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Testimony on Administrative Code ch. 46-04-01
Human Rights Practice and Procedure
Prepared for the
Administrative Rules Committee

September 11, 2008

Good morning, Chairman Fischer and members of the Administrative Rules Committee. I am Lisa Fair McEvers, Commissioner of Labor.

The Department of Labor is granted the power to receive and investigate complaints alleging violation of the Human Rights Act, found in N.D.C.C. ch. 14-02.4. The department is also granted the authority to adopt rules necessary to implement the chapter. While much of the department's procedure is contained within N.D.C.C. ch. 14-02.4, the department has received several requests for rules which further describe the processes the department follows when investigating a claim of discrimination under the Human Rights Act.

These rules are meant to provide the framework under which the department is already practicing. These rules were not drafted in response to any statutory changes made by the Legislative Assembly. The rules are not related to any state or federal regulation; however, some of the rules are similar to rules followed by the Equal Employment Opportunity Commission (EEOC) used for investigations of employment discrimination. The proposed rules were not mandated by federal law.

Notice for the proposed rules was provided by filing a copy of the full notice with the Legislative Council along with a copy of the proposed rules. In addition, an abbreviated notice was published in each official county newspaper in North Dakota.

A hearing was conducted by a hearing officer from the Office of Administrative Hearings. One person, other than department staff, attended the hearing and submitted oral testimony which summarized written testimony provided to the hearing officer. The testimony was provided by Ms. Cheryl Bergian, Executive Director of the North Dakota Human Rights Coalition.

In general, Ms. Bergian was supportive of the draft rules. There were additional issues that Ms. Bergian wanted included or considered for the rules. The proposed rules were modified to incorporate some of the suggestions made by

Ms. Bergian. Due to the length of Ms. Bergian's testimony and the department's response, I have attached copies of the same for your review. Also enclosed is a copy of the rules showing the modifications added following consideration of Ms. Bergian's testimony.

The cost to publish the notice the hearing using the North Dakota Newspaper Association was $1,497.50. The cost for the administrative hearing officer to conduct the hearing was $345.19.

The subject matter of the rules is the practices and procedures used by the department in cases involving the Human Rights Act. A regulatory analysis was not required under N.D.C.C. § 28-32-08, therefore an analysis was not completed. The department did conduct a Small Entity Regulatory Analysis and a Small Entity Economic Impact Statement. Copies of each are attached. A Takings Assessment was also completed, a copy of which is attached. The Office of the Attorney General has examined the proposed rules, publication notices and other requirements for adopting administrative rules and found them to be in compliance with N.D.C.C. ch. 28-32.

Thank you for your consideration of the department's new rules.

North Dakota Human Rights Coalition

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Before the
NORTH DAKOTA DEPARTMENT OF LABOR
600 East Boulevard Avenue
Bismarck, North Dakota
Public Hearing
September 28, 2007

In the Matter of

Notice of Intent to
Adopt Administrative Rules
To Implement the North Dakota Human Rights Act

I. Introductory Statement

The North Dakota Human Rights Coalition thanks the Department of Labor and Commissioner Lisa Fair McEvers for their work on the draft regulations. The North Dakota Human Rights Act are vitally important statutes, and the regulations will provide significant guidance to both the agency and the public regarding their implementation and enforcement.

The NDHRC has been advocating for the promulgation of administrative regulations for the North Dakota Human Rights Act so that guidance is available to the public, to complainants, to respondents, to representatives of complainants and respondents, and to the staff of the Human Rights Division of the North Dakota Department of Labor in how the North Dakota Department of Labor administers its enforcement authority of the North Dakota Human Rights Act. We appreciate opportunity to provide these comments.

II. Probable Cause

The NDHRC encourages the Department to include in its regulations a definition of the standard of "probable cause," and to ensure the consistent use of that term within the proposed regulations. The standard for probable cause has not been explicitly defined by either the North Dakota Human Rights Act itself or the Department's proposed rules.

A regulatory definition of probable cause offers several benefits. The Department will benefit because its actions will be guided by a consistent standard. This will promote effective, even-handed processing of complaints. Additionally, the inclusion of a clearly-articulated standard will enhance the perception of the Department as an impartial agency, which processes complaints in accordance with established guidelines.

A definition of probable cause will also assist complainants and respondents. They will understand the standard governing determination of complaints, and will be better able to prepare and respond to them. As the statute recognizes, a probable cause determination by the Department also impacts a complainant's later success in the courts. Because of the larger legal import of a Department finding, it is imperative that all parties are fully informed regarding the probable cause standard.

For these reasons, the NDHRC encourages the Department to add an explicit definition of probable cause in its proposed regulations. This definition should mirror the statutory requirements and case law on determination by administrative agencies. Such a definition might be added to Proposed Rule 46-04-01-01, reading: "Probable Cause" means a determination after investigation that the facts can reasonably support a belief that a discriminatory practice occurred.

A. ***Defining Probable Cause***

The North Dakota Human Rights Act explains the role of a probable cause finding in the investigative process. N.D.C.C. §14-02.4-23(2) states that after conducting an investigation, the Department "shall determine from the facts whether probable cause exists *to believe* that a discriminatory practice has occurred." (Emphasis added). According to the North Dakota Human Rights Act, for the Department to make a finding of probable cause, it must determine only that the facts support a belief that discrimination occurred; it does not require that a complainant prove that discrimination occurred. Should the Department determine "probable cause exists *to believe* that a discriminatory practice has occurred," it is required by N.D.C.C. §14-02.4-23(3) to then proceed to informal resolution of the complaint, conciliation, or an administrative hearing.

The NDHRC urges the Department, in considering how to define probable cause, to look to established precedent in the State of North Dakota and elsewhere. The North Dakota Supreme Court has explained that a probable cause standard is akin to a "reasonable person" standard. The Court defers to fact-finding determinations by administrative agencies that meet such a standard. The Court's key focus when reviewing agency findings is to "determine whether a reasoning mind could reasonably have determined the factual conclusions were supported by the weight of the evidence." *Walton v. North Dakota Department of Human Services*, 522 N.W.2d 336, 338 (N.D. 1996) (citing *Power Fuels, Inc. v. Elkin,* 283 N.W.2d 214, 220 (N.D. 1979).

The Supreme Court of South Dakota has offered an even more detailed analysis of probable cause. This Court defined probable cause specifically within the context of the South Dakota human rights law. According to the South Dakota Supreme Court, a probable cause finding required "only that a reasonable, intelligent and prudent person would have more than a suspicion, upon reasonable inquiry, that a cause of action exists, whether the chances of success on the merits is great or small." *Erdahl v. Groff*, 576 N.W.2d 15, 19 (S.D. 1998). The Court described this as a "lesser standard," which required less proof than a "preponderance of the evidence" standard. *Id.* The NDHRC believes that the South Dakota Supreme Court's interpretation of this language is consistent with the language and intent of the North Dakota Human Rights Act, which equates probable cause with a reasonable belief that the facts indicate

discrimination, but does not require a preponderance of evidence or conclusive proof of such discrimination. N.D.C.C. §14-02.4-23.

