

COLORADO DEPARTMENT OF REGULATORY AGENCIES
OFFICE OF POLICY AND RESEARCH

COLORADO SUBPOENA POWERS OF THE DIRECTOR OF THE CIVIL RIGHTS DIVISION

1995 SUNSET REVIEW



***Joint Legislative Sunrise/Sunset Review Committee
1995-1996 Members***

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June 30, 1995

The Honorable Richard Mutzebaugh, Chair
Joint Legislative Sunrise/Sunset Review Committee
State Capitol Building
Denver, Colorado 80203

Dear Senator Mutzebaugh:

The Colorado Department of Regulatory Agencies has completed the evaluation of the **Subpoena Powers of the Director of the Civil Rights Division in Cases Relating to Allegations of Unfair Employment Practices**. We are pleased to submit this written report, which will be the basis for my office's oral testimony before the Joint Legislative Sunrise/Sunset Review Committee. The report is submitted pursuant to §24-34-104 (8)(a), of the Colorado Revised Statutes, which states in part:

"The Department of Regulatory Agencies shall conduct an analysis of the performance of each division, board or agency or each function scheduled for termination under this section..."

The Department of Regulatory Agencies shall submit a report and such supporting materials as may be requested, to the Sunrise and Sunset Review Committee created by joint rule of the Senate and House of Representatives, no later than July 1 of the year preceding the date established for termination..."

The report discusses the question of whether there is a need for the regulation provided under article 34 of title 24, C.R.S. The report also discusses the effectiveness of the division and staff in carrying out the intention of the statutes and makes recommendations for statutory and administrative changes in the event this regulatory program is continued by the General Assembly.

Sincerely,

Joseph A. Garcia
Executive Director

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EXECUTIVE SUMMARY

The Department of Regulatory Agencies has concluded its Sunset Review of the Subpoena Powers of the Director of the Civil Rights Division when investigating allegations of unfair employment practices, and recommends its continuation.

The particular statutory section under review is §24-34-306, C.R.S.. Subsection (2)(a) gives the Director the power to subpoena witnesses and compel the production of documents during the investigation of charges of unfair employment practices. Subpoena power during hearings is not under review, nor is subpoena power associated with investigation of allegations of housing discrimination.

The Civil Rights Division must investigate all employment discrimination complaints filed against Colorado employers with one or more employees. It must conduct investigations within statutory time constraints. Without subpoena power an uncooperative respondent has the power to obstruct an investigation. The Civil Rights Division has found this power invaluable, and there is no evidence that it has been abused.

BACKGROUND

The first Colorado agency to deal with civil rights issues was created in 1951. The Colorado Anti-Discrimination Act established the Fair Employment Practices Office in the Department of Labor. The same Act gave this office the responsibility to investigate charges of employment discrimination based on race, creed, color, national origin, or ancestry. However, the office's authority to resolve discrimination disputes was limited. They could file a civil suit only for public employees and attempt to arbitrate discrimination complaints involving private employers.

In 1955, the Colorado Anti-Discrimination Commission was established and was given authority over public and private employers with six or more people. It was also authorized to issue cease and desist orders, and to order an employer to re-hire, re-instate, or promote employees. Over the years, the classes of persons covered by the anti-discrimination employment statute grew to include gender, physical or mental disabilities, and age. In 1965, the commission was renamed the Colorado Civil Rights Commission ("CCRC") and transferred to the Department of Regulatory Agencies as part of the Administrative Organization Act of 1968.

The Director of the Civil Rights Division ("Director") has the responsibility of investigating all employment discrimination complaints filed against Colorado employers with one or more employees. Discrimination based on race, color, sex, creed, ancestry, national origin, age, marriage to a co-worker, or disability is unlawful under the Employment Practices statute. Until 1991, the Director had to conduct these investigations without the authority to subpoena testimony or documents from the respondent and/or relevant witnesses.

On June 6, 1991, Governor Roy Romer signed into law a bill giving the Colorado Civil Rights Division ("CCRD") subpoena powers during the investigation of employment discrimination cases.

SUMMARY OF STATUTE

The statute under review gives the Director subpoena powers during the investigatory phase of employment discrimination cases. The subpoena power during the investigation process in discrimination cases involving housing is not subject to this review. Neither is the authority of the Commission to subpoena documents and witnesses during a hearing. The Division does not have subpoena power during an investigation of discrimination in public accommodation complaints.

An investigation of possible employment discrimination is only one element of a process governed by statutory procedures and time limits. For example, the statute controls who may file a complaint, when it may be filed, when and to whom notice must be given, and by what time the Director must refer a case to the commission for hearing. The statute also defines unlawful discrimination.

