

THE YALE LAW JOURNAL

VOLUME 56

FEBRUARY, 1947

NUMBER 3

LOCAL REGULATION OF DISCRIMINATORY EMPLOYMENT PRACTICES

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THE social and economic stresses of war and reconversion have produced an upsurge of activity to make more effective use of the processes of law to reduce discrimination in employment. The federal Fair Employment Practices Committee carried on intense efforts in this direction during the war; several states have enacted anti-discrimination statutes; and more recently a substantial number of municipal ordinances, looking to local authority as an additional weapon with which to attack discrimination, have been introduced.

Most Americans will agree that there are sound moral, economic, social and legal reasons against discrimination because of race, color or religion. Morally, discrimination is but one way by which the majority bullies minorities. Whether all members of the majority group join in the discriminatory practice is immaterial. The fact is that discrimination lessens the dignity and stature of the entire community and runs counter to the moral principles of this nation.¹ Our historic and universal acceptance of equality of opportunity, justice and liberty as the standards of the American way of life has bred a struggle to square the national conscience with the fact that minority racial and religious groups, so prevalent in our nation,² do not find this "a land of equal opportunity for all."³ The recent war, with its emphasis upon ideologies, intensified the struggle, for it was difficult—and embarrassing—to denounce the Nazis' racial and religious theories when only the self-

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The authors acknowledge their indebtedness to the American Council on Race Relations for making available copies of the proposed Municipal Ordinances, correspondence relating thereto, and for other assistance.

1. MYRDAL, *AN AMERICAN DILEMMA* (1944) c. I, *passim*.

2. H. R. REP. No. 2016, 78th Cong., 2d Sess. (1944) 2, and SEN. REP. No. 1109, 78th Cong., 2d Sess. (1944) disclose the following figures:

13,000,000 Negroes; 3,000,000 Americans of Mexican or Spanish origin; 5,000,000 Jews; 22,000,000 Catholics; 6,000,000 aliens.

3. Evidence of the extent of discrimination may be found in *FIRST REPORT OF F.E.P.C.* (Gov't Printing Office 1945) 29, 250; and *REPORT OF THE NEW YORK STATE TEMPORARY COMMISSION AGAINST DISCRIMINATION*, Legislative Document (1945) No. 6.

deceived could deny the existence of similar theories in America.⁴ Economically, denial of employment is a denial of independence. Moreover, it deprives a community of productive labor when it is needed, and in periods of economic stress dooms individuals discriminated against to dependence upon charity or public subsidy. Socially, the by-products of discrimination are slum areas, race riots, juvenile delinquency and crime. Legally, discrimination in employment violates the concepts of justice expressed in the Declaration of Independence, the Bill of Rights and the Federal and State Constitutions.

Despite general agreement on the desirability of eliminating discrimination in employment, there is sharp disagreement as to the most effective means for achieving this objective.⁵ Many persons sympathetic with the objective oppose the use of law as being an ineffective, perhaps harmful approach. Reduced to its simplest terms, the argument is that discrimination is a personal matter which can be solved only by education—not by legislation. This approach to law is basically most conservative. In essence it is the belief that law gives form to what the community has already accepted and practiced as a custom, that the legislative process simply mirrors community behavior patterns.

If this concept of law is correct, the law instead of being a vital dynamic force is static. Myrdal suggests that acceptance of the theory that "stateways cannot change folkways" must be explained, in the light of specific American conditions, as the translation of a defeatist attitude into a general theory.⁶ The emergence of the modern service state, with its primary goal the promotion of the general welfare, however, has swept away these obsolete notions of the function of law. If we were to wait for the mores of the entire group to catch up with the abuses of industrial society, we would still have extensive child labor, long and arduous hours of work, uncompensated industrial accidents, old age without security, grossly underpaid workers and unilateral dictation of employment contracts. As stated by an eminent student of sociological jurisprudence:

"Legislation, in its creative branch, is one of the most marvelous of human inventions. It would be unwise to leave the course of

4. "In a recent letter to FEPC, then Acting Secretary of State Acheson stated that in his opinion 'the existence of discrimination against minority groups in the United States is a handicap in our relations with other countries. The Department of State, therefore, has good reason to hope for the continued and increased effectiveness of public and private effort to do away these discriminations.'" CLEARING HOUSE RELEASE No. 24, AMERICAN COUNCIL ON RACE RELATIONS. FEPC (June 26, 1946) *Summary and Conclusion*.

5. See Hunt, *The Proposed Fair Employment Practice Act; Fact & Fallacies* (1945) 32 VA. L. REV. 1, 22.

6. MYRDAL, *op. cit. supra* note 1, at 19, 20, 1031. See also McWilliams, *Race Discrimination and the Law* (1945) 9 SCI. AND SOC. 1.

social life to the irrational vagaries of custom when the possibility of influencing it in a conscious and enlightened manner is given."⁷

It is true, as our experience with the Prohibition Amendment testifies, that legislation cannot race too far ahead of what the community is ready to accept. But in dealing with legislation aimed against discriminatory employment practices, we have a completely different situation than that involving intoxicating beverages. Equality of economic opportunity is a basic part of the articulated American philosophy of government. Legislation merely attempts to close the gap between preachment and practice and to translate into reality a long-established and frequently stated belief. Nor is such legislation an attempt to legislate the Golden Rule. There is no question but that a law directed at controlling an individual's thoughts would have little likelihood of success, if for no other reason than inability to determine when it is being violated. But a law regulating employment practices regulates behavior, not thoughts; it prohibits the act of refusing employment because of an applicant's color or religion—not subjective concepts on the matter.

It has been said that "where the value of an act depends mainly on the spirit in which it is performed, it is not a proper subject for legal control."⁸ The point is not applicable to FEP legislation, for the value of the act of abstaining from discrimination does not depend on the spirit in which it is done. It may be done grudgingly, but if its result is to give employment to an individual who previously would have been discriminated against, it will have served its immediate purpose. Thus, for example, the old and well established "custom" of black-listing—discrimination because of union affiliation—has been effectively checked, and employment contracts affecting millions of workers have been negotiated through processes of collective bargaining imposed by law.⁹ The remarkable success of the FEPC during its short life and the progress being made under comparable state legislation should dispel any doubts as to the effectiveness of law as a means of eliminating discriminatory employment practices.

EXISTING FEDERAL AND STATE LEGISLATION

Various federal statutes enacted in the last decade have forbidden racial and religious discrimination,¹⁰ but none has to any extent covered

7. Timasheff, *The Sociology of Law* in *HARVARD SOCIOLOGICAL STUDIES* (1939) 311. See also FRIEDMANN, *LEGAL THEORY* (1944) 182-3: "As modern social conditions demand more and more active control, the state extends its purposes. Consequently custom recedes before deliberately made law, mainly statute and decree. At the same time, law emanating from central authority as often moulds social habits as it is moulded itself."

8. MACIVER, *SOCIETY—ITS STRUCTURE & CHANGES* (1933) 274-5.

9. See Bernhardt, *The Right to a Job* (1945) 30 *CORN. L. Q.* 292, 304-5.

10. See Dublirer, *Legislation Outlawing Racial Discrimination in Employment* (1945) 5 *LAWYERS GUILD REV.* 101, 104 n:35.

discrimination in employment. The first major attack on the national problem was made in 1941 by an Executive Order creating the wartime Fair Employment Practices Committee.¹¹ The life of this agency, however, was brought to a premature end, and Congress has not yet seen fit to re-establish it on a permanent basis.¹²

Prior to 1945 some states had passed laws banning discrimination in very limited fields of employment.¹³ Since then comprehensive bills have been introduced in more than twenty states¹⁴ and have been passed in New York,¹⁵ New Jersey,¹⁶ Indiana,¹⁷ Wisconsin,¹⁸ and Massachusetts.¹⁹ In general these bills are similar in pattern. After setting forth legislative findings, they prohibit discrimination in employment because of race, creed, color, or national origin. Next, those "unfair labor practices" which constitute discrimination are defined. The persons and fields of employment covered and exempted are then specified, and an administrative agency or officer is given the power of investigation, hearing and enforcement.

At least until all states take action, there will of course remain a need for federal legislation if effective, nation-wide progress against discrimination is to be made. There is also a practical value to federal legislation in those few states having anti-discrimination statutes, for it must be conceded that in general the federal government, perhaps because of its greater resources, has a better record for effective law enforcement than state or local governments. Conversely, since a federal law would be limited to employment practices of the national government and of

11. For history and discussion of the FEPC, see Murray, *The Right to Equal Opportunity in Employment* (1945) 33 CALIF. L. REV. 388. The Committee was created June 25, 1941, as a war agency by Executive Order No. 8802. Executive Order No. 9346 further defined the Committee's powers. The law prohibited discriminatory employment practices because of race, creed, color, or national origin in government service, in defense industries and by trade unions. The FEPC was created to administer the law.

12. Being only a war-time agency the FEPC could not last beyond the official end of the war. Congress, however, brought about its end much sooner by refusing to grant an appropriation to the Committee. When Congress adjourned a bill was still pending in each house (S. 101 and H. R. 2232) known by the title "Fair Employment Practice Act." See Maslow, *FEPC—A Case History in Parliamentary Maneuver* (1946) 13 U. OF CHI. L. REV. 407.

13. See Dublirer, *supra* note 10, at 104. Such laws, however, have been ineffective.

14. See Dublirer, *supra* note 10, at 105 n. 46. See also Maslow, *The Law and Race Relations* (1946) 244 ANNALS 75, 79.

15. N. Y. Laws 1946, c. 118. Discussed in Note (1945) 19 ST. JOHN'S L. REV. 170; Turner, *The New York State Law Against Discrimination* (1946) 4 NAT. BAR. J. 3 (a brief discussion of how the Commission has been functioning to date); 17 N. Y. STATE B. A. BULL. 76.