Interpretations of federal antidiscrimination law are also instructive here. For example, federal courts have described the importance of a applying a lesser standard in Equal Employment Opportunity Commission determinations in complaints alleging discrimination in violation of federal law. For example, the United States Court of Appeals for the Sixth Circuit has noted that EEOC determinations are intended to serve two purposes: "notice to the employer and a common ground for conciliation." *EEOC v. McCall Printing Corp.*, 633 F.2d 1232, 1237 (6th Cir. 1980). An agency determination letter is not the equivalent of a legal pleading. The Sixth Circuit expressly declined to treat "a determination letter with greater formality than that attached to a pleading." *Id.* at 1236-37. Similarly, the Fourth Circuit has also held that the determination serves notice and conciliatory purposes, but does not indicate an adjudicative finding on the merits of the claim. *EEOC v. Chesapeake & Ohio R.R.*, 577 F.2d 229, 232 (4th Cir. 1978).

III. The Human Rights Regulations Should Reflect the Department's Statutory Obligation to Provide for Administrative Hearings Where Probable Cause Has Been Found And Conciliation Has Failed

The NDHRC is concerned that the Department's proposed rules fail to reflect and implement a significant obligation imposed by the North Dakota Human Rights Act: to provide for an administrative hearing where it has found that there is probable cause to believe that discrimination has occurred and conciliation efforts have failed.

An area of inconsistency between the North Dakota Human Rights Act and the Department's proposed regulations concerns the statutory obligation of Department, once it has determined that probable cause exists and conciliation has been unsuccessful, to provide for an administrative hearing on the complaint. The statute is clear and unambiguous on this point: "If the department determines that probable cause exists to believe that a discriminatory practice has occurred and is unable to resolve the complaint through informal negotiations or conciliation, the department ***shall issue*** a probable cause determination ***and provide*** for an administrative hearing in the manner provided in chapter 28-32 on the complaint." N.D.C.C. §14-02.4-23(3) (emphasis added). The NDHRC urges the Department to include its final rules language implementing §14-02.4-23(3), which both acknowledge the Department's obligation to provide for administrative hearings and describe the procedures for implementing the administrative hearing requirement.

IV. The Proposed Human Rights Regulations Lack Provisions Regarding Retaliation

The North Dakota Legislature encourages North Dakotans to assist the Department in resolving human rights violations. The legislature created a statutory provision to protect citizens who participate in the resolution of such complaints from any threatened or actual retaliation. N.D.C.C. §14-02.4-18. The North Dakota Human Rights Act protects the rights of citizens to file a complaint of discrimination, to testify about alleged discrimination, and to assist in investigations actions under the Act. *Id.* Threatened or actual reprisal against citizens engaging

in any of these activities constitutes a form of discrimination. *Id.* The proposed regulations, however, are silent on the issue of retaliation. The NDHRC recommends that the Department include in its final rules provisions designed to ensure enforcement of the statutory protection from retaliation.

First, the proposed regulations should make explicit in the "Definitions" section (46-04-01-01) that retaliation is one of the discriminatory practices prohibited by the North Dakota Human Rights Act. Second, the Department's regulations should address the special urgency of retaliation allegations. The NDHRC believes that the EEOC's approach is appropriate. In its regulations implementing various federal employment discrimination statutes, the EEOC recognizes that retaliation must be remedied promptly. If unresolved, retaliation creates adverse harm to individual complainants. It also has detrimental effects on the broader community, including "a chilling effect upon the willingness of individuals" to oppose discrimination or to participate in administrative processes to resolve discrimination. EEOC Compliance Manual § 8-I (A) (1998). To confront the immediate harm of retaliation, the EEOC will seek temporary or preliminary relief before it completes processing of a retaliation charge when there is likelihood that the complainant "will suffer irreparable harm because of the retaliation." *Id.* The NDHRC recommends that the Department also emphasize prompt resolution of retaliation complaints. One means may be an express statement in Department regulations granting priority processing to complaints containing allegations of retaliation.

V. Need for Greater Specificity Regarding Investigative Process

The NDHRC appreciates the Department's effort to codify the procedures for investigating and disposing of complaints, but believes the proposed regulation will benefit from additional detail. A thoroughly documented investigative process will better inform potential complainants and respondents about the process in which they are participating. A detailed investigative process also will facilitate consistent departmental practices, and will enhance the public perception that Department works to investigate complaints in a uniform and evenhanded manner.

Proposed Rule 46-04-01-08 does not enumerate what procedures and practices will be used by the Department, or what evidence will be gathered. Such information could easily be included in the North Dakota Human Rights Act regulations.

Many states offer explicit guidance regarding the investigative process in their own Human Rights regulations. For example, Minnesota explicitly outlines the procedures that may be used to investigate a complaint and the types of evidence that may be gathered. Minn. R. §5000.0500-0510 (2005). Additionally, the regulations provide that the Minnesota Department of Human Rights may use interviews (or depositions) to collect information from any person related to the complaint. §5000.0500(2) (2005). Conferences involving both, or either, of the parties may be arranged by the Department, and recorded. §5000.0510 (2005). Absent privilege, production or inspection of documents and other tangible things may be compelled. §5000.0500(3). The use of written interrogatories, an inexpensive and effective means of obtaining answers to specific question, is also permitted. §5000.0500(4) (2005).

California's Fair Employment and Housing Commission adopted equally thorough regulations pertaining to the investigative process. Cal. Code Regs. Tit. 2, §7400-37 (2004). A separate section is devoted to outlining the procedures for the discovery process, and defining the types of evidence that may be gathered. §7417. The section also includes definitions of relevant terms, such as "statements" taken from witnesses. §7417(E)(3).

Some states offer briefer outlines of the investigative process, but add a requirement of due process in the investigation. New York, for example, chooses to define its investigative methods simply as field visits, written or oral inquiries, conference, or any other method or combination of methods deemed suitable. 9 NYCRR §465.6 (2004). The Division of Human Rights is required to make a "prompt and fair investigation" of allegations. §456.6(a).

The NDHRC recommends that the Department follow the examples of such states and expand its regulations regarding the investigative process. Identifying specific investigative procedures that might be used and explaining the types of evidence that might be gathered will benefit all parties participating in the process, and should result in more thorough investigations and greater predictability of outcomes. Finally, documenting this process through regulations will underscore public perception that the Department works to resolve complaints according to standardized practices.

The NDHRC believes that full investigation and the search for truth will be aided, as will each party's satisfaction with the process, if the parties are allowed to suggest interrogatory questions, document requests, possible witnesses, and areas of inquiry, so long as it is made clear that the investigation is made by the Department, not the parties, and hence the suggestions by either party are for the assistance in the Department's goal of determination whether a violation of the North Dakota Human Rights Act has occurred.

VI. Approval and Enforceability of Conciliation Agreements

The NDHRC commends the Department for emphasizing the importance of conciliation of discrimination complaints. The NDHRC believes the Department can best promote conciliation by clarifying and expanding the Department's own role in the conciliation process. The Department regulations should articulate a clear method for monitoring conciliation agreements requiring specific performance. This would further the legislative preference for conciliation expressed in the Human Rights Act §14-02.4-22. It would also prevent the need for complainants to file new charges should respondents fail to comply with conciliation agreements.

