

Ordinance No. 5964

AN ORDINANCE TO REVISE THE POWERS, DUTIES, AND PROCESS OF THE HUMAN RELATIONS COMMISSION BY AMENDING CHAPTER 2.64 OF THE RAPID CITY MUNICIPAL CODE

WHEREAS, the City of Rapid City has enacted ordinances making discriminatory practices unlawful within the city; and

WHEREAS, the City has established a Human Relations Commission (HRC) to investigate and mediate discriminatory practices in Rapid City; and

~~WHEREAS, the HRC desires to be designated a Fair Employment Practices Agency (FEPA) by the United States Equal Employment Opportunity Commission (EEOC); and~~

Comment [WEN1]: All FEPA references are removed from the ordinance.

~~WHEREAS, in order to qualify to be a FEPA, the HRC must have two things: an ordinance that prohibits discriminatory employment practices and an enforcement power; and~~

WHEREAS, the Human Relations Commission is currently authorized to mediate claims of discrimination where there is probable cause to believe unlawful discrimination has occurred; and

WHEREAS, currently the HRC may request that parties mediate, but has no power to enforce the prohibitions against unlawful discrimination or to protect complaining parties from retaliation; and

WHEREAS, the Common Council finds that it is in the best interests of the City of Rapid City to empower the HRC with ~~the full~~ enforcement powers provided in state law; and

WHEREAS, the Common Council also desires to declare by ordinance its intent that complaints of discrimination be resolved by mediation to the extent possible; and

WHEREAS, the Common Council further finds that revisions to the process of investigating and hearing complaints of discrimination filed with the HRC are needed to improve efficiency, ~~and assist the HRC in qualifying as a FEPA; and~~

~~WHEREAS, the changes made by This Ordinance will place the HRC in the best position possible to enter into similar agreements with other federal agencies.~~

NOW THEREFORE, BE IT ORDAINED by the City of Rapid City, that Chapter 2.64 of the Rapid City Municipal Code be and is hereby amended to read in its entirety as follows:

CHAPTER 2.64: HUMAN RELATIONS COMMISSION

Section

- 2.64.010 Declaration of policy–Purpose.
- 2.64.020 Definitions.
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- 2.64.040 Claims against public entities or officials, ~~city, officials, employees, agents and servants~~.
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- 2.64.100 Commission–Purposes and powers.
- 2.64.110 Commission–Meetings.
- 2.64.120 Commission–Reporting requirements.
- 2.64.130 Commission has exclusive authority.
- 2.64.140 Procedure.
- 2.64.150 Appeal.
- 2.64.150 Investigative materials confidential–Access to material by parties following determination–Complainant’s right.

2.64.010 Declaration of policy–Purpose.

It is the public policy of the city and the purpose of this chapter:

- A. To acknowledge that discriminatory practices based on race, color, sex, creed, religion, ancestry, disability, familial status, or national origin with respect to employment, labor union membership, housing accommodations, property rights, education, public accommodations, and public services, or any of them, tend to create and intensify conditions of poverty, ill health, unrest, lawlessness and vice which adversely affect the public health, safety, order, convenience and general welfare;
- B. To recognize the rights of all persons, without regard to race, color, sex, creed, religion, ancestry, disability, familial status, or national origin, to have equal opportunities with respect to employment, labor union membership, housing accommodations, property rights, education, public accommodations and public services;
- C. To prevent, investigate, ~~and~~ mediate, and prohibit any and all discriminatory practices based on race, color, sex, creed, religion, ancestry, disability, familial status, or national origin with respect to employment, labor union membership, housing accommodations, property rights, education, public accommodations or public services;
- D. To protect all persons from unfounded charges of discriminatory practices; ~~and~~

E. To encourage the resolution of discrimination complaints through mediation; and

EF. To effectuate the foregoing policy by means of public information and education, mediation and conciliation, and the enforcement powers conferred by law on the Commission.

