PENNSYLVANIA CATHOLIC CONFERENCE

May 6, 2022

Via Electronic Mail

M. Joel Bolstein, Chair
Pennsylvania Human Relations Commission
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Via email: RA-HRREGSCOMMENT@pa.gov

David Sumner, Executive Director
Independent Regulatory Review Commission
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Via email: irrc@irrc.state.pa.us

Re: Proposed Rulemaking to Define Terms in the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act
16 Pa. Code §§41.201 – 41.207
Regulation Reference No. 52-013

Dear Messrs. Bolstein and Sumner:

The Pennsylvania Catholic Conference ("PCC") is an association comprised of the eight Latin Rite Roman Catholic Dioceses of Pennsylvania and the two Byzantine Rite Catholic Dioceses whose territories include the Commonwealth of Pennsylvania. PCC finds itself compelled to submit the following objections regarding the Pennsylvania Human Relations Commission's ("PHRC" or "Commission") proposed regulations defining the terms "Sex" under the Pennsylvania Human Relations Act (PHRA) and the Pennsylvania Fair Educational Opportunities Act (PFEOA) (collectively, the Acts).

1. **The Commission lacks the statutory authority to propose these regulations because the action is procedurally improper. The PHRA prescribes the Commission's appropriate course of action and outlines the Commission's remedy to propose new bases of unlawful discrimination.**

The proper statutory mechanism which the Legislature gave to the Commission is to make "recommendations for such further legislation concerning abuses and discrimination..." in the annual report the Commission is required to submit each fiscal year to the "General Assembly, the Labor and Industry Committee of the Senate and the State Government Committee of the House of Representatives and the Governor." 43 P.S. § 957(k). The PHRA does not grant the Commission the authority to create new classes of or bases of prohibited discrimination. Because the Legislature provided a mechanism by which the Commission could recommend legislative action to authorize additional bases for discrimination, the Commission is limited to that mechanism and cannot propose regulations which create new bases of unlawful discrimination.

2. The Commission overreaches and overextends the statutory authority granted to it by the Legislature by expanding the bases for unlawful discrimination claims to include claims of discriminatory conduct unintended by the Legislature.

The Supreme Court of Pennsylvania has already definitively held that the Pennsylvania Human Relations Commission does not have the authority or jurisdiction to redress discrimination on grounds which have not been specifically established by the General Assembly. In *Pennsylvania Human Relations Commission v. Mars Community Boys Baseball Association,* the Pennsylvania Supreme Court stated:

> A fair reading of Sections 5 and 7 reveals the manifest intent of the legislature to limit the Commission's jurisdiction to those areas of statutorily defined unlawful discriminatory practices contained in Section 5. Because Section 5(i)(1) did not list gender discrimination in places of public accommodation, resort or amusement until 1978, the Commonwealth Court correctly held that the Commission lacked jurisdiction over the present complaint.

Pennsylvania Human Relations Commission v. Mars Community Boys Baseball Association, 410 A.2d 1246, 1248 (Pa 1980).

The *Mars* case involved claims of gender discrimination. Girls were not allowed to play baseball for the Mars Community Boys Baseball Association. The Commission accepted a discrimination claim even though at the time of the alleged discriminatory conduct sex discrimination was not a listed basis for discrimination under Public Accommodations section of the Act. When originally enacted in 1955, discrimination based on sex was not a prohibited activity and not actionable by the Commission. In 1969, the Legislature amended the Act to prohibit sex discrimination only in the areas of employment, union membership and housing but did not prohibit sex

discrimination in the area of public accommodation, resort or amusement.[1] In *Mars*, the Supreme Court reasoned that because the Legislature amended the Act in 1969 and prohibited sex discrimination in the areas of employment, housing and union membership, but chose to NOT prohibit sex discrimination in areas of public accommodation, the Commission was powerless to bring forth a claim on that basis.

Additionally, it is insufficient to claim that the expanded forms of discrimination now specifically proscribed in the proposed Regulations were somehow intended to be included by the General Assembly that long ago added the term "sex" to the PHRA. The Commission has not been given the statutory authority to predict the Legislature's future intent, absent specific authorization.

