STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

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ATTORNEY GENERAL OPINION NO. 88- 8

Roger W. Lovett
Chief Legal Counsel
Commission on Civil Rights
Landon State Office Building, 8th Floor
900 S.W. Jackson St., Suite 851 S.
Topeka, Kansas 66612-1258

Re: Labor and Industries--Kansas Acts Against Discrimination--Waiver of Jurisdiction Over Certain Claims; Equal Protection

Synopsis: Assuming the Kansas Commission on Civil Rights (KCCR) otherwise has the authority to waive jurisdiction over employment and housing discrimination complaints filed by its employees, it is our opinion that the KCCR would not be precluded by the Equal Protection Clause from doing so. Cited herein; K.S.A. 44-1001 et seq.; 44-1111 et seq.; 42 U.S.C.S. §§2000e-5, 3610; 24 C.F.R. §§105.18, 105.20 (1977); U.S. Const., Amend. XIV.

* * *

Dear Mr. Lovett:

As Chief Legal Counsel for the Kansas Commission on Civil Rights (KCCR) you request our opinion regarding Fourteenth Amendment restraints on the ability of the KCCR to waive jurisdiction over certain complaints of unlawful discrimination.

You advise that the KCCR is responsible for processing complaints filed pursuant to the Kansas act against discrimination (K.S.A. 44-1001 et seq.) and the Kansas age discrimination in employment act (K.S.A. 44-1111 et seq.). On occasion employees of the KCCR have filed such complaints, thus presenting the KCCR with the following potential problems: the parties against whom such complaints are filed claim they are prejudiced by the complainant's position in the agency; following an investigation which results in a determination of no probable cause to credit the allegations of the complaint, ill will develops between the complaining party employee and the investigator. In view of the fact that complaints alleging violations in the areas of employment and housing may also be processed administratively by federal agencies (the Equal Employment Opportunity Commission, EEOC, and the Department of Housing and Urban Development, HUD, respectively), you question whether a policy to waive the KCCR's right to initial processing of such complaints would be appropriate. Your specific questions are as follows:

"1. Does a procedure which delays the processing of certain complaints constitute a violation of the Fourteenth Amendment rights of the affected complainants?

"2. Do the appearances of impropriety and the potential of internal discord inherent in regular processing of the complaints filed by [KCCR] employees justify an invasion of Fourteenth Amendment rights?"

You do not ask whether the act against discrimination or the age discrimination in employment act would permit the KCCR to waive processing of such complaints.

Title VII of the Civil rights Act of 1964 (42 U.S.C.S. §§2000e et seq.) provides that a complainant must attempt to exhaust any state or local remedies available before filing a complaint with the EEOC. 42 U.S.C.S. §2000e-5. See also Ashworth v. Eastern Airlines, Inc., 389 F.Supp. 597 (D.C. Va. 1975); Willis v. Chicago Extruded Metals Company, 358 F. Supp. 848, 850, 851 (N.D. Ill. 1973). A similar procedure exists with regard to complaints filed with HUD. 42 U.S.C.S. §3610(c); 24 C.F.R. §§105.18, 105.20 (1977). The purpose of the exhaustion provision in Title VII, and presumably of that in Title VIII as well, is to "avoid federal action whenever possible by making the state a partner in the enforcement" of these acts. EEOC v. Wah Chang Albany Corp., 499 F.2d 187, 189 (9th Cir. 1974). The

exhaustion provision is dependent upon state law and procedure and, consequently, deferral is not required in all instances. Greenlow v. California Dept. of Benefit Payments, 413 F. Supp. 420 (E.D. Cal. 1976). "[A] state agency's judgment that it has been given a meaningful opportunity to act on a discrimination complaint is entitled to considerable if not conclusive weight." Equal Employment Opportunity Commission v. Deleware Trust Company, 416 F. Supp. 1040, 1044 (D. Del. 1976). Thus, it would appear that as long as the state or local administrative agency is given the opportunity to consider discrimination complaints over which it has authority, the deferral/exhaustion provisions in Title VII and Title VIII would be met regardless whether the state or local agency actually processes the complaint. See Willis v. Chicago Extruded Metals Company, supra at 851 (state commission waived right to proceed due to overloaded docket); EEOC v. Deleware Trust Co., supra at 1043, 1044; Greenlow, supra at 423 (state commission waived jurisdiction over complaints concerning alleged retaliation for the prior filing of a complaint with EEOC). While these cases do not address the issue of equal protection, they do indicate recognition by the courts that state agencies may waive jurisdiction over employment and housing discrimination complaints in certain circumstances.

We turn now to the specific question of whether the KCCR's decision to not process discrimination complaints filed by its own employees would constitute a violation of those employees' right to equal protection under the law.

> "[A]dministrative agencies must execute the law committed to them fairly and honestly and treat everyone alike according to the standards and rules of action prescribed. Failure in this respect, if it extends beyond the rudimentary requirements of fair play, enters the realm of unreasonable and arbitrary action from which the courts will grant relief. Rules and regulations should be uniform and framed to avoid unequal operation on persons in the same class. Where individuals or classes of individuals are treated differently on the basis of classification established by statute or administrative rule, the equal protection clause requires that such classifications be reasonable and based

> upon some principle of public policy, and that they be not arbitrary or capricious.
>
> "A regulation or order which involves a classification on a reasonable basis does not deny equal protection of the laws or create any improper discrimination. All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." 2 Am.Jur.2d Administrative Law §193 (1962) (footnotes omitted).

The class of individuals to be treated differently in this case is composed of employees of the KCCR. While certain of these employees may also belong to other classifications which would be deemed suspect, their affiliation with the group of KCCR employees does not necessarily render that classification as suspect. These people are to be separated out for differential treatment based on their connection with the KCCR, not their race, nationality, etc. Thus, the distinction does not require the strict scrutiny necessary when dealing with suspect classes.

Neither do we believe that the right involved here constitutes a fundamental right. While access to the courts has been deemed a constitutionally protected right, 1 Antineau, Federal Civil Rights Acts: Civil Practice 134 (2d ed. 1980), we do not believe access to this particular administrative agency under these circumstances rises to that level. The individuals to be affected are not without administrative remedy, for they may file claims with the federal counterparts to the KCCR. Though these federal agencies may not process claims as quickly as the KCCR, we do not believe that this alone would render access to KCCR processing a fundamental right.

Where there is no suspect class or fundamental right involved, equal protection requirements are satisfied if the agency can show a rational basis for the differential treatment, and that the means selected have a real and substantial relation to the the objective sought. McGowan v. Maryland, 366 U.S. 420,

425-26, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); Manhattan Buildings Inc. v. Hurley, 231 Kan. 20, 30 (1982). The basis given for this differential treatment is to avoid the appearance of impropriety inherent in processing the complaint of a fellow worker, and to lessen the internal discord which develops when a co-employee's complaint is found to be without merit. We can well imagine the discomforts felt when asked to investigate oneself, and believe there may even exist a possible conflict when doing so. We therefore conclude that the basis alleged is rational. Further, the means selected-waiver of jurisdiction over certain complaints filed by KCCR employees - is substantially related to the objective sought.

In conclusion, assuming the KCCR otherwise has the authority to waive jurisdiction over employment and housing discrimination complaints filed by its employees, it is our opinion that the KCCR would not be precluded by the Equal Protection Clause from doing so.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Julene L. Miller

Julene L. Miller
Deputy Attorney General

RTS:JLM:jm