

National Gay and Lesbian
Task Force



CREATING CHANGE

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Alexis Taylor, General Counsel
D.C. Office of Human Rights
441 4th Street, NW, Suite 570 North
Washington, DC 20001

July 31, 2008

Dear Ms. Taylor:

We are responding to the Notice of Proposed Rulemaking published in the District of Columbia Register on July 11, 2008 concerning intent by the D.C. Office of Human Rights (OHR) and the D.C. Commission on Human Rights (CHR) to amend Chapter 8 of Title 4 of DCMR governing the "Gender Identity or Expression" provision of the D.C. Human Rights Act of 1977 (DCHRA).

The Task Force strongly opposes all of the proposed changes and amendments in the proposed rulemaking described herein. These proposed amendments to Chapter 4 of Title 8 of the District of Columbia Municipal Regulations are in violation of the District's Human Rights Act (HRA). Additionally, the changes are directly contrary to the Office's statement that they fully embrace the protections given to transgender individuals by the HRA. The HRA states, "It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of ... gender identity or expression." (§ 2-1401.01). The bill to amend the HRA to add protections for individuals based on gender identity or expression was not only unanimously passed, each member of the D.C. Council was a cosponsor of the bill.

OHR is meant to act as a mediator, remaining neutral between parties, but always on the side of human rights. Their role is to work with both sides and find a compromise, not to succumb to outside pressures to take away the rights of an already disadvantaged group of people, merely because enforcing the law is perceived as difficult. The proposed amendments to the regulations in Chapter 8 of Title 4 are taking the side of what is easy over what is right and what is the law.

Proposed Subsections 801.3 and 801.4

Under the proposed new subsections 801.3 and 801.4, the D.C. Department of Corrections (DOC) would essentially be exempted from complying with the HRA. This goes against the Council's clear intent that all individuals, whether incarcerated or not, be protected from

discriminatory practices based on gender identity or expression. Transgender individuals often face the worst kinds of harassment and discrimination in correctional facilities. Instead of working with the DOC to help them comply with the HRA, this regulation would ironically give them a get-out-of-jail-free card when it comes to violating the letter and spirit of the law.

OHR's unsubstantiated reasons behind changing Section 801 do not justify the proposed amendments. The OHR claims that they are attempting to protect not only transgender individuals, but also the rest of the prison population. This implies that female prisoners are less safe because a fellow prisoner happens to be a transgender woman. Not only is this offensive, but it also perpetuates the stereotype that transgender people are innately sexual offenders. There is no evidence that allowing individuals to be classified by the gender they identify as would pose any risk of harm to others. In *Crosby v. Reynolds*, a federal court held that a female inmate's constitutional right to privacy was not violated when she was placed in a cell with a transgender woman who had received hormone treatments, but who had not undergone a sex reassignment surgery. 763 F.Supp. 666 (D.Me.1991).

Even if it were true that there were legitimate safety or privacy issues at play, there are solutions that would not violate a transgender person's right to be housed according to their gender identity. For example, transgender prisoners could share a cell and have different shower times than the rest of the prison population. Other types of gender-specific shared housing where safety and security is paramount, such as homeless shelters, have found solutions and are housing people according to their gender identity.

Allowing the DOC to discriminate against transgender individuals by forcing them to be classified as a gender other than the one they identify should be considered a form of cruel and unusual punishment. Classification for housing affects more than which cell a person is housed in. Policies concerning clothing, procedures related to strip searches and exposure to sexual assault are just a few areas affected by the proposed changes.

Additionally, the scope of the proposed regulation is broader than just having an impact on transgender people in jails and prisons; the DOC will be permitted to discriminate against transgender individuals in mental institutions and youth in foster care and youth facilities. In *R.G. v. Koller*, a federal court held that the Hawaii Youth Correctional Facility's use of isolation to "protect" transgender wards constituted punishment in violation of her Due Process rights. Likewise, the Department of Justice found that the failure to protect wards from assaults by other wards was partly due "to the absence of a classification criteria for housing youth." The defendant's own witnesses stated that, in their professional judgment, housing transgender youth with members of the opposite gender as the one they identify as is unsafe and inappropriate. *R.G. v. Koller*, 415 F.Supp.2d 1129 (D.Hawaii 2006.).

Sections 801.3 and 801.4 should be dropped in their entirety. The OHR should instead work in earnest with the Department of Corrections and the transgender community to find practical, nondiscriminatory solutions to housing inmates.

Section 202.2

The OHR has proposed a repeal of Subsection 202.2, which requires businesses with single-occupancy restrooms to replace gender-specific signs with ones that read, "Restroom." Much of the harassment and discrimination experienced by transgender individuals is related to restrooms. People may not have an exclusively male or female appearance, especially during the time of gender transition, and can be harassed by employees and other customers for using the "wrong" restroom, even when it is the restroom appropriate for their gender identity. Thus, using gender-specific restrooms is often very distressing for transgender individuals.

A great partial solution to harassment/discrimination of transgender people in the bathrooms is to convert single-use restrooms that are gender-specific to become gender-neutral. The only thing needed to do so is an inexpensive sign that says “restroom.” By converting these restrooms, transgender people are able to use these restrooms with no stress of potential or actual harassment or violence. And, discrimination and harassment is thus prevented before it even happens, saving the OHR from having to process a complaint. This is why Section 202.2 was originally adopted.

