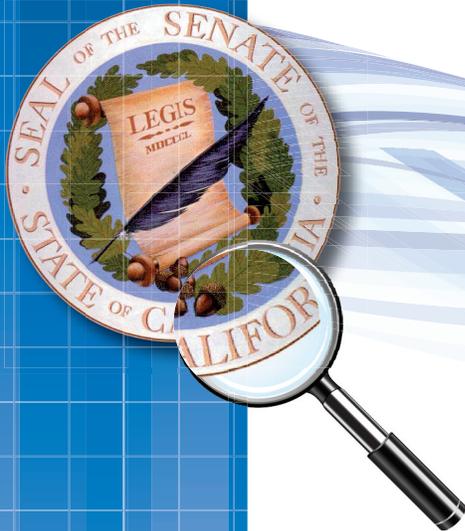


Department of Fair Employment and Housing: Underfunding and Misguided Policies Compromise Civil Rights Mission

A report prepared for the Senate Rules Committee

December 18, 2013



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Executive Summary

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 “foments 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.

I. DFEH's historic mission, duties, and federal partners

Statutory history reflects state's commitment to eradicate discrimination

The Fair Employment and Housing Act (FEHA) has shaped California's civil rights protections since its passage in 1959. Then known as the Fair Employment Practices Act, those protections originally focused on job discrimination based on race, ancestry, national origin and religion. Coverage was expanded over the years to include age, physical and mental disability, marital status, sex, gender identity, and sexual orientation.

In the words of the Act:

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interests of employees, employers, and the public in general. (Government Code Section 12920)

The statute says the state must provide effective remedies that both prevent and deter unlawful employment practices. The instrument for accomplishing this is the California Department of Fair Employment and Housing (DFEH).

The department was established by the Legislature a half-century ago as the Division of Fair Employment Practices, functioning within the Department of Industrial Relations. It became an independent department in 1980, when the state's employment discrimination statute was retooled to include housing protections. The new Department of Fair Employment and Housing was mandated to enforce California's comprehensive anti-discrimination laws in employment, housing, and public accommodations.

In 1993, the department took over administration of the California Family Rights Act, bringing family leave cases under its jurisdiction. Then, in 2008, hate crimes were added to the department's enforcement portfolio.

Throughout its history, the department was paired with a commission, which adjudicated cases brought by the DFEH and also functioned as its rule maker. In 2012, however, the Fair Employment and Housing Commission was eliminated as part of Governor Brown's reorganization of state government. A budget trailer bill, SB 1038, created in its place a Fair Employment and Housing Council to handle the commission's regulatory duties. More significant, however, was another change: Now, instead of filing accusations with the commission, the department is able to proceed directly to civil court once mandatory mediation is complete. SB 1038 also allows DFEH to collect attorney's fees – providing additional income to the department as well as a financial deterrent for employers.

Finally, the department moved to a new agency in 2013. Under the Governor's reorganization, DFEH transitioned from the State and Consumer Services Agency to the new Business, Consumer Services and Housing Agency.

State civil rights law grants DFEH broad, independent authority and duties

The department's jurisdiction extends to private and public employers and housing providers. Under the FEHA, the DFEH's broad authority over discrimination claims is described in mandatory terms. For example, the department's many activities, including rule making, decision making and investigations are described not only as "functions and powers" but also as "duties." (Gov. Code, § 12930 (e) and (f)(1)). These obligations and independence give DFEH the right to unilaterally call employers and housing providers to task by issuing subpoenas (Gov. Code, § 12963.1), serving written interrogatories and requests for production of documents (Gov. Code, §§ 12963.2, 12963.4), deposing witnesses (Gov. Code, § 12963.3), and hauling employers into court to compel discovery if they don't cooperate. (Gov. Code, § 12963.5)

Nothing in the current law or regulations provides for or signals tolerance for outside interference. Although budget cuts over the years have made it infeasible to determine the validity of each and every claim before it, the department is actually required, not merely permitted, to initiate prompt investigations into any claim which alleges "facts, sufficient to constitute a violation of the FEHA." (2 CCR 10026(a)) Its own regulations further provide that "the department *shall* gather during the course of an

investigation all relevant evidence necessary to determine whether an unlawful practice has occurred.” (emphasis added) (2 CCR 10026(d))

DFEH partners with federal commission

In addition to filing a claim with the state Department of Fair Employment and Housing, there are two other avenues for individuals who believe they have been victims of workplace discrimination. If they can find willing lawyers, they can take their cases to civil court. Or they can file a claim with the United States Equal Employment Opportunity Commission (EEOC).

In order to file a discrimination lawsuit, claimants must obtain a “right-to-sue” letter from either the DFEH or the EEOC. California issues these letters automatically upon request and does no further investigation. Almost half of the more than 20,000 claims filed with the DFEH each year involve a pre-investigative right to sue letter.

About three-fourths of all employment discrimination claims in California are filed with the state department, with the remainder filed with the federal EEOC. Why does the state field most of the claims? One explanation is that California’s Fair Employment and Housing Act is broader and stronger than federal law. For example, the state law protects workers from discrimination based on sexual orientation, marital status, and gender identity; federal law does not. FEHA applies to employers with five or more employees – and prohibits harassment in every workplace regardless of size. Federal law applies to employers with 15 or more employees. Perhaps most importantly, the standards written into the state statute are more protective of employee rights than federal law.

EEOC pays DFEH \$650 for each employment claim it resolves. In 2012-13, the federal agency paid the state department \$2 million for investigating 3,211 claims. The two agencies have an information-sharing agreement to avoid overlapping investigations.

DFEH and HUD join forces to address housing discrimination

The department has a similar work-sharing agreement with the federal Department of Housing and Urban Development. DFEH is the largest of HUD’s 87 fair-housing partner agencies across the nation.

DFEH is paid by HUD to investigate claims of housing discrimination. In 2012-13, the top payment was \$2,600 per claim on a sliding scale, based

on how quickly the department handled an individual claim. Additional funds are paid to cover administrative costs and training.

Throughout its 19-year history with HUD, the California department was often recognized for its exemplary work. In April 2013, however, the federal agency ordered the DFEH to improve its recent performance or lose the contract with HUD. Among the criticisms, HUD wrote that the quality of discrimination investigations had declined to such a point that “we could not determine whether or not the Fair Housing Act had been violated.” In response, DFEH hired more housing investigators and agreed to return to its previous system for intake and investigation of housing claims.

II. UCLA/RAND concludes DFEH enforcement unfair and underfunded

One of the first things DFEH Director Phyllis Cheng did after she was appointed by Governor Schwarzenegger in 2008 was to commission a comprehensive study of the history and effectiveness of California's fair employment law during its first 50 years (1959-2009). She turned to Gary Blasi and Joseph Doherty, a pair of experts who led a team of dozens of researchers, including law student volunteers, to prepare the most exhaustive report on the FEHA in its history.

Titled *California Employment Discrimination Law and Its Enforcement: The Fair Employment and Housing Act at 50*, the 2010 report was the product of the joint research center of the RAND Corporation and the UCLA Law School, where Blasi and Doherty were law professors. They looked at 212,414 discrimination cases, using sequential logistic regression techniques.

The 2-inch-thick report's findings were both unsettling and groundbreaking. As Blasi and Doherty wrote:

What we have found raises serious questions regarding whether enforcement of the Fair Employment and Housing Act is either fair or efficient. At the same time, our analyses and interviews with scores of stakeholders from diverse perspectives leads us to believe that these shortcomings are the product of systems and markets rather than the motivations or performance of individuals, many of whom work very hard with inadequate resources.

Although FEHA covers both employment and housing discrimination, the report limited its analysis to the department's response to employment discrimination. While the report made dozens of observations regarding the shortcomings of that response, several stand out:

- *We found sufficient reasons to be concerned that our anti-discrimination system may itself discriminate, perhaps against people in the very groups that it was designed to protect.*

- *At present, we have two anti-discrimination systems – separate and unequal. Those with lawyers operating on contingency fees have access to a civil justice system. Others depend on the alternative provided by the DFEH. Access to those two systems appears to vary systematically by race, by occupation, and by sex.*
- *The funding we allocate to different government functions signals – more accurately than any proclamation – the relative importance we place on those functions. The current funding for administrative enforcement of the FEHA – the only enforcement available to half of the individuals who seek enforcement – suggests that laws prohibiting discrimination in the labor market or the workplace are not, at least for some people, very important.*
- *At the same time, policymakers and the public will (and should) be reluctant to increase funding for an activity that appears only marginally effective. For that reason, consideration of increased funding should accompany the adoption of reforms in administrative enforcement.*

Report recommends practical reforms

Among many recommendations, the authors urged the Department of Fair Employment and Housing to:

- Evaluate the recent changes in intake procedures which initially switched to telephone rather than face-to-face interviews and [since the report] have relegated most complaints to complicated online forms.
- Upgrade investigator qualifications.
- Improve training.
- Reevaluate burdensome caseloads.
- Assure consistency of practices from case to case.
- Provide an “appropriate level of resources for education and administrative enforcement of the FEHA.”

Other suggestions in the report, including a strengthened mediation program, were already underway at the department. Another important recommendation – restructuring of the system to allow for direct court action – was adopted by the Legislature and took effect Jan. 1, 2013.

DFEH resists and criticizes findings

The UCLA/RAND report was the subject of a legislative hearing soon after its release. In February 2010, a joint oversight hearing of the Senate and Assembly Judiciary Committees was held in the State Capitol. The findings were presented by its authors. Several other speakers representing business and employee rights groups also addressed the committees.

Somewhat surprising testimony came from the DFEH staff itself, which had commissioned the UCLA/ RAND study in the first place. Director Cheng and others criticized many of the study's basic findings, describing the report as "retrospective" and already out-of-date, while the department was focused on the future.

A central finding of the UCLA/RAND report involved a comparison of outcomes between cases handled by private attorneys and cases handled by the department. The private bar, driven by contingency fees, tends toward high-dollar cases, often to the disadvantage of low-wage workers, according to the study. As a corollary, certain groups of claimants – particularly African-Americans and women – have a significantly harder time finding private counsel than others. The report's authors also found that private lawyers obtained much higher settlements and judgments than DFEH, leading to the conclusion that the two systems were "separate but unequal."

In an interview with Senate oversight staff, Professor Blasi talked about this situation: "In cases with very little lost wages, and no egregious behavior to support punitive damages – why would the private bar take it? It's ironic. This is discrimination by the very system that's supposed to fight discrimination. The main disparity is, if you have a lawyer, the system works about as good as it gets."

"It's ironic. This is discrimination by the very system that's supposed to fight discrimination."
– UCLA/RAND report author Gary Blasi

At the hearing, Cheng challenged that negative finding, saying that such a comparison was unfair. "Given the different purposes of California's civil rights agencies and the private bar, the label of 'separate and unequal' is a misnomer," she told the two committees. "The better analogy is 'apples and oranges,' two separate but complementary systems that ensure a discrimination-free workplace." She noted that DFEH clients pay nothing to the department, receive all of their damage awards, and do not have to pay retainers, court filing fees, or lawyers' contingency fees.

Many recommendations ignored

The Senate Oversight Office asked DFEH to what extent it was implementing the recommendations of the UCLA/RAND study and how such changes were working out. It was apparent throughout the responses that the department was not using the report's recommendations as a blueprint for change. Here is a sampling of the responses:

- **Analysis of settlement amounts.** Has the department implemented the report's idea of using a panel of outside experts to evaluate whether settlement amounts were appropriate? (The report had criticized the average settlements for employees as either insignificant or non-existent.) The DFEH did not say whether such evaluation was occurring, instead pointing to its new Mediation Division which it expected to improve settlement amounts for investigated cases.
- **Low-cost legal services.** Has the department done anything to promote legal services for unrepresented claimants by pairing them with nonprofits? The DFEH expressed no interest in encouraging low-cost legal services and stated that the department "has declined to implement this recommendation." Among other things, the department claimed that results for unrepresented DFEH claimants were not proven by the study to be any worse than outcomes for those with private counsel.
- **Upgrade investigators' qualifications.** The DFEH did not directly respond to this recommendation but asserted that it always strives to retain qualified investigators.
- **Avoid burdensome and irrelevant "boilerplate" document requests to employers.** DFEH did not address this recommendation.
- **Reevaluate caseload assignment efficiency.** The department said it had licked the problem of caseload inefficiencies by "case grading, pairing consultants with staff counsel, and hiring legal analysts and graduate legal assistants."
- **Provide adequate resources to conduct thorough investigations.** In an interview with the Senate Oversight Office, the director emphasized that the department did not need more funding for any purpose. Indeed, in a May 2012 press release, the department announced that it had returned more than \$2.5 million to the state in unused funds.

III. A Problem of Dwindling Resources and Increased Demand

FINDING: 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. The state must either dramatically increase funding or limit the ambitious mission of the law.

DFEH and state leaders must come to grips with the chasm between the broad legal mandate to provide effective remedies – including full investigations into all proper claims alleging discrimination – and the allotment of resources appropriated for that purpose in the state budget.

As described in Section I, the jurisdiction of the DFEH is broad, extending to private and public employers and housing providers. Moreover, the department’s mission is well-defined and complex. In the face of more than 20,000 claims per year, the cost of actually meeting its mandatory responsibilities is daunting.

The department is responsible for rule making, drafting complaints, investigations, individual court enforcement actions, settlement procedures, court discovery motions, class action litigation, merit determinations, and many more activities. None of these responsibilities is more central to its mission, or more time consuming, than the duty to adequately investigate complaints which allege discrimination against an employer or housing provider. The law describes these responsibilities not merely as “functions and powers” but also as “duties.” (Gov. Code, § 12930)

With respect to investigations, DFEH’s own regulations require the department to initiate prompt investigations into all claims which allege “facts, sufficient to constitute a violation of the FEHA.” (2 CCR 10026(a)) Nor is there any dispute that by its own regulations “the department *shall* gather during the course of an investigation all relevant evidence necessary to determine whether an unlawful practice has occurred.” (emphasis added) (2 CCR 10026(d)) Even so, according to our sources,

every day overworked employment investigators are faced with an unresolvable conflict between what the law requires and what available resources make feasible.

Insufficient funding to hire more investigatory personnel, experts told us, creates a different reality than that laid out in FEHA. The lack of time to conduct adequate investigations was a theme often repeated by DFEH workers during this investigation. As one wrote in a letter sent to our office: “The enforcement staff is overwhelmed with a caseload so large that it is difficult for them to conduct thorough and timely investigations.”

DFEH itself has not championed the cause of adequate funding. Instead, the department’s official position is that there is no need for any more money. In a May 4, 2012, press release, DFEH trumpeted its lack of need by announcing it had returned \$2.5 million to the state treasury. Top officials adamantly told the Senate Oversight Office that they had no need for additional funding “for any purpose” and could not list a single activity that would benefit from better funding. This position is starkly at odds with the UCLA/RAND study and apparently disregards the unmanageable caseloads being carried by its investigators.

In August 2013, a memo from 10 Los Angeles-based DFEH investigators pleaded with department leaders to address their unmanageable caseloads. They wrote: “We believe that acknowledging workload demands would bring a better understanding of the additional time required to properly investigate complaints.” According to their memo, the investigators had raised these issues repeatedly in the past but had been ignored.

When UCLA/Rand researchers decried the fact that California spent only 81 cents annually per worker statewide on civil rights enforcement – an amount they regarded as woefully inadequate – Director Cheng had this response at a legislative oversight hearing in 2010: “The finding that California employees pay only 81 cents per year for the DFEH speaks well for its efficiency and effectiveness....The budgetary constraints have spurred many successful innovations. These include automation of the appointment and right-to-sue systems, telephone intake, and a case grading system that properly targets resources according to merit and has nearly doubled productivity. Like other enterprises that face fiscal challenges, the department has become more efficient and effective in carrying out its mission.” Today, the director adds the new cloud-based data management system, Houdini, to the list of plusses.

But others we conferred with said the department’s civil rights mandate cannot be achieved without more money. Over the last decade, dollars

provided to DFEH have shrunk while demand for investigations and qualified investigators has increased.

Comparison of DFEH Budget, Staff and Caseloads 2007-08 and 2011-12			
Category	2007-08	2011-12	% change
Overall budget	\$24,370,000	\$21,701,000	-11%
Personnel budget	\$18,586,000	\$16,488,000	-11%
Cases for investigation	7,530	8,745	+16%
Investigators	109	99	-9%
Cases per investigator	69	88	+27%
Funding per case	\$3,236	\$2,481	-23%
Field offices	10	5	-50%

(Source: California Department of Fair Employment and Housing)

In 2008, according to the UCLA/RAND study, the department “received 34% more complaints than in 1985-86, but had 7% fewer staff members to handle them.” The trend has continued, as illustrated in the table above. Comparing the years 2007-08 and 2011-12, DFEH’s personnel budget was cut by 11% even as cases for investigation increased by 16%. The combination of higher demand and reduced resources has resulted in dramatically increased caseloads for investigators, less personal service for complainants, and the closing of many satellite DFEH offices which were once located across California.

