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massDOT
Massachusetts Department of Transportation

Memo

To: Eddie J. Jenkins, Chief Diversity & Civil Rights Officer

From: John Lozada, Manager of Federal Programs

Date: 02/16/12

Re: Disability and Title VI Complaint Coordination with Rail & Transit Division, Regional Transit Authorities and the Federal Transit Administration

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This memorandum provides an outline of MassDOT's responsibility for investigations regarding Regional Transit Authority (RTA) related civil rights complaints and how that effort is coordinated with the Federal Transit Administration (FTA) and the RTAs. The analysis will focus on complaint handling authority, although MassDOT's broader civil rights oversight responsibility for Title VI is referenced, to illustrate some of the confusion that has existed in this area. Also considered are factors for building the resource and coordination for complaint handling. This focus is specific to complaint matters that would arise concerning the RTAs, where there has been the most significant lack of clarity in terms of roles and responsibilities. This memo does not reach MassDOT's civil rights relationship to the Metropolitan Planning Organizations (MPO), although MassDOT is clearly the primary recipient as all of the MPOs and smaller subrecipients, and is primarily responsible for securing civil rights compliance from each of these entities.

Short Summary of Facts and Analysis

The relationship between MassDOT and the RTAs is set forth by state and federal statutory and regulatory provisions, creating oversight responsibility that includes civil rights complaint investigations. The structure for complaint handling has been weak due to several factors: MassDOT has not had a fully staffed Rail & Transit Division, the lack of a State Management Plan with a well developed strategy on civil rights matters that is in part linked to the Rail & Transit staffing issue, and prior limitations in staffing and oversight within MassDOT's Office of Civil Rights. Nonetheless, efforts have been underway to build up program management within the Rail & Transit Division, restate a more comprehensive State Management Plan and coordinate civil rights activities between Civil Rights and Rail & Transit on civil rights matters.

MassDOT role in providing civil rights oversight to RTAs is based on its receipt of federal funding and regulatory grant oversight obligations, although the FTA also has oversight responsibilities regarding civil rights and the RTAs. This dual responsibility has been confusing in the past based on the different levels of accountability among non-rural RTAs to MassDOT and the FTA. The FTA has an obligation to provide direct oversight of funds it grants directly to the RTAs, including with regard to complaint matters, but MassDOT is also obligated to provide civil rights oversight of the RTAs based on its

status as a designated recipient of federal funds. The non-rural RTAs in turn have an obligation to provide a structure for addressing civil rights complaints which is reviewed and approved by the FTA, and MassDOT reviews the rural RTA's mandated civil rights program requirements. Complainants are able to file grievances with the FTA, MassDOT or individual RTAs on civil rights matters. On complaints filed with MassDOT, there is a practice of contacting the FTA to confirm the appropriateness of complaint handling on non-rural RTA matters, similar to a protocol established by the Federal Highway Administration (FHWA). This is not a written requirement, but a practical way to address jurisdictional considerations to limit conflict with the other agencies.

Beyond Civil Rights unit resources, and those of the FTA, there are potential investigative capacities within the RTAs and the Rail & Transit Division that MassDOT could utilize to handle complaints. If a structure were developed to rely on Rail & Transit resources for investigations, there would be training, capacity and support needs to address, although the Civil Rights unit would have to be in control of that staff person's activities on complaints. Regardless of the structure for complaint handling, it would remain practical to check in with the FTA in complaint matters. Civil rights oversight responsibilities, including with regard to complaint investigations, should be spelled out in the MassDOT State Management Plan required for RTA program management.

Law, Facts and Analysis

1) *How the RTA, MassDOT and FTA relationships are structured – Law and Regulation*

The Regional Transit Authorities are established as a political subdivision of the Commonwealth pursuant to M.G. L. c. 161B and as approved by majority vote of the legislative body of the combination of cities and towns. The affairs of each authority are managed by an administrator who is appointed by, and serves at the pleasure of, the advisory board of the authority. The authority holds and manages the mass transportation facilities and equipment it acquires. There are 15 RTAs in Massachusetts, of which three are identified as operating completely in non-urbanized areas, and referenced to as rural RTAs. Both MassDOT and the RTAs are empowered to take such actions and carry out such responsibilities as are related to the receipt of federal aid.