A person, their attorney, the Colorado Civil Rights Commission, a commissioner, or the Attorney General may file a charge of employment discrimination. They must do so within six months from the date of the alleged violation, and the complaint must be a verified written charge submitted in duplicate. Once a charge is filed, the Director, with staff assistance, is responsible for investigating such complaints.

Under the statute, there are time constraints in which the Civil Rights Division must take action. An investigation, and the determination whether probable cause exists for crediting the allegations of unfair employment practices, must be completed, and written notification of a formal hearing must be served on the respondent within 270 days after the charge is filed. The CCRD has developed internal standards that guide investigators on when, and in what circumstances, subpoenas may be sought. (See Appendix - Division of Civil Rights Memo)

<i>Statutory Time Limits</i>

If the statutory time limit is not met, the civil rights commission loses jurisdiction over the complaint. Once they lose jurisdiction, the charging party may seek relief authorized by the law. Such relief allows the charging party to file a civil action in the district court for the district in which the alleged discriminatory or unfair practice occurred.

Unfair employment practices on which a person may file a complaint include:

- race
- color
- creed
- age
- national origin
- ancestry
- gender
- physical or mental disability
- marriage to a co-worker

Discrimination may be found in written and unwritten policies and practices. Situations in which a complaint may be filed include:

- termination
- hiring
- job advertisements
- compensation
- promotion
- demotion
- layoff and recall
- aiding, abetting, or coercing in any unfair employment practice.

The groups regulated under this statute are employers, employment agencies, labor organizations, and on-the-job training and vocational training programs and schools. Only two groups are exempted from this statute. These groups are religious organizations which do not receive public funds and employees in the domestic service of other persons.

If an unfair employment practice is proven, the Civil Rights Commission may order the employer to:

- Cease and desist unfair employment practices
- Correct these unfair employment practices by,
 - ◊ *hiring*
 - ◊ *reinstatement*
 - ◊ *upgrading employee*
 - ◊ *referral of an applicant for employment for membership in a labor organization or for a job training program.*
- Display posters with the provisions from the civil rights laws
- Initiate other relief that is agreed to by both parties, including affirmative action
- Pay actual damages, not punitive damages

Under the current statute, the Director may subpoena witnesses and compel the testimony of witnesses and the production of books, papers, and records relevant to a charge of unfair employment practice during the investigatory stage of the complaint. This subpoena is enforceable in the district court for the district in which the alleged discriminatory or unfair practice occurred.

PROGRAM DESCRIPTION AND ADMINISTRATION

Investigating An Employment Discrimination Charge

The CCRD is a state agency which is directed by law to serve the public through both compliance and prevention activities. It is concerned with the civil rights of all persons including a charging party and a respondent. To carry out this obligation, it has a central office and two outreach offices located in Denver and four regional offices throughout the state. (Colorado Springs, Greeley, Pueblo, and Grand Junction.)

If someone believes they have been discriminated against in employment matters, they may file a charge with the CCRD. The charging party signs a formal charge form that allows the CCRD to investigate the case.

A complaint also may be filed with the U.S. Equal Employment Opportunity Commission ("EEOC"). The CCRC/D and the EEOC have a cooperative agreement which prevents duplication in filing and processing of a charge where there is common jurisdiction. This agreement will be discussed later.

As stated previously, there is a time limit during which a person may file a charge of employment discrimination. A person must file a complaint with the CCRD within six months of the alleged act of discrimination. Once a complaint is filed, an investigator sends a notification letter advising the respondent of the charges and explaining the time limits, and procedural rights and obligations of both parties. The administrative processing, which includes a notice of public hearing, of a charge must be completed within 270 days. A party may request a 90 day extension of time by filing a motion with a commissioner or the commission. This extension may be used only once by each party, and if it is used during the investigation it may not be used during the hearing.

The Director may initiate one of the following courses of action:

1. If probable cause does not exist, the Director shall dismiss the charge and notify the complainant and respondent. The notice must include the following advisements:
 - The charging party has the right to file an appeal of the dismissal with the Commission within ten days of the date of mailing of the notification.
 - The charging party may file a civil action if done so within ninety days of the date of mailing the notice of dismissal from the Director, or within ninety days of the date of mailing of notice that the Commission has dismissed the appeal.
 - If the charging party does not file an action within the time limits, no district court has jurisdiction to hear such an action.
2. If probable cause does exist, the respondent is served with written notice which states with specificity the legal authority and jurisdiction of the commission and the matters of fact and law asserted.
 - Both parties must submit to compulsory mediation.
 - If mediation fails, the complaint is referred to the CCRC for authorization for a hearing.