William C. McNeill is the managing attorney for the Legal Aid Society’s Employment Law Center, based in San Francisco. In a group interview with the Center’s legal staff, McNeill said his office sends about 100 cases a year to DFEH. He described his frustrations with the department – leaving 12 phone messages to get a copy of a file, for example, or right-to-sue letters that are impossible for a non-lawyer to understand.

“You have to ask: How much is funding an issue with the department, particularly as far as training and hiring investigators?” McNeill said. “You send people to DFEH because 1) you have to; or 2) you want to find out what the case is about. Yes, you listen to the client, but you don’t know

everything. So, you go to the department, and, arguably, the department now investigates. That is its charge, after all. But we have found that they don't do it."

One outcome of diminished resources is diminished clout, according to Gary Blasi, an author of the UCLA/RAND report.

"Nobody is afraid of the DFEH – the defense counsel's view is that it is an annoyance and a joke," Blasi said in an interview with the Senate Oversight Office. "If you meet a mugger, and the mugger is 2 feet tall and kicking you in the knees, are you going to give that mugger your wallet? Well, the DFEH is that 2-foot-tall mugger."

He said that the department's federal counterpart, the Equal Employment Opportunity Commission, is more effective. Blasi ticked off the reasons: "They don't settle immediately at EEOC. They have career lawyers, more resources, and they operate in federal court. But the major structural difference is that the EEOC sees itself as a law enforcement agency, not as a complaint processing agency."

He suggested that the California department should analyze its complaint data to figure out where to put its resources, and then leverage its dollars and its clout. He also proposed that the state could create a small fee – perhaps a dime annually per worker – to raise money to fund enforcement. "But who is going to push for this?" Blasi asked. "There is no civil rights movement demanding it."

IV. Secret policy can thwart claims by public employees

FINDING: Under a secret policy, the Department of Fair Employment and Housing must get the approval of the Governor’s Office before pursuing a meritorious discrimination claim against a public agency. Private workers face no such hurdle. Claims against public agencies are also treated differently during investigations. This constitutes unequal treatment for public employees, creates a potential for abuse, and compromises DFEH’s statutory independence. Further, the policy may constitute an unlawful underground regulation, although the department vigorously disputes this.

The Department of Fair Employment and Housing is entrusted with upholding and enforcing civil rights law for the people of California. The primary vehicle for this is the Fair Employment and Housing Act, which protects workers across the state from job discrimination and harassment. The statute makes no distinction between private and public employees – but DFEH does. Since early 2008, the Senate Oversight Office learned, the DFEH has had one set of rules for private employees and a more burdensome set for public employees.

We found that the department has taken steps to shorten investigations and sidetrack public employee claims at the earliest opportunity. We also found a more serious roadblock: Even those few public employee claims that are deemed meritorious by DFEH must then survive an additional, secret obstacle – gubernatorial approval to proceed.

It is known as the GOAR process, an acronym for “Governor’s Office Action Request.” Under the policy, the department may not pursue a claim against any public agency unless the Governor’s Office or a delegated administration official approves the action request. If denied, the administration need not give reasons for the denial to the DFEH lawyers or investigators who must abide by it, even if it contradicts their professional judgment. There is no accountability in this process; a denial could be a matter of saving money or saving face when the law dictates it should be about violations of the fair employment act.

There is nothing remotely similar to shield private employers from enforcement of the anti-discrimination law.

The Senate Oversight Office confirmed the existence of the policy during interviews with the department's former chief counsel and others, as well as through authenticated documents provided by whistleblowers. When questioned about GOARs, the DFEH initially refused to comment, citing attorney-client and other legal privileges. Then, confronted with their own memos and other documents, they conceded that the policy exists and defended their right to invoke it. They downplayed the impact of the process, saying the current administration has not formally denied a GOAR from DFEH since February 2011. They declined to provide information about the previous governor's record – although the GOAR procedure has been in effect at DFEH since early 2008.

Employment law experts we consulted said they were troubled by the GOAR policy. One was Gary Blasi, the UCLA law professor who co-authored the comprehensive study of DFEH in 2010.

“This GOAR procedure is dishonest,” Blasi said in an interview. “People think they're going to be treated fairly. They are led to believe that systems work. They are not told they have to meet some special standard because they work for the government.” He stressed that the identity of the employer, public or private, should play no role in a decision to pursue a discrimination case.

Clearly, under such a process, the state could shut down cases brought against it by individuals seeking to assert their civil rights. Less obvious, perhaps, is another issue: The special procedure to protect public agencies has, prior to this investigation, been secret to all but a handful of top department, agency, and Governor's Office officials. This secrecy renders the process a form of differential treatment for public employees and possibly unlawful under prohibitions that bar so-called “underground regulations.”

Professor Blasi also objected to the secrecy of the process. “The government cannot operate with secret procedural rules,” he said.

The secrecy shrouding this procedure has been a barrier to the Senate Oversight Office's ability to determine how many meritorious discrimination claims by public employees have been thwarted by GOARs and whether or not there are valid reasons for those decisions. The DFEH continues to decline to answer many basic questions about the number of GOARs and their outcomes since 2008, based on legal privileges. The Office of the California Legislative Counsel has provided

this office an opinion that the GOAR policy itself, as detailed in an interagency memo, is not protected by traditional attorney-client, attorney work product, or common law deliberative process privileges.

What is the GOAR process?

In the current administration, the policy is outlined in a memorandum dated March 17, 2011, by the governor's executive secretaries to all agency secretaries and department directors. (*See Attachment A.*) The memo's subject: "Procedures for Submitting Materials to the Governor's Office." It is noteworthy that the policy is not aimed specifically at DFEH but at all departments. The bulk of the six-page memo, including most of the description of GOARs, is non-controversial and pertains to "significant issues [which] should be conveyed to the Governor's Office through a Governor's Office Action Request (GOAR) package." The memorandum also includes mundane descriptions of proper procedures, such as the color of the folders to be used.

Even the GOAR rules pertaining to legal issues are primarily non-controversial. For example, the governor requires notification and the right to approve many litigation decisions "that could have a significant impact on state policy," or decisions "to seek review of a case by the Supreme Court of the United States," among other categories.

The Governor's Office must approve "proposals to sue or bring an enforcement action against another government agency (federal, state, state agency, county or municipality.)"
– Administration memo, 3/17/2011

The rule at issue here, as applied to DFEH decisions, however, expressly requires approval by the Governor's Office of any "[p]roposals to sue or bring an enforcement action against another government agency (federal, state, state agency, county or municipality.)" As interpreted and enforced by the DFEH, this approval rule applies to all government respondents, including school districts, police departments, and county offices. This broad mandate created problems, according to Tim Muscat, former chief counsel at DFEH. Muscat, who left the department in October 2012, said he argued unsuccessfully that local government should not be included.

"The concern I had was that a significant percentage of our cases are against local agencies," Muscat said in an interview. "There was a real time crunch to get the GOAR approved." (DFEH has a one-year deadline to act on a complaint.)

Meritorious claims by private employees face no such impediment; they move directly to enforcement. Only public employees – at all levels from a part-time crossing guard to a university president – depend on the approval of the Governor’s Office.

According to the 2011 administration memo, the GOAR process applies not just to DFEH cases but to any enforcement action by a state department. This raises an important question: Have GOARs (or similar approval practices) been applied to other departments with legislative mandates to enforce state laws, such as labor, safety, and environmental statutes? We asked the Brown administration about this point but have received no answer as of the date of this writing.

At DFEH, the GOAR obstacle applies only to the strongest claims, since the department would not propose to enforce the discrimination law in a case that had not been investigated and found to be meritorious. This has created morale problems and frustration.

“Personally – I am not a big fan of the GOAR process,” Muscat said. “We were told to do this. As a principle – every time we sent a GOAR, it was a case we believed we should pursue. If they said no, we were disappointed. Agency did not give an explanation for turning down a GOAR. I don’t know what their criteria were.”

Martha West, a leading authority on employment discrimination law in California, was blunt when told of the GOAR policy. “This is awful,” she said. “It totally violates the statute.” Now a professor emerita at the UC Davis School of Law, West said the procedure takes prosecutorial discretion from the DFEH and gives it to the governor.

“There are no standards for this secret policy of the governor,” she said. “It’s based on politics, not law. I think statutes should be amended by the Legislature, not by a secret policy between the agency and the governor.”

“There are no standards for this secret policy of the governor.”

– Law professor Martha West

Other barriers have also affected claims against public agencies

To accommodate the GOAR procedure, DFEH has changed the way public agency complaints are handled. First, all public employee claims are automatically sidetracked to an early settlement procedure whether either side has requested settlement or not. These early mediations (held

before any facts have been established) are less effective for complainants, producing average settlements of less than 25 percent the amount received when a DFEH attorney is involved in a post-investigation mediation.

The department's internal procedures (clarified by email to staff in December 2012) provide that housing claims and private employee claims shall be referred to this "pre-investigation" mediation only when one of the parties requests it. However, "state and local agency cases" are sidetracked to early mediation as soon as they are served "regardless of whether the complainant has expressed a desire to mediate." This imperative to take public agency claims off the normal investigation track is repeated in several internal DFEH documents we obtained.

Asked about this, DFEH pointed out correctly that no party can be forced against its will to agree to a mediated settlement. Still, it is another example of claims by public employees being treated differently.

After the GOAR policy took effect, investigations of public agency claims were significantly shortened to give the administration time to process the requests for approval. An email dated February 8, 2010, advised DFEH staff that investigations needed to be completed "at least 60 days" earlier than the normal deadline in order to provide "sufficient time to send a GOAR to Agency seeking approval for the filing." The email, focusing on claims against state agencies, also announced that GOARs and their attendant delays would be applied to class-action complaints, director's complaints, and even petitions for discovery. Subsequent instructions extended the shorter deadlines to local public agencies as well. (We are informed that recently the department has shortened the time frame for all investigations to accommodate mandatory mediations.)

The result? Public employee claims were slowed down by pre-investigation mediation, sped up during the investigation stage, and finally subjected to a waiting period for GOAR approval. If a discovery petition is delayed by a GOAR, the entire investigation might be compromised. If a GOAR request is neither approved nor denied within FEHA's one-year deadline, the case is effectively killed, a de facto denial. Again, nothing similar applies to claims brought by private employees.

Some cases have been discarded by the department simply because there was no time for a GOAR. "There were times when, because of time constraints, we could not go forward with a claim because there wasn't time to send a GOAR," said Muscat, the former chief counsel. "Not a lot of times – maybe 10 altogether."

In May 2010, a complaint filed against the University of California was investigated, deemed meritorious, and ready for filing by the chief counsel. In an email dashing this possibility, the DFEH's chief of enforcement wrote: "UC Berkeley should be considered a state agency. Accordingly, we are already well beyond the 60-day deadline. If you have any thoughts about submitting a progress memo on that investigation, please call me ASAP." Despite objections from the investigator, the decision to go forward with an accusation was shelved because it was "probably untimely."

Results like these, according to several department staffers, were frustrating to DFEH investigators and may have chilled the pursuit of public agency claims. This might explain the significant drop in accusations filed against government employers. In 2006, before GOARs, 15 percent of the department's 88 accusations were leveled against public entities. In 2012, that dwindled to just 1 percent of 83 accusations. DFEH credits the drop to successful conciliation and mediation, but that does not explain why accusations against private employers did not decrease proportionately.

In 2006, before GOARs, 15 percent of the department's 88 accusations were against public entities. In 2012, that dwindled to 1 percent of 83 accusations.

At no time were the parties informed that their cases hinged on the approval of the Governor's Office – or whether that approval had been granted or denied. Sources close to the process told the Senate Oversight Office that meritorious public agency cases have been dismissed because of a GOAR denial, but the actual reason for closure was not disclosed to the complainant or the employer.

Exact impact on public agency claims remains unclear

Prior to 2013, GOARs were most often sought after lawyers and enforcement officials at DFEH decided that the case should be filed as an "accusation." An accusation represented the judgment of DFEH that the case had merit and should be pursued administratively at the Fair Employment and Housing Commission. (The commission was abolished at the end of 2012. Now the DFEH is authorized to take cases to court so long as attempts to settle have been exhausted. GOARs are still required.)

Most statistics on GOAR approvals have been withheld by DFEH during this oversight investigation. For months, DFEH maintained that it would make no comment whatsoever about GOARs because their very existence was protected by attorney-client and other privileges. Eventually, faced

with irrefutable documentation, the department conceded that the policy did exist. DFEH said it has submitted a total of 10 GOARs since Gov. Jerry Brown took office in January 2011. One GOAR was denied in February 2011. Four others were approved, according to the department, and five were withdrawn after the cases were settled. DFEH refused to supply details about the 10 cases.

Likewise, DFEH did not answer our questions for the years 2008-10 on the grounds that the department could not waive the attorney-client and other privileges of Gov. Schwarzenegger's administration.

The public record on GOARs is murky because key facts have been withheld. DFEH's statement that no denial of a GOAR has occurred since February 2011 is questioned by Marlene Massetti, a former district administrator who headed up enforcement in the department's busy San Jose office.

"It's disheartening when you have to fight your own agency to uphold the law."

– DFEH veteran
Marlene Massetti

Massetti said, for example, that she was told on May 16, 2011, that the department had decided not to prosecute a particularly strong race discrimination case against a local school district. Pressing for the reason, she called the chief of enforcement who told her the GOAR had not been approved – but asked her not to share that information with the staff. (Her recollection is corroborated by emails and notes from the time.)

"I struggled with this," Massetti said in an interview. "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. State agencies should be held to the same standard from the beginning to the end. That's what we always told the public – your case will be treated like others."

She said she and others at DFEH were demoralized by the existence of the GOARs: "All of us have a personal commitment to civil rights. We believe in the equal and civil rights of individuals. The fact that the department does this undermines the department. It's disheartening when you have to fight your own agency to uphold the law."

In the end, she said, disillusionment with GOAR denials drove her into early retirement. "I left because of this," said Massetti, who retired in November 2012. "I was there 25 years. For someone like me – who spent my whole career and life working for civil rights – to end up like this? It is so disheartening."

DFEH initially resisted the GOAR requirement as intrusive

A former top official at DFEH, who served through several administrations prior to 2008, told the Senate Oversight Office that the independence of the DFEH “has always been sacred.” According to this official, agency overseers and the Governor’s Office have only two possible legitimate interests in a DFEH case: (1) to be aware of problems in order to prevent future discrimination; or (2) to advise a respondent agency on a case defense strategy. Otherwise, this official said, the Governor’s Office “never got involved” and did not influence, much less dictate, what the department did with a complaint. Another former high-ranking DFEH official confirmed that prior to 2008 there was no GOAR policy at the department. (These two officials, who are currently in state service, spoke on condition that they would not be identified.)

One of the former DFEH officials spoke of an unsuccessful attempt early in the Schwarzenegger administration to apply the GOAR process to discrimination cases. This official recalls that the department argued vigorously that requiring administration approval of DFEH cases would compromise the integrity of the process. As a result, he said, the department was informally exempted from the GOAR requirement.

Tim Muscat told the Senate Oversight Office that when he became DFEH’s chief counsel in May 2008 the GOAR policy for state agencies was already in place. (It was later extended to local government, which Muscat said he protested to no avail.) Thus it appears that the GOAR policy, as applied to DFEH, was instituted during the first four months of 2008. Current DFEH officials declined to discuss how or why the policy was instituted.

Legal issues

1. Do GOARs infringe on the legal independence of DFEH?

The GOAR process raises a significant question: Is the Governor’s Office an impartial party? The problem arises when a governor can determine whether one of his own departments or agencies will be sued under FEHA. Imagine the analogous situation: the DFEH consulting with a private corporation to receive approval to sue it in court.

Notwithstanding the issue of impartiality, DFEH maintains that subjecting its independent decisions to the GOAR process is fully authorized by the California Constitution and the Government Code. DFEH describes the Constitutional authority as flowing from the

governor’s “supreme executive power of the state” and his obligation to “see that the law is faithfully executed,” phrases found in Article V, section 1.

Government Code section 12010 requires the governor to “supervise the official conduct of all executive and ministerial officers.” In support of this, DFEH cites an opinion of the California Attorney General: “The Governor is authorized to issue directives, communicated verbally or by formal written order, to subordinate executive officers concerning the enforcement of the law.” (63 Ops.Atty.Gen. 583 (1980).)

These points are well taken, and the governor is certainly vested with broad authority within the office’s Constitutional mandate and limitations. Moreover, nothing in this report should be interpreted as a formal legal opinion and no court has addressed the issue.

However, to be clear, the DFEH does not maintain that the governor’s powers are limitless. Nor could it.

