

LEGAL NOTICE NO. ----- OF 2024

THE PUBLIC SERVICE COMMISSION ACT

IN EXERCISE of the powers conferred by Section 48 of the Public Service Commission Act, Cap 185 The Public Service Commission makes the following Regulations –

THE PUBLIC SERVICE COMMISSION (AFFIRMATIVE ACTION)
REGULATIONS, 2024

PART I - PRELIMINARY

Citation

1. These Regulations may be cited as the Public Service Commission (Affirmative Action) Regulations, 2024

Scope and application

2. These Regulations shall apply to all public bodies and all persons holding or acting in an office in a public body except those exempted under Article 234 (3) of the Constitution.

Interpretation

3. In these Regulations, unless the context otherwise requires-

“Affirmative action” means any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom.

“Affirmative action measures” are measures designed to ensure that suitably qualified persons from special interest groups have equal employment opportunities and are equitably represented at all levels in the public service.

“Authorized Officer” means any officer, body or authority appointed by the Commission to perform its delegated functions in a Ministry or State department, or any member of the Commission;

“Commission means” Public Service Commission.

“disability” includes any physical, sensory, mental, psychological, or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual’s ability to carry out ordinary day-to-day activities;

“marginalized community” means—

- a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;
- b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;
- c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or
- d) pastoral persons and communities, whether they are—
 - (i) nomadic; or
 - (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole;

“marginalised group” means a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4);

“special interest groups” means a group or community established to be underrepresented or not represented in an organization and includes any underrepresented gender, persons with disabilities, persons from minority and marginalized communities and the youth;

“Personal Information” means any information relating to an identified or identifiable natural person;

“Public body” means includes —

- (a) corporation, council, board, committee or other body which has power to act under and for purposes of any written law relating to the undertakings of a public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law;
- (b) a corporation, the whole or a controlling majority of shares which are owned by a person or entity that is a public body by virtue of any of paragraph (a) of this definition;
- (c) statutory public bodies; or
- (d) any public body brought under the jurisdiction of the Commission by an Act of Parliament for a specified function to the extent of that function;

“Qualifications” means: for purposes of implementation of these regulations’ qualifications include:

- (e) Formal qualifications;
- (f) Relevant experience; and
- (g) Capacity to acquire, within a reasonable time ability to do the job

“Medium term goals ” means goals established by a public body, for improving representation of special interest groups, which must be achieved within three calendar years.

“Long term goals ” means goals established by a public body, for improving representation of special interest groups, which must be achieved within five calendar years.

Guiding principles

4. The Commission and all public bodies shall be guided by the following principles while implementing these regulations:

- a) **Communication:** The affirmative action plans , programmes and purpose shall be fully communicated to all officers in a public body.
- b) **Participation:** Affirmative action plans and programmes shall be developed with the active participation of employees at all levels.
- c) **Transparency:** Affirmative action programmes and practices shall be open to scrutiny within and outside the Public Service.
- d) **Accountability:** Accountability for the delivery of affirmative action shall be vested at the highest level in the public body:-

Objects of the regulations

5. The objects of these Regulations are to—

- (a) mainstream in the public service a culture which supports and values diversity and affirmation of special interest groups;
- (b) support the attraction into, retention and advancement of persons from special interest groups in the public service;
- (c) speed up the achievement of representation of special interest groups in the public service as required by the Constitution;
- (d) eliminate unfair discrimination against persons from special interest groups: and
- (e) promote equal opportunity and fair treatment in employment in the public service.

Prohibition of discrimination

6. (1) A public body shall not unfairly discriminate directly or indirectly against any job applicant or employee in any employment policy or practice on one or more grounds including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(2) It is not unfair discrimination, taking into account the nature of the job, to take affirmative action consistent with the purposes of Article 54, 55 and 56 of the Constitution, and afford special interest groups opportunities for appointment.

