Advisory Committee
Ad Hoc Subcommittee
Report on Warrant Article 24 – Citizen Complaint Procedure
October 22, 2019

The Ad Hoc Subcommittee of the Advisory Committee held a public hearing on Warrant Article 24 on Thursday, Oct. 10, beginning at 6 pm in Room 103 of Town Hall.

In attendance were Arthur Conquest, TMM-6, sponsor of WA 24; Ruthann Sneider, TMM-6; Ann Braga, Director of Human Resources; John Bowman, Bicycle Advisory Committee; Bobbie Knable, TMM-10 and Advisory Committee; Carol Caro, TMM-10 and Advisory Committee; Saralynn Allaire, TMM-16 and chair, Commission on Disability; Larry Onie; Deborah Brown, TMM-1; Bob Miller, TMM-8; Dennis Doughty, TMM-3 and Advisory Committee. Attending for the subcommittee were John VanScoyoc, chair; Janet Gelbart; Claire Stampfer; David-Marc Goldstein; and Neil Gordon.

BACKGROUND

Article 24 proposes to amend the General By-law establishing the Commission for Diversity, Inclusion and Community Relations (CDICR) and the Office of Diversity, Inclusion and Community Relations (ODICR).

The stated purpose of Article 24 is "to provide for a citizen complaint procedure."

Article 24 makes changes in the current By-law with the effect of adding investigatory powers to the CDICR:

Currently:
The Commission is empowered to review and summarize complaints "without investigating or making determinations of fact, or drawing any legal conclusions, concerning allegations of discrimination or bias against a member of a Brookline Protected Class, by any Town agency, Town official or employee." (A separate section applies to School employees and referral of complaints to the Superintendent and/or School Committee.)

As changed under Article 24:
In cases where complaints of discrimination are made to the Commission, the Article assigns these powers to the Commission: "the Commission shall (1) investigate the complaint by interviewing the complainant and any witnesses, (2) prepare written findings, and (3) recommend appropriate action to the Select Board, Library Trustees or Moderator as appropriate within 90 days of receipt of the complaint." (A separate section applies to investigation of complaints against School employees and "recommend appropriate action" to the Superintendent and/or School Committee.)

This section of the ODICR by-law is deleted (no replacement language offered):
(vii) Receive Other Complaints:; according to procedures developed by the Commission and as approved by the Select Board, and initiate preliminary review of the facts, without drawing any legal conclusions, from any person who comes in contact with the Town, concerning allegations of discrimination or bias against a member of a Brookline Protected Class. The Commission shall also have the authority, in its discretion, to take one or more of the following actions: (1) Provide the complainant with information about complainant’s options to bring proceedings at the Massachusetts Commission Against Discrimination or other appropriate federal, state, or local agency; (2) Refer the complainant and any other parties to the complaint to the CDO acting as ombudsperson or to a local or regional mediation service; (3) Present any results of preliminary review of the alleged facts to the Town Administrator and/or the Select Board, in an appropriate case, for action;

DISCUSSION

1. Testimony given during the public hearing:

Arthur Conquest (sponsor of WA 24): “existing (complaint) procedures of the Diversity, Inclusion and Community Relations Commission do not go far enough.... DICRC is an inappropriate model.” As an example of a “do-nothing” response by DICRC, Conquest cited “disgraceful treatment of a Native American woman and her daughter” at an Advisory Committee hearing… “I wrote it up, went to the DICRC to file a complaint … I believe their goal was to brush the incident under the rug.” Mr. Conquest cited DICRC procedures for referring complaints to the Massachusetts Commission Against Discrimination (MCAD), while denouncing the MCAD as “a fraud when it comes to complaints filed against Brookline.” Conquest also cited incidents involving treatment of himself by a poll watcher on election day and, recently, staff at the 2 Clark Rd. school, as offenses which, in his view, were not investigated satisfactorily by DICRC.

Deborah Brown: “There’s something structurally wrong with the way we handle discrimination complaints... a formal informality that means nothing truly happens... How many millions are we paying because of discrimination complaints? And we’re not even getting at those people who just leave... people who just keep their heads down... There’s something fundamentally wrong with the way we are processing and analyzing these complaints.”

Saralynn Allaire: Handling of ADA complaints is “working well” and “might serve as a model” for handling of other categories of complaint... “A person with a complaint takes it to the ADA coordinator” who sometimes brings it to DICRC … “they work together to come up with a solution.”

Larry Onie. “We have a serious problem with the MCAD... The MCAD is missing in action.”
Ann Braga, Director of Human Resources. Raised concerns about Article 24 “bringing this kind of investigatory power” to DICRC because it would impose “individual liability” on members of the DICRC. She also cited the potential “chilling effect” of a process that requires bringing complaints to a public body.

2. Concerns raised by members of the Ad Hoc Subcommittee

Neil Gordon. Would Article 24 require that the DICRC “be both advocate and finder of fact?” Another concern: “staff resources now are less than needed to accomplish existing mandates. If this is added to DICRC, they don’t have resources to do it, nor do they have the skills.”

Janet Gebart. “My concern is you're placing a solution in a body of volunteers with limited time, who may or may not have the skills.”

Claire Stampfer: “Can independent investigation be done by anyone who's an employee of the Town. Is what's being sought here someone who's an outside counsel?”