Gubernatorial power is not absolute in this area because the governor may not violate the law by infringing on the powers of the judicial or legislative branches – or by violating the rights of a class of citizens. In court, opponents of the GOAR policy could argue that the Legislature explicitly provided that FEHA “shall be deemed an exercise of the Legislature’s [not the Governor’s] authority pursuant to Section 1 of Article XIV of the California Constitution.” (California Government Code section 12920.5) Under this argument, adding a secret procedure to FEHA is, in effect, amending FEHA. In 1992, an Attorney General opinion noted:

“...the Governor may not invade the province of the Legislature. California Constitution, article III, section 3 provides as follows: ‘The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.’ Consequently, the Governor is not empowered, by executive order or otherwise, to amend the effect of, or to qualify the operation of existing legislation. (Lukens v. Nye (1909) 156 Cal. 498, 503-504; and cf. Contractor’s Ass’n of Eastern Pa. v. Secretary of Labor (1971) 442 F.2d 159, 168; unpub. opn. of the Cal. Atty. Gen., No. I.L. 78-32 (1978).)” (Id., at pp. 584-585, emphasis added.) 75 Cal.Ops.Atty.Gen. 263 (1992)

In other words, the governor may not violate the FEHA. The unanswered question is whether the GOAR policy violates FEHA's provisions which vest DFEH with independent authority to make final case decisions.

There is certainly nothing in the statute that would permit either the governor or the department to discriminate against public employee claims. In FEHA itself the broad discretion to pursue or reject a case is only the department's. The decision on whether to proceed is to be based on questions of case strength, importance, and other policy factors. Whether the respondent is a public agency does not fall within the kinds of factors laid out in the regulations.

2. Does the GOAR process constitute an underground regulation?

A final problem with the GOAR process is its secrecy. DFEH stated in written responses to the Senate Oversight Office that the process is not actually secret because the department now concedes it exists. Meanwhile, it still declines to provide details of the procedure, standards for GOAR decisions, or statistics on case approvals and denials during most of its existence. Since neither the public nor the parties to DFEH investigations have ever been informed of this process – and remain ignorant of its details – it is fair to characterize it as secret.

Most importantly, the policy has never been subjected to a public rule making process.

California law, specifically the Administrative Procedures Act (APA), prohibits secrecy if the GOAR process constitutes a so-called “underground regulation.” The prohibition against underground regulations is found in Government Code section 11340.5 (a):

No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

DFEH maintains that the GOAR process is not an underground regulation, writing this to the Senate Oversight Office:

Even if the California Administrative Procedures Act (APA) could trump the Constitution's command that the Governor ensure that the law is faithfully executed, it is not implicated by the Governor's

request that agencies communicate with him about certain discrete events, such as taking legal action against a public agency. The APA governs rules, orders, or standards of general application that implement or interpret the law enforced or administered by the agency. (Gov. Code, § 11342.600.) The March 17, 2011 memorandum [establishing GOARS] does not implement or interpret any law. Rather, it applies to certain categories of decisions made by any agency within the executive branch of government, and governs how executive branch secretaries and department heads interact with the Governor’s Office, including which specific actions require approval. Finally, even if the March 17, 2011 memorandum were a regulation, it still would not be subject to the APA pursuant to the internal management exception. (Gov. Code, § 11340.9, subd.(d))

Although this report makes no claim to an authoritative legal opinion, it should be noted that DFEH’s justification that the GOAR process is not a regulation leaves out a key defining factor recognized by common law. The leading case defining underground regulations is the decision of the California Supreme Court in *Tidewater Marine Western, Inc. v Bradshaw*, 14 Cal.4th 557 (1996). This is the applicable language:

*The APA...defines ‘regulation’ very broadly to include ‘every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency.’ (Gov. Code, § 11342, subd. (g), emphasis added.) *Tidewater*, at p.571.*

In the quote above, the underlined portion of the definition (“or to govern its procedure”) broadens DFEH’s definition of regulations subject to the APA. The GOAR approval process, as applied to DFEH, is a rule that governs the procedure of DFEH by adding a level of scrutiny for a class of discrimination complaints, those filed against public agencies.

DFEH also omits clearly established legal authority by citing an exemption for underground regulations when the regulation “relates only to the internal management of the state agency.” The California Office of Administrative Law points out in its online summaries that courts have interpreted this “internal management” exemption very narrowly. It is only applicable if both of two elements, neither of which describes the GOAR rule, are present: (1) the rule may affect only the employees of the issuing agency; and (2) the rule may not affect a matter of serious

consequence involving an important public interest. Opponents of the policy would likely argue that the GOAR rule does affect a class of employees (public employees) but not only those employed by DFEH, and also affects the civil rights of these individuals, an important public interest.

Given the legal questions surrounding the GOAR policy, the only way to clear up these questions is through a transparent rule making process in which the Office of Administrative Law reviews a regulation drafted by DFEH.

V. Mismanagement of housing claims leads to federal crackdown

FINDING: Top management at the Department of Fair Employment and Housing compromised the quality of housing discrimination investigations and ignored clear warnings from their own housing experts, putting a multimillion-dollar contract in jeopardy.

The assessment from the federal Department of Housing and Urban Development was blunt. It said the performance of DFEH in its key task of investigating housing discrimination claims fell to such a low standard in 2013 that officials reviewing the closed files “could not determine whether or not the Fair Housing Act had been violated.” This astonishing conclusion was based on detailed findings that DFEH investigations failed “to reflect the required type of independent corroborations of allegations or defenses” that HUD regards as minimal to get at the truth.

HUD’s April 18, 2013, letter cited other evidence of a precipitous decline in the California department’s handling of housing discrimination claims. It said DFEH was extremely short-handed, and as a result the number of closed cases had dropped by 75 percent in five years. It also criticized the department for missing deadlines and for failing to collect \$3 million in federal payments it had earned. The upshot: DFEH was placed under a Performance Improvement Plan (PIP), which outlined changes that must be made. If the department did not improve within six months, the letter cautioned, its multimillion-dollar work-sharing contract with HUD was at risk. (*See Attachment B.*)

In an interview, DFEH Director Phyllis Cheng told the Senate Oversight Office that she was blindsided by the April PIP. “HUD never spoke to anyone about this except the district housing people,” she said. “No one told me. There were no alarm bells rung.” But the Senate Oversight Office was told by Beth Rosen-Prinz, a former top housing official at DFEH, that the director was warned repeatedly that new policies she insisted on would lead to precisely the types of deficiencies noted in the April PIP. In September 2012, department management was also notified in writing and by telephone that DFEH risked a PIP sanction if it did not

improve, according to Jeff Jackson, HUD's chief of program compliance in San Francisco.

This state of affairs is in sharp contrast to the California department's previous experience with the federal housing agency. For nearly 20 years, DFEH enjoyed a strong and consistent history as a civil rights partner with HUD. The department – HUD's largest state contractor – was repeatedly recognized as one of the most effective enforcers of fair housing in the nation. But that status changed last spring when DFEH received the stern warning from HUD's San Francisco regional office.

Nationwide, HUD partners with 87 fair-housing agencies. Only two others had records bad enough in 2013 to warrant a PIP.

DFEH had ample warning prior to PIP from HUD and internal experts

Cheng wrote two letters to HUD in response to its initial September notice. The director's letters were dated Oct. 25, 2012, and Feb. 11, 2013. In the October letter, she laid out a five-step plan for improving case management. In the February letter, she acknowledged that timely case closures had actually declined since September. But she blamed the setback on the department's transition to a new electronic database, HoudiniESQ.

"Prior to Houdini," Cheng wrote, "housing consultants had specialized tasks, focusing primarily on intake or investigations. With Houdini, they now have both intake and investigative duties, requiring them not only to learn new duties and procedures but also to develop techniques to balance their front-end and back-end processing responsibilities. The new duties, together with the extensive time spent in training, have impacted the timeliness of the investigative work during this period."

The department's long-time housing expert, Rosen-Prinz, says the roots of the problem preceded the arrival of Houdini in July 2012. The trouble began, she said, when DFEH decided to handle housing claims and employment claims the same: fewer resources, larger caseloads, less follow-up.

Rosen-Prinz is a former deputy director and regional administrator for housing at DFEH. She was responsible for developing and managing the state's fair housing program from 1994 until she retired in December 2011. Director Cheng described Rosen-Prinz as "very good;" HUD's Jackson says she is respected nationally for her expertise in fair housing.

During her last full year on the job, Rosen-Prinz told the Senate Oversight Office, she spent many hours in meetings planning for the new computerized case management system.

“During that time, I repeatedly pointed out to the DFEH planners the unique features of the housing program and urged them to adapt the new system to the needs of the program,” she said in a written statement. “I knew from my years of experience in managing the housing program, that certain features – such as the specialization of the complaint intake and investigation functions – were essential to the effectiveness of the program and essential to meeting the stringent timeliness requirements of the HUD partnership agreement.

These suggestions were disregarded and the planners continued with their original plan to implement a homogeneous system intended to be applicable to both housing and employment complaint processing. The housing program was thus forced to conform to the features of the new system.”

It was a case, she said in an interview, of the tail wagging the dog. “I argued, repeatedly, that we needed to have a specialized intake system for housing complaints,” she said. “But they just wanted to have a uniform system. They suggested it might be too expensive to customize Houdini, and that housing was too complicated. At some point, the director came into my office and said flatly: ‘We are not going to do it.’ She made it clear – they wanted people to file complaints online and they didn’t want a different system for housing complaints.”

Director Cheng told the Senate Oversight Office that she has no recollection of being warned by her housing staff that HUD had special requirements that must be met. “I don’t recall anyone in housing speaking to this issue,” the director said.

Treating housing claims like employment claims led to HUD crackdown

Tim Muscat, who was one of Cheng’s top lieutenants, defended the decision to equalize housing and employment staffing. Muscat was DFEH’s chief counsel, later chief of enforcement, before he left the department at the end of 2012. “It was a matter of efficiency and fairness,”

“I knew from my years of experience in managing the housing program, that certain features – such as the specialization of the complaint intake and investigation functions – were essential... These suggestions were disregarded ...”

DFEH veteran Beth Rosen-Prinz

according to Muscat. “I completely agreed with [the director’s] direction to right-size the workload.”

In an interview, Muscat said he had great respect for the department’s housing consultants. “But they had an average of 10 cases each and employment consultants had 70 or more,” he said. “I didn’t think that was fair – I tried to equalize the workload. I wanted a certain equity as to the amount of resources that went to each claim.”

HUD’s PIP letter arrived on April 18; Director Cheng replied four days later. Her response validated Beth Rosen-Prinz’ earlier pleas to handle housing complaints separately – Cheng reinstated the housing intake system and promised to hire eight new housing investigators. Contradicting her letter to HUD earlier in the year in which she blamed the housing problems on the new computer system, the director now conceded that it was the attempt to achieve balance between housing and employment claims that failed.

“The [caseload] gap between housing and employment was enormous,” Cheng said in an interview. “We needed to equalize the caseload. The attempt was to make sure there

HUD’s Improvement Plan for DFEH

Among the problems HUD cited:

- 1) On declining quality of investigations, HUD saw an increasing number “that fail to reflect the required type of independent corroborations of allegations or defenses...Most troubling in our review of these cases is that, based on the incomplete data collection, we could not determine whether or not the Fair Housing Act had been violated.”
- 2) Staffing inadequacies have begun to impact the quality of DFEH’s work.
- 3) Despite an initial warning of non-compliance on Sept. 26, 2012, DFEH failed to meet the required performance standards and failed to take adequate corrective measures.
- 4) The department’s sudden loss of housing investigators – down from 21 consultants in June 2011 to 12 in June 2012 – compromised its ability to handle cases. Case closures within 100 days decreased 37 percent, costing the department more than \$200,000 in case-processing funds.
- 5) A projection that DFEH would close fewer than 293 cases by the end of the 2013 performance year, compared to 687 closed cases the previous year and 1,251 five years earlier. (Actually, 466 cases were closed.)
- 6) DFEH had not submitted vouchers for over \$3.3 million in funding that HUD was already committed to paying the department.
- 7) Estimated reimbursements would be less than \$450,000 in the 2012-13 fiscal year. According to HUD: “This contrasts sharply with recent years when case processing funds earned by DFEH have ranged from \$1.3 million (2012) to \$3.1 million (2009).” (Actual reimbursements totaled \$770,874 in 2012-13.)

(See Attachment B for the full document.)

was uniformity between housing and employment. Clearly it didn't work out."

That it didn't work out should have come as no surprise, according to Rosen-Prinz.

"Generally speaking," she said, "the housing consultants' caseloads were smaller than employment caseloads – but fewer cases doesn't mean the workload wasn't equal. There was a difference between doing the investigation of housing cases and employment cases. What we were required to do by HUD was so different than employment. You can just look at the physical files to see the difference: Housing files were several inches thick – employment files were half-an-inch thick. There weren't any shortcuts available. HUD simply requires a more extensive investigation."

Despite Director Cheng's strong commitment to equalize caseloads between housing and employment investigators, HUD's PIP caused the department to change course. Six months after the PIP, HUD reassessed the situation and in a Nov. 5 letter to the department found only one area still out of compliance: the timely processing of cases. (HUD's standard is that at least 50 percent of all cases should be closed in 100 days; DFEH closed barely 10 percent.) The PIP remains in effect until January 2014 in that single area, according to Jeff Jackson, HUD's compliance chief. (*See Attachment C.*)

Jackson said improvements in other areas have been notable. The number of DFEH housing investigators increased from 10 in April to 17 – including five new hires and two transferred from employment. The housing intake staff was reinstated. Submitting vouchers for uncollected federal funds was brought up to date. And the quality of investigations is back to the old standard.

"They heard us....But we warned the director: You can't reduce staffing again, or this will happen all over again."

– Jeff Jackson, HUD
compliance chief

"They are going onsite to conduct their investigations," he said in an interview Nov. 4. "They are documenting that they made contact with both complainant and respondent. They are doing all the appropriate interviews. As for not being able to tell if the law was violated, we are not seeing that kind of stuff. They heard us."

Jackson summed up: "The PIP startled the department. It got their attention. These changes are meaningful – if they remain in place, they'll

be fine. But we warned the director: You can't reduce staffing again, or this will happen all over again."

One reason the department moved so quickly to respond to the PIP may lie in the fact that HUD pays a premium for thorough and timely investigations. In a similar arrangement between DFEH and the federal Equal Employment Opportunity Commission (EEOC) the costs of investigated employment cases typically are reimbursed at about \$650 each. HUD, on the other hand reimburses the state at triple that rate.

Therefore, as described in the next section, the real question for the DFEH may not be whether it can return its housing investigation program to its former reputation. It's whether the employment discrimination investigations, which became the model for the housing investigations during the period criticized so strongly by HUD, are themselves adequate to meet standards expected by Californians.

VI. New policies hinder employment investigations

FINDING: Employment discrimination investigations suffer from understaffing, poor quality, intake confusion, and premature case grading.

We asked DFEH Director Phyllis Cheng if the department typically devotes more time and resources to housing discrimination investigations than it does to employment claims. Her answer was emphatic: “I would disagree that employment cases have a lower standard of investigation. I disagree with that. The average employment case tends to be more complicated than housing cases.”

If that is so, it seems that the amount of effort that goes into employment investigations would at least equal that devoted to housing inquiries.

Historically, however, the housing investigations paid for by HUD have been given far more attention than employment discrimination cases. With the exception of the past year’s HUD/DFEH difficulties, housing investigators have had significantly smaller caseloads than their counterparts on the employment side. This allows them to meet HUD’s guidelines, which call for investigations that include corroborative interviews, well-documented analysis, and site visits if necessary.

Illustrating the difference, Beth Rosen-Prinz, former head of the housing division at DFEH, said that a typical housing case file was several inches thick, while employment files were half-an-inch thick.

As detailed previously, HUD’s Performance Improvement Plan (PIP) focused a bright light on new policies at DFEH. The changes in intake procedures and workload had as its principal aim to treat all cases the same. In other words, housing claims would now be handled like employment claims: fewer resources, larger caseloads, less follow-up. HUD’s reaction was stunning. By handling housing cases like employment cases, HUD protested that fundamental investigative

standards had been breached. HUD reviewers said they could not even tell whether or not the fair housing law had been violated when they read closed case files.

What HUD required

The standards required by HUD were not draconian. According to the PIP, HUD wanted the following procedures followed:

The respondent's defenses, relevant policies and practices, as well as other relevant data, must be identified and analyzed and the complainant, respondent, and all relevant witnesses must be interviewed. Contradictions between complainant's allegations and respondent's defenses must be investigated and when applicable, comparative data must be obtained. When necessary, information must be independently corroborated. Simply obtaining respondents' statements rebutting complainant's allegations will normally not resolve disputed issues of fact.

Professional employment discrimination investigators do not regard such standards to be extraordinary, according to Lisa Bradley Buehler, an employment law attorney interviewed for this report. "It is a fundamental principle of fairness and thoroughness that investigators gather not only the relevant witness accounts, but consider all information that substantiates or refutes those accounts, including the credibility of witnesses," she said.

