

SPECIAL INVESTIGATION

DEPARTMENT OF FAIR EMPLOYMENT HOUSING

Compliance Review Unit
State Personnel Board
December 5, 2014

TABLE OF CONTENTS

Introduction	1
Executive Summary	1
Background	2
Scope and Methodology.....	2
Findings and Recommendations	4
Department Response	8
SPB Reply	9

INTRODUCTION

Established by the California Constitution, the State Personnel Board (the SPB or Board) is charged with enforcing and administering the civil service statutes, prescribing probationary periods and classifications, adopting regulations, and reviewing disciplinary actions and merit-related appeals. The SPB oversees the merit-based recruitment and selection process for the hiring of over 200,000 state employees. These employees provide critical services to the people of California, including but not limited to, protecting life and property, managing emergency operations, providing education, promoting the public health, and preserving the environment. The SPB provides direction to departments through the Board's decisions, rules, policies, and consultation.

Pursuant to Government Code section 18661, SPB's Compliance Review Unit (CRU) conducts compliance reviews of appointing authority's personnel practices in four areas: examinations, appointments, equal employment opportunity (EEO), and personal services contracts (PSCs) to ensure compliance with civil service laws and Board regulations. The purpose of these reviews is to ensure state agencies are in compliance with merit related laws, rules, and policies and to identify and share best practices identified during the reviews. SPB conducts these reviews on a three-year cycle.

The CRU may also conduct special investigations in response to a specific request or when SPB obtains information suggesting a potential merit-related violation.

EXECUTIVE SUMMARY

In response to the Board ruling in *Angelina Endsley v. DFEH, Case No. 13-1216N*, the CRU conducted a special investigation into the Department of Fair Employment Housing's (DFEH) personnel practices related to appointments made from January 1, 2012, to January 23, 2014; and from January 1, 2011, through January 23, 2014, for Career Executive Assignments (CEA). Based upon the review of the information contained in DFEH appointment files and staff interviews, the CRU uncovered no direct evidence of further unlawful appointments. However, the CRU did find violations in DFEH hiring practices. The following table summarizes those findings:

Finding	Severity
Appointment Documentation Was Not Retained for the Appropriate Amount of Time	Serious
Probation Reports Were Not Provided	Serious

A color-coded system is used to identify the severity of the violations as follows:

- Red = Very Serious
- Orange = Serious
- Yellow = Non-serious or Technical

BACKGROUND

The mission of the Department of Fair Employment and Housing is to protect Californians from employment, housing and public accommodation discrimination, and hate violence. The DFEH is the largest state civil rights agency in the country. It was established by the Legislature in 1959 as the Division of Fair Employment Practices and was initially part of the Department of Industrial Relations. In 1980, the DFEH was established as an independent department charged with enforcing California's comprehensive employment, housing, public accommodations and public service non-discrimination laws, as well as the State's bias-related hate violence law.

The DFEH's statutory mandate is to protect the people of California from employment, housing and public accommodations discrimination and hate violence pursuant to the California Fair Employment and Housing Act (FEHA), Unruh Civil Rights Act, Disabled Persons Act, and Ralph Civil Rights Act. The Department has jurisdiction over both private and public entities operating within the State of California, including corporate entities, private sector contracts granted by the State of California, and all State departments and local governments.

The DFEH receives and investigates discrimination complaints in its five district offices throughout California. The district offices handle employment, housing, public accommodations, and hate violence cases, along with a special investigations unit that focuses on systemic discrimination cases statewide. In addition, there are two legal offices that prosecute cases and three mediation dispute resolution offices that mediate complaints. The DFEH routinely provides technical assistance to employers, business establishments and housing providers regarding their responsibilities under the law. The Department is part of the Business Consumer Services and Housing Agency and is administered by a Director appointed by the Governor.

SCOPE AND METHODOLOGY

On January 23, 2014, in the matter of *Angelina Endsley v. DFEH*, Case No. 13-1216N, the Board found that DFEH committed bad faith in unlawfully appointing Ms. Endsley twice. In addition to calling for an investigation of the actions of DFEH staff involved in

Endsley's unlawful appointments, the Board also directed the CRU to conduct an audit and review of DFEH's personnel practices with respect to its selection process from January 1, 2009, to January 23, 2014, the five-year period in which the Board may correct an unlawful appointment (Cal. Code Regs., tit. 2, § 266, subd. (b).). The CRU review, however, was hampered by DFEH's failure to maintain adequate records for the five-year period. Therefore, the scope of this special investigation was limited to a review of DFEH appointments from January 1, 2012, to January 23, 2014, and Career Executive Assignment (CEA) files from January 1, 2011, through January 23, 2014. DFEH indicated that it did not maintain records beyond the minimum time period required by California Code of Regulations, title 2, sections 174 and 548.40, which provide as follows:

All applications for a state civil service position must be maintained and preserved on file for at least two years. (Cal. Code Reg., tit. 2, §174.)