At the beginning of the investigatory phase of the process, a formal request for information is sent to the respondent. At the same time, the investigator invites the parties to meet with the CCRD staff for an “Early Resolution Program Conference” in an attempt to resolve the charge. Many respondents do not choose to participate in this voluntary step of the process.

The information requested of the respondent is what the investigator believes is needed for the Director to determine whether there is probable cause to refer the complaint to the Commission. Such information usually includes clarifying the proper name of the respondent, the legal structure of the business, asking for an explanation of the actions that were taken (such as discharge or non-promotion), asking the respondent to give a specific and detailed sequence of events that led to the action that was taken, and asking the respondent to answer to the elements of the statute that set up a prima facie case of discrimination. The letter also informs respondents that the CCRD has the power to subpoena witnesses and information should they not cooperate with the investigation. The exact language in the letter is:

You should be aware that Colorado Revised Statutes have been amended to grant the Director of the Civil Rights Division the authority to subpoena witnesses and to compel the productions of books, paper, and records relevant to the charge [C.R.S. 24-34-306(2)(a)]. Such subpoena is enforceable in the district court in which the alleged discriminatory or unfair practice occurred. This subpoena authority will be exercised only when, in the judgment of the Director, failure to cooperate voluntarily makes it necessary.

Investigators allow a maximum of thirty days for the respondent to submit the information requested. Investigators have flexibility in setting the time-limit for responses, and they contact the respondents more than once before they decide that the respondents are not going to cooperate. The use of a subpoena to get information during the investigation stage is used by the CCRC/D only as a last resort.

(See Appendix - Division of Civil Rights Memo)

As evidence of this, one need only look at the number of subpoenas that CCRD has issued since it has had authority to do so. Approximately 3000 cases of employment discrimination have been filed in the last four years with the CCRD - it has only issued 29 investigative subpoenas. Those numbers show that subpoenas were issued in less than 1% of the complaints filed. If the respondent fails to answer the subpoena, the CCRD may seek to enforce it through the courts. This has been done only twice since the Division has had subpoena power.

The Director reviews all subpoenas to see if the information requested is relevant. This is an internal policy of the Division that controls the use of a subpoena and guards against unreasonable use of such.

Cooperative Agreement with the EEOC

The CCRD and the EEOC operate under a worksharing agreement, in recognition of the instances where the two agencies have a common jurisdiction. It is designed to provide individuals with an efficient procedure for obtaining redress for their grievances under appropriate state or federal laws. Although there are instances of when state and federal jurisdiction overlap, there are circumstances when no jurisdictional overlap occurs. For example, Title VII of the Civil Rights Act of 1964 applies to certain employers and organizations with 15 or more employees. It does not apply to employers and organizations with less than 15 employees. Those employers and employees are governed by Colorado civil rights laws.

The EEOC and the CCRD act as agents for the other for the purpose of receiving and drafting charges. Among other things, they advise individuals of their rights to file charges with the other agency, they explain the rights and responsibilities of the parties under the applicable federal, state, or local statutes, and/or assist a person in drafting a complaint in a way which will satisfy both agencies' requirements.

This worksharing agreement is common to other “Fair Employment Practice Agencies” throughout the United States. Ninety-six agencies in 47 states, 2 U.S. Territories, and Washington D.C. have such cooperative arrangements with the EEOC. The only states that do not have agencies with such contracts are Alabama, Arkansas, and Mississippi.

SUNSET ANALYSIS

Should Investigation Subpoena Power Be Continued?

In civil rights cases, the burden of proof falls upon the party who files the charge; however, the evidence in an employment case is typically controlled by the employer. Employment records are controlled by the employer. Even testimony by other employees may be influenced by the employer. Without the ability to subpoena records and testimony during a civil rights investigation, the CCRD cannot gather complete information about the charges of discrimination. The use of a subpoena also provides some protection to those employers who want to cooperate but who are reluctant to turn over certain employment records for fear of violating privacy laws. Also, it is not uncommon for witnesses to withhold cooperation during an investigation without a subpoena.

Without complete information, the Director is not able to make a fully informed decision whether there is probable cause that employment discrimination occurred. The Director must make this decision based on the available evidence, and this decision must be made within the time limits that allow for post-determination steps required under the statute. These steps are, if probable cause is found, a conciliation conference, a legal review, and a CCRC review. If no probable cause is found, an appeal may be filed and answered, heard and ruled on by the CCRC.

