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state-funded services. The HCRC carries out the Hawai‘i constitutional mandate that no person shall be discriminated against in the exercise of their civil rights. Art. I, Sec. 5.

The HCRC supports S.B. No. 2895.

S.B. No. 2895, authorizes the HCRC Executive Director, in cases in which a notice of cause has been issued and conciliation efforts fail, to: 1) issue a final demand, and docket the case for litigation; **OR**, 2) dismiss the complaint and issue a notice of right to sue. The bill also provides an exception for dual-filed fair housing cases, as required by U.S. Department of Housing and Urban Development (HUD) federal substantial equivalence requirements.

The current HRS § 368-13(e) mandates that when conciliation efforts in a cause case fail to secure a conciliation settlement, the Executive Director *shall* issue a final conciliation demand. § 368-14 then requires that the case be docketed for contested case hearing / trial before a Hearings Examiner.

The mandatory language in the statute, with the use of the word "shall" in mandating each next step of the process has several consequences negatively affecting the efficiency and effectiveness of HCRC civil rights law enforcement, affecting the way that cases are investigated and conciliated.

The bill provides for prosecutorial discretion, allowing the Executive Director to decide which cases should be litigated. **Similar discretion is provided to and exercised by the U.S. Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964.**

The current mandatory language creates problems and inefficiencies, stemming from the difference between the “reasonable cause” standard applied in investigation and the “preponderance of evidence” standard applied in litigation, administrative hearing and judicial review. Simply put, there are cases that are cause cases but not litigation cases, in which there may be reasonable cause, but it would be difficult to prevail at hearing and on appeal. The result is that the HCRC is forced to use its limited resources in an inefficient manner, in conciliation and investigation, rather than focusing its resources on strong cases that should be litigated.

This bill will in some measure help to alleviate the problems created by loss of enforcement resources since 2007, by allowing for more strategic use of existing resources.

S.B. No. 2895 also provides a new subsection 368-13(f) that makes an exception to the exercise of discretion by the Executive Director under the amendment to subsection 368-13(e). The new subsection (f) maintains the mandatory language from the current statute for cases that are dual-filed under both our state fair housing law, chapter 515, and the federal Fair Housing Act. These comprise approximately 10-15% of the complaints filed with the HCRC. Our federal partners at the U.S. Department of Housing and Urban Development (HUD) Office of Fair Housing and Equal Opportunity (FHEO) have advised us that this exception is required to maintain substantial equivalence with federal fair housing law.

The HCRC supports passage of S.B. No. 2895.

From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc:
Subject: Submitted testimony for SB2895 on Mar 2, 2016 10:01AM
Date: Monday, February 29, 2016 1:19:52 PM

SB2895

Submitted on: 2/29/2016

Testimony for JDL on Mar 2, 2016 10:01AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Louis Erteschik	Hawaii Disability Rights Center	Comments Only	Yes

Comments: We have concerns about this bill. We don't see any rationale for having the Commission investigate a case and then not follow through on it. If the case is dismissed and the Complainant is then on his or her own, then they are not much better off than if the matter had not been investigated. In that scenario, they may as well have been advised to pursue litigation directly. Victims of Civil Rights violations are often unable to obtain lawyers to represent them and depend upon the Commission to protect them. This has the potential to be an abdication of the Commission's responsibility. We also have concerns about having any decisions of the Executive Director of the Commission be beyond judicial review. The Commission is created as a state agency and there is no particular reason for them to be immune from the same laws that govern other administrative agencies. In particular, we have seen a few cases where some odd results were achieved. In at least one, the Executive Director's Decision was reversed by his own Commission and that Decision was then appealed and reversed by the Circuit Court. While we express no opinion on the merits of that specific case, it underscores the need to maintain the full range of administrative and judicial review over the actions of the Civil Rights Commission.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc:
Subject: Submitted testimony for SB2895 on Mar 2, 2016 10:01AM
Date: Friday, February 26, 2016 5:32:17 PM
Attachments: [sb2895.docx](#)

SB2895

Submitted on: 2/26/2016

Testimony for JDL on Mar 2, 2016 10:01AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Karin Nomura	Individual	Oppose	No

Comments: ...The executive director's determination to dismiss a complaint and to issue a notice of right to sue issued may be reconsidered on the executive director's own initiative but shall not be subject to judicial review or reconsideration by the commission on the commission's own initiative but shall not be subject to judicial review, because this is taking the rights away from the victim, and giving too much discretionary power to those that may...

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As someone who went through the process of the Hawaii Civil Rights Commission – with claims from the investigator of how he didn't have a land line by his computer; from time of submission (when those were the documents sent to me when I mentioned I wanted to file a claim – later told wrong forms) to the actual time of contact with an investigator being over 3 months (told they were back logged – not enough staff/etc); to being told that it would take over 2 years for security footage to be requested, in writing from actual confirmed employees (non-confirmed with shouts in my neighborhood at night of people claiming to be HCRC employees and the “investigation” – which actually included “clients” of my former employer – complete with name and address, after midnight no less.) I can understand why not all complaints that are viable are investigated and a letter to sue issued, with the executive director's “discretion” – “discretion” being very powerful in whether a victim receives the help they need or not. With of course the amount of time and dedication needed to prove a claim against what may appear to be an upstanding corporation in the public's eyes (which all corporations/agency's should be upstanding) – for pro bono (had that shouted at night in my neighborhood too) no less. But sometimes they are the last agency in a long line of agency's for the victim, and they need to be compensated for their strife...though it is easier to get rid of some issues...in my case 8 years and still ongoing, but in a much more diminished capacity – because of “discretion”, which I've mentioned is very powerful – as some people receive “justice” while other's do not – which seems very discriminating in circumstances such as this, not to mention just how “powerful” injustice can be, in the wrong hands. And when you add in the determination to dismiss, shall not be subject to judicial review, it becomes even more discriminating in my view, as the victim is pleading with the agency to correct an injustice; discretion (in my case, shouts of “you asked for too much, that's why”/“who do you think you are” (even comparisons of what was listed in my letter to the HCRC shouted at me, when I came home from work) in my neighborhood – this after mock investigations and other incidents. With after the news footage of a person they assisted shouts of how that was the largest amount ever issued during conciliation...)) of the “investigator”, who may or may not be impartial if this is what occurs; making a “victim” even more “powerless” when there are laws supposedly in place already (which I've learned does not mean that the agency's in charge will actually enforce – even when emailed the line and measure) and extreme, hence victimizing the victim again – and with impunity. (I've had the continued shouts each time the “investigation” conducted in my neighborhood has been “completed” of “we're above the law” so many times that it's just beyond comprehension – along with the “join the...and you can get away with stuff like this” cause they're “powerful”)

If talking about what occurred at my former working place; in my neighborhood; when I went out shopping; will get this bill thrown out, I will gladly spend the day talking to every party that taking away the right to appeal a decision made by the HCRC, The executive director's determination to dismiss a complaint and to issue a notice of right to sue issued may be reconsidered on the executive director's own initiative but shall not be subject to judicial review or reconsideration by the commission on the commission's own initiative but shall not be subject to judicial review, because this is taking the rights away from the victim, and giving too much discretionary power to those that may. I see this as helping conglomerates continue abusing their employees ...the HCRC should be helping the “victim(s)” of large conglomerates that have the funds to defend themselves vs. the employee/claimant/victim, which is why most get away with repeating their actions – some because the penalty vs. the crime is so minimal

to them, that it's worth committing the act over and over again – they just get smarter over time – like most offenders learn a new trade while in prison, so do white collar criminals.