Buehler is the founder of the California firm Employment Advisors, where she has specialized in conducting workplace investigations for more than a decade. She said the HUD standards reflect the basic principles required for any adequate employment discrimination investigation. In an emailed comment, she wrote:

Good investigators know to turn over every stone in their efforts to make findings on disputed issues. The more information an investigator obtains in an investigation, the easier it is for the investigator to weigh conflicting accounts and reach fair, unbiased, and reasonable findings of fact. It is a rare investigation in which an investigator can make well-reasoned findings based on the accounts of only the complainant and respondent.

HUD's concerns raise a serious question about whether most employment claims filed at DFEH receive adequate investigations. This poses a real problem because DFEH's own regulations mandate that claims be investigated, with the exception of cases that are clearly non-

jurisdictional, plainly frivolous, or where the complainant bypasses the DFEH by requesting the right to sue in civil court.

According to the law and regulations:

After any employment discrimination complaint, alleging facts sufficient to constitute a violation of the FEHA, is filed for investigation with the department, the department shall initiate prompt investigation thereof. (2 CCR 10026(a); see also, California Government Code section 12963)

Furthermore, “the department shall gather during the course of an investigation all relevant evidence necessary to determine whether an unlawful practice has occurred.” (2 CCR 10026(d)) In essence, the department’s obligation to investigate each case alleged against an employer is very similar to the HUD requirements for housing discrimination claims. Although some priority may be given to complex cases and cases which immediately appear meritorious, nothing in the statute suggests that other potentially valid cases may be subject to cursory investigations – or no investigations at all.

The PIP controversy, therefore, while focusing on housing claims, provides a useful lens for looking at employment claims. When the two types of claims were handled identically, the housing investigations sank to the level of the employment investigations.

Staffers object to poor investigations, computer glitches, and inappropriate billing

On Aug. 13, 2013, 10 DFEH investigators from Los Angeles wrote an eight-page internal memorandum detailing why they believe the department “is not meeting its mission and obligation to properly investigate complaints of discrimination, harassment and retaliation filed by the people of California.” The investigators were not part of the housing unit criticized by HUD but were devoted to handling employment cases.

The highly critical memo was responded to by the department’s acting chief of enforcement, Mary Bonilla, on Aug. 22, 2013. On Nov. 6, 2013, the Los Angeles investigators wrote another memo to Bonilla, expressing appreciation for part of her response, but questioning the “veracity” of some of Bonilla’s statements and challenging the department to acknowledge the reality of excessive caseloads and a poorly designed computer system. Bonilla sent another response Dec. 5.

In the copies of the memos obtained by the Senate Office of Oversight, the names of the 10 Los Angeles investigators were redacted, so we were unable to interview them separately.

The memo complained about specific problems with Houdini, unmanageable caseloads, drastically reduced time available for investigations, and inaccurate reporting of closed cases. The investigators claimed that these issues had been repeatedly raised, but they had been ignored or dismissed out of hand.

The Aug. 13 memo also made the serious charge that investigators were instructed to close cases that had not been investigated fully so that the department would be paid for them under its contract with the federal EEOC. According to the memo: “Not only do we believe these cases are misclassified as ‘investigations,’ but we believe that the extended time spent on these cases would be better served on cases that we intend to fully investigate.”

Bonilla’s August 22 response said that the department was adopting nearly all the investigators’ suggestions, which demonstrated “our genuine commitment to accommodate your concerns.” The adopted suggestions, according to Bonilla, included several requests for more equipment, improved automation and notifications, and the elimination of unnecessary reports. Some requests, including a reduction of new case assignments, were characterized as “modified adopted.”

Most of Bonilla’s memo, however, rebutted the 10 investigators’ major premises about Houdini, caseloads, improperly closed cases, and the overall failure to devote sufficient time to investigations.

The 10 investigators’ November response, addressed to both Bonilla and Cheng, was diplomatic but expressed continued frustration. The memo said that the “adopted” suggestions had not in fact been implemented and expressed skepticism about statistics cited by Bonilla.

Investigator caseloads have doubled under Houdini, according to Dorothy Sanders, a consultant who handles employment claims at the department’s Elk Grove headquarters. She wrote a memo to DFEH management on Oct. 21, 2013, in response to criticism that her productivity has slowed. The memo, which she shared with the Senate Oversight Office, noted that pre-Houdini she received departmental awards for Excellence in Productivity and for Excellence in Investigations.

“A caseload of 157 cases represents an unreasonable burden given all of the tasks that must be accomplished,” Sanders wrote. “In point of fact, during the 6 ½ years I have worked at DFEH, caseloads were typically in the range of 55-75 cases, maximum....It is also important to note that servicing of complaints used to be a function that was performed by Office Technicians/clerical personnel. These administrative duties are very time-consuming and have increased with the sheer volume of cases.”

Last June, in letters shared with the Senate Oversight Office, a dozen current and former DFEH professionals told us that a series of challenges over the past five years stymied their ability to promote civil rights and do their jobs. The group includes lawyers, top administrators and investigators, some of whom asked for confidentiality to shield them from possible repercussions. Here is a sample of their unsolicited comments, all received by our office after it was learned that a Senate oversight investigation was underway:

- *“To be placed in a position of constant confusion, flux and disorganization was stressful. 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.”*
- *“Prior to the implementation of [the new computer system] the consultants’ caseloads were between 68 and 80 cases at one time. [Now that] the consultant’s caseload [has] increased to between 125- 140 cases, it seems the department went from a belief of doing quality work to an emphasis on the quantity of work. The investigators no longer have time to do a thorough investigation.”*
- *“There is no face-to-face interaction with the complainant or respondent.”*
- *“Houdini, the new cloud-based electronic database, has been... riddled with problems.The system simply does not support the level of service previously provided by DFEH.”*
- *“Staff morale has reached an all-time low with DFEH employees leaving for other jobs or taking early retirements...The department cannot afford to continue to lose its most valued, experienced and dedicated employees and expect to enforce the civil rights of the citizens of California.”*
- *“Complainants are not permitted to make appointments to submit their complaints in person, as allowed in the past. This policy is detrimental to many with low education levels and those with inadequate English skills who feel much more at ease dealing with someone in person.”*

Not everyone has such a bleak view of the department, however. Tim Muscat, former chief counsel and chief of enforcement until leaving the department in October 2012, had very high praise for the department's new initiatives, saying: "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."

New practices frustrate claimants, confuse employers, and reduce service

One key grievance voiced by veteran DFEH staff has been the change in the way complaints are handled at the front end. Some say the new Houdini computer system, a cloud-based case management system, has caused complications, delays and consumer complaints. Others point to dwindling customer service and office closings.

Meanwhile, some employers say the quality of the complaints being served on them has deteriorated to the point that they often can make no sense of them. These amateurish complaints, now drafted by the complainants themselves, are difficult to respond to or investigate.

The automation of complaints is controversial both inside and outside the department – and has some unintended consequences. Perhaps the most important issue is that it does not serve the non-English speaking community well. The Nov. 6, 2013, memo from the 10 Los Angeles investigators described the problem:

One concern that is shared by all of us is the inability for non-English speaking complainants to file a complaint online using HoudiniEsq. We believe the huge demographic is being harmed by DFEH's failure to implement a system that allows everyone the ability to file a complaint online in the same way as the English-speaking public. Currently, non-English [speakers] must wait on the phone for someone to file their complaint on the phone. We have witnessed complainants waiting in our lobby for someone to answer their call, only to be disconnected. The forms issued to complainants to complete are also not available in any non-English language, and do not present them with any of the "who-what-when" line of questioning found in HoudiniEsq filing system.

Complainants who are unable to manage online filing are told to call the department to have someone help them through it. Several sources said this is harder than it sounds, even for many English speakers. The help line number often requires a long wait. When representatives come on

the line, they provide clerical advice for navigating the form rather than helping the complainant understand the law or state their claims clearly.

In an interview with the Senate Oversight Office, one former DFEH consultant, Doriann Shreve, described the reaction by department veterans when they were told how the new computerized system would work for people trying to file a complaint:

All the consultants asked: What if people don't have a computer? We were told: "They can go to the library and use a computer." Well, we said, what if they don't have email addresses? We were told: "They can get an email address." To think that all people would be able to understand this was ridiculous. Some people don't even know how to turn a computer on. Eventually, they set up the call center so people could get help.

Shreve, an employment investigator who retired in May, also talked about problems resulting from people drafting their own complaints with no help from the department:

The complainants would write their life stories – they didn't understand that everything they write there is going to be seen by the respondent. I have sent out three-and-a-half page complaints – they can go on and on. Once it is filed, it has to be served. And once they hit "submit," it's filed. That's the document you send to the respondent. Sometimes, the employer's answer would be: "I'm not sure what I'm supposed to be responding to."

In the past, when there were DFEH offices across the state, an employee with a complaint could schedule a face-to-face interview with a staffer. As discussed below, the law and its regulations require knowledgeable DFEH staff themselves to "draft" the complaint on the basis of the initial interview. When this was done at the very outset of the case, frivolous or non-jurisdictional complaints were typically screened out at this stage. For example, if a worker said she was the victim of discrimination because her employer did not pay minimum wage to any of its employees, a DFEH consultant would refer the employee to the proper wage-and-hour agency that handled that type of complaint. This would not be counted as a "discrimination complaint" – and many wasted hours would be avoided since the non-jurisdictional case would not be investigated by DFEH or served on the employer.

The first major shift away from this traditional level of service came with the virtual elimination of all face-to-face interviews. Claimants were only interviewed by telephone. As offices closed, the DFEH became absolutist

about the policy that no complainant should be interviewed in person. One staff member told our office that the policy was so strict that a complainant who showed up in person at a DFEH office was told to use the phone in the lobby rather than continuing a face-to-face conversation that had already begun.

When the Houdini computer system was put in operation the intake process was further altered. “Prior to Houdini,” one former DFEH attorney lamented, “the complaint clerk always drafted the complaint. Regular citizens don’t know how to do that stuff – they pour their hearts out. So then the department sends these unedited complaints to their employers – who knows what happens to them after that? If they’re retaliated against, do you think they are going to come to DFEH and file another complaint?”

On Jan. 18, 2013, about six months after Houdini began operation, Director Cheng sent a memo to all employment unit staff that clearly laid out the new rules. She wrote:

In an effort to alleviate caseloads and expedite complaint processing to serve the public, please implement the below instructions immediately:

Service of Complaints. *Effective immediately as long as a complaint states a claim within the Department’s jurisdiction, it is to be served on the respondent(s) in the form submitted by the complainant after verifying the address of the respondent(s). Consultants are not to delay service in order to interview complainants before serving the complaint. Consultants are not to take any steps to amend the complaint before service.*

Complaints without Jurisdiction. *If the complaint does not state a claim over which the department has jurisdiction, it should be served on the respondent(s) with the admonition that no action is necessary and then closed.*

Consequently, the complaints served on employers are not only drafted by unsophisticated complainants – they do not necessarily fall under the department’s jurisdiction. One former DFEH consultant wrote to the Senate about the frustration and embarrassment this situation engendered. (She asked not to be named due to fear of retaliation.)

“To constantly apologize to the public for problems created by the department’s policy of serving non-jurisdictional/rejected complaints was draining.”

– A former DFEH consultant

To constantly apologize to the public for problems created by the department's policy of serving non-jurisdictional/rejected complaints was draining...In the past, complaints which were determined to fall outside the department's jurisdiction were explained to the claimant and filed away. With Houdini, these same complaints were now being served to the respondent/accused offender along with a letter stating the department's position to not investigate. It became pointless and depressing to know that you were now creating more harm than good.

As Doriann Shreve noted, even rambling or garbled statements become official complaints the moment the complainants hit “submit” on their computers. Asked about this policy, DFEH responded that under the Government Code, all verified complaints must be served on the named respondents. Indeed, there is no exception based on whether the DFEH believes there is jurisdiction. Pursuant to Government Code section 12962, no matter how poorly drafted or irrelevant, these complaints have to be served on a confused employer.

But the DFEH also has another legal mandate: “[DFEH] shall draft the language of each complaint filed for investigation on a complaint form prescribed by the department,” and “set forth the allegations in ordinary and concise language...[and] shall liberally construe the facts alleged by a complainant when drafting a complaint and include all relevant claims supported by the facts alleged.” (2 CCR 10009(a))

Through its complaint amendment process, the department apparently may still comply with this “drafting” mandate before pursuing an investigation. But it stands to reason that if the DFEH is going to draft a complaint for an aggrieved employee, it should do so before, not after, the employer sees an incomprehensible complaint drafted by the complainant.

Employers do not benefit from this process, according to Glenna Wheeler of the Office of Human Rights for the California Department of Mental Health. Her office, where she has been chief for 10 years and assistant chief for seven years before that, has interacted with DFEH on employee complaints for the better part of two decades. In the past, she said, her department received complaints with “particularized allegations,” where the facts were “specific and related to an employee’s arguments that the FEHA had been violated.” It was obvious, she said, that someone at DFEH had “sat down with the complainant to make sure the complaint made sense.”

But now, Wheeler said, employees “apparently go online and write anything they want and no one edits or advises the employee.” The result: She often receives “rambling pages,” often with “no periods, no paragraphs.” Worse, she said, the allegations are not clear. “The new complaints include lots of irrelevant matter that has no relation to the FEHA,” she said.

Employers are given 30 days to respond to a complaint. When the new complaints are incomprehensible and nearly impossible to investigate, Wheeler says she often must request an extension. Her frustration continues when she calls the department.

“It seems we are dealing with people with far less experience than before,” she observed. She has also noticed “tremendous turnover” in DFEH staff. She said the typical response to questions is “I just got this case” – and although this might be the latest in a series of telephone calls, she must “start all over again explaining the problem.” Once, she received two amended complaints for the same case, each requiring a separate response. “It’s very frustrating,” concluded Wheeler.

“The new complaints include lots of irrelevant matter that has no relation to the FEHA.”

– Glenna Wheeler, employer

Prioritizing cases too early risks error and unfairness

The idea behind “case grading” is to juggle limited resources and to involve department lawyers early to assure the best cases receive the attention they deserve. Former Enforcement Chief Nelson Chan told the Senate Oversight Office that consultants – the department’s investigators – are expected to flag the best three cases among their files every month and bring them to the attention of the legal division.

Tim Muscat, Chan’s predecessor, described the virtues of case grading this way: “The new case-grading system is very important. It destroyed the old first-in, first-out system, which was driven by the ‘I cannot let the case expire’ viewpoint... The consultants had a high caseload – and they didn’t want cases to expire.” (Claims expire in a year.)

Muscat said that case-grading had three goals:

- Prioritization.
- Training for consultants – by increasing interaction between DFEH attorneys and consultants; and
- Reducing workloads – consultants shifted their focus to the best cases and reduced the time spent on the rest.

Over the years, the cases classified as the most promising have been dubbed either “A” cases or “3-star” cases. The challenge for such a system is to make sure cases given the 3-star treatment don’t improperly edge out other deserving claims. Muscat said he advised consultants to grade cases after receiving the employer’s response to the charge but before hearing the claimant’s rebuttal. This did not worry him, he said, because case grades could always change and the final finding of merit did not usually happen until the 11th month.

The practice of prioritizing cases at such an early stage – often on intake and before the complainant has rebutted the employer’s response – raises the concern that grading may not be based any evidence. Muscat said DFEH officials “went back and forth” about this timing, but at the end of the day they felt it was desirable to prioritize cases as early as possible.

Doriann Shreve, the former DFEH investigator who left in May 2013, said that “everyone was different” in the way they graded cases. “Denied accommodation, harassment, pregnancy – those cases I would look at closer,” she told the Senate Oversight Office. By comparison, she knew that race discrimination claims, for example, would typically not be 3-star cases because they were harder to prove and seldom found to be meritorious.

That approach was very similar to the advice given in a department memo distributed to all consultants on March 19, 2009, entitled Case Grading System. The memo’s list of typical “A” cases cited reasonable accommodation, harassment and pregnancy – the same categories that Shreve looked at more closely.

Since 2008, investigators have been given a series of sometimes conflicting instructions on what makes a case meritorious. The current case grading policy is much improved over past directives we saw. The policy makes clear that each month consultants must present a minimum of three new 3-star cases to their assigned attorney. At this same meeting, the attorney and the consultant are required to update previous 3-star cases.

The key problem with the current policy is this provision: “In selecting cases for case grading it is NO LONGER necessary to wait for the response [from the employer] before grading a case.” This calls for case grading even earlier than Muscat did in 2009. The provision is also of particular concern in light of the fact that, in the Houdini era, complaints reviewed at this early stage may not be comprehensible.

Grading cases so early, with no evidence and no contact with either the employer or the employee, is inviting a misinformed decision and may prejudice strong cases that are simply not presented well by unsophisticated complainants.