PART II – ROLES AND RESPONSIBILITIES

Public Service
Commission

7. The Public Service Commission shall be responsible for —

- (a) developing and implementing an affirmative action plan in respect of Ministries and the office of the Attorney General;
- (b) communicating the affirmative action plans and programmes for Ministries and the Office of the Attorney General to staff within the public body;
- (c) direct public bodies on measures to be taken in order to achieve representation including development of affirmative action plans;
- (d) ensuring the integration of affirmative action plans in the human resource management and development policies and practices in all public bodies;
- (e) monitoring and evaluating the implementation of the affirmative action plans by public bodies;
- (f) receiving reports from public bodies on implementation of the affirmative action plans; and
- (g) conducting compliance audits and communicating the findings, recommendations and directions of the Commission on the audits.

Authorized Officer

8. An Authorized officer shall be responsible for —

- (a) analysing the information relating to the public body's workforce in terms of gender, age, ethnicity and disability status to determine the levels of representation of persons from special interest groups;
- (b) reviewing the employment practices and policies at the workplace for purposes of identifying and eliminating barriers to employment or advancement of persons from special interest groups;

- (c) instituting policies and practices and providing reasonable accommodation to achieve equitable representation of special interest groups in the public body;
- (d) developing and implementing affirmative action plans and programmes to address identified under-representation;
- (e) integrating affirmative action plans and programmes in the human resource management and development policies and practices;
- (f) communicating the affirmative action plans and programmes to staff within the public body; and
- (g) Ensuring adequate resources are allocated for achievement of the affirmative action plans and programmes.

PART III — DEVELOPMENT AND IMPLEMENTATION OF AFFIRMATIVE ACTION PLANS

Affirmative action plans

9. (1) The Commission and all public bodies shall develop and implement affirmative action plans that—

- (a) specify the policies and practices to be instituted by the public body in the medium term including medium-term numerical goals, for the hiring, training, promotion and retention of persons from special interest groups to correct the under-representation identified by the analysis under Regulation 8(a);
- (b) set out the public body's long term goals for increasing the representation of underrepresented groups in the public body's workforce and the strategy for achieving those goals;
- (c) establish a timetable for the implementation of the matters referred to in paragraphs (a) and (b) above;
- (d) guide on the roles and responsibilities of Authorized Officers, Council, Board, Committee and employees at all levels for supporting the achievement of affirmative action plans;

- (e) set standards for corporate behaviour and management style which will prevent discrimination of employees from special interest groups;
- (f) establish avenues for complaints by any person if they believe that there has been discrimination, or that a legitimate expectation has been undermined;
- (g) provide for financial and other resources for implementation of affirmative action activities; and
- (h) provide for monitoring, evaluation and reporting arrangements.

(2) The Plans shall have a definite timeline for implementation of the medium- term as well as long term commitments.

Establishment of numerical goals

10.In establishing the short-term numerical goals referred to in Regulation 9(1)(a), an authorized officer shall consider the following factors—

- (a) the degree of under-representation of persons in each special interest group in the institution's workforce;
- (b) the availability of qualified persons in special interest groups within the institution's workforce;
- (c) the anticipated growth or reduction of the institution's workforce during the period in respect of which the numerical goals apply; and
- (d) any other factor that may be prescribed.

PART IV — MONITORING, EVALUATION AND REPORTING ON THE IMPLEMENTATION OF AFFIRMATIVE ACTION PLANS

Monitoring and Evaluation

11. An Authorized Officer, Council, Board or Committee shall monitor and evaluate, on a regular basis, the implementation of the action plan to assess progress made towards achieving the objectives.

Review of affirmative action plans

12. An authorized officer, Council, Board or Committee shall, at least once during the period in respect of which the short-term numerical goals referred to in Regulation 9(1)(a) are established, review the affirmative action plans and —

(a) update the numerical goals, taking into account any appointments, promotions, retirements or terminations; and

(b) make any other changes that are necessary as a result of an assessment made pursuant to Regulation 9 or as a result of changing circumstances.