Again, the Supreme Court of Pennsylvania has ruled that the Commission has no such power to act outside the legislatively established boundaries. In *Pennsylvania Human Relations Commission v. St. Joe Minerals Corporation, Zinc Smelting Division*, when the Commission wanted to force the company to submit to discovery methods not specifically authorized by the General Assembly, the Court rejected the Commission's overreach. The Court said:

> The Legislature did not include the power now sought to be confirmed in the Commission. Whether or not this omission was wise is of no moment to this Court. Our function is to interpret the statute according to what the Legislature said, not according to what it should have said or might have said.

Pennsylvania Human Relations Commission v. St. Joe Minerals Corporation, Zinc Smelting Division, 382 A.2d 731, 736 (Pa 1978).

The issue in *St. Joe Minerals* was the method by which the Commission sought discovery from the employer. The Commission sought a judicial order to force the employer to answer written interrogatories even though the Commission's investigatory powers were statutorily limited to holding hearings, subpoenaing witnesses, compelling attendance and taking testimony. Because requiring answers to written interrogatories was not an enumerated power, the Court determined that the Commission was acting beyond its authority. The Court reasoned: "The term 'investigate' is admittedly broad. Yet simply because interrogatories are one possible method of investigation does not mean that that method is necessarily implied in an enabling act conferring the right to investigate." *Id.* Similarly, the Legislature's specific authorization to investigate claims of sex discrimination does not mean the Legislature authorized the Commission to expand the term "discrimination based on sex" to include "Pregnancy, including medical conditions related to pregnancy" and "Childbirth

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[1] Act 1978-309

including medical conditions related to childbirth." Both of which would arguably include the decision to abort a child. Such a leap is a much greater one than merely trying to serve interrogatories.

The proposed Regulations issued by the Commission seek to establish a basis for discrimination ("pregnancy, including medical conditions related to pregnancy" and "childbirth including medical conditions related to childbirth") which has not been specifically authorized by the Legislature and would open the door to a basis for discrimination that the Legislature never imagined – on its face, forcing employers and religious entities to accommodate and cooperate with abortion. Given Pennsylvania's longstanding protections for the unborn child and for rights of religious conscience, it cannot be reasonably argued, with any credibility, that the Pennsylvania Legislature intended the PHRA to protect an individual's insistence on receiving active cooperation in securing an elective abortion.

Similarly, considering the General Assembly's lengthy history of refusing, during every consecutive session that it has been proposed, to add sexual orientation to the list of prohibited bases for discrimination, it would be difficult to find, or even infer, that all of those intervening Legislatures believed such protections were already covered. Likewise, because protecting and accepting transgenderism was never imagined when the General Assembly amended the PHRA in 1969 to prohibit sex discrimination, it cannot be credibly claimed that the General Assembly intended sex discrimination to include protecting a transgender person's claim of discrimination against an employer or a place of public accommodation.

For these reasons, and whatever the policy merits may be of achieving the PHRC's goals by legislative means, the Commission is proposing to act outside the legislative intent of the PHRA. The Commission is powerless to enact the proposed regulations without specific authorization from the General Assembly and should not usurp the legislative function that has been denied it by statute.

3. The Commission's selective reliance on federal case law is misplaced.

The Commission ignores the fact that recent United States Supreme Court decisions provide a robust constitutional barrier to extending these new proposed regulations against religious entities. The Commission relies upon federal law to justify the proposed regulations by stating "This portion of this proposed rulemaking is consistent with the Title VII definition for sex. Section 701(k) of Title VII states that '[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes.'" Regulatory Analysis Form, Preamble, p. 8.

While it may be true that the Equal Employment Opportunity Commission has taken the position that discrimination based on sexual orientation and gender identity are equivalent to sex discrimination[2], it is important to understand the EEOC decisions address only employment scenarios and not situations in which religious entities offer what might be seen as a "public accommodation." One source of trouble with the proposed PHRA amendments is that the definitions are intended to apply not just to employment but to housing and public accommodations as well.

The Commission also cites the recent United States Supreme Court case, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), as justification to create an expansive definition for the term "sex." The Court held that discriminating against an individual for being homosexual or transgender is discrimination based on one's sex. *Bostock*, 140 S. Ct. at 1753. Here again, Bostock addressed only employment issues and the *Bostock* Court readily acknowledged that they were not deciding issues related to sex-segregated bathrooms, locker rooms or dress codes under other Federal or state laws nor were they deciding issues related to bathrooms or locker rooms. Again, the Commission attempts to use employment case law to justify intrusions on intimate public accommodations. These are the same public accommodations which are very private facilities wherein the Commission ignores the sense of modesty and privacy which both men and women currently enjoy in Pennsylvania.