In her recent memo to DFEH management, consultant Sanders noted that a department directive ordered investigators to grade all their cases no later than Feb. 8, 2013. “Most consultants assigned random grades to cases without regard for meaningful review,” according to Sanders. As a result, she said, so many complaints were designated as 2-star cases that the staff was instructed “to go back and change the grade to either 1 or 3 stars. Given the volume of cases and the volume of work, it becomes burdensome to review the entirety of the file and make a proper assessment.”

“In selecting cases for case grading it is NO LONGER necessary to wait for the response [from the employer] before grading a case.”

– DFEH Memo

VII. Webinars fail to comply with law and DFEH's own regulations

FINDING: Thousands of state supervisors have attended sexual-harassment prevention webinars offered by the Department of Fair Employment and Housing that fail to comply with the statute mandating such training -- or the department's own regulations.

In 2011, the Department of Fair Employment and Housing began offering anti-harassment training aimed especially at state government managers and supervisors. State supervisors, like most of their private sector counterparts, are mandated by California law (AB 1825, Reyes, Chapter 933, Statutes of 2004) to receive a two-hour training every two years. By the end of 2011, a DFEH press release said the state "has saved \$280,000 and trained more than 7,000 of its employees since June by providing webinar-based, no-cost mandatory sexual harassment prevention training." By September 2012, more than 10,000 state employees had been trained.

The Senate Office of Oversight and Outcomes found that the DFEH webinars we viewed did not meet the basic requirements of the statute or DFEH's own regulations. They were too short and failed to monitor whether participants were paying attention -- or even present. This led to the improper certification of potentially thousands of state supervisors who relied on the DFEH to adhere to legal requirements. Additionally, the format and content of the webinars were at odds with the mandatory provisions of the law. The irony is that the very department that's supposed to monitor compliance with AB 1825 was itself offering inadequate training.

DFEH made adjustments to the webinars when we asked about the problems. In particular, the webinar we attended in May 2013 was long enough, and, according to DFEH, certifications were not mailed to trainees who had only been logged on for a small portion of the class. These were significant improvements, but most of the issues described in the following pages were not acknowledged.

By voting to require mandatory anti-harassment training for supervisors, the California Legislature endorsed a principle reflected in a long line of workplace discrimination cases. The principle is that, while prevention training is probably important for all employees, it is essential for those in managerial and supervisory positions. There is another crucial reason for effective supervisor training. For most Californians, an employer's internal policies and training practices are the main firewall against discrimination in the workplace.

The webinar-based style of prevention training is one of three methods that employers may use to comply with the mandatory training law. (The others are traditional classroom instruction and "click-through" computer software programs.) Webinars are subject to stricter rules than the other methods, since they are provided online, often with no visual supervision to assure that trainees are participating in the class. According to the department's own regulations:

"Webinar" training is an internet-based seminar whose content is created and taught by a trainer and transmitted over the internet or intranet in real time. An employer utilizing a webinar for its supervisors must document and demonstrate that each supervisor who was not physically present in the same room as the trainer nonetheless attended the entire training and actively participated with the training's interactive content, discussion questions, hypothetical scenarios, quizzes or tests, and activities. The webinar must provide the supervisors an opportunity to ask questions, to have them answered and otherwise to seek guidance and assistance. (2 11023(2)(C), formerly in 7288.0)

During the webinars we monitored, the Senate Oversight Office noted several areas where the DFEH offerings were non-compliant with the statute or its more specific regulations:

- 1 **Length.** The training sessions are required to be a minimum of two hours. The first two DFEH webinars we sampled ended at approximately 90 minutes.
- 2 **Actual participation.** Employers using a webinar for their supervisors must document and demonstrate that each supervisor who was "not physically present in the same room as the trainer" nonetheless attended the entire training and actively participated in it. DFEH did not provide or require such documentation but nevertheless certified that their program was fully compliant with AB 1825.

The Senate Oversight Office audited two DFEH webinars in September and November of 2012, and returned to audit a third course in May 2013. Real-time attendance data appeared on our computer screen indicating the number of attendees who were logged on to the webinar at each moment. Based on our observations, between one fourth and one half of the attendees missed some or all of the webinars in 2012. Nevertheless, they received certificates of completion if their computers were logged on for any portion (even one minute) of the webinar. By May 2013, after this office warned of the problem, the number of over-certifications had dropped measurably. The webinar program apparently still has no effective mechanism for helping employers assure that trainees are actively participating in the “entire training” as required. (It is possible to design webinars in a manner that requires regular interaction with the instructor and disqualifies any non-participating trainee.)

3 Practical guidance.

The training should not be designed as a seminar for legal personnel but for supervisors of all stripes. For this reason the training must, according to law, focus on realistic and practical content such as strategies to prevent sexual harassment in the workplace and practical examples, such as “hypotheticals based on workplace situations and other sources which illustrate sexual harassment, discrimination and retaliation using training modalities such as role

Key Components of AB 1825

Anti-harassment training is mandatory for supervisors. Among the provisions of AB 1825 and its regulations:

- Employers of 50 or more workers shall provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees.
- The training shall include information and practical guidance regarding federal and state prohibitions against sexual harassment in employment – as well as remedies available to victims of sexual harassment.
- The training shall also include practical examples aimed at instructing supervisors in the general prevention of harassment, discrimination and retaliation. It shall be presented by trainers or educators with knowledge and expertise in such prevention.
- Employers utilizing a webinar for their supervisors must document and demonstrate that each supervisor who was “not physically present in the same room as the trainer” nonetheless attended the entire training and actively participated in it.
- The webinar also must provide the participants an opportunity to ask questions and “to have them answered,” and must train supervisors about their employer’s particular internal policies.

plays, case studies and group discussions.” (See 2 CCR 11023.0(c) (5), (6), formerly found in 7288.0) The DFEH webinars focused almost exclusively on sexual harassment law and failed to instruct attendees about practical strategies to enforce anti-discrimination policies.

- 4 **Answering Trainee Questions.** The webinar also must provide the participants an opportunity to ask questions and “to have them answered.” The DFEH could not meet this requirement because it set up classes with more than 500 participants at a time – making most interaction and meaningful questions and answers impossible during the live program. Only a handful of questions were answered by the trainer during the webinars. Participants were also invited to email DFEH their questions. As a test, we asked several questions during our audit sessions and with a single exception were ignored. We also emailed two questions during the May 2013 webinar as instructed. In September, the department notified us they had no record of our questions and suggested we re-send them.
- 5 **Focus on internal policies.** AB 1825 and its webinar regulations require that training must present not only the legal framework for the prevention of harassment and discrimination, but also the employer policy and enforcement perspective. Again, no attempt to comply was made.
- 6 **Failure to cover discrimination and retaliation.** AB 1825 emphasizes that the training be more than a primer on preventing sexual harassment. It requires, for example, explaining the prohibition against retaliation and covering all forms of illegal discrimination under state and federal law.

The DFEH webinar failed to discuss federal and state discrimination law and the various protected characteristics other than gender – such as race, age, disability or sexual orientation. Retaliation was barely mentioned. Since these topics were not discussed, attendees were provided no practical examples or strategies for preventing retaliation or discrimination other than sexual harassment.

Despite these substantial problems, the DFEH issued more than 10,000 certificates of completion which declared: “This two-hour webinar is compliant to the Government Code section 12950.1.”

In our May audit, despite some improvements made in the webinar, we saw no evidence of a solution to the key problem of trainees logging

on and either leaving the room or otherwise ignoring some or all of the webinar. We tested the idea by arranging for an employee in our office to sign up for the training. She logged on to the webinar site, then immediately left the office and was literally absent during the entire program. Nevertheless, our absentee “supervisor” received a certification of full compliance.

In response to our written inquiries, a DFEH spokesperson said the department relies on standards set by the California State Bar for its continuing legal education (CLE) programs. In an interview, the DFEH director also flatly stated that the training was in compliance with “State Bar standards.”

The Senate Oversight Office contacted Robert Hawley, deputy executive director of the State Bar of California, to ask about DFEH’s contention. Hawley wrote back on August 19, 2013: “The State Bar does not maintain any standards for AB 1825 classes, nor do we certify the extent to which a presentation complies with AB 1825.” With respect to DFEH’s specific webinar he added, “The State Bar does not and did not examine the extent to which the programming actually satisfied the requirements of AB 1825, Gov’t Code section 12950.1, as that is beyond our expertise and mission.” When asked about the State Bar’s comments, DFEH did not respond to our written question.

The Senate Oversight Office spoke to a civil rights official from a major state department who had attended the training. She characterized the DFEH webinar series as “simply not helpful” and said that she had numerous practical prevention questions she hoped the DFEH would help her tackle. Instead of practical guidance, she said, she received from the DFEH webinar link the blanket statement “we don’t give legal advice.” She told our office that in private conversations, officials from two of the largest state agencies shared her concerns. When she told her department that the DFEH training did not meet her needs, she was told that she could not train her supervisors using other methods because “the DFEH webinar is free.” Her comments raise the possibility that the overall impact of the free webinar program may be to undercut more comprehensive training programs of state agencies whose anti-discrimination training budgets have been cut to zero.

The Senate Oversight Office also asked what the department planned to do about webinar trainees who attended for less than the required two hours. DFEH responded that due to a change in the software used to track webinar participation, the department has no records of anyone who attended in 2012. They did, however, put this notice on the DFEH website:

To all supervisors and managers who received a certificate from the DFEH for participating in a sexual harassment prevention training webinar in 2012: If you were not logged on for the full two hours, or if the webinar lasted less than two hours due to audience participation or the presenter's style, even though all the required course content was covered, you should retake the training to ensure compliance with AB 1825. Please [click here](#) to register for the DFEH's November 7, 2013, sexual harassment prevention training webinar for free, to satisfy your AB 1825 requirement.

The Oversight Office notes that one of the co-authors of this report, John Adkisson, an employment and civil rights lawyer in California since 1984, has been a classroom trainer for harassment and discrimination prevention classes, including those that comply with AB 1825. He also trained civil rights investigators. For several years, he taught classes under contract to state and local government agencies and private employers. Since 2009, his classes have been limited to employees of the California State Senate and the Office of the Legislative Counsel.

VIII. Recommendations

General recommendation:

- The Legislature should consider the wide gap between the promise of the Fair Employment and Housing Act – considered the strongest anti-discrimination statute in the nation – and the ability of DFEH to process and investigate the thousands of claims it receives while under constant budget cuts. 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.

Public agency claims:

- DFEH should stop treating discrimination claims filed by public employees differently than it handles private claims. This includes practices before and during investigations. And – once a claim’s merit has been established – it would stop the practice of allowing the Governor’s Office or the Agency to dictate whether the case is pursued.
- In the course of our scrutiny of DFEH, we learned of Governor’s Office Action Requests – known as GOARs. Prior to this oversight investigation, the existence of this policy was hidden from the public. We think there should be complete transparency regarding the GOAR process. The public, in our view, is entitled to know when Governor’s Office approval was first required for claims against state agencies, when it was expanded to local agencies, and why. Further, the public should be informed of the exact number of GOAR cases since January 2008, the names of the cases,

dates, approval rates – and the rationale for second-guessing the professionals at DFEH.

- There is a serious question as to whether a procedure such as a GOAR would be lawful if it were pursued as a regulation. 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 possible taint of an 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 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 Legislature should consider seeking a full accounting as to whether GOARs (or similar approval practices) have been applied to other independent departments with legislative mandates to enforce state laws, such as labor, safety, and environmental statutes. Since the written policy on its face applies to all state enforcement actions, we strongly recommend that sufficient facts be disclosed to the Legislature to ascertain whether these practices invade the province of legislative powers outlined in the California Constitution.

Housing discrimination claims:

- The Legislature should consider monitoring the relationship between the federal Department of Housing and Urban Development (HUD) and DFEH, at least until HUD is satisfied that the department is meeting its previous high standard of compliance with federal requirements. This monitoring could be accomplished through regular reports to the Legislature and the public, including correspondence and agreements with HUD about the DFEH's performance.

Employment discrimination claims:

- We are persuaded that the serious problems cited by HUD were caused in large part by DFEH's decision to handle housing discrimination investigations in the same way it handles employment claims. What the HUD action revealed, therefore, was that the manner in which most employment investigations are handled at DFEH is inadequate as well. This fact should be faced squarely and should be the subject of analysis to find a

solution. The dozens of current and former DFEH employees who have attempted to improve the process should be invited to help. In particular, charges by Los Angeles investigators that cases have been improperly closed without full investigation in order to qualify for federal funds should be promptly investigated by the department.

- Statements by DFEH employees that non-English speakers receive a lower standard of service and access during the complaint intake process should be assessed and remedied, if appropriate. Steps should also be taken to make the complex online intake system more user friendly for Californians with poor English skills, poor computer skills, or no computers at all.
- The DFEH should revisit changes in the intake process that have resulted in sometimes garbled and non-jurisdictional complaints being served on employers. The FEHA expressly assigns the department, not the complainant, the duty to draft complaints in concise, plain language. If DFEH feels compelled to serve all complaints, it should return to the practice of helping complainants at the front end with language and organization. If necessary, the statute should be amended to end the current chaotic intake process.
- Case-grading decisions should be based on the evidence of each case and not upon pre-investigation first impressions or instincts of consultants. This is especially important when complaints may be difficult to understand due to technical problems or language issues.

AB 1825 Webinar

- The department should seek out a pro bono training expert to revamp the department's anti-harassment webinar program. The new program must comply with all of the requirements outlined in AB 1825 and its implementing regulations.
- The department should cease any reliance on California State Bar standards for judging the adequacy of its AB 1825 training, since the State Bar claims no knowledge or jurisdiction regarding the subject.

IX. Sources

Legal References:

California Constitution

- Article V, section 1: (Governor’s “supreme executive power of the state” and his obligation to “see that the law is faithfully executed.”)
- Article III, section 3: (The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution....)

California Supreme Court

- Tidewater Marine Western, Inc. v Bradshaw, 14 Cal. 4th 557 1996: (Defining underground regulations)

Statutes

- The Fair Employment and Housing Act (California Government Code, sections 12900-12996)
- Specific Government Code Sections:
 - 11340.5 (a): (Administrative Procedures Act (APA) Government Code section prohibiting “underground regulation”)
 - 11340.9, subd. (d): (APA internal management exception for underground regulation)
 - 12010: (Governor’s power to “supervise the official conduct of all executive and ministerial officers”)
 - 12920: (Legislative finding that discrimination adversely affects the public interest)
 - 12930: (DFEH’s functions, powers, and duties)

- 12930 (e) and (f)(1): (Examples of function, powers, and duties to investigate and establish rules)
- fmr.12930 (h): (Former DFEH authority to issue accusations)
- 12962: (mandatory service of complaints)
- 12963: (duty to investigate)
- 12963.1: (DFEH subpoena authority)
- 12963.2: (DFEH authority to serve written interrogatories)
- 12963.3: (DFEH authority to depose witnesses)
- 12963.4: (DFEH authority to issues requests for production of documents)
- 12963.5: (Compelling discovery in court)

California Code of Regulations

- 2 CCR 10009(a): (DFEH duty to draft complaints in ordinary and concise language)
- 2 CCR 10026(a): (DFEH duty to initiate prompt investigations)
- 2 CCR 10026(d): (DFEH duty to gather all relevant evidence)
- 2 CCR section 10031(a): (Independent authority of DFEH to pursue merit claims)
- 2 CCR section 10031(c): (DFEH discretion to issue accusations when circumstances warrant)
- 2 CCR 11023.0: renumbered from previous 7288.0) (Mandatory harassment and discrimination training regulations)

Attorney General Opinions

- 63 Cal.Ops.Atty.Gen. 583 (1980) (Governor is authorized to issue directives to subordinate executive officers concerning the enforcement of the law)
- 75 Cal.Ops.Atty.Gen. 263 (1992) (Governor is not empowered, by executive order or otherwise, to amend the effect of, or to qualify the operation of existing legislation)

Bills

- SB 1038 (Committee on Budget and Fiscal Review), Chapter 46, Statutes of 2012: (FEHC eliminated; DFEH empowered to proceed directly to civil court)
- AB 1825 (Reyes), Chapter 933, Statutes of 2004: (Mandatory harassment and discrimination prevention training)

Individuals:

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Mary Bonilla, acting chief of enforcement, DFEH

Lisa Bradley Buehler, founder, Employment Advisors

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Nelson Chan, chief of enforcement, DFEH

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Martha West, professor of law emerita, University of California, Davis

Glenna Wheeler, chief, Office of Human Rights for the California Department of Mental Health

(Additionally, the Senate Oversight Office interviewed several former DFEH staff members who requested that their names not be used in the report.)

Documents:

Agreement between the Department of Fair Employment and Housing and LOGICBit Software LLC (for replacement of the department's software for case management). California Department of General Services Procurement Division. June 2011.

Apples and Oranges – Response to the UCLA-RAND Report. Phyllis Cheng, director of the Department of Fair Employment and Housing. Testimony before legislative joint oversight hearing. Feb. 23, 2010.