If the only evidence available is the information contained in the charging party's complaint, discrimination charges that otherwise may not warrant a hearing might get one. If the Director does not make a decision within the statutory time constraints, the CCRC loses jurisdiction over the case. If that happens, the charging party's only option is to hire an attorney and to go to court.

When the complaint gets to a hearing, the CCRC may subpoena all pertinent records and testimony. At that point, the CCRC would have all pertinent evidence and be able to determine whether employment discrimination occurred. If the evidence showed that the charging party did not meet the burden of proving discrimination, the CCRC would dismiss the complaint. However, the state and the employer would have already expended much time, money, and resources to reach a conclusion that could have been reached at the outset of the complaint. Such a scenario clearly obstructs the administrative process and does not further the goal of due process.

The legislature had been reluctant to give the CCRD subpoena power. Prior to granting such power to the Division in employment discrimination cases, the legislature granted the Division authority to issue subpoenas for cases involving housing discrimination. Such authority still has not been given for public accommodation cases. The legislature has been reluctant to give an administrative agency the power to investigate private citizens and businesses. Their concerns are with giving an administrative agency power that might be used improperly to intimidate and pressure the employers and citizens of Colorado. But the legislature has granted such authority to an administrative body when it is needed to carry out its statutory directive, and where there is due process protection.

As was stated in the “Investigating An Employment Discrimination Charge” section of this report, there is no evidence that abuse or misuse has been the result. Subpoenas are used only as a last resort. As stated previously, out of the approximately 3000 cases of employment discrimination that have been filed since the CCRD has had subpoena power, only 29 subpoenas have been issued. In other words, subpoenas were issued in less than 1% of cases filed. Clearly, CCRD recognizes the significance of its authority to subpoena information during investigations and it has not abused its power.

In the past year, division investigators have noticed an interesting trend in how employment discrimination investigations progress. They are finding that an increasing number of attorneys are representing respondents at the administrative level of the case, which has not been true in the past. Consequently, the answers from respondents have become more cautious, more positional, and less substantive. The attitude of some attorneys is one of compelling the CCRD to subpoena for the information. The attorneys believe that in order to adequately represent the interests of their clients, they must require the CCRD subpoena any information needed.

If the power to subpoena during investigations is repealed, the CCRC might become less effective as an adjudicative body. The CCRC needs to be presented with cases that are completely and thoroughly investigated in order to make a decision. If the CCRC is presented with a complaint that is not complete, it must then subpoena for the missing information.

Almost all of the regulatory boards or commissions in the Department of Regulatory Agencies have subpoena power during the investigation stage of the complaint process. For example, the Plumbing Board, the Electrical Board, and even the Board of Barbers and Cosmetology may subpoena documents and witnesses during investigations of complaints. It is just as important to protect the civil rights of employees and employers as it is to protect the public from an incompetent cosmetologist.

According to the Director, investigative subpoenas are issued only in situations where the respondent has failed to cooperate. Prior to the issuance of the subpoena, the Director and staff make many efforts to obtain voluntary compliance. By the time the decision is made to issue the subpoena, the statutory deadlines to complete the investigations are being approached. Consequently, if the respondent fails to comply with the subpoena, and the Division needs to petition a court for enforcement of the subpoena, the time limits to complete the investigation are nearing exhaustion. A similar situation occurs when the respondent decides to contest the subpoena in court.

<i>Potential Problem</i>

The possibility thus exists for the Division's compliance with statutory deadlines to be hampered by respondents not responding to subpoenas, or contesting them. If this possibility becomes a viable issue in the future, consideration might be given to provide a statutory "tolling" period, which would stop the running of the deadline during the pendency of a court action to either enforce the subpoena or to challenge it.

This report is not recommending any changes to the statute at this time regarding the tolling issue, but it has arisen as a potential problem.

RECOMMENDATIONS

The Civil Rights Division Should Have the Authority to Issue Subpoenas

This review concludes that the Colorado Civil Rights Division should continue to have the authority to issue subpoenas during the investigatory phase of employment discrimination cases.

Sunset statutory evaluation criteria number III asks whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices. It is apparent that the legislature believes that fighting employment discrimination serves the public interest. Colorado has a strong history of protecting the civil rights of its citizens. The general assembly passed legislation in the 1950s to prohibit employment discrimination. It even created an administrative agency to investigate such conduct.

The statutory obligation of Civil Rights Commission and Division is to investigate and hear employment discrimination cases. To fulfill this obligation, they must have the ability to investigate charges completely. The employee may file a complaint, but it is the employer that has control of the pertinent evidence. Without the authority to subpoena relevant information from an employer, CCRC/D's ability to enforce the statute would be impeded.