The proposed regulations do not contain any provisions providing for the monitoring of the conciliation agreements requiring specific performance by the Department. If a respondent fails to comply with an agreement, the complainant must return to the Department and seek its intervention anew. The NDHRC urges the Department to include provisions in its final rules that will designate a process for monitoring conciliation agreements requiring specific performance.

Minnesota has recognized the importance of monitoring conciliation agreements requiring specific performance. Minnesota's regulations require that the Department of Human Rights

monitor all agreements that require specific performance. §5000.0800(3)(a). Should the Department believe that a respondent has failed to comply with a conciliation agreement, it commences investigation. *Id.* If noncompliance has occurred, the Department may initiate action to enforce the agreement. *Id.*

Similarly, New York has created regulations that outline both a mandatory investigation of compliance and a time frame for such. 9 NYCRR § 465.18 (2004). The Division of Human Rights must investigate whether a respondent is complying with the terms of a conciliation agreement. 9 NYCRR § 465.18(a). Investigation must occur within one year of the date of the agreement. *Id.* Investigation of compliance may also occur "at any other time" in the Division's discretion. *Id.*

The NDHRC also recommends that the Department to consider providing the following guidance to parties in the conciliation process:

(1) Making it clear that the Department shall encourage parties to negotiate, and will to the extent possible, encourage the parties to negotiate, without limitation to parties' exploring of possible negotiated settlements among themselves. Some past Department practice has been to purport to forbid direct negotiations between the parties which has discouraged amicable and mutually beneficial settlement of matters before the Department.

(2) Retain the Department's authority to approve settlement agreements, but set forth factors upon which the Department will decide whether to approve a particular agreement or not. Such factors might include:
   a. Fairness of the agreement to both sides
   b. The parties' history of cooperation
   c. The inclusion of relevant economic damages
   d. The parties' having engaged in negotiations among themselves will not be a factor weighing against approval
   e. The fact that either party seeks relief not available in Departmental proceedings will not be a factor weighing against approval

The regulations should make it clear that in no case will the Department approve a settlement entered into over the objections of either party, and that the failure of parties to reach settlement or the parties' engaging in settlement negotiations among themselves will not be considered in the Department's determination of probable cause, and the Department's determination of probable cause will not be delayed as a result.

VII. Respondents Should Be Required to File An Answer to a Charge of Discrimination

The NDHRC urges the Department to include in its final rule a requirement that a respondent file with the Department a written answer to a complaint against it. Proposed Rule 46-04-01-06 states that a respondent *may* file a written answer to the complaint of an alleged discriminatory practice. A written answer by the respondent is optional, while the complainant is required to file a written complaint, which is supplied to the respondent. While the respondent receives all

the information supplied to the Department by the complainant, the complainant is deprived of reciprocal information that would be supplied by a written answer by the respondent.

As currently drafted, the regulation provides a respondent with no incentive to submit any response at all. While a respondent who fails to provide a written response may be construed as waiving its right to submit an initial counter-argument to the complainant's charge, the practice gives no advantage to the charging party at all. An investigation will eventually take place in any event, at which point the respondent will again be given an opportunity to provide the department with its own evidence.

Allowing a respondent to elect whether to answer the charge against it hinders the process of investigation, causing an increased burden on the Department's resources, and hampers the complainant's ability to seek a timely remedy. To require a respondent to file a written answer would ameliorate these. Additionally, this requirement will encourage the respondent to seek to correct any alleged discriminatory practice immediately, as it will not be able to wait until an investigation before taking any action of its own.

The NDHRC therefore recommends replacing the word "may" in the proposed regulation with "shall," so that the second sentence of the rule reads: "The respondent *shall* file a written answer to the complaint within twenty days of the date the respondent receives notice of the complaint."

This proposed rule would be similar to that in the Minnesota Human Rights Act, which reads: "The respondent shall file with the department a written response setting out a summary of the details of the respondent's position relative to the charge within 20 days of receipt of the charge." Minn. Stat. §363A.28(1); *see also* Minn. R. 5000.0500(1) (2005). Should a respondent fail to file this answer, the statute provides for the possibility of a default judgment to be entered against it. §363A.28(1).

In addition, the NDHRC urges the Department to include a provision that a copy of the answer of the respondent will be provided to the complainant or charging party within ten days of receipt by the Department, which would be a corollary procedural provision to the requirement that the Department provide a copy of the complaint or charge of discrimination to the respondent within ten days of filing. Without the requirement of a written answer, which is then provided to the complainant or charging party, the respondent is provided all information received by the Department from the complainant or charging party, and the complainant or charging party may not receive any of the information provided to the Department by the respondent.

VIII. Complainants Should Be Informed of Their Right to Legal Representation

The right of a complainant to be represented by legal counsel should be included in the Department's final rules. In the proposed rules, no reference to this right is included anywhere. Without such express reference, a complainant may mistakenly interpret this absence as meaning s/he cannot be represented by counsel, or may fail to realize that this option exists. Additionally, the absence of such a provision also could be construed as implying the Department itself will be providing legal advice.

To address this concern, the NDHRC recommends adopting the language currently used in the Minnesota Human Rights regulations: "A person may be represented by legal counsel at any state of proceedings before the department." Minn. R. 5000.0300(1) (2005). This phrase could be inserted in Proposed Rule 46-04-01-07, or added as a separate rule itself. Wherever included, a statement that the Department will effectively communicate with the counsel of those parties who are represented should accompany this proposed addition.

IX. The Proposed Rules Should Recite the Statute of Limitations for Filing a Complaint

The statute of limitations for filing both a charge of discrimination with the Department and an action in district court under the North Dakota Human Rights Act should be included in the proposed rules. Currently, these rules reiterate neither the requirements of filing with the Department within 300 days of the alleged discriminatory conduct, nor the requirement of bringing a court action within 90 days of the conclusion of the Department's investigation/probable cause determination.

While these requirements are described in the statute itself, they also should be included in the proposed rules to avoid any confusion. N.D.C.C. §14-02.4-19. Of particular importance is the 90-day limit to bring an action in court, due to this short time frame and the fact that the Department has not always inform complainants of the 90-day time limit at the time it issues its probable cause decisions.

The NDHRC recommends including both of these requirements in the proposed rules. The initial limit of 300 days to file with the Department and the limit of 90 days to bring an action in court following the Department's completion of an investigation could be inserted into Proposed Rule 46-04-01-04, which already notes the existence of these requirements. Otherwise, these limits should be added to these proposed rules as a separate rule.

X. A Complaint Should Be Deemed Filed When the Department Is First Contacted

Proposed Rule 46-04-01-04 should be changed so that a complaint is deemed filed at the time the Department is first contacted regarding the alleged discriminatory conduct. Proposed Rule 46-04-01-02 require a complainant to complete an initial intake questionnaire, after which the Department assesses the jurisdiction and timeliness of the allegations. Should the Department determine that the charge is timely, and does in fact allege a violation, it prepares a complaint to be signed by the charging party. Under the proposed rules, only when this officially prepared complaint is received will the complaint be regarded as filed.

The NDHRC is concerned that if the Department's assessment is prolonged or if a complainant contacts the Department close to the deadline for filing, the statute of limitations could expire between the initial contact and when the Department prepared, sends out and finally receives back the signed complaint. This practice could bar claims that were timely reported, due to the speed at which the Department is able to process these claims and make the initial assessments. Under this proposed rule, the statute of limitations is effectively reduced by the time the Department requires to make these assessments. Additionally, a claimant has no way of knowing how long this period of time will be. The current rule, in essence, prevents a claimant

from ever knowing the true date that discriminatory conduct must be reported.

