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INVESTIGATIVE REPORT
PA13-0002

CHARGING PARTY: Timothy Berthold

RESPONDING PARTY: Rock River Cottage and Antiques

CHARGE: Public accommodations/sexual orientation

SUMMARY OF CHARGE: On September 17, 2012, Timothy Berthold filed a charge of discrimination alleging that Rock River Cottage and Antiques discriminated against him because of his sexual orientation. Specifically, in April 2012, Mr. Berthold made a reservation and paid a deposit for himself and his partner to rent Rock River Cottage in July 2012. When Mr. Berthold and his partner arrived on July 14, 2012, they found the cottage occupied. Believing that the owner, Elizabeth Dery, had made an error and double-booked the cottage, Mr. Berthold requested that his deposit be returned. After initially refusing to refund the deposit, Ms. Dery subsequently sent a series of harassing e-mails to Mr. Berthold before finally returning his deposit in early August.

SUMMARY OF RESPONSE: Rock River Cottage and Antiques provided no written response to the charge of discrimination.

PRELIMINARY RECOMMENDATION: This investigative report makes a preliminary recommendation that the Human Rights Commission find that there are **reasonable grounds** to believe that Rock River Cottage and Antiques discriminated against Mr. Berthold because of his sexual orientation in violation of 9 V.S.A. §4502(a) of the Vermont Fair Housing and Public Accommodation Act.

SUMMARY OF INVESTIGATION:

Interviews:
Timothy Berthold, 10/11/12
Elizabeth Dery, 10/22/12

Documents:
Charge of Discrimination, 9/17/12
Response to request for information from Charging Party, 10/7/12, 10/13/12

Elements of prima facie case:

1. He is a member of a protected class (sexual orientation);
2. He made himself available to receive and pay for services ordinarily provided by the respondent to all members of the public in the manner in which they are ordinarily provided; and
3. He did not enjoy the privileges and benefits of the place of public accommodation under factual circumstances which rationally support an inference of unlawful discrimination in that a) he was deprived of the services while similarly situated persons outside the protected class were not deprived of those services and/or b) he received services in a markedly hostile manner and in a manner which a reasonable person would find objectively unreasonable.

I. Facts

A. Background

1. **Timothy Berthold** is professor in the Health Education Department at the City College of San Francisco. He is gay.

2. **Elizabeth Dery** is the owner of Rock River Cottage and Antiques in Townshend, Vermont. The cottage is available for rent to the general public.

B. The circumstances

3. Mr. Berthold first learned about the Rock River Cottage rental through vermontproperty.com, a website which advertises Vermont rental properties online. Mr. Berthold initially contacted Rock River Cottage and Antiques via an e-mail rental inquiry on April 25, 2012 and indicated that he was interested in renting the cottage starting July 18, 2012. The message also included a note that said, "We are also open to staying July 14-18th."

Ms. Dery responded the same day with additional information about the cottage, available dates for the summer and fall, and rental rates.

4. The next day, Mr. Berthold responded by saying he would be back in touch with Ms. Dery by that Saturday, April 28, 2012 to confirm a reservation. Ms. Dery responded that day with an e-mail that said, "Great, Tim, and I won't sell your space unless I check with you first!"

5. On Sunday, April 29, 2012 Mr. Berthold sent an email to Ms. Dery that stated, "We would love to confirm for four nights – July 14, 15, 16, and 17. Please let me know how to proceed (such as with a deposit)." Ms. Dery responded with the following message:

> Hi Tim! Great! You're going to have a ball! Deposit is 300 [sic], to my name, address below. Pls let me know when mailed and I'll let you know when it lands!

6. Two days later, the following messages were exchanged:

May 1, 11:57 AM (EST), Mr. Berthold to Ms. Dery:
Please consider us confirmed, and I put a check in the mail to you yesterday.
May 1, 9:11 AM (PST), Ms. Dery to Mr. Berthold:
a-ok...I will let you know when it lands!

7. When Mr. Berthold and his partner arrived at the cottage on July 14th and found the cottage occupied, Mr. Berthold called and spoke with Ms. Dery about his reservation. When Ms. Dery informed him that she had been expecting him for the week of July 18th, Mr. Berthold requested the return of his $300 deposit.[1]

8. What follows is the series of e-mails between Ms. Dery and Mr. Berthold between July 14 and July 16, 2012 regarding the confusion over Mr. Berthold's reservation and his request for the deposit return:

[1] Mr. Berthold described this conversation as "not unpleasant." In contrast, Ms. Dery said that Mr. Berthold was "very nasty and upset" and hung up on her, even after she offered to find another place for him to stay.

