

**02-029**

**COUNTIES, CITIES AND TOWNS: URBAN COUNTY EXECUTIVE FORM OF GOVERNMENT – HUMAN RIGHTS.**

**CONSTITUTION OF VIRGINIA: BILL OF RIGHTS (GOVERNMENT SHOULD BE UNIFORM).**

**General Assembly would need to enact legislation authorizing Fairfax County to amend its human rights ordinance to prohibit discrimination based on sexual orientation.**

The Honorable Kenneth R. Plum  
Member, House of Delegates  
April 30, 2002

**Issues Presented**

You ask whether it is necessary for the General Assembly to enact enabling legislation to allow (1) Fairfax County to prohibit discrimination due to sexual orientation or (2) the Fairfax County Human Rights Commission to investigate cases involving alleged discrimination based on sexual orientation.

**Response**

My answer is that enabling legislation is required in both instances.

**Facts**

You state that, during the 2002 Session of the General Assembly, you presented to the House Committee on Counties, Cities and Towns, House Bill No. 750, which would have amended §§ 15.2-853 and 15.2-854 of the *Code of Virginia* by adding "sexual orientation"<sup>1</sup> as prohibited discrimination with regard to actions and investigations by a human rights commission in a county that has adopted the urban county executive form of government.<sup>2</sup> At that time, you were advised by a committee member that your bill was unnecessary because the Constitution of Virginia protects individual rights.<sup>3</sup>

**Discussion**

Section 15.2-853 authorizes counties with an urban county executive form of government<sup>4</sup> to establish human rights commissions by ordinance. This enabling statute allows such an ordinance to prohibit "discrimination in housing, real estate transactions, employment, public accommodations, credit and education on the basis of race, color, religion, sex, pregnancy, childbirth or related medical conditions, national origin, age, marital status<sup>5</sup> or disability."

Virginia adheres to the Dillon Rule of strict construction, which provides that "[local governing bodies] have only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly

granted powers, and those which are essential and indispensable."<sup>6</sup> Any doubt as to the existence of a power must be resolved against the locality.<sup>7</sup> The Dillon Rule recognizes that localities are political subdivisions of the Commonwealth, which, in turn, rest on the foundation of Article I, § 14 of the Constitution of Virginia.<sup>8</sup>

The prohibition against discrimination based on sex<sup>9</sup> in § 15.2-853 relates to one's gender. It is the biological condition of sex, whether one is male or female, rather than any particular sexual manifestation, that is the object of the prohibited discrimination.<sup>10</sup> Therefore, authority to prohibit or investigate alleged discrimination based on sexual orientation may not be "fairly or necessarily implied"<sup>11</sup> from discrimination based on sex.

## **Conclusion**

Accordingly, it is my opinion that it is necessary for the General Assembly to enact enabling legislation to allow Fairfax County to amend its human rights ordinance to prohibit discrimination based on sexual orientation or the Fairfax County Human Rights Commission to investigate cases involving alleged discrimination based on sexual orientation.

<sup>1</sup>"Sexual orientation" means "[a] person's predisposition or inclination toward a particular type of sexual activity or behavior: heterosexuality, homosexuality, or bisexuality." Black's Law Dictionary 1379 (7<sup>th</sup> ed. 1999).

<sup>2</sup>House Bill No. 750 was passed by indefinitely in the House Committee on Counties, Cities and Towns on February 1, 2002.

<sup>3</sup>You do not advise as to the substance of the committee member's argument beyond this truism. I am, therefore, unable to opine on the legal merits of the argument.

<sup>4</sup>Chapter 8 of Title 15.2, §§ 15.2-800 to 15.2-858 contains Virginia's laws governing the urban county executive form of government. Fairfax County is the only political subdivision of the Commonwealth so organized at present. See H.B. 750, available at <http://legis.state.va.us>.

<sup>5</sup>House Bill No. 750 would have inserted in the first sentence of § 15.2-853, "sexual orientation" after "marital status."

<sup>6</sup>*Arlington County v. White*, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000) (quoting *City of Virginia Beach v. Hay*, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999)).

<sup>7</sup>2A Eugene McQuillin, *The Law of Municipal Corporations* § 10.19, at 369 (3<sup>rd</sup> ed. 1996); see 2000 Op. Va. Att'y Gen. 75, 76.

<sup>8</sup>*Board of Supervisors v. Cox*, 155 Va. 687, 709-10, 156 S.E. 755, 762 (1931). Article I, § 14 guarantees "[t]hat the people have a right to uniform government; and, therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof." This language is identical to Article I, § 14 of the 1902 Constitution and

remains unchanged from Chapter 3, § 14 of the Declaration of Rights, adopted June 12, 1776.

<sup>9</sup>"Sex" means "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism." Black's Law Dictionary, *supra* note 1, at 1379.

<sup>10</sup>A primary rule of statutory construction is that "[one] must look first to the language of the statute. If a statute is clear and unambiguous, ... the statute [should be given] its plain meaning." Loudoun Co. Dept. Soc. Serv. v. Erzold, 245 Va. 80, 85, 425 S.E.2d 800, 802 (1993); see *also* Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985); 2000 Op. Va. Att'y Gen. 11, 14.

<sup>11</sup>*White*, 259 Va. at 712, 528 S.E.2d at 708.

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