

Government of the District of Columbia

OFFICE OF THE CORPORATION COUNSEL

DISTRICT BUILDING

WASHINGTON, D. C. 20004



IN REPLY REFER TO:

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October 4, 1983

OPINION OF THE CORPORATION COUNSEL

SUBJECT: Whether the Commission on Human Rights has the authority to review no-probable-cause determinations made by the Office of Human Rights in cases involving private sector complaints of discrimination.

Ms. Maudine R. Cooper
Acting Director
Office of Human Rights
421 8th Street, Northwest
Washington, D.C. 20004

Dear Ms. Cooper:

This is in reply to the March 10, 1983 request of Anita Bellamy Shelton for an opinion regarding whether the Commission on Human Rights has the authority to review no-probable-cause determinations made by the Office of Human Rights in cases involving private sector complaints of discrimination. Based on three provisions contained in Part 4 of Title 8, DCRR ("Rules Governing Procedure and Practice in Relation to Complaints Alleging Unlawful Discriminatory Practices" (hereinafter "Rules")), the Commission apparently asserts such review authority. Ms. Shelton took the position that subsequent legislative actions of the D.C. Council, in particular the promulgation in 1973 of Title 34 DCRR and the enactment in 1977 of the Human Rights Act, D.C. Law 2-38, D.C. Code 1981, §1-2501 et seq., had the effect of superseding those provisions of the Rules giving the Commission the power to review no-probable-cause determinations made by the Office of Human Rights.

After reviewing the pertinent documents, I am of the opinion that the Commission on Human Rights has no authority to review no-probable-cause decisions made by the Office of Human Rights.

If such review authority is deemed desirable by the Mayor or the Council of the District of Columbia, it must be expressly conferred on the Commission by an appropriate amendment to the Human Rights Act of 1977. The reasons for my opinion are as follows:

As noted above, the basis for the Commission's claim of authority to review no-probable-cause determinations made by the Office of Human Rights is Part 4 of Title 8, DCRR. Part 4 provides:

Rule

- 4.1 Dismissal of Complaint
- 4.2 Who May Apply and Form
- 4.3 Review by Chairman

Rule 4.1 Dismissal of Complaint.

If the Director shall determine either on the face of the complaint or after investigation that a complaint should be dismissed, an order shall be issued dismissing the complaint. Said order shall be served on the complainant and shall advise him of his right to apply to the Chairman for review of such dismissal.

Rule 4.2 Who May Apply and Form.

The complainant may apply to the Chairman of the Commission for a review of the dismissal of his complaint. Such application must be in writing, state specifically the grounds upon which it is based, and must be filed in duplicate at the Office of Human Rights within 30 days after service of the order of dismissal.

Rule 4.3 Review by Chairman.

Upon such application, the Chairman and two members of the Commission shall review the dismissal of the complaint, and accordingly, shall enter an order affirming, reversing or modifying the prior determination or remanding the matter for further investigation and action. A copy of such order shall be served upon the party or parties.

The genesis of Part 4 is the set of rules adopted by the District of Columbia Commission on Human Relations on January 14, 1971. See 17 D.C. Reg. 464 (Jan. 25, 1971). At that time the "Office of Human Rights" did not exist. There was only one D.C. Government administrative body charged with administering the regulations prohibiting discrimination in housing and employment in the District of Columbia (Articles 45 and 47 of the Police Regulations). That body was then called the Human Relations Commission, and was the successor body to the Commissioners' Council on Human Relations which is referred to in Articles 45 and 47 of the Police Regulations. Under Article 45 relating to housing discrimination, the Council and its successor had no authority to hear and decide the merits of a complaint if conciliation of a complaint was unsuccessful. The Council

could only refer the complaint to the "Corporation Counsel for such legal action, civil or criminal, as, in the judgment of the Corporation Counsel is available and appropriate." Article 45, §8(d).

With regard to Article 47 prohibiting discrimination in employment, however, the Council and its successor had the authority to hear, and decide the merits of a complaint. (Enforcement of the Council's decisions was assigned to the Corporation Counsel.) See Article 47, §9(a)-(d). Section 9(a) of Article 47 states that if the Council is unable to conciliate through conference and persuasion "a complaint which it believes may involve a violation of this Article," then the Council shall "hold a hearing to determine whether or not an unlawful employment practice has been committed." This language is the closest reference to a probable cause determination that exists in Article 47. Thus, under Article 47, it could be said that if "probable cause" was to be determined, it was to be determined by the Council and its successor, the Commission on Human Relations.

The administration of the Council on Human Relations, and of its successor, the Commission on Human Relations, was entrusted to an Executive Director. See Organization Order No. 125, D. C. Code 1967, Title 1 Admin. Appendix p. 161. This Organization Order does not assign to the Executive Director any role in making probable cause determinations with regard to discrimination complaints filed with the Council.