July 14, 1:01 PM (PST), Ms. Dery to Mr. Berthold:

Hi Tim...below is your request form from vtproperty.com...you wrote July 18 – 22 as your arrival/depart dates and i [sic] confirmed it many times in the header of my emails...i [sic] will try to sell your time, otherwise you read my policy in the info I sent. Sorry for the confusion, for both of us!

July 15, 5:02 PM (EST), Mr. Berthold to Ms. Dery:

Please re-read this chain of email correspondence. On April 29th I wrote to ask to confirm the rental for July 14-17. You responded "Great" and asked for a deposit of $300. This is where the confusion licaerfully [sic] read the actual content of my email. The "Subject" heading of the email was out-dated, as we were each responding to previous emails.

But I clearly asked to rent the house from July 14-17 and sent you the deposit that you asked for.

I certainly hope you are able to rent the house for Juky [sic] 18-22nd.

Please return our deposit. Thank you.

July 15, 7:36 PM (PST), Ms. Dery to Mr. Berthold:

i [sic] sent you the actual form you filled out, tim [sic] ...you put in "arrival" and "departure" July 18 and July 22 below that in the mes [sic] space you said that if i [sic] didnt [sic] have that you could do 14-1q7 [sic], but i [sic] had your first choice...its [sic] right there in front of you...taske [sic] responsibility for YOUR mistake...not to mention more than a half dozen emails from me with July 18-22 in the header.

July 15, 7:39 PM (PST), Ms. Dery to Mr. Berthold:

TIM – THIS IS THE FORM YOU FILLED OUT WHEN YOU SENT YOUR REQUEST . . . LOOK BELOW AT YOUR ENTRIES![2]

July 16, 12:30 AM (EST), Mr. Berthold to Ms. Dery:

My banking records show that you cashed my $300 check dated April 10th. The memo on that check reads "Deposit for July 14-17." You should have read the check and my earlier email asking you to to [sic] confirm July 14-17 (to which you responded "Great").

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[2] Ms. Dery is referring to Mr. Berthold's April 25, 2012 rental inquiry, which she cut and pasted into this e-mail, in which he originally inquired about an arrival date of July 18, 2012 but which also contained the note about a possible alternative arrival date of July 14, 2012.

My original request for a different time period is irrelevant, as is the subject line of the e-mails. When I asked you to confirm July 14-17, and you responded "Great," I was justified in believing we had a deal. It is not my fault you continued to focus only on the original date in the subject line, and failed to read the content of my email or the check. Customers often change their miinds [sic] As this is your business, you should have been more careful.

Again, please return the deposit.

July 16, 7:44 AM (PST), Ms. Dery to Mr. Berthold:

Tim...I printed out the from [sic] VermontProperty.com YOU fiiled [sic] in with your primary dates written right into the form, July 18-22, which you saw yourself! When I said "great", I was pleased to give you your first choice on dates, July 18-22 as YOU wrote. No, I didn't look in the memo line and see different dates or I would have caught YOUR error sooner. The screw-up is your fault. If you wanted July 14-17 as your PRIMARY dates, you should have entered them that way . . . in fact you wrote this: "Message: We are also open to staying July 14-18th." Why did you do that if those were your primary dates? And you think I should read that as your primary date choice?? What would YOU have thought if you read it?

In my 6 years renting the cottage you are a FIRST (and thank God I don't get more of your type lol). I rarely get cancellations but when I do, I jump through hoops to resell the time and return deposits. But since you're such a flaming asshole, I won't be able to resell your time. This will be a lesson to you in taking responsibility for your own mistakes, not to mention hangin [sic] up on me after spewing your "flaming" attitude which no woman deserves, especially me.

July 16, 3:45 PM (EST), Mr. Berthold to Ms. Dery:

I believe that it was reasonable for me to assume that you had read my email requesting a date change from the original dates that I entered in the form. It was also reasonable for me to construe your response ("Great") as confirming the new dates I has [sic] requested. The old date that remained in the subject line of the e-mail string is irrelevant.

