VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF MARTINSVILLE

MICHAEL WARE MOORE	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 690CL09000035-00
	)	
VIRGINIA MUSEUM OF NATURAL HISTORY	)	
	)	
and	)	
	)	
VIRGINIA DEPARTMENT OF HUMAN RESOURCE MANAGEMENT	)	
	)	
Respondents.	)	

RESPONDENTS' RESPONSE TO PETITONER'S REPLY TO RESPONDENTS'MOTION TO DISMISS, PLEA OF SOVEREIGN IMMUNITY AND DEMURRER

The Virginia Museum of Natural History (VMNH) and the Virginia Department of Human Resource Management (DHRM), by counsel, file their Response to Petitioner's Reply Memorandum opposing Respondents' Motion to Dismiss, Plea of Sovereign Immunity and Demurrer to the "Petition for Appeal" in the captioned matter.

A. Motion to Dismiss

Petitioner argues that Repondents' motion to dismiss is premised on the notion that the state can deny any appeal of any probationary employee despite the nature of the alleged illegal discrimination. It is true that the grievance procedure is not available to probationary employeees regardless of the nature of their complaint; it is not true that a probationary

employee has no remedy for illegal discrimination. There are other remedies, governed by different procedures. Petitioner has no "appeal" in this case for the simple reason that he is not covered by, and therefore has no access to, the grievance procedure. Moreover, discrimination based upon sexual preference is not illegal under either state or federal law, although Respondents deny that Petitioner's discharge was based upon his sexual preference.

Petitioner cites the Governor's Executive Order #1 and the Virginia Human Rights Act as the source of his protection. The Executive Order creates no cause of action and it is not an expression of state legislative policy. Instead, it is an executive directive to state agencies not to discriminate in their hiring practices based upon sexual orientation. The Petitioner's recourse under that policy is to file a complaint with the Office of Equal Employment Services within the Department of Human Resource Management, which investigates such complaints. In this case, the Petitioner did file such complaint, and the matter was investigated. The Policy does not provide for a judicial appeal, and it would be impossible for it to do so. Only the General Assembly can create casues of action as a matter of legislative authority. *See* Va. Const. Art. III, § 1 (2009) and Art. IV, § 1 (2009).

While Petitoner cites to the Virginia Human Rights Act, generally, as the source of legislative authority for his claim of illegal discrimnation based upon sexual preference (Va. Code §2.2-3900 *et seq.*), he cites no provision of that Act for the proposition that sexual preference is a protected category. He cites no provision because there is none; that Act mirrors federal law, which to date, does not extend protection to employees or applicants based upon their sexual preference. To the contrary, the Virginia General Assembly has consistently rejected attempts to amend the Human Rights Act (and other state laws) to add sexual preference as a protected category.

B. Sovereign Immunity

Petitioner, in effect, is asking the Court to create a right of action against state agencies from the Governor's Executive Order. As stated above, the Governor cannot establish any such cause of action; only the General Assembly can do this. The Executive Order does not purport to create any cause of action or to open up the greivance procedure to probationary employees.

Petitioner makes the novel argument that the Governor, in executing the Executive Order, "has consented to suits by employees wrongfully discharged from employment based upon their sexual orientation." The immunity of the Comonwealth can be waived only by constitutional amendment or by laws enacted by the General Assembly. *Rector and Visitors of the University of Virginia v. Carter*, 267 Va. 242, 591 S.E. 2d 76 (2004). Executive orders fall within neither category.

C. Demurrer

Petitioner attempts to buttress his claim by citing to federal precedent that extends protection to employees under the Equal Protection Clause. This precedent is either irrelevant to the category of sexual preference (which is not otherwise protected by either federal or state law), or has been overruled by the recent decsion of the United States Supreme Court in *Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146 (2008), which rejected the "class-of-one theory" in public employment.

Moreover, the Petitioner cannot cite any precedent to support his claim. Specifically, the Court in *Engquist* held that in public employment cases (as distinguished from regulations affecting the general public), a plaintiff cannot use the Equal Protection Clause to pursue a claim

of wrongful termination because she was treated "differently from others for a bad reason, or for no reason at all" (slip opinion at 14) (unless another independent constitutional right was implicated). The Court refused to accept the equal protection argument, because to do so would be to "constitutionalize the employee grievance" (*Id.* at 16). Recognizing the need to defer to the government in its personnel adminstration, the Court refused to accept an Equal Protection theory of recovery to challenge discharges of individual employees.

CONCLUSION

WHEREFORE, for the reasons stated above, Respondents ask that the Court deny this Petition and dismiss it with prejudice.

Respectfully submitted,

VIRGINIA MUSEUM OF NATURAL HISTORY

and DEPARTMENT OF HUMAN RESOURCE MANAGEMENT

By: _____
Counsel

WILLIAM C. MIMS
Attorney General of Virginia

DAVID E. JOHNSON
Deputy Attorney General

RONALD C. FOREHAND
Senior Assistant Attorney General

JAKE A. BELUE
Assistant Attorney General
Virginia State Bar #74674
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 371-8721
Facsimile: (804) 786-2650

GUY W. HORSLEY, JR.
Special Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-0969

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2009, a copy of the foregoing Pleading was mailed, postage prepaid to the following:

Michael B. Hamar, Esquire
520 West 21st Street, Suite J
Norfolk, Virginia 23517

Counsel