> Each authority is authorized and directed from time to time to take all necessary action to secure any federal assistance which is or may become available to the commonwealth or any of its subdivisions for any of the purposes of this chapter. If any federal law, administrative regulation or practice requires any action relating to such federal assistance to be taken by any department or instrumentality of the commonwealth other than the authority such other department or instrumentality is authorized and directed to take all such action, including without limitation filing applications for assistance, supervising the expenditure of federal grants or loans and making any determinations and certifications necessary or appropriate to the foregoing, and the authority is authorized and directed to take all action necessary to permit such other department or instrumentality to comply with all federal requirements. M.G.L. c. 161B, Sc. 22

At the federal level, there are different grants available to RTAs, some administered by the FTA directly (relying on MassDOT to pass-through funds), and others which MassDOT administers directly, including those under 49 U.S.C. §§ 5310 (elderly individuals and individuals with disabilities program), 5311 (Non-urbanized Area

Formula Program), 5316, Job Access and Reverse Commute (JARC) and 5317 (New Freedom Program). The FTA has responsibility for national implementation of these and other funding programs, including the granting of federal aid to the RTAs under 49 U.S.C. §§ 5307 (Urbanized Area Formula Funding program) which is financially more substantial than the grants administered by MassDOT. Of the fifteen RTAs only the three rural RTAs do not receive §5307 funds, including the Martha's Vineyard, Nantucket and Franklin RTAs, all of which receive funding that MassDOT administers. MassDOT is considered a direct recipient of federal financial assistance for purposes of civil rights oversight responsibility, and has primary oversight over the three rural agencies pursuant to FTA regulatory provisions. See, Circular 4702.1A, Title VI and Title VI-Dependent Guidelines for Federal Transit Administration Recipients, Chapter VI (note that there is a revision to this Circular pending, for which public comment is currently being evaluated).

2) *Civil Rights Accountability Structure*

On complaints concerning disability related matters, the nondiscrimination provisions under 49 C.F.R. Part 27 set forth MassDOT's obligation, as a recipient, to assure that "the program or activity will be conducted or the facility operated in compliance with all the requirements imposed by or pursuant to this part. 49 C.F.R. § 27.9(a). MassDOT's obligations include the designation of a responsible person to carry out the obligations, providing notice to the public and establishing procedures to resolve grievances related to the requirements. 49 C.F.R. §§ 27.13 and 15. These provisions are related to the requirements for Title VI oversight, which are found in FTA Circular 4702.1A and 49 C.F.R. Part 21.

The question of funding and MassDOT's accountability for civil rights program implementation, including complaint investigation, has been confusing in the past as related to RTA civil rights reporting and the Title VI program. The essence of the confusion stems from the different reporting obligations between the rural and non-rural RTAs. Despite the fact that non-rural RTAs report directly to FTA, MassDOT maintains a broad obligation to provide resources and address civil rights complaints, as does the FTA, 49 C.F.R. § Sec. 27.123. To date, there have been no written protocols to identify how to decide or when MassDOT or the FTA should take the lead on an investigative matter.

In practice, however, FTA will refer a matter to MassDOT to address, or MassDOT will apprise the FTA of a matter to determine whether the FTA is interested in handling the complaint or if MassDOT should handle the matter. In 2011, for example, MassDOT took a deep look into the activities within the Southeastern Regional Transit Authority (SRTA) in light of MassDOT concerns and FTA triennial audit findings noting deficiencies on multiple levels, including with respect to civil rights matters. SRTA is directly accountable to the FTA under the funding scheme and regulations. The approach for checking in with the FTA is consistent with the way the FHWA structures the handling of ADA complaint matters, set forth in a memorandum to FHWA Division Directors on the handling of Title VI and ADA complaints. See, MassDOT Civil rights\ADA\FHWA\policy\Attachment - Memorandum - Office of Civil Rights - FHWA.mht. There was recently some clarification of the reporting obligation in the proposed restatement of FTA Circular C 4702.1A on Title VI obligations for FTA recipients. In the

Title VI arena, for example, the regulation will not clearly state that where MassDOT is effectively a pass through of funds to an RTA that is a "direct recipient" of funds through the FTA, the RTA has no reporting oversight obligation to the State Transportation Agency (STA). It must be noted that even where there the FTA would directly investigate a matter as to a particular RTA, MassDOT still has state level civil rights obligations that may require MassDOT to independently investigate a matter, including, but not limited to M.G.L. 151b and Executive Order 526.