I know this experience has taught you to actually read the content of emails from your customers, rather than rely only on the original date request form or the outdated subject line of an e-mail string.

I want to get this experience behind me, so please refrain from contacting me any more, unless you intend to refund my $300 check (which had "Deposit 7/14-7/17" written on it).

9. After this exchange of email messages with Ms. Dery, Mr. Berthold contacted Fran Dodd, the manager of the vermontproperties.com website, and forwarded the email exchanges to Ms. Dodd. Mr. Berthold also asked Ms. Dodd to consider removing Ms. Dery from the website listings; Ms. Dodd declined to do so at that time. Ms. Dodd subsequently spoke with Ms. Dery that day about returning Mr. Berthold's deposit and then sent the following email to Mr. Berthold at 5:08 PM:

> Thank you for your call today letting me know about your interaction with Liz. Dery.
>
> I spoke with her just now. She does not sound as if she will back down on who made a mistake on the dates.
>
> However, she did sound willing to return your deposit if you acknowledge that you made an error in dates or in not correcting the dates in the subject lines of the series of emails between you. In the interest of getting back $300, it may be wise to make this gesture.
>
> Communication is a two-way street and an art. I advised her to use less inflammatory language which would make it easier to resolve differences such as this one.
>
> As I explained to you on the phone, given that this is the first complaint about Liz in the six years she has posted her property, I will not be removing her listing, but I have made a note of your complaint.
>
> I do recommend that you request a written rental agreement with dates and payment and policies for any future rental. If dates changes, request a new agreement. It can offer clarity which may help avoid miscommunication.

10. Ms. Dery eventually agreed to return Mr. Berthold's deposit (as indicated in the final email exchanges on July 16th listed below).

> **July 16, 5:26 PM (EST)**, Mr. Berthold to Ms. Dery:
>
> I certainly acknowledge that my original request form included different dates – July 18-22. When our plans changed, and I requested to stay July 14-17, I did not change the subject

heading of our email correspondence. It [sic] wish I had done so. I do hope that you will return our deposit.

July 16, 2:29 PM (PST), Ms. Dery to Mr. Berthold:
Tim...I just found the email (below) you just referenced w the date change...Yes, I did miss that change, which is why all of my subsequent emails had the first set of dates. My sincere apology. In fact that was my error. Irronically [sic], those new dates remained open until just 2 weeks ago...
I will return your deposit since it was my error in missing the change after your initial inquiry. So I'm the flaming asshole, not you lol...hope the rest of your vacation time is more peaceful. Again, my apologies!

July 16, 2:31 PM (PST), Ms. Dery to Mr. Berthold:
Absolutely, don't worry . . . it [sic] my MY [sic] fault!

July 16, 11:53 PM (EST), Mr. Berthold to Ms. Dery:
Please send the refund promptly. I just want to get you and this bad vacation experience behind me as soon as possible.

11. Mr. Berthold had no additional contact with Ms. Dery after July 16th. While waiting for the return of his deposit, Mr. Berthold received a series of emails from Ms. Dery on July 26, 2012 regarding his request for the deposit refund:

July 26, 4:55 PM (PST), Ms. Dery to Mr. Berthold:
that [sic] was quite a review, written by a homosexual, no less, who came precisely for the gay nude beach! lol that ought to scare them away, right? All the folks who come to the river are my friends...known them for years...we get bad apples who come to the river for the wrong reasons, but you are only a few, thankfully...

July 26, 7:30 PM (PST), Ms. Dery to Mr. Berthold:
really? [sic] take back what you said on st prop.com, you flamer! You guys are somthin [sic]...so ornery, and unforgiving...my bro gay like you, but not like you...

July 26, 7:37 PM (PST), Ms. Dery to Mr. Berthold:
Tim, I was unable to book your time, but the Gay Beach that you wanted is still here! You can come on the other dates I sent you...Maybe you're not able...