Communication

13. An authorized officer, Council, Board or Committee shall communicate to the employees in the public body the purpose of affirmative action plans and shall keep the employees informed about measures undertaken or planned and the progress made in achieving representation of the special interest groups.

Records
Cap 14.

14. An authorized officer, Council, Board or Committee shall, in accordance with these regulations, establish and maintain records in respect of implementation of the public body's affirmative action plans.

Reports

15. (1) An authorized officer, Council, Board or Committee shall, on or before 30th July of each year, file with the Commission a report on the affirmative action plans for the period between 1st July to 30th June of the previous financial year.

(2) The report referred to in sub-regulation (1) shall contain—

(a) a description of the measures taken by the public body during the reporting period and the implementation status;

(b) the total number of employees disaggregated by age, gender, ethnicity and disability status ;

(c) percentage representation of persons from special interest groups;

(d) the number of employees recruited, appointed, promoted and those who exited the service and the percentage representation of the special interest groups.

(2) A report shall be filed using electronic media in a manner specified in writing by the Commission.

(3) The report shall be deemed to have been filed on the day it is submitted to the Commission.

PART V — COMPLIANCE AUDITS

Audits

16. (1)The Commission, in the discharge of its mandate of investigating, monitoring and evaluating personnel practices, shall audit the implementation of affirmative action plans developed by public bodies.

(2)The Commission may designate any of its officers as affirmative action compliance audit officers.

Powers of
compliance officers

17. A compliance audit officer may, in auditing the implementation of affirmative action plans

- a) require an Authorized Officer, Council, Board or Committee to produce for examination or copying any record, book of account or other document that the officer believes, on reasonable grounds contains information that is relevant to the enforcement of these regulations.
- b) reproduce or cause to be reproduced any record from a data processing system in the form of a print-out or other intelligible output and remove the print-out or other output for examination and copying; or
- c) use or cause to be used any copying equipment at the place to make copies of any record, book of account or other document.

Assistance to
compliance officers

18. An Authorized Officer, Council, Board or Committee shall provide—

- a) assistance to the compliance officer to enable the officer to exercise the powers conferred on compliance officers by these regulations; and
- b) the officer with any information relevant to the enforcement of these regulations that the officer may reasonably require.

Undertaking

19. (1) The Commission shall require the Authorized Officer, Council, Board or Committee to commit, in writing, to remedy the identified gaps where a compliance audit establishes that the Authorized Officer, Council, Board or Committee —

- (a) has not collected information or conducted an analysis referred to in Regulation 8(1)(a) or conducted a review referred to in regulation 12;
- (b) has not prepared affirmative action plans;
- (c) has prepared affirmative action plans that do not meet the requirements of regulation 9;
- (d) has not made efforts to implement its affirmative action plans; or
- (e) has failed to establish and maintain employment records;

(2) Where goals have not been achieved, an authorized officer shall prepare a subsequent plan before the lapse of the existing plan.

(3) Where a compliance audit establishes underrepresentation, the Commission may recommend that the public body appoints or promotes persons in the special interest group without undue reliance on fair competition or merit if—

- a) a community in Kenya is not adequately represented in appointments to or promotions in the public service or in a public institution;
- b) the balance of gender in the public service or in a public institution is biased towards one gender;
- c) an ethnic group is disproportionately represented in the public service or in a public institution; or

- d) persons with disabilities are not adequately represented in the public service or in a public institution.

PART VI — MISCELLANEOUS PROVISIONS

Sanctions

20. A person who contravenes any provision of these regulations may be subjected to disciplinary proceedings in accordance with the terms of service and liable to any penalties specified in Section 68 of the Public Service Commission Act.

Complaints

21. (1) The Commission may on its own initiative or on a complaint made by any person investigate any issue relating to affirmative action.

(2) The Commission in conducting an investigation under paragraph (1) shall afford every relevant party an opportunity to be heard before the Commission makes a determination in the matter.

Matters not covered

22. Any matter relating to affirmative action that is not addressed by these regulations shall be dealt with in accordance with such special or general instructions issued by the Commission.