2.64.020 Definitions.

For the purposes of this chapter, the following words and phrases shall mean:

A. **COMPLAINT COMPLAINANT.** A person on whose behalf a complaint alleging unlawful discrimination has been filed.

B. ***DISCRIMINATION.*** Any act or attempted act which because of race, color, sex, creed, religion, ancestry, disability, familial status, or national origin results in the unequal treatment or separation or segregation of any person, or denies, prevents, limits or otherwise adversely affects or if accomplished would deny, prevent, limit or otherwise adversely affect, the benefit or enjoyment by any person of employment, membership in a labor organization, ownership or occupancy of real property, a public accommodation, a public service or an educational institution.

C. ***EDUCATIONAL INSTITUTION.*** Any university, college or school operating within the city, including any school, institution or organization for vocational training, but the term shall not apply to the students of, or the education provided by, any school maintained and operated by a religious corporation, or association solely for the benefit of its own membership.

D. ***EMPLOY.*** To use or be entitled to the use and benefit of the services of a person as an employee.

E. ***EMPLOYER.*** Any person within the city who hires or employs any employee, and any person wherever situated who hires or employs any employee whose services are to be partially or wholly performed in the city, but the term “employer” shall not include any person with respect to the hiring or employment of a household domestic servant, or any religious corporation, association or society with respect to the hiring or employment of individuals of a particular religion, when religion shall be a bona fide occupational qualification for employment, provided such selection is not based on race, color, ancestry or national origin.

F. ***EMPLOYMENT.*** The state of being employed as an employee by an employer.

G. ***EMPLOYMENT AGENCY.*** Any person regularly undertaking, with or without compensation, to procure for employees opportunities to work for any employer and includes any agent of such a person.

H. ***HIRE.*** To engage or contract for, or attempt to engage or contract for, the services of any person as an employee.

I. **LABOR ORGANIZATION** Any person, employee representation committee, or plan in which employees participate, and which exists wholly or in part for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms or conditions of employment and shall include any conference, general committee, joint or system board or joint Council.

J. **LAWYER.** A person duly authorized and licensed by the state to engage in the practice of law.

K. **PROBABLE CAUSE.** A determination that it is more likely than not that the complainant or members of a class, or both, were discriminated against based on a violation of this chapter. The likelihood that discrimination occurred is assessed based upon evidence that establishes a prima facie case, and if the respondent has provided a viable defense, whether there is evidence of pretext.

~~K~~L. **PUBLIC ACCOMMODATIONS.** The services and facilities of any and all places of business within the city engaged generally in the provision of services or goods to the public or soliciting generally the public patronage, including, without limitation, theaters, hotels, motels, restaurants, taverns, barbershops, beauty shops, insurance companies, lending organizations, financial institutions and carriers.

~~L~~M. **PUBLIC SERVICES.** The services or facilities provided within the city to the general public.

~~M~~N. **REAL ESTATE BROKER/REAL ESTATE SALESMAN.** A real estate broker and a real estate salesperson, as defined by state law.

~~N~~O. **REAL PROPERTY.** Any right, title, interest in or to the possession, ownership, enjoyment or occupancy of any parcel of land, any building situated thereon or any portion of a building in the city.

~~O~~P. **RESPONDENT.** A person against whom a complaint alleging unlawful discrimination has been filed or issued.

~~O~~Q. **VERIFIED COMPLAINT.** An allegation of unlawful discrimination by a member of a protected class that is sworn under oath or affirmation before an officer authorized by law to administer oaths.

2.64.030 Unlawful acts.

The following are declared to be unlawful discrimination:

A. For an employer, because of race, color, sex, creed, religion, ancestry, disability, or national origin, to fail or refuse to hire, to discharge an employee or to accord adverse, unlawful or unequal treatment to any person or employee with respect to application, hiring, training,

apprenticeship, tenure, promotion, upgrading, compensation, layoff, discharge or any term or condition of employment;

B. For an employment agency, because of race, color, sex, creed, religion, ancestry, disability, or national origin, to accord adverse, unlawful or unequal treatment to any person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, discharge, or any term or condition of employment;

C. For any labor organization, because of race, color, sex, creed, religion, ancestry, disability, or national origin, to deny full and equal membership rights to an applicant for membership or to a member, to expel, suspend or otherwise discipline a member or to accord adverse unlawful or unequal treatment to any person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, discharge or any term or condition of employment;

