Legal Aid Society
OF THE DISTRICT OF COLUMBIA
MAKING JUSTICE REAL

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Council of the District of Columbia

Performance Oversight Hearing Regarding the Office of Human Rights

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The Legal Aid Society of the District of Columbia[1] submits this testimony to discuss the performance of the Office of Human Rights (OHR). OHR has the potential to serve a vital role in combatting the discrimination that many District residents face in housing, employment, and other settings. Unfortunately, it is not currently meeting that potential. Our testimony today details our concerns about OHR's processes, as well as recommendations for how the office can effectively address them, including greater levels of internal oversight, training for OHR staff, and changes to agency policies and procedures. We urge the Committee to work with OHR to explore these recommendations, and further, to use the budget process to ensure that OHR has the resources it needs to make needed reforms.

OHR is tasked with, among other functions, adjudicating complaints of District residents who have experienced unlawful discrimination 1) in housing, employment, commercial spaces, public accommodations, or educational institutions, in violation of the D.C. Human Rights Act, 2) by being unlawfully denied job and housing opportunities under the "Ban the Box" laws, or 3) by being unlawfully denied appropriate language services at certain government agencies pursuant to the Language Access Act.

Given the practical realities of the District's demographics, Legal Aid's client community is overwhelmingly black, immigrant, and/or disabled. Our clients experience, by virtue of these characteristics, an alarming level of discrimination – both blatant and more subtle – at the hands of landlords, employers, government actors, and others. For our client community, OHR is a necessary and vital resource, as it at least theoretically provides a process through which a District resident, especially a resident without the representation of a civil rights attorney, can seek justice after experiencing discrimination. OHR's process is meant to provide minimal barriers for *pro se* persons, including providing an affirmative investigatory component that is not available to litigants who would otherwise have to file in D.C. Superior Court or Federal Court to seek relief.

[1] The Legal Aid Society of the District of Columbia was formed in 1932 to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs." For more than 80 years, Legal Aid attorneys and volunteers have served tens of thousands of the District's neediest residents. Legal Aid currently works in the areas of housing, family, public benefits, consumer, and appellate law. More information about Legal Aid can be obtained from our website, www.LegalAidDC.org, and our blog, www.MakingJusticeReal.org.

Based on our experiences both directly bringing complaints on behalf of our clients and advising other current and former clients who bring OHR complaints *pro se*, Legal Aid is concerned that that OHR and its processes suffer from serious deficiencies. It is especially disconcerting that the District residents we see who bring discrimination complaints through the OHR process too often end up *worse off* than they would have been had they not filed any complaint at all. Legal Aid has been forced to issue heavy warnings to residents contemplating filing *pro se* complaints at OHR about the process and the significant risks and pitfalls that come with it. Some of the many systemic, repeating issues Legal Aid has seen at OHR are detailed below.

Legal Aid would like to see improvements to the agency's performance, and believes that tighter oversight of the mediation process, better training for staff, and some systemic changes outlined below will significantly improve OHR's effectiveness in providing a means for those residents who are victims of discrimination to seek justice.

THERE MUST BE GREATER OVERSIGHT OF THE MEDIATION PROCESS

In our work with clients, we have seen several problematic elements in settlement agreements produced through the OHR mediation process, and we have also developed concerns about the mediation process itself.

Clients Leaving Mediation Worse Off

One of the most disturbing patterns we see with our current and former clients who file OHR complaints *pro se*, is that the mediation process often results in the complainants subjecting themselves to liability or obligations that they never would have otherwise incurred, and getting little or nothing in return. Our clients are complainants in these cases, not respondents, and it does not make sense that a complainant would effectively leave the OHR process worse off than they entered.

For example, multiple complainants who have brought housing complaints against their landlords in rent-controlled properties have explained to Legal Aid that they were encouraged to sign settlement agreements requiring them to move out and withdraw their complaint, often for little to no compensation for giving up their leasehold interest and moving, and with zero compensation for the discrimination that was the subject of their complaint. The focus of the mediation was often not the discrimination and how the tenant could be compensated, but instead the needs of the landlord, and how those needs could be met with a resolution of the complaint (i.e. the tenant's withdraw of the complaint). The monetary value to a landlord of having a long-term tenant move out of a rent-controlled property is often enormous, and landlords are, with the help of the mediation process at OHR, turning complaints of discrimination filed at OHR *against the complainants* to gain this benefit.

Mediators Giving Legal Advice

In many instances, especially in housing discrimination cases, we have heard that mediators give legal advice, which by itself is inappropriate, but which is severely compounded

when that advice is simply wrong. From encouraging and describing to a landlord (incorrectly) how to increase the rent on a tenant-complainant, to telling complainants that the law required them to move out of their home anyway, mediators' focus on landlords' desires rather than compensating tenants for the discrimination they suffered has, on at least three occasions of which we are aware, led to misleading advice, and/or the execution of what Legal Aid would consider to be unconscionable settlement agreements.