The appointing power must maintain a CEA examination file for a period of three years that includes, but is not limited to, the specific job-related evaluation criteria and selection procedures that were used in the examination; documentation on how those criteria were applied to the candidates and the competitiveness of the candidates' qualifications relative to each other; and the appointing power's rationale for selecting the successful candidate. (Cal. Code Regs., tit. 2, § 548.40.)

However, DFEH is also required to comply with its own records retention statute contained in the Fair Employment and Housing Act. Government Code section 12946 provides, in pertinent part, as follows:

It shall be an unlawful practice for employers . . . to fail to maintain and preserve any and all applications, personnel, membership, or employment referral records and files for a minimum period of two years after the records and files are initially created or received, or for employers to fail to retain personnel files of applicants or terminated employees for a minimum period of two years after the date of the employment action taken.

CRU discovered incomplete personnel records for most of the 84 appointments that fell within the two-year minimum record keeping requirement.

The primary objective of this Board-directed audit was to determine if there were any additional violations of the civil service rules pertaining to DFEH's practices relating to appointments, and to recommend corrective action where deficiencies were identified.

On January 29, 2014, a preliminary survey and materials request form was sent to DFEH requesting that DFEH gather and make available all appointment files and requested documentation from January 1, 2009, to January 23, 2014, for CRU's review. The CRU held an entrance conference via telephone with DFEH on February 6, 2014, to explain the special investigation and audit directive from the Board. On February 12, 2014, the DFEH notified the CRU that the department did not possess any appointment files prior to January 1, 2012, nor any CEA files prior to January 1, 2011.

The CRU examined the documentation that DFEH provided, which included notice of personnel action forms, request for personnel action forms, vacancy posting advertisements, certification lists, duty statements, employment verification, application screening criteria, interview questions, hiring interview rating criteria, interview scoring, correspondence, and probationary reports. The CRU also interviewed appropriate DFEH current and former staff and performed follow-up investigations into additional allegations received during the course of the investigation regarding perceived improper hiring practices and document shredding at DFEH.¹ Additionally, as a result of incomplete recordkeeping, the CRU performed external research to confirm eligibility of the appointments.

FINDINGS AND RECOMMENDATIONS

During the period of review, DFEH made 84 appointments. The CRU reviewed all of those appointments, which are listed below:

Classification	Appointment Type	Tenure	Time Base	No. of Appointments
Accountant Trainee	Certification List	Permanent	Full Time	1
Associate Business Management Analyst	Certification List	Permanent	Full Time	1
Attorney IV	Certification List	Permanent	Full Time	1
FEH Administrator I	Certification List	Permanent	Full Time	2
FEH Administrator II	Certification List	Permanent	Full Time	2

¹ CRU staff received correspondence alleging that personnel documents had been shredded sometime between the date of the board order and commencement of the investigation. CRU staff was unable to find any evidence to substantiate this allegation.

Classification	Appointment Type	Tenure	Time Base	No. of Appointments
FEH Consultant I	Certification List	Permanent	Full Time	4
FEH Consultant II	Certification List	Permanent	Full Time	12
FEH Consultant III	Certification List	Permanent	Full Time	2
FEH Consultant III (Supervisory)	Certification List	Permanent	Full Time	1
FEH Counsel	Certification List	Permanent	Full Time	6
FEH Counsel	Certification List	Permanent	Part Time	1
FEH Counsel	Certification List	Limited Term	Full Time	1
Graduate Legal Assistant	Certification List	Limited Term	Full Time	9
Information Officer	Certification List	Permanent	Full Time	1
Information Systems Technician	Certification List	Permanent	Full Time	4
Legal Analyst	Certification List	Permanent	Full Time	2
Legal Secretary	Certification List	Permanent	Full Time	2
Office Technician (Typing)	Certification List	Permanent	Full Time	1
Senior FEH Counsel (Specialist)	Certification List	Permanent	Full Time	4
Senior Information Systems Analyst (Specialist)	Certification List	Permanent	Full Time	1
Senior Personnel Specialist	Certification List	Permanent	Full Time	2
Staff Information Systems Analyst (Supervisor)	Certification List	Permanent	Full Time	1
CEA III, Chief of Enforcement	Information List	CEA	Full Time	1
Chief Counsel II, CEA	Information List	CEA	Full Time	1
Legal Secretary	Mandatory Reinstatement	Permanent	Full Time	1
Parole Service Associate	Mandatory Reinstatement	Permanent	Full Time	1
Seasonal Clerk	Temporary Authorized	Limited Term	Intermittent	1
Associate Personnel Analyst	Transfer	Permanent	Full Time	1
Attorney IV	Transfer	Permanent	Full Time	1
Data Processing Manager II	Transfer	Permanent	Full Time	1
Executive Assistant	Transfer	Permanent	Full Time	1