16. N. J. Laws 1945, c. 169; 18 N. J. STAT. ANN. (West, Supp. 1946) 25-1, discussed in 68 N.J.L.J. 217, 219, 221, 225, 227.

17. Ind. Laws 1945, c. 325; IND. STAT. ANN. (Burns, Supp. 1945) 40-2301.

18. Wis. Laws 1945, c. 490.

19. Mass. Laws 1946, c. 368; 1 ANN. LAWS OF MASS. (Michie, Supp. 1946) c. 6, § 56.

businesses engaged in interstate commerce, complementary state legislation would be needed even if a federal act were passed.

MUNICIPAL REGULATION

Since it is in urban areas that the problem is most acute, it is not surprising that there has been increasing discussion of the desirability of city ordinances to prevent discriminatory employment practices. The need for integration of minority groups into the defense program, the difficulty of obtaining federal and state legislation, and local agitation by prominent minority groups for immediate progress have combined to stimulate municipal action. In August, 1945, Chicago became the first city to enact an ordinance on the subject; with Milwaukee and very recently Minneapolis following suit.²⁰ Similar ones have now been proposed or introduced in Buffalo, Philadelphia, St. Louis, Cincinnati, Detroit,²¹ Cleveland, Seattle, Los Angeles, Toledo, Spokane, San Diego and Indianapolis.

If local ordinances can be so drafted as to pass the stringent tests of legality generally applied to all municipal acts, they offer several advantages not found in state FEP legislation. First, it may be easier to secure their passage, for discrimination is apt to affect a greater proportion of voters in the cities than on a state-wide basis; and, moreover, what numerical strength minority groups have in the state is in many cases diluted in the legislature by districting schemes giving disproportionately large representation to rural areas. Secondly, local enforcement tends to be more vigorous and efficient, partly because law enforcement is usually regarded as a local problem. Thirdly, local FEP ordinances can be utilized much more effectively as educational devices than either state or federal statutes; a commission concentrating on the problem of discrimination within the city can make the community aware of its own situation and alive to the need of legal sanctions when other means fail. Education at the local level, if properly carried out, should yield maximum benefits. These advantages of municipal ordinances would seem to outweigh the ever-present danger that local political influences and the power and prestige of selfish individuals may carry greater weight than they would at either the state or the federal level.

The provisions of most of the municipal ordinances so far proposed fall into four sections: findings and policy, coverage, unfair employment practices and enforcement and penalties.

Findings and policy. Chicago and Seattle state the policy of the ordi-

20. The Milwaukee ordinance was passed May 13, 1946. Minneapolis enacted its ordinance which is similar to that proposed for Detroit on Jan. 31, 1947. The Chicago ordinance is set forth in App. I.

21. See App. II.

nance to be cooperation with the United States in winning the peace by securing the aid of all workers regardless of color, creed, etc.²² Milwaukee relates the ordinance to the state's policy against discrimination.²³ Other cities make findings that discrimination in employment affects the progress and prosperity of the city;²⁴ impairs the health and living standards of minority groups; gives rise to economic and social tensions; and endangers the peace, safety, and general welfare of the community.²⁵ Nearly all make some statement that discrimination is contrary to our basic democratic traditions.²⁶ A few wisely state that the ordinance is an exercise of the police power of the city to promote the peace, safety, health and general welfare.²⁷

Coverage. All of the ordinances cover three groups: the city, including all officials and employees thereof; contracting agencies of the city; and private persons. Contracting agencies are required to include in all contracts or orders a provision requiring the contractor, his agents and sub-contractors to observe the provisions of the ordinance.²⁸ The provisions covering private persons differ primarily in their degree of specification. The Chicago ordinance merely states that it shall be unlawful for "any person to discriminate against any other person."²⁹ In such a case, it would appear desirable for the sake of clarity to define "person" to include individuals, partnerships, associations, corpora-

22. See App. I, § 1.

23. "Whereas, the State of Wisconsin, through its duly elected representative, has set forth a policy against discrimination in public and private employment; and . . ."

24. For example, Toledo and Cleveland: "Whereas, the progress and prosperity of this City is dependent upon full employment of workers, regardless of race, creed, color or national origin. . . ."

25. See Detroit ordinance § 1, App. II. The Minneapolis ordinance states that "Such job discrimination tends unjustly to condemn large groups of inhabitants of this City to depressed living conditions, which breed vice, ignorance, disease, degeneration, juvenile delinquency and crime, thereby causing grave injury to the public safety, general welfare and good order of this City, and endangering the public health thereof." § 1. (b).

26. Philadelphia: ". . . mindful of the growing threat of discrimination in employment to our basic democratic traditions. . . ."

27. Cincinnati, Cleveland, Philadelphia and Minneapolis.

28. See Detroit ordinance § 4, App. II. In one of the proposed drafts for St. Louis, the provision is even more explicit. It requires that all contracts include ". . . a provision obligating the contractor not to discriminate, directly or indirectly, through collective bargaining contracts or otherwise. . . ."

"Section 3. The provisions of Section 2 hereof shall apply to all contracts of the City, the performance of which by the contractor involves the employment of persons by such contractor in the manufacture, conversion, repair, distribution or delivery of materials, supplies, articles, equipment, utilities or services included in the contract of a value or price exceeding \$100.00 and to all subcontracts thereunder including all leases of property of the City . . . granting the use of such property for any purpose contemplating the employment of persons. . . ."

29. See Chicago ordinance § 4, App. I. Only by reference to § 5, providing that "any person, firm or corporation who shall violate, etc." does it appear that the word "person" in § 4 includes more than private individuals.

tions, etc.³⁰ Detroit specifies "all private employers having ten or more employees engaged in a business" within the city as well as labor organizations and private employment agencies.³¹ In Philadelphia, the draftsmen, apparently on the theory that they were anchoring the ordinance to firmer ground, provided that it should apply to all persons enjoying stated benefits from the city.³² A number of the ordinances exempt specified persons or groups.³³

Unfair employment practices. Here again the differences between the various ordinances are principally in wording and in the degree of specification. The following are in essence the practices forbidden: discrimination against a person solely because of race, creed, color, national origin or ancestry in regard to hire, tenure, promotion, terms or conditions of employment, increases in compensation, or union membership; adoption or enforcement of a rule or employment policy which discriminates between employees on account of race, creed, color, etc.; requirement of information from an applicant or employee concerning his race, creed, color, etc. as a condition of employment; publication of advertisements containing a specification or limitation as to race, creed, color, etc.; assistance in, or incitement to, the commission of any of the unfair employment practices forbidden by the ordinance.

Enforcement and Penalties. The vital enforcement and penalty provisions are of two kinds: those which merely provide penalties for violation,³⁴ and those which also create a commission with power to administer and seek compliance with the ordinance.³⁵

LEGALITY OF MUNICIPAL ANTI-DISCRIMINATION ORDINANCES

The legal basis of municipal ordinances has given rise to much discussion. Whether a municipality may validly prohibit discriminatory employment practices has not been settled by any court of last resort.

30. Section 3 of the Philadelphia ordinance provides that "the term 'person' includes one or more individuals, partnerships, associations, labor unions, corporations, legal representatives, trustees in bankruptcy, or receivers."

31. App. II, §§ 2(4) and (6).

32. Philadelphia ordinance § 4(c): "Every person enjoying the use or benefit of any franchise, license, permit, tax exemption, authorization, or other privilege granted by the City of Philadelphia."

33. Cincinnati exempts sectarian, religious or fraternal organizations and also any person whose employees are in domestic service at his home. Detroit exempts employers of fewer than 10 persons. See App. II, § 2(4). Philadelphia exempts employers of fewer than 6, as well as religious and sectarian organizations. Minneapolis exempts employees in domestic service and employees of a religious institution limited in membership to persons of a single religious faith.

34. See Chicago ordinance § 5, App. I. This provision leaves enforcement of the ordinance to the individual injured or to the prosecuting authorities of the city.

35. See Detroit ordinance §§ 6-8, App. II. The Minneapolis ordinance creates a five-man commission with power to hear and investigate complaints.

Some of the proposed ordinances have met with unfavorable opinions from city attorneys, however, and many cities have delayed adoption pending submission of drafts in more restricted form. Fear that an adverse court decision on the validity of the ordinance might prejudice attempts to secure a state law has also caused proponents of anti-discrimination legislation to approach municipal regulation cautiously.

The power of any municipality to enact legislation, no matter of what nature, depends upon its charter, its enabling act, or the state constitution.³⁶ A few cities enjoy broad "home rule" powers. The majority, however, are subject to state statutes enumerating the specific powers which a city may exercise,³⁷ and in general the courts have held that a city may exercise only those powers specifically granted.³⁸ These are basic limitations upon municipal action. The discussion which follows combines a consideration of the existence of the power to regulate employment practices with the objections raised to its exercise.³⁹

Public employment—Civil Service. Apparently little doubt is entertained about the power of a municipality to apply anti-discrimination regulations to employment practices of its own agents.⁴⁰ In "home-rule" cities there would probably be no need to spell out any specific grant of power,⁴¹ and in other cities applicable authority can usually be

36. See 1 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. Rev. 1940), §§ 363, 367; Brooklyn City R. R. v. Shalen, 191 App. Div. 737, 182 N. Y. S. 283 (2d Dep't), *aff'd*, 229 N. Y. 570, 128 N. E. 215 (1920); People v. Wolper, 350 Ill. 461, 183 N. E. 451 (1932). Where the state constitution authorizes adoption or amendment by a municipality of its own charter the powers of the municipal corporation are derived from the constitution. St. Louis v. Western Union Tel. Co., 149 U. S. 465 (1893). The Municipality is always a creature of the state and has only such powers as the state confers upon it. The theory that a municipality has an inherent right of self-government has been long-lived although it has never acquired any substantial following. See (1930) 41 HARV. L. REV. 894, 897.

