

EQUAL EMPLOYMENT PRACTICES COMMISSION

City of New York

40 Rector Street, 14th Floor, New York, New York 10006

Telephone: (212) 788-8646 Fax: (212) 788-8652

Ernest F. Hart, Esq.

Chair

Manuel A. Méndez

Vice-Chair

Chereé A. Buggs, Esq.

Angela Cabrera

Veronica Villanueva, Esq.

Commissioners

Abraham May, Jr.

Executive Director

Eric Matusewitch, PHR, CAAP

Deputy Director

January 18, 2006

Honorable Robert M. Morgenthau
District Attorney, New York County
One Hogan Place
New York, NY 10013

Re: Final Determination Pursuant to Audit of the New York County District Attorney's Office's
Equal Employment Opportunity Program from January 1, 2003 through December 31, 2004

Dear Mr. Morgenthau:

We have reviewed your office's December 22, 2005 response (transmitted by EEO Officer Frederick Watts, Esq.) to our October 26, 2005 Letter of Preliminary Determination pursuant to the audit of the New York County District Attorney's Office's (DANY's) Equal Employment Opportunity Program from January 1, 2003 through December 31, 2004. Our Final Determination is as follows:

Agree

We agree with DANY's responses to the following EEPC recommendations, pending documentation, which can be provided during the compliance period:

Recommendation #1

DANY's EEO Pamphlet should be revised to reflect the current address and telephone number for the U.S. Equal Employment Opportunity Commission.

Recommendation #4

All agency recruitment literature, including internal job postings, should indicate that DANY is an equal opportunity employer. (Sect. IV, Citywide EEO Policy)

Recommendation #5

The agency should ensure that its EEO policies are available in “appropriate alternate formats to employees with disabilities.” (Sect. VB, Citywide EEO Policy)

Recommendation #6

DANY should adopt and tailor the City’s Reasonable Accommodation Policy and Procedure, available at www.nyc.gov/html/dcas/html/resources/eoo.html.

Recommendation #10

It is the Commission’s position that appropriate documentation of meetings and other communications between the EEO Officer and the agency head regarding EEO decisions should be maintained.

Recommendation #11

It is the Commission’s position that agencies with at least 750 employees should have full-time EEO Officers.

Partially Agree

For the following reasons, hereafter identified as “EEPC Rationale,” we partially agree with DANY’s responses to the following recommendations:

Recommendation #2

The agency’s EEO Policy Statement and Internal Discrimination Complaint Procedure should be revised to include all of the “protected classes” under the New York City and New York State Human Rights laws.

Response

DANY agrees to update its EEO policy statement and all related materials to include all protected classes under the New York City and New York State Human Rights Laws, *with the exception* of those with “prior arrest or conviction.”

As a law enforcement agency, we feel strongly that a person’s encounter with the criminal justice system may be highly relevant in determining that person’s ability to hold a position in a law enforcement office. This office’s prosecutorial work makes it the custodian of highly confidential information about sensitive matters, often involving violent crime. It is critical to the integrity of our investigations, and the safety of our witnesses and other employees, that our staff be trusted with sensitive information. We therefore cannot consent to the notion that one’s criminal history is irrelevant in determining one’s suitability to work here.

As do other law enforcement offices, we conduct background investigations on each employee. We make case by case determinations as to whether the employee’s background and criminal history is consistent with working with sensitive and confidential materials that are routinely handled by members of this office. The nature and level of the employee’s responsibilities are key factors to consider when evaluating whether an arrest of criminal

conviction would impact the public's trust in a person's ability to function in a law enforcement capacity. Consultation with the Law Department supported this approach.

In sum, we will revise office written policies to include all protected classes outlined in the latest City EEO policy, with the exception of persons with a prior arrest or conviction. Consistent with City practice at the Department of Investigation, the New York City Police Department, and the other District Attorney's Offices, eliminating persons with arrest and conviction records from "protected classes" is appropriate for protecting the safety of employees and the public, and the integrity of law enforcement.

EEPC Rationale

While we agree with your approach to this issue (evaluating job candidates with arrest or conviction records on a case-by-case, job-related basis), the New York City and New York State Human Rights Laws' prohibition against discrimination on the basis of arrest and conviction records still apply to the District Attorneys' offices. EEPC's Counsel recently consulted with the New York City Law Department on this issue and was informed that the human rights laws do apply to district attorneys offices. Therefore DANY should not exclude persons with arrest and conviction records from its EEO policies.