The NDHRC recommends changing the text of Proposed Rule 46-04-01-04 to read: "A complaint is filed, for timeliness and statute of limitations purposes, at the time the complainant completes the initial Intake Questionnaire referred to in Administrative Rule 46-04-01-02, alerting the Department to the alleged discriminatory conduct." Including the need to return an original signed complaint to the Department may still be required, but that event should not control the date of filing for limitations purposes.

XI. General Statement of Purpose

The NDHRC believes that both transparency and consistency would be fostered by a general statement of purposes preceding or included in the Definitions section. Such as statement might adopt the language of N.D.C.C. §14-02.4-01 as a general aid to construction of the regulations for the benefit of parties, attorneys, advocates, the general public and the Department itself. That there is no fee for filing or disposition of matters before the Department should be stated explicitly, as should the Department's commitment to making its proceedings user-friendly to non-represented parties including providing for the appointment of appropriate translation services for deaf, hard-of-hearing, speech impaired, non-English fluent, or blind persons.

XII. Conclusion

The North Dakota Human Rights Coalition appreciates the opportunity to submit these comments and stands ready to assist the Department in crafting appropriate rules that will fully implement the spirit and intention of the North Dakota Human Rights Act.

Respectfully Submitted,

Cheryl Bergian
Executive Director
North Dakota NDHRC

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Lisa K. Fair McEvers
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SUMMARY OF COMMENTS RECEIVED IN REGARD TO PROPOSED RULES RELATED TO HUMAN RIGHTS, N.D. ADMIN. CODE Ch. 46-04-01

A public hearing was held September 28, 2007, concerning proposed administrative rules related to human rights. Written comments on these proposed rules could be offered through October 10, 2007.

One written comment was received within the comment period, with such comment being provided at the public hearing contemporaneously with public comments being made, and with the same content by Ms. Cheryl Bergian, the Executive Director of the North Dakota Human Rights Coalition, P.O. Box 1961, Fargo, ND 58107-1961.

Summary of Comments:

Comment: Ms. Bergian suggests that a definition of "probable cause" be included in the proposed rules. Ms. Bergian further suggests the department consider numerous cases which discuss probable cause in adopting a definition of probable cause. Ms. Bergian lists a number of possible benefits from implementing such a definition and suggests that the North Dakota Department of Labor rely on the South Dakota Supreme Court's interpretation of probable cause, as well as several federal circuit court decisions. Ms. Bergian also indicates that the North Dakota Human Rights Coalition believes the South Dakota Supreme Court's interpretation of probable cause is "consistent with the language and intent of the North Dakota Human Rights Act."

Response: The term "probable cause" is a term of art used as an evidentiary standard in both criminal and civil cases. In reviewing various statutes, rules, and regulations, only one codified definition of the term "probable cause" was found which is used in the area of human rights, that being in South Dakota at S.D.C.L. § 20-13-1.1. While exhaustive research was not conducted, it appears the term has not been codified more frequently because, as the North Dakota Supreme Court has stated, the "probable cause standard is incapable of precise definition." State v. Washington, 2007 ND 138, 737 N.W.2d 382. Even in the examples provided by Ms. Bergian, the courts have used a variety of descriptions or definitions for the terms "probable cause" or "reasonable cause."

The North Dakota Department of Labor, in addition to investigating alleged discrimination under the Human Rights Act and the Housing Discrimination Act, is by work sharing agreement a or cooperative agreement the authorized investigative agency for both the Equal Employment Opportunity Commission (EEOC) and the Department of

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Housing and Urban Development (HUD) for enforcement of the federal laws which parallel state law. Much of the Human Rights Act and the Housing Discrimination Act is based on the federal laws enforced by either the EEOC or HUD. The United States Congress has not defined probable cause by statute for the enforcement of federal discrimination statutes. Neither the EEOC nor HUD has defined "probable cause" by federal regulation. It would not be prudent for the North Dakota Department of Labor to bind itself to a definition of probable cause that has not been formally codified, either by federal statute or the code of federal regulation when the department is also the enforcement agency of these federal laws.

As to looking to other courts for guidance, it seems logical that if the department intended to craft a definition of probable cause that it could look at the North Dakota Supreme Court's various discussion of probable cause or to cases in the Eighth Circuit, rather than the various circuit courts cited by Ms. Bergian. In addition, after reviewing the legislative history of the North Dakota Human Rights Act, it is unclear how Ms. Bergian came to the conclusion that our legislative assembly's intent was to articulate a precise definition of probable cause. Upon review of the legislative history of the Human Rights Act, it appears that the main purpose in the passing of HB 1440 (the Human Rights Act) in 1983 was to give North Dakotans a place to seek remedies for alleged discrimination somewhere other than in federal court.

The department, however, does use the guidance of case law and other sources when reviewing complaints to determine whether or not the department believes, based on the facts and circumstances of each individual case, that probable cause exists to believe that a discriminatory practice has occurred. One of the guides used is the EEOC Compliance Manual, which does have a definition of "reasonable cause standard" which reads as follows:

> **Reasonable Cause Standard.** A determination of reasonable cause is a finding that it is more likely than not that the charging party, aggrieved persons, and/or member of a class were discriminated against because of a basis prohibited by the statutes enforced by EEOC. (citation omitted). The likelihood that discrimination occurred is assessed based upon evidence that establishes, under the appropriate legal theory, a *prima facie* case, and if the respondent has provided a viable defense, evidence of pretext.

This definition is nearly identical to the definition found in S.D.C.L. § 20-13-1.1. The North Dakota Department of Labor does look to the EEOC Compliance Manual and other sources for guidance, including the above definition. In fact, proposed administrative rule § 46-04-01-10 references the department's ability to refer to the Compliance Manual established by the EEOC for guidance. However, while the department may rely on this definition, it is not bound by the same.

While Ms. Bergian's position on the possible benefits of implementing a definition for probable cause are understandable, the department does not agree that it is necessary to define "probable cause" in the rules and believes that it would not be prudent to do so.

Comment: Ms. Bergian suggests that the Human Rights rules should reflect the Department's statutory obligation to provide for administrative hearings where probable cause has been found and conciliation has failed.

Response: Most of the procedure for procuring an administrative hearing is already set forth by statute in the Human Rights Act and the Administrative Practices Act. Such procedure will not be reiterated in the administrative rules. However, there is no objection to providing in the administrative rules additional subsections under investigation and disposition which indicates the department's current practices when a probable cause finding has been determined. Amendments have been made to § 46-04-01-08 reflecting such procedures as follows:

5. If the department determines that probable cause exists to believe that a discriminatory practice has occurred or is occurring and is unable to resolve the complaint through informal negotiations or conciliation, the aggrieved person will be offered an administrative hearing at no cost. If the aggrieved person requests an administrative hearing, the department participates in the hearing in an attempt to obtain appropriate relief on behalf of the aggrieved person. The Attorney General represents the department in such proceedings. An aggrieved person has the right to intervene; however, if an aggrieved person wishes to be represented by an attorney at the administrative hearing, it will be at their own expense.