37. WALKER, FEDERAL LIMITATIONS UPON MUNICIPAL ORDINANCE MAKING POWER (1929) 10. The author points out that until recently most home-rule charters followed the same practice. Now many charters grant the city power to exercise "all municipal functions," which will necessitate court definition of the limits of that phrase. The Illinois general charter for cities is an excellent example of the degree of control the state may retain. See REVISED CITIES AND VILLAGES ACT, 24 ILL. STAT. ANN. (Smith-Hurd, 1942) §1-1. See also LEPAWSKY, HOME RULE FOR METROPOLITAN CHICAGO (1935) 1, and *passim*.

38. 1 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) § 98. People v. Wolper, 350 Ill. 461, 183 N. E. 451 (1932); Chicago Packing Co. v. Chicago, 88 Ill. 221 (1878). Failure of the legislature to enumerate certain powers will preclude their exercise by the city. 1 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. Rev. 1940) § 368; People *ex rel* Huntley Dairy Co. v. Village of Oak Park, 268 Ill. 256, 109 N. E. 11 (1915).

39. Generally the validity of an ordinance is challenged—as an unconstitutional assumption of power—as being in conflict with constitutional provisions or with other state laws.

40. "There are few matters so intimately and exclusively of municipal concern as the mode of selecting persons for municipal employment. Possibly on this account there are few cases in which the court is called on to discuss the right." MCGOLDRICK, LAW AND PRACTICE OF MUNICIPAL HOME RULE (1933) 76.

41. Thus, for example, in Minnesota a city has all the powers of a civilian employer. State v. McColl, 127 Minn. 155, 149 N. W. 11 (1914). In Markley v. St. Paul, 142 Minn.

found without difficulty. Even the restrictive Illinois Cities and Villages Act⁴² grants the power to engage in public works,⁴³ to control the finances and property of the city,⁴⁴ to make contracts,⁴⁵ and "To provide by ordinance in regard to the relation between all municipal officers and employees in respect to each other, the municipality, and the people."⁴⁶ These provisions or others of a similar nature clearly grant the power to employ and, as an incident thereof, the power to prescribe the conditions and manner of employment.⁴⁷

Attacks on the validity of municipal regulation of a city's own employment practices are therefore likely to be of a technical nature. The argument may be advanced that the city council has no power to prescribe rules of employment because the state civil service act applicable to cities provides the method of appointment.⁴⁸ Of course the council would retain its powers so far as not granted to the state civil service commission, and to this extent at least the ordinance would be valid. But only a court blind to the policy of the civil service act would limit the ordinance on so technical a ground, since the policy of the ordinance coincides with that of the act.⁴⁹ "An ordinance making additional regu-

356, 172 N. W. 215 (1919), it was held that neither the spirit nor the letter of the state compensation act prevented a "home-rule" city from providing for additional compensation. In New York under the City Home Rule Law it is provided that: ". . . the local legislative body of a city shall have power to adopt and amend . . . (6) local laws in relation to the qualifications, number, mode of selection and removal . . . of all its officers and employees. . . ." N. Y. CITY HOME RULE LAW § 11.

42. 24 ILL. STAT. ANN. (Smith-Hurd, 1942) Art. 23 "General Powers of the Corporate Authorities" and Arts. 24 to 37 relating to special powers. Compare 16 MO. REV. STAT. ANN. (1943) §§ 6229, 6293.

43. 24 ILL. STAT. ANN. (Smith-Hurd, 1942) § 58-1.

44. *Id.* § 23-2.

45. *Id.* § 2-9.

46. *Id.* § 23-98.

47. A city charter need not specifically grant the power to employ in order that such power may exist. A city is deemed to have the power to do acts necessary to carry out its other powers. 1 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. Rev. 1940) § 367.

48. The Illinois Act provides that no appointment shall be made to offices or places of employment in the classified civil service except under and according to the rules promulgated by the Civil Service Commission. To this extent the act purports to qualify or restrict the power of regulating employment. 24½ ILL. STAT. ANN. (Smith-Hurd, 1935) §§ 41-2. See *People v. Kipley*, 171 Ill. 44, 49 N. E. 229 (1897).

Under home-rule laws the city is usually given power to provide the method of selecting employees and thereby the power to establish a merit system. MCGOLDRICE, LAW AND PRACTICE OF MUNICIPAL HOME RULE (1933) 76. Under the provisions of the New York City Home Rule Law quoted in note 41 *supra*, New York City has established a merit system. See NEW YORK CITY CHARTER ANN. (1943) §§ 21, 811-8.

49. See *People v. Kipley*, 171 Ill. 44, 60, 49 N. E. 229, 234 (1897). Most civil service acts are set up to avoid favoritism in employment—a form of political rather than racial or religious discrimination. Of necessity the employment practices provided for in such acts are non-discriminatory. However, it should not be thought that the civil service acts have thereby precluded racial or religious discrimination. Many of them contain a loophole,

lations which are reasonable and consistent with the legislative regulatory act is not void as conflicting with the state law, for an ordinance may duplicate or complement statutory regulations."⁵⁰

Public contracts—competitive bidding. A municipal corporation, like a private corporation, has a general power to make contracts in furtherance of the corporate objects,⁵¹ and an implied power to make any contract necessary to enable it to exercise the powers and perform the duties conferred on it by law.⁵² Does it, like the federal⁵³ and state⁵⁴ governments, have the power to determine those with whom it will deal, and to fix the terms and conditions upon which it will make contracts? If so, it may require all departments and contracting agencies of the city to include in all contracts a provision requiring compliance with the ordinance.⁵⁵ Again the answer turns upon the nature of the city's charter. In home-rule cities the power has been held to be as broad as that of the state.⁵⁶ Even in cities under strict legislative con-

found in the provision which allows an appointing agency or department to choose one out of a specified number of eligibles certified to it. See 24 $\frac{1}{2}$ ILL. STAT. ANN. (Smith-Hurd, 1935) § 47. This situation has not escaped the attention of FEPC advocates. In Massachusetts, while a state FEPC law was under consideration, the following amendment was proposed to the civil service law: "Sec. 15A. Discrimination against Eligibles in the Competitive Class. Whenever, in making appointment . . . from among those graded highest . . . (in examinations), an appointing officer shall appoint . . . any person graded lower than any other person . . . (who might have been) . . . appointed . . . and who was willing to accept such position . . . such appointing officer shall, within five days after making such appointment . . . enter upon the records of his office a statement in writing of his reasons for appointing . . . the person so appointed . . . and his reasons for failing to appoint . . . the person . . . graded higher . . . and shall . . . transmit a copy of such statement to the civil service commission, certifying . . . (that the statement is true and that) . . . such selection was not made by reason of the race, color, religion or national origin of any person so refused or given employment. Until such statement is filed . . . accepted and approved by the civil service commission, the commission shall not approve the salary, wage, or compensation of the person so employed or given employment." Compare a similar act passed in New York which requires the person who has been discriminated against to file a complaint rather than requiring an explanation from the appointing officer. N. Y. CIVIL SERV. LAW (McKinney, 1946) § 14-b-2.

50. 2 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. Rev. 1939) 699-700 and cases cited. "The mere fact that the state in the exercise of the police power has made certain regulations does not . . . prohibit a municipality from enacting additional requirements." Fox v. Racine, 225 Wis. 542, 545, 275 N. W. 513, 514 (1937).

51. 3 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. Rev. 1943) § 1269.

52. People v. Spring Lake Dist., 253 Ill. 479, 97 N. E. 1042 (1912); Chicago v. Peck, 98 Ill. App. 434 (1900), *aff'd*, 196 Ill. 260, 63 N. E. 711 (1902).

53. Perkins v. Lukens Steel Co., 310 U. S. 113 (1940).

54. Atkin v. Kansas, 191 U. S. 207 (1903).

55. See App. I, § 3 and App. II, § 4.

56. Jahn v. Seattle, 120 Wash. 403, 207 Pac. 667 (1922). "The whole matter of providing public works being delegated to the city, the city has, as an incident of its power to contract . . . the same inherent power to prescribe the conditions under which the work shall be carried on within the city, in absence of any restriction by the state, that the state has, and it may exercise . . . (such power) . . . until it is restricted by legislative enactment."

control such power should exist as an incident of the general power to contract,⁵⁷ provided, of course, that it has not been proscribed by the state.

Many states do, however, impose an important limitation on the municipality's power to prescribe the conditions of its contracts, namely that the municipality may not make any requirement which will restrict competitive bidding.⁵⁸ The purposes of this limitation are to make sure the city obtains the lowest feasible prices and to minimize favoritism and graft.⁵⁹ It is entirely possible that some contractors would abstain from bidding rather than abandon discriminatory employment policies. Should the FEP ordinance thus indirectly decrease competition, it might increase the cost of city projects. If so, it is conceivable that courts would hold that the public contracts clause of the ordinance conflicted with the statutory competitive bidding requirement.⁶⁰ In most cases, however, proof that the ordinance had increased costs would be difficult to establish. Furthermore, the enlightened judicial approach would be to recognize that the underlying purpose of

Milwaukee v. Raulf, 164 Wis. 172, 183-4, 159 N. W. 819, 822 (1916). Compare 2 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. Rev. 1939) § 787 at 946 and cases cited.

57. Compare *Atkin v. Kansas*, 191 U. S. 207 (1903). As an incident of its general power to contract a city may insert such provisions as it deems necessary for the protection of the public, e.g., the requirement of a contractor's bond even though no statute expressly requires it. 2 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) § 830.