Additionally, the New York Police Department, Department of Investigation, and other District Attorneys' offices have not eliminated persons with arrest and conviction records from their EEO policies. They have modified their policies to indicate that arrest and conviction records may be a bar to employment under certain circumstances. (See New York Police Department EEO Policy Statement, www.nyc.gov/html/nypd/html/oeeo/policyst.pdf.)

We therefore recommend that DANY revise its EEO documents to include persons with arrest and conviction records and append an appropriate qualifying statement.

Recommendation #3(1)

DANY's Internal Discrimination Complaint Procedures should be revised to include the following requirements of the City's Discrimination Complaint Procedures Implementation Guidelines: 1) the EEO investigator's confidential written report should be submitted to the agency head for his or her signature (to signify review and approval).

Response

DANY feels it unnecessary to have its EEO officer submit its final determination to the agency head for review and approval. The EEO officer is an Assistant District Attorney with 22 years of prosecutorial and management experience. The EEO officer has held a high level executive position for more than 14 years. The District Attorney has given authority over EEO matters to this experienced executive prosecutor. To require as a matter of routine that the elected District Attorney review EEO complaints is inconsistent with efficient management of this agency.

EEPC Rationale

We accept DANY's position that the agency head need not review and approve the EEO Officer's confidential written reports, however a direct report to the agency head, other than the

EEO Officer, should review and approve those reports to ensure procedural and substantive fairness and accuracy.

Recommendation #7

DANY should participate in the Section 55-A Program. At a minimum, the agency should obtain and distribute Program brochures issued by the Department of Citywide Administrative Services.

Response

DANY is willing to explore participation in the Section 55-A Program. However, virtually all titles in this office are non-competitive, and this may impact the office's eligibility to participate in the program. Moreover, it bears emphasizing that this office, without any assistance or prompting from the City, developed a longstanding voluntary relationship with a not-for-profit agency where we are able to employ adults with developmental disabilities. The office is proud of the fruitful relationship we enjoy with Job Path, and feel that this relationship demonstrates a commitment to providing equal employment opportunities.

EEPC Rationale

We commend DANY's voluntary relationship with Job Path and its willingness to explore participation in the Section 55-A Program. However, it is the position of the Department of Citywide Administrative Services that all agencies that have competitive city titles should participate in the program. This obligation is not contingent on the number (however small) of the agency's competitive titles. DANY should participate in the Section 55-A Program.

Recommendation #8

The EEO Officer and EEO Coordinators should be scheduled for training conducted by DCAS (Office of Citywide EEO) or enrolled in training conducted by another appropriate agency or school, such as the EEO Studies Program at Cornell University's School of Industrial and Labor Relations. The EEO professionals should obtain the certificate or otherwise complete the program at the institution selected by DANY. (Sect. VB, Citywide EEO Policy)

Recommendation #9

The Assistant District Attorney who conducts EEO training should be scheduled for training conducted by DCAS or enrolled in training conducted by another appropriate agency or school, such as the EEO Studies Program at Cornell University's School of Industrial and Labor Relations. The Assistant District Attorney should obtain the certificate or otherwise complete the program at the institution selected by DANY.

Response

In response to the EEPC observations that certain DANY staff require additional training, the office has contacted Jyll Townes of DCAS, and is making arrangements for EEO trainers and coordinators to receive DCAS training.

The office nonetheless observes that the EEPC audit did not give sufficient weight to the training and experience of DANY staff who handle EEO matters. The EEPC audit states that the

training is called for to “ensure...a uniform body of knowledge...” The audit fails to give sufficient weight to the fact that the EEO officer, and another Assistant District Attorney who conducts training, are experienced attorneys with extensive legal training in litigation and employment law.

EEPC Rationale

While DANY agrees to provide additional EEO training to some EEO trainers and the EEO coordinators, the response does appear to commit to providing such EEO training to the EEO Officer or the Assistant District Attorney who conducts EEO training. It is critical that *all* EEO professionals—including the EEO Officer and the Assistant District Attorney/EEO Trainer—receive the same training. This recommendation, embodied in the Citywide EEO Policy, ensures that all individuals involved in interpreting and administering the complex EEO Program possess a common body of professional knowledge. The Commission has consistently applied this recommendation to attorneys and non-attorneys in EEO positions throughout the City government.

