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Carl A. Auerbach*

I. INTRODUCTION

The 1969 Minnesota Legislature further amended the State Act Against Discrimination, effective June 6, 1969,1 and thereby strengthened the Act in several ways. Certain substantive prohibitions were added—against discrimination on the basis of sex in connection with employment, against the maintenance by an employer of "a system of employment which unreasonably excludes" an applicant for employment and against blockbusting.

Significant procedural changes were also made. A determination by the Commissioner of Human Rights that no probable cause exists to credit a charge of an unfair discriminatory practice was subjected to appeal to a Review Board of the State Board of Human Rights. The crippling condition imposed in 1967 upon the granting of interim relief was eliminated, namely, that before the Commissioner could obtain interim relief from a district court, in cases in which he found probable cause, the charging party had to give security for the payment of costs and damages to the respondent in the event the complaint was ultimately dismissed.

Finally, the armory of sanctions imposed for violating the State Act was enlarged. Authority was granted to order anyone found to have engaged in an unfair discriminatory practice to pay damages, within prescribed limits, to the person discriminated against. If the final order of a hearing panel or examiner requires a lessee or renter to be evicted from a dwelling unit involved in an unfair discriminatory practice, the lessor found to have engaged in such a practice was made liable for the actual damages sustained by the lessee or renter as a result of the eviction. Every licensing or regulatory agency of the state or its political subdivisions was empowered to suspend or revoke the

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license or certificate of public convenience and necessity of any holder failing to stop the unfair discriminatory practice in which it was previously found to have engaged, provided that the agency is otherwise authorized to take such action. State departments and agencies were forbidden to award contracts to any person or firm which does not possess and does not have a pending application for a certificate of compliance with the State Act. The Commissioner of Human Rights was authorized to issue these certificates and the hearing panels and examiners were authorized to deny, suspend or revoke them in the event of violation of the Act's provisions. Finally, it was made a misdemeanor for any person to deny, or to aid, abet, incite, compel or coerce another person to deny an individual or group of individuals the full and equal enjoyment of any place of public accommodation.

These are significant improvements. But the legislature did not remedy all the serious deficiencies of the State Act which I described in 1967.2 Furthermore, some of the changes it made in 1969 are of dubious merit and raise new problems and difficulties. This article will evaluate the 1969 amendments and compare them with the Uniform Law Commissioners' Model Anti-Discrimination Act.3 It will not repeat the material contained in the 1967 article but will give the background necessary to an understanding of the 1969 amendments.

II. THE PROHIBITION OF DISCRIMINATION IN EMPLOYMENT

A. DISCRIMINATION ON THE BASIS OF SEX

The most important addition of the 1969 amendments is the prohibition of discrimination in employment on the basis of sex. Section 363.12, subdivision 1 of the State Act now declares it "is also the public policy of this state to secure for individuals in this state, freedom from discrimination because of sex in connection with employment." Subdivision 2 of the section proclaims the "opportunity to obtain employment without discrimination because of sex" to be "a civil right." The obligation not to discriminate because of sex is imposed upon labor organizations,4

3. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM LAW COMMISSIONERS' MODEL ANTI-DISCRIMINATION ACT (1966) [hereinafter cited as MODEL ANTI-DISCRIMINATION ACT].
employers and employment agencies.

The State Act in this respect now conforms to the Model Act. Henceforth, too, cases of alleged sex discrimination in employment previously handled under Title VII of the Federal Civil Rights Act of 1964 may be handled under the State Act.

B. PROHIBITED PRACTICES

1. By employers. Prior to the 1969 amendments, the State Act forbade an employer "to refuse" to hire "an applicant" for employment for any of the proscribed reasons. The 1969 amendments added the prohibition that employers may not "maintain a system of employment which unreasonably excludes" an applicant for employment. This prohibition is not contained in the Model Act, which forbids an employer to "fail" as well as to "refuse" to hire "an individual" for any of the proscribed reasons. The purpose of its addition is not entirely clear from its language.

Nothing of moment turns on the absence in the State Act of the words "to fail" or its use of "applicant for employment" instead of "an individual." The 1969 amendment does not seek to bring the State Act closer to the Model Act in these respects or expressly to authorize plans to fill vacancies or hire new employees so as to eliminate or reduce imbalance with respect to race, color, creed, religion, national origin or sex.

Rather the amendment seems directed at situations in which an employer refuses to hire an applicant for employment, not directly because of the applicant's race, color, creed, religion, national origin or sex, but because the applicant fails to satisfy the prescribed qualifications for employment, if these qualifications are unreasonable and the applicant's failure to satisfy them is related to one of the proscribed factors. In such situations, too, individuals may never apply for employment, knowing they do not possess the stipulated qualifications.

So the amendment may prohibit an employer from imposing unnecessarily and unreasonably high qualifications for certain jobs—for example, that all applicants must be high school gradu-

4. MINN. STAT. § 363.03 (1) (1) & (4) (b) (1969).
5. MINN. STAT. § 363.03 (1) (2) & (4) (b) (1969).
6. MINN. STAT. § 363.03 (1) (3) & (4) (b) (1969).
8. MINN. STAT. § 363.03 (1) (2) (a) (1969).
9. See Auerbach, supra note 2, at 272-75.
ates, if the proportion of individuals of a particular race, color, creed, religion, national origin or sex who are high school graduates is smaller than the proportion of high school graduates in the total population. It may also prohibit the systematic failure of an employer to bring his job openings to the attention of the black community. Finally, it may outlaw an employer's use of uniform tests for job applicants if these tests disfavor individuals of a particular race, color, creed, religion, national origin or sex and fail accurately to predict the potential job performance of such individuals. However, if an employer decides to give to such individuals different tests better designed to predict their job performance, he may run into trouble under the State Act. For the employer must then know the race, color, creed, religion, national origin or sex of the applicants for employment. Yet section 363.03, subdivision 1 (4) (a) of the State Act forbids an employer, or an employment agency, to require an applicant for employment to furnish information "that pertains to the applicant's race, color, creed, religion or national origin . . . ." Information concerning the applicant's sex may still be required.

On the whole, the prohibition added by the 1969 amendments may have salutary effects by requiring employers to take affirmative steps to widen the employment opportunities of individuals belonging to certain racial and ethnic groups and of women generally. A liberal reading of the pre-existing provisions of the State Act might have accomplished the same ends. The added prohibition makes it easier to do so. It is difficult to understand, therefore, why labor organizations were not expressly forbidden to maintain systems of qualification for apprenticeship and membership or of referral for employment which unreasonably exclude applicants for membership or members for any of the proscribed reasons. It should be pointed out, too, that a liberal reading of section 363.03, subdivision 1 (1) may accomplish this result.

2 By employers, labor organizations and employment agencies. As stated above, section 363.03, subdivision 1 (4) generally prohibits an employer, employment agency or labor organization from requiring an applicant for employment or for membership in a labor organization to furnish information pertaining to his race, color, creed, religion or national origin. Prior to the 1969 amendments, only one exception from this prohibition was made. Information pertaining to the national origin of an applicant may be elicited if required by the United States, the State of Minnesota
or a political subdivision or agency of either, in the interest of national security.

The 1969 amendments added another exception. Information "pertaining to the race, color, creed, religion or national origin of the applicant" may be elicited if "required by the United States or a political subdivision or agency" thereof "for the purpose of compliance with the public contracts act." No further explanation is given of the reference to the federal "public contracts act." The federal statute generally so called is the Walsh-Healey Act, which is not pertinent for purposes of section 363.03, subdivision 1(4) of the State Act. The 1969 legislature probably had in mind the executive order of the President which implements the guarantee embodied in Title VII of the 1964 Civil Rights Act of nondiscrimination in employment by contractors and subcontractors performing under contracts with the federal government or under federally assisted construction contracts. Under the rules and regulations issued by the Secretary of Labor, to whom the administration of the executive order has been delegated, information pertaining to the race or national origin of applicants for employment may be required, particularly in connection with affirmative action programs.

It is strange that a similar exception was not made by section 363.03, subdivision 1(4) of the State Act when the information in question is required by the State of Minnesota or a political subdivision thereof, for a similar purpose, particularly in light of the new sanctions imposed upon public contractors who violate the State Act and the elaborate procedures provided for applying them. The reference to a "political subdivision" of the United States can hardly be taken to refer to a state; this would be a

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most unusual way for the Minnesota Legislature to refer to the state of Minnesota. The context of the whole section 363.03, subdivision 1(4) precludes such a construction. In all probability, it was an oversight to fail to include the state of Minnesota and its political subdivisions. But the oversight may be embarrassing if the information in question is sought to be elicited for purposes of enforcing the new provision affecting public contractors, which we shall consider below.

III. THE PROHIBITION OF DISCRIMINATION IN REAL PROPERTY TRANSACTIONS

As amended in 1967, the State Act, unlike the Model Act, contained no provision directed against “blockbusting.”14 The 1969 amendments added such a provision, using the language of section 606 of the Model Act but with some significant differences.