58. See WIS. STAT. (1945) § 62.15 which requires contracts to be let to "the lowest responsible bidder." See also 24 ILL. STAT. ANN. (Smith-Hurd, 1942) §§ 19-76, 23-100. The following are examples of provisions held to be restrictions on competitive bidding: Specifications requiring a contractor to allow no laborer to work more than a certain number of hours per day. *Glover v. People*, 201 Ill. 545, 66 N. E. 820 (1903); *McCheaney v. People*, 200 Ill. 146, 65 N. E. 626 (1902). *Contra*: *Milwaukee v. Raulf*, 164 Wis. 172, 159 N. W. 819 (1916). The requirement that no alien labor be employed. Compare *Doyle v. People*, 207 Ill. 75, 69 N. E. 639 (1903). Requirement that the contractor pay a minimum wage. *Hillig v. St. Louis*, 337 Mo. 291, 85 S. W. (2d) 91 (1935); *Bohn v. Salt Lake City*, 79 Utah 121, 8 P. (2d) 591, 81 A. L. R. 215 (1932). *Contra*: *Iowa Elect. Co. v. Town of Cascade*, 227 Iowa 480, 288 N. W. 633 (1939); *Wagner v. Milwaukee*, 180 Wis. 640, 192 N. W. 994 (1923). Requirement that only union-made materials or union labor be used. *Neal Publishing Co. v. Rolph*, 169 Cal. 190, 146 Pac. 659 (1915); *Holden v. City of Alton*, 179 Ill. 318, 53 N. E. 556 (1899). *Contra*: *Amalithone Realty Co. v. New York*, 162 N. Y. Misc. 715, 295 N. Y. Supp. 423 (Sup. Ct. 1937). See RHYNE, LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW (1946) 65.

59. *Hillig v. St. Louis*, 337 Mo. 291, 295, 85 S. W. (2d) 91, 92 (1935).

60. The mere possibility of abstention from bidding because of an FEP ordinance should not of itself compel the conclusion that cost has been increased. It has been held that a clause prohibiting the employment of alien labor does not invalidate a contract or special assessment in the absence of a showing that it was a factor in competition for the contract. *Doyle v. People*, 207 Ill. 75, 69 N. E. 639 (1903); *Hamilton v. People*, 194 Ill. 133, 62 N. E. 533 (1901). Logically, in order for the ordinance to be held a violation of the charter provision requiring competition it should be shown that costs have increased and that the plaintiff has thereby suffered damage. *Ebbeson v. Board of Public Education*, 18 Del. Ch. 37, 156 Atl. 286 (1931); *Allen v. Labsap*, 188 Mo. 692, 87 S. W. 926 (1905). But cf. 2 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) § 808.

both the statutory provision and the ordinance is to further the public interest.⁶¹ Indeed, most legislatures, by providing that contracts shall be awarded to the lowest responsible bidder,⁶² have themselves recognized that low cost does not by itself give full protection to the public's best interests.⁶³ On balance, the public contracts clause would probably stand up in court.⁶⁴

Private employment. The provisions regulating the employment practices of private employers⁶⁵ present the most difficult legal problems. For that reason as well as the fact that they constitute the heart of FEP legislation, these provisions are most subject to attack. In the absence of any specific grant of power, cities must base regulation of private employment practices on the municipal police power granted by the state constitution or legislature.

The scope of the police power, like that of other powers granted a municipality, will depend on the nature of the grant.⁶⁶ Cities which derive their power from organic law may pass an ordinance as broad, within its limitations, as any which the legislature may enact.⁶⁷ How-

61. See (1936) 36 COL. L. REV. 496, 497 to same effect.

62. See, e.g., 24 ILL. STAT. ANN. (Smith-Hurd, 1942) § 19-76 ("lowest secure bid"); WIS. STAT. (1945) § 62.15. The city has a broad discretionary power in interpreting the phrase "lowest responsible bidder." See *West v. City of Oakland*, 30 Cal. App. 556, 560, 159 Pac. 202, 204 (1916); cf. Note (1934) 44 YALE L. J. 149.

63. See *Wagner v. Milwaukee*, 180 Wis. 640, 192 N. W. 994 (1923). Lowest responsible bidder does not mean the same as lowest possible cost; thus, a provision specifying patented materials or articles has been held not to prevent competition, *Hobart v. Detroit*, 17 Mich. 246, 97 Am. Dec. 185 (1868), and *Sanborn v. Boulder*, 74 Colo. 358, 221 Pac. 1077 (1924), where elimination of the provision would preclude the city from making use of new and valuable inventions. The requirement of competitive bidding is only incidental to the main purpose of protecting the public interest by securing the best advantages at the lowest practical price. 3 MCQUILLIN, MUNICIPAL CORPORATIONS (2d ed. Rev. 1943) § 1293.

64. The following statement indicates that the courts will consider the nature of an ordinance provision which purportedly restricts competition: "(it must be shown) . . . that the provision restricting competition and *having a tendency injurious to the public* actually entered into the competition in some way." (Italics inserted.) *McChesney v. People*, 200 Ill. 146, 152, 65 N. E. 626, 628 (1902). It has been held that the courts will not interfere where the conditions imposed allow reasonable opportunity for competition. See *Hastings Pavement Co. v. Cromwell*, 67 N. Y. Misc. 212, 124 N. Y. S. 388 (1910). See 3 MCQUILLIN, MUNICIPAL CORPORATIONS (2d ed. Rev. 1943) § 942 pointing out that the police power may be used to protect economic interests; and *City of Fernandina v. State*, 143 Fla. 802, 197 So. 454 (1940). But cf. *Bohn v. Salt Lake City*, 79 Utah 121, 8 P. (2d) 591, 81 A. L. R. 215, 255 (1932).

It has been suggested that public welfare statutes might logically be construed as conferring power on municipalities to insert provisions in contracts which are solely for the advancement of the public welfare, e.g., the relief of local unemployment, without regard to the effect on bidding. Note (1932) 81 A.L.R. 255 at p. 256.

65. App. I, §§ 4-5, and App. II, § 2(4)-(6).

66. See note 36, *supra*.

67. *Seattle v. Rogers*, 6 Wash. (2d) 31, 106 P. (2d) 598, 130 A. L. R. 1498 (1940); *Dayton v. S. S. Kresge Co.*, 114 Ohio St. 624, 151 N. E. 775, 53 A. L. R. 916, 920 (1926);

ever, where the power is drawn from the legislature, it is confined within narrower limits.⁶⁸ In states where the municipality is given power to legislate upon certain subjects in a specifically limited manner, and there is also a general power to enact ordinances for the general welfare, etc., the latter power is generally limited to measures in furtherance of the other powers which are specifically enumerated.⁶⁹ However, the courts of at least one jurisdiction, Minnesota, have rejected so narrow a construction.⁷⁰

If, in a particular state, it is doubtful that a city can regulate private employment practices under such general grants as the power to regulate in the interest of the public welfare, to license,⁷¹ or to enact police regulations, efforts should be made to secure passage of a state enabling

Brouger v. Board of Public Works, 205 Cal. 426, 271 Pac. 487 (1928). Note (1939) 5 LEGAL NOTES ON LOCAL GOV'T. 75-6.

68. The state of "legal infancy" to which cities may be confined is illustrated by Chicago's position. See LEPAWSKY, HOME RULE FOR METROPOLITAN CHICAGO (1935), *passim*. See also Chicago Law Department, 1940 REPORT, HOME RULE, *passim*. More recently the trend has been to accord wider discretion to municipal authorities in the exercise of the police power in the public interest. 3 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. Rev. 1943) 116 and cases cited.

69. See Birmingham v. Louisville & N. R. Co., 216 Ala. 178, 112 So. 742 (1927). In City of Bloomington v. Werrick, 381 Ill. 347, 353-4, 45 N. E. (2d) 852, 856 (1942), this rule is clearly stated: the police power delegated to the city "relates solely to the enforcement of ordinances and regulations passed . . . under powers conferred by other provisions of the statute. It confers no additional powers and cannot be invoked as an independent source of legislative power." It is intended only to carry out other powers properly delegated.

Often the enumeration of those businesses and occupations over which the municipality has been given control serves to exclude control over all others. See State v. Reeve, 104 Fla. 196, 139 So. 817, 79 A. L. R. 1119, 1126 (1932); Barnard & Miller v. Chicago, 316 Ill. 519, 147 N. E. 384, 38 A. L. R. 1533, 1538 (1925).

70. In Duluth v. Cerveney, 218 Minn. 511, 517, 16 N. W. (2d) 779, 783 (1944), the court said:

"A city exercises police power within its jurisdiction to practically the same extent as the State itself. This power is not confined to the narrow limits of precedents based on conditions of a past era. Rather, it is a power which changes to meet changing conditions, which call for revised regulations to promote the health, safety, morals, or general welfare of the public."

And in State *ex rel* Remick v. Clousing, 205 Minn. 296, 285 N. W. 711, 123 A. L. R. 465, 471 (1939), it was determined that the "general welfare" clause of the city charter was not limited to a subsequent enumeration of subjects which the city was authorized to regulate. To same effect see Century Brewing Co. v. Seattle, 177 Wash. 579, 32 P. (2d) 1009 (1934); Milwaukee v. Raulf, 164 Wis. 172, 159 N. W. 819 (1916).

71. The power to license particular businesses is usually set forth in a specific and often narrowly construed grant to a city. However, the possibility that the licensing power could be used to aid in securing compliance with an FEPC should be explored in terms of the laws of each state. A similar suggestion has been made with respect to civil rights laws. See Gertz, *Enforcement of Civil Rights Laws Through Municipal Licensing Power* (1946) 4 NAT. B. J. 43. Although the author sets forth adequate arguments upon which the use of the licensing power as an enforcement measure can be justified, he fails to give any legal basis for his reasoning.

act. The act should specifically empower any municipality to regulate discriminatory employment practices. By this device, all doubt as to the power of a municipality to pass an ordinance would be eliminated. In view of the strictness with which municipal powers are habitually construed, it would also be wise for the act to authorize the creation of city enforcement commissions.⁷² A provision of this type would conform to the pattern sometimes followed with regard to civil service, health and building regulations where, in addition to defining specifically a city's power to regulate a subject, the acts provide for creation of local enforcement bodies. While such statutes have usually been limited to large cities, they could easily be made applicable to all municipalities at their option.