Assembly Budget Subcommittee No. 4, hearing agenda item: Department of Fair Employment and Housing. May 1, 2012.

California Employment Discrimination Law and Its Enforcement: The Fair Employment and Housing Act at 50. Gary Blasi and Joseph W. Doherty. UCLA-RAND Center for Law & Public Policy. 2010.

Contract between U.S. Equal Employment Opportunity Commission and the California Department of Fair Employment and Housing. May 21, 2013.

Department of Fair Employment and Housing: Its Complaint Processing Needs More Effective Management. Kurt R. Sjoberg, California State Auditor. Jan. 16, 1997.

DFEH Charge Screening: A Management Tool Becomes an Impediment to Justice. Nicole G. Berner. Graduate School of Public Policy, University of California, Berkeley. May 8, 1996.

Fair Employment and Housing 50 years after the FEHA: Where do we go from here? Joint Oversight Hearing of the Senate and Assembly Judiciary Committees (and background papers). Chairs, Senator Ellen Corbett and Assemblyman Mike Feuer. Feb. 23, 2010.

Navigating Muddy Waters: Workers at Sea in the Discrimination Complaint Process. Kara Daillak. Employment Law Center's Workers' Rights Clinic. 1994.

A Phoenix Rises from the Budgetary Ashes. Phyllis Cheng. California Labor & Employment Law Review. 2011.

Procedures for Submitting Materials to the Governor's Office. Memorandum from the Office of the Governor, Edmund G. Brown Jr., to Agency Secretaries and Department Directors. March 17, 2011.

Response to Senate Rules Committee Questions. Phyllis Cheng. Prepared for Senate confirmation hearing. Jan. 28, 2009.

Senate Budget and Fiscal Review Subcommittee No. 4, hearing agenda item: Department of Fair Employment and Housing. May 10, 2012.

Through Struggle to the Stars: A History of California's Fair Housing Law. Ann M. Noel and Phyllis Cheng. Published by the Real Property Law Section of the State Bar of California. 2009.

Transformative year for civil rights in California. Phyllis Cheng. Los Angeles Daily Journal. Aug. 2, 2012.

U.S. Department of Housing and Urban Development documents

- FY2011 and FY2012 Funding Guidance for Fair Housing Assistance Program agencies. 2011 and 2012.
- Performance Assessment Report for the California Department of Fair Employment and Housing. Sept. 18, 2012.
- Performance Improvement Plan for the California Department of Fair Employment and Housing (and accompanying letter). April 18, 2013.
- Modification of Performance Improvement Plan. Nov. 5, 2013.

X. Attachments

- A. Memorandum: Procedures for Submitting Materials to the Governor's Office
- B. Letter: Issuance of Performance Improvement Plan (from HUD)
- C. Letter: Modification of Performance Improvement Plan (from HUD)

MEMORANDUM

OFFICE OF THE GOVERNOR EDMUND G. BROWN JR.



*JAMES M. HUMES
NANCY McFADDEN
Executive Secretaries*

DATE: *March 17, 2011*

TO: *Agency Secretaries and Department Directors*

FROM: *James M. Humes
Nancy McFadden
Executive Secretaries*

RE: *Procedures for Submitting Materials to the Governor's Office*

This memo describes new procedures for notifying the Governor's Office of important issues and for obtaining approval from the Governor's Office for significant actions. These procedures are intended to reduce unnecessary work and to foster better decision making by ensuring that information is conveyed to the Governor's Office in a timely and organized manner. They are not intended to create bureaucratic impediments; if you are unsure whether a particular action needs approval from the Governor's Office, or if you have an issue that needs immediate attention, you should feel free to call the Governor's Office for direction. Our mutual goals should be to be cooperative, collaborative and helpful in ensuring that the Governor has sufficient information and time to evaluate matters properly.

I. A Governor's Office Action Request (GOAR) Package Should Be Used for Significant Matters.

Some routine or time-sensitive issues may be conveyed to the Governor's office informally through an e-mail or telephone call. But significant issues should be conveyed to the Governor's Office through a Governor's Office Action Request (GOAR) package.

GOAR packages should be sent with the approval of agency secretaries or department directors¹ to the Governor's GOAR Intake Unit. Packages that seek approval of a proposed action or seek the Governor's signature should be sent in a red folder. Packages that are sent for informational purposes should be sent in a blue folder. Attached to the front of all folders should be a GOAR Package Summary. The GOAR Package Summary form is attached and can be obtained electronically by emailing goarintakeunit@gov.ca.gov. The GOAR summary should include a concise statement of the reason why the package is being submitted to the Governor's Office, whether requested action could have a significant fiscal impact, and the name and contact information for the person who is best able to answer questions about the package. The GOAR summary should also clearly indicate the due date if the package seeks approval of an action or the Governor's signature.

Required GOAR Contents.

Unless the requested action is self-explanatory, the GOAR package should include a memo along with copies of other important materials that are necessary for a full understanding of the issue. The memo should explain what decision is needed, describe the relevant background, make a recommendation, and discuss the pros and cons of the recommendation. The memo should be clear and concise, but also provide enough information for the Governor's Office to make a fully informed decision.

Delivery of a GOAR.

Absent extraordinary circumstances, GOAR packages should be received by the Governor's GOAR Intake Unit no later than 14 days before the due date. For matters that can be considered within normal time constraints, hard copies of the package should be delivered. If a quick decision is needed, the package may be sent electronically by forwarding the GOAR summary and the package material to goarintakeunit@gov.ca.gov. GOAR packages that could have a significant fiscal impact will be forwarded by the GOAR Intake Unit to the Department of Finance for review, and anyone submitting such a package should take into account the additional review time needed.

The GOAR Intake Unit will log in all packages and assign them to the appropriate Governor's Office staff. Staff will either handle the matter or make a recommendation to an Executive Secretary, who will forward appropriate issues to the Governor. Packages that sought approval of an action will be returned to the agency or department after a final decision has made to approve or deny the request. Inquiries about the status of packages can be made by calling the GOAR Intake Unit at (916) 324-0229 or by sending an e-mail to goarintakeunit@gov.ca.gov.

¹Throughout this memorandum, "department directors" refers to department heads who do not report to an agency secretary, and "departments" refer to departments that do not report to an agency. Departments that report to an agency should route GOAR packages through their agency before they are submitted to the Governor's Office.

II. Special Procedures Apply to Certain Matters.

Documents Requiring the Governor's Signature.

Requests for the Governor's signature on letters, emergency proclamations, delegations, and other matters having a due date should normally be submitted to the Governor's Office in a red GOAR package. If the Governor's signature is sought on a draft document, such as a letter or a proclamation, a computer disk containing the draft document in WORD format should be included in the package.

Significant Reports to the Legislature.

Routine Legislative reports do not need to be sent to the Governor's Office; they should be forwarded directly to the Legislature upon approval by the agency secretary or department director.

Significant or controversial Legislative reports should be forwarded to the GOAR intake unit *with a brief summary explaining why the report is significant or controversial.* These reports should normally be submitted in a blue GOAR package.

Non-emergency Proclamations.

Occasionally, departments and agencies request the Governor to issue a proclamation regarding their programs or employees. Requests for non-emergency proclamations should be sent by e-mail to CARrequest@gov.ca.gov, or faxed to (916) 558-3160. Questions about these proclamations can be sent by e-mail or by calling (916) 445-2841.

Out-of-State Travel and Hiring Freeze Exemptions.

Requests for out-of-state travel that would impose costs on the State, and requests for exemptions from the hiring freeze should not be sent directly to the Governor's Office. Instead, these requests should be sent to the Department of Finance.

Legal Issues.

Significant legal issues should be submitted in a red GOAR package, unless indicated otherwise below.

- ***Litigation Decisions.*** Agencies and departments are not required to obtain Governor's Office approval regarding litigation decisions except in the following instances:
 1. Proposed litigation decisions that could have a significant impact on state policy. [If there is any doubt about the policy impact, agency/department counsel should ask for clarification from the Legal Affairs Secretary or the Chief Deputy by sending them an e-mail at govlegalaffairs@gov.ca.gov or by calling them at (916) 445-0873.]

2. Decisions to seek review of a case by the Supreme Court of the United States or the California Supreme Court. A copy of the applicable appellate decision should be submitted with the request, along with the recommendation of the Attorney General or outside counsel.
 3. Proposed legal arguments that a federal or state law is invalid or unconstitutional (on its face or as applied).
 4. Proposals to sue or bring an enforcement action against another government agency (federal, state, state agency, county or municipality).
 5. Legal policy disputes between executive agencies or between the Attorney General's office and state agencies or departments.
- **Settlements.** Agencies and departments may use their best judgment and settle cases where agency secretaries (or department directors when their departments do not report to an agency) and their counsel believe settlement is in the state's best interest. Settlement proposals that include the following terms, however, must first be reviewed and approved by the Legal Affairs Office:
 1. An expenditure that will need to be included in the annual Attorney General's claims bill, is sought when the agency or department is facing or projecting a budget deficit, or could cause the agency or department to have a budgetary deficiency.
 2. An expenditure of \$2 million or more for departments that do not report to an agency.
 3. An expenditure of \$3 million or more for departments that report to an agency.
 4. An expenditure of funds that will obligate payments in subsequent fiscal years.
 5. An agreement to significantly expand or reduce a government entitlement program.
 6. An agreement that may impact or change state policy.
 7. An agreement that could generate substantial interest by a constituent or special-interest group or the media.
 8. An expenditure of attorneys' fees of \$250,000 or more by departments that do not report to an agency.
 9. An expenditure of attorney's fees of \$500,000 or more by departments that report to an agency.

In cases in which the Attorney General's office or private counsel has provided settlement advice, a copy of the advice letter or memo must be included in the GOAR package.

- **Other Significant Litigation Events.** The Legal Affairs Office should be promptly notified of significant litigation events. Examples of significant litigation events include, but are not limited to, the filing of a new significant case, dismissals of significant cases or appeals, significant rulings, rulings likely to generate media attention, motions seeking contempt against a state entity or

official, and contempt orders against a state entity or official. This information may be conveyed to the Legal Affairs Office through an e-mail or phone call.

- ***Non-Routine and Significant Regulations.*** The Governor's Office should be notified of proposed regulations that may involve a significant policy matter or that may generate media attention before the regulations are submitted to the Office of Administrative Law.
- ***Outside Counsel.*** The Legal Affairs Secretary should be notified when an agency or department seeks to hire outside counsel because the Attorney General has declined to represent the agency or department on the grounds that the Attorney General lacks sufficient resources or expertise. The Legal Affairs Secretary should also be notified when an agency or department seeks to enter into a contract or amend a contract that authorizes the department or agency to pay outside counsel \$150,000 or more. These notifications may be conveyed to the Legal Affairs Office through an e-mail or phone call.
- ***Amicus Curiae Participation.*** Requests to participate as amicus curiae shall be submitted to the Legal Affairs Secretary for review and approval through a red GOAR package. Generally, participation as amicus is only justified when a state agency has a compelling interest in the outcome of the case and there is reason to believe that the legal position of the agency will not be adequately presented to the court by a party. In cases in which the Attorney General's office or private counsel has provided advice about filing an amicus brief, a copy of the advice letter or memo must be included in the GOAR package.
- ***Requests for Attorney General Opinions.*** Requests for formal or informal opinions from the Attorney General shall be submitted for review and approval through a red GOAR package. This requirement does not apply to confidential advice provided by the Attorney General's office in the context of legal representation, unless the advice pertains to pending legislation, the budget act, the powers and duties of the Governor, the validity or enforceability of state law, or the validity of a gubernatorial act.
- ***Public Records Act (PRA) Requests.*** Agencies and departments must follow the Public Records Act in determining what information should be released or withheld in response to a PRA request. Approval from the Governor's Office is required before an agency or department agrees to 1) withhold documents in reliance on the balancing test articulated in Government Code section 6255, or 2) disclose copies of memoranda or other correspondence that were communicated to or from the Governor's Office within the meaning of Government Code section 6254(1). Approval for these determinations may be obtained through an e-mail or phone call.

III. The Governor's Press Office Should Be Notified of Matters Likely to Generate Media Attention.

Agency secretaries and department directors are responsible for ensuring that the Governor's Press Office is notified of matters that are likely to generate media attention.

Each evening, responsible agency and department communications personnel should electronically send to the Governor's Press Office a Daily Agency Report. This report should describe any media calls received that day and potential new media reports.

Responsible agency and department personnel should immediately notify the Governor's Press Office of new media reports that are likely to receive wide-spread attention or be controversial. These notifications have historically been referred to as "Red Flag Media Reports," and the Governor's Press Office should be notified of them through a phone call or by sending an e-mail marked urgent.

The main e-mail address for the Governor's Press Office is govpressoffice@gov.ca.gov, and the main phone number is (916) 445-4571.

IV. Memos Describing Important Upcoming Events Should Be Sent Before the Beginning of Each Month.

Before the beginning of each month, agency secretaries and department directors are to send the Governor's Office a memo of foreseeable upcoming events that involve a significant policy or that may generate media attention.

These memos do not need to be submitted in a GOAR package. Instead, an electronic version of the memo may be sent to the GOAR intake unit (goarintakeunit@gov.ca.gov), which will consolidate them and distribute them to appropriate staff in the Governor's Office. The summaries contained in this report should be concise and limited to matters that are truly significant or controversial.

Irrespective of this month-ahead memo, the Governor's Office should be notified as soon as possible whenever critical and time-sensitive issues arise.



U.S. Department of Housing and Urban Development
San Francisco Regional Office - Region IX
800 Harrison Street
San Francisco, California 94107-1387
www.hud.gov
espanol.hud.gov

April 18, 2013

Ms. Phyllis Cheng, Director
California Department of Fair Employment and Housing
2218 Kausen Drive, Suite 100
Elk Grove, CA 95758

Dear Ms. Cheng:

Subject: Issuance of Performance Improvement Plan
California Department of Fair Employment and Housing

Pursuant to our HUD's implementing regulations for the Fair Housing Assistance Program at 24 CFR 115, this letter serves to notify you that we have determined that the California Department of Fair Employment and Housing (DFEH) has failed to meet the required performance standards and requirements set forth at 24 CFR 115, and has failed to take adequate measures to correct the finding of non-compliance identified to DFEH in our September 26, 2012 Performance Assessment letter. Accordingly, HUD will place your agency on a Performance Improvement Plan (PIP) for an initial six-month period. Effective immediately, HUD will limit the number of complaints originated by our department that are referred to DFEH on a monthly basis to no more than the number of HUD-originated complaints that DFEH has closed in the prior month. We will simultaneously require other corrective actions by DFEH as set forth in the attached PIP, and determine DFEH's progress based upon the benchmarks associated with each corrective action.

On September 26, 2012, as part of our annual Performance Assessment of DFEH, HUD issued a finding of non-compliance with FHAP Performance Standard 1 (failure to commence complaint proceedings, carry forward such proceedings, complete investigations, issue determinations, and make final administrative dispositions in a timely manner, 24 CFR 115.206(e)(1)). Although the Performance Assessment letter made an overall finding of compliance, it expressed concerns that a significant loss of fair housing investigative staffing (12 assigned fair housing consultants as of the June 30, 2012 end of the evaluated performance period, down from 21 consultants a year earlier) may have begun to notably impact DFEH's complaint processing abilities. The letter noted that only 37% of the 687 cases closed by DFEH within the July 2011-June 2012 performance period had been closed within 100 days, causing DFEH to fall well short of HUD's performance goal that a minimum of 50% of closures shall occur within 100 days of filing. The letter also noted that DFEH had lost more than \$200,000 in case processing funds due to non-compliance with the FHAP Timeliness Criteria.

agreements authorized payment for work already accomplished by the agency (cases closed 7/2010-6/2011, and 7/2011-6/2012, respectively). We find the relative lack of current DFEH staffing inconsistent with DFEH leaving such large, available, earned funding balances untouched. We are requiring in the attached PIP that DFEH must voucher for all of this funding before July 5, 2013.

During its many years of FHAP participation, DFEH has become HUD's largest and one of our most critical fair housing enforcement partners. I am hopeful that we can successfully resolve the matters identified in the PIP, as it is undoubtedly in HUD's interest that DFEH maintain its FHAP participation. I would be happy to discuss any concerns that you may have regarding this letter and/or the attached PIP. If you believe that alternate corrective actions could better achieve the desired result, I am also willing to negotiate alternative terms of the corrective actions proposed under paragraph 5 of the PIP. If you wish to pursue that discussion with me, I request that you contact me within the week to propose a date and time for a conversation with my staff and me. You may reach me by telephone at 415/489-6526, or by e-mail at anne.quesada@hud.gov.

Pursuant to policy, a copy of this cover letter and the attached PIP have been forwarded to our Headquarters, as well as to the Secretary of the California State and Consumer Services Agency.

