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House of Representatives
Commonwealth of Pennsylvania
Harrisburg

REPRESENTATIVE CURT SONNEY
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June 1, 2022

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, Pennsylvania 17101
VIA e-Mail: irrc@irrc.state.pa.us

**RE: Pennsylvania Human Relations Commission Proposed Regulation #52-13
(IRRC # 3339) "Protected Classes under the PHRA and PFEOA"**

Dear Commissioners:

I submit for your consideration the following comments on the Proposed Regulation #52-13: "Protected Classes under the PHRA and PFEOA" published in the *Pennsylvania Bulletin* on April 9, 2022.

It is the General Assembly's role to ensure that regulations proposed by State agencies are consistent with the legislative intent and the statutory authority of the agency, and do not impose unreasonable requirements on the regulated community.

In determining whether a regulation is adopted within an agency's granted power, we must look for statutory language authorizing the agency to promulgate the legislative rule and examine that language to determine whether the rule falls within its grant of authority." *Marcellus Shale Coalition v. Department of Environmental Protection*, 216 A.3d 448, 459 (Pa. Cmwlth.), *appeals quashed*, 223 A.3d 655 (Pa. 2019) (citing *Slippery Rock Area Sch. Dist. v. Unemployment Comp. Bd. of Review*, 983 A.2d 1231, 1239-41). We must consider "the purpose of the statute and its reasonable effect" and whether "the regulation is consistent with the enabling statute. [*Id.*].

In this rulemaking, the Commission proposes to provide definitions for the terms "sex discrimination," "race discrimination," and "religious creed discrimination," that, in the Commission's words, will provide guidance and consistency regarding the interpretation of the PHRA and the PFEOA.

Both the Pennsylvania Human Relations Act ("PHRA") and the Pennsylvania Fair Educational Opportunities Act ("PFEOA") grant the Pennsylvania Human Relation

Commission (“Commission”) the board authority to adopt, amend or rescind such rules and regulations as may be necessary to effectuate the purposes and provisions of the respective acts. [See 43 P.S. § 957(d); 24 P.S. § 5006(6)].

I agree with the analysis provided by Representative Seth Grove, chairman of the House State Government Committee, in that it is difficult to gauge whether this regulation clarifies the law or seeks to circumvent and exceed the law as enacted. There is no dispute that the Commission has the authority to address confusion and gaps in clarity in the PHRA and PFEOA; however, the definitions proposed by the Commission are overly broad interpretations. For example, the definitions for religious creed, sex, and race discrimination explicitly state that they are not exhaustive – meaning they are open-ended and do not provide guidance or consistency in the interpretation. The Commission has no statutory authority to predict the General Assembly’s intent or meaning of these terms.

Furthermore, as Chairman Grove points out the proposed regulation does not conform to the legislative intent of the General Assembly in enacting the PHRA and PFEOA. The Commission cited to the U.S. Supreme Court decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), as basically superseding the legislative intent of the Pennsylvania General Assembly regarding discrimination on the basis of sex. In that case, the Supreme Court held that Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of sex, includes discrimination against an individual on the basis of sexual orientation and gender identity. [*Id.* at 1734]. However, the Supreme Court specifically stated that this holding narrowly pertains to the realm of employment discrimination prohibited under Title VII of the Civil Rights Act:

The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.

[*Id.* at 1753].

For these reasons, I ask that the Commission consider these issues when reviewing the proposed regulation.

Sincerely,

A handwritten signature in black ink, appearing to read "Curt Sonney". The signature is fluid and cursive, written over a light blue horizontal line.

Curt Sonney, Chairman

Pennsylvania House Education Committee