MINNESOTA OFFICE OF THE LEGISLATIVE AUDITOR

Department of Human Rights

EXECUTIVE SUMMARY

The Legislature established the Minnesota Department of Human Rights (DHR) in 1967 to enforce the state's laws against illegal discrimination. The department operates two enforcement programs: (1) case processing, which investigates charges filed by individuals who feel they have been the victims of discrimination, and (2) contract compliance, which assures that vendors doing business with the state are in compliance with the affirmative action provisions of state law.

In recent years, critics of DHR have raised questions about the department's ability to fulfill its statutory responsibilities. In response to these complaints, the Legislative Audit Commission asked us to evaluate the performance of the department. Our study addressed the following questions:

- **Are discrimination charges investigated and resolved in a timely fashion?**
- **How well is the contract compliance program working?**
- **How do the department's organization, productivity, and practices compare with human rights agencies in other states?**
- **What can be done to improve the department's performance in order to better achieve the goals of the Human Rights Act?**

In carrying out the study, we interviewed managers and staff at the department and representatives of human rights agencies around the country. We surveyed department employees and reviewed case files. We inquired about general work-related issues and individual cases. We extracted data from the department's case-tracking system and put together statistical information on the department's performance that goes back to mid-1992, the date the present case-tracking system became operational.

CASE PROCESSING

The central function of the Minnesota Department of Human Rights is the enforcement of the Minnesota Human Rights Act through investigation of charges of ille-

gal discrimination. In FY 1993-95, approximately 1,200 to 1,400 charges were filed with the department each year. About 70 percent of the charges filed from July 1992 to June 1995 were employment-related, about 5 percent alleged discrimination in public accommodations, another 5 percent alleged housing discrimination, and about 4 percent charged discrimination in public services.

Discrimination is prohibited on the basis of age, race, color, national origin, religion, creed, sex, disability, marital status, familial status, sexual orientation, and status with respect to public assistance. About 22 percent of charges filed during fiscal years 1993 to 1995 alleged sex discrimination, followed by race (17 percent), disability (17 percent), and age (11 percent). The remaining charges were accounted for by scattered allegations in other categories, and allegations which charged more than one basis of discrimination.

On a basic measure of case processing effectiveness, we found:

- **The department did not close as many cases as it opened in fiscal years 1994 and 1995.**

The department's year-end inventory of open cases is growing.

As the following table shows, the number of cases open at year-end grew from 1,359 in June 1993 to 1,784 in June 1995, an increase of 31 percent in two years. One consequence of a growing inventory of open cases is that the department is unable to investigate and resolve charges in a reasonable amount of time and within the deadline set in statute.

Charges Filed, Cases Closed, and Cases Open at Year-End, FY 1993-95

Fiscal Year	Charges Filed	Cases Closed	Year-End Inventory
1993	1,287	1,373	1,359
1994	1,396	1,089	1,666
1995	1,362	1,244	1,784

Source: Program Evaluation Division analysis of Department of Human Rights case-tracking data.

The Minnesota Human Rights Act states that the department should make a determination within 12 months after a charge is filed "as to whether or not there is probable cause to credit the allegation of unfair discriminatory practices."[1] We examined the length of time the department takes to issue its probable cause determinations and found:

- **Most probable cause determinations took longer than 12 months, the statutory deadline for making a determination.**

Of the 173 cases closed in FY 1993-95 for which the department issued a probable cause determination, and for which data were available, it took DHR more than a

1 *Minn. Stat.* §363.06, Subd. 4.

year to reach a determination in 66 percent of the cases.[2] In about 21 percent of the cases it took the department more than two years to find probable cause. To comply with the deadline, cases that do not result in a probable cause determination should be closed within a year as well.

The department argues that the statutory deadline is advisory rather than mandatory; however, the Minnesota Court of Appeals recently overturned a major employment discrimination case on the grounds that the department took nearly three years to make a determination of probable cause. This case is currently under review by the Minnesota Supreme Court, which may clarify the legal meaning of the statutory deadline.[3]

The department must close a case or make a probable cause determination within a year of when the case was filed.

The department closed a total of 3,706 cases during fiscal years 1993 through 1995. We found that it took the department an average of 427 days to close these cases. Looking at the data another way:

- **About 45 percent of cases closed in FY 1993-95 exceeded the 12-month deadline.**

About 33 percent of the cases closed took between one and two years; 9 percent took between two and three years; and 3 percent took more than three years.