To date no state has tried this approach. It would, however, provide a practical solution where passage of a state FEP act is not politically feasible. Legislators who claim that their constituents oppose a fair employment practices bill should have no objection to an act which merely permits communities which do favor such legislation to adopt it. Moreover, even where it is possible to obtain a state FEP act, enabling provisions should be included in it so that state action may be buttressed by local action.

Often the attack on municipal police ordinances is based not on lack of municipal authority but on violation of the constitutional requirements of due process.⁷³ Municipal legislation is subject to the prohibitions of both the state and federal constitutions, and violation of the due process clause by a police measure raises the same questions under both constitutions.⁷⁴ In general, if a police ordinance seeks to attain objectives which a government may legally effect, and if it is not unreasonable or arbitrary in the means adopted, the due process clause will not invalidate it. More specifically, it has been contended that a fair employment practice law violates due process because it infringes on freedom of contract.⁷⁵

This argument is unsound in view of decisions upholding regulation of employment for the protection of society "against the evils which

72. The Detroit ordinance (App. II) and Minneapolis ordinance make provision for a limited type of enforcement body.

73. MCGOLDRICK, *THE LAW & PRACTICE OF MUNICIPAL HOME RULE* (1933) 332. For this reason there is often difficulty in distinguishing between the extent of the police power in home rule and other cities.

74. See *Gray v. Hall*, 203 Cal. 306, 318, 265 Pac. 246 (1928), and *McCoy v. Kenosha County*, 195 Wis. 273, 277, 218 N. W. 348 (1928) to the effect that "due process" has like meaning under both state and federal constitutions.

75. This contention is considered in *Dublirer, Legislation Outlawing Racial Discrimination in Employment* (1945) 5 *LAW. GUILD REV.* 101, 108 and Note (1945) 19 *ST. JOHN'S L. REV.* 170, 175. Although the contention is there considered in its application to federal and state FEP laws, it would, if valid, apply equally to municipal legislation.

menace the health, safety, morals, and welfare of the people.”⁷⁶ Freedom of contract does not mean that one may conduct a business in derogation of the public interest.⁷⁷ The state⁷⁸ or its subdivisions⁷⁹ may exercise the police power to eradicate an evil shown to threaten the public welfare. That discriminatory employment practices harmful to the public may be regulated is illustrated by decisions holding that the Wagner Act prohibits discriminatory refusal to hire on the sole basis that the applicants have union records.⁸⁰ If we can validly outlaw such discriminatory employment practices in order to insure industrial peace, *a fortiori* we can outlaw similar practices which threaten not only the public peace but also our economic and social welfare. Courts in recent years have made many statements which indicate a belief that discrimination because of race, creed, or color is against public policy.⁸¹ That fact being accepted, there can remain no doubt but that the matter is subject to the police power.

76. See *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937), and the numerous decisions following the opinion in this case.

77. See *Nebbia v. People*, 291 U. S. 502 (1934).

78. That the state may so exercise its police power is too clear to merit argument. See *Nebbia v. People*, 291 U. S. 502 (1934), cited *supra* note 77; *State Board of Milk Control v. Newark Milk Co.*, 118 N. J. Eq. 504, 179 Atl. 116 (1935).

79. *Bowers v. North Little Rock*, 190 Ark. 175, 77 S. W. (2d) 797 (1935); *Grown v. Cleveland*, 125 Ohio St. 455, 181 N. E. 897, 84 A. L. R. 708, 714 (1932); *Columbia v. Phillips*, 101 S. C. 391, 85 S. E. 963 (1915).

80. *NLRB v. Waumbeac Mills*, 114 F. (2d) 226 (C. C. A. 1st, 1940); *Nevada Consolidated Copper Corp.*, 26 NLRB 1182 (1940); but *cf.* *NLRB v. Nevada Consolidated Copper Corp.*, 316 U. S. 105 (1942); see also *Phelps Dodge Corp. v. NLRB*, 313 U. S. 177 (1941) (to effectuate the policy of the act, employer required to offer employment to men he refused to hire because of their union affiliations); *Bernhardt, The Right to a Job* (1945) 30 *CORN. L. Q.* 292, 304, 305 and cases cited therein.

81. “Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation.” *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552, 561 (1938).

“The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation.” *Murphy, J. concurring in Steele v. Louisville & N. R. R.*, 323 U. S. 192, 209 (1944).

“A judicial determination that such legislation [*i.e.*, legislation prohibiting a labor organization from discriminating against any person because of race, creed or color] violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of the employees.” *Railway Ass’n v. Corsi*, 326 U. S. 88, 93-4 (1945). See also concurring opinion of *Frankfurter, J.*, 326 U. S. 88, 97-8: “Of course a State may leave abstention from such discriminations to the conscience of individuals. On the other hand, a State may choose to put its authority behind one of the cherished aims of American

The due process clause serves as a last refuge for most opposition to regulatory measures. As a general rule the courts are more likely to invalidate as unreasonable those ordinances passed under general, implied, or incidental powers than those passed in conformity with an express grant.⁸² FEP ordinances, so far as the clauses regulating private employment practices are concerned, fall within the former group, for they involve an exercise of the general police power in the interest of the general welfare.⁸³ It is important, therefore, that careful attention be given to drafting the policy clause of the ordinance.⁸⁴ The clause should set forth the purpose and social necessity for the measures, so that the ordinance itself will provide a basis for judging its reasonableness. This, together with the extensive material which can be compiled to show the evil effects of discrimination, should make it difficult successfully to attack the ordinance as arbitrary or unreasonable.⁸⁵ Decisions as to the necessity and efficacy of an ordinance are for the city's legislative body,⁸⁶ and should not be questioned by the courts if there is reasonable relation between the action taken and the evil sought to be remedied.⁸⁷

Enforcement—municipal administrative bodies. Some of the existing and proposed ordinances make violation a crime, but leave enforcement proceedings to be initiated by the cities' regular prosecuting authorities.⁸⁸ There is little doubt of the validity of this type of provision, for a city may always prescribe a penalty for violation of an ordinance and charge the proper officials with enforcement.⁸⁹ However, the effective-

feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such state power would stultify that Amendment."

82. 2 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1939) 864 *et seq.* This is further reason for an enabling clause.

83. Compare *Euclid v. Ambler Co.*, 272 U. S. 365, 386 (1926). The court establishes the principle that ordinances passed under the police power cannot be declared unconstitutional unless their provisions "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395.

84. The policy clause in the Detroit ordinance is well drawn and should fulfill its purpose. See App. II.

85. In determining whether an ordinance is unreasonable the courts consider the objects sought to be attained and the necessity for its adoption. See *Biffer v. Chicago*, 278 Ill. 562, 116 N. E. 182 (1917); *Los Angeles Co. v. Hollywood Cemetery Ass'n*, 124 Cal. 344, 57 Pac. 153 (1899).

86. *Cleaners Guild of Chicago v. Chicago*, 312 Ill. App. 102, 37 N. E. (2d) 857 (1941); *Bond v. Cooke*, 237 App. Div. 229, 262 N. Y. Supp. 199 (3d Dep't 1932); *Sverkerson v. Minneapolis*, 204 Minn. 388, 283 N. W. 555, 120 A. L. R. 944, 950 (1939).

87. *Chicago v. Waters*, 363 Ill. 125, 1 N. E. (2d) 396 (1936). This relationship should, of course, be made clear in the policy clause.

88. See App. I, § 5.

89. *State v. Parker*, 87 Fla. 181, 100 So. 260 (1924); *State v. Wong Hing*, 176 Minn. 151, 222 N. W. 639 (1929); see 2 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. Rev. 1939) § 747.

ness of such a provision in legislation of this type is open to serious doubt. State civil rights laws make discrimination in public places of amusement or accommodation a criminal offense punishable by fine and imprisonment.⁹⁰ These laws have proved universally ineffective,⁹¹ and their failure may be traced directly to the inadequate enforcement provisions.⁹² The burden of making a complaint falls upon the person discriminated against, and even if complaint is made, the chances of prosecution are small. Public prosecutors regard this type of case as comparatively minor, and since the offenders frequently represent prominent business interests, it is often considered politically wise to avoid pressing such matters. Also, convictions are hard to obtain because even the sympathetic prosecutor, when hampered by lack of adequate investigatory facilities, finds it hard to prepare an airtight case. All too often the aggrieved persons, recognizing these facts, will suffer the injury rather than pursue a fruitless complaint.⁹³

Prevention rather than punishment after the event should be a primary purpose of any fair employment practices law. Positive results achieved through administrative action are more effective in this regard than the negative approach of a court-enforced penalty.⁹⁴ What is

90. See *Legislative Attempts to Eliminate Racial and Religious Discrimination (1939)* 39 COL. L. REV. 986, 996, for statutory references. Many of these statutes also provide damages or a statutory penalty to be obtained in a civil suit by the person aggrieved.

91. *Id.* at 1002; Maslow, *supra* note 14 at 76.

92. *Ibid.*

93. Provision for damages or a penalty to be given the injured party does not increase the number of criminal complaints filed or civil suits brought. The burden of a lawsuit outweighs the small recovery usually allowed, and even if no limit was set on recovery, the difficulty of proving damages would deter action.

94. See CLEARING HOUSE RELEASE NO. 24, AMERICAN COUNCIL ON RACE RELATIONS, FEPC (June 26, 1946) *Summary and Conclusion* 4-11.