The Model Act prohibits any “person” from engaging in “blockbusting.” The comparable provision of section 363.03, subdivision 2(4) of the State Act covers only real estate brokers and salesmen. It does not apply to real estate owners, managing agents, other agents or financial institutions subject to other prohibitions of section 363.03, subdivision 2. Yet those who engage in blockbusting are not exclusively real estate brokers and salesmen, and the antiblockbusting provision of the State Act should not have been so limited.

Moreover, the Model Act imposes two separate prohibitions, but the new section 363.03, subdivision 2(4) of the State Act imposes but one. The State Act makes it an unfair discriminatory practice for

any real estate broker or real estate salesman, for the purpose of inducing a real property transaction from which such person or any of its members may benefit financially, to represent that a change has occurred or will or may occur in the composition with respect to race, creed, color, or national origin of the owners or occupants in the block, neighborhood, or area in which the real property is located, and to represent, directly or indirectly, that this change will or may result in undesirable consequences in the block, neighborhood, or area in which the real property is located, including but not limited to the lowering of property values, an increase in criminal or antisocial behavior, or a decline in the quality of schools or other public facilities.15

Instead of the “and” emphasized in the quoted provision of

14. See Auerbach, supra note 2, at 255-56.
15. Emphasis added.
the State Act, the Model Act contains "or." So the Model Act, unlike the State Act, prohibits persons from inducing whites to sell their property to them at low prices by representing that the neighborhood is about to be opened to Negroes even though they do not also represent that the neighborhood will or may suffer undesirable consequences as a result. It is true that it is difficult to imagine how a person can represent that undesirable consequences will or may result from a change in the racial composition of a neighborhood without thereby representing that such a change has occurred or will or may occur. Nevertheless there is no reason for the State Act to prohibit the representation as to change only when it is accompanied by a representation as to undesirable consequences.

Finally, the 1969 Legislature did not adopt section 706(b)(9) of the Model Act, which authorizes the administrative agency to order "payment to [an injured party] of profits obtained by the respondent through a violation" of the blockbusting prohibition.16

IV. THE PROHIBITION OF OTHER DISCRIMINATORY PRACTICES

The 1969 amendments deleted the provisions of section 363.03, subdivisions 1(4)-(7) and subdivision 2(4) of the State Act. In their place, a new subdivision 6 was added which reads:

It is an unfair discriminatory practice for any person, employer, labor organization, or employment agency:

(1) To intentionally engage in any economic or other reprisal against any person because that person has opposed any practice forbidden under this [Act] or has filed a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this [Act];

(2) Intentionally to aid, abet, incite, compel, or coerce a person to engage in any of the practices forbidden by this [Act];

(3) Intentionally to attempt to aid, abet, incite, compel, or coerce a person to engage in any of the practices forbidden by this [Act];

(4) To intentionally obstruct or prevent any person from

16. There are other differences between the anti-blockbusting provisions of the State and Model Acts, apart from the differences highlighted above, but they are minor. The State Act, but not the Model Act, prohibits the representation of undesirable consequences generally and uses the enumeration in the Model Act for illustrative purposes only and it prohibits such representation "directly or indirectly." Finally, the State Act specifies as an illustration of an undesirable consequence a decline in the quality of public facilities other than schools; the Model Act does not.
complying with the provisions of this [Act], or any order issued thereunder, or to resist, prevent, impede, or interfere with the commissioner or any of his employees or representatives in the performance of duty under this [Act];

(5) To intentionally engage in any economic reprisal against any person because that person has associated with a person or group of persons of a different race, color, creed, religion or national origin.

In the main, the new subdivision 6 consolidates the overlapping provisions previously set forth in section 363.03, subdivisions 1 (4)-(7) and subdivision 2 (4). It is expressly provided now, as it was not previously, that only intentional action of the kind described is prohibited.

The former subdivision 1 (4) was subject to the criticism that it prohibited "retaliation in respect to rights or relationships other than those protected against discrimination on the basis of race, religion or ethnic background." For example, literally read, subdivision 1(4) would have forbidden an individual to "exclude another from his card party because that other person filed a charge . . . or opposes practices forbidden by" the Act. The new subdivision 6 is not immune from this criticism because it prohibits not only any economic reprisal, but also any "other reprisal" (exclusion from a card party?) for the reasons indicated.

Subdivision 6(5) is entirely new. Prohibiting only economic reprisals for the reasons set forth, it adds a prohibition of substantial importance but of dubious value. It is unnecessary in part because it overlaps other provisions of the State Act. In connection with employment, public accommodations, public services and educational institutions, the prohibitions of the State Act are not limited to discriminatory practices based on the race, color, creed, religion or national origin of the individual discriminated against. They outlaw such practices even when they are engaged in because of the race, color, creed, religion or national origin of other persons, such as the wife, natural or adopted child, parent or associates of the person discriminated against. But there was grave doubt whether the 1967 amendments to the State Act achieved this result in connection with the prohibition of discrimination in real property transactions.

18. Bonfield, supra note 17, at 39-40. Bonfield's remarks are directed at section 801 of the Model Act but also apply to subdivision 1(4).
19. See Auerbach, supra note 2, at 257-58. There was also some
division 6(5) removes all such doubt. To discriminate against a prospective purchaser, renter or lessee of real property because of the race, color, creed, religion or national origin of his wife, child, parent or associates is to engage in economic reprisal for the reasons proscribed by subdivision 6(5). But this result could have been attained in much simpler and more direct fashion and without the undesirable aspects of the broad prohibition in subdivision 6(5). For unlike the State Act prior to the 1969 amendments, subdivision 6(5) also prohibits economic reprisal which does not involve employment, real property transactions, public accommodations, public services or educational institutions or any of the reasons for reprisal proscribed by subdivision 6(1). For example, it would prohibit any person from refusing to deal with a retailer because the retailer "has associated with a person or group of persons of a . . . race, color, creed, religion or national origin" different from his own. Yet such an application of subdivision 6(5) would constitute an undue infringement upon personal choice.

Certainly the prohibition in subdivision 6(5) is anomalous so long as it is not also made unlawful to engage in economic reprisal against a person, divorced from the reasons enumerated in subdivision 6(1), because of that person's own race, color, creed, religion or national origin. Few, however, would question the undesirability of making it unlawful for a white person to refuse to patronize a retail store because it is owned by a Negro or for a black person to refuse to patronize a retail store because it is owned by a white. It is difficult to see any significant difference between this situation and that proscribed by subdivision 6(5). Moreover, the problems of enforcing the broad sweep of subdivision 6(5) will be formidable indeed.

If, of course, apart from any anti-discrimination law, a statute or the common law requires business entities to maintain certain business relationships unless there is good cause to terminate them, the race, color, creed, religion or national origin of one of the parties to the relationship or that of his associates would not constitute good cause. The public policy embodied in the State Act would compel this result.

question whether this result was achieved by section 363.03(5)(3). See id. at 270.
V. ADMINISTRATIVE ORGANIZATION

A. THE STATE BOARD OF HUMAN RIGHTS

The 1969 amendments enlarged the membership of the Board from 15 to 24 and arranged staggered terms. The chairmen of the State Commission on Indian Affairs and the Advisory Committee on Women's Affairs were made ex officio members of the State Board of Human Rights.

Prior to the 1969 amendments, the State Board was empowered "to exercise the functions, powers, and duties of the appeal board provided for" in the State Act. This reference to the State Board as an appeal board was mistaken because the hearing panels of the State Board acted solely as adjudicatory bodies in the first instance and not as appeal boards. The 1969 amendments eliminated this reference to the State Board as an appeal board but empowered the State Board to hear appeals from findings of no probable cause by the Commissioner of Human Rights. We shall consider this important change below.

B. POWERS OF COMMISSIONER OF HUMAN RIGHTS

Section 363.05, subdivision 1(10) of the State Act empowers the Commissioner, as well as any hearing examiner, to "subpoena witnesses, administer oaths, take testimony, and require the production of examination of any books or papers relative to any matter under investigation or in question." The State Act as amended in 1967, however, itself contained no provision for enforcing this subpoena power. The 1969 amendments added subdivision 2 to section 363.05, providing that:

Disobedience of a subpoena issued by the commissioner pursuant to subdivision 1 shall be punishable in like manner as a contempt of the district court in proceedings instituted upon application of the commissioner made to the district court of the county where the alleged unfair discriminatory practice in connection with a charge made by a charging party or a complaint filed by the commissioner has occurred or where the respondent resides or has his principal place of business.

In this way, the State Act brings into play the provisions of

22. See Minn. Stat. § 363.071(1) (1969); Auerbach, supra note 2, at 300-01.
24. As to the authority of the hearing panels of the State Board of Human Rights to exercise the powers granted by section 363.05(1) (10), see Auerbach, supra note 2, at 314-15.
Minnesota Statutes, chapter 588 relating to contempt and chapter 596 relating to subpoenas. It should be noted that section 363.05, subdivision 2 does not require the Commissioner to apply to a court for the issuance of a judicial subpoena for disobedience of which the punishment for contempt will be imposed. Disobedi-ence of the Commissioner's subpoena is punishable as if it were a district court's subpoena, but the applicable punishment may be inflicted only by the appropriate district court under the applicable provisions of chapters 588 and 596.