D. For any person having any interest in real property, any real estate broker, or any real estate agent, because of race, color, sex, creed, religion, ancestry, disability, familial status, or national origin, to fail or refuse to sell, rent, assign or otherwise transfer any real property to any other person, or to accord adverse, unlawful, or unequal treatment to any person with respect to the acquisition, occupancy, use or employment of any real property;

E. For any person engaged in the provision of public accommodations, because of race, color, sex, creed, religion, ancestry, disability, or national origin, to fail or refuse to provide to any person access to the use of and benefit from the services and facilities of such public accommodations; or to accord adverse, unlawful or unequal treatment to any person with respect to the availability of the services and facilities, the price or other consideration thereof, the scope and quality thereof, or the terms and conditions under which the same are made available, including terms and conditions relating to the credit, payment, warranties, delivery, installation and repair;

F. For any person engaged in the provision of public services, by reason of race, color, sex, creed, religion, ancestry, disability, or national origin, to fail or refuse to provide to any person access to the use and benefit thereof, or the terms and conditions under which the same are made available, including terms and conditions relating to the credit, payment, warranties, delivery, installation and repair;

G. For any person to conceal or attempt to conceal any unlawful discrimination, to aid, abet, compel, coerce, incite, induce or attempt to induce, another person to unlawfully discriminate or by any means, trick, artifice, advertisement or sign, or by use of any form of application, or by making any record or inquiry, or by any device whatsoever to bring about or facilitate unlawful discrimination, or to engage in or threaten to engage in any reprisal, economic or otherwise, against any person by reason of the latter's filing a complaint or testifying or assisting in the observance and support of the purposes and provisions of this chapter,

H. For any person, bank, banking organization, mortgage company, insurance company, or other financial institution or lender, or any agent or employee thereof, to whom application is

made for financial assistance for the purchase, lease, acquisition, construction, rehabilitation, repair or maintenance of any real property, to discriminate against any person or group of persons, because of the race, color, sex, creed, religion, ancestry, disability, familial status, or national origin of the person or group of persons or of the prospective occupants or tenants of the real property in the granting, withholding, extending, modifying or renewing the financial assistance, or in the rates, terms, conditions or extension of services in connection therewith; and

I. Wherever religious organizations or bodies are exempt from any of the provisions of this chapter such exemption shall apply only to religious qualifications for employment or residence in church owned or operated property, and the organizations shall not be exempt from any provisions of this chapter relating to discrimination based upon race, color, sex, ancestry, disability, or national origin.

2.64.040 Claim against public entities or officials. ~~city, officials, employees, agents and servants.~~

~~Any and all complaints alleging unlawful discrimination made against the City of Rapid City, its officials, employees, agents and servants shall be referred by the Commission to the State's Commission of Human Rights. The Commission shall have no jurisdiction of complaints made against the City of Rapid City, the State of South Dakota, the United States of America, any political subdivision of the State of South Dakota, or the officials, employees, agents or servants alleged to be acting in their official capacity of any of the foregoing. The Commission shall refer any such complainant to an agency authorized to receive such a complaint.~~

2.64.045 Time for filing complaint.

Any complaint filed under this Chapter shall be filed within one hundred eighty (180) days after the last occurrence of an alleged discriminatory or unfair practice.

2.64.050 Commission—Created.

There is created for the City a Human Relations Commission to be known as the Rapid City Human Relations Commission (referred to throughout this chapter as Commission).

2.64.060 Commission—Members—Composition—Compensation.

The Commission shall be composed of 7 members, all of whom shall be legal residents of the city, and all of whom shall serve without pay and shall be appointed pursuant to § 2.64.070. Due regard shall be given to the demographic diversity of Rapid City and the representation of minorities and women on the Commission.

2.64.070 Commission—Members—Appointment— Terms.

The Mayor, with the approval of the Common Council shall appoint each member of the Commission for a term of 3 years; provided that, upon organization of the Commission, 3 members shall be appointed for a 3-year term, 2 members for a 2-year term and 2 members for a

1-year term. Thereafter, appointment shall be made as they expire for the full term of 3 years. All terms of office shall expire on ~~July~~ October 1. However, any person whose term has expired shall continue to serve until the appointment and qualification of a successor. No member shall serve more than 2 consecutive 3-year terms of office. This restriction does not apply to partial terms to which a member may be appointed. This restriction shall apply only to terms commenced after December 1, 2013.

