



STATE OF SOUTH CAROLINA

HUMAN AFFAIRS COMMISSION



Raymond Buxton, II
Commissioner

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October 20, 2017

The Honorable Laurie Slade Funderburk
Committee First Vice-Chair
Legislative Oversight Committee
South Carolina House of Representatives
Post Office Box 11867
Columbia, South Carolina 29211

Dear Representative Funderburk:

In response to your letter dated, October 18, 2017, we are replying to the questions presented by the Economic Development, Transportation, and Natural Resources Subcommittee as part of the legislative oversight process.

Agency Law Recommendation #5: Mandatory Mediation for State Agencies and Employees

1. Does this recommendation create a situation in which employees of state agencies have more limited rights than employees of private companies in employment disputes?

Response:

No. Mandatory Mediation would provide the complaining employee with an additional opportunity to resolve his or her complaint. Mediation would encourage a mutual resolution between the State agency and its employee, but would not force a resolution on the parties. Pursuant to the definition found in S.C. Code Ann. § 8-17-320 (14), the term mediation means “an alternative dispute resolution process whereby a mediator who is an impartial third party acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. The process is informal and nonadversarial with the objective of helping the disputing parties reach a mutually acceptable agreement.”

The mediation process being proposed through Law Recommendation #5 in SCHAC’s Program Evaluation Report would mimic the non-adversarial process found in the code section addressing State grievances. Should any Mandatory Mediation fail, the complaining employee would then have his or her complaint investigated by an Agency investigator at SCHAC.

2. Does the agency expect the success rate of mediations to decrease if some parties are required to complete mediation? If so, by how much?

Response:

Currently, the Agency’s success rate for Voluntarily Mediations generally exceeds 50%. Between January 1, 2016, and July 31, 2017, 177 mediations were held with 117 resulting in a settlement (or approximately 66% resolved). (See Agency’s letter to the LOC dated July 31, 2017).

Our mission is to eliminate and prevent unlawful discrimination in employment, housing and public accommodation.

While the number of settlements *may* decrease if mediation became mandatory in charges against State agencies, any actual decline is difficult to project. The Agency asked the State Grievance Committee for a statistic related to its resolution rate for Mandatory Mediations, but given the short timeframe to respond, a definitive breakdown of settlements versus impasses is unavailable. However, to the Grievance Committee's best knowledge, a similar percentage of cases – or around 65-70% - are resolved in mediation, even when it is mandatory. Furthermore, of the cases that SCHAC handled, less than 10% of them are against State agencies, meaning the resolution rate would not decrease drastically, even if most Mandatory Mediations were unsuccessful (which is highly unlikely).

3. Please estimate the cost of the following to (1) SCHAC; and (2) state agencies responding to complaints.
 - a. Mediation
 - b. Investigation

Response:

In our letter dated July 7, 2017, we estimated that SCHAC's cost for resolving a case in mediation, before conducting investigation, is approximately \$545.21 per case. We estimated that SCHAC's cost for investigating a case that has not been mediated is approximately \$1,083.88. If a case is both mediated and then investigated following mediation's impasse, SCHAC's cost is approximately \$1,300.62.

A State agency's cost for engaging in mediation or investigation is hard to project. Many variables are involved, to include whether the agency is represented by an attorney, the number of decision-makers involved, the hourly rate of the decision-maker(s) involved, and the complexity of a case. Generally speaking, however, mediation is scheduled easily through phone calls or email with the respective stakeholders. The mediation itself takes approximately 2-5 hours in SCHAC's office or by phone. Therefore, the cost of mediation to a State agency would be based on the average hourly rate of the decision-makers involved multiplied by approximately 5 hours.

Investigations are more costly for State agencies, since relevant witnesses need to be interviewed, employment file contents need to be copied, policies need to be produced, and position statements must be written. While SCHAC does not solicit feedback from respondents on the number of hours spent responding to complaints, SCHAC has spent approximately \$4,070.25, on average, in recent history when responding to charges filed against it at its Federal counterpart, the EEOC.

4. What costs, both monetary and otherwise (e.g., time), might a complainant against a state agency incur due to mediation?