We examined the timeliness with which the department handled different types of case closures and found that it took the department an average of 426 days to dismiss a large category of weak cases accounting for about two-thirds of all closures. As discussed below, these cases, classified as DWR, meaning "does not warrant further use of department resources," typically lacked an effective rebuttal from the charging party. On average, DWR cases spent about 100 of the 426 days until closure awaiting attention from a supervisor. After an enforcement officer has enough information about a case to recommend a particular type of closure, the case must go through supervisory review. This review typically requires only a few hours of work.

However, this statutory deadline is regularly exceeded.

Case Outcomes

We also looked at how the department closed the cases it investigated in the last three years. There are many different types of case closures. First, the person bringing the charge, known as the charging party, can withdraw the case in order to take it to court, or because the parties to the case have privately settled their dispute. Or, the charging party can decide that pursuing the case is not worth the time and trouble. Second, the department can dismiss a case because a jurisdictional problem is discovered, because the charging party fails to cooperate, or because the case, upon preliminary investigation, lacks evidence. (Although a charging party may *file* a case with only an allegation of unfair discriminatory

2 For the cases closed in FY1993-95, the department issued 271 probable cause determinations; however, for 98 of those cases, the case-tracking system database did not contain information on the original determination date; therefore, these cases are not included in this analysis.

3 State of Minnesota vs. RSJ Inc., d/b/a Jose's American Bar & Grill and Joseph Schaefer. Appellate Court Case No. C1-94-2365.

practice, in order to reach a determination of probable cause, the charging party, with the department's help, must eventually present evidence that supports the discrimination claim and outweighs evidence to the contrary.) Third, the department can assist the charging party and respondent to reach a settlement in the case. Fourth, a case can end with a no probable cause determination if the department completes a full investigation but finds insufficient evidence to support the charge. Finally, the department can issue a probable cause determination in a case, after which the case can be settled, withdrawn, dismissed, or heard by an administrative law judge.

Most cases are dismissed or withdrawn.

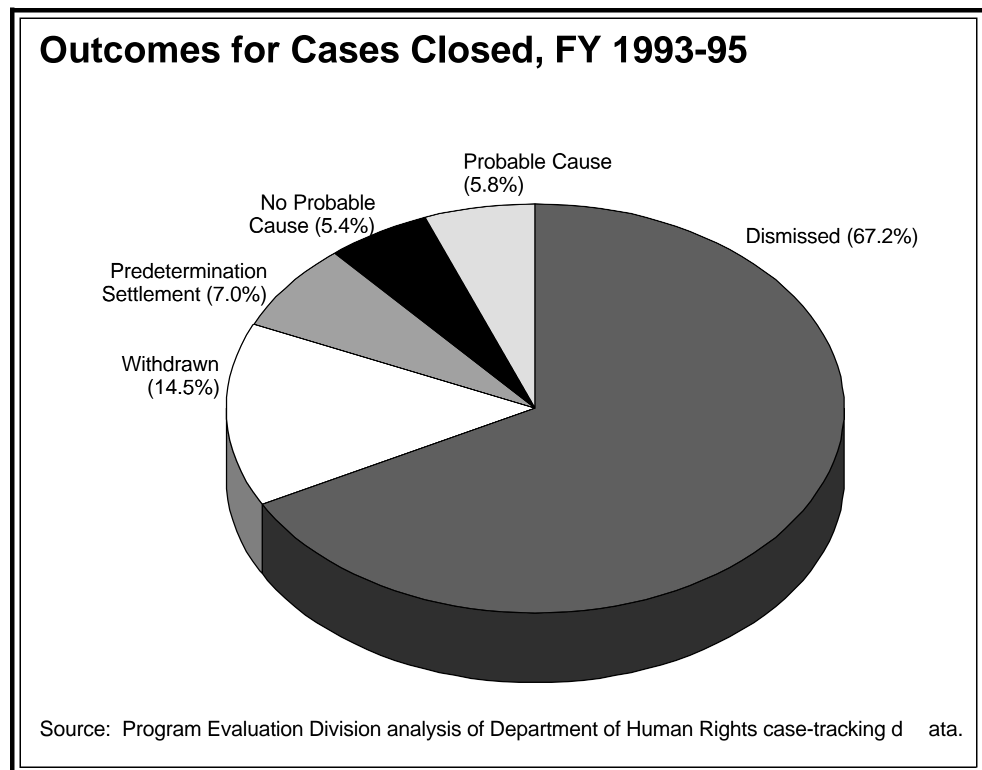
Considering cases closed in fiscal years 1993 through 1995, our data show:

- **Most cases closed in recent years were dismissed or withdrawn;**
- **Relatively few cases resulted in a settlement in favor of the person who filed the charge; and**
- **Even fewer cases resulted in a probable cause determination and subsequent litigation.**

About 67 percent of the cases were dismissed by the department. In almost all of these cases, either the charging party failed to rebut the non-discriminatory explanation provided by the respondent, or the case simply lacked evidence to sustain the charge. The charging party bears the ultimate burden of proof in cases filed with the department, just as in any civil action.

