



GRETCHEN WHITMER  
GOVERNOR

STATE OF MICHIGAN  
MICHIGAN CIVIL RIGHTS COMMISSION  
LANSING

ALMA WHEELER SMITH  
CHAIR

August 12, 2019

The Honorable Gretchen Whitmer  
Governor of Michigan  
P.O. Box 30013  
Lansing, Michigan 48909

Dear Governor Whitmer:

Thank you for your letter of August 2, 2019 regarding the Michigan Civil Rights Commission's decision to retain but discipline the Executive Director of the Department of Civil Rights, Agustin Arbulu. I am responding on behalf of the commission.

The commission was, if possible, more troubled than you by the investigative report and called a special meeting for July 29 to consider our course of action. As you noted in your letter, the investigative report concluded in part:

**[I]t is more likely than not**, that Director Arbulu did make inappropriate, offensive comments regarding women to [complainant] in violation of the work rule. In addition, Director Arbulu **more likely than not** made additional comments to [complainant] regarding his sexual orientation. The comments and communication did interfere with [complainant's] employment and created an offensive work environment for him. [p. 7]

The very next two sentences of that paragraph which were not in your letter concluded:

[Complainant] had a subsequent conversation with Director Arbulu the day after the event and indicated that he felt the issue was resolved. **Therefore, there is a question as to if the conduct was such as to "substantially interfere" with [complainant's] employment.** [p. 7] (emphasis added).

The commission also had a second legal guidance document made available for our consideration in closed session on July 29. At a commissioner's request, an item has been placed

on our August 27 regular meeting agenda to consider waiving attorney-client privilege on that memo from the assistant attorney general who was advising me on the complaint and open/closed meeting procedures. If there is an affirmative vote, that document will be sent to you and disclosed to the public.

Pursuant to the Open Meetings Act (OMA), Section 8(a), upon request by Director Arbulu, the commission moved from the open special meeting to closed session for consideration of the complaint against him. In your letter, you requested that the commission: "...provide me a written and detailed explanation of why the Commission has chosen to retain Director Arbulu as Director of the Michigan Department of Civil Rights..." and "...provide a copy of any written transcripts or audio recordings of the closed session meeting where the Commission considered this matter."

Respectfully, we must decline.

The commission did not make a written transcript or audio recording of the closed session. We did, as required by law, keep minutes of that closed meeting. I am certain the commissioners remember the discussions that occurred during the closed session but I am treating those conversations too as if they are covered by the OMA provisions on closed session meetings. There is an audio recording of the open meeting sessions of the July 29, 2019 Special Meeting and we will provide it upon your request.

The Attorney General's Open Meetings Act Handbook explains the OMA inclusive of cites for case law and attorney general opinions:

Closed session minutes shall only be disclosed if required by a civil action filed under Sections 10, 11, or 13 of the OMA. The board secretary may furnish the minutes of a closed session of the body to a board member. A member's dissemination of closed session minutes to the public, however, is a violation of the OMA and the member risks criminal prosecution and civil penalties. An audiotape of a closed session meeting of a public body is part of the minutes of the session meeting and, thus, must be filed with the clerk of the public body for retention under the OMA. (p. 15) [Footnotes excluded]

As a public body, the commission must have a majority to act. While our determination may not be what any one of us individually desired, we believed it important to be able to act unanimously. We considered several possible options for handling the director's offence including termination, disciplinary action and no action. There were no other complaints in the director's personnel file which suggested this was an isolated incident. However, the director's efforts to minimize his actions and deflect his own personal responsibility for them to others were of serious concern.

On advice of counsel, the sexual harassment complaint before us was not actionable. The commissioners then considered whether the director's behavior was consistent with the standards we have for the leader of the department and, if not, what discipline his departure from those standards warranted.

The commission elected to try a restorative justice discipline model which is precisely in line with the department's mission. In order to inform attitudes and behavior, the department utilizes education and training models to work with public and private bodies to mitigate institutional racism and sexism and systemic bias. Otherwise, the department's enforcement actions would be exclusively punitive rather than constructive. Director Arbulu's immediate actions caused harm to an individual, the department, the commission and himself. To repair that harm, we require the director to take responsibility for his actions and we create a pathway that we believe would redress the victims of his action and reintegrate him into the department as a more complete and understanding leader. If that doesn't work to the commission's satisfaction, the commission can take other action.

We can assure you that the commission will closely monitor the director's growth and development through this corrective strategy. We are acutely aware that the department and commission have been buffeted by this incident and by our decision. The commission will carefully balance the director's continued service against the long-term damage that might be done to department morale and both the department and commission's credibility.

Sincerely,

A handwritten signature in black ink, appearing to read "Alma Wheeler Smith". The signature is fluid and cursive, with a large, sweeping initial "A".

Alma Wheeler Smith  
Chair  
Michigan Civil Rights Commission

Cc: Mark Totten, Chief Legal Counsel, Office of the Governor