



July 29, 2013

The Honorable Dwight C. Jones, Mayor
The Honorable Charles R. Samuels, President, and Members
of the Richmond City Council
900 E. Broad Street, Suites 200 and 201
Richmond, VA 23219

Dear Mayor Jones, President Samuels and Council Members:

AMERICAN CIVIL
LIBERTIES UNION OF
VIRGINIA
701 E. FRANKLIN ST.
SUITE 1412
RICHMOND, VA 23219
T/804.644.8080
WWW.ACLUVA.ORG

I am writing you concerning the City Council's adoption of Ordinance No. 2013-10-98 (Personnel Rules for Classified Service) on May 28, 2013 (effective immediately) ("the Ordinance") that amended the City's personnel rules dealing with discrimination on the basis of sexual orientation and gender identity. For the reasons set forth below, the ACLU of Virginia asks that you work together to propose and pass an amendment to the Personnel Rules to delete language added in May (referenced below) that calls into question the City's commitment to equal opportunity for lesbian, gay, bisexual and transgender (LGBT) workers and to ensure that all City employees are protected from discrimination.

The Ordinance adopted by consent in May amended the equal employment opportunity provision in the Personnel Manual that prohibits discrimination on the basis of sexual orientation by inserting the following modifier -- "to the extent now or hereafter permitted by law." The amended language undercuts the non-discrimination protections included in the Executive Directive issued by the Mayor on April 15, 2011 by introducing uncertainty as to whether discrimination based on sexual orientation is or is not a violation of the City's non-discrimination policy. The effect of the change made by the Ordinance is to deprive City employees of the protection that the Executive Directive offered and to chip away at the strong non-discrimination policy that previously existed.

The Mayor and the City Council possess the inherent authority, responsibility and power to protect the constitutional rights of the City's residents and employees, and you have a legal obligation to do so faithfully and impartially---including protecting employees from discrimination on the basis of sexual orientation and gender identity. The Mayor's Executive Directive (like a similar Executive Directive issued by Governor Bob McDonnell) expressly states that discrimination on the basis of sexual orientation or gender identity is unconstitutional and, accordingly, prohibited in the City of Richmond. By passing legislation undermining that objective, members of the City Council acted contrary to their sworn duty to uphold the Constitution and laws of the United States as well as the Constitution and laws of Virginia.

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As amended, the EEO provision included in the amended Personnel Manual leaves the City of Richmond in a precarious position. The Mayor and the City Council are bound by the United States Constitution not to discriminate on the basis of sexual orientation.¹ The amended ordinance may give supervisors and department heads the impression that discrimination based on sexual orientation is currently permitted by law, and therefore, not prohibited. If city officials act on that misimpression, the City will be vulnerable to constitutional lawsuits. Thus, contrary to advice you may have received,² the nondiscrimination policy as set forth in the Executive Directive is not only permissible, it is essential to ensure that the City adheres to its constitutional obligations.

Further, the amended provision in the Personnel Manual fails to take into account evolving federal law under Title VII of the Civil Rights Act of 1964 with which the City must comply as an employer. The EEOC has issued an interpretation of Title VII that discrimination in the workplace against lesbian, gay, bisexual or transgender (LGBT) employees may constitute sex discrimination based on gender stereotyping.³ As the law continues to develop and protect LGBT people from workplace discrimination, it is imperative that the City's policies explicitly outlaw workplace discrimination against LGBT employees and provide clear rules about unlawful conduct.

¹ *Romer v. Evans*, 517 U.S. 620 (1996) (discriminatory laws based on sheer animus toward lesbian and gay persons violate the Equal Protection Clause of the Fourteenth Amendment). *Lawrence v. Texas*, 539 U.S. 558 (2003) (consensual, adult sexual relationships are protected by the Fourteenth Amendment, notwithstanding societal views regarding the morality of such relationships); *Quinn v. Nassau County Police Dept.*, 53 F. Supp. 2d 347 (E.D.N.Y. 1999) (harassment of police officer because of his sexual orientation violated equal protection clause); *Weaver v. Nebo School Dist.*, 29 F. Supp. 2d 1279 (D. Ut. 1998) (violated equal protection clause to terminate high school teacher's position as volleyball coach because of her sexual orientation); *Miguel v. Davis*, 51 P.3d 89 (Wash. Ct. App. 2002) (state employer's differential treatment of employees because of sexual orientation it violates right to equal protection); *Glover v. Williamsburg Local School Dist. Bd. Of Educ.*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998) (firing teacher because of his sexual orientation violates equal protection clause).