2.64.080 Commission–Organization.

The Commission shall, at its first organizational meeting and at each first meeting in ~~July~~ October of subsequent years, elect from its membership the officers it may deem necessary. The officers thus elected will appoint from among the membership of the Commission subcommittees as they deem necessary and proper. Each subcommittee shall organize and appoint what officers it deems necessary, including a secretary within its membership.

2.64.085 Commission–Members–Removal.

The Mayor with the confirmation of the Common Council, shall after public hearing have authority to remove any member of the Commission for cause, which cause shall be stated in writing and made a part of the record of the hearing.

2.64.090 Commission–Vacancies.

In case of any vacancy in membership of the Commission due to death, resignation, or otherwise, a successor shall be appointed pursuant to the requirements of §§ 2.64.060 and 2.64.070 to fill the unexpired portion of the term of the member he or she replaces. ~~If a member of the Commission fails to attend 3 consecutive meetings, his or her seat on the Commission shall be termed vacant.~~

2.64.100 Commission–Purposes and powers.

A. The Commission may investigate complaints of discrimination occurring within the corporate limits of the City of Rapid City that allege one or more acts declared unlawful by Section 2.64.030. ~~any and all discriminatory practices based on sex, race, color, creed, religion, ancestry, disability, familial status, or national origin with respect to employment, labor union membership, housing accommodations, property rights, education, public accommodations or public services.~~

B. The Commission may act to disseminate information, to engage in and cooperate with programs of research and education, to cooperate with persons or groups interested in similar objectives, to conduct public meetings, to mediate and conciliate the instances of alleged discrimination, and to approve stipulations, consent orders and agreed settlements, ~~and to~~ refer matters to ~~state’s Commission of Human Rights or any other local, state or federal~~ another agency or department of government, ~~and to hear complaints alleging discrimination with such investigation and inquiry as may reasonably appear necessary.~~

Comment [WEN2]: Removed power of HRC to initiate complaints

C. The Commission, in the hearing of verified complaints, may subpoena and examine witnesses, administer oaths, take testimony, and require the production for examination of relevant books or papers and to take such affirmative action as allowed herein as in the judgment of the Commission will effectuate its purposes. No subpoena may issue prior to the time allowed for a response pursuant to Section 2.64.140B. A subpoena shall only be issued upon the recommendation of the investigator and upon the vote of a majority of all the appointed Commissioners. The Commission shall have no power to award pain and suffering, punitive, or consequential damages.

Comment [WEN3]: Reference to limits on action to be taken by HRC – See list in § 2.64.140(H)

Comment [WEN4]: Limits on issuance of subpoena have been added

D. The Commission is authorized to enter into referral agreements with other private or governmental organizations tasked with similar purposes. The Commission shall have the power to make such rules and regulations not inconsistent with this Chapter and state law as are required by any such agreement. Notwithstanding § 2.64.140, the Commission is specifically authorized to create by rule an alternative process for informal resolution of complaints. All rules and referral agreements shall be approved by the Common Council before they are implemented by the Commission.

Comment [WEN5]: Removed work-sharing agreement authorization (FEPA) and added *private* in addition to public organizations

Comment [WEN6]: Added Council approval for rules/informal process

2.64.110 Commission–Meetings.

The Commission shall meet at least once a month at a regular time and place to be set by the Commission.

2.64.120 Commission–Reporting requirements.

The Commission shall make a report to the Common Council ~~each on or before January 1, 2009,~~ and July every 6 months thereafter, and at such other times as the Council may direct.

2.64.130 Commission has exclusive authority.

The Human Relations Commission created by this chapter shall have the exclusive authority to investigate and ~~mediate~~ resolve allegations of violations of Section 2.64.030. The Commission may refer any complaints it receives to the appropriate state or federal agency for further action or investigation either in its discretion or where required by this ordinance or by state or federal law. ~~Investigation, mediation or referral to the appropriate state or federal agency Action~~ by the Commission in accordance with this Chapter and state law shall be the sole ~~remedies~~ remedy for violations of Section 2.64.030.