The venue provisions of the new section 363.05, subdivision 2 may create difficulty. They require the Commissioner, in the event of disobedience of his subpoena, to resort to the district court "of the county where the alleged unfair discriminatory practice in connection with a charge made by a charging party or a complaint filed by the commissioner has occurred or where the respondent, defined in section 363.01, subdivision 8 as "a person against whom a complaint has been filed or issued," resides or has his principal place of business." These venue provisions seem to assume that a charge has been made or a complaint issued before the Commissioner acts under section 363.05, subdivision 2. Yet this may not be the case. It is clear that the powers granted by section 363.05, subdivision 1 (10) to obtain necessary evidence may be exercised by the Commissioner before, as well as after, a complaint is issued or even a charge is made.

It would not be reasonable to read the venue provisions of section 363.05, subdivision 2 as limiting the substantive grant of power in section 363.05, subdivision 1 (10). The simple objectives with respect to venue sought to be achieved by section 363.05, subdivision 2 can easily be attained even if a complaint has not been issued and a change has not been made. The Commissioner will know who the potential respondent is and probably where the possible or suspected unfair discriminatory practice has occurred. He should have no problem in selecting the district court deemed appropriate by section 363.05, subdivision 2.

VI. ADMINISTRATIVE PROCEDURE AND ADJUDICATION

A. Complaint Procedure
1. Distinction between "charge" and "complaint." Section 363.06 distinguishes between a "charge," which is filed by a person claiming to be aggrieved by a violation of the Act, and a "complaint," which is issued by the Commissioner if he de-
determines, after investigation, that "probable cause exists to credit" the charge. To tidy matters, the 1969 amendments added definitions of the terms "charging party" and "complainant." "Charging party" is defined as "a person filing a charge with the commissioner or his designated agent pursuant to section 363.06, subd. 1."\(^{25}\) "Complainant" is defined as "the commissioner of human rights after he has issued a complaint pursuant to section 363.06."\(^{26}\) The term "charging party" was then substituted for "complainant" in section 363.06, subdivision 4 (1).

2. Administrative and judicial review of a finding of no probable cause. Before the 1969 amendments, the Commissioner's determination that probable cause did not exist to credit a charge was not subject to any further administrative review. The 1969 amendments provide such review. Section 363.06, subdivision 4 (1) now states that the Commissioner's determination of no probable cause "shall be a final decision of the department unless an appeal is taken as ... provided in" a new subdivision 7 of the section. Subdivision 7 provides that such appeals shall be taken to the Review Board—a panel of three members of the State Board of Human Rights selected to perform this function by the Chairman of the State Board. It should be pointed out, by way of contrast, that the Commissioner of Human Rights, not the Chairman of the State Board, is authorized to select from the Board membership the three-man panels (as well as the independent examiners) to hear and adjudicate complaints. I do not see any special reason for this difference, but I do not think the matter is momentous.

Unlike the hearing panels which have an ad hoc existence only, it seems that the Review Board is intended to be a standing board which does not go out of business after each case. Of course, its membership may vary from time to time at the pleasure of the State Board Chairman, and its members may also be selected to serve on hearing panels.

Under the new section 363.06, subdivision 7, a charging party aggrieved by the Commissioner's determination of no probable cause has 15 days after being served the required written notice of this determination within which to appeal to the Review Board. The charging party must serve a written notice of appeal upon the Commissioner and the person against whom the charge is directed. The Review Board must hold a hearing on

\(^{25}\) Minn. Stat. § 363.01(22) (1969).
\(^{26}\) Minn. Stat. § 363.01(23) (1969).
the appeal within 30 days thereafter and give the parties at least five days written notice of the time and place of the hearing. The charging party, who may be represented by counsel, and the Commissioner must be present at the hearing. The respondent may attend.

The hearing is to be "informal"; the Commissioner is required to make available to the Review Board all the information in his possession relevant to the case. The charging party may introduce any evidence relevant to the charge whether or not, apparently, such evidence was previously furnished to the Commissioner.

The Review Board is to "hear testimony, review all the evidence, and issue a decision in writing with a statement of reasons therefor." Its decision "shall be final unless it finds that probable cause exists in which instance it shall remand the case to the commissioner for further proceedings."

The administrative review thus provided has advantages. It is a de novo review before a body that will not participate in any way in making the original administrative determination of no probable cause. In addition, although the State Act contains no such express requirement, it makes it possible, if that is thought desirable, to assure that no member of the Review Board will serve on a state board panel to judge a case in which the Review Board reversed the Commissioner's finding of no probable cause. It is to be hoped, however, that the members of the Review Board will be assigned to adjudicatory panels in other cases. Such experience will be useful in performing the review function.

At the same time, use of the State Board of Human Rights to review the Commissioner's determinations of no probable cause makes it difficult to obtain consistency in an enforcement policy that should seek to be selective in the cases carried to formal hearing. Furthermore, though the hearing before the Review Board is to be "informal," it will obviously approach an adjudicatory hearing. Undue delay may therefore result because a reversal of the Commissioner's finding of no probable cause will merely institute another full hearing before an examiner or board panel. For these reasons, the system of administrative review of initial determinations of no probable cause previously suggested\(^\text{27}\) seems preferable.

Unlike the Model Act, the State Act does not provide for judicial review of a final administrative determination of no

\(^{27}\) See Auerbach, supra note 2, at 325-26.
probable cause.28

B. Interim Relief

Although section 363.06, subdivision 4(3), as enacted in 1967, was based upon section 703 (f) of the Model Act, it failed to adopt some of the most important features of the latter section which are designed to provide interim relief to assure that persons discriminated against do not win meaningless legal victories, particularly in housing cases.29 Adequate interim relief is the key to effective enforcement of an antidiscrimination law. The 1969 amendments eliminated the requirement of the State Act which destroyed the effectiveness of its provision for interim relief—the requirement in section 363.06, subdivision 4(3) that before the Commissioner could obtain interim relief from a district court, the charging party had to give security “in such sum as the court deems proper for the payment of such costs and damages as may be incurred or suffered by the party who is found to have been wrongfully enjoined or restrained.”

C. The Affirmative Relief Authorized

As amended in 1967, the State Act empowered the adjudicatory panels of the State Board of Human Rights or the hearing examiners, upon finding an unfair discriminatory practice, not only to issue a cease and desist order but also to direct the respondent “to take such affirmative action as in the judgment of the panel or examiner will effectuate the purposes of” the Act. Unlike the Model Act, it did not attempt to specify the kinds of affirmative action the panel or examiner may direct the respondent to take.30

The 1969 amendments specifically authorize certain kinds of affirmative action to be required, but not the whole panoply of actions set forth in the Model Act. Thus section 363.071, subdivision 2 as amended provides:

The panel or examiner may order the respondent to pay the charging party compensatory damages, except damages for mental anguish or suffering, and may also order the respondent to pay the charging party punitive damages in an amount not less than $25 nor more than $100. In addition to the aforesaid remedies, in a case involving discrimination in

(a) employment, the panel or examiner may order the hiring, reinstatement or upgrading of an employee with or without

28. See id. at 322-27.
29. See id. at 337-40.
30. See id. at 345-46.
back pay, admission or restoration to membership in a labor organization, or his admission to or participation in an apprenticeship training program, on-the-job training program, or other retraining program, or any other relief the panel or examiner deems just and equitable.

(b) housing, the panel or examiner may order the lease, or rental of the housing accommodation to the charging party, or the sale, lease or rental of a like accommodation owned by or under the control of the person against whom the complaint was filed, according to terms as listed with a real estate broker, or if no such listing has been made, as otherwise advertised or offered by the vendor or lessor, or any other relief the panel or examiner deems just and equitable.

Except for the provision authorizing the panel or examiner to pay damages to the charging party, the 1969 amendments added little to the pre-existing powers of the panel or examiner. They merely enumerate the affirmative remedies which are standard in these cases and obviously included in the broad grant of authority to require the taking of such affirmative action as will effectuate the Act's purposes. The specification, moreover, may provoke questions whether the legislature intended panels and examiners not to direct the taking of the other kinds of affirmative action enumerated in the Model Act but omitted from the State Act.

Such questions are most likely to arise under section 363.071, subdivision 2(b). Section 706(b)(4) of the Model Act states that affirmative action includes the "sale, exchange, lease, rental, assignment or sublease of real property to an individual." Section 706(b)(8) separately includes the cancellation, rescission or revocation of a contract, deed, lease or other instrument transferring real property, which is the subject of a complaint of a discriminatory practice, to a person who had actual knowledge or record notice, prior to the transfer or the execution of the legally binding obligation to make the transfer, that a determination of reasonable cause has been made with respect to the discriminatory practice.