6. The aggrieved person will be notified in writing of their option to request an administrative hearing. The aggrieved person must contact the department within 20 days from receipt of the determination to elect an administrative hearing. Reasonable extensions will be considered, if the request is made within the 20 day period.

7. If the aggrieved person does not elect an administrative hearing offered by the department, the aggrieved person may bring a civil action in state district court. The aggrieved person is responsible for their own representation in a state district court action.

Comment: Ms. Bergian suggests the proposed Human Rights regulations lack provisions regarding retaliation. Ms. Bergian further suggests that retaliation should be set forth in the definitions section of the rules. Ms. Bergian also suggests that the department should take the "EEOC's approach" and add an express statement to the rules granting priority processing for retaliation claims.

Response: Retaliation by statutory definition is a discriminatory practice as noted in N.D.C.C. § 14-02.4-18. The proposed administrative rules, instead of enumerating each possible of type of discrimination, incorporates all types of prohibited discrimination by using the term "discriminatory practice" to refer to all types of investigations. Allegations of retaliation are investigated in the same manner as all other allegations of a discriminatory practice. Because retaliation is included by the broader term of

"discriminatory practice" and is specifically defined by statute, there is no reason to single out retaliation for further definition in the rules.

Retaliation allegations may or may not be more urgent than other types of claims—it depends on the facts and circumstances of each case. These factors are similar to those set forth in the EEOC Compliance Manual section discussing special remedies in retaliation cases. Because the department already considers such factors for all cases, the department disagrees that it is necessary to specifically grant retaliation cases a "priority" in processing.

Comment: Ms. Bergian suggests there is a need for greater specificity regarding the investigative process.

Response: The investigative procedures and practices of the department must be flexible, and may vary from case to case depending on the individual circumstances of each case. Ms. Bergian cites several examples, including a New York provision which defines its investigative methods as: "field visits, written or oral inquiries, conference, or any other method or combination of methods deemed suitable." This description is only slightly different than the proposed rule which reads: "An investigation may include, subject to reasonable notice to the parties, on-site visits, interviews, fact-finding conferences, and the obtaining of records and other information as is reasonably necessary to investigate the complaint or charge of discrimination." This provision provides due process to parties by requiring a reasonable notice and flexibility to the department to utilize the tools necessary depending on the circumstances of each case, including the use of interrogatories.

During the last legislative session, the department proposed, and the legislative assembly passed a provision which allows the department subpoena power to: "require the attendance of a witness and the production of a book, record, document, date, or other object." Based on the broad investigative authority already articulated by statute and the current proposed rule, the department does not believe additional or more explicit guidance is necessary.

Comment: Ms. Bergian suggests that further clarifying and expanding the department's role in the conciliation process is necessary. The suggestions include: 1) articulating a method for monitoring conciliation agreements requiring specific performance; 2) articulating how conciliation agreements will be monitored; 3) providing parties specific guidance on the conciliation process; 4) setting forth factors upon which the department will approve a conciliation agreement; and, 5) making clear to parties of what happens when a conciliation fails.

Response: Ms. Bergian first suggests that regulations should articulate a clear method for monitoring conciliation agreements requiring specific performance. The department currently monitors all conciliation agreements and negotiated settlements for compliance as follows:

- The monitoring of compliance agreements is currently assigned to the agency's Human Rights Director.
- When an investigator closes a case in which the monitoring of a compliance agreement is necessary, the file, along with a completed conciliation/negotiated settlement monitoring checklist, is given to the Human Rights Director. The conciliation monitoring checklist specifically identifies areas of compliance which need to be monitored.
- A monitoring schedule is established using Microsoft Outlook. The schedule varies depending on the terms of each agreement.
- The Respondent is required to submit compliance reports to the NDDOL as each requirement is met.
- The Human Rights Director marks off each item of compliance achieved by the Respondent as appropriate documentation is received.
- Reminder letters and written requests for verification may be periodically sent to the Respondents as needed.
- The assurance of compliance and enforcement of conciliation/negotiated settlement agreements is handled by the NDDOL.
- In the event that legal action is required due to a breach of the agreement or non-compliance, the case will be referred to the North Dakota Attorney General's Office.

While the above informal process is working well, the department has no objection to adopting a rule reiterating a general summary of what the department is already doing. However, it is not believed to be prudent to reduce each step to administrative rule, as using a general description provides the department the flexibility to implement methods of improvement without requiring amendment of the rules. The proposed administrative rules already have provisions for monitoring compliance; however, the department agrees to add language similar to that in Minnesota as suggested by Ms. Bergian to § 46-04-01-07 referring to informal negotiations and § 46-04-01-09 referring to conciliations as provided below:

46-04-01-07. Informal Negotiations.

6. The department shall monitor all negotiated settlement agreements which have been approved by the department and which require specific performance by one or more of the parties. If it appears that a party is not in compliance with the terms of the agreement, the department shall notify the party in an attempt to obtain voluntary compliance, and/or conduct further investigation into the alleged breach.

7. If there is probable cause to believe that a party has breached the negotiated settlement agreement, the department may commence proceedings to enforce the agreement, unless to do so would not warrant the use of department resources.

46-04-01-09. Conciliation in Employment Discrimination.

6. The department shall monitor all conciliation agreements which have been approved by the department and which require specific performance by one or more of the parties. If it appears that a party is not in compliance with the terms of the agreement, the department shall notify the party in an attempt to obtain voluntary compliance, and/or conduct further investigation into the alleged breach.

7. If there is probable cause to believe that a party has breached the conciliation agreement, the department may commence proceedings to enforce the agreement, unless to do so would not warrant the use of department resources.

Ms. Bergian also implies in her comments that complainants have had to file new charges in order to get respondents to comply with conciliation agreements, and this is simply not true. While complainants have contacted the department to inform the department of an alleged breach, the department has not required any further action by either party to ensure enforcement of the agreement. The department has on several occasions asked the Attorney General's office to institute proceedings to enforce the terms of particular agreements.

Ms. Bergian asks that language be added to encourage parties to negotiate, including encouraging parties to negotiate a settlement themselves. Ms. Bergian has alleged that the department has discouraged such settlements in the past. Under the present administration of the department parties have **not** been discouraged from negotiating settlements on their own; however it is not agreed that encouraging outside negotiations would be helpful.

Settlement negotiations often occur where one party is represented by counsel and another party is not, creating an uneven situation for the party not represented. In this situation having the department involved creates an environment leveling the playing field, and to negotiate an appropriate settlement. While the department does not represent either party, its role as a neutral arbiter ensures the public interest will be considered in any settlement agreement. In addition, the department will not monitor or enforce any settlement agreements in which the department is not a party to the agreement.

Ms. Bergian wants a number of factors listed in the administrative rules upon which the department will decide whether to approve of a particular agreement.

The first factor suggested was fairness of the agreement to both sides. Fairness of any proposed settlement must be determined by the parties involved, not the department. Using such a factor would put the department in the position of considering the merits of the case, taking the department out of the role of a neutral third party. Parties can only enter into a settlement agreement voluntarily. If the parties do not believe an offer is fair, they are not required to accept it.