2.64.140 Procedure.

~~The following procedure will be followed by the Commission:~~

~~A. Upon receipt of a formal written complaint, the Commission shall meet within 30 days.~~

~~B. The Commission forwards complaint to the alleged violator and requests a response within 30 days.~~

~~—C.— If no response is received from the alleged violator, the Commission shall direct the preparation of its own findings and follow the requirements of subsections H through I of this section.~~

~~—D.— Upon receipt of a response, the Commission shall review the complaint and response and determine whether there is probable cause to support the allegations contained in the complaint.~~

~~—E.— If the Commission determines there is probable cause to support the allegations contained in the complaint, the Commission shall set a time for mediation between the parties and shall notify the parties of its determination and the time and place of the mediation.~~

~~—F.— If the mediation results in an agreement between the parties, the agreement shall be reduced to writing, signed by both parties and be adopted by the Commission.~~

~~—G.— If no agreement is reached through the mediation process or if the respondent declines to participate in mediation, the Commission shall direct the preparation of its own findings on the complaint.~~

~~—H.— The Commission shall review the findings and approve, amend, or reject the findings.~~

~~—I.— Except in the case of a settlement, upon approval of the Commission's findings, the original complaint, along with the Commission's findings shall be forwarded to the South Dakota Human Relations Commission.~~

The following procedure shall be followed by the Commission:

A. *Complaint.* Any person claiming to be aggrieved by a discriminatory practice made unlawful by this Chapter may file with the Commission a verified written complaint.

1. The complaint shall be in the form prescribed by the Commission, state the name and address of each respondent, and shall set forth the pertinent facts on which it is based, as known to the complainant and shall state any other information required by the Commission.
2. The Commission may dismiss a complaint if the complainant fails to state a claim upon which relief can be granted or if the Commission determines the complaint has been abandoned or withdrawn.

B. *Response.* Promptly upon the filing of any complaint, the Commission shall forward a copy thereof, by registered or certified mail, to all respondents.

1. All respondents shall file a written response to the complaint within thirty days after mailing thereof or within any period of extension granted by the Commission or its designated representative.

2. If no response is received from a respondent, the Commission shall note such default. For good cause shown, the Commission may set aside an entry of default within ten days after the date of the entry. If the respondent is in default, the Commission may proceed to hear testimony adduced upon behalf of the complainant. After hearing testimony, the Commission may prepare its own findings and enter any order, in compliance with subsection H. below, that the evidence warrants.

C. *Notice of Right to Transfer.* Upon the filing of any complaint, the parties to the complaint shall be notified that any party thereto may, within fifteen days of the date of receipt of the notice of the proceeding, demand as a matter of right that the matter be transferred to the State Commission of Human Rights. Immediately upon receipt of notice of a party's demand to transfer the complaint under this provision, the Commission shall forward the complaint to the State Division of Human Rights and shall have no further jurisdiction with regard to the complaint.

D. *Probable Cause.* Upon receipt of a response, the Commission shall cause to be made such investigation into the matter as it determines necessary and appropriate to determine whether there is probable cause to support the allegations of discrimination. The investigator shall be appointed or retained by the City Attorney.

Comment [WEN7]: Added

1. If there is no probable cause to support the allegations of discrimination, the Commission shall dismiss the complaint.
2. If the Commission finds probable cause to support the allegations of discrimination, the Commission shall direct one of the following actions:
 - a. mediation of the complaint with a mediator selected by the City Attorney, or
 - b. conference or conciliation with the investigating official attempting to eliminate the discriminatory or unfair practice.

Comment [WEN8]: Changed from Commission to City Attorney

E. *Mediation and Conciliation.*

1. If the mediation or conciliation results in an agreement between the parties, the agreement shall be reduced to writing, signed by both parties, and adopted by the Commission.
2. If no agreement is reached, the Commission shall send the notice required by 2.64.140(F) and set the matter for hearing.

F. *Notice to Parties.* The Commission shall send a notice to all parties that includes the following:

1. A list of the allegations of discrimination that the Commission finds probable cause to support;
2. An explanation of the facts, law and reasons for the findings; and

3. The notice required by SDCL 20-12-6.1 that the parties have twenty days to elect to have the claims asserted in the complaint decided in circuit court in lieu of a hearing before the local commission.
4. If any party makes an election to proceed in circuit court, the Commission shall have no further jurisdiction with regard to the complaint.