July 26, 7:59 PM (PST), Ms. Dery to Mr. Berthold:

I have had to deal with all of you for the past 6 yrs...if you think you're [sic] gay-by [sic] tirade is going to get you somewhere, good for you! Fact is that I made things rite [sic] for you, but you're a miserable Queen...I was not surprised you work for a college!!!...too funny...paychecks and politics...biggest problem in this USA is "education"...totally corportized [sic]...led by queens like you, and wait til you see what i [sic] do!!!...CA guys...your paycheck I will take away...just watch...lol...and my dauther [sic] had to leave Wheaton--, if you think I'm somehow below you, you're obviously wrong..FU, and dont [sic] you even think of fuckin [sic] w [sic] me, since i [sic] apologized, and you didnt [sic] FU YOU CAN NOT HURT ME, BUT I CAN HURT YOU, just so happens my old friend here was very high up in your world.

July 26, 8:29 PM (PST), Ms. Dery to Mr. Berthold:

go [sic] fuck your world here at the gay beach...sorry you're disappointed....boo hoo for you...boo hoo

July 26, 10:09 PM (EST), Mr. Berthold to Ms. Dery:

Please return our deposit as you had promised.

12. Ms. Dery said that she had no recollection of the emails she sent to Mr. Berthold on July 26th. She stated that she sent the emails while intoxicated and that her drinking that day was due to a near death experience she had just had while at Cape Cod the previous week.[3]

13. Mr. Berthold said he had no knowledge of, and was not involved in the website review about Ms. Dery and her rental property that she mentioned in her July 26th emails. After receiving the series of emails from Ms. Dery on July 26th, Mr. Berthold contacted Ms. Dodd again and forwarded

[3] Ms. Dery told this investigation she was "horrified" by what she wrote to Mr. Berthold on July 26th. Ms. Dery also said that her psychiatrist interpreted Ms. Dery's emails as a response to her perception of Mr. Berthold as a "mortal threat" (because of the negative internet review and its impact on her primary source of income). She also stated that she has no problem with gay people, that her brother is gay, and that she hosts a gay group at her cottage each year. Instead, Ms. Dery said that she was upset by Mr. Berthold's "elitist" and "snotty" attitude which she attributes to academics like Mr. Berthold.

the emails from Ms. Dery. At that point, Ms. Dodd agreed to deactivate Ms. Dery's property listing from the vermontproperties.com website.

14. On or about August 1, 2012, Mr. Berthold received a check from Ms. Dery in the amount of $350.00. Enclosed with the check was a note that stated the additional $50.00 was "for all your troubles."

II. Analysis

The Vermont Fair Housing and Public Accommodations Act, 9 V.S.A. §4502(a) provides:

> (a) An owner or operator of a place of public accommodations or an agent or employee of such owner or operator shall not, because of . . . [the] sexual orientation . . . of any person, refuse, withhold from or deny to that person any of the accommodations, advantages, facilities and privileges of the place of public accommodation.

Mr. Berthold alleged that Rock River Cottage and Antiques discriminated against him because of his sexual orientation. Specifically, in April 2012, Mr. Berthold made a reservation and paid a deposit for himself and his partner to rent Rock River Cottage in July 2012. When Mr. Berthold and his partner arrived on July 14, 2012, they found the cottage occupied. Believing that the owner, Elizabeth Dery, had made an error and double-booked the cottage, Mr. Berthold requested that his deposit be returned. After initially refusing to refund the deposit, Ms. Dery subsequently sent a series of offensive e-mails to Mr. Berthold before finally returning his deposit in early August. In essence, Mr. Berthold is stating a claim of disparate treatment in his access to the "accommodations, advantages, facilities and privileges of" Rock River Cottage and Antiques as a place of public accommodation.

A. Prima facie case

Generally, as in employment and school cases, in order to establish a prima facie case of disparate treatment discrimination a Charging Party has to show that he/she/they was/were treated differently than other similarly situated persons outside of his/her/their protected class. However, in developing a prima facie framework for claims of discrimination in places of public accommodations such as in this case, courts such as the U.S. District Court in Maryland in *Callwood v. Dave & Buster's, Inc.*[4] have made a clear distinction between the prima facie framework used in an employment setting (where ongoing relationships are involved) and the framework used for public accommodations cases (where relationships and interactions are much more transient in nature):

