

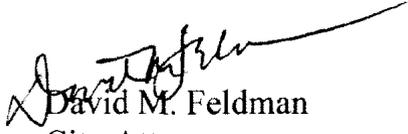
CITY OF HOUSTON

Legal Department

Interoffice

Correspondence

To: Mayor Annise D. Parker

From: 
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City Attorney

Date: November 19, 2013

Subject: Legal Opinion Regarding Same-Sex
Spousal Benefits

ATTORNEY-CLIENT COMMUNICATION PRIVILEGED AND CONFIDENTIAL

A growing number of states have recognized same-sex marriage, causing the courts to give increasing attention to whether laws that do the opposite, and further discrimination based on sexual orientation, are unconstitutional. In light of this trend, and the requests by employees seeking benefits for same-sex spouses, you have asked me to review the City of Houston's authority to continue to deny benefits to same-sex spouses of employees that have been legally married in other jurisdictions, with a particular focus on the City Charter amendment of 2001, which has heretofore been relied on to prohibit the granting of such benefits.

The relevant City Charter provision, which was initiated by voter petition, reads as follows:

Except as required by State or Federal law, the City of Houston shall not provide employment benefits, including health care, to persons other than employees, *their legal spouses* and dependent children; nor shall the City provide any privilege in promotion, hiring, or contracting to a person or group on the basis of sexual preference, either by a vote of the city council or an executive order of the Mayor. Further, the City of Houston shall not require entities doing business with the City to have any of the above benefits or policies.

If any portion of this proposed Charter amendment is declared unlawful, then such portion shall be removed and the remainder of the Charter amendment will remain in effect. Any ordinance in conflict with this section of the Charter is hereby repealed and declared invalid. Article II, Section 22. (emphasis added.)

After reviewing relevant case law around the country and from the U.S. Supreme Court, I believe a court would now find that the continued application of Article II, Section 22 of the Houston City Charter to deny benefits to legally married same-sex spouses to be unconstitutional, primarily because it denies the employees of such spouses equal protection of the laws.

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution provides that: “No State shall.....deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend XIV, §1. This prohibition applies with equal force to all governmental entities within the State of Texas, including the City of Houston, meaning that all persons similarly situated should, generally, be treated alike under the law. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Plyler v. Doe*, 457 U.S. 202, 216 (1982). In order to pass constitutional muster, the current application of the City Charter provision would have to survive rational basis review, at a minimum. In other words, there must be some rational connection between the discriminating law or policy in question and a legitimate governmental interest. *See Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 1003 (N.D. Cal. 2010), *aff’d sub nom.*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated by, Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013) (holding initiative’s proponents had no standing to appeal the district court’s judgment for the same-sex couple plaintiffs, and therefore effectively reinstating the district court’s holding finding California’s prohibition against same-sex marriage unconstitutional under due process and equal protection analyses).

In 1996, the U. S. Supreme Court considered the constitutionality of an amendment to the Colorado Constitution; the amendment prohibited all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their “homosexual, lesbian, or bisexual orientation, conduct, practices or relationships.” *Romer v. Evans*, 517 U.S. 620, 624 (1996). The Court held that the constitutional amendment failed for lack of a rational basis, finding that it could not be explained by “anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.” *Romer* at 632. Applying a similar test to the current application of Article II, section 22 of the City of Houston’s charter yields a similar result: it seems not to further any governmental end, but simply makes homosexuals unequal to all other city employees. Application of the City of Houston’s charter to deny benefits to legally married same-sex spouses arguably violates the Equal Protection Clause by treating employees differently on the basis of sexual orientation or sexual identity; that is, a female city employee may secure employment benefits for the husband she married in California, but a female city employee may not obtain the same benefits for a wife she married in California. The weight of recent court decisions would dictate that such a distinction does not serve a legitimate governmental interest.

The Supreme Court’s DOMA ruling and its effect thus far

Significantly, after the U.S. Supreme Court struck down the federal Defense of Marriage Act (DOMA) in *U.S. v. Windsor*, 133 S.Ct. 2675; 2013 U.S. LEXIS 4935 (June 26, 2013), a number of federal agencies have announced that they will recognize same-sex marriages that were valid in the place of celebration, regardless where those couples now live. These agencies include the Office of Personnel Management, the U.S. Citizenship and Immigration Services, the Department of Defense, and the Federal Election Commission. In addition, the Internal Revenue Service issued an announcement on August 29th, stating that all legally married same-sex couples will be recognized as married for federal tax purposes, even if those couples reside in states that do not recognize same-sex marriage.

Texas DOMA

Although the U.S. Supreme Court struck down the federal Defense of Marriage Act's definition of marriage as a union between a man and a woman, the Court did not deprive individual states of the right to maintain their own definitions of marriage. Texas has done so in its constitution (Tex. Const. Art. I, Sec. 32), and has its own version of DOMA—a statute that prohibits political subdivisions of the state from giving effect to:

1. A public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or any other jurisdiction; or
2. Right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or any jurisdiction.

Tex. Fam. Code § 6.204.

This law has been challenged as unconstitutional, and while some courts have found it to be constitutional, others have found it to be constitutionally infirm. The Texas Supreme Court has an opportunity to rule on this law this term, but it may choose to decide the two pending cases on much narrower grounds. *In re Marriage of J.B. and H.B.*, (Tex. App. – Dallas 2010, pet. granted) 326 S.W. 3d 645; *State v. Naylor* 330 S.W.3d 434, (Tex. App. – Austin 2011, pet. granted). (Both cases involve same-sex couples who were married in other states and wish to be divorced in Texas.) While state law is significant authority for the City of Houston, the City could still face liability for complying with a law that is unconstitutional, or would cause it to apply its own laws in an unconstitutional manner.

Conclusion and Recommendation

In conclusion, it is my legal opinion that the City of Houston may extend benefits to legally married same-sex spouses on the same terms it extends benefits to heterosexual spouses. To apply Article II, section 22 of the City Charter differently would, based on my review of all relevant federal authority, be unconstitutional. Therefore, I recommend you give serious consideration to directing the Human Resources Department to offer benefits to same-sex spouses of city employees who were lawfully married in a state that recognizes same-sex marriage.