About 6 percent of cases closed had probable cause outcomes.

Outcomes for Cases Closed, FY 1993-95



Source: Program Evaluation Division analysis of Department of Human Rights case-tracking data.

About 6 percent of the cases were withdrawn by the charging party to take the case to court, and an additional 9 percent were withdrawn for other reasons. Roughly 5 percent of the cases were no probable cause determinations, and about 7 percent were settled prior to a determination. Thus, only 6 percent of the cases closed in FY 1993-95 had probable cause outcomes.

In conclusion:

- **Over three-quarters of cases closed did not sustain the original charge of discrimination.**

The data show that sufficient evidence is not found to support most cases. However, the department took a long time to identify the cases that it could dismiss. This raises the question of whether the department should more aggressively screen cases early in the process and focus its resources on cases with greater potential. We discuss our ideas for increasing the department's effectiveness later in this summary.

CONTRACT COMPLIANCE

The Human Rights Act requires any business with more than 20 full-time employees that wishes to qualify for a state contract in excess of $50,000 to be certified by the Department of Human Rights. The general purpose of this program is "to increase employment opportunities for women, minorities, and disabled individuals by requiring contractors to adopt and implement affirmative action programs approved by the commissioner."[4] Possession of a certificate affirms that a contractor is in compliance with the statutory provisions regarding affirmative action.

Businesses wishing to contract with the state must be certified by DHR as having an approved affirmative action plan.

The contract compliance unit of DHR reviews affirmative action plans submitted by vendors interested in doing business with the state. In order to meet department standards, a plan must contain 11 specific elements, including a clear statement of the business' affirmative action policy, procedures for disseminating that policy, three types of statistical analyses, and goals and timetables for taking corrective action.

We examined data from the contract compliance unit and found that:

- **The number of certificates issued annually has increased since the affirmative action plan reviews began in 1985.**

In fiscal year 1995, the department issued certificates, which are valid for two years, to 1,310 businesses, up from the 295 certificates the department issued in 1986 and the 864 granted in 1991. As of July 1995, there were more than 2,400 businesses certified to bid for contracts to do business with the state of Minnesota.

4 *Minn. Rules* 5000.3410, Subd. 1.

According to state rules, the department has 30 days after it receives a plan to issue a certificate, or 15 days to return the plan with a notice of deficiencies. A business whose plan is rejected by the department may revise its plan and resubmit it for review. DHR then has 15 days to consider the revised submission.

We calculated the length of time it took for the department to respond to affirmative action plans and found that:

- **The department issued certificates of compliance in a timely manner.**

It took the department an average of three to nine days to issue a certificate or send a deficiency letter, depending on the type of plan received and the type of notice sent. The department sent out more than 95 percent of certifications in a timely manner, and 86 percent of deficiency letters within the required 15 days.

Minnesota law forbids the award of state contracts to vendors who are not either certified by DHR or exempt from certification requirements.[5] The department circulates a bimonthly list of contractors and their certification status to state agencies, who shoulder the responsibility for ensuring that uncertified vendors do not receive contracts. The Department of Human Rights does not routinely check lists of businesses who are awarded contracts to ensure that all successful bidders are certified.

We tested a 20 percent sample of contracts awarded in fiscal year 1995 to determine whether state agencies were adhering to the law. We looked at four types of contracts: commodities contracts; professional/technical contracts; and construction contracts awarded by the Department of Administration and the Minnesota Department of Transportation. Our test demonstrated that:

- **In fiscal year 1995, about 5 percent of the state contracts over $50,000 were awarded by state agencies to uncertified vendors.**

We found only a few state contractors without a required certificate.

Our test results signify marked improvement over the results of a similar test we conducted in 1981, during an earlier evaluation of the department. At that time, depending on the type of contract, we found that between 55 and 90 percent of tested contracts had been awarded to uncertified vendors. While improvements still need to be made, we conclude that state agencies are following the contract compliance provisions of the Human Rights Act much more closely than they were 15 years ago.

According to statute, DHR is expected not only to review affirmative action plans, but also monitor the efforts of businesses to implement those plans. The law gives the Commissioner of Human Rights the authority to suspend or revoke a certificate of compliance if the holder has not made a good faith effort to implement its affirmative action plan.[6] The administrative rules outline several ways that the department can monitor those efforts. Among other things, the contract compliance

5 *Minn. Stat.* §363.073.