² We understand that the Mayor and Council may have been advised that the new language included in the Personnel Manual was needed to allow the City Attorney to sign off as to "form and legality" on the proposed ordinance before it was brought before Council. We also understand that the City Attorney's view is that the Mayor and Council are without authority to protect LGBT employees from workplace discrimination because the General Assembly has not yet included sexual orientation or gender identity "as a protected class" in the Virginia Human Rights law or other sections of the Code of Virginia. We believe that the City Attorney's advice is neither complete nor is his sign off required by the City Charter, ordinance or general law in order for the City Council to take legislative action to approve a policy prohibiting City employees from engaging in unconstitutional discrimination against LGBT workers. The Virginia Human Rights Act sets out the public policy of Virginia in Section 2.2-3900 but does not define or limit the authority of the Mayor and Council to act to implement the United States Constitution and to protect employees from unconstitutional discrimination or to avoid potential liability under Title VII of the Civil Rights Act.

³ The EEOC has held that discrimination against an individual because that person is transgender (also known as gender identity discrimination) is discrimination because of sex and therefore is covered under Title VII of the Civil Rights Act of 1964. See *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012), <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>. The Commission has also found that claims by lesbian, gay, and bisexual individuals alleging sex-stereotyping state a sex discrimination claim under Title VII. See *Veretto v. U.S. Postal Service*, EEOC Appeal No. 0120110873 (July 1, 2011); *Castello v. U.S. Postal Service*, EEOC Request No. 0520110649 (Dec. 20, 2011), <http://www.eeoc.gov/decisions/0520110649.txt>.

In addition to the City's legal obligation to prohibit discrimination on the basis of sexual orientation and gender identity, protecting LGBT workers from discrimination because of who they are is simply good public policy. Most of the major private employers in the region and Richmond based companies already have policies protecting LGBT employees from discrimination.⁴ They recognize that there are serious economic harms that would flow from the City's refusal to protect LGBT workers from discrimination.⁵ If the amended Personnel Policy remains in effect, leaving LGBT workers unclear about the City's commitment to fair workplace policies, the City risks losing current and prospective employees for fear that such discrimination is tolerated. Further, many businesses and individuals avoid moving to communities that are seen as hostile to sexual minorities, particularly those individuals in the creative class and millennials⁶ whom the City is working hard to attract. The City of Richmond cannot afford the perception that discrimination against LGBT employees is permitted if it wishes to be an employer of choice and a first class city.

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Please work together to offer and pass an amendment to the Personnel Manual that deletes the newly added parenthetical language and ensures that all City employees are fully protected from discrimination on the basis of sexual orientation and gender identity.

The ACLU of Virginia is a strong advocate for anti-discrimination protections for LGBT people in all aspects of society including employment, housing, businesses, and public places and brings impact litigation in support of that advocacy where appropriate. To that end, the ACLU of Virginia stands ready, if necessary and appropriate, to represent LGBT City employees subjected to unlawful workplace discrimination based on sexual orientation or gender identity.

Should you have any questions, please do not hesitate to call me at (804) 644-8080. Thank you for your attention to this matter.

Very truly yours,



Claire Guthrie Gastanaga
Executive Director

⁴ E.g., Ahold (Martin's), Altria, Bank of America, BonSecours, Capital One, CarMax, Dominion, Federal Reserve Bank, Food Lion, Genworth, Home Depot, Hunton and Williams, Kroger's, Lowe's, McGuireWoods, Mead Westvaco, Northrup Grumman, Target, UPS, Verizon, Wal-Mart, and WilliamsMullen.

⁵ Discrimination and Dollars. Center for American Progress

http://www.americanprogress.org/issues/2012/03/pdf/lgbt_biz_discrimination_infographic.pdf

⁶ New Progressive America: The Millennial Generation. Center for American Progress

http://www.americanprogress.org/wp-content/uploads/issues/2009/05/pdf/millennial_generation.pdf

Brad Braberg, Attracting the Talent,

http://www.renaissanceatbristol.com/news/upload/72_attracting-the-talent.pdf