



# CITY OF RAPID CITY

RAPID CITY, SOUTH DAKOTA 57701-2724

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### MEMORANDUM

**TO:** Common Council  
**FROM:** Wade Nyberg, Assistant City Attorney *WEN*  
**DATE:** September 24, 2013  
**RE:** Human Relations Commission ordinance changes

The Rapid City Human Relations Commission (HRC) was originally formed in the 1970s. After several years, the HRC became inactive, and appointments ceased to be made to the commission. In 2009, the HRC ordinance was amended, new members were appointed, and the HRC began meeting again. It received its first complaint of unlawful discrimination in December of 2009. The HRC has continued to receive and investigate complaints since then.

#### Complaints Received by HRC by Year and Type

	Employment	Housing	Other	Total
2013	1	1	0	2
2012	3	5	5	13
2011	5	3	8	16
2010	3	3	13	19
2009	0	0	1	1

#### *Fair Employment Practices Agency*

The impetus for this ordinance change came from a request from the Mayor to look into the possibility of the HRC being recognized by the U.S. Equal Employment Opportunity Commission (EEOC) as a Fair Employment Practices Agency (FEPA). The EEOC is the federal

agency tasked with enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of a protected class (i.e. race, color, religion, sex, national origin, age, disability or genetic information). FEPAs are state and local agencies that enforce local ordinances or statutes against discrimination. The EEOC uses FEPAs to reduce its workload, and this is accomplished through execution of a work sharing agreement, the most recent version of which is attached to the agenda. The EEOC compensates FEPAs for their work on the EEOC's behalf. In order to qualify to be a FEPA, the local commission must have two things: an ordinance that "makes unlawful employment practices based upon race, color, religion, sex, national origin or disability" and an enforcement power "[t]o grant relief from the practice; to seek relief from the practice; or to institute criminal proceedings with respect to the practice." 29 CFR § 1601.70.

The HRC is tasked by the Rapid City Municipal Code with investigating and mediating violations of the City's anti-discrimination ordinance. RCMC Chapter 2.64. The current ordinance meets the first requirement for a FEPA designation. The second requirement, enforcement power, is not met. Currently, if the HRC finds that there is probable cause to believe that discrimination has occurred, it can request mediation, but has no enforcement power to order that discrimination stop, take any affirmative action against further discrimination or retaliation, or even order mediation. The ordinance amendment would allow the HRC to enforce the City's anti-discrimination ordinance with the powers available to it under state law.

A FEPA designation and a worksharing agreement are not guaranteed. The request by the HRC is subject to federal budget constraints, shared jurisdiction of other FEPAs, and other considerations. The State Human Rights Commission and the Sioux Falls Human Relations Commission are both FEPAs.

### ***Goals of Ordinance Amendment***

The goals of amending the ordinance are twofold. First, the HRC would have the power to enforce the anti-discrimination ordinance. It would be able to take action against unlawful discrimination, including requiring mediation and/or entering an order, enforceable through the court system, requiring that discrimination cease or requiring the hiring, reinstatement, or upgrading of employees, with or without back pay. Also, it would be able to take such action should there be retaliation against a person filing a complaint. The powers granted in the ordinance change would allow for more thorough and complete investigations. Under the new ordinance, staff (likely an assistant city attorney) will be conducting the investigations. If respondents accused of unlawful discrimination are uncooperative, the HRC will have the tools to require a response at the very least, and end discrimination if it is found to be unlawful.

The second goal of the ordinance is to meet the qualifications for a FEPA designation with the addition of an enforcement power. It specifically authorizes the HRC to enter into worksharing agreements with other agencies. While the EEOC is the main focus at this point, the ordinance also puts the HRC in the best possible position to enter into a similar agreement with the Department of Housing and Urban Development (HUD) for referral and resolution of housing discrimination cases. These worksharing agreements would make the HRC eligible for federal reimbursement for cases resolved, and it would also gain the citizens of Rapid City the benefit of having a local, in-person response to complaints of discrimination.

### ***Statutory Powers***

Municipalities are authorized by SDCL 20-12-4 to “investigate any 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.” In order to carry out that function, a city may establish a commission on human relations. SDCL 20-12-5. The commission may be given the powers:

1. to disseminate information,
2. to engage in and co-operate with programs of research and education,
3. to co-operate with persons or groups interested in similar objectives,
4. to conduct public meetings and hearings,
5. to mediate and conciliate in instances of alleged discrimination, and
6. to initiate and hear complaints alleging discrimination with such investigation and inquiry as may reasonably appear necessary.

*Id.* In addition, the commission may have the following authority in investigating complaints:

1. subpoena and examine witnesses,
2. administer oaths,
3. take testimony, and
4. require the production for examination of relevant books or papers and
5. to take such affirmative action as in the judgment of the commission will effectuate its purposes.

SDCL 20-12-6. In addition, state law provides that the commission’s powers “may be coextensive with the powers of the State Human Rights Commission as set forth in § 20-13-42.”

*Id.* SDCL 20-13-42 provides the State Human Rights Commission powers as follows:

If, upon taking into consideration all the evidence at a hearing, the commission finds that a respondent has engaged in, or is engaging in, any discriminatory or unfair practice as defined in this chapter, the commission shall state its findings of fact and shall issue and cause to be served upon such respondent an order requiring such respondent to cease and desist from such discriminatory or unfair practice and to take such affirmative action, including hiring, reinstatement, or upgrading of employees, with or without back pay; the referring of applicants for employment by any respondent employment agency; the admittance or restoration to membership by any respondent labor organization; the admission to or continuation in enrollment in an apprenticeship program or on-the-job training program; the posting of notices; the making of reports as to the manner of compliance; compensation incidental to the violation, other than pain and suffering, punitive, or consequential damages; costs allowable under chapter 15-17; any other appropriate relief; and reasonable attorneys' fees for housing matters, as in the judgment of the commission effectuates the purposes of this chapter.

None of the powers described above are available to the HRC unless granted by ordinance.

### *Appeals/Further Administrative Process*

The powers given by the proposed ordinance would not be unchecked, as state law contains several restraints on the local HRC powers. First, the parties must be notified that within 15 days of the receipt of notice of the HRC proceeding, any party may demand as a matter of right that the case be transferred to the State Human Rights Commission. SDCL 20-12-9. Such an election strips the local HRC of jurisdiction, and the complaint is processed by the State Division of Human Rights. There is also a requirement that upon finding probable cause, the commission must notify the parties that either party has the option to proceed in circuit court in lieu of further proceedings in front of the HRC. SDCL 20-12-6.1. If the matter stays with the local commission, state law includes the right to appeal, which allows a dissatisfied complainant or respondent to appeal to circuit court using the S.D. Administrative Procedure Act. See SDCL 20-12-7 & SDCL ch. 1-26.