Sincerely,



Anne Quesada

Director

Office of Fair Housing & Equal Opportunity

Enclosure: Fair Housing Assistance Program Performance Improvement Plan for DFEH

cc: Kenneth Carroll, Director, Fair Housing Assistance Program Division, HUD-HQs
Anna Caballero, Secretary, California State and Consumer Services Agency

Fair Housing Assistance Program (FHAP)
Performance Improvement Plan (PIP)
For
California Department of Fair Employment and Housing (DFEH)

Performance Deficiency,
Required Corrective Actions and Timetables

DEFICIENCIES:

- Performance Standard 1 (24 CFR 115.206(e)(1)): Failure to commence complaint proceedings, carry forward such proceedings, complete investigations, issue determinations, and make final administrative dispositions in a timely manner (*see also: 2012 Annual Cooperative Agreement FF209K129002 Criteria for Processing & Timeliness Criteria*);
- Performance Standard 3 (24 CFR 115.206(e)(3)): Failure to consistently demonstrate that, during the period beginning with the filing of a complaint and ending with filing of a charge or dismissal, the agency will, to the extent feasible, attempt to conciliate the complaint (*see also: 2012 Annual Cooperative Agreement FF209K129002 Criteria for Processing*);
- Requirements for participation in the FHAP (24 CFR 115.307(a)(3)): Failure to use the Department's official complaint data information system (i.e., Title Eight Automated Processing and Office Tracking System, or TEAPOTS) and input all relevant data and information into the system in a timely manner (*see also: 2012 Annual Cooperative Agreement FF209K129002 Criteria for Processing*);
- Requirements for participation in the FHAP (24 CFR 115.307(a)(7)): Unilateral reduction in the level of financial resources committed to fair housing activities.

Following an introductory statement of background, this PIP is divided into six sections:

- (1) Quantitative concerns
- (2) Qualitative concerns
- (3) Draw-down/vouchering of allocated funding
- (4) Summary of Technical Assistance provided to DFEH prior to issuance of this PIP
- (5) Corrective actions sought to correct performance deficiencies identified in this PIP
- (6) Duration of the PIP, consequences of failure to institute effective corrective actions

Background:

On September 28, 2012, our office issued to DFEH its annual Performance Assessment of DFEH's fair housing complaint processing program; the letter addressed DFEH's performance

with respect to complaint processing activities during the period of July 1, 2011 through June 30, 2012. Although our letter found DFEH in overall compliance, we issued a finding of non-compliance with respect to FHAP Performance Standard 1 (timely processing of complaints), and we issued a concern related to Performance Standard 3 (documentation of conciliation efforts). Our letter noted that while DFEH had met or exceeded the FHAP management goal to close a minimum of 50% of all complaints within 100 days of filing in prior performance evaluation periods, during this period DFEH closed only 37% of complaints within 100 days. We noted that reduction of DFEH's fair housing investigative staff, from 21 assigned consultants in the prior performance period ending June 30, 2011, down to just 12 by June 30, 2012, may have been the cause of the lengthier complaint processing times, and also contributed to the agency losing over \$200,000 in complaint processing funds due to non-compliance with the FHAP Timeliness Criteria. We also noted a significant reduction in the number of complaints processed to closure by DFEH, 637 cases completed for the evaluated period. This represented a 20% drop in the number of complaints processed to closure by DFEH in the prior period (816 closures for the 7/2010-6/2011 period), and down even more markedly from the 2007-2009 timeframe when DFEH was closing over 1,250 complaints/year.

While recognizing the historically high levels of DFEH consultant (investigator) productivity and experience, the cut-back of almost half of the fair housing staff (from 21 consultants to 12), did not appear sufficient to meet the number of fair housing complaints being newly-filed with the agency.

We sought as a corrective action to this finding of non-compliance DFEH's certification that it had implemented "a formal, monthly assessment of its degree of compliance with the requirement that a minimum of 50% of closures occur within 100 days of filing, and that DFEH make quarterly reports to our office commencing on December 31, 2012 documenting that procedures are being successfully implemented to ensure that DFEH will come much closer to meeting the timeliness standard on a monthly basis by the end of this next performance evaluation period (July 2012-June 2013). If DFEH does not demonstrate significant improvement in this area in the months ahead, our office would feel compelled to seek compliance through measures outlined in the FHAP program regulations at 24 CFR 115.210, which could include placing DFEH under a Performance Improvement Plan and limiting the number of cases referred to the agency for processing".

DFEH provided responses to HUD's finding of non-compliance in letters dated October 25, 2012 and February 11, 2013. In its October letter, DFEH reported having hired one new consultant for its Los Angeles office earlier that month, and that it had taken actions to "fill additional housing consultant positions in the near future." In its February letter, DFEH

reported that interviewing processes were ongoing to lead to two new consultants to be hired for its Fremont office, and one new consultant for its Los Angeles office. DFEH also identified other processes that it would be implementing in efforts to streamline processing, including refinement of its Early Mediation Process, use of retired annuitants to train new staff, and designation of Consultant III Gloria Morales as an "expediter".

We find now as is set forth in detail in the paragraphs below, and despite the commitments made by DFEH in its letters, that DFEH has fallen still further away from compliance with performance standard #1, and that despite our technical assistance to the agency, performance problems in other important areas are also developing. For these reasons, we have concluded that it is appropriate to place DFEH under a formal Performance Improvement Plan (PIP) to ensure that these issues are addressed before they jeopardize the agency's substantial equivalency under the federal Fair Housing Act, and the agency's continued participation in the Fair Housing Assistance Program.

Analysis of Issues of non-compliance:

1. Quantitative Concerns:

- Performance Standard 1 (24 CFR 115.206(e)(1): Failure to commence complaint proceedings, carry forward such proceedings, complete investigations, issue determinations, and make final administrative dispositions in a timely manner.
- Requirements for participation in the FHAP (24 CFR 115.307(a)(7)): Requirements for participation in the FHAP; Corrective and remedial action for failing to comply with requirements: a FHAP agency may not unilaterally reduce the level of financial assistance committed to fair housing activities.

The chart below provides an historic context for the number of new complaints filed with DFEH in recent years, and the agency's record of case closures:

Chart 1: History of complaints filed & closed by DFEH 2007-present

Performance Year	Total cases filed in year	Total cases closed in year	Complaint Processing Funds earned by Agency
7/2012 – 6/2013*	605*	293 (Projection*)	\$ 450,000 (Projection*)
7/2011 – 6/2012	805	687	\$1,353,709
7/2010 – 6/2011	888	788	\$1,792,603**
7/2009 – 6/2010	878	881	\$2,057,410
7/2008 – 6/2009	1,001	1,251	\$3,148,757**
7/2007 – 6/2008	1,070	1,272	\$2,338,160

*Data submitted by DFEH in monthly closure reports for period of Jul 2012 – Feb 2013 list a total of 195 closures within these eight months, thus averaging 24.4 closures/month. If the closure trend continues unchanged throughout the remaining four

months of the performance year, DFEH will have closed approximately 293 cases during this one-year performance period; case processing funds are estimated based upon a proportional formula of past compliance with the Timeliness Criteria for cases reviewed in the first eight months of the performance year. The actual amount for which DFEH will become eligible may be higher or lower.

**New payment standards were enacted in 2008, and again in 2010, that increased the per-case reimbursement levels. Maximum per-case funding grew to \$2,400/case in 2008, and was increased to \$2,600/case in 2010. Actual reimbursement is based upon closure category and compliance with the Timeliness Criteria in effect for the performance year.

Our concern derived from the numbers in chart 1 above is that DFEH is currently closing half as many complaints as it is newly-filing each month. As of April 1, 2013, HUD's TEAPOTS database, which reflects the status of FHAP complaints including those of DFEH, showed 545 cases open with DFEH, the highest number of housing discrimination complaints ever open at a single time with the agency since HUD entered into a work-sharing agreement with DFEH in 1994.

DFEH states that its Journeyman-grade Investigators should be able to close six fair housing cases per month (DFEH response to HUD Performance Assessment data request, September 2012). With staffing of 11 investigators (11 investigators x 6 cases/month x 11 months, subtracting one month for leave and furloughs) DFEH could potentially close as many as 726 cases/year. However, the past projections of five or six closures/month were based upon consultants doing *solely* investigative/conciliation work, and not the intake screening work which was formerly assigned to a dedicated intake unit. Using figures from the chart above reflecting DFEH's closure of 195 cases over an eight-month period with a fair housing consultant staff of eleven employees, DFEH is projected to close approximately 300 cases before the end of this performance period ending June 30, 2013. That number is less than half the number of new complaints that we expect will be filed (through DFEH originations, or HUD referrals) during this same period.

In response to HUD's performance assessment finding that DFEH's compliment of dedicated fair housing consultants had dropped from 21 at the end of the prior performance period (i.e., as of September 2011) down to 12 by the end of the period ending in September 2012, DFEH committed to HUD in its October 2012 and February 2013 responses to our PAR finding of non-compliance that it would hire new staff. DFEH hired one new consultant for its Los Angeles office in October 2012. However, as of April 1, 2013, DFEH actually had only ten fair housing consultants, and therefore two fewer than it had when HUD made the finding of non-compliance in September 2012.

Our concern with the DFEH staffing losses derives from the fact that of the 545 cases that were open with DFEH as of April 1, 2013, 413 (76%) of those have already aged over 100 days. The current trend indicates that the percentage of the 300 projected closures complying with the Timeliness Criteria will be even lower than the non-compliant 37% we noted in our September 2012 performance assessment report. Unfortunately, these numbers show that DFEH is

growing further away from the threshold 50% timeliness goal established by the Department for FHAP agencies, rather than coming closer into compliance as it committed to doing in its October 2012 and February 2013 responses to HUD.

Of the 195 closures submitted to HUD and reviewed for closure, a large percentage have failed in some way to comply with the Criteria for Processing and/or Timeliness Criteria, resulting in loss of case processing funds. Although some types of administrative closures are not eligible for the full \$2,600 authorized for cases completed in full compliance with the Timeliness Criteria, payment determinations for the 195 cases closed by DFEH from July 1, 2012 through February 28, 2013 total only \$299,702, and reflect losses of nearly \$158,000 so far this performance period. If this trend continues for the duration of the performance period, case processing funds to DFEH are projected to total approximately \$450,000 for this one-year period (July 1, 2012 – June 30, 2013). This case processing funding contrasts very sharply with the much-larger case processing funding earned by DFEH in prior years (see Chart 1 above, for specifics), when DFEH was closing far more cases and was only occasionally losing funds for untimely closures.

It should also be noted that the separate category of Administrative Costs funds is computed as an amount equivalent to 20% of the agency's prior-year Cooperative Agreement totals, so the longer-term effect of the greatly reduced number of fair housing closures, and loss of case processing funding due to untimely processing, will also result in significant losses of AC funding to DFEH in future years, if unabated.

Lastly, for the first time in our 19-year-long work-sharing history with DFEH, DFEH has failed in recent months to close all of its cases within 365 days of filing (a total of 10 cases submitted in February and March 2013 reflected closures more than 365 days beyond the DFEH filing dates, according to dates available in TEAPOTS and in closure documents submitted by DFEH). As DFEH would be statutorily barred from proceeding with litigation on a case not "caused" within one year of the filing date, this trend potentially jeopardizes the rights of a complainant with a meritorious but un-conciliated complaint to achieve a remedy through litigation. While we believe that DFEH management continues to carefully track those cases with potential "cause" findings to ensure they are moved to DFEH's Office of Counsel in time to allow filing within the statute of limitations, the trend is of great concern to HUD because of the possibility of loss of adequate remedy in a meritorious case.

Chart 2: Comparison of complaints originated by DFEH versus originated by HUD

FY and Month Filed	Complaints originated by DFEH	Complaints originated by HUD, waived to DFEH	Total new complaints filed

Mar 2012	13	40	53
Apr 2012	29	29	58
May 2012	46	31	77
Jun 2012	30	45	75
Jul 2012	25	35	60
Aug 2012	16	42	58
Sep 2012	1	52	53
Oct 2012	7	49	56
Nov 2012	19	41	60
Dec 2012	7	49	56
Jan 2013	12	32	44
Feb 2013	11	28	39
Mar 2013	25	38	63
Totals:	241	511	752

Chart 2 above depicts the number of fair housing complaints filed with DFEH, separating those originated by DFEH from those originated by HUD but waived to DFEH for processing pursuant to our Memorandum of Understanding with the agency. Historically, the proportion of cases originated by DFEH versus those originated/waived by HUD averaged 50%/50% on a yearly basis, though it varied among individual months. However, the trend in the chart above shows a very significant drop-off of new complaints being originated by DFEH in the August-September 2012 timeframe, which HUD recognizes as occurring during the period DFEH was transitioning to its new HOUDINI case processing system. HUD recognizes that with any new system of automation, it will take time for staff to gain experience in the operation of a new system. And so, the sharp fall-off of complaints originated by DFEH and submitted to HUD for dual-filing in the months immediately following HOUDINI implementation (August, September) was to be expected. While the numbers of DFEH-originated complaints has recently begun to rise (to 25 complaints newly filed in March 2013), the number of complaint originations by DFEH still remains much lower than in periods prior to the implementation of HOUDINI.

In October 2012, our office received complaints from persons who had attempted to access and file housing discrimination complaints using DFEH's new online system. HUD conducted its own "tests" of the new DFEH online filing system, and found similar concerns: on several days we could not gain any access to the DFEH online filing system, and on other days the system failed before we could complete a test filing process. These issues were brought to the attention of DFEH management, who appear to have addressed the problems as no further complaints about access to the DFEH system were vocalized to our staff. However, as Chart 2 depicts, the number of complaints originated by HUD on a monthly basis is still far exceeding the number of complaints being originated by DFEH.

2. Qualitative Concerns

- Performance Standard 1 (24 CFR 115.206(e)(1)): Failure to commence complaint proceedings, carry forward such proceedings, complete investigations, issue determinations, and make final administrative dispositions in a timely manner;
- Performance Standard 3 (24 CFR 115.206(e)(3)): Failure to consistently demonstrate that, during the period beginning with the filing of a complaint and ending with filing of a charge or dismissal, the agency will, to the extent feasible, attempt to conciliate the complaint;
- Requirements for participation in the FHAP (24 CFR 115.307(a)(3)): Failure to use the Department's official complaint data information system (i.e., Title Eight Automated Processing and Office Tracking System, or TEAPOTS) and input all relevant data and information into the system in a timely manner.

Merit/NRC Closures:

While concerns about the quality of DFEH's fair housing complaint processing were not raised in our September 2012 Performance Assessment letter, there have been instances of non-compliance with the Criteria for Processing, which is an appendix to our annual Cooperative Agreement with all FHAP agencies including DFEH (FF209K129002, signed into execution with DFEH on September 19, 2012). The Criteria for Processing sets forth the required degree of thoroughness, and identifies the supporting documentation that FHAP agencies must submit to HUD upon their completion of processing, by individual case closure category.

The Criteria for Processing requires for all merit-type (No Reasonable Cause (NRC) or Cause) closures that "During the period beginning with the filing of a complaint and ending with the FHAP agency's determination or charge of discrimination, the agency, to the extent feasible, must attempt to conciliate the complaint" (paragraph III.A.4). The Criteria also states, under "Required Documents" for merit-type closures, that "documentation of conciliation attempts" must be submitted to HUD (paragraph III.B).

Historically, HUD was able to determine DFEH's consistent compliance with this requirement through DFEH's submission of a case chronology as one of the closure documents for merit-type closures. Although a case chronology is not a document required by the Criteria, our agencies had a long-standing, mutual oral agreement that submission of a detailed chronology, if including "PDS" (pre-determination settlement) notes, would suffice to meet this requirement to document conciliation activity. The chronologies simultaneously served a separate purpose for cases that did not meet the Timeliness Criteria, in that the chronologies could be used to demonstrate the steadiness of investigative, conciliation and administrative

activity on the case, thus enabling HUD to consider granting waivers to the Timeliness Criteria, and increasing payment amounts to DFEH.

With DFEH's implementation of its new HOUDINI processing system, DFEH eliminated its former manually-produced case chronologies and implemented a new, though less-detailed system within HOUDINI. While DFEH's new system may enable a more-accurate tracking of time spent on individual complaints, it does not provide the types of detailed case activity notes that the former system provided, and more specifically it is not documenting conciliation efforts in a large percentage of merit-type case closures. HUD noted that case chronologies submitted during the period July 2012 – February 2013 were either incomplete or contained inaccurate information (e.g., contradicting dates in the TEAPOTS interview or document screens) in 34 out of 176 NRC (19%) closures.