"FEPC during its five years satisfactorily settled nearly 5,000 cases by peaceful negotiation, including 40 strikes caused by racial differences. During the last year of the war, FEPC held 15 public hearings and docketed a total of 3,485 cases, settling 1,191 of them. These settlements were not publicized and generally escaped attention. The contrary impression, that FEPC normally met with unyielding opposition, was created by the comparatively few difficult cases which received emphasis through public hearings and public expressions of defiance by some recalcitrant employers and unions.

"In fact, the bulk of FEPC's useful work was accomplished by the quiet persuasion of its regional representatives assigned to 15 regional and subregional offices located in major industrial centers.

"That is not to say that persuasion alone can end discrimination. The employer's need for war workers, or his patriotism, or dislike of exposure, each in its respective situation was a powerful incentive to stop discrimination. The practice, however, seldom disappeared spontaneously. The intervention of a third party with authority to act if necessary, was required to start the process in motion. . . .

"The public hearing is an essential step toward the ending of discrimination where negotiation has failed. Dislike of public exposure of their intolerant actions is a stimulant to move the indifferent or the timid into taking the first steps by which workers of different racial or religious backgrounds may be brought together to work in harmony."

needed—and has been provided by some of the ordinances—is an administrative body with regulatory and protective functions specifically designed for the problem.⁹⁵ Such a body, hearing complaints⁹⁶ and making routine investigations of concerns subject to the ordinance, would be in a position to formulate uniform standards for the type of case that it will consider. Employers desiring to comply with the ordinance could refer proposed rules and regulations to the commission for approval or suggested modification. A commission could also effectively use conciliation and mediation in those situations where discrimination is either unknown to top management or is an unconscious carry-over of a community pattern. Finally, a commission may formulate and carry out an educational program for the elimination of discriminatory practices.⁹⁷ This program could include publicity campaigns against violators.⁹⁸ Very few individuals or firms would be insensitive to publication of the fact that they are engaged in discriminatory practices.⁹⁹

95. See App. II. §§ 5-8.

"The inadequacies of the old procedures to meet the new claims, the lack of any power in the judicial branch of government to initiate proceedings, the delays attendant upon formalism, the want of that type of specialized application that makes for expertness, these are the basic causes for administrative law. Its creation, like the creation of the older equity, was an effort to grant protection to the common man in the realization of new liberties born of a new economic order. The continuity of the common man's radio programs, the security of his bank deposits, his protection against unfair discrimination in employment, his right to have light and power at reasonable rates . . . —to mention only a few of the necessities of modern life—these are some of the new liberties which make up the right of today's common man to the pursuit of happiness, and these liberties for their protection today seek the administrative and not the judicial process." Landis, *The Development of the Administrative Commission*, quoted in GELLHORN, *ADMINISTRATIVE LAW, CASES AND COMMENTS* (1940) 18.

96. Although none of the proposed ordinances which make provision for a commission is patterned after state FEP acts such as that in New York, it is of interest to note that the state acts have been weakened because of their failure to provide that the organized representatives of minority groups may file complaints with the state commission. See Comment, "Persons Aggrieved" *Under the Ives-Quinn Law* (1946) 6 *LAW GUILD REV.* 421.

97. See Pesin, *Summary, Analysis and Comment on 'Anti-Discrimination' or 'Fair Employment Practices' Legislation of New Jersey* (1945) 68 *N. J. L. J.* 217. In Chicago the 1945 Report of the Mayor's Committee on Race Relations (at 11) recommended that the FEP ordinance be strengthened by the inclusion of some enforcement machinery.

98. One of the ordinances proposed in St. Louis (Board Bill No. 45) which pertained primarily to city contracts provided: Sec. 5 . . . "If upon such informal investigation a majority of the commission finds there is reasonable cause to believe that there has been such violation of the provisions of this ordinance, the Commission shall have authority, upon due notice to any contractor complained of, of the time and place of hearing of such complaint to make a finding of violation by such contractor . . . and shall make a report to the Mayor . . . of any such violation and publicize the same. . . ."

99. The first prosecution under the Chicago ordinance was an excellent example of the coercive power of publicity. In *Chicago v. M. Wenzler* (May, 1946) as reported in the files of the American Council on Race Relations, the defendant's attorney took great pains to state that the defendant (personnel director of a corporation whose product was nationally advertised and distributed) had no desire to discriminate against the complainant or any members of his race, maintaining that no discrimination was intended against the complain-

Granting the desirability of a commission for the administration of FEP ordinances, has a municipality the power to create such a body? This problem needs careful consideration. Most inquiry into the legal aspects involved has been devoted to state and federal bodies. The briefest review of the structure of government in nearly all cities will reveal the presence of administrative bodies such as building commissions and boards of health and sanitation which have a more vital and direct effect upon the city-dweller than do many federal and state administrative bodies. Some of these municipal bodies are direct creatures of the state legislature; others are creatures of the city council. In dealing with the latter type the courts have constantly overlooked the fact that the legislative power of most cities is a delegated power; instead they have treated it as if it stemmed from constitutional grant, as in the case of state legislative power. Thus the following type of erroneous analysis continues to exist: Since a city council is subject to the same prohibition against delegation as the legislature,¹⁰⁰ the council cannot delegate the exercise of its powers to other municipal officers, administrative officials, or to its own committees.¹⁰¹ In the language of the courts, it is the power to exercise discretion as to what the law *shall* be which cannot be delegated.¹⁰² This is to be distinguished from a delegation of power which involves authority or discretion as to the execution of a law.¹⁰³ In the latter case, ministerial or administrative powers are granted, and they may be validly delegated.¹⁰⁴ These distinctions are tenuous, because the content of a law is often determined

ant and that the case arose out of a misunderstanding concerning complainant's true intentions with respect to the job she sought. The court suggested that as proof of his good faith and desire to abide by the ordinance, the defendant offer to hire the complainant. To this the defendant readily agreed, and the case was dismissed. Apart from illustrating the defendant's desire to avoid the contention that it subscribed to a policy of discrimination, the case also illustrated the desirability of a commission, for if defendant were sincere in his contention of a misunderstanding, an attempt at mediation by a commission would surely have brought that fact out before the case reached the prosecution stage. If defendant actually maintained discriminatory employment practices, publicity by the commission plus the threat of further publicity in a court prosecution would have brought a quicker settlement.

100. *Ill. Power and Light Corp. v. City of Centralia*, 11 F. Supp. 874 (E. D. Ill. 1935) (see especially review of Ill. decisions at 886-7), *rev'd*, 89 F. (2d) 985 (C. C. A. 7th, 1937); *Ex parte Kinney*, 53 Cal. App. 792, 200 Pac. 966 (1921); *People v. Sell*, 310 Mich. 305, 17 N. W. (2d) 193 (1945); *State ex rel. City of Excelsior Springs v. Smith*, 336 Mo. 1104, 82 S. W. (2d) 37 (1935); *State ex rel. Srigley v. Woodworth*, 33 Ohio App. 406, 169 N. E. 713 (1929).

101. 1 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. Rev. 1940) § 395 and cases cited for various jurisdictions.

102. *State ex rel. Zilisch v. Auer*, 197 Wis. 284, 291, 221 N. W. 860, 863 (1928); *Minneapolis Gas-Light Co. v. Minneapolis*, 36 Minn. 159, 30 N. W. 450 (1886).

103. *State ex rel. City of Excelsior Springs v. Smith*, 336 Mo. 1104, 82 S. W. (2d) 37 (1935).

104. *Jewell Belting Co. v. Bertha*, 91 Minn. 8, 11, 97 N. W. 424, 425 (1903); *Carthage v. Garner*, 209 Mo. 688, 108 S. W. 521 (1908). The fundamental weakness of this distinction

by the way it is carried into effect, and for this very reason the courts have required that definite standards be provided for the administration of a law in order that it avoid invalidity as a grant of legislative power.¹⁰⁵

More accurately defined, the problem is one of sub-delegation of legislative powers. The totality of the law-making power is in the state legislature, and only through delegation of such power is a municipality empowered to enact ordinances.¹⁰⁶ The character of the problem thus changes from that of a constitutional question to one of statutory interpretation.¹⁰⁷ Whichever approach is used, it seems that at one point or another the courts will return to the question of discretionary versus non-discretionary powers.¹⁰⁸ Too often the tendency in drafting these ordinances is to prohibit discrimination without defining what discrimination is. It is quite likely that use of such a term or similar terms may lead to a successful attack on the ordinance on the ground that the term is so broad as to leave to the administrative officer who deals with the problem, or to the courts, the definition of the type of offence which the ordinance seeks to prohibit. This problem can be minimized by a carefully drawn definition which specifies certain types of conduct as constituting discrimination.

Long-standing practice in all communities supports the statement that a city council may appoint administrative agents to carry out its

is brilliantly expressed by Ernst Freund, *Power of Zoning Boards of Appeals to Grant Variations* (1931) 20 NAT. MUN. REV. 537. See also remarks of Judge Rosenberry in *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, 496, 498, 506, 220 N. W. 929, 938, 939, 942 (1928).

105. *City of Pekin v. Industrial Commission*, 341 Ill. 312, 173 N. E. 339 (1930); *Poggel v. Louisville Ry.*, 225 Ky. 784, 10 S. W. (2d) 305 (1928); *State v. Lindquist*, 171 Minn. 334, 214 N. W. 260 (1927).

An ordinance which contains no rules or provisions limiting an officer's discretion is void. *Yick Wo v. Hopkins*, 118 U. S. 356 (1886); *People v. Sholem*, 294 Ill. 204, 128 N. E. 377 (1920); *Fred Wolferman Bldg. Co. v. General Outdoor Adv. Co.*, 30 S. W. (2d) 157 (Mo. App. 1930).

106. Weeks, *Legislative Power versus Delegated Legislative Power* (1937) 25 GEO. L. J. 314, 331. The effect of the early doctrine that a municipality has a right of self-government has been to insure that delegation of legislative power to a municipality will not be invalidated under the general rule. See 1 SUTHERLAND, STATUTORY CONSTRUCTION (3d ed. 1943) 59-60.

