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Civil rights enforcement threatened by new agency head

Administrative Law Judges' positions at risk



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A move to weaken civil rights enforcement in California was temporarily averted when the Fair Employment and Housing Commission announced at its September 18, 2007 hearing that it would postpone a vote on a proposal to strip the agency of its specialized Administrative Law Judges (ALJ). The announcement followed a hastily mounted opposition campaign by legislators and civil rights advocates who had learned of the proposal a few days before the hearing.

Under the Fair Employment and Housing Act (Gov. Code §§ 12900 *et seq.*), Californians – including those who lack the means to hire private attorneys – may file employment and housing discrimination complaints with the Department of Fair Employment and Housing (DFEH). DFEH investigates, and if sufficient evidence exists to believe the law was violated, attempts to settle the case. If that proves impossible, and neither party opts for court enforcement, the case proceeds to administrative enforcement before one of the Commission's Administrative Law Judges, who specialize in employment and housing discrimination law. The ALJs then issue draft opinions, which are reviewed by the Commission before being finalized.

Such cases used to be heard by ALJs in California's Office of Administrative Hearings, many of whom lacked expertise in civil rights law. The results were abysmal. Ninety percent of draft decisions were rejected by the Commission, including some whoppers like the one that found nothing wrong with an employer who insisted on maintaining an all-male workforce.

In 1992 the legislature empowered the Commission to hire its own ALJs, and since then more than 90 percent of draft decisions have been judged legally sound by the Commission. While many might applaud this dramatic reversal as a win for civil rights enforcement, Schwarzenegger appointee Rosario Marin wants to turn back the clock by removing the Commission's specialist ALJs and forcing Californians to have their cases heard by generalist ALJs in the Office of Administrative Hearings.

Governor Arnold Schwarzenegger appointed Marin to be Secretary of the state's Consumer Services Agency last year. The agency oversees civil rights enforcement and consumer protection in California. Marin had previously worked for the Bush administration during the president's first term of office, and had since served as a member and chair of California's Integrated Waste Management Board.

Marin's proposal drew alarm from legislators, who questioned the Commission's authority to unilaterally reverse the legislature's 1992 decision to improve civil rights enforcement by authorizing the use of ALJs with expertise in civil rights laws. They objected to Marin's proposal in a September 11, 2007 letter to the governor signed by Senate President Pro Tem Perata, Assembly Speaker Nunez, and the chairs of the Senate Judiciary Committee, Senate Labor Committee, Senate Budget Committee, Senate Health Committee, Assembly Labor Committee, Assembly Judiciary Committee, Assembly Budget Committee, Latino Legislative Caucus, Legislative Black Caucus, Asian Pacific Islander Legislative Caucus, and the Legislative Lesbian, Gay, Bisexual and Transgender Caucus.

The legislators' letter warned that, if implemented, Marin's proposal "would be a significant setback to civil rights enforcement in the State of California and contrary to the express intent of the Legislature." It urged the governor to postpone a vote on the proposal "until this matter has been fully investigated and appropriately vetted with the Legislature."

The legislators' letter also expressed concern about the timing of the vote, in light of the fact that two of the seven Commissioners, who are appointed by the governor and whose terms were expiring that month, might feel pressured to vote for Marin's proposal "not because it is reasonable or justified but in

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order to maintain their positions." (The text of the letter appears at http://www.californiaprogressreport.com/2007/09/threat_to_civil.html).

Governor Schwarzenegger asked Marin to respond. In a letter to the legislators, she wrote that her proposal "was developed following a thorough, thoughtful and deliberate vetting process" that had determined that there was "an insufficient caseload to justify four full-time staff to hear only" fair employment and housing cases. Marin stated that over the past few years, the Commission's ALJs had issued an average of eight decisions per year. (The text of Marin's letter appears at http://www.californiaprogressreport.com/2007/09/senator_sheila_1.html).

When Marin's letter failed to appease her critics, she issued an invitation via e-mail at 12:19 a.m. to a handful of civil rights advocates on the day of the hearing, inviting them to participate in a half-hour conference call with her at 9:30 a.m. The e-mail, which was forwarded by one recipient to the California Coalition for Civil Rights' ListServ less than 15 minutes before the call, contained an incorrect call-in number. A statement later issued by Senator Sheila Kuehl noted that this ensured that "only the most resourceful and dedicated defenders of equality would be able to locate the teleconference, should they actually hear of it."

When civil rights advocates arrived at the Commission's hearing that afternoon prepared to testify, they learned that the Commission had decided to postpone its vote on Marin's proposal and also to request a legal opinion letter from the attorney general. But the Commission did not promise it would wait for the AG opinion letter before deciding whether to approve Marin's proposal.

The hearing's public comment period included testimony from the Commission's ALJs. They told the Commissioners that only a small handful of states used generalist ALJs to hear fair housing cases. They explained that their work consisted of much more than issuing decisions. They also act as mediators to settle housing and employment discrimination disputes, review draft decisions, provide technical assistance on civil rights matters to legislators, and draft regulations to implement civil rights laws.

The newest ALJ, who had taken a pay cut to accept his position eight months earlier, objected to having to "defend my integrity and that of my colleagues," and decried Marin's push to force a decision from Commissioners without adequate notice. He noted that Marin's attempt to have the Commission unilaterally reverse a legislative decision raised separation of powers concerns.

Kevin Baker, Counsel to the Assembly Judiciary Committee, agreed, and asked the Commission to postpone their vote until the legislature reconvened in January and held hearings to provide Californians with an opportunity to express their views. But the Commission refused to do so, and to date there has been no announcement on when the vote will take place.

Readers who want to comment on Marin's proposal can send letters to Secretary Marin or Commission Chair George Woolverton:

Secretary Rosario Marin
State and Consumer Services Agency
915 Capitol Mall, Suite 200
Sacramento, CA 95814-2719

George Woolverton
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3580 Wilshire Blvd #1900
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Information about upcoming legislative hearings is available by calling the Assembly Judiciary Committee at 916.319.2334.

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