The Commission on Human Relations' January 14, 1971 rules of procedure must be analyzed against this structural and functional background. Rules 3 and 4 of these Rules provided in pertinent part (17 D.C. Reg. 470-471 (Jan. 25, 1971)):

Rule 3. INVESTIGATION, PROBABLE CAUSE & CONCILIATION:

- a. Investigation: After the filing of a complaint, the Commission shall make prompt investigation of the allegations of the complaint. The respondent shall be informed of the nature of the charges against him and a copy of the complaint shall be made available to him. Any party has the right to request that the Commission obtain additional information. The Commission shall, on request of a party, share all data acquired during the course of an investigation.
- b. Probable Cause: If after investigation, the Executive Director of the Commission shall find that there is probable cause to credit the complaint, written notice of such finding shall be sent to all parties.
- c. Dismissal: If the Executive Director of the Commission shall determine either on the face of the complaint or

after investigation that a complaint should be dismissed, an order shall be issued dismissing the complaint. Said order shall be served on the complainant and shall advise him of his right to apply to the Chairman for review of such dismissal in accordance with Rule 4.

* * * *

Rule 4. REVIEW OF DISMISSALS:

- a. Who may Apply and Form: The complainant may apply to the Chairman of the Commission for a review of the dismissal of his complaint. Such application must be in writing, state specifically the grounds upon which it is based, and must be filed in duplicate in the office of the Commission within 30 days after service of the order of dismissal.
- b. Review by Chairman: Upon such application, the Chairman and two members of the Commission shall review the dismissal of the complaint, and accordingly, shall enter an order affirming, reversing or modifying the prior determination or remanding the matter for further investigation and action. A copy of such order shall be served upon the party or parties. [Emphasis added.]

Thus, in promulgating Rule 3b, the Commission delegated to its Executive Director the function of screening the frivolous from the non-frivolous complaints through the mechanism of making a determination, after appropriate investigation, of whether "there is probable cause to credit the complaint." Not willing to delegate final authority in this matter, however, the Commission, in Rule 4, provided that a complainant whose complaint was dismissed by the Executive Director for lack of probable cause, could, upon request, have that decision reviewed by three members of the Commission itself, one of whom would be the Chairman.

Six months after these Rules were adopted, Mayor Washington on July 8, 1971, issued Commissioner's Order No. 71-224. This order replaced Organization Order No. 125 and established an Office of Human Rights and a Commission on Human Rights. Order No. 71-224, however, did not deal with the matter of assigning responsibility for making probable cause determinations with respect to discrimination complaints. On October 18, 1971, an amended set of rules of procedure applicable to both the Office and the Commission was approved. With appropriate changes in terminology, this amended set of rules continued the previously adopted procedure under the new structure established by Mayor's Order No. 71-224. Namely, the Director of the Office of Human Rights made the initial determination of whether there is probable cause to credit a complaint (Rule 3.2), and the Commission on Human Rights could, upon the request of a complainant, review the propriety of such determination (Rule 4).

In 1973 the D.C. Council enacted into law Title 34 DCRR, known as the "Human Rights Law." In Title 34, the Council specifically conferred upon

the Office of Human Rights the authority to "determine whether there is probable cause to believe that the respondent has engaged or is engaging in an unlawful discriminatory practice." If the Office determines that "probable cause does not exist the Director forthwith shall issue and cause to be served on the appropriate parties, an order dismissing the allegations of the complaint." 34 DCRR §§ 31.2(b) and (c). Significantly there is nothing in Title 34 DCRR itself or in its legislative history which indicates that the Council intended that the Commission have the power to review no-probable-cause determinations made by the Office of Human Rights. The same procedural scheme was enacted into law in the Human Rights Act of 1977. See D. C. Code 1981, §1-2545. As in Title 34, there is no language in the Human Rights Act of 1977 which could be construed as conferring upon the Commission the power to review no-probable-cause determinations made by the Office of Human Rights.

Generally an administrative agency "has only those powers which are expressly conferred or which are necessarily implied by the statutes under which it operates." Kimberly-Clark Corp. v. Public Service Com'n., 110 Wis. 2d 455, 329 N.W. 2d 143, 146 (1983); Durant v. Motor Vehicle Accident Indem. Corp., 20 A.D. 2d 242, 246 N.Y.S. 2d 548, 554 (1964); Mendota Apts. v. District of Columbia Commission on Human Rights, D. C. App., 315 A. 2d 832 (1974) (Commission has no power to award compensatory damages absent express authorization by the Commissioners); see generally 1 Am. Jur. 2d Administrative Law, §72 (1962). The power to review no-probable-cause determinations of the Office of Human Rights has not been "expressly conferred" on the Commission on Human Rights. Nor is such power "necessarily implied" by either Commissioner's Order No. 71-224 or the Human Rights Act of 1977.