Reading these two provisions of the Model Act together, it is reasonable to conclude that section 706(b)(4) relates to sales, leases and rentals which can be effectuated either because the real property in question has not been transferred to someone else or, if it has been, the transfer may be rescinded or revoked under section 706(b)(8). Accordingly, section 706(b)(4) would not apply if the real property was transferred to a person who had neither prior actual knowledge nor record notice that the real property in question was the subject of a complaint of a discriminatory practice and that a determination of reasonable cause had been made with respect to the practice.
The 1969 legislature did not enact a provision comparable to section 706(b)(8) of the Model Act. Section 363.071, subdivision 2(b), which is comparable to section 706(b)(4) of the Model Act, is not as broad as the latter insofar as it authorizes only ordering the lease or rental, not the sale, to the charging party of the housing accommodation which is the subject of the charge. Does section 363.071, subdivision 2(b), then, authorize a panel or examiner to order the transfer of real property to the charging party, assuming a like accommodation is not available, if the property has been transferred to another person with or even without prior actual knowledge or record notice that the property in question was the subject of a charge and a finding of probable cause had been made? It should also be recalled at this point that the State Act does not embody the provision of section 703(g) of the Model Act authorizing the administrative agency, after a finding of probable cause, to cause a notice to be posted on all entrances to the real property which is the subject of the complaint . . . stating that prospective transferees will take the real property subject to the rights of the complainant [charging party under the State Act] and to the power of the Commission to nullify a transfer of the real property.

The section goes on to say that if “a notice is so posted, the [administrative agency] shall file a copy in the [appropriate office] where the real property is situated, in the same manner and with like effect as a [notice of lis pendens].”

The question posed above could be confidently answered in the negative were it not for the fact that the 1969 amendments added a new clause (4) to section 363.06, subdivision 4 providing:

If any lessor, after he has engaged in a discriminatory practice defined in section 363.03, subdivision 2, clause (1)(a), shall lease or rent such dwelling unit to a person who has no knowledge of such practice or of the existence of any charge with respect thereto, such lessor shall be liable for actual damages sustained by such person by reason of any final order hereunder requiring such person to be evicted from such dwelling unit.

This new clause contemplates an eviction order against a lessee or renter with “no knowledge,” let alone actual knowledge or record notice, of the discriminatory practice or a charge respecting it. Furthermore, it contemplates such an order even if the dwelling unit in question was leased or rented before probable cause was found. Should section 363.071, subdivision 2(b) then be read as authorizing the eviction orders contemplated by section 363.06, subdivision 4(4)? If so, then it can also and more easily be read to authorize eviction of a lessee or renter with
actual knowledge or record notice, prior to the lease or rental, that the lessor has engaged in a discriminatory practice involving the unit or that a charge with respect to the unit exists.

It seems difficult to justify eviction of a lessee or renter who had "no knowledge" of either fact. Under the circumstances, section 363.071, subdivision 2(b) may be read, most reasonably, as authorizing an order that the housing accommodation involved in the discrimination be leased or rented to the charging party only if it is still available to be leased or rented or it has been leased or rented to a person who had actual knowledge or who may be charged with constructive knowledge, prior to the lease or rental, that the dwelling unit was involved in a charge of a discriminatory practice. In the latter case, the order that the housing accommodation be leased or rented to the charging party would be accompanied by an order to evict the lessee or renter. The words "no knowledge" in section 363.06, subdivision 4(4) would accordingly be read as meaning "no actual knowledge" and implying constructive knowledge.

Under the State Act, the lessee or renter may be charged with such constructive knowledge only if the district court, under section 363.06, subdivision 4(3), grants some form of temporary relief which the lessor disregards, notice of which the lessee or renter may be held to as a matter of law. But temporary relief may be granted by a district court only at the insistence of the Commissioner and only after the Commissioner (and, in some cases, the court as well) finds that probable cause exists to believe that the lessor has engaged in a discriminatory practice. Under the broad authority given the district court by section 363.06, subdivision 4(3) to grant such temporary relief "as it deems just and proper," the court may then, for example, order a notice of the complaint to be posted on all entrances to the real property involved and require that a copy of the posted notice be filed in the same manner as a notice of lis pendens. Prospective lessees and renters would then have legal notice that a complaint is pending and they will lease or rent subject to the rights of the charging party and the power of the panel or examiner to require the lessee's or renter's eviction.

It should be noted, too, that section 363.06, subdivision 4(4), like section 363.071, subdivision 2(b), does not deal with sales of houses involved in discriminatory practices. Doubt would remain as to the power of a panel or examiner under section 363.071, subdivision 2 to order the cancellation of the sale of a house involved in a discriminatory practice even to a purchaser with prior actual
knowledge or record notice of the pending complaint. Yet there is little reason not to give such power to the panels and examiners.

In all likelihood, too, the State Act will not be held to empower a panel or examiner to direct the affirmative action of payment to an injured party of profits obtained by a respondent through a violation of the anti-blockbusting provision of section 363.03, subdivision 2(4).

Finally, it should be noted that even the provision authorizing the panel or examiner to order the respondent to pay damages to the charging party is not as strong as the corresponding provision of the Model Act. The Model Act does not exclude damages for mental anguish or suffering, as does the State Act. Unlike the State Act, it specifically permits costs, including a reasonable attorney’s fee, to be recovered by the charging party. And it authorizes minimum damages to be assessed at $500 for each violation, while the State Act authorizes the assessment of punitive damages, in addition to compensatory damages (except damages for mental anguish or suffering), in an amount not less than $25 nor more than $100. Thus the recovery under the State Act may be less than $500.

VII. SANCTIONS FOR VIOLATION OF STATE ACT

The 1969 amendments added a number of additional sanctions to help enforce the prohibitions of the State Act.

A. DAMAGES TO VICTIM OF DISCRIMINATION

As we just saw, section 363.071, subdivision 2 of the State Act has been amended to authorize the panel or examiner to order the respondent to pay the charging party compensatory and punitive damages within specified limits. A provision has also been added to section 363.091 directing the district court, in the event it sustains such an award of damages or modifies it either in a review, enforcement or combined review-enforcement proceeding, to enter judgment on the order of the panel or examiner, or on such order as modified by the court, “in the same manner as in the case of an order of the district court, as provided in section 546.27.”

B. DAMAGES TO EVICTED LESSEES OR RENTERS

As we saw, the 1969 amendments added a clause (4) to section 363.06, subdivision 4 to make lessors liable to lessees or renters
evicted from dwelling units involved in the discriminatory practices of the lessor. In addition to the difficulties with this provision we have already considered, there seems to be no reason why only lessors who engage in the discriminatory practices prohibited by section 363.03, subdivision 2 (1) (a), and not in those prohibited by (1) (b) or (1) (c), should be subjected to the new liability.

On the other hand, if a lessor is subject to such liability when ultimately found to have engaged in a discriminatory practice, there is no reason why the lessor should not be protected, as he is under section 703 (f) (2) of the Model Act, when the complaint against him is ultimately dismissed and he suffers damages and costs because of the temporary relief granted to the charging party. Section 703 (f) (2) provides that in such case the charged party may recover such damages and costs from the state.

C. LICENSE REVOCATION

As amended in 1967, the State Act, unlike the Model Act, contained no provision authorizing the revocation of licenses of persons found to have violated the Act. The 1969 amendments added such a provision in a new subdivision 4 to section 363.071 of the State Act. In some respects, this new provision may be "broader" and in others "narrower"—from the perspective of deterring violations—than the comparable provisions in sections 706 (c) and 805 of the Model Act. Section 363.071, subdivision 4 provides:

In the case of a respondent which is subject to the licensing or regulatory power of the state or any political subdivision or agency thereof, if the panel or hearing examiner determines that the respondent has engaged in a discriminatory practice, and if the respondent does not cease to engage in such discriminatory practice, the commissioner may so certify to the licensing or regulatory agency. Unless such determination of discriminatory practice is reversed in the course of judicial review, a final determination is binding on the licensing or regulatory agency. Such agency may take appropriate administrative action, including suspension or revocation of the respondent's license or certificate of public convenience and necessity, if such agency is otherwise authorized to take such action.

The State Act may be broader than the Model Act in that it authorizes the suspension or revocation of certificates of public convenience and necessity as well as of licenses. Possibly, but not very likely, the term "license" in the Model Act may be read

31. See pp. 274–76 supra.
32. See Auerbach, supra note 2, at 360–61.
to include a certificate of public convenience and necessity. The State Act removes all doubt on this score. So, for example, under the State Act motor carriers violating its provisions may have their certificates of public convenience and necessity or permits suspended or revoked.\textsuperscript{33}

The State Act may be narrower than the Model Act in a number of ways. First, it grants no independent authority to suspend or revoke a license or certificate for violation of its provisions. It authorizes such action only if the licensing or regulatory agency is “otherwise authorized to take” it. This means that the agency must be authorized by some other statute to suspend or revoke licenses or certificates for reasons other than violation of the State Act. For example, franchises, permits or certificates of convenience and necessity may be issued by the State Public Service Commission to common carrier railroads,\textsuperscript{34} pipelines, sluiceways, conveyor belts and similar types of mechanical conveyors.\textsuperscript{35} But there seems to be no provision in either chapter 218 or chapter 221 authorizing the suspension or revocation of such a franchise, permit or certificate of convenience and necessity for any reason. This may mean that the legislature regards the services rendered by these enterprises as so important that resort to suspension or revocation of their permission to do business is not deemed an appropriate sanction to enforce the law. It is doubtful that this sanction would be applied to these enterprises even under a provision like that in section 805 of the Model Act. Yet so long as the State Act generally gives the agency discretion, and does not compel it, to suspend or revoke the license or certificate of a violator, there is no reason why it should not give the agency this authority even if the agency does not otherwise possess it.