If the OHR’s response to our objection to eliminating the gender neutral restroom requirement is, as staff indicated it was in a meeting, “if someone is prevented from using the gender appropriate bathroom, then they can file a complaint and they will win” then OHR is missing the point. First, how can someone file a complaint against another customer or patron in a situation where the harassment is not endorsed by the provider of public accommodation? The answer is that there would be no point in filing the complaint. But, had there been gender neutral bathrooms, the entire situation would have been avoided. Second, there are serious costs and ramifications to filing a complaint, even a legitimate one. Does the individual have the time to file a complaint? What good would it do, given that the discrimination already happened? Would their employer or other potential employers read newspaper accounts or find out through other means that this person has filed a complaint, and are they ready to be discriminated against as someone who may be a trouble-maker? The answer is that a transgender person may weigh the pros and cons and decide NOT to file a complaint, feeling that it is not worth the cost.

If OHR claims that businesses are unaware of the law and it places an undue burden on businesses, as staff did so during one meeting, then its concern is similarly misplaced. Neither of these excuses justifies a repeal of Subsection 202.2. First, it is the OHR’s responsibility to educate the public about, and assist in compliance with, the law, which it can do through its website, through mailings to businesses licensed by the city, through having posters that explain the law, etc. The OHR could cooperate with other city agencies to bring awareness of the law, such as working with building and/or health inspectors, who visit every business at least once a year. It could be easy and straight forward to have them inform businesses with single-occupancy restrooms of the gender-neutral sign requirement. Second, there are many more sections of OHR regulations, on various topics, that should be eliminated if awareness of the regulation is considered a valid reason to repeal a section.

Third, it is not OHR’s role to make a cost-benefit analysis. Doing so is contradictory to the intent of the Council because the HRA states that a ‘business necessity’ exception cannot be justified by the facts of increased cost to business. (§ 2-1401.03(a)). The expense of putting up a sign, which could even be handwritten, should not be seen as a valid cost. If the concern is liability, an immediate fix should dismiss any lawsuit filed.

A business could comply with the law simply by taping a piece of paper with the word “Restroom” written on it over a gender-specific sign.

We all know that having a regulation does not translate into immediate compliance throughout the city. It is okay if Section 202.2 is generally enforced at the time a complaint is made, either informally or formally. Having Section 202.2 can help many transgender people who work to make sure the businesses they frequent are complying with the law by informally or formally asking them to comply with the regulation. Take for example a transgender person in transition, who has an increased need for gender neutral restrooms. Under Section 202.2, they can ask their employer to re-sign the single-occupancy restrooms in the building, which will create a safe place for the individual to use restrooms. If OHR takes away Section 202.2, this transgender employee is at the mercy of their employer’s decision, which is precisely the result OHR should be working to avoid.

Repealing Subsection 202.2 will have an adverse impact on transgender people, will make it more likely that transgender people will experience discrimination/harassment in restrooms, and will cause stress to transgender people who know they have to use a gender-specific restroom. All of this can be avoided by retaining Section 202.2 and allowing businesses to come into compliance.

Section 806.5

The proposed Subsection 806.5 will require that identification badges for employees of the District of Columbia state the employee's legal name and any change to the badge will require proof of a formal legal name change. Note: the draft regulation says "legal name" which does not comport with current policy which is only the person's first and last name (not their full legal name). This proposed section is a completely unnecessary provision that will disproportionately affect transgender individuals and goes against the clear intent of the Council.

First, regulations are supposed to explain how the Human Rights Amendment applies to entities covered by the law. This section makes no mention of how the gender identity or expression protections apply to name badges, except by the negative implication that there are no protections from discrimination on the basis of gender identity or expression in the name badge policy. Thus, this section does not belong in these regulations.

Second, there are many transgender individuals that have used a name publicly for years and even decades, but have not gone through the process of legally changing it. People do not change their legal names for various reasons, including:

- cost
- no ability to take time off work for a court appearance
- not wanting to change their name for safety reasons until they also have met medical standards to change their gender simultaneously
- not wanting to upset family members such as spouses, children, or the parents who named them
- needing to use the new name and live in a gender for a year as part of their own process to make sure permanent gender transition is right for them

Forcing transgender people to use their legal name, which are in large print on the face of the badge, will cause tremendous amounts of unnecessary harassment, questioning by security personnel, etc., for no security reason.

Third, if OHR's concern is that without this regulation in place, it will open the floodgates for people to put whatever name they choose on their badges, that concern is misplaced. The concept of reasonable accommodations is well rooted in civil rights, and that framework should guide us to the solution here. "Reasonable accommodations" stands for the simple proposition that a policy/practice may actually discriminate against one set of people who are differently situated than others. For example, if the policy is that staff use the front entrance of the building, which has stairs, an employee that uses a wheelchair should be allowed to use the side entrance with the ramp (but this does not mean that all staff can use the side entrance). Similarly, transgender people should be given reasonable accommodations with regard to the name used on their badge.

Section 806.5 should be dropped in its entirety because it would cause widespread discrimination and harassment of transgender people.

Conclusion

The OHR should be proud that D.C.'s transgender protections are the most progressive in the country and should continue to implement the HRA in a way that can act as a role model for other jurisdictions that are aiming to protect the rights of transgender individuals, rights that the rest of us take for granted. If the proposed changes are adopted, D.C.'s regulations will be discriminatory on their face and will become the *worst* regulations in the country relating to a transgender-inclusive nondiscrimination law.

If you would like to discuss this matter, please contact myself at (202)639-6308 or lmottet@thetaskforce.org or Laurie Young at (202) 639-6304 or lyoung@thetaskforce.org (if I am unavailable).

Sincerely,

A handwritten signature in black ink, appearing to read "L Mottet", with a long horizontal flourish extending to the right.

Lisa Mottet, Esq.
Transgender Civil Rights Project Director