The Commission's argument that it has the power to review no-probable-cause determinations made by the Office of Human Rights is set forth in the first full paragraph of page 3 of the Chairperson's letter to the Corporation Counsel, dated July 25, 1983, as follows:

It is the Commission's position that the Council's intent in adopting Title 34 was to expand the subject matter jurisdiction of the District's existing anti-discrimination apparatus, and to lend it the force of its legislative authority, without subtracting from the procedural rights or expectations available to parties under the prior regulations. The inference of the Commission's continued authority to review Office dismissals is necessary in order to carry out the Council's stated intent "to secure an end in the District of Columbia, to discrimination for any reason other than individual merit . . ."
(Sec. 1-2501) Denial of the inference would result in an administrative scheme that would not only discriminate against complainants in favor of respondents, but would

discriminate against complainants on the basis of their inability to pursue private causes of action. This is true because dismissals of complaints filed in the Superior Court of the District of Columbia can be appealed to the D.C. Court of Appeals. (Rule 41, Superior Court Rules of Civil Procedure)

This argument runs counter to the general rule relating to the determination of the scope of the powers of an administrative agency, noted above. As stated, I do not believe that such review power, although arguably desirable as a matter of policy (cf. Kremer v. Chemical Construction Corporation, 102 S. Ct. 1883, 1888 (1982), detailing the procedure followed by New York), is necessarily implied by the express powers conferred upon the Human Rights Commission by Mayor's Order No. 71-224 and the Human Rights Act of 1977. I also do not agree with the suggestion that to decide that the Commission has no review power is also to decide that a no-probable-cause determination by the Office of Human Rights is the end of the local line ^{1/} for the complainant. A complainant whose complaint has been dismissed by the Office of Human Rights on the basis of a no-probable-cause determination might challenge the propriety of that determination by a suit for appropriate equitable relief in the Superior Court. See Capitol Hill Restoration Society Inc. v. Moore, D.C. App., 410 A. 2d 184, 188 (1979). And, of course, the ruling of the Superior Court would be appealable to the D.C. Court of Appeals. Id. See also Kegley v. District of Columbia, D.C. App., 440 A.2d 1013, 1018, (1982)(Superior Court's review of propriety of agency action in a non-contested case proceeding is similar to Court of Appeals' review of agency action in a contested case proceeding).

The decision in Brown v. Capitol Hill Club, D.C. App., 425 A. 2d 1309 (1981), is not inconsistent with this position. In that case, Mr. Brown sought to abandon his administrative remedy after his complaint had been dismissed on no-probable-cause grounds and bring an action for discrimination in the Superior Court "as if no [administrative] complaint had been filed." 425 A.2d at 1311. The court ruled that under D.C. Code §6-2296 (now codified as §1-2556) Mr. Brown was not entitled to do this. There is nothing in the Human Rights Act, however, which prohibits a suit in Superior Court challenging, on procedural or substantive grounds, the propriety of a no-probable-cause determination by the Office of Human Rights, when the purpose of such suit is the reinstatement of the administrative complaint.

In sum, until the promulgation of Title 34 DCRR by the D.C. Council in 1973, it was proper for the Commission to review no-probable-cause determinations made by the Office of Human Rights because prior to the promulgation of Title 34, the power to make such determinations in the

^{1/} The complainant may also, of course, have a possible Title VII claim. Such a claim would not be precluded by a finding of no probable cause by the Office of Human Rights. See Kremer v. Chemical Construction Corp., 102 S. Ct. 1883, 1891, N.7 (1982)(res judicata preclusion applied where no-probable-cause determination was upheld by a New York appellate court).

first instance resided in the Commission itself by virtue of the language of §9(a) of Article 47 of the Police Regulations. Since this was so, the Commission had the authority to delegate that power to its own Executive Director and later to the Director of the Office of Human Rights and to reserve to itself the authority to review decisions made by its delegee. By the passage of Title 34 in 1973, however, the D. C. Council removed, from the Commission the power to make probable cause determinations, and assigned that function to the Office of Human Rights.

Since the Commission's review authority derived from its authority under Article 47 to make probable cause determinations in the first instance, the removal of that latter authority by the Council in 1973, coupled with the absence of any assignment of review authority to the Commission, indicates that the Council intended only the Office of Human Rights to be involved in the probable cause determination process. Stated otherwise, Part 4 of Title 8 DCRR seems inconsistent with the procedural structure established by the Council in Title 34 DCRR and the Human Rights Act of 1977. Since Title 8 DCRR is merely a set of agency-promulgated procedural regulations, any inconsistency between such regulations and the provisions of the Human Rights Act of 1977 must be resolved in favor of the latter 2/

Accordingly, it is my opinion that absent express authorization by the Council of the District of Columbia, the Commission on Human Rights has no authority to review no-probable-cause determinations made by the Office of Human Rights with respect to private sector complaints of discrimination within the purview of the Human Rights Act of 1977. 3/

Sincerely,

Inez Smith Reid

Inez Smith Reid
Acting Corporation Counsel, D. C.

2/ It is interesting to note that in 1978, J. Leon Williams, then Commission on Human Rights Chairman, in a decision in the case of Barbara L. Valentine v. National Education Association, et al, No. 6-PE-438, arrived at a similar conclusion. What appears to be the most legible copy available of this decision is appended hereto as Appendix "A".

3/ I am aware of the reference to Rule 4.2 of the Rules by the D. C. Court of Appeals in Brown v. Capitol Hill Club, D. C. App., 425 A. 2d 1309, 1311 (1981). That case, however, does not purport to decide the question presented here.