The intent of the Pennsylvania General Assembly controls the PHRA and Pennsylvania case law recognizes that, at present, the General Assembly did not intend that sexual orientation and gender identity be protected classes in the PHRA. On April 26, 2017, the Pennsylvania Supreme Court issued an opinion in *Southeastern Pennsylvania Transportation Authority (SEPTA) v. City of Philadelphia.*[3] The case involved a claim against SEPTA for SOGI discrimination under Philadelphia's Fair Practice Ordinance (FPO).

The Court held that the General Assembly established SEPTA, as a Commonwealth agency under the exclusive jurisdiction of the PHRC and not subject to the FPO. Because the PHRA does not prohibit SOGI discrimination, SEPTA is immune from such a claim made under Philadelphia's FPO. Justice Wecht's concurring opinion is of particular importance to the issue at hand.

Justice Wecht strongly asserted that discrimination based on sexual orientation and gender identity are not prohibited by the PHRA and it is not for

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2 *Complainant v. Anthony Foxx*, E.E.O.C. Appeal No. 0120133080

3 *Southeastern Pennsylvania Transportation Authority (SEPTA) v. City of Philadelphia*, 2017 WL 1489043 (April 26, 2017). Only the Westlaw citation is currently available.

the Commission – nor even the Pennsylvania Supreme Court - to elevate its judgment over the Legislature's. He wrote:

> The Dissent correctly interprets my position as "amount[ing] to an assertion that the General Assembly intended to require SEPTA to comply with some anti-discrimination laws (*i.e.*, those in the PHRA relating to discrimination based upon, *inter alia*, race, color, religious creed, ancestry, age or sex, 43 P.S. § 956(a)), but to be free from any obligation to comply with other anti-discrimination laws (*i.e.*, those in the FPO relating to discrimination based upon, *inter alia*, gender identity or sexual orientation, Phila. Code § 9–1103(1))." I am compelled to draw that conclusion because I fail to see how we can take the liberty of inferring any other legislative intent. . . . In the PHRA, the General Assembly affirmatively chose to prohibit certain types of discrimination while affirmatively declining to prohibit others.

Southeastern Pennsylvania Transportation Authority (SEPTA) v. City of Philadelphia, 2017 WL 1489043, at 12.

Justice Wecht clearly articulated that only the General Assembly has the power and authority to expand the PHRA and offer special protections to the LGBTQ community:

> Absent further developments in constitutional or federal law, only our General Assembly has the power to align Pennsylvania with Philadelphia and our numerous sister states that have chosen to provide legal protections to persons who suffer discrimination on the basis of their gender identity or sexual orientation. Id. at 12.

None of the majority of the Supreme Court Justices (JJ. Mundy, Baer, Saylor and Wecht) disputed Justice Wecht's argument that "[t]his Court may not override [the General Assembly's] choice by seeking to improve upon or read into the PHRA what cannot fairly be inferred under our rules of statutory construction." *Id.* Neither should the Commission.

4. The Commission overlooks the bona-fide occupational qualification (BFOQ) exception that is protected in the PHRA

The Commission's Regulatory Analysis Form totally ignores the fact that the PHRA already exempts religious entities from "sex" discrimination prohibitions when "sex" is a bona fide occupational qualification. Therefore, the Commission's "across-the-board" application of the overly broad definition of "sex" will naturally conflict with the current protections the General Assembly

wrote into the PHRA for a religious employer's bona fide occupational qualifications for employment by a religious entity.

Current regulations, which remain unaffected by the present Notice of Proposed Rulemaking, further elaborate on the concept of the "bona fide occupational qualification." The pertinent regulation reads:

> **41.71. Bona fide occupational qualification definition.**
>
> (a) It is anticipated that section 5 of the Pennsylvania Human Relations Act (43 P. S. §955) which allows employment practices otherwise prohibited if based upon a bona fide occupational qualification will have limited scope and application.
>
> (b) Discrimination in employment based upon race, color, religious creed, ancestry, age, sex or national origin is valid as a bona fide occupational qualification only when it is reasonably necessary to the essence of the normal operation of a particular business or enterprise.
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> * * * *
>
> (f) An employer may exclude persons from positions on the basis of sex only when the sexual characteristics of the employe are crucial to the successful performance of the job.