107. See also MCGOLDRICK, BUILDING REGULATION IN NEW YORK CITY (1944) 185: "A somewhat different problem is raised by the extensive and complicated series of sub-delegations of power which are inherent in the New York City building law system. Every agency other than the State legislature is a party to this process. When the city council confers power on a commissioner it is sub-delegating; and when the commissioner assigns duties and powers to subordinates, he is sub-delegating. The question which arises is whether the sub-delegating party has the power to so sub-delegate. Sub-delegation is not a constitutional problem but is entirely a question of statutory interpretation."

108. See SUTHERLAND, *op. cit. supra* note 106, at 72-4.

laws.¹⁰⁹ Having prescribed the scope of the subject matter, it may create committees or boards which have power to make investigations, to gather information, and to make reports and recommendations.¹¹⁰ The authority to promulgate rules and regulations, and to make determinations of fact necessary to effectuate the operation and enforcement of an ordinance¹¹¹ may also be delegated to administrative boards or officials. An ordinance which defines what activities are prohibited may validly delegate to an administrative official the authority to determine when its provisions are being violated.¹¹²

In the Detroit ordinance, for example, the unfair employment practices which are forbidden are specified.¹¹³ There is no leeway for the commission to broaden the definition¹¹⁴ except as some expansion is inherent in the interpretation process. It has the power only to determine when the defined practices exist¹¹⁵ and not what they shall be. The commission's power to make rules and regulations is limited to those found necessary to carry out the functions of the commission and the purposes of the ordinance.¹¹⁶ Ordinances granting power to the police to adopt rules and regulations to effectuate the express purpose

109. *State ex rel. Campbell v. Cincinnati St. Ry.*, 97 Ohio St. 283, 119 N. E. 735 (1918); *Storey v. Seattle*, 124 Wash. 508, 215 Pac. 514 (1923).

110. *Dancer v. Mannington*, 50 W. Va. 322, 40 S. E. 475 (1901); *Burlington v. Dennison*, 42 N. J. L. 165 (1880). See *Biddeford v. Yates*, 104 Me. 506, 72 Atl. 335 (1908).

111. *Northwestern Laundry v. Des Moines*, 239 U. S. 486 (1916); *Evanston v. Wazau*, 364 Ill. 198, 4 N. E. (2d) 78, 106 A. L. R. 789, 795 (1936); *State ex rel. City of Excelsior Springs v. Smith*, 336 Mo. 1104, 82 S. W. (2d) 37 (1935).

112. "For the proper enforcement of its ordinance the city legislative body may delegate a power to an officer to determine some fact or state of things upon which the ordinance makes or intends to make its own action depend." *Borum v. Braham*, 4 Cal. App. (2d) 331, 336, 40 P. (2d) 866, 868 (1935). *Moy v. Chicago*, 309 Ill. 242, 140 N. E. 845 (1923); *Fred Wolferman Bldg. Co. v. General Outdoor Adv. Co.*, 30 S. W. (2d) 157 (Mo. App. 1930).

113. App. II, § 7(c). This section expressly subjects action under this power to approval by the council. However, just as the council's rule-making power is subject to judicial review *on the question of reasonableness*, so too would be the action of its agent.

114. The use of the word discrimination in the Detroit ordinance follows that in the Wagner Act, which provides, that it shall be an unfair labor practice for an employer "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." 49 STAT. 452 (1935), 29 U. S. C. § 158(c) (1940). The courts have not found difficulty in construction of discrimination in this section. See cases cited in note 80 *supra*. It should also be noted that in the Detroit ordinance, as in the Wagner Act, the word "discrimination" is used in defining more exactly the prohibited "unfair practices." This avoids the difficulty that would arise from a broad prohibition of discrimination in employment because of race, creed, color or religion.

115. App. II, § 8. The unfair practices are already defined and the commission is limited by that definition.

116. It is expressly provided that the Commission shall "make such rules and regulations, subject to approval by the Common Council, *as may be necessary* to carry out the functions of the commission and achieve the purpose of this ordinance."

of an ordinance have been upheld.¹¹⁷ It would seem to follow that the Detroit commission's rule-making power, with the limitation just noted, should also be upheld. Should that power be questioned, however, the ordinance contains a further safeguard—all rules and regulations made by the commission are subject to approval of the council.¹¹⁸ Any question of delegation arising by reason of the rule-making power should be obviated by this limitation, which in effect makes all rules and regulations those of the council itself.

Although the Detroit commission is authorized to make determinations of fact,¹¹⁹ its findings are not binding. Upon finding any person in violation of the ordinance the commission may certify the case to the city for prosecution. Therefore there is no need to provide for judicial review of the commission's findings of fact, since any finding binding upon the defendant will have to be made by the court.¹²⁰ Where possible,¹²¹ it would be desirable that the commission be empowered to make a conclusive finding as to the question of violation.

Probably of even greater value would be the power to seek compliance with the ordinance through the commission's own enforcement staff. Experience in federal legislation has shown that an act whose enforcement has been left to a general enforcement agency never attains the degree of effectiveness achieved when enforcement is conferred upon the body whose main duty is to administer the particular law.¹²² However, the absence of such powers does not detract from the desirability of a commission, nor will it seriously impair its workability. The very important work of investigation, mediation, and conciliation would alone justify the existence of a commission. Of extreme importance is the ability of the commission to aid the city attorney in secur-

117. *Taylor v. Roberts*, 84 Fla. 654, 94 So. 874 (1922). See also *Borum v. Graham*, 4 Cal. App. (2d) 331, 40 P. (2d) 866 (1935).

118. See note 116 *supra*.

119. App. II, § 8.

120. In *Tighe v. Osborne*, 150 Md. 452, 133 Atl. 465, 46 A. L. R. 80, 88 (1926), the court held that a municipality may validly provide for an appeal from the determination by an administrative agency of questions of law only, quoting from an earlier decision. "And while it [the ordinance] provided for no appeal from the decisions of such agencies upon issues of facts, nevertheless persons aggrieved thereby would not be injured because if such decisions were unreasonable, arbitrary, or oppressive, they could be reviewed and corrected upon application to a court of chancery." *Id.* at 464-5, 133 Atl. at 469.

121. If the ordinance does specifically provide that there is a right of appeal, there should be no doubt that the council has the power to make the commission's finding of fact conclusive. Then in the prosecution for violation of the ordinance the only question the defendant could raise as to the facts would be that the commission's finding was arbitrary and unreasonable. If there were substantial evidence of a probative nature to support the finding, the court would be bound to accept it even though it might have found to the contrary.

122. Compare, *e.g.*, the experience under Sec. 7(a) of the NIRA, 48 STAT. 199 (1933), with that under the Fair Labor Standards Act, 52 STAT. 1060 (1938), 29 U. S. C. § 201-19 (1940).

ing convictions by implementing his case with information and facts which he has neither the time nor facilities to secure.

For some cities, especially those with a relatively small population, the greatest problem in creating a commission may be budgetary rather than legal. In such event a possible solution may be to provide for the appointment of members who will serve without compensation. In view of the large number of public-spirited citizens who have freely given time and energy to the various committees on human relations established in many cities during recent years, there should be no dearth of volunteers.

CONCLUSIONS

While it is true that discrimination in employment is of national concern,¹²³ the problem is particularly acute in urban centers.¹²⁴ Because state officials often come from rural areas and frequently are not aware of the magnitude of the discrimination problems of the city, it is both proper and desirable that local authorities be charged with the solution of this problem just as they have been with the solution of other urban problems.¹²⁵

In drafting an FEP ordinance, specific and general grants of power by the legislature to municipalities should be carefully examined and evaluated. Where doubt exists as to the power of the municipality to enact an ordinance, effort should be directed towards obtaining the passage of a state law specifically enabling the municipality so to act, and where a state fair employment practice law is sought, it should include such an enabling clause to encourage local action. However, unless the trend of decisions in a particular state has been especially narrow in interpreting the extent of municipal power, an effective fair employment practices ordinance can be drafted which would withstand attack in the courts. Such an ordinance should provide for an administrative agency to make possible the use of educational and persuasive techniques and to aid in effective enforcement; but where an adminis-

123. See *FIRST REPORT OF F.E.P.C.* (Gov't Printing Office 1945) 43, exposing the extent of discrimination in industries such as railroads, shipbuilding, oil, aircraft, seafaring, etc.

124. 65 U. S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* (1943) 139. Chart No. 138, showing the average number of persons in farm work, discloses that only 2,406,000 out of a total of 10,263,000 farm workers in 1943 were hired; see also Chart No. 129 on p. 119, classifying by industry the number of persons employed in rural, rural-nonfarm, and rural-farm groups.

125. In respect to city and state licensing systems, "It is no doubt true that few inspection services, city or state, are perfect, but in Chicago, state inspection is far too infrequent. . . . In spite of the hazards of political favoritism, city inspection generally means expert regulation, and it works well in many fields where the public health and safety is seriously involved. In any case, it is superior to state regulation, which almost invariably lacks the essence of a good inspectional system, that is, a skilled inspection personnel." *LEPAWSEY, HOME RULE FOR METROPOLITAN CHICAGO* (1935) 35-6.

trative agency is provided, special care must be used in drafting standards for the guidance of the agency, in order to avoid the pitfall of invalid delegation of legislative power.

A municipal ordinance directed at employment discrimination should not be considered merely as a substitute for a state law,¹²⁰ but as supplementing the state law just as the latter would complement the proposed federal law. The possibility of concerted action on all levels of government offers real hope that legislation can eliminate discrimination.