The State Act may also be narrower than the Model Act because a license or certificate may not be suspended or revoked unless it has been finally determined that the holder has engaged in a discriminatory practice and the Commissioner certifies that the holder has not stopped the practice. The Model Act does not allow such a free “first bite.” Suspension or revocation may follow the initial determination that the holder engaged

\textsuperscript{33} See \textsc{Minn. Stat.} ch. 221 (1969). Although section 363.071(4) does not specify a “permit,” a “permit” is defined in ch. 221 as “the license, or franchise, which may be issued to motor carriers, ... authorizing the use of the highways of Minnesota for transportation for hire.” \textsc{Minn. Stat.} § 221.011(8) (1969).

\textsuperscript{34} \textsc{Minn. Stat.} § 218.041(2) (2) (1969).

\textsuperscript{35} \textsc{Minn. Stat. §§} 221.54-.55 (1969).
in the discriminatory practice.

This broader aspect of the Model Act is in part balanced by the requirement, not found in the State Act, that, before a license may be suspended or revoked, the agency administering the Model Act must also determine "that the discriminatory practice was authorized, requested, commanded, performed or knowingly or recklessly tolerated by the board of directors of the respondent or by an officer or executive agent within the scope of his employment." This condition was inserted "to assure that the remedy [which the Uniform Law Commissioners acknowledged to be severe] is limited to flagrant cases, and is not applied when a low-level employee discriminates . . . ."36 This condition is preferable to the "second-bite" requirement of the State Act. On the one hand, the latter does not assure that the remedy will not be applied when the violations are not flagrant, that is, when the second or subsequent violations are committed by low-level employees. This fact, of course, may be taken into consideration by the licensing or regulatory agency in exercising its discretion to suspend or revoke. But it is best if the agency exercising this discretion does not have to evaluate the nature or seriousness of the violation, which it is not equipped to do. The Commissioner may take this fact into consideration himself when deciding whether to certify that the holder has not stopped the discriminatory practice. In any case, the Model Act imposes as a requirement what is at most a consideration affecting the exercise of discretion under the State Act.

On the other hand, the State Act requirement does not assure that the sanction will be applied in every flagrant case. Suspension or revocation cannot be invoked even if the violation was authorized, requested, commanded, performed or knowingly or recklessly tolerated by the board of directors of the license or certificate holder or by an officer or executive agent acting within the scope of his employment, so long as the violation is not repeated. This condition deprives the sanction of needed deterrent value.

Finally, it is not clear how, under section 363.071, subdivision 4, the question whether the respondent has stopped the discriminatory practice will be determined if the Commissioner and the respondent disagree about the matter. The first sentence of the subdivision seems to leave this determination to the Commis-

36. Model Anti-Discrimination Act, supra note 3, § 706(c), comment.
sioner alone. But the second sentence implies the possibility of judicial review of this determination. It would not be sensible to read the words “such determination” in the second sentence to refer only to the initial determination by the panel or examiner because there is just as much reason to subject the second or subsequent charge of violation to hearing, administrative adjudication and judicial review as there is with the first. Two possibilities then exist. The second or subsequent charge, if contested, may be submitted to a panel or examiner for hearing and adjudication and any finding of a continuation of the discriminatory practice subjected to judicial review. Another possibility arises from the fact that a failure to stop the discriminatory practice would constitute contempt of the original cease and desist order. If, then, the license or certificate holder is cited to the district court for contempt and the court finds the holder to be in contempt, the Commissioner may make the necessary certification under subdivision 4. The latter alternative seems the more desirable because it would be more expeditious and invoke the penalties for contempt as well.

D. Contract Termination

As amended in 1967, the State Act authorized no special sanction to be imposed upon a party to a contract with the state or a political subdivision thereof that violated the Act. Section 181.59 of the Minnesota Statutes, however, did so. Without repealing section 181.59, the 1969 amendments added the following subdivision 5 to section 363.071:

In the case of a respondent which is a party to a public contract, if the panel or hearing examiner determines that the respondent has engaged in a discriminatory practice, the commissioner may so certify to the contract letting agency. Unless such finding of a discriminatory practice is reversed in the course of judicial review, a final determination is binding on the contract letting agency and such agency may take appropriate administrative action, including the imposition of financial penalties or termination of the contract, in whole or in part, if such agency is otherwise authorized to take such action.

The new subdivision 5 adds substantively to the provisions of section 181.59. It is not limited to public contracts for materials, supplies or construction but covers all other contracts as well—e.g., a contract for architectural or other technical consulting services. It is aimed not only at discrimination in employment but at all other discriminatory practices as well—e.g.,

37. See Auerbach, supra note 2, at 361-63.
in connection with any facilities provided by or under the control of the employer, such as housing facilities, locker rooms, wash rooms, rest rooms, restaurants, parking lots and recreation facilities.

The new subdivision 5 does not require, as does section 181.59, that the discriminatory practice must be in connection with employment "for the performance of any work under" the contract or subcontract with the state or a political subdivision thereof. Nor should such a requirement be read into the new subdivision 5. A contractor who, for example, violates the State Act on jobs other than in the performance of his public contract may demonstrate in this way too that he is not fit to be a public contractor.

Unlike section 181.59, which authorizes forfeiture of money due or to become due under a public contract only for a second or subsequent violation, subdivision 5 authorizes the imposition of financial penalties, as well as termination of the contract, for a first violation. It is also unlike section 363.071, subdivision 4 in this respect. The legislature may have regarded the revocation or suspension of a license or certificate of public convenience and necessity as a more severe sanction than the termination of a public contract or imposition of financial penalties upon a public contractor. But this may not be so in every case. It is reasonable to think that the absence of a "second-bite" condition in subdivision 5 attests to the lack of necessity for or desirability of such a condition in subdivision 4.

Finally, unlike section 181.59, subdivision 5 applies not only to discrimination "by reason of race, creed, or color," but also because of national origin or sex.

The new subdivision 5, together with the new section 363.073, authorizes the Commissioner of Human Rights to participate in the administration of these provisions affecting public contracts. It would facilitate administration, as we shall see, if the Governor also designated the Commissioner to enforce the provisions of section 181.59.

Section 363.071, subdivision 5 of the State Act is broader than the comparable section 706(d) of the Model Act in some ways. The latter requires that the discriminatory practice occur "in the course of performing under a contract or subcontract, with the

38. Section 181.59, however, authorizes termination of a contract, in whole or in part, for a first violation.

State or political subdivision or agency thereof . . . .” As we saw, subdivision 5 makes no such requirement. Subdivision 5 also does not contain the provision found in the Model Act that a violation may be certified to the contracting agency only “if the discriminatory practice was authorized, requested, commanded, performed, or knowingly or recklessly tolerated by the board of directors of the respondent or by an officer or executive agent acting within the scope of his employment . . . .” Given the fact that the sanctions authorized by subdivision 5 may be imposed for a first violation, this omission is unfortunate.

Finally, the State Act is broader than the Model Act because, unlike the latter, it authorizes the contract letting agency to impose “financial penalties” upon a violating public contractor. This provision is in accord with pre-existing policy in the state and cities of Minnesota, as exemplified by section 181.59 and the Minneapolis Civil Rights Ordinance. But unlike the latter, the State Act unfortunately prescribes no standards to guide the contract letting agency in fixing the amount of money penalties.

In one respect, the State Act may be narrower than the Model Act. As in the case of subdivision 4 discussed above, subdivision 5 does not give the contract letting agency an independent authority to terminate the contract or impose financial penalties. The agency may do so only if it “is otherwise authorized to take such action.” The Model Act itself authorizes the taking of such action. This may not be a significant restriction on the effectiveness of the sanctions in question because it will be a rare public contract indeed that does not provide for termination in whole or in part and even imposition of financial penalties upon the contractor for some reason other than violation of the State Act. A contractor may also be “otherwise authorized to take such action” by virtue of section 181.59 or a municipal ordinance.

Section 806(2) of the Model Act also authorizes the contracting agency to

assist the State and all political subdivisions and agencies thereof to refrain from entering into further contracts, or extensions or other modifications of existing contracts, with the respondent, until the [agency administering the Act] is satisfied that the respondent will carry out policies in compliance with the provisions of this Act.

The 1969 amendments added a new section 363.073 to the State Act which spells out in detail how the Commissioner of

40. See Auerbach, supra note 2, at 362-63.
Human Rights may effectuate the policy embodied in section 806(2) of the Model Act. This provision forbids any “department or agency” of the state to award a public contract to any firm or person which does not possess or has not applied for a certificate of compliance with the State Act. The Commissioner of Human Rights is authorized to issue these certificates “to bidders on public contracts” under rules and regulations promulgated by him in accordance with the provisions of the State Administrative Procedure Act. This section does not expressly cover the award of contracts by political subdivisions of the state, but only by a “department or agency” of the state. Section 363.071, subdivision 5, it should be recalled, provides for the certification by the Commissioner to the “contract letting agency” of a violation committed by “a respondent which is a party to a public contract.” Neither “public contract” nor “contract letting agency” is defined in the State Act. But “public contract” is broad enough to include a contract with a political subdivision of the state. The remedial purposes of the Act call for this inclusion, particularly since 181.59 expressly includes contracts with political subdivisions of the state and is clearly indicative of the state’s policy in this regard. Section 363.071, subdivision 4, which authorizes the suspension or revocation of a violator’s license or certificate of public convenience and necessity, also expressly includes licenses or certificates issued by political subdivisions of the state and their agencies.