> Employment decisions, by and large, are regularized and periodic, are made by supervisory personnel, and by their very nature are almost always documented, and thus preserved for sober examination. Consequently, employment decisions leave behind a paper trail of evidence which to a greater or lesser extent will be available during discovery or otherwise to a discrimination victim. It makes sense, therefore, to insist upon evidence of comparators – similarly situated applicants or employees not in the same protected class – in assessing the strength of the inference of a discriminatory motive which is essential to proof of the claim.
>
> In the [public accommodations] context, in contrast, the interactions of a highly mobile public with [public accommodations staff] are necessarily ad hoc and transient, are almost never with higher-ranking personnel of the enterprise, and are almost never documented in any meaningful sense. Given the ephemeral nature of interpersonal interactions in the public accommodations context, therefore, it may be wholly unrealistic to require a member of the protected class who suffers through what she perceives to be a shockingly discourteous and hostile experience, to identify victims of such

[4] 98 F.Supp.2d 694 (D. Md., 2000); see also *Lizardo v. Denny's Inc.*, 270 F3d 94 (2nd Cir. 2001) (citing *Callwood* with approval); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862 (6th Cir. 2001); *Franek v. Tomahawk Lake Resort*, 754 A.2d 1237 (N.J. Super. 2000).

> outlandishly horrendous service who are not members of the protected class . . .

Callwood v. Dave & Buster's, Inc., 98 F.Supp.2d 694, 706

In accordance with the *Callwood* court's analysis, in order to make out a prima facie case of public accommodations discrimination, Mr. Berthold must show the following:

1. He is a member of a protected class (sexual orientation);
2. He made himself available to receive and pay for services ordinarily provided by the respondent to all members of the public in the manner in which they are ordinarily provided; and
3. He did not enjoy the privileges and benefits of the place of public accommodation under factual circumstances which rationally support an inference of unlawful discrimination in that a) he was deprived of the services while similarly situated persons outside the protected class were not deprived of those services and/or b) he received services in a markedly hostile manner and in a manner which a reasonable person would find objectively unreasonable.

Id.

If Mr. Berthold is able to establish a prima facie case of discrimination, in accordance with the *McDonnell Douglas Corp. v. Green*[5] burden-shifting scheme, Rock River Cottage and Antiques must then present a legitimate non-discriminatory reason for its actions. If Rock River Cottage and Antiques is able to do so, Mr. Berthold must show by a preponderance of the evidence that Rock River Cottage and Antiques' reasons were pretext, and that the actual reasons for its actions were discriminatory.

Mr. Berthold is gay (first element) and submitted a rental inquiry to Ms. Dery on April 25, 2012 through vermontproperty.com, a website that lists rental properties throughout Vermont. As a rental property, Rock River Cottage and Antiques is a place of public accommodation (second element).

[5] 411 U.S. 792 (1973).

Given the *Callwood* analysis in which multiple instances of discriminatory behaviors and evidence of victims outside the protected class are not a required showing to establish a prima facie case in public accommodations cases (3(a) of the prima facie elements), this analysis focuses instead on 3(b) of the prima facie elements. The *Callwood* court stated:

> Factors relevant to the determination of whether conduct is "markedly hostile" are whether the conduct of a merchant or her agents is (1) so profoundly contrary to the manifest financial interests of the merchant and/or her employees; (2) so far outside of widely-accepted business norms; and (3) so arbitrary on its face, that the conduct supports a rational inference of discrimination.

Id. at 708

When Mr. Berthold and his partner arrived in Vermont on July 14, 2012, they found the rental unit occupied. Subsequently, Mr. Berthold contacted Ms. Dery to request a refund of his $300 deposit. What followed was a series of email exchanges between Mr. Berthold and Ms. Dery between July 14th and 16th and another series of emails from Ms. Dery to Mr. Berthold on July 26th. While the emails from Ms. Dery between July 14th and 16th made no overt reference to Mr. Berthold's sexual orientation, it would not be unreasonable to interpret her use of the terms "flaming asshole" and "flaming attitude" as potentially offensive to a gay person given that the adjective "flaming" is commonly used in a pejorative manner to describe gay men. Even if Ms. Dery were given the benefit of the doubt in her use of such language, in the least, her tone in her emails was unpleasant and unprofessional. As Ms. Dodd stated in her July 16th email to Mr. Berthold, Ms. Dery's language was "inflammatory."