Classification	Appointment Type	Tenure	Time Base	No. of Appointments
FEH Consultant I	Transfer	Permanent	Full Time	1
FEH Consultant II	Transfer	Permanent	Full Time	2
FEH Consultant II	Transfer	Limited Term	Intermittent	2
FEH Consultant III (Supervisor)	Transfer	Permanent	Full Time	1
Legal Analyst	Transfer	Permanent	Full Time	2
Senior Fair Employment and Housing Counsel (Specialist)	Transfer	Permanent	Full Time	1
Senior Legal Typist	Transfer	Permanent	Full Time	1
Senior Legal Typist	Transfer	Permanent	Full Time	1
Staff Services Analyst	Transfer	Permanent	Full Time	1
Staff Services Manager	Transfer	Permanent	Full Time	2

FINDING NO. 1 – DFEH Did Not Maintain and Preserve Appointment Records for the Minimum Period Required by Law

Summary: DFEH failed to retain records documenting the various steps in the hiring process. (MSM, § 1200, pp. 1200.7-1200.8; Cal. Code Reg., tit. 2, § 50.). Specifically, of the 84 appointments reviewed, DFEH did not retain or provide the following:

- Certification list for 1 appointment
- Notice of personnel action forms for 2 appointments
- Screening criteria for 31 appointments
- Hiring interview rating criteria for 32 appointments
- Hiring interview scoring sheets for 10 appointments

Criteria: In relevant part, civil service laws require that the employment procedures of each state agency shall conform to the federal and state laws governing employment practices. (Gov. Code, § 18720.) State agencies are required to maintain and preserve any and all applications, personnel, membership, or employment referral records and files for a minimum period of two years after the records and files are initially created or received. (Gov. Code, § 12946.) State agencies are also required to retain personnel files

of applicants or terminated employees for a minimum period of two years after the date the employment action is taken. (*Ibid.*)

Severity: Serious. Without adequate documentation, CRU could not verify if all the appointments conformed to the federal and state laws governing employment practices.

Cause: Lack of updated policies and procedures to ensure that records are retained for the appropriate periods of time.

Action: It is recommended that within 60 days of the Executive Officer's approval of these findings and recommendations, DFEH submit to the CRU a written corrective action plan that the department will implement to ensure conformity with the record retention requirements of Government Code section 12946.

FINDING NO. 2 – DFEH Failed to Provide Any of the Probationary Evaluations for All Appointments Reviewed

Summary: DFEH failed to provide probationary reports for any of the 84 appointments reviewed by CRU.

Criteria: The service of a probationary period is required when an employee enters state civil service by permanent appointment from an employment list.² (Cal. Code Regs., tit. 2, § 322, subd. (a).) In addition, unless waived by the appointing power, a new probationary is required when an employee is appointed to a position under the following circumstances: (1) without a break in service in the same class in which the employee has completed the probationary period, but under a different appointing power; and (2) without a break in service to a class with substantially the same or lower level of duties and responsibilities and salary range as a class in which the employee has completed the probationary period. (Cal. Code Regs., tit. 2, § 322, subd. (c)(1) & (2).)

² A new probationary period is not required when an employee is appointed by reinstatement with a right of return. (Cal. Code Regs., tit. 2, § 322, subd. (d)(2).)

During the probationary period, the appointing power is required to evaluate the work and efficiency of a probationer at sufficiently frequent intervals to keep the employee adequately informed of progress on the job. (Gov. Code, § 19172; Cal. Code Regs., tit. 2, § 599.795.) The appointing power must prepare a written appraisal of performance each one-third of the probationary period. (Cal. Code Regs., tit. 2, § 599.795.)

Severity: Serious. The probationary period is the final step in the selection process to ensure that the individual selected can successfully perform the full scope of their job duties. Failing to use the probationary period to assist an employee in improving his or her performance or terminating the appointment upon determination that the appointment is not a good job/person match is unfair to the employee and serves to erode the quality of state government.

Cause: Lack of updated policies and procedures related to the timely completion of probationary reports.

Action: It is recommended that within 60 days of the Executive Officer's approval of these findings and recommendations, DFEH submit to the CRU a written corrective action plan that the department will implement to ensure conformity with the probationary period and probationary evaluations requirements contained in California Code of Regulations, title 2, section 322, subdivision (c)(1) & (2).

DEPARTMENTAL RESPONSE

Finding No. 1

DFEH concurs with the CRU's Finding No. 1. DFEH is updating its policies and procedures relating to personnel records retention and will ensure those policies and procedures are followed in the future. These revised policies will be included in the corrective action plan.

Finding No. 2

DFEH concurs with the CRU's Finding No. 2. DFEH was unable to provide the requested documentation within the timeframe requested by CRU. As a result of the

audit findings DFEH's Personnel Office will begin sending monthly notifications to managers and supervisors with a list of past due reports. This will be documented in the corrective action plan.

SPB REPLY

Based upon DFEH's written response, DFEH concurs with the CRU's findings and will comply with the CRU's recommendations. DFEH will update its policies and procedures relating to personnel records retention and ensure that they are followed. DFEH will also begin sending monthly notifications of past due probationary reports to their managers and supervisors. CRU recommends that DFEH include an enforcement mechanism in their plan to ensure that probationary reports are completed timely for every probationary employee.

It is further recommended that DFEH comply with the afore-stated recommendations within 60 days of the Executive Officer's approval and submit to the CRU a written report of compliance.