Confidentiality Agreements

Furthermore, almost every settlement we see coming out of the OHR process requires the complainant to keep the settlement confidential, often explicitly subjecting the complainant to damages, costs, and attorneys' fees for any alleged violation of this provision. These confidentiality provisions can lead to unnecessary further litigation between the parties, as well as unnecessary liability for our clients should they share their experience, or be accused of doing so. Confidentiality clauses also prohibit the public from having access to complete information about complaints and settlements with bad actors, making it easier for bad actors to continue patterns of discrimination and harder to achieve meaningful systemic change. At a time when we are trying not only to remedy specific instances of discrimination, but to change the larger culture, preventing disclosure of settlements hampers efforts to bring public awareness to the fact that discrimination is not acceptable — and has consequences.

The frequency with which we see confidentiality provisions in settlement agreements negotiated by OHR mediators leads us to believe that these provisions may actually be part of a "form" settlement, or at least a standard approach that mediators may be taking to guiding the settlement process.

Release Clauses

What also appears to be "standard" in OHR agreements are extremely broad release clauses, which almost always stand to benefit the institutional respondent rather than the complainant. These clauses are full of legalese and are difficult, even for those with law degrees, to completely understand. In some cases, they may even be unlawful. In housing cases, for example, the landlord owes a duty of care to the tenant and is responsible for keeping the premises up to certain housing codes. A settlement in a housing discrimination case that includes a full waiver of liability may lead a tenant unwittingly – and wrongfully – to release claims related to defending a future nonpayment of rent suit, or to damages related to hazardous conditions in the home.

Proposed Solution

The parties in an OHR mediation are usually not similarly situated. Complainants, who are often *pro se* and low income, typically face institutional and represented respondents. They are starting from a position of severe disadvantage. It is important for OHR to counter these disadvantages and ensure a more level playing field, and yet, we see too many cases in which the process seems to exacerbate them.

To remedy a process that appears to disadvantage and harm complainants, Legal Aid recommends that OHR create favored settlement language and guidelines discouraging settlements that create liabilities or obligations on complainants. We also recommend that the agency provide further training to mediators on not giving legal advice to either party, and not exerting undue pressure on either party to reach particular settlement terms.

THE INTAKE PROCESS CREATES UNNECESSARY BARRIERS

Unfortunately, the problems we see do not just occur at the mediation phase. As early as the initial stages of the intake process, we have seen practices that, if left un-checked, would lead to complainants either never filing complaints in the first place or proceeding using complaint documents with important errors. For example, we have seen (and intervened in) "ban the box" cases where OHR stopped complaints from even being filed, with staff erroneously insisting that a hard copy of the job application needed to be included in the complaint (a hard copy of the job application is in fact not required to file a complaint).

In cases in which complaints have been able to get through the door, staff who are responsible for processing the complaint and converting it into a "charge" (which is drafted by OHR rather than the complainant or their attorney) have consistently drafted documents that omitted important facts, exaggerated facts needlessly, taken out necessary respondents, and/or included inaccurate facts. We have seen this happen to our clients who file complaints as *pro se* parties, as well as with complaints that we draft as lawyers on behalf of our clients. Even as lawyers, we have had to constantly and repeatedly send back corrections to mistakes made by intake staff in these charging documents.

The mistakes made at this processing stage often seem to stem from staff's misunderstandings of applicable law, especially where nuance is involved. We've seen OHR's failure to understand at the intake level, and oftentimes beyond the intake level, basic elements of national origin discrimination, source of income discrimination, disability discrimination, the Fair Housing Act, and the Language Access Act, as well as OHR's own regulations when it comes to the rights and processes afforded to complainants as they navigate through these complaint processes.

Proposed Solution

We recommend that OHR take legal analysis of sufficiency of the complaint away from the front desk and intake staff, who are often not familiar enough with the law to conduct that inquiry. We also recommend limiting the re-writing of complaints during the intake process. Staff should, at most, be permitted to add to, but not change or delete, statements contained in the original complaint.

After a complaint is filed, OHR should begin promptly with investigation. Additionally, OHR should add more staff with extensive experience in handling discrimination claims, which would help cover some of the gaps we see in both subject-matter expertise and knowledge around acceptable resolutions of cases. Finally, as a layer of protection against inappropriate

dismissals of cases, OHR should require that administrative dismissals of complaints be supported by a well-researched legal memorandum.

THE COMPLAINT PROCESS SUFFERS FROM UNREASONABLE DELAYS

For complaints that are not immediately dismissed, OHR often delays months and sometimes years in making decisions. For example, OHR waited nine months after Legal Aid assisted a District resident in filing a housing discrimination complaint before issuing a decision which administratively dismissed the complaint for "lack of jurisdiction." Legal Aid filed a Request to Reopen the matter, which has now been pending for over two and half years.[2]

We have also observed that, after long delays, OHR will often turn around and require a response from the complainant within mere days, which is not only unfair to the complainant, but puts them in a poor position to fully participate in the process. In addition, the agency places further burdensome requirements on complainants. For example, after OHR finalizes charges (often after an involved back and forth with the complainant to correct OHR's errors), the complainant must have these charges notarized. In the same vein, OHR has refused to accept changes made to charging documents when those changes were done in pen and initialed, insisting that the changes to mistakes in charging documents must be typed out to be accepted. Witness statements must also be notarized. The requirement to have statements notarized, and to make any changes to OHR-drafted mistakes only by computer is unnecessary and unduly burdensome to litigants.