At that point in time, had those emails been the only communication between Ms. Dery and Mr. Berthold, this investigation *might* have been hard-pressed to conclude that Mr. Berthold "received services in a markedly

hostile manner and in a manner which a reasonable person would find objectively unreasonable" and which would "rationally support an inference of unlawful discrimination" (third element). However, the subsequent emails from Ms. Dery on July 26th provide clear evidence of hostility directed at Mr. Berthold *specifically related to his sexual orientation*.

Regardless of Ms. Dery's asserted positive association with other gay men in her life, she still engaged in inappropriate, offensive behavior towards Mr. Berthold regarding his sexual orientation and in the context of engaging in transactions related to her rental services as a place of public accommodation. As a business person, even if Ms. Dery does not like a customer for *any* reason, there is no excuse for treating a patron in an unprofessional manner. In this case, Ms. Dery's behavior could easily be interpreted as "profoundly contrary to [her] manifest financial interests, "far outside of widely-accepted business norms," and "arbitrary on its face." Because Ms. Dery specifically referenced Mr. Berthold's sexual orientation, this investigation concludes that Mr. Berthold has established, with a preponderance of evidence, the third element of his prima facie case.

Ms. Dery (Rock River Cottage and Antiques) is not able to provide any legitimate, non-discriminatory reasons for her actions other than intoxication and her distaste for academics and their alleged attitudes. Whether intoxication is a valid excuse for Ms. Dery's behavior is questionable. In criminal cases, when intoxication is offered as a defense for criminal behaviors, juries are asked "to determine the effect of intoxication on a defendant's mental processes and whether his mental capacity was so diminished as to prevent him from forming the requisite intent."[6] In this case, while Ms. Dery might indeed have been intoxicated, she was not so intoxicated to the point of not being able to turn on a computer, type in Mr. Berthold's email address, and write and send 5 consecutive messages to Mr.

[6] *Vermont v. Langdell*, 187 VT 576, 580 (2009).

Berthold about a negative internet review that she wrongly attributed to Mr. Berthold.

In addition, Ms. Dery stated that she has a clear distaste for academics such as Mr. Berthold and is upset by their "elitist" and "snotty" attitudes. While this investigation has no reason to question Ms. Dery's assertions about her feelings about academics, if this were the only reason for her inappropriate behaviors towards Mr. Berthold, then her emails would have contained only disparaging comments about Mr. Berthold *as an academic*. However, this was not the case; Ms. Dery's July 26th emails contained multiple derogatory comments about Mr. Berthold *as a gay man*. Thus, this investigation believes that Mr. Berthold has shown, with a preponderance of evidence, that Ms. Dery's actual reasons for her behavior were discriminatory and therefore Mr. Berthold's claim prevails.

PRELIMINARY RECOMMENDATION: This investigative report makes a preliminary recommendation that the Human Rights Commission find that there are **reasonable grounds** to believe that Rock River Cottage and Antiques discriminated against Mr. Berthold because of his sexual orientation in violation of 9 V.S.A. §4502(a) of the Vermont Fair Housing and Public Accommodation Act.

Tracey Tsugawa, Investigator

Robert Appel, Executive Director

Date 11/2/12

STATE OF VERMONT
HUMAN RIGHTS COMMISSION

Timothy Berthold	)	
	)	
v.	)	HRC Charge No. PA13-0002
	)	
Rock River Cottage and Antiques	)	
	)	

FINAL DETERMINATION

Pursuant to 9 V.S.A. Section 4554, the Vermont Human Rights Commission enters the following Order:

1. The following vote was taken on a motion to find that there are **reasonable grounds** to believe that Rock River Cottage and Antiques, the Respondent, illegally discriminated against Timothy Berthold, the Charging Party, in violation of Vermont's Fair Housing and Public Accommodations Act on the basis of Sexual Orientation.

Mary Marzec-Gerrior, Chair	For ✓	Against __	Absent __	Recused __
Nathan Besio	For ✓	Against __	Absent __	Recused __
Mary Brodsky	For ✓	Against __	Absent __	Recused __
Mercedes Mack	For ✓	Against __	Absent __	Recused __
Donald Vickers	For ✓	Against __	Absent __	Recused __

Entry: ✓ Reasonable Grounds __ Motion failed

Dated at Montpelier, Vermont, this 29th day of November, 2012.

BY: HUMAN RIGHTS COMMISSION

Mary Marzec-Gerrior, Chair

Nathan Besio

Mary Brodsky

Mercedes Mack

Donald Vickers