The second factor suggested is the "parties'" history of cooperation. Again, the department cannot consider such outside factors. If a party had been part of a previous

negotiated settlement with the department, the agreement would most likely not be subject to disclosure by the very terms of the agreement.

The third factor suggested is the inclusion of relevant economic damages. This factor would not be pertinent in all cases. The department currently uses a damages worksheet in some of its cases if necessary and it would be confusing to require this as a factor in all cases.

The fourth factor suggested is that the parties having engaged in negotiations among themselves will not be a factor weighing against approval. This is not really a factor, but a statement, and it is not necessary as the department does not discourage outside negotiations.

The fifth factor suggested is that if either party seeks relief not available in department proceeding will not be a factor weighing against approval. This factor is not necessary, because if a party is seeking relief that the department cannot authorize, the department will not approve the settlement agreement. That does not prevent the parties from withdrawing the complaint or charge of discrimination and resolving the matter on their own.

Likewise there is no need to have a rule indicating that the department will not approve an agreement over the objections of either party. Any agreement entered into must be voluntary by all parties for it to be a valid agreement. The department disagrees that promulgating a rule utilizing the factors listed would be helpful.

Comment: Ms. Bergian suggests that the department should require respondents to file an answer to a charge of discrimination. Ms. Bergian also suggests that the rules should include a provision that will require not only that the respondent be required to submit an answer, but also that the department would be required to provide the complainant or charging party with a copy of the answer within 10 days of the receipt of the answer.

Response: When promulgating rules, the department may not go beyond the scope of its statutory authority. There is no requirement in the Human Rights Act that a respondent must file a written answer to a complaint. While the department now has the authority to subpoena records and require attendance of witnesses, it would be beyond the department's statutory authority to require a respondent to file an answer.

The department has other investigative tools to obtain the necessary information if a respondent refuses to answer. In addition, if the respondent chooses not to answer, the opportunity to provide a defense is basically waived. The department's proposed rule states: "Failure by a respondent to file a response may result in the department concluding its investigation based upon information provided by the complainant or charging party and such other information as is reasonably available to the department." This result, along with utilizing the department's subpoena power is as far as the department has authority to impress upon a respondent the importance of providing the department with an answer.

Chapter 46-04-01
Human Rights Practice and Procedure

Section

46-04-01-01. Definitions. When used in this chapter or in the North Dakota Human Rights Act:

1. "Act" means the North Dakota Human Rights Act, N.D.C.C. ch. 14-02.4.

2. "Alternative Dispute Resolution" means the confidential and voluntary mediation process facilitated by the department for resolving allegations of employment discrimination prior to investigation being conducted by the department.

3. "Charge of Discrimination" means written allegations of a discriminatory practice in regard to employment filed with the department in compliance with these rules, including an amended charge of discrimination.

4. "Charging Party" means a person, including the department, who files a charge of discrimination in regard to discriminatory employment practices under N.D.C.C. ch.14-02.4.

5. "Complainant" means a person, including the department, who files a complaint under N.D.C.C. § 14-02.4-19, in all areas covered by the Act, except employment.

6. "Complaint" means written allegations of a discriminatory practice filed with the department in compliance with these rules, in all areas covered by the Act, except employment, including an amended complaint.

7. "Conciliation" means the negotiations facilitated by the department between a charging party and the respondent to resolve the issues involving employment, after there has been a determination of probable cause.

8. "Conciliation agreement" means a written agreement setting forth the terms that resolve the issues under conciliation.

9. "EEOC" means the United States Equal Employment Opportunity Commission.

10. "Informal negotiations" means negotiations facilitated by the department between a complainant or charging party and the respondent to resolve the issues raised in the complaint or charge of discrimination, which may include, but is not limited to mediation or alternative dispute resolution.

11. "Negotiated Settlement Agreement" means a written agreement setting forth the terms that resolve the issues under informal negotiation.

12. "Respondent" means a person accused of a discriminatory practice.

General Authority: N.D.C.C. § 14-02.4-22
Law Implemented: N.D.C.C. ch. 14-02.4

46-04-01-02. Intake and Reviewability and Dismissal.

1. An aggrieved person may utilize an intake questionnaire provided by the department to gain assistance from the department, by contacting the department in person, by telephone, or in writing regarding alleged discriminatory practices.

2. The department shall promptly make a preliminary assessment to determine whether the information provided involves a potential violation of the Act and whether the department has jurisdiction over the matter.

3. The department shall administratively close or dismiss an intake questionnaire if during the preliminary assessment of the intake questionnaire it is determined that the alleged violation is:

    a. not within the jurisdiction of the department; or

    b. otherwise excluded from department review by state or federal law.

4. If it is determined that the department does not have jurisdiction, the department shall inform the aggrieved person of the reason the department lacks jurisdiction.

General Authority: N.D.C.C. § 14-02.4-22
Law Implemented: N.D.C.C. ch. 14-02.4

46-04-01-03. Complaint or Charge of Discrimination

1. A complaint or charge of discrimination may be filed by any aggrieved person or the person's duly authorized representative. A complaint or charge of discrimination filed by a representative shall state that the representative is authorized to file the complaint. The department may file a complaint or charge of discrimination.

2. Department staff shall be available during regular business hours to provide reasonable assistance to the aggrieved person in the drafting of the complaint or charge of discrimination.

3. Every complaint or charge of discrimination shall be in writing, signed and verified upon a form designated by the department.

4. A complaint or charge of discrimination shall contain a concise statement setting forth, to the extent reasonably possible, the following information:

    a. the name, address and telephone number of the complainant or charging party;

    b. the name, address and telephone number of the respondent(s);

    c. the specific basis for the complainant's or charging party's belief that an unlawful practice has occurred, with relevant dates, places and names of any individual participating in the alleged unlawful conduct or practice;

    d. the specific basis for the complainant's or charging party's belief that the alleged conduct is subject to the Act, identifying the statute to be reviewed;

    e. the specific harm the complainant or charging party believes he or she has suffered as a result of the alleged unlawful conduct;

    f. any other information required by the department.

5. A complaint or charge of discrimination may be amended at any time by the complainant, the charging party or the department in order to:

    a. Cure technical defects or omissions;

    b. Allege additional facts if they relate to the facts in the original complaint or charge of discrimination;

    c. Add, remove or change a party; or,

    d. Accomplish the purposes of the Act.

6. A complaint of discrimination may be withdrawn by a complainant. A charge of discrimination may be withdrawn by a charging party, but only with the consent of the department. A complainant or charging party may submit a signed request for withdrawal with the department at any time. The department shall consider whether the withdrawal of charge would defeat the purposes of the Act, and based upon that assessment, may permit or refuse to permit the withdrawal of a charge of discrimination by a charging party.

7. A charge of discrimination filed with the department that alleges a violation of law administered by the EEOC under the then existing work sharing agreement, shall be forwarded to the EEOC by the department.

General Authority: N.D.C.C. § 14-02.4-22
Law Implemented: N.D.C.C. §§ 14-02.4-19, 14-02.4-23

46-04-01-04. Computation of Time.

1. Time limitations for filing an action are as set forth in N.D.C.C. § 14-02.4-19. In actions involving the department, a complaint, a charge of discrimination, an answer, or an election is deemed to be "filed" on the date it is received by the department, whether by mail, personal delivery, or facsimile. Documents produced by the department are deemed filed when signed by the Commissioner or by his or her designee.