No reason appears why subdivision 5 of section 363.071 should be read differently in this respect from subdivision 4. And if “public contract” in subdivision 5 includes contracts with political subdivisions of the state and their agencies, section 363.073 should similarly be construed, by defining an “agency of the State” to include a political subdivision thereof. The argument for such a construction is further strengthened by the fact that subdivision 2 of section 363.073, set forth below, authorizes the denial, suspension or revocation of a certificate of compliance if it is found that the applicant or holder has committed an unfair discriminatory practice “in respect of a public contract.” The term “public contract” in subdivision 2 is not expressly limited to contracts with departments and agencies of the state in the narrower sense. But of course it could also be argued, with force, that the public contracts referred to in subdivision 2 are those for which certificates of compliance are needed under subdivision 1.

It is also recognized that Minnesota Statutes, section 16.011
defines an "agency of the state" to exclude political subdivisions of the state. But this definition should not govern the State Act if a more inclusive definition, reasonably supported by the language, would better carry out the purposes of the Act.

As of this writing, the Commissioner of Human Rights proposes to adopt neither the most inclusive alternative nor the most restrictive. The proposed rules for the issuance of certificates of compliance, following section 181.59 almost verbatim, define a "public contract" as "any contract for or on behalf of the state or its political subdivisions, including any county, city, borough, town, township, school, school district or any other district in the state."1 "Contract letting agency" is defined as "any department or agency of the state or its political subdivisions which is responsible for awarding public contracts." But the proposed rules define an "agency" as "any department or agency of the state, including state officers, boards, commissions, bureaus, divisions or departments of the state."

Consequently, an application for a certificate of compliance could be denied, or a certificate suspended or revoked, if it were found that the applicant or holder had committed an unfair discriminatory practice in respect of a contract for or on behalf of a political subdivision of the state. But such action under section 363.073 would bar only state agencies, as narrowly defined in the proposed rules, from awarding a contract to such an applicant or holder. It would not bar political subdivisions of the state from awarding contracts to such an applicant or holder. But again it should be stressed that, under section 363.071, subdivision 5, the Commissioner might certify the violation to the contract letting agency and that agency might terminate the contract in whole or in part. The sanctions of section 181.59 might also be invoked. The Commissioner's proposed rules would facilitate the use of these two sections by requiring that notification of the denial, suspension or revocation of any certificate of compliance be given to the political subdivision of the state for which the applicant for or holder of a certificate is performing under a public contract as well as to all state departments and agencies and local human rights commissions.

The important difference remains that the refusal to award a contract to a violator is mandatory under 363.073, subdivision 1

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1. In the Matter of the Proposed Adoption of the Rules of the State Department of Human Rights Governing Certificates of Compliance for Public Contracts (undated). As of this writing, rules have not yet been promulgated.
but is only discretionary under section 363.071, subdivision 5 and section 181.59. The Commissioner's proposed rules contain the ambiguous directive that, upon receiving notice of the denial, suspension or revocation of a certificate of compliance, "the contract letting agency shall take such remedial action as required or permitted by law or ordinance." If this provision is intended to compel a political subdivision of the state to act under section 363.071, subdivision 5 or section 181.59, it is an assertion of power by the Commissioner which he does not possess under the statutes.

By providing for the issuance of certificates of compliance "to bidders on public contracts," section 363.073 may be taken as applying only to contracts which must be awarded on competitive bids. Neither section 363.071, subdivision 5 nor section 181.59 contains such a limitation. The Commissioner's proposed rules seem to accept this limitation. But it would be reasonable to read "bidders" to mean any persons seeking to enter into public contracts. Such an interpretation is especially warranted because contracts not covered by section 363.073 may nevertheless be covered by the substantive provisions of 363.071, subdivision 5 and section 181.59. The Commissioner in the case of the former, and the governor in the case of the latter, would still be obliged to enforce these provisions. For this reason, in the interest of administrative consistency, it would be wise if the governor entrusted the administration of section 181.59 to the Commissioner of Human Rights. But the scope of the latter section should not be narrowed by the Commissioner. There appears to be no policy reason why only contracts which must be awarded on competitive bids should be subject to the mandatory requirements of section 363.073. The most efficient use of administrative resources, however, may justify the exemption, by administrative rule, of employers who do not transact an appreciable amount of business with the state annually and employ a relatively small number of persons.

Subdivision 2 of section 363.073 provides:

Certificates of compliance may be suspended or revoked, or a pending application for a certificate may be denied, by a panel or examiner, in an order based on a finding that the holder or applicant has committed an unfair discriminatory practice in respect of a public contract; provided, however, that:

42. The proposed rules define a "bidder" as "any person who submits a bid to any agency of the State for a contract which is required by law or otherwise to be based on competitive bids."
(1) any contractor certified to be in compliance with regulations of the federal government in respect of discriminatory practices shall also be certified by the state; and

(2) a contract awarded by a department or agency of the state shall not be terminated or abridged because of suspension, revocation or denial of a certificate based upon an unfair discriminatory practice for which the commissioner's complaint was issued after the date of the contract award; and

(3) in the case of a respondent whose certificate of compliance has been suspended, revoked, or denied, the commissioner shall issue a certificate of compliance in accordance with subdivision 1 within 90 days after he finds that the respondent has ceased engaging in any unfair discriminatory practice.

This subdivision is most confusing, particularly in relation to subdivision 1 of the same section and section 363.071, subdivision 5. Its substantive relation to the latter section will first be considered. Section 363.073, subdivision 2 authorizes the denial, suspension or revocation of a certificate of compliance only if a panel or examiner finds that the applicant or holder has committed an unfair discriminatory practice "in respect of a public contract." As we saw, section 363.071, subdivision 5 is not so limited; the violation invoking the sanctions therein provided need not occur in the course of performing a public contract. That section 363.073, subdivision 2 contains such a restriction may be ground for implying it in 363.071, subdivision 5, because it makes sense to read these two closely related statutory provisions in a uniform fashion. But as indicated above, the state's antidiscrimination policy will be furthered if such a restriction is not read into section 363.071, subdivision 5. One can only wonder why it was incorporated in section 363.073, subdivision 2.

Second, section 363.071, subdivision 5 does not contain the limitation found in section 363.073, subdivision 2(2). Since the discriminatory practice which triggers the sanction must be "in respect of a public contract," it is impossible to imagine how it can occur except "after the date of the contract award." In that case, the complaint can only be issued after such date and no public contract can ever be "terminated or abridged" because of the suspension, revocation or denial of a certificate of compliance. In this respect, section 363.073, subdivision 2(2) would be controlling because it limits the discretion of the contract letting agency, whereas section 363.071, subdivision 5 merely authorizes the exercise of the agency's discretion. This also makes it very doubtful that financial penalties could be imposed under section 363.071, subdivision 5 because that might be held to be an abridgement of the contract within the meaning of section 363.073, subdivision
2(2). Thus the only sanction permitted by these two sections, read together, seems to be disqualification for future contracts. It is important to add, however, that section 363.073, subdivision 2(2) does not override section 181.59, which continues to have force on its own account.

Section 363.073, subdivision 2(1) also seems to be inconsistent with section 363.071, subdivision 5 and hard to justify on its merits. It is certainly not contemplated that a contractor certified to be in compliance under section 363.073 may still be subject to the penalties provided by section 363.071, subdivision 5. Yet it is possible that a contractor “certified to be in compliance with regulations of the federal government in respect of discriminatory practices” may be committing unfair discriminatory practices in respect of contracts with Minnesota departments and agencies. Why should not all the sanctions of the State Act then apply?

The reference to contractors “certified to be in compliance with regulations of the federal government” is also not entirely clear, but probably brings into operation the provisions of Executive Order No. 11246, as amended. Under these provisions, federal government contractors and subcontractors, as well as contractors and subcontractors performing under federally assisted construction contracts, must file compliance reports with the contracting or assisting agency or the Secretary of Labor, as may be directed. The agency or the Secretary may publish the names of contractors or labor unions which have complied or failed to comply with the executive order. The Secretary is also authorized to provide for the issuance of a U.S. Government Certificate of Merit to employers or labor unions engaged in work under government contracts or under federally assisted construction contracts. He must first be satisfied that the personnel and employment practices of the employer, or the personnel, training, apprenticeship, membership, grievance and representation, upgrading and other practices and policies of the labor union, conform to the purposes and provisions of the executive order. The Certificate of Merit is subject to suspension or revocation by the Secretary if, in his judgment, the holder of the certificate has failed to comply with the provisions of the executive order.

