

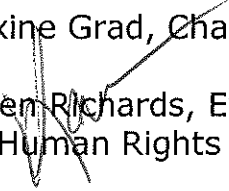


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MEMO

TO: Maxine Grad, Chair- House Judiciary

FROM:  Karen Richards, Executive Director
VT Human Rights Commission

RE: Fair & Impartial Policing (FIP)

DATE: February 23, 2017

This memo is intended to provide some additional information to the House Judiciary Committee on some of the issues related to FIP.

There are a number of issues that could be clarified with regard to the legislation passed in 2016 (Act 147). As you are aware, the 2016 amendments to 23 V.S.A. §2366(a) require that all agencies adopt by July 1, 2016 "a fair and impartial policing policy that includes, at a minimum, the elements of the Criminal Justice Training Council (VCJTC) model policy." This was a change from the prior iteration in which agencies had to adopt a policy containing the elements of either the Vermont State Police (VSP) policy or the model policy issued by the Office of the Attorney General (AGO). The change to a single model policy was inserted by the Senate Judiciary Committee so that there would be a single model policy that all agencies had to follow thereby ensuring that people would be treated the same way regardless of where they encountered law enforcement in Vermont.

Act 147 also changed subsection (b) to require that any agency that failed to adopt the model policy would be held to have done so. Prior to that, they were held to have adopted the AGO policy.

A model policy was created and approved by the VCJTC on June 14, 2016. The model contains "essential" elements and "non-essential" elements. The statute just refers to "elements." The essential and non-essential elements formulation was proposed by the VCJTC to account for the concerns of some

law enforcement agencies. Those agencies were concerned that the policy's requirements of noninvolvement with immigration enforcement might be viewed as so-called "sanctuary policies" and put federal funds at risk.^{1 2} The compromise position that the VCJTC chose broke the policy out into two categories, "essential" and "non-essential" elements. Thus, while an agency is required to have a policy that includes all of the "essential" elements, it can choose to adopt some or none of the "non-essential" elements and arguably still be in compliance with the statutory requirements. All of the non-essential elements are related to noninvolvement with immigration enforcement and ensuring protection of constitutional rights.

The Attorney General's Immigration Task Force is currently working on a draft policy and legal guidance for law enforcement and municipalities regarding their role in immigration enforcement. The model FIP policy is an essential part of Vermont's commitment to protecting the rights of all Vermont residents and ensuring public safety. The non-essential elements are considered best practices for preventing local law enforcement's participation in and use of state and local resources in the enforcement of federal immigration laws.

Given this and the fact that the bi-furcation of the elements has created a patchwork of policies across the state---failing to meet the Senate Judiciary's intention of having a single policy that covers anyone encountering law enforcement anywhere in the State--- it would make sense to have the VCJTC model policy be the entire policy, that is include both the essential and non-essential elements. Otherwise, it places our immigrant communities in the untenable position of being protected in some parts of Vermont and not protected in others. Individuals may not have either the knowledge or the ability to avoid those jurisdictions that offer fewer protections.

¹ Most analyses, including that of the VCJTC's attorney and the Vermont Attorney General's Office have concluded that so long as a given policy does not specifically prohibit officials or entities from contacting the federal government concerning immigration status or citizenship, as prohibited under 8 U.S.C. § 1373, there would not be a loss of funding. It must also be noted that § 1373 does not include any funding mechanism, so any potential punishment from the federal government could be challenged under the Tenth Amendment to the U.S. Constitution.

² S.79, the Governor's proposed bill currently being voted on by the Vermont Senate, also addresses some of the concerns of law enforcement concerning so-called "sanctuary policies" because the legislation states that if any provisions of a Vermont policy conflict with federal law, specifically 8 U.S.C. §1373, they are abolished. The bill also affirmatively states that nothing is intended to prohibit officials or entities from reporting immigration status to federal authorities.

In addition to having inconsistency about policies containing essential and non-essential elements, other issues have arisen. Some agencies have decided that a policy in existence prior to the July 1, 2016 deadline conforms to the essential elements and therefore have chosen not to adopt the specific model policy language. Other agencies have decided to change the model policy's language as they see fit. Both sets of policies may or may not conform to the essential elements but there is no entity charged with making this determination. This renders the default policy protection intended by 20 V.S.A. § 2366(b) difficult, if not impossible, to enforce.

Finally, there is no provision in the statute for how the model policy would be reviewed or revised in the future. As we know, policies are living documents that may need to be modified to reflect changed circumstances.

Based on this, the HRC recommends the following with regard to FIP.

- 1) Provide for a single model policy that is adopted by all agencies and contains both the essential and non-essential elements of the current model policy.
- 2) Give the Attorney General's Office the authority to determine whether a law enforcement agency's current policy complies with the requirements of 20 V.S.A. §2366(a) and require that any new or modified FIP policy be submitted to the Attorney General for review within a certain time period thereafter. Any policy deemed not in compliance would default to the model policy under (b).
- 3) Provide a mechanism for the VCJTA to review the model policy every two years to determine whether modifications are necessary.