Recommendation 1 - The General Assembly should continue the subpoena power of the Colorado Civil Rights Division.

APPENDICES

Division of Civil Rights Memo

Sunset Statutory Evaluation Criteria

- (I) Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation;
- (II) If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;
- (III) Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices of the Department of Regulatory Agencies and any other circumstances, including budgetary, resource and personnel matters;
- (IV) Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;
- (V) Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;
- (VI) The economic impact of regulation and, if national economic information is available, whether the agency stimulates or restricts competition;
- (VII) Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;
- (VIII) Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;
- (IX) Whether administrative and statutory changes are necessary to improve agency operations to enhance public interest.

Part 3 - Colorado Civil Rights Division-Commission-Procedures

24-34-301. Definitions. As used in parts 3 to 7 of this article, unless the context otherwise requires:

(1) "Age" means a chronological age of at least forty years but less than seventy years.

(1.5) "Commission" means the Colorado civil rights commission created by section 24-34-303.

(1.6) "Commissioner" means a member of the Colorado civil rights commission.

(2) "Director" means the director of the Colorado civil rights division, which office is created by section 24-34-302.

(2.5) (a) "Disability" means a physical impairment which substantially limits one or more of a person's major life activities and includes a record of such an impairment and being regarded as having such an impairment.

(b) (I) On and after July 1, 1990, as to part 5 of this article, "disability" shall also include such a person who has a mental impairment, but such term does not include any person currently involved in the illegal use of or addiction to a controlled substance.

(II) On and after July 1, 1992, as to parts 4, 6, and 7 of this article, "disability" shall also include such a person who has a mental impairment.

(III) The term "mental impairment" as used in subparagraphs (I) and (II) of this paragraph (b) shall mean any mental or psychological disorder such as developmental disability, organic brain syndrome, mental illness, or specific learning disabilities.

(3) "Division" means the Colorado civil rights division, created by section 24-34-302.

(4) (Deleted by amendment, L. 93, p. 1655, 59, effective July 1, 1993.)

(5) "Person" means one or more individuals, limited liability companies, partnerships, associations, corporations, legal representatives, trustees, receivers, or the state of Colorado, and all political subdivisions and agencies thereof.

(6) "Respondent" means any person, agency, organization, or other entity against whom a charge is filed pursuant to any of the provisions of parts 3 to 7 of this article.

24-34-302. Civil rights division - director. There is hereby created within the department of regulatory agencies a division of state government to be known and designated as the Colorado civil rights division, the head of which shall be the director of the Colorado civil rights division, which office is hereby created. The director shall be appointed by the executive director of the department of regulatory agencies pursuant to section 13 of article XII of the state constitution, and the executive director shall give good faith consideration to the recommendations of the commission prior to making such appointment. The director shall appoint such investigators and other personnel as may be necessary to carry out the functions and duties of the division.

24-34-303. Civil rights commission - membership. There is hereby created, within the division, the Colorado civil rights commission. The commission shall consist of seven members, who shall be appointed by the governor, with the consent of the senate, for terms of four years; except that, of the first members appointed, two shall be appointed for terms of two years and two shall be appointed for terms of three years. In making the first two appointments to the commission on or after July 1, 1981, whether such appointments are for a full term or to fill a vacancy, the governor shall appoint one member to represent the business community and one member to represent state or local government entities. In making the next two appointments to the commission, whether such appointments are for a full term or to fill a vacancy, the governor shall appoint one member to represent small business and one member to represent state or local government entities. The governor shall make all subsequent appointments in such a manner that there are at all times two members of the commission representing the business community, at least one of which shall be a representative of small business, two members of the commission representing state or local government entities, and three members of the commission from the community at large. The membership of the commission shall at all times be comprised of at least four members who are members of groups of people who have been or who might be discriminated against because of disability, race, creed, color, sex, national origin, or ancestry as defined in section 24-34-402 or because of marital status, religion, or age. Appointments shall be made to provide geographical area representation insofar as may be practicable, and no more than four members shall belong to the same political party. Vacancies shall be filled by the governor by appointment, with the consent of the senate, and the term of a commissioner so appointed shall be for the unexpired part of the term for which the commissioner is appointed. Any commissioner may be removed from office by the governor for misconduct, incompetence, or neglect of duty. Commissioners shall receive a per diem allowance and shall be reimbursed for actual and necessary expenses incurred by them while on official commission business, as provided in section 24-34-102 (13). The commission may adopt, amend, or rescind rules for governing its meetings, and four commissioners shall constitute a quorum.