A contractor, then, may be said to be certified as being in compliance with regulations of the federal government, within the meaning of section 363.073, if he holds a Certificate of Merit or if his name has been published as a contractor complying with

43. See note 11 supra.
the provisions of the Executive Order. Finally, it should be noted that the federal government regulations reach labor unions working on federal contracts or subcontracts or federally assisted construction contracts. The language of section 706(d) of the Model Act accomplishes a similar result by its reference to "a respondent who is found . . . to have engaged in a discriminatory practice in the course of performing under a contract or subcontract with the State or political subdivision or agency thereof." Such a respondent may be a labor union. But labor unions do not seem to be reached by either section 363.071, subdivision 5 of the State Act which speaks of "a respondent which is a party to a public contract," or section 363.073, subdivision 1 which authorizes the issuance of certificates of compliance "to bidders on public contracts."

The relation between subdivisions 1 and 2 of the new section 363.073 raises perplexing procedural problems, so perplexing, indeed, that they create grave doubts about the usefulness of the whole scheme of enforcement envisaged by the new section 363.073. Subdivision 1 of that section compels state departments and agencies to award contracts to business entities which have applications pending for certificates of compliance. The general purpose of this requirement is understandable and laudable—not to bar any business entity from being awarded a state contract while the Commissioner is investigating the question of its compliance with the State Act.

In effect, as we shall see, this may mean that contracts may continue to be awarded to any business entity which has applied for a certificate of compliance until such time as it is found to have committed an unfair discriminatory practice in respect of a public contract. Then its application for a certificate of compliance may be denied and it may be debarred from receiving future state contracts. Similarly, a holder of a certificate of compliance may continue to receive state contracts until it is found to have committed an unfair discriminatory practice in respect of a public contract. Then its certificate may be revoked or suspended and it may be debarred from receiving future state contracts. But why, then, is the whole system of certificates of compliance necessary? Why would not the simple provision of section 806 (2) of the Model Act have sufficed? If the legislature intended the sanction for violation embodied in section 363.073—debarment from future state contracts—to be mandatory, rather than discretionary as in the Model Act, it could have provided that a business entity which violates the State Act shall
be barred from entering into contracts with the state or any of its agencies or political subdivisions until a panel or examiner finds that it has ceased to be a violator and will carry out policies in compliance with the Act.

While a business entity with a pending application for a certificate of compliance may receive state contracts while its compliance is being investigated, the Commissioner is not required to issue a certificate of compliance until his investigation is completed and he is satisfied the applicant is complying. It is important that a certificate not be issued until the Commissioner is so satisfied because confidence in his effectiveness will be shaken if he issues certificates to applicants subsequently found to have violated the State Act.

It is not clear from the Commissioner's proposed rules that this is the position he is taking. The statute itself creates difficulties for this position by separating the power to issue certificates from the power to deny them. Subdivision 1 of section 363.073 empowers the Commissioner of Human Rights—who has no formal adjudicatory functions under the State Act—to "issue" the certificates of compliance. Yet subdivision 2 empowers only a state board panel or a hearing examiner, not the Commissioner, to deny, suspend or revoke a certificate. If, therefore, after considering an application for a certificate, the Commissioner decides to issue it, he may do so. But if he decides not to issue it, he must refer the matter to a panel or examiner who may deny the certificate only "in an order based on a finding that the holder or applicant has committed an unfair discriminatory practice in respect of a public contract."

Under the proposed rules, a certificate of compliance would be issued within 90 days after receipt of the application, on the basis of the application alone, to any applicant who (1) is not engaged in the performance of a public contract at the time of making an application; and (2) does not become so engaged while the application is pending, and (3) has not performed on a public contract within six months of making the application. The applicant, however, would first have to certify to the Commissioner, as all applicants would be required to do, "that he will abide by the terms and conditions of the certificate of compliance, including the compliance review procedures . . . , and will agree

44. As of this writing, the draft rules do not set forth this third category, but this is an obvious oversight for reasons that will become apparent.
to comply with the Act and the rules and regulations adopted pursuant thereto with respect to public contracts."

The six-month limitation imposed above is intended to achieve consistency with the policy expressed in section 363.06, subdivision 3 that a "charge of an unfair discriminatory practice must be filed within six months after the occurrence of the practice." This limitation makes sense in connection with initial applications for certificates, the only situation to which it applies. It would not apply to a business entity which has had its application for a certificate denied or its certificate of compliance suspended or revoked and subsequently applies for reinstatement of the old certificate or issuance of a new one. Presently, there is no employer in the state under a formal order to cease and desist from violating the Act.

The proposed rules authorize the Commissioner to send a compliance review questionnaire (which is not set forth in the proposed rules) to an applicant for a certificate of compliance who has performed on a public contract within six months of making the application or is performing on a public contract at the time of, or subsequent to, the making of the application. The questionnaire normally would have to be completed and returned within 30 days of its receipt. In addition, the Commissioner could decide to make an on-site investigation of the business operation of such an applicant. In that case, the applicant would be obliged to give the Commissioner access during normal business hours to "books, records, accounts and personnel relevant to compliance with the Act with respect to public contracts."

Holders of certificates of compliance would be asked to file periodic contract compliance review reports. In addition, the Commissioner could conduct further investigations, including review of employment practices and on-site inspections of the holder's business operations with respect to public contracts. Certificate holders would also be required to give the Commissioner access during normal business hours to "books, records, accounts and personnel relevant to compliance with the Act with respect to any public contract which has been awarded to the holder following the issuance of a certificate of compliance."

The proposed rules do not state what will happen if the applicant for or holder of a certificate fails to meet one of these obligations sought to be imposed upon him by the rules. But they do provide that "any person violating, or failing to comply with a provision of the . . . rules and regulations contained herein shall be deemed by the Commissioner to have committed an
unfair discriminatory practice as set forth in section 363.03, subdivision 6(4) of the Act and the commissioner may issue a complaint pursuant thereto." If then a panel or examiner finds that such a violation was committed, could the certificate of compliance be either denied, suspended or revoked? Probably not.

It is true that the failure to file a required questionnaire or periodic report or the refusal to permit an on-site investigation or access to records and personnel are unfair discriminatory practices within the meaning of section 363.03, subdivision 6(4), because such failures and refusals intentionally "resist, prevent, impede or interfere with the commissioner . . . in the performance of duty under" the Act. But section 363.073, subdivision 2 authorizes an application for a certificate to be denied, and a certificate to be suspended or revoked, only by a panel or examiner and then only in an order based on a finding that the applicant or holder has committed an unfair discriminatory practice in respect of a public contract. It is possible to argue that in the cases supposed there is interference with the Commissioner's duty in respect of public contracts. But the statutory language ordinarily would be taken to mean that the discriminatory practice invoking the sanction must be committed in the course of performing under the public contract.

The difficulty cannot be obviated by rules declaring that the failure to file a required questionnaire or a periodic report or the refusal to permit an on-site investigation or access to records and personnel shall be ground for denying a certificate or suspending or revoking it, as the case may be. As we saw, the Commissioner has no authority to deny, suspend or revoke a certificate. Furthermore, it is doubtful whether his rule-making authority under section 363.073, subdivision 1, or his general authority under section 363.05, subdivision 1(8) to "adopt suitable rules and regulations for effectuating the purposes of" the Act, empowers him to prescribe policies binding upon panels and examiners in the exercise of their judicial functions. Finally, the same difficulty would remain that only the commission of an unfair discriminatory practice in respect of a public contract is ground for denying, suspending or revoking a certificate.

Yet it would be absurd to compel the Commissioner to issue a certificate of compliance in a case in which he is prevented by the applicant itself from acquiring the information he thinks is

45. The proposed rules, quite properly, follow section 363.01, subdivision 9 in defining an unfair discriminatory practice as any act described in section 363.03.
necessary to determine the applicant's compliance. Since an
applicant's refusal to cooperate in any of the ways mentioned is
a violation of section 363.03, subdivision 6(4), the Commissioner
may issue a complaint and bring the matter to hearing before
a panel or examiner, looking to an order to the applicant to
cooperate. It is also possible that in such case the Commissioner
might even seek temporary relief from an appropriate district
court, under section 363.06, subdivision 4(3), enjoining all con-
tract letting agencies from awarding any additional contracts
to the applicant until he cooperates with the Commissioner.
Furthermore, the Commissioner may exercise his subpoena power
under section 363.05, subdivision 1(10), which is broad enough to
obtain most of the information the Commissioner may seek.

These are cumbersome ways for the Commissioner to obtain
the information he needs in order to decide whether a certificate
should be issued to an applicant. May not the Commissioner
promulgate a rule that an applicant's failure, upon the Commiss-
ioner's request, to complete a compliance review questionnaire
and return it within the specified time or its refusal to permit an
on-site investigation or access to records and personnel will re-
sult in the Commissioner's refusal to issue the certificate? Such
a rule is certainly proper "for the issuance of certificates of com-
pliance" under subdivision 1. Thus there may be a refusal to
issue a certificate to such an applicant which is not a "denial"
of its application within the meaning of section 363.073. This
distinction is tolerable when it is recalled that state contracts may
continue to be awarded to such an applicant under section 363.073,
subdivision 1. After refusing to issue the certificate, the Com-
missioner could launch an investigation of the non-cooperator,
using his subpoena power and, if necessary, a proceeding under
section 363.03, subdivision 6(4) that might lead to the formal
denial of the application.