Disagree

For the following reasons, hereafter identified as “EEPC Rationale,” we respectfully disagree with DANY’s responses to the following recommendations:

Recommendation # 3(2)

DANY’s Internal Discrimination Complaint Procedures should be revised to include the following requirements of the City’s Discrimination Complaint Procedures Implementation Guidelines: 2) the respondent(s) should be notified in writing of the disposition of the case.

Response

All EEO complainants are notified of the outcome of the matter, either in writing, or in a face-to-face meeting with the EEO Officer. DANY agrees that going forward, regardless of whether there is a face to face meeting with the complainant, the person bringing the complaint shall be notified of the outcome in writing. All persons accused of wrongdoing in EEO complaints are contacted directly by the EEO officer. In instances of a finding of no wrongdoing, it appears unwarranted to make such notifications in writing.

EEPC Rationale

The City’s Discrimination Complaint Procedures Implementation Guidelines require City agencies to notify respondents in writing of the disposition of the case. No exception is made for instances of “No Probable Cause” determinations. It is unfair and inappropriate to notify only one party to a discrimination complaint in writing of a “No Probable Cause” determination.

Recommendation #12

The agency’s performance evaluation forms should be revised to include a rating for the EEO performance of supervisors/managers. The agency may adopt the rating (“Utilizing Human Resources”) contained in the citywide managerial performance evaluation form.

Response

The performance evaluation instruments used by the office have categories “Professional Judgment” and “Interpersonal Relations.” These categories capture all aspects of the employees’ interactions with both his colleagues and the public. The current evaluation instruments effectively allow the office to rate staff in areas of EEO.

EEPC Rationale

The categories “Professional Judgment” and “Interpersonal Relations” do not refer to EEO performance. Additionally, all seven of the DANY supervisors/managers to whom the question applied told Commission auditors that their performance evaluations do not include an EEO rating section. It should not be burdensome for DANY to revise its performance evaluation forms by either adopting the category in the citywide managerial performance evaluation form or developing its own, clearer EEO-performance category.

Recommendation #13

All employees should receive written notification of the identity, location, and telephone number of the agency’s EEO Officer. (Sect. IV, Citywide EEO Policy)

Response

The office will continue to do all that it can to make staff aware of the EEO program, and the identities of all responsible for implementing the program. The names of all EEO coordinators and officers are included in all posted and distributed materials, and the EEO officer personally speaks at every EEO training sessions.

It is disappointing that 44% of the staff replied to the survey that the[y] do not know the name of the EEO officer. However, the EEPC survey does indicate that over 90% of the respondents acknowledge having been given EEO materials and training—all which include the name of the EEO officers and coordinators. The facts thus suggest that while some staff do not know the name of the EEO officer, they have the materials and training to easily learn who the EEO officer is, and access EEO services.

EEPC Rationale

While we commend DANY for distributing its EEO policies to agency staff during the audit period, the survey results (cited above) and the Commission’s recommendation logically call for the redistribution of the identity, location, and telephone numbers of the EEO Office’s personnel.

Conclusion

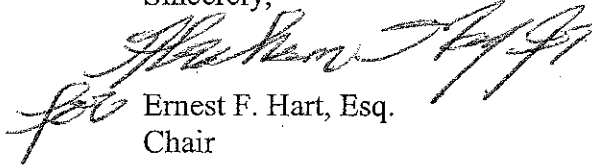
Pursuant to section 832 of the New York City Charter, this Commission will initiate an audit compliance procedure not to exceed six months. However, you may respond in writing to this Final Determination prior to the initiation of audit compliance.

If you choose to issue a written response, please do so within thirty days. If you choose not to issue a written response, we will initiate audit compliance in the next two weeks. Towards

that end, EEPC Counsel Lisa Badner or her designee will contact your EEO Officer to ascertain your intentions.

In closing, we thank you and your staff for your cooperation during the audit process. We look forward to a mutually satisfactory compliance process.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ernest F. Hart".

Ernest F. Hart, Esq.
Chair

C: Frederick J. Watts, Esq., EEO Officer