Regardless of the interplay between the agencies, for FTA Disability complaints and Title VI complaint purposes, an aggrieved person may file a matter with an RTA, MassDOT or the FTA, each of which have the obligation to address grievances. Given the evident concern about agencies potentially investigating themselves that the conflicts that could result, it is critical that a system of communication between the respective agencies be articulated and maintained.

3) *Practical Operational Considerations on Rail & Transit Investigations*

The Rail & Transit Division (RTD), led by Acting Division Administrator Jonathan Davis, is the entity designated to administer MassDOT's FTA related grant programs. This Division is led by John Englert (who will resign from MassDOT, effective February 2012), and includes a Community Transit Programs Unit (CTP), which oversees the FTA programs that support the RTAs, among other subrecipients that include small grantees. The CTP also has responsibility for managing the Commonwealth's capital funding programs for all fifteen RTAs and providing technical assistance on a range of matters, as well as providing fiscal administration services. The CTP is supported by various MassDOT Enterprise Services offices, including Budget, Fiscal, Human Resources, Civil Rights and the Office of Transportation Planning. Currently, there are two staff members within MassDOT Civil Rights who are partially funded through the FTA, to provide civil rights support relating to the FTA programs, but others within MassDOT could be assigned. FTA administrative support funding could be secured to provide assistance, for such civil rights program needs as exist, including with respect to investigations.

In coordinating MassDOT civil rights oversight regarding the RTAs, there has been discussion about Rail & Transit employing two program managers to provide on the ground assistance with program management. It was considered that one of the managers might be linked to Civil Rights to address civil rights requirements, to ensure congruity and support from the Civil Rights unit. Under such a relationship, the Civil Rights unit should supervise those civil rights activities of a staff person from the Rail & Transit division that would normally be a Civil Rights responsibility under 49 C.F.R. §§ 27.13 and 15. To date, Rail & Transit has hired one program manager, who has participated in discussions on Rail & Transit Title VI Program development. The question of whether that manager could investigate complaints has not been addressed. It is not certain when or if the second program manager position will be filled, and what supervision, training or other support from Civil Rights would be required to enable complaint handling by this manager. When the structure of any civil rights complaint administration within Rail & Transit is addressed, the redraft of the State Management Plan must include the method MassDOT will use for this civil rights oversight.

Conclusion

The development of the Rail & Transit Division is adding structure and depth to the relationship between the RTAs and MassDOT, while demonstrating to the non-rural RTAs that MassDOT's Civil Rights and Rail & Transit Divisions are resources beyond the funding relationship that has served as the primary focus of attention. This issue of building the RTA-MassDOT relationship is a focal component of the Beyond Boston transit study that is underway, which MassDOT Civil Rights sits on as a working group member.

Although there is no written FTA structure for determining which agency should handle complaints, MassDOT should reasonably check in with the FTA and the RTAs on non-rural RTA complaints to ensure there is no FTA interest in directly investigating a particular matter. This approach is consonant with the FHWA's approach to ADA complaints and allows for MassDOT to coordinate well with the FTA, including as to the possibility of referring particular matters for investigation by an RTA. If the Rail & Transit Division has sufficient staff resources, and supervision by Civil Rights on civil rights activities could be worked out, it would be helpful since the Rail & Transit Division has recurring business with all of the RTAs. It will also be important for MassDOT to develop a better understanding of the capabilities among the non-rural RTAs to address complaint matters.

Ultimately, the management structure for civil rights oversight, including investigations, must be spelled out in the State Management Plan for MassDOT, which remains pending a final draft, and was the subject of a deficiency finding from the FTA in both its 2010 State Management Review and its 2011 Title VI audit. We received an e-mail this week from the Rail & Transit Division program manager that the revised State Management Plan will be forwarded to MassDOT Civil Rights next week for review, comment and inclusion, after any needed revision, into MassDOT's Title VI Plan for Rail & Transit.