126. An ordinance may duplicate or complement statutory regulations, 2 McQUILLIN, MUNICIPAL CORPORATIONS (2d Ed. Rev. 1939) 699-700 and cases cited. State legislation does not preclude municipal police regulations on the same subject. See Note (1940) 7 U. OF CHI. L. REV. 388, 389-90. *Johnson v. Great Falls*, 38 Mont. 369, 99 Pac. 1059 (1909); *Evanston v. Wazau*, 364 Ill. 198, 4 N. E. (2d) 78, 106 A. L. R. 789 (1936) (a municipality may exercise power concurrently with the state).

APPENDIX I

The Chicago Ordinance passed August 21, 1945, reads as follows:

Providing for cooperation with the Federal Government agencies in preventing discrimination on account of race, color, or creed; prohibiting city and private employers from making such discriminations; and declaring criminal penalties for violations thereof.

Be it Ordained by the City Council of the City of Chicago:

Section 1. Whereas, it is the policy of the United States Government in furtherance of the successful winning of the peace to insure the maximum participation of all available workers in production, regardless of race, creed, color or national origin, in the firm belief that the democratic way of life within the nation can be defended successfully only with the help and support of all groups within its borders, the City of Chicago, to cooperate with the United States Government, by eliminating possible discrimination in public and private employment, enacts this ordinance to be known as the Fair Employment Practices Ordinance.

Section 2. It shall be unlawful for any Department of the City of Chicago, or any city official, his agent or employee, for or on behalf of the City of Chicago, involving any public works of the City of Chicago to refuse to employ or to discharge any person, otherwise qualified, on account of race, color, creed, national origin, or ancestry; to discriminate for the same reasons in regard to tenure, terms or conditions of employment; to deny promotion or increase in compensation solely for these reasons, to publish offer of employment based on such discrimination; to adopt or enforce any rule, or employment policy which discriminates between employees on account of race, color, religion, national origin, or ancestry; to seek such information as to any employee as a condition of employment; to penalize any employee or discriminate in the selection of personnel for training, solely on the basis of race, color, religion, national origin, or ancestry.

Section 3. All contracting agencies of the City of Chicago, or any department thereof, shall include in all contracts hereafter negotiated or renegotiated by them a provision obligating the contractor not to discriminate against any employee or applicant for employment because of race, creed, color or national origin and shall require him to include a similar provision in all sub-contracts.

Section 4. It shall be unlawful for any person to discriminate against any other person by reason of race, creed, color or national origin, with respect to the hiring, application for employment, tenure, terms or conditions of employment.

Section 5. Any person, firm or corporation who shall violate or fail to comply with any of the provisions of this ordinance shall be guilty of a misdemeanor, and shall be punished by a fine in any sum not exceeding two hundred dollars (\$200.00).

Section 6. If any part of this ordinance shall be declared invalid the balance of the ordinance shall remain in full force and effect.

APPENDIX II

The proposed Detroit ordinance reads as follows:

Section 1. *Findings and Statement of Policy*

The Common Council of the City of Detroit finds that: A. Detroit's population is composed of peoples of many diverse racial, religious and language groups. B. Unfair employment treatment and unequal economic opportunities accorded the members of some of these groups, because of their race, creed, color and national origin or ancestry, has had the effect of impairing their living standards; hampering their educational progress; undermining their health; has given rise to social and economic tensions and endangers the continued peace, safety and general welfare of the whole community. C. Such disadvantageous treatment is contrary to democratic principles.

It is the policy of the City of Detroit, deemed essential to the continued welfare and security of the City in this postwar period and afterwards, that there be a clearly defined policy and an officially sanctioned program of inter-group and inter-cultural development to the end that racial, religious and nationality prejudices may be dissipated; tensions eased and removed; and discrimination in employment and employment opportunity brought to an end.

Therefore, the Common Council of the City of Detroit does hereby prohibit certain unfair employment practices as hereinafter defined; and establish the City of Detroit Commission on Inter-Group Relations as an administrative agency charged with the duty of supervising and effectuating the aforementioned policy by investigating and seeking to adjust all alleged violations of this ordinance and providing for an educational program for the City of Detroit designed to eliminate prejudices based on race, creed, color and national origin or ancestry.

Section 2. *Coverage*

The provisions of this ordinance shall apply to and be binding upon:

- (1) All departments of the City of Detroit;
- (2) All officials, agents and employes of the City of Detroit and its instrumentalities while acting for or on behalf of the City of Detroit;
- (3) All contractors and their subcontractors and agents who are engaged in the construction of public works for the City of Detroit or in the performance of any work contract entered into with the City of Detroit;
- (4) All private employers having ten or more employes engaged in a business or in business enterprises located in the City of Detroit;
- (5) All labor organizations having closed shop, union shop, maintenance of membership or check-off contractual relations with any person, firm or corporation subject to this ordinance; and
- (6) All private employment agencies licensed to do business in the City of Detroit.

Section 3. *Unfair Employment Practices*

It shall be an unfair employment practice prohibited by this ordinance for any person, firm, corporation or labor organization subject to this ordinance to:

- (a) Discriminate against any person in regard to hire, tenure, terms or conditions of employment, or union membership, solely because of race, creed, color, national origin or ancestry; or
- (b) Publish or cause to be published any help-wanted or other advertisement containing any specification or limitation as to race, creed, color or national origin or ancestry; or
- (c) Require of any applicant, as a condition of employment or membership, any information concerning the race, creed, color or national origin or ancestry of such applicant; or
- (d) Assent to, permit or condone the circulation on his premises or about his place of business and/or among his employes during working hours any literature which violates the provisions of the City of Detroit Anti-Defamation Ordinance. (443-D, Chapter 117 Municipal Code of the City of Detroit, 1945. P. 456).
- (e) Aid, abet, encourage or incite the commission of any unfair employment practice forbidden by this ordinance.

Section 4. *Contracts*

- (a) All departments and contracting agencies of the City of Detroit shall include in all contracts and orders hereafter negotiated or renegotiated by them and which require the employment of labor, a provision obligating the contractor, his agents and subcontractors to observe the provisions of this ordinance. And no payment shall be made by the City of Detroit on any such contract or order until there has been filed with the City of Detroit, in such form and manner as the Corporation Counsel may prescribe, a sworn statement certifying that such contract or order has been or is being performed or filled in conformity with the provisions of this ordinance.

Section 5. *Sanctions*

- (a) Any person, firm, corporation, or labor organization who shall be adjudged guilty of violating or failing to comply with any of the provisions of this ordinance shall be guilty of a misdemeanor and shall be punished by a fine of not less than \$50 and not more than \$100. The violation as to each person may be deemed a separate offense. Provided, however, that no enforcement proceedings for any violation of this ordinance shall be instituted except as hereinafter provided.
- (b) In addition to such other penalties as are provided herein for violations of this ordinance, any person, firm or corporation subject to and adjudged guilty of violating Section 4 of this ordinance, shall be barred from bidding upon or receiving any future contracts or orders for a period of two (2) years from the date of such conviction, unless the Mayor shall find and declare that the public interest requires that this subsection not be invoked.

Section 6. *Commission on Inter-Group Relations*

- (a) There is hereby established the City of Detroit Commission on Inter-Group Relations, hereinafter referred to as the Commission, which shall consist of seven members including a Chairman: The members of the Commission shall be representative of the racial, religious and nationality groups comprising the bulk of the population of the City of Detroit. They shall be appointed by the Mayor, with the approval of the Common Council, and shall receive such per diem and necessary expenses as the Common Council shall by resolution provide. Unless removed by the Mayor for a cause approved by the Common Council, each member of the Commission shall serve for a period of two (2) years and until his suc-

cessor is duly appointed and qualified; provided, however, that four of the original seven members of the Commission shall be appointed for a term of one (1) year.

- (b) Within the limits of the funds which shall be made available by the Common Council for the use of the Commission, the Mayor shall appoint and fix the compensation of such staff and personnel (including a full-time executive secretary) and make provision for such facilities, services and supplies as may be necessary to enable the Commission to effectively and efficiently carry out its functions under this ordinance.
- (c) The Commission may utilize the services and facilities of the other departments of the City and State agencies and such voluntary and uncompensated services and facilities as may from time to time be needed.

Section 7. *Duties of the Commission*

The Commission shall function as an agency of the Common Council and it is authorized to and shall:

- (a) Receive, investigate, mediate and seek to adjust all complaints of unfair employment practices forbidden by this ordinance.
- (b) Formulate and carry out a comprehensive educational program designed to reduce and ultimately eliminate prejudice based upon race, creed, color, national origin and ancestry.
- (c) Make such rules and regulations, subject to approval by the Common Council, as may be necessary to carry out the functions of the Commission and achieve the purpose of this ordinance.

Section 8. *Investigations and Hearings*

In the performance of its duties under this ordinance the Commission may require the attendance and/or information from any city department head, municipal employe or other person, firm, corporation or labor organization subject to this ordinance, under the same terms and conditions as the Common Council might. It may conduct hearings, take testimony, make findings of fact and issue cease and desist orders to any person, firm, corporation or labor organization found to have violated or to be violating the provisions of this ordinance. In the event such person, firm, corporation or labor organization refuses or fails to comply with any such order issued to it by the Commission, the Commission shall certify the case and the entire record of its proceedings therein to the Corporation Counsel, who shall proceed forthwith to invoke against such person, firm, corporation or labor organization the sanctions provided in Section 5 of this ordinance.

Section 9. *Effective Date and Separability*

- (a) This ordinance may be cited as the Fair Employment Practices Ordinance of the City of Detroit and shall become effective 90 days after its passage, provided that Section 6 shall become effective immediately.
- (b) If any part of this ordinance shall be declared invalid, the balance shall remain in full force and effect.
- (c) When the Chairman and a majority of the members of the Commission have been appointed, qualified and take office, the present City of Detroit Interracial Committee shall cease to exist. All employes of said Committee shall then be transferred to and become employes of the Commission, and all records, papers, other property of the Committee and the remainder of any funds allocated to the Committee shall then pass into the possession and custody of the Commission.