Response:

Mediation requires little or no preparation. Mediation does not require an attorney's presence. Additionally, mediation can be held in person, or by phone. While it is hard to assess the average costs of mediation for a complainant, the types of costs that may be incurred include 1) the complainant's time (including time off work, if necessary); 2) attorney fees; and 3) travel costs, if the mediation is held in person. Complainants generally will spend around 2-5 hours of time engaged in the actual mediation. Scheduling the mediation via email or phone would likely take under 30 minutes, on average. Should a complainant retain an attorney, the attorney is likely to charge an hourly rate for his or her attendance. Again, however, attorneys are not needed for the purposes of mediation or investigation. Finally, if a complainant chooses to have mediation at SCHAC's office rather than by phone, the complainant may incur travel costs for attendance at the mediation. SCHAC, on occasion, does dispatch mediators to the county of harm, when necessary, if travel costs are at issue in a particular matter.

5. How much does mediation delay an investigation if the mediation does not lead to a resolution?

Response:

The average delay will vary and, in recent months, has decreased due to the Agency's implementing a two-week deadline for scheduling mediations. However, as a sample, from January 1, 2017, through April 30, 2017, (very busy mediation months wherein scheduling becomes toughest), 42 files were referred to mediation. Of those 42 mediations, 28 resulted in settlements while 14 resulted in impasses. The 14 impasse cases averaged a total of 42 days of delay per case. Therefore, the average delay to an investigation moving forward would be 42 days or less.

6. Please present some options for limiting in statute the amount of damages that may be awarded to a complainant under the proposed revision of S.C. Code §45-9-60.

Response:

Prefacing the options presented, we should note that the State statute itself provides for *minimum* relief for successful civil actions in circuit court, rather than a limitation. In S.C. Code Ann. §45-9-100, the Circuit Court is directed that, "Upon a finding that a person has violated the provisions of Article 1, the amount of damages that an aggrieved party has sustained is declared to be a minimum of five thousand dollars. In addition, the court, upon a finding that a person violated the provisions of Article 1, shall award the aggrieved party reasonable attorney's fees, as determined by the court, and costs." As such, a limitation on a panel's award of damages following an administrative hearing before the panel conflicts with remaining provisions of the law.

Furthermore, Federal public accommodations laws do not cap damages. There is a statutory cap on *civil penalties* imposed to vindicate the public interest, which follows a similar structure to that found in the Federal Fair Housing Act (which limits penalties at \$19,787 for a first offence, \$49,467 for a second offence, etc.), but damages are determined based on the specific facts and subject to judicial review, as is done in the vast majority of damages determinations. The relevant Federal regulation section regarding caps on civil penalties in Federal law for public accommodations violations can be found at 28 CFR 36.504.

With that information in mind, below are several options for limiting an award of damages to an Aggrieved Party at a panel hearing:

Option 1

A defined/presumed damage amount that acts as a ceiling and floor, e.g., "The aggrieved party may elect, at any time before a final order is rendered, to recover, instead of actual damages, an award of statutory damages for all violations involved in the action in a sum of not less than \$5,000* or more than \$30,000* as the Panel considers just." *These numbers are just samples but would be in keeping with the already established minimum found in S.C. Code Ann. § 45-9-100.

Option 2

A statutory cap on noneconomic damages, tied to the size of the entity through either:

- A) reference to 42 U.S. Code § 1981 (b), provided that public accommodations entities with fewer than 15 employees would be subject to the limitations as if they had 15 employees; or
- B) a code section outlining limits tied to size.

Option 3

No statutory cap on damages. This is in keeping with the way damages are calculated under the relevant Federal law and in the State court context. This approach preserves discretion in fact-finding and allows for full recovery in the (exceedingly rare) event that provable damages exceed whatever cap might be envisioned.

The Human Affairs Commission takes pride in our service to the citizens of South Carolina, and we value continued cooperation in the legislative oversight process. We look forward to continuing discussion with the Subcommittee.

Sincerely,

A handwritten signature in black ink, appearing to read "Raymond Buxton, II". The signature is fluid and cursive, with a long horizontal stroke at the end.

Raymond Buxton, II
Commissioner