6 *Minn. Stat.* §363.073, Subd. 2.

unit can rely on: (1) updated information submitted semiannually by vendors; (2) on-site reviews, when department staff visit the business location to evaluate aspects of the business that relate to the affirmative action plan; and (3) information from the case processing unit about businesses that have been found guilty of illegal discrimination.

We found that:

- **With recent cutbacks in the contract compliance unit staff, the department has essentially ceased to monitor the efforts of businesses to implement their affirmative action plans.**

Citing scarcity of resources, compliance unit staff told us that the department is now unable to review the contents of the semiannual compliance reports; staff merely record whether or not a contractor has submitted a report. Similarly, we learned that the unit does not have plans to conduct any on-site reviews of businesses in fiscal year 1996. In the past four years, DHR conducted an average of 19 on-site visits annually. Finally, compliance unit staff told us that despite past requests for information, DHR case processing units have not provided information that would enable them to identify businesses that have illegally discriminated against their employees.

This decline in oversight may be attributable to a drop in the amount of resources available to the contract compliance unit. The unit presently employs seven full-time personnel, down from eleven positions in May 1994. Since that time, the unit has lost more than one-third of its employees, either through attrition or transfer of staff to other department units.

We think it is important for the department to have an adequate capacity to measure whether businesses are making good faith efforts to implement their plans. The department does not need to be able to monitor every certified vendor, but it should be able to identify egregious violations of the Human Rights Act's contract compliance provisions and take appropriate action.

The department needs to more closely monitor the implementation of affirmative action plans.

Administrative rule states that the purpose of the contract compliance program is to increase employment opportunities for women, minorities, and disabled persons.[7] Given this goal, we recommend:

- **The Legislature should consider increasing the contract size and employment thresholds.**

The Legislature set the minimum contract amount at $50,000 in 1981 and has not subsequently raised it, even to adjust for inflation. (The inflation rate since 1981 has been about 73 percent.) We think the Legislature should consider raising the threshold to $100,000, which would reduce the number of contracts to which certification requirements apply by about 30 percent, based on statistics from the sample of contracts we tested. Similarly, raising the minimum number of employees that businesses must have before they are subject to the affirmative action plan

7 *Minn. Rules* 5000.3410, Subp. 1.

requirement would allow the department to focus its resources on larger employers. Both of these actions would free resources for the contract compliance program to use toward monitoring implementation of affirmative action plans.

ANALYSIS OF CASE PROCESSING PRODUCTIVITY

We sought to learn what factors account for delays in case processing. One problem is that caseloads carried by individual enforcement officers are too large to manage effectively. By caseloads, we mean the number of open cases assigned to each enforcement officer at any given time. Full-time enforcement officers were each responsible for 78 cases, on average, in June 1995. (The average was over 100 cases until the creation of a mediation program resulted in a one-time reduction in the caseload size.)

The magnitude of the caseload means that enforcement officers cannot respond promptly to developments in many cases. It also means that a lot of time is spent taking phone calls from charging parties and respondents who wonder what is happening with their case, and it means that investigators have to spend time reacquainting themselves with cases that they have not worked on for a while. As cases sit idle, their quality tends to deteriorate because witnesses become harder to locate and potential testimony fades from witnesses' memories. Both the charging party and respondent are left in a state of uncertainty, and may experience continuing disruption in their personal and professional lives.

We recommend:

- **The department should reduce caseloads permanently to 40 or 50 cases per enforcement officer.**

Caseloads carried by individual enforcement officers are too large to manage efficiently.

Our report discusses several ways for the department to do this, including internal reallocation of resources, better training, better supervision and technical leadership, and, to the extent necessary, the establishment of priorities so that high-potential cases are promptly investigated and low-potential cases are promptly screened out or dismissed.

We reviewed investigator production requirements at human rights agencies around the country. Like many agencies, DHR expects enforcement officers to close a specific number of cases each year. We learned:

- **DHR's production standard of 75 cases per year for fully trained, full-time enforcement officers is comparable to standards around the country.**

While it is difficult to make exact comparisons among the states because of differences in the scope of enforcement officers' responsibilities, over half the states

that responded to our inquiries had a standard that equaled or exceeded Minnesota's requirement of 75 cases per year.

The problem in Minnesota is two-fold:

Minnesota's investigator production standard is in line with the standards in other states.