2. Each document received by the department shall be date stamped to reflect the date it was received.

General Authority: N.D.C.C. § 14-02.4-22
Law Implemented: N.D.C.C. §§ 14-02.4-19, 14-02.4-23

46-04-01-05. Notice requirements.

1. Notice to Complainant or Charging Party. Within ten days of the filing of the complaint or charge of discrimination, the department shall provide notice to the complainant or charging party, and such notice shall include:

    a. the date the complaint or charge of discrimination was filed with the department;

    b. a copy of the complaint or charge of discrimination; and,

    c. a statement describing the department's duties and the complainant's or charging party's obligations under the Act.

2. Notice to Respondent(s). Within ten days of the filing of a complaint or charge of discrimination, the department shall provide notice to the respondent(s), and such notice shall include:

    a. the date the complaint or charge of discrimination was filed with the department;

    b. a copy of the complaint or charge of discrimination;

    c. a statement of the time limits applicable to the investigative process;

    d. a statement describing the respondent's options for responding to the complaint or charge of discrimination; and,

    e. a statement, if not readily discernable from the complaint or charge of discrimination, identifying the alleged discriminatory practice on which the complaint or charge of discrimination is based.

General Authority: N.D.C.C. § 14-02.4-22
Law Implemented: N.D.C.C. §§ 14-02.4-19, 14-02.4-23

46-04-01-06. Respondent's Answer.

1. The respondent(s) may file a signed written response within twenty days of the date a respondent receives notice of the complaint or charge of discrimination.

2. If a complaint or charge of discrimination is amended, the respondent(s) may file an amended response in the same manner as the original.

3. Department staff shall be available during regular business hours to provide reasonable assistance to respondent(s) in drafting and completing responses.

4. The department may grant an extension of time to file a response upon request by a respondent if such a request is reasonable and not for the purpose of delay.

5. Failure by a respondent to file a response may result in the department concluding its investigation based upon information provided by the complainant or charging party and such other information as is reasonably available to the department.

6. The department may send a follow-up request for information, to gather additional documentary evidence, and when relevant, to gather comparative information as to how other persons similarly situated were treated by the respondent(s).

7. Failure by a respondent to provide requested information may result in the department issuing a subpoena or subpoena duces tecum requiring the production of the requested information.

General Authority: N.D.C.C. § 14-02.4-22
Law Implemented: N.D.C.C. §§ 14-02.4-19, 14-02.4-23

46-04-01-07. Informal Negotiations.

1. In all cases involving allegations of discriminatory practices, the department shall, during the period beginning with the filing of a complaint or charge of discrimination and ending with the dismissal or the issuance of a determination of probable cause by the department, to the extent feasible, engage in informal negotiations in an attempt to resolve the complaint or charge of discrimination.

2. The department does not represent any party in the informal negotiation process, and shall act as a neutral third party in attempting to reach an agreement that is satisfactory to all parties.

3. A negotiated settlement agreement between the complainant or charging party and the respondent(s) shall be reduced to writing, is subject to departmental approval, and is enforceable in the same manner as a final determination of the department. A copy of the signed negotiated settlement agreement shall be provided to the complainant or charging party and the respondent(s).

4. A negotiated settlement agreement may include terms for monitoring compliance with the agreement. The department may require any party to submit compliance reports as the department deems necessary to show the manner of compliance with the terms of the negotiated settlement agreement.

5. Where the department is unable to obtain voluntary compliance and it is determined that further efforts would be futile or nonproductive, the parties will be notified in writing that negotiations to resolve the dispute have failed. If any party fails to respond within 15 days after the receipt of a proposed negotiated settlement, the department may conclude that negotiations have failed as a result of the inactivity.

6. The department shall monitor all negotiated settlement agreements which have been approved by the department and which require specific performance by one or more of the parties. If it appears that a party is not in compliance with the terms of the agreement, the department shall notify the party in an attempt to obtain voluntary compliance, and/or conduct further investigation into the alleged breach.

7. If there is probable cause to believe that a party has breached the negotiated settlement agreement, the department may commence proceedings to enforce the agreement, unless to do so would not warrant the use of department resources.

General Authority: N.D.C.C. § 14-02.4-22
Law Implemented: N.D.C.C. §§ 14-02.4-22, 14-02.4-23

46-04-01-08. Investigation and Disposition.

1. Pursuant to N.D.C.C. § 14-02.4-22, the department shall investigate allegations of discriminatory practices.

2. An investigation may include, subject to reasonable notice to the parties, on-site visits, interviews, fact- finding conferences, and the obtaining of records and other information as is reasonably necessary to investigate the complaint or charge of discrimination.

3. A party's unjustified failure to cooperate with the department's reasonable investigative request may result in the department concluding its investigation based on such other information as is available to the department. A party's unjustified failure to cooperate with the reasonable investigative request may also result in the issuance of a subpoena or subpoena duces tecum.

4. Unless the matter is otherwise resolved, upon completing its investigation the department shall determine from the evidence obtained whether probable cause exists to believe that a discriminatory practice has occurred. The determination will include a brief statement of the reasons for the department's conclusions and will be mailed to all parties.

5. If the department determines that probable cause exists to believe that a discriminatory practice has occurred or is occurring and is unable to resolve the complaint through informal negotiations or conciliation, the aggrieved person will be offered an administrative hearing at no cost. If the aggrieved person requests an administrative hearing, the department participates in the hearing in an attempt to obtain appropriate relief on behalf of the aggrieved person. The Attorney General represents the department in such proceedings. An aggrieved person has the right to

intervene; however, if an aggrieved person wishes to be represented by an attorney at the administrative hearing, it will be at their own expense.

6. The aggrieved person will be notified in writing of their option to request an administrative hearing. The aggrieved person must contact the department within 20 days from receipt of the determination to elect an administrative hearing. Reasonable extensions will be considered, if the request is made within the 20 day period.

7. If the aggrieved person does not elect an administrative hearing offered by the department, the aggrieved person may bring a civil action in state district court. The aggrieved person is responsible for their own representation in a state district court action.

8. On all complaints or charges of discrimination filed under the Act, it is the department's goal to determine whether or not probable cause exists within 180 days unless it is impracticable to do so. If the department is unable to make its determination within 180 days, it shall notify the parties of the reason(s) for delay.

9. The department may dismiss or administratively close a complaint or charge of discrimination prior to the completion of its investigation if:

    a. The matter is resolved through informal negotiations;

    b. The complaint or charge of discrimination is withdrawn by the complainant or charging party;

    c. The complainant or charging party fails to cooperate with the department during the investigation, subject to the department providing notification by certified mail, of the need to cooperate and/or provide required information within 30 days of the notice;

    d. The department is unable to locate the complainant or charging party;

    e. The complaint or charge of discrimination is deferred to a federal agency for investigation under the terms of a work-sharing agreement between the department and the federal agency.

10. The department shall notify the complainant or charging party and respondent of any dismissal or administrative closure of a complaint or charge of discrimination.

General Authority: N.D.C.C. § 14-02.4-22
Law Implemented: N.D.C.C. § 14-02.4-23

46-04-01-09. Conciliation in Employment Discrimination.