In one case, we learned that OHR dismissed an elderly District resident's complaint for not responding to an OHR email, after the complainant had specifically asked OHR to communicate with him by phone and regular mail, because his computer was often breaking.

Proposed Solution

OHR should require the declaration language allowed under Superior Court Civil Procedure Rule 9-I for any statement that needs to be verified.[3] The agency should also allow litigants to amend mistakes made by OHR with pen and initials. The agency should also make it a policy to communicate with complainants in their preferred method of communication and clarify policies around timeframes for complainant responses to OHR requests. And given that the priority should be a thorough investigation of discrimination complaints, any such

[2] OHR's reason for declaring a lack of jurisdiction was, in total, that "[c]omplainant alleges facts or circumstances which occurred through DC Housing Authority. Complainant's issues were addressed in a Language Access charge of discrimination, since the issues are not based on discrimination. Therefore, OHR must dismiss the complaint." *But see, e.g.,* 4 D.C.M.R. § 1215.3 (2017) (explicitly noting that filing a language access complaint does not preclude a complainant from also filing a discrimination complaint under the DC Human Rights Act).

[3] Superior Court Civil Procedure Rule 9-I(e)(A)states that "whenever any matter is required or permitted by these rules to be supported by the sworn written declaration, verification, certificate, statement, oath, or affidavit of a person, the matter may, with the same force and effect, be supported by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed as true under penalty of perjury, and dated, in substantially the following form, which must appear directly above the person's signature . . . I declare (certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date)."

timeframes should be reasonable to complainants and allow liberal leave for complainants who need more time to complete responses required by OHR.

SYSTEMIC BIAS AGAINST FINDING NON-COMPLIANCE OR DISCRIMINATION AND FAILURE TO ENGAGE IN SUBSTANTIVE ENFORCEMENT

In cases we have observed, we have found that OHR will rarely make a finding of non-compliance or discrimination unless the incidents complained of are uncontested and blatant. OHR will oftentimes fail to engage in any involved analysis to determine whether allegations constitute discrimination or violations under the law, and will also often make conclusions based on respondents' versions of events, or assumptions about facts, without giving complainants the opportunity to respond to these alleged facts or assumptions.

With language access complaints, even when agencies are found to be in noncompliance with the Act, we have seen OHR fail to enforce these findings of non-compliance. For example, Legal Aid is still waiting to receive confirmation from OHR that the D.C. Housing Authority (DCHA) has complied with "corrective actions" that were supposed to have been finalized by OHR years ago. OHR did not in fact finalize the corrective actions and enforce related OHR deadlines for compliance, as required by OHR's regulations governing the Language Access Act.[4] Instead, the agency engaged in a back and forth with DCHA over a period of months, during which time DCHA proposed its own corrective actions and deadlines in response to OHRs proposals. OHR appears to have never pushed back. In May 2016, one year after the initial finding of noncompliance, and only after a Legal Aid inquiry as to the status of the corrective actions, OHR admitted that it did not know whether DCHA had complied even with DCHA's own proposed deadlines and corrective actions, and would check in with DCHA to see. In February 2017, Legal Aid emailed OHR to find out if OHR had received any response to its inquiry, but has not heard anything in response to that email, over a year later.

Proposed solution

OHR must take steps to improve training for staff on substantive law, including its nuances. Additionally, as discussed above, OHR should hire more staff who have extensive, practical experience with discrimination law. Finally, the agency should hire sufficient staff to decrease caseloads, so that adequate attention can be paid to each case.

[4] The Language Access Act regulations require that within 60 days of a final decision finding non-compliance by OHR, the Language Access Director schedule a meeting with the Respondent to discuss the final decision and order and appropriate corrective actions; and within 60 days of that meeting with Respondent, OHR must issue an order enumerating required corrective actions. *See* 4 D.C.M.R § 1223.2(a)(b) (2017). The regulations further require that "[i]f Respondent does not take action . . . Respondents failure to act will be reported to the Office of the City Administrator ("OCA") or Office of Mayor for further action." 4 D.C.M.R. § 1223.4 (2017). It does not appear that OHR ever issued a finalized order or reported non-compliance with such order, as required by the regulations.

CONCLUSION

We appreciate the opportunity to testify today about what we and our clients have experienced in interactions with OHR. While we are deeply concerned about the issues we have raised today, we see these problems as fixable and hope that the Committee will work closely with OHR to address them.