May the Commissioner go further and promulgate a rule
that an application will not be regarded as "pending" within the
meaning of subdivision 1 unless and until at least the compliance
review questionnaire, which when requested becomes an integral
part of the "application," is properly filled in and returned? This
alternative would require that until then no state contract be
awarded the business entity in question. Such a result may be
inconsistent with the legislative intent expressed in section
363.073, subdivision 1 that contracts continue to be awarded while
the question of compliance is being investigated by the Commis-
sioner. Yet it may be argued that the rule suggested falls within
the reasonable scope of the Commissioner's authority to define, by rule, the term "application" in section 363.073, subdivision 1.

Greater difficulty would be presented by a rule stating that refusal to permit an on-site investigation or access to records and personnel will also be ground for holding that no "application" is pending because the information so gathered is made part of the application itself. Such a rule would seem to fly in the face of the legislative intent.

Still greater difficulty would confront any effort to impose an administrative sanction upon a certificate holder who refuses to file periodic reports or permit on-site investigations or access to records and personnel. The Commissioner, by rule, might condition the initial issuance of the certificate upon the filing of such reports and permitting such access. He might then make a breach of any of these conditions ground for "rescission" of the certificate by him, not "suspension" or "revocation" by a panel or examiner. The rules might also provide that, in case of rescission of a certificate by the Commissioner, the former certificate holder will be required to file a new application, including a compliance review questionnaire. Whether these suggestions would be looked upon as far-fetched by a court may depend upon the need demonstrated by the Commissioner for such reports and access.

Since such reports can only serve to alert the Commissioner to the need to investigate compliance, the failure to file a required report may serve the same function. The Commissioner could investigate every certificate holder who fails to file such reports. He could then use his subpoena power and, if necessary, proceedings under section 363.06, subdivision 6(4) to obtain the information he needs to determine whether to institute proceedings looking to formal suspension or revocation of the certificate. This alternative may also be the only one available to overcome a refusal to permit an on-site investigation or access to records and personnel.

Still other difficulties remain. The issuance or reinstatement of a certificate, either upon an initial application therefor or following a denial, suspension or revocation, may be contested. The decision of the Commissioner to issue or reinstate a certificate constitutes a finding on his part that no probable cause exists to believe that the applicant has engaged or is any longer engaging in an unfair discriminatory practice in respect of a public contract. Indeed, a charge against the applicant may be pending before the Commissioner at the same time as the proceeding for the
issuance or reinstatement of a certificate. Yet there is no provision in section 363.073, or in the Commissioner's proposed rules for appealing the issuance or reinstatement of a certificate by the Commissioner even though a finding of no probable cause in connection with a charge pending at the same time would be appealable to the review board. Thus the possibility exists that a certificate may be issued or reinstated under circumstances giving rise to a finding of probable cause by the review board and further proceedings culminating in a final cease and desist order against the certificate holder.

This possibility could be obviated by rules providing for public notice of each application for a certificate and each proceeding under section 363.073, subdivision 2(3). The rules should further state that if a charge is filed against the person or firm involved in such a pending application or proceeding, a certificate will not be issued unless the Commissioner finds no probable cause and his finding is not appealed to, or if appealed is sustained by the review board. Of course if the charge is filed after a certificate is issued or reinstated and is ultimately sustained, the certificate may be suspended or revoked either for a first, second or subsequent time.46

If the Commissioner has probable cause to believe that an applicant for or holder of a certificate has engaged in or is engaging in an unfair discriminatory practice, the proposed rules wisely provide that the Commissioner shall issue a complaint and the denial, suspension or revocation of the certificate awaits the outcome of the proceeding on the complaint. The outcome will be simultaneously either the dismissal of the complaint and the issuance or reinstatement of the certificate or the denial, suspension or revocation of the certificate and the issuance of an order directing the applicant to cease and desist and to take such affirmative or remedial action as the panel, examiner or courts may direct. This assures that the same panel or examiner will handle all aspects of what is essentially one case, thereby avoiding the possibility of contradictory findings by different panels. It also assures that all aspects of the final administra-

46. A similar problem, it should be pointed out, is presented by section 363.071(4), if the Commissioner determines that a respondent has ceased the discriminatory practice in which he was previously found to have engaged and, therefore, decides not to recommend suspension or revocation of the respondent's license or certificate. The Commissioner's determination in this context may also be contested. The above suggestions with respect to section 363.073(2)(3) also apply to section 363.071(4).
tive order issued in the case will be subject to judicial review at the same time.

There is also the possibility that the applicant for a certificate which was denied or the holder of a certificate which was suspended or revoked may again apply for the issuance or reinstatement of the certificate and that the Commissioner may find, under section 363.073, subdivision 2(3), that the applicant has not ceased to engage in unfair discriminatory practices. (It should be noted that these violations need not be committed in performing under a public contract.) The Commissioner's proposed rules merely provide that if the Commissioner finds that the respondent-applicant has not ceased violating the Act, he "shall so notify the respondent-applicant in writing setting forth his reasons therefor."

It is difficult to understand why section 363.073, subdivision 2(3) does not call for a finding by a panel or examiner in such a case. Furthermore, the State Act provides for no judicial review of the Commissioner's finding in question. Yet the respondent-applicant should be entitled to a hearing on the question. The Commissioner's rules should provide either for initial determination of the question at issue by a panel or examiner or for appeal from his finding to a panel or examiner. Better still, from the point of view of effective enforcement, contempt proceedings should be instituted and the issuance or reinstatement of the certificate should await the outcome of these proceedings.

Finally, section 363.073 does not specify the procedure to be followed by the Commissioner in issuing certificates of compliance or by panels and examiners in denying, suspending or revoking certificates. Nor does it provide for judicial review of such action by panels and examiners.

When the denial, suspension or revocation of a certificate is imposed only as an additional sanction accompanying an order to cease and desist, the procedures set forth in the State Act for processing complaints and for judicial review of orders of panels and examiners will apply. The Commissioner's proposed rules so provide but are probably unnecessary.

47. The proposed rules define a "respondent-applicant" as "any person whose certificate of compliance has been denied or revoked pursuant to section 363.073, subdivision 2 of the Act and who submits a compliance application to the commissioner." The definition, probably inadvertently, omits a person whose certificate of compliance has been suspended under section 363.073, subdivision 2.
Nevertheless, there is little doubt about the Commissioner's authority under section 363.073, subdivision 1 and section 363.05, subdivision 1(8) to promulgate procedural rules to govern the issuance, denial, suspension and revocation of certificates of compliance. To the extent that such rules are needed, the State Act grants express authority to promulgate them only to the Commissioner, not to the panels and examiners. In making such rules the Commissioner is not attempting to lay down substantive policies to control the panels and examiners.

Quite apart from the Commissioner's procedural rules, an applicant for a certificate of compliance or a holder of such a certificate is entitled to have a panel or examiner follow requirements of the State Administrative Procedure Act in deciding whether to deny, suspend or revoke the certificate. The proceeding leading to such a decision is a "contested case" within the meaning of section 15.0411, subdivision 4 of the State Administrative Procedure Act because it is "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." Setting aside the question of constitutional right, it is reasonable to conclude that the requirement of section 363.073, subdivision 2 that a panel or examiner deny, suspend or revoke a certificate only "in an order based on a finding that the holder or applicant has committed an unfair discriminatory practice in respect of a public contract" clearly implies some kind of hearing on which the finding may be based. In this way, the provisions of sections 15.0418, 15.0419, 15.0421, 15.0422 and 15.0424 come into play.

For similar reasons, a finding by the Commissioner or, as suggested above, a panel or examiner that a respondent-applicant has not ceased engaging in unfair discriminatory practices, for purposes of section 363.073, subdivision 2 (3), should also be subject to judicial review.

It should again be noted that section 363.072, subdivision 1 provides that only a respondent aggrieved by a final decision of the panel or examiner may seek judicial review. Thus, only applicants denied certificates of compliance, or holders of such certificates which have been revoked or suspended, may seek judicial review under section 363.072, subdivision 1. Neither the Commissioner nor a charging party is given standing by the State Act to seek judicial review of a decision of a panel or examiner

48. See Auerbach, supra note 2, at 346-49.
refusing to deny, suspend or revoke a certificate.

Reflection upon the difficulties inherent in section 363.073 only reinforces the view that a somewhat stronger version of section 806 (2) of the Model Act would have sufficed to make the compliance certificate system wholly unnecessary.

E. CRIMINAL PENALTIES

Prior to the 1969 amendments, the State Act did not make it a crime to violate any of its provisions. The 1969 amendments added a section 363.101 which declares it a misdemeanor for any person to deny, or to aid, abet, incite, compel or coerce another person to deny an individual or group of individuals the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of a place of public accommodation because of race, color, creed, religion or national origin. Section 363.101 states that this sanction is imposed in addition to all other remedies provided by the State Act. There would seem to be little justification for limiting the criminal penalty to violations of the guarantee of access to public accommodations.