G. *Hearing.* Upon expiration of the twenty-day timeframe following the notice in subsection F above, the Commission shall set the time and place of a public hearing and provide notice to the parties by registered or certified mail at least thirty days prior thereto.

1. The public hearing shall be conducted by a hearing examiner appointed by the City Attorney pursuant to contested case procedures in SDCL ch. 1-26.
2. No Commission member who took part in an investigation, mediation, conciliation, or informal complaint resolution process created by § 2.64.100(D) may take part in the public hearing.
3. The Commission shall have authority to conduct prehearing conferences; to subpoena witnesses to appear, testify and produce records, books, papers and other documents; to administer oaths; to take testimony; to receive evidence; to examine and cross examine witnesses; and issue such other orders as authorized by law.
4. All parties shall appear in person at the hearing and may, at their option, be represented by counsel. All parties may, in accordance with any order of procedures as may be determined by the Commission, present evidence, call witnesses and present arguments bearing upon the facts alleged in the complaint.
5. The Commission shall not be bound by the strict rules of evidence applicable to courts of law or equity, but the right of cross-examination shall be preserved. The complainant bears the burden of proving by a preponderance of the evidence the allegations in the complaint. The testimony taken at a hearing shall be under oath, and the entire proceeding shall be electronically recorded, stenographically reported, or both.

Comment [WEN9]: Requirement for a hearing examiner added

H. *Disposition of Complaint.* Following the hearing, the Commission shall dispose of the complaint in one of the following manners:

1. If the Commission determines that allegations of discrimination are not proven by a preponderance of the evidence or that the unlawful act or practice complained of has been satisfactorily eliminated, rectified, and that further proceedings are unnecessary, it shall order the dismissal of the complaint.
2. If the Commission determines that the allegations of discrimination are proven by a preponderance of the evidence, the Commission shall state its findings of fact and

shall issue and cause to be served upon the respondent an order requiring the respondent to cease and desist from such discriminatory or unfair practice and to take such affirmative action as the Commission determines necessary, including and limited to the following:

- a. hiring, reinstatement, or upgrading of employees, with or without back pay;
- b. referring of applicants for employment by any respondent employment agency;
- c. admittance or restoration to membership by any respondent labor organization;
- d. admission to or continuation in enrollment in an apprenticeship program or on-the-job training program;
- e. the posting of notices;
- f. the making of reports as to the manner of compliance;
- g. costs allowable under SDCL Chapter 15-17; and
- h. reasonable attorneys' fees for housing matters, as in the judgment of the Commission effectuates the purposes of this Chapter.

A majority vote of all appointed Commissioners shall be necessary for the Commission to order any affirmative action. The Commission may not award monetary compensation other than back pay pursuant to subsection a., costs pursuant to subsection g., or attorney fees in housing matters pursuant to subsection h. above. The Commission shall not award compensation for pain and suffering, punitive damages, or consequential damages;

- 3. Within five days of the determination, the Commission shall give notice of the order to the complainant and respondent by registered or certified mail.

2.64.150 Appeal.

Any party aggrieved by a final order of the Commission may appeal pursuant to SDCL 20-12-7.

2.64.160 Investigative materials confidential—Access to material by parties following determination—Complainant’s right.

Prior to the hearing held under Section 2.64.140(G), all information and materials regarding a complaint of discrimination obtained by the Commission or an investigating official are confidential. Notwithstanding SDCL §§ 1-27-29 to 1-27-32, inclusive, and as provided by SDCL § 20-13-32.2, after the issuance of a determination under Section 2.64.140(D) and upon receipt of a written request and payment of costs for copying, all investigatory materials may be disclosed to the parties or their counsel of record. The complainant shall have the right to dismiss the complaint at any time prior to the commencement of the hearing held pursuant to Section 2.64.140(G).

CITY OF RAPID CITY

Comment [WEN10]: Added mandatory cease and desist order, with option of additional action from the list here. This is copied out of the statute referenced earlier (SDCL 20-13-42) listing the powers of the State Human Rights Commission. These are the only options for further action – the HRC is limited to the list provided here.

Comment [WEN11]: Clarify limits on monetary damages that may be awarded

Mayor

ATTEST:

Finance Officer

(seal)