1. In cases involving allegations of discriminatory employment practices, the department shall, during the period beginning with the issuance of a probable cause determination, to the extent feasible, engage in conciliation with the parties in an attempt to resolve the charge of discrimination.

2. The department does not represent any party in the conciliation process and shall act as a neutral third party during the conciliation process in attempting to reach an agreement that is satisfactory to all parties.

3. A conciliation agreement between the charging party and the respondent(s) shall be reduced to writing, is subject to departmental approval, and is enforceable in the same manner as a final determination of the department. A copy of the signed conciliation agreement shall be provided to the charging party and the respondent(s).

4. A conciliation agreement may include terms for monitoring compliance with the agreement. The department may require any party to submit compliance reports as the department deems necessary to show the manner of compliance with the terms of the conciliation agreement.

5. Where the department is unable to obtain voluntary compliance and it is determined that further efforts would be futile or nonproductive, the charging party and the respondent(s) shall be notified in writing that conciliation efforts have failed. If any party does not respond within 15 days after the receipt of a proposed conciliation remedy, the department may conclude that conciliation has failed as a result of the inactivity.

6. The department shall monitor all conciliation agreements which have been approved by the department and which require specific performance by one or more of the parties. If it appears that a party is not in compliance with the terms of the agreement, the department shall notify the party in an attempt to obtain voluntary compliance, and/or conduct further investigation into the alleged breach.

7. If there is probable cause to believe that a party has breached the conciliation agreement, the department may commence proceedings to enforce the agreement, unless to do so would not warrant the use of department resources.

General Authority: N.D.C.C. § 14-02.4-22
Law Implemented: N.D.C.C. §§ 14-02.4-22, 14-02.4-23

46-04-01-10. Reliance on Outside Sources

The rules set forth contain the procedures established by the department for carrying out its responsibilities in the administration and enforcement of the Act. In the absence of a specific rule, in cases where a charge of discrimination is dual filed with the department and the EEOC, the department will rely on federal regulations and the Compliance Manual established by the EEOC for guidance.

General Authority: N.D.C.C. § 14-02.4-22
Law Implemented: N.D.C.C. § 14-02.4-23

46-04-01-11. Parties' Right to Representation

The complainant, any aggrieved person, or the respondent may be accompanied, advised, and represented throughout the investigation or any administrative proceeding

by any chosen representative, including private counsel, at the party's own expense. If the party chooses to be represented, they must notify the department in writing of such representation, and of the nature and scope of the representation to facilitate effective communication.

General Authority: N.D.C.C. § 14-02.4-22
Law Implemented: N.D.C.C.§ 14-02.4-22, 14-02.4-23

SMALL ENTITY REGULATORY ANALYSIS

1. Was establishment of less stringent compliance or reporting requirements for small entities considered? To what result?

   Yes. However, because the rules do not contain reporting requirements, there really is no issue. In addition, the Human Rights Act applies equally to all entities or individuals regardless of size.

2. Was establishment of less stringent schedules or deadlines for compliance or reporting requirements considered for small entities? To what result?

   Yes. However, as noted above, the Human Rights Act applies equally to all entities regardless of size. However, the proposed administrative rules do provide for an extension of time to file a response upon request by a respondent (whether an individual or an entity), if the request is reasonable and not for the purpose of delay of the investigation.

3. Was consolidation or simplification of compliance or reporting requirements for small entities considered? To what result.

   Yes. Because the proposed administrative rules do not set forth standardized compliance or reporting methods, no simplification is necessary. The Department's investigation of alleged discrimination seeks to obtain records and other information as is reasonably necessary to conduct a fair, impartial and thorough investigation of a complaint or charge of discrimination, which may vary depending on the nature of the case.

4. Were performance standards established for small entities for replacement design or operational standards required for the proposed rule? To what result?

   No. The rules set forth no design or operational standards for any entity.

5. Was exemption of small entities from all or any part of the requirement in the proposed rule considered? To what result?

   Yes, but as noted above, there can be no exemption to liability for discrimination based on size of an entity, as the North Dakota Human Rights Act prohibits discriminatory practices by any person, which is defined as an individual, partnership, association, corporation, limited liability company, unincorporated organization, mutual company, joint stock company, trust, agent, legal representative, trustee, trustee in bankruptcy, receiver, labor organization, public body, public corporation, and the state and a political subdivision and agency thereof, which would include small entities.

SMALL ENTITY ECONOMIC IMPACT STATEMENT

1. Which small entities are subject to the proposed rule?

   Any entity against which a complaint alleging a discriminatory practice has been filed with the Human Rights Division of the North Dakota Department of Labor.

2. What are the administrative and other costs required for compliance with the proposed rule?

   This would vary from case to case. The proposed administrative rules do not put any new additional burdens on small entities or entities of any size. The rules merely articulate and formalize the process that is already being followed by the Human Rights Division of the Department of Labor in human rights investigations. If the entity responds to a request for information, such production may have cost associated with providing the Human Rights Division of the Department of Labor with business records, personnel files and other documentary evidence that will assist in the investigation process. While it is not required that an entity be represented by an attorney, some respondents do retain counsel to assist them in defending against allegations of discriminatory conduct, which would be an additional cost.

3. What is the probable cost and benefit to private persons and consumers who are affected by the proposed rule?

   The cost to private citizens and consumers would be of nominal or no cost, as the proposed rules are meant to assist all parties involved in human rights investigations to understand the process, by reducing to writing and making available to the general public the process already being followed by the Human Rights Division. The benefit of having the proposed rules in place ensures that those who may be involved in the investigative process are aware of what may be expected of them during an investigation. Any cost to a private citizen or consumer associated with providing the Human Rights Department with documents or other evidence to support an allegation of discrimination would be the same, regardless of whether the rules are promulgated or not.

4. What is the probable effect of the proposed rule on state revenues?

   None.

5. Is there any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule?

   No.

TAKINGS ASSESSMENT

1) It is not likely that the proposed rules may result in a taking or regulatory taking because enforcement of the Human Rights Act will not result in the taking of real property as defined under N.D.C.C. § 28-32-09(3).
2) The purpose of the proposed rules is to implement provisions of the North Dakota Human Rights Act (N.D.C.C. ch. 14-02.4), which requires the department to receive and investigate allegations of discrimination and the rules address: a) definitions of terms used in the Act; b) the intake and reviewability processes under the Act; c) the process for filing a discrimination complaint or charge of discrimination under the Act; d) how to compute time on filing of documents; e) notice requirements; f) respondents' answers; g) informal negotiations and conciliation; h) investigation and disposition of complaints; and, i) reliance on outsides sources.
3) The rules are necessary to inform the public of the processes used by the department when receiving, investigating and resolving complaints filed with the department and will have no effect on private property owners in the context of a possible taking.
4) The estimated cost would be nothing, as the rules could not possibly be viewed as resulting in a taking as defined.
5) There is no source in the agency's budget for any compensation which may be ordered, but as noted above, no such order is likely.
6) The benefits of the proposed rule exceed the estimated compensation costs because the estimated compensation cost is zero.

The North Dakota Department of Labor has reviewed the definition of a "taking" as set forth in N.D.C.C. § 28-32-09(3), assessed whether the proposed rule implicate a possible taking, and has determined that nothing in the proposed rules would result in a taking.