Additionally, Title VII's prohibition on certain forms of discrimination, including sex discrimination, also does not apply when the protected trait is a bona fide occupational qualification (BFOQ). 42 U.S.C. § 2000e-2(e)(1).

The adoption of and application of the Commission's proposed definitions is flawed. It would be statutorily and constitutionally absurd to prevent a religious employer from requiring an affirmation of and adherence to conduct which is consistent with the tenets of the Church's religious creed and doctrine regarding sexuality, childbirth and abortion. How can any employee or the Commission attempt to direct a Catholic employer, or any religious employer, that it is not a BFOQ for the employee to adhere to or refrain from publicly repudiating the Catholic institution's "Catholicity" – the Church's theological teaching on God's design for sexuality and marriage. How does the Commission tell the religious employer that it does not compromise that employer's religious identity or does not dilute the employer's religious message to be forced to employ an employee who publicly repudiates its religious message.

5. The Commission misrepresents the adverse impact the proposed regulations will have on small businesses and religious entities.

The Commission's Regulatory Analysis Form, box 24 & 27, states that "the proposed regulation does not have an adverse impact on small businesses." Yet, in its preamble to the Regulatory Analysis Form, the Commission admits that "the Commission recognizes that persons who are subject to the provisions of the PHRA and the PFEOA may believe that enforcement of the PHRA and the PFEOA against them violate their free exercise of religion." Entities "who are subject to the provisions of the PHRA and the PFEOA" are the same small businesses and religious entities who the Commission dismisses as not being adversely impacted by the proposed regulations.

Catholic small businesses and Catholic entities and Catholic employers who are subject to the Regulations will rightly feel that their right to free exercise of religion is being violated by the broad facial sweep of the proposed Regulations. It would be statutorily and constitutionally absurd to prevent Catholic and other religious entities from acting in such a way that gives expression to their deeply held doctrinal tenets regarding their fundamental beliefs regarding human sexuality. Forcing the Catholic employer or the Catholic public accommodation to act contrary to the religious beliefs that God created each person either male or female; created marriage as sacred between one man and one woman; and that aborting a life that God created at conception by abortion is a sin violates both the Pennsylvania and the United States Constitutions. Further, adopting the proposed Regulations without clear exemptions for religiously motivated conduct, will necessarily give rise to the "adverse impact" of additional litigations and added expenses for religious entities.

It is disingenuous for the Commission to disregard such constitutional violations as "no adverse impact" on religious employers and religious facilities. Under the precedent of *Catholic Bishop of Chicago v. NLRB*, 440 U.S. 490 (1979), in order to apply a statute (or Regulation) against a religious entity when it would burden the entity's religious freedom, the Courts must first find the affirmative intention of the [Legislature] clearly expressed to affix the mandate/prohibition on those entities. *See*, 440 U.S. at 506-507. This is a special point of statutory construction, reinforced by the judicial imperative to avoid unnecessarily deciding constitutional issues. Nor should an administrative agency unnecessarily provoke confrontations and conflicts of a constitutional dimension between church and state.

6. The Commission's nodding but dismissive reference to the Pennsylvania Religious Freedom Protection Act is improper.

The Commission's dismissive response to the acknowledged fact that the free exercise of religion of certain religious entities and rights of religious conscience may be violated by its proposals is that "[t]he proposed rulemaking does not address those concerns because the Pennsylvania Religious Freedom

Protection Act (RFPA), 71 P.S. §§ 2401-2407, provides the mechanism for asserting such claims." The RFPA deserves more than the Commission's mere nodding reference. Through the RFPA, the General Assembly has expressed its solicitude for religious liberty and for protecting citizens', and churches', rights to freely exercise their religious beliefs in their daily lives. The Commission should not so freely disregard those protections and try to force religiously hostile Regulations on the religious citizenry.

For the foregoing reasons, PCC is compelled to object to the proposed Regulations defining the term "Sex" under the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act. To cure the deficiencies in the proposed Regulations, the Commission should utilize the statutory mechanism expressly available to it and request, in its annual report to the General Assembly, the Legislative Committees, and the Governor, that the General Assembly should act affirmatively to avoid this constitutional controversy and amend the PHRA itself, ensuring that any proposed amendment must include strong religious protections and accommodations that would establish a uniform, constitutional standard statewide.

Thank you for your kind attention to these comments and objections.

Very truly yours,

Eric Failing
Executive Director