Of the 86 merit-type closures submitted by DFEH between July 1, 2012 and March 26, 2013, only 37 (43%) contained closure documentation of conciliation activity by DFEH staff, reflecting a failure to comply with the Criteria for Processing. In addition, the absence of detailed case chronologies enabled HUD much less latitude in waiving the Timeliness Criteria, which contributed to the result noted above that DFEH lost nearly \$158,000 in complaint processing funds due to non-timely closures because HUD Government Technical Monitors reviewing the closures lacked detailed documentation of case activity, and therefore could not justify timeliness waivers based upon demonstration of steady processing activity by DFEH consultants. HUD GTMs made informal attempts to obtain missing documents from DFEH in the early months of the current performance year (commencing July 1, 2012). However, as the number of case closures that omitted required documents increased, payment determinations and timeliness waivers came increasingly to be based solely upon what DFEH had submitted. HUD notes that DFEH's own case closure form has within it a checklist to assist DFEH clerical staff to identify required documents, and that in many cases this checklist was not being used as intended to guide DFEH staff to include documents required under the Criteria for Processing.

The Criteria for Processing also requires for merit-type closures that "(the) respondent's defenses, relevant policies and practices, as well as all other relevant data, must be identified and analyzed and the complainant, respondent, and all relevant witnesses must be interviewed. Contradictions between complainant's allegations and respondent's defenses must be investigated and when applicable, comparative data must be obtained. When necessary, information must be independently corroborated. Simply obtaining respondents' statements rebutting complainant's allegations will normally not resolve disputed issues of fact" (Criteria for Processing, paragraph III.A.1). The Criteria also states that "For most complaints, on-site

inspections and/or interviews are the most thorough way to conduct an investigation..." (supra, iii.A.4).

HUD has noted an increasing number of merit-type closures since July 2012 that fail to reflect the required type of independent corroborations of allegations or defenses. HUD's review of the 86 NRC closures by DFEH during the period of July 2012 – February 2013 reveals that DFEH went onsite in fewer than ten percent of all NRC closures. Many NRC closures containing disputed facts that would seem to require independent corroboration pursuant to the Criteria for Processing do not reflect any meaningful, independent corroboration. In other cases, inappropriate types of evidence is being used to evaluate a defense, such as dependence upon a small number of telephonic interviews with current tenants to inquire into the consistency of a respondent's admission policies rather than by going onsite to gather objective information of actual practices through tenant and rejected-applicant file reviews. Most troubling in our review of these cases is that based on the incomplete data collection, we could not determine whether or not the Fair Housing Act had been violated.

Under HUD's 2012 Contributions Agreement/Schedule of Articles which also forms a component of our annual Cooperative Agreement with FHAP agencies including DFEH, recipients of FHAP funding "agree...to fully utilize the (TEAPOTS), and input information in TEAPOTS in a timely manner" (paragraph 20). Although HUD did not identify in its Performance Assessment letter the failure of DFEH consultants to input complaint investigative data (interviews, documents) into TEAPOTS on an as-occurring basis, this has become more of a problem since issuance of the Performance Assessment letter. As cases age without completion of processing, this has given rise to complaints to our office, and also to our Headquarters office, about lack of DFEH's lack of progress on filed complaints, which have greatly increased in number in recent months. In the past, our GTR and GTMs could review accurate, up-to-date progress in TEAPOTS and assuage complainants with factual information indicating that DFEH was conducting thorough, active investigations. However, absent data in TEAPOTS, we do not know if the investigation has commenced or is proceeding as appropriate.

We have also noted that as DFEH's fair housing consultant staffing levels dropped, the average caseload dramatically increased. According to DFEH's September 4, 2012 response to our PAR data request letter, the average caseload per fair housing consultant had risen from 15.6 cases/consultant in June 2011 to 35.4 cases/consultant as of June 2012. Since the total number of open cases has increased substantially since the September 2012 issuance of our PAR finding of non-compliance, whereas DFEH staffing has actually been further reduced to just ten consultants, we have reason to believe that DFEH's consultant caseload (based upon there being 545 open cases as of 4/1/2013) has grown to over 50 cases/consultant. We are

concerned that this may not be a manageable caseload based upon the quality of investigative processing that HUD requires of FHAP partners as a demonstration of continuing substantial equivalency. Even at a sustained production rate of five closures/consultant/month, it would take DFEH's current staff more than ten months to clear out the current backlog of cases. This does not factor in any new complaints filed during this time period.

Settlement-type closures:

Qualitative issues have also been observed in settlement-type closures (mediation, conciliation, withdrawals with resolution). The Criteria for Processing (paragraphs IV and IV.A) requires that the settlement-type closures must reflect the complainant's statement that the agreement constitutes closure of the complaint at HUD and the FHAP agency, and required documents include a copy of the agreement that clearly identifies the types of relief being achieved. Of the 75 case closures within these categories submitted by DFEH within the period of July 2012-February 2013, 19 of these (25%) either failed to include a copy of the agreement, or contained no documentation of the types or amount of relief obtained, and a substantial number of withdrawal agreements (which are also used in mediated cases) failed to reflect the complainant's specific intent to also withdraw his/her HUD complaint in addition to withdrawal of the referenced DFEH case, as a part of the settlement process. During technical assistance that HUD provided onsite to DFEH staff in August 2012, we emphasized the importance of clearly and completely documenting forms of relief achieved through conciliation or settlements, as this documentation of relief as accumulated in TEAPOTS is an important part of the Department's reports to Congress documenting the effectiveness of the Fair Housing Assistance Program.

Overall comments on case processing:

We note that at approximately the same time as DFEH implemented its HOUDINI case processing system, case closure documentation was forwarded to HUD from DFEH's Quality Assurance branch in Elk Grove, after which a significant problem developed with required documents not being included within the closure packets provided to HUD.

In efforts to help address the problem, HUD implemented a procedure in late 2012 that allowed for all required documents to be scanned and forwarded to HUD via electronic mail, instead of requiring DFEH to physically duplicate and forward hard copies of these documents by regular mail as had always been done in the past. However, use of the electronic submission of closure documents has not helped to correct the problem of missing closure documents. Under the Criteria for Processing, HUD may withhold or reduce payment for cases wherein the agency fails to provide the required documentation. While we have been working with DFEH to establish a long-term correction to this voluminous and time-consuming problem, our HUD staff cannot

continue to devote time to identifying missing documents on a case-by-case basis, which if continuing unabated will result in significant losses of case processing reimbursement to DFEH.

3. Draw-down/vouchering of obligated funding:

Chart 3: Funding allocated to DFEH/funds drawn-down as of 4/1/2013

Cooperative Agreement/date of execution	Total Funding Authorized by Agreement	Funding drawn-down by agency as of 4/1/2013	Funding that remains available as of 4/1/2013
FF209K119002 (9/2011)	\$2,755,443	\$1,228,588	\$1,526,855
FF209K129002 (9/2012)	\$1,833,362	\$0	\$1,833,362
Total funding available			\$3,360,217

Our office is aware of the state of California's budget issues and the impact those have had on funding to state agencies, including in some cases challenges to hiring and replacing staff, and also reportedly disallowing California state staff to travel outside of the state. While the reduction in DFEH's fair housing staffing levels (as noted above, from 21 as of 7/2011, to ten as of present) may or may not be attributed to funding constraints, HUD believes that DFEH's failure to draw down over \$3.3 million in funds it has been authorized to draw down for work it long-ago completed during the timeframes of 7/2010-6/2011 (FF209K119002) and 7/2011-6/2012 (FF209K129002) may be contributing to the performance problems which might be addressed through adequate funding.

4. Summary of Technical Assistance provided to DFEH prior to issuance of this PIP

Because of case processing problems that had begun to manifest themselves even prior to our issuance of a formal finding of non-compliance to DFEH in our Performance Assessment letter of September 26, 2012, we coordinated with DFEH to provide onsite technical assistance to DFEH staff in its Fremont and Los Angeles offices, in August 2012. During the training, we emphasized the importance of thorough investigations, of documentation of conciliation activity, and the real-time use of TEAPOTS to document case activity.

With issuance of the Performance Assessment finding, we documented the increasing number of complaints that had failed to comply with the Timeliness Criteria, and noted that untimely closures related to inadequate staffing to support the volume of cases filed with DFEH had caused the agency to lose more than \$200,000 in case processing funds for the performance period of 7/2011-6/2012. In our Performance Assessment letter, we sought from DFEH

quarterly reports from the agency to document actions it had taken to address the finding of non-compliance with respect to FHAP Performance Standard 1, for untimely processing.

HUD GTM Patricia Miskovich has also provided near-weekly technical assistance to various DFEH staff in efforts to resolve the problems identified above, including incomplete documentation, inadequate investigation, and failure to document conciliation activity, among other issues.

As noted above, DFEH submitted to HUD in October 2012 and February 2013 the reports required by the Performance Assessment letter, in both reports indicating actions that it had or would soon be taking to hire new fair housing investigative consultants, and assuring HUD that other administrative measures were being simultaneously implemented to address the finding of non-compliance.

DFEH also submitted to HUD monthly case closure reports that listed closures achieved during the month ended, which reports clearly indicated to DFEH senior management as well as to HUD that rather than making progress to reduce processing times of its cases by hiring new staff, DFEH was growing still further out of compliance as its fair housing staffing levels actually decreased from twelve fair housing consultants to ten.

5. Required corrective actions: In accordance with FHAP regulations at 24 CFR 115.210(a)(2):

a) Corrective Action: HUD will limit cases waived to DFEH for processing. The number of complaints originated by HUD and waived to DFEH for processing in any month will be limited to that number of HUD-originated cases closed in the prior month by DFEH. This limitation shall remain in place until such time as DFEH has demonstrated compliance with the FHAP management goal that a minimum of 50% of closures will occur within 100 days of filing, or until rescinded for other good cause by the Department.

Benchmark for determining DFEH's compliance: (a) Timely submission of case closure reports by the 21st day of each month, reporting all cases closed the prior month; and (b) For a minimum of three successive months, 50% or more of DFEH closures will have occurred within 100 days of filing. For purposes of computing this benchmark, the HUD filing date will be used to establish commencement of processing. The date of the DFEH District Administrator's or Regional Administrator's signature on the closure transmittal form, or with respect to NRC-type closures, the date of DFEH's issuance to the complainant of the 10-day pre-closure letter as identified to HUD within the Determination field of TEAPOTS, will be used to establish the DFEH closing date; (c) demonstration of effective progress by DFEH to eliminate the existing backlog

of more than 400 cases that as of the date of this PIP had already aged over 100 days without completion of processing.

b) Corrective Action: DFEH will document to HUD on a quarterly basis the additional efforts it has taken, and plans to take, to retain existing fair housing consultant (investigative) staff, to replace lost staff, and to increase staffing levels to such a number as to reduce caseloads back to manageable levels. DFEH will document actions to HUD in quarterly reports, the first of which shall be due to HUD on May 1, 2013; such quarterly reports will continue until such time as the Department removes DFEH from this PIP.

Benchmark for determining DFEH's compliance: (a) Timely submission of quarterly reports to HUD that includes information regarding the names, grades (consultant, supervisor, clerical/support, attorney, mediator, other-specified), office assignment location (i.e., Fremont, Los Angeles, other), and percentage of time (if other than 100% allocation to fair housing assignments) of staff involved in processing of fair housing cases. For fair housing consultants newly-hired within the quarter, the date of hire will also be identified. The first such report is due to HUD by May 1, 2013; and (b) The reports document that the average caseload for DFEH fair housing consultants has been established at a level that will ensure thorough and well documented investigations; and (c) Information regarding each employee's attendance/participation in NFHTA courses (i.e., course description (e.g., week 1), date of attendance or course completion if taken online. (Note: see also Corrective Action d), below, regarding Consultants who will continue to be simultaneously assigned complaint intake and screening duties.)

c) Corrective Action: DFEH will continuously monitor its consultant caseloads to ensure that actual progress is being made and to report such measure to address timeliness and qualitative performance deficiencies in its reports to HUD. The next such quarterly report, which will be made in conjunction with the report required under paragraph b) above, will be due to HUD on May 1, 2013; such quarterly reports will continue until such time as the Department removes DFEH from this PIP.

Benchmark for determining DFEH's compliance: (a) Timely submission of quarterly reports to HUD documenting DFEH's progress with respect measures implemented in response to Corrective Action c), above; and (b) HUD's review of DFEH fair housing complaint closure documents that establishes for a period of at least three successive months that 95% or more of case closures within those months have fully complied with the Criteria for Processing, as determined by HUD, including all documents required according to the closure category, and for conciliation/resolution/mediation closures will include copies of the agreements clearly indicating the types and amount of relief achieved, and for merit-type closures will document

thorough investigations that have included, where appropriate, the independent collection of corroboration of the complainant's allegations and the respondent's defenses.

d) DFEH will provide such additional training and oversight to administrative staff currently assigned to its Quality Assurance unit and who are responsible for forwarding the documentation of cases closed, as required under the Criteria for Processing and the Timeliness Criteria, to ensure that all required documents are forwarded on a timely and accurate basis to HUD. DFEH will report actions it has taken to HUD as part of the quarterly reports described in paragraphs b) and c) above; the first such report due to HUD by May 1, 2013. Such quarterly reports will continue until such time as the Department removes DFEH from this PIP.

Benchmark for determining DFEH's compliance: (a) Timely submission of quarterly reports to HUD documenting DFEH's actions to address this Corrective Action; and b) a minimum of 95% of closures submitted to HUD fully comply with the documentation requirements identified in the Criteria for Processing according to closure category.

e) Corrective Action: DFEH will immediately (within ten business days of issuance of this PIP) voucher for all remaining funds for which it is eligible under FF209K119002 (including training funds, subject to a statement of actual training expenses incurred in sending staff to NFHTA courses); and for a minimum of half of the funds for which eligible under FF209K129002. DFEH must voucher for the remaining balance of funds for which eligible under FF209K129002 by July 5, 2013.

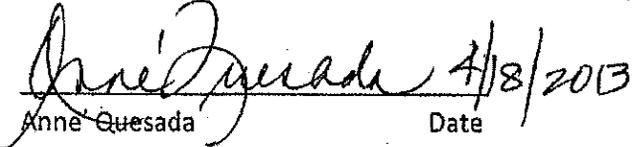
Benchmark for determining DFEH's compliance: (a) DFEH will submit vouchers, as required under this Corrective Action. Vouchers for the Training category of funding for each Cooperative Agreement will include the names of staff who traveled to attend NFHTA course training, or other training pre-approved by the HUD GTR, and include a statement of actual costs incurred for such travel, pursuant to the respective Cooperative Agreements and appendices to those including the "Guidance to Agencies" applicable to the respective agreement.

6. Duration of the PIP, consequences of failure to institute effective corrective actions:

This PIP remains in effect for six months from the date of its execution, but may be extended by the Department beyond that period where we have determined that DFEH is demonstrating progress in implementing corrective actions to remediate deficiencies noted in this PIP but where additional time would be needed for DFEH to come fully into compliance with FHAP performance standards and regulations. If DFEH implements the aforementioned corrective actions and achieves the identified benchmarks within the specified timeframes, or with extensions as provided for in the paragraph above, HUD will not proceed with other performance deficiency procedures.

However, if DFEH does not agree to implement the PIP or does not implement the corrective actions and/or achieve the benchmarks identified in the PIP within the specified timeframes, in accordance with 24 CFR 115.210(b) HUD may proceed with suspending DFEH's substantial equivalence certification. In such circumstance, I will notify DFEH in writing of the specific reasons for the suspension and provide DFEH with the opportunity to respond within 30 days. The period of suspension will not exceed 180 days and HUD has authority not to fund DFEH during the period of suspension.

If, following the period of suspension, the deficiencies have not been corrected, in accordance with 24 CFR 115.210(c), the Assistant Secretary for Fair Housing and Equal Opportunity may proceed with withdrawal of DFEH's substantial equivalence, which is the final FHAP performance deficiency procedure.


Anne Quesada 4/18/2013
Director Date
Office of Fair Housing and Equal Opportunity, Region IX



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San Francisco Regional Office - Region IX
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November 5, 2013

Phyllis W. Cheng, Director
California Department of Fair Employment and Housing
State of California
2218 Kausen Drive, Suite 100
Elk Grove, CA 95758

Re: Modification of Performance Improvement Plan

Dear Director Cheng:

Pursuant to the April 18, 2013 Performance Improvement Plan (PIP) the U.S. Department of Housing and Urban Development (HUD) issued to the Department of Fair Employment and Housing (DFEH), I am pleased that the DFEH has made substantial progress such that all but one standard has been fully satisfied.

The sole remaining performance issue that remains to be fully addressed pursuant to the PIP is the one that relates to Fair Housing Assistance Program Performance Standard #1, i.e., the requirement that DFEH is to complete 50 percent of case investigations and closures within 100 days from the filing of a complaint.

Thus, HUD hereby narrows the scope of, and extends the PIP, until this limited standard is satisfied. We are optimistic that the DFEH can timely achieve this goal on or before January 18, 2014, at which time the modified PIP may be lifted.

We look forward to continuing a productive partnership with the DFEH.

Sincerely,

A handwritten signature in black ink, appearing to read "Anne Quesada".

Anne Quesada, Director
Office of Fair Housing and Equal Opportunity

cc: Kenneth Carroll, Director, FHAP Division, FHEO-HQs
File

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