3. Concerns raised (via email) by Police Department, Fire Department, Lloyd Gellinean (Director of the Office of Diversity, Inclusion, and Human Relations), and Kelly Race (DICRC)

● (BFD) “I can appreciate the intent of the article and I am in no way opposed to any impartial transparency or scrutiny of our department and its members. There are however certain rights, protections and processes afforded to our membership through both collective bargaining and Civil Service as well as other employment related law that would likely supercede any additional process the CDICR undertakes. Respectfully submitted, John F. Sullivan, Fire Chief Emergency Management Director”

● (BPD) “I have more questions than answers for the Ad-hoc committee. There are already established law, rules, regulations and procedures that have been approved by the Select Board (BOS) which is the duly Chief Elected Executive Officers of the Town. We have a very extensive complaint policy that is currently been the subject of a review and modification by two esteemed citizens (Bobbie Knable, Kelly Race). This has been going on for two years. There is also established US Supreme Court case law, NLRB v. J. Weingarten, Inc. 420 U.S. 251 (1975) established under National Labor Relations guidelines. These parameters go back over 40 years. The confusion is furthered by the fact that the State of Massachusetts already has independent governing body to address complaints of discrimination, the Massachusetts Commission Against Decimation (MCAD). Is it the goal of the WA to replace the State agency w/ a local committee? What would be the legal ramifications against the Town of Brookline if there were contradictory processes? Would the CDICR report to the MCAD? Would they have the legal authority as representatives for the Town of Brookline?”
“Under Massachusetts General Law (MGL) the Chief of Police and Selectboard hold unambiguous authority over police officers. Would this usurp that and thus bring the town into dispute w/ established laws? Additionally, in the case of police officers (Versus other town employees), officers have clearly established rights under Civil Service law. How would the CDICR work w/ Civil Service? Would they have the legal authority to recommend action or investigate complaints based on Civil Service guidelines? Under current civil service laws, as well as MGL, wouldn’t it create a significant incongruity and lead to potential liability?

We certainly understand the desire of citizen to participate in Brookline government affairs. The Town has spent considerable time, resources, and money to hire the most qualified individuals to lead their respective departments.

“Is it advisable to have citizens who sit on boards and commissions undertake the duties, responsibilities and functions of these highly respected, competent department heads? I hope this is useful, and have forwarded a copy to the Chief Lipson as well.

Very Respectfully,
Deputy Superintendent Michael Gropman
Brookline Police Department”

● (ODICR) “Speaking for the Office and not the Commission, I do have some questions: If this amendment passes does it grant the power to subpoena to the Commission? Will investigations be a public process? Will recommendations to the Select Board regarding Town employees, be confidential? Is there any expectation of confidentiality for anyone seeking an investigation or the focus of one? What potential liabilities will the investigatory process bring to individuals serving on the Commission? I am not sure how many individuals on the Commission have experience with investigations. Would it make sense that the by-law include that the composition of the Commission, have at least one individual that has expertise in investigative process? The phrase Citizen Complaints is too broad, I think it needs to be more specific. As currently phrased the Commission would be receive complaints well outside the scope of their function. Overall I am favorable to the amendment.

Best,
Lloyd Gelllineau”

● (DICRC) “I am not in support of WA 24. When the commission was writing the by-laws, there was a great deal of discussion about whether it should have the ability to conduct investigations into complaints. For a wide variety of reasons, mostly legal, it was decided that investigations would be limited to what was included in the by-laws. A working group was established to develop the complaint procedures. The working group did a thorough job and prepared a comprehensive complaint policy and processes for filing, reviewing, and referring various types of complaints. Since the procedures were established (in 2015, I believe), no complaints have been filed with the CDICR.

“WA 24 does not provide any additional authority, resources, legal standing, expertise, etc. that would be required for the CDICR to conduct investigations that would be of any benefit to the individuals bringing complaints or to the Town.”
Thank you and regards,
Kelly Race
Commission for Diversity, Inclusion and Community Relations 2014-present

4. Concerns raised in 2014 by the then-Select Board’s recommendation re: Warrant Article 10 (the DICRC by-law)

From May 27, 2014 Annual Town Meeting Article 10 – Supplement No. 1 Page 3

“Authority of the Commission. Some have suggested that the Commission needs more direct involvement and authority in adjudicating claims of discrimination against the Town or others. As previously mentioned, we feel strongly that a volunteer appointed body subject to the open meeting law should not be involved in specific matters that implicate complex privacy rights, labor law or other factors that could compromise the Town’s interests. Should this Commission be assigned this quasi-judicial role, persons appearing before them would have to be advised that they had a right to bring legal counsel and that any statements they made could later be used to their detriment. The Commission would also require extensive training and a set of procedural rules to ensure fairness in such proceedings. We believe that the CDO, under the general advice and policy direction of the Commission, is better suited for this task.”

RECOMMENDATION

Based on testimony cited above, members of the Ad Hoc Subcommittee recognize that not all complaints of discrimination processed by the DICRC (and subsequently to the MCAD) are resolved to the satisfaction of all parties. However, on balance, the recommended complaint procedure under Article 24, with its empowering of the DICRC to investigate and, effectively, adjudicate complaints, poses administrative complications and liability risks, while possibly overstepping local authority. As well, the DICRC is nearing completion of its own (required) 5-year report on its activities and review of its bylaw. It is hoped that the DICRC 5-year review will take into consideration some of the complaints made in public testimony to the Ad Hoc Subcommittee.

By 5-0 vote, the subcommittee recommends NO ACTION on Article 24.