24-34-304. Division and commission subject to termination - repeal of part. (1) The provisions of section 24-34-104, concerning the termination schedule for regulatory bodies of the state unless extended as provided in that section, are applicable to the division and the commission created by this part 3.

(2) This part 3 is repealed, effective July 1, 1999. Prior to such repeal, the functions of the division and commission shall be reviewed as provided for in section 24-34-104.

24-34-305. Powers and duties of commission. (1) The commission has the following powers and duties:

(a) To adopt, publish, amend, and rescind rules and regulations, in accordance with the provisions of section 24-4-103, which are consistent with and for the implementation of parts 3 to 7 of this article. All such rules adopted or amended on or after July 1, 1979, shall be subject to sections 24-4-103 (8) (c) and (8) (d) and 24-34-104 (9) (b) (II).

(b) To receive, investigate, and pass upon charges alleging unfair or discriminatory practices in violation of parts 4 to 7 of this article;

(c) To investigate and study the existence, character, causes, and extent of unfair or discriminatory practices as defined in parts 4 to 7 of this article and to formulate plans for the elimination thereof by educational or other means;

(d) (I) To hold hearings upon any complaint issued against a respondent pursuant to section 24-34-306; to subpoena witnesses and compel their attendance; to administer oaths and take the testimony of any person under oath; and to compel such respondent to produce for examination any books and papers relating to any matter involved in such complaint. Such hearings may be held by the commission itself, or by any commissioner, or by any administrative law judge appointed by the commission pursuant to part 10 of article 30 of this title, subject to appropriations for such administrative law judges made to the department of administration; except that, if no administrative law judge is made available within the time limitations set forth in section 24-34-306 (11), the governor shall appoint an administrative law judge at the request of the commission, and such administrative law judge shall be paid out of moneys appropriated to the division. If a witness either fails or refuses to obey a subpoena issued by the commission, the commission may petition the district court having jurisdiction for issuance of a subpoena in the premises, and the court shall in a proper case issue its subpoena. Refusal to obey such subpoena shall be punishable as contempt.

(II) No person may be excused from attending and testifying or from producing records, correspondence, documents, or other evidence in obedience to a subpoena in any such matter on the ground that the evidence or the testimony required of him may tend to incriminate him or subject him to any penalty or forfeiture. However, no testimony or other information compelled under order from the commission, or other information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case, except a prosecution and punishment for perjury or false statement committed in so testifying.

(e) To issue such publications and reports of investigations and research as in its judgment will tend to promote goodwill among the various racial, religious, age, and ethnic groups of the state and which will tend to minimize or eliminate discriminatory or unfair practices as specified by parts 3 to 7 of this article. Publications of the commission circulated in quantity outside the executive branch shall be issued in accordance with the provisions of section 24-1-136.

(f) To prepare and transmit annually, in the form and manner prescribed by the heads of the principal departments pursuant to the provisions of section 24-1-136, a report accounting to the governor and the general assembly for the efficient discharge of all responsibilities assigned by law or directive to the commission;

(g) To recommend policies to the governor and to submit recommendations to persons, agencies, organizations, and other entities in the private sector to effectuate such policies;

(h) To make recommendations to the general assembly for such further legislation concerning discrimination as it may deem necessary and desirable;

(i) To cooperate, within the limits of any appropriations made for its operation, with other agencies or organizations, both public and private, whose purposes are consistent with those of parts 3 to 7 of this article, in the planning and conducting of educational programs designed to eliminate racial, religious, cultural, age, and intergroup tensions;

(j) To adopt an official seal.

(2) Any provision of this article to the contrary notwithstanding, no person shall be required to alter, modify, or purchase any building, structure, or equipment or incur any additional expense which would not otherwise be incurred in order to comply with parts 3, 4, 6, and 7 of this article.

(3) In exercising the powers and performing the duties and functions under parts 3 to 7 of this article, the commission, the division, and the director shall presume that the conduct of any respondent is not unfair or discriminatory until proven otherwise.

(4) Whether by rule, regulation, or other action or whether as a remedy for violation of any provision of parts 3 to 7 of this article or otherwise, the commission shall not prescribe or require the implementation of a quota system.

24-34-306. Charge - complaint - hearing - procedure - exhaustion of administrative remedies - repeal. (1) Any person claiming to be aggrieved by a discriminatory or unfair practice as defined by parts 4 to 7 of this article may, by himself or his attorney-at-law, make, sign, and file with the commission a verified written charge in duplicate which shall state the name and address of the respondent alleged to have committed the discriminatory or unfair practice and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The commission, a commissioner, or the attorney general may in like manner make, sign, and file such charge. Prior to any other action by the commission, the respondent shall be notified of the charges filed against him.