- **Only 9 of 15 enforcement officers were expected to produce at a rate of 75 cases per year in fiscal year 1995, and only 8 of the 9 met that standard.**

- **Even if all enforcement officers had met the standard, the department still would not have been able to close the 1,200 to 1,400 cases filed in each of the last three years.**

It is essential that all enforcement officers (EOs) meet the production standard, and it is reasonable to expect this, since the rate is close to the department's actual historic level of productivity. It is also essential for the department to close approximately as many cases as are filed each year, and meet the statutory 12-month deadline for closing cases or making determinations. The department is currently training four new investigators who will join the permanent staff in March 1996. The addition of four more EOs will increase the department's capacity, enabling it to close 1,300 to 1,400 cases annually. If filings are higher than this level, there are other steps the department can and should take.

The department can achieve at least some improvement in production through better administrative and technical leadership and supervision, more training relating to case law and investigative methods, and an information system that better serves the needs of management and enforcement officers. The current case-tracking system does not readily allow department management to monitor the inventory of open cases, although it contains the basic data necessary for assessing case processing performance. The department did not present much data in its 1993 and 1994 performance reports, and was unable to provide the same kinds of information it produced in 1981 and 1983 in response to requests from our office. It is likely that improved effectiveness will be achieved over time by improvement in these areas through steady attention and effort.

Strategies for Improving Performance

We conclude with a discussion of three additional issues that we emphasize because of their strategic importance and the fact that the Legislature as well as the department will be involved in decisions relating to each.

- **Legislators need to examine the department's budget and consider whether the performance problems we have observed should be addressed through a budget increase.**

- **Department managers as well as legislators need to decide how the department should set priorities in the face of limited resources.**

- **Legislators need to consider whether to locate the department in a different organization or modify its structure.**

The department should close as many cases as are opened each year by shifting resources to case processing and by screening out weak cases more quickly and carefully.

We think that the department should be able to handle the current rate of case filings within its current budget. The number of charges filed has not been unusually high in recent years. A temporary budget increase could be contemplated to solve specific problems such as clearing the present inventory of open cases, but temporary increases have failed to produce an enduring solution to case backlogs in the past. We would not like to see budget increases substitute for essential policy and administrative changes. In our view, the key to solving the problem is for the department to commit itself to the following rule:

- **The department should close at least as many cases as are opened each year.**

If the number of cases filed is below the capacity of the department to give each case full treatment, then it may not be necessary to prioritize cases. Even in this unlikely event, prioritization could still be advantageous. The department could invest in community outreach or education activities that might result in the filing of more or better charges. And the department could put resources into investigating those charges which have the greatest potential for affecting compliance with the Minnesota Human Rights Act.

The law currently gives the commissioner authority to "adopt policies to determine *which charges are processed* and the *order in which charges are processed.*"[8] However, the Legislature may want to emphasize, clarify, or change this authority. Whatever the department's budget, we recommend that:

- **The department should identify high-potential cases and dismiss or otherwise dispose of low-potential cases if resources do not allow full treatment of all cases.**

During the 1995 session, legislators raised a question about the organization of the Minnesota Department of Human Rights. Some asked if the department should be located within the Office of the Attorney General. This issue was also debated in the mid-1980s during another time when the Legislature was concerned about the department's performance. It is possible that the organization of DHR as a separate department of state government contributes to its operational problems.

We collected information on how human rights agencies are organized around the country and found:

- **DHR is organized differently than the civil rights enforcement agencies in most other states.**

Forty-seven of the 50 states have a unit within state government that investigates claims of illegal discrimination, and in at least 37 of those 47 states the agency is governed by a part-time human rights commission or board. This organizational

8 Minn. Stat. §363.06 Subd. 4 (7). (Emphasis added.)

arrangement carries advantages and disadvantages, but it does offer an opportunity to forge ties with community groups most interested in the department's programs, provide a forum for debating policy and priorities, and provide an organizational location to hear appeals that is independent of the staff who were involved in the initial determination. It may be that a board or commission could provide the Minnesota department with the ongoing oversight that it has not received from either the Legislature or executive branch because, as state departments go, it is a small agency with a small budget.

In most states, the human rights agency is governed by a part-time human rights commission or board.

We also studied the role of state attorneys general in enforcing civil rights statutes and found that:

- **Only two states, Arizona and Vermont, rely on their attorney general to investigate discrimination charges.**

We also found that in at least 20 states, the civil rights enforcement agency is affiliated with a larger agency, sometimes for administrative purposes only.

In our view:

- **The Legislature should consider whether the Minnesota Department of Human Rights could benefit from the addition of a part-time governing board or affiliation with a larger state agency.**

A larger agency could provide DHR with administrative resources in areas like computer systems, budgeting, and personnel administration.