(2) (a) After the filing of a charge, the director, with the assistance of the staff, shall make a prompt investigation thereof. If such charge alleges an unfair employment practice as defined in part 4 of this article or an unfair housing practice as defined in part 5 of this article, the director may subpoena witnesses and compel the testimony of witnesses and the production of books, papers, and records relevant to such charge. Any subpoena issued pursuant to this paragraph (a) shall be enforceable in the district court for the district in which the alleged discriminatory or unfair practice occurred.

(b) The director shall determine as promptly as possible whether probable cause exists for crediting the allegations of the charge, and shall follow one of the following courses of action:

(I) If the director determines that probable cause does not exist, he shall dismiss the charge and shall notify the person filing the charge and the respondent of such dismissal. In addition, in such notice the director shall advise both parties:

(A) That the charging party has the right to file an appeal of such dismissal with the commission within ten days of the date of mailing of the notification of such dismissal;

(B) That if the charging party wishes to file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge he filed with the commission, he must do so: Within ninety days of the date of mailing of the notice specified in this subparagraph (I) if he does not file an appeal with the commission pursuant to sub-subparagraph (A) of this subparagraph (I); or within ninety days of the date of mailing of notice that the commission has dismissed the appeal specified in sub-subparagraph (A) of this subparagraph (I);

(C) That, if the charging party does not file an action within the time limits specified in sub-subparagraph (B) of this subparagraph (I), such action will be barred and no district court shall have jurisdiction to hear such action.

(II) If the director determines that probable cause exists, the respondent shall be served with written notice which states with specificity the legal authority and jurisdiction of the commission and the matters of fact and law asserted and the director shall order the charging party and the respondent to participate in compulsory mediation. Immediately after such notice has been given, the director shall endeavor to eliminate such discriminatory or unfair practice by conference, conciliation, and persuasion and by means of the compulsory mediation required by this subparagraph (II).

(c) The director's subpoena powers in cases relating to allegations of unfair employment practices are repealed on July 1, 1996. Prior to such repeal, the director's subpoena powers in such cases shall be reviewed as provided for in 24-34-104, C.R.S.

(3) The members of the commission and its staff shall not disclose the filing of a charge, the information gathered during the investigation, or the efforts to eliminate such discriminatory or unfair practice by conference, conciliation, and persuasion unless such disclosure is made in connection with the conduct of the investigation, in connection with the filing of a petition seeking appropriate injunctive relief against the respondent under section 24-34-507, or at a public hearing or unless the complainant and the respondent agree to such disclosure. Nothing in this subsection (3) shall be construed to prevent the commission from disclosing its final action on a charge, including the reasons for dismissing such charge, the terms of a conciliation agreement, or the contents of an order issued after hearing.

(4) When the director is satisfied that further efforts to settle the matter by conference, conciliation, and persuasion will be futile, he shall so report to the commission. If the commission determines that the circumstances warrant, it shall issue and cause to be served, in the manner provided by section 24-4-105 (2), a written notice and complaint requiring the respondent to answer the charges at a formal hearing before the commission, a commissioner, or an administrative law judge. Such hearing shall be commenced within one hundred twenty days after the service of such written notice and complaint. Such notice and complaint shall state the time, place, and nature of the hearing, the legal authority and jurisdiction under which it is to be held, and the matters of fact and law asserted.

(5) In accordance with rules adopted by the commission, discovery procedures may be used by the commission and the parties under the same circumstances and in the same manner as is provided by the Colorado rules of civil procedure after the notice of hearing under subsection (4) of this section has been given.

(6) The respondent may file a written answer prior to the date of the hearing. When a respondent has failed to answer at a hearing, the commission, a commissioner, or the administrative law judge, as the case may be, may enter his default. For good cause shown, the entry of default may be set aside within ten days after the date of such entry. If the respondent is in default, testimony may be heard on behalf of the complainant. After hearing such testimony, the commission, a commissioner, or the administrative law judge, as the case may be, may enter such order as the evidence warrants.

(7) The commission or the complainant shall have the power to reasonably and fairly amend any complaint, and the respondent shall have like power to amend his answer.

(8) The hearing shall be conducted and decisions rendered in accordance with section 24-4-105; except that the decision shall also include a statement of the reasons why the findings of fact lead to the conclusions. The case in support of the complaint shall be presented at the hearing by one of the commission's attorneys or agents, but no one presenting the case in support of the complaint shall counsel or advise the commission, commissioner, or administrative law judge who hears the case. The director and the staff shall not participate in the hearing except as a witness, nor shall they participate in the deliberations of, or counsel or advise, the commission, commissioner, or administrative law judge in such case. At any such hearing, the person presenting the case in support of the complaint shall have the burden of showing that the respondent has engaged or is engaging in an unfair or discriminatory practice, and the respondent's conduct shall be presumed not to be unfair or discriminatory until proven otherwise.

(9) If, upon all the evidence at a hearing, there is a statement of findings and conclusions in accordance with section 24-4-105, together with a statement of reasons for such conclusions, showing that a respondent has engaged in or is engaging in any discriminatory or unfair practice as defined in parts 4 to 7 of this article, the commission shall issue and cause to be served upon the respondent an order requiring such respondent to cease and desist from such discriminatory or unfair practice and to take such action as it may order in accordance with the provisions of parts 4 to 7 of this article.

(10) If, upon all of the evidence at a hearing, there is a statement of findings and conclusions in accordance with section 24-4-105, together with a statement of reasons for such conclusions, showing that a respondent has not engaged in any such discriminatory or unfair practice, the commission shall issue and cause to be served an order dismissing the complaint on the person alleging such discriminatory or unfair practice.

(11) If written notice that a formal hearing will be held is not served within two hundred seventy days after the filing of the charge, if the complainant has requested and received a notice of right to sue pursuant to subsection (15) of this section, or if the hearing is not commenced within the one-hundred-twenty-day period prescribed by subsection (4) of this section, the jurisdiction of the commission over the complaint shall cease, and the complainant may seek the relief authorized under this part 3 and parts 4 to 7 of this article against the respondent by filing a civil action in the district court for the district in which the alleged discriminatory or unfair practice occurred. Such action must be filed within ninety days of the date upon which the jurisdiction of the commission ceased, and if not so filed, it shall be barred and the district court shall have no jurisdiction to hear such action. If any party requests the extension of any time period prescribed by this subsection (11), such extension may be granted for good cause by the commission, a commissioner, or the administrative law judge, as the case may be, but the total period of all such extensions to either the respondent or the complainant shall not exceed ninety days each, and, in the case of multiple parties, the total period of all extensions shall not exceed one hundred eighty days.

(12) The division shall maintain a central file of decisions rendered under parts 3 to 7 of this article, and such file shall be open to the public for inspection during regular business hours.

(13) Any member of the commission and any person participating in good faith in the making of a complaint or a report or in any investigative or administrative proceeding authorized by parts 3 to 7 of this article shall be immune from liability in any civil action brought against him for acts occurring while acting in his capacity as a commission member or participant, respectively, if such individual was acting in good faith within the scope of his respective capacity, made a reasonable effort to obtain the facts of the matter as to which he acted, and acted in the reasonable belief that the action taken by him was warranted by the facts.

(14) No person may file a civil action in a district court in this state based on an alleged discriminatory or unfair practice prohibited by parts 4 to 7 of this article without first exhausting the proceedings and remedies available to him under this part 3 unless he shows, in an action filed in the appropriate district court, by clear and convincing evidence, his ill health which is of such a nature that pursuing administrative remedies would not provide timely and reasonable relief and would cause irreparable harm.

(15) The charging party in any action may request a written notice of right to sue at any time prior to service of a notice and complaint pursuant to subsection (4) of this section. Any request for notice of right to sue shall be in writing. A claimant's request for notice of right to sue made after the expiration of one hundred eighty days following the filing of the charge shall be granted promptly. If a claimant makes a request for a notice of right to sue prior to the expiration of one hundred eighty days following the filing of the charge, said request shall be granted upon a determination by the commission, a commissioner, or the administrative law judge that the investigation of the charge will not be completed within one hundred eighty days following the filing of the charge. A notice of right to sue shall constitute final agency action and exhaustion of administrative remedies and proceedings pursuant to this part 3.

24-34-307. Judicial review and enforcement. (1) Any complainant or respondent claiming to be aggrieved by a final order of the commission, including a refusal to issue an order, may obtain judicial review thereof, and the commission may obtain an order of court for its enforcement in a proceeding as provided in this section.

(2) Such proceeding shall be brought in the court of appeals by appropriate proceedings under section 24-4-106 (11).

(3) Such proceeding shall be initiated by the filing of a petition in the court of appeals and the service of a copy thereof upon the commission and upon all parties who appeared before the commission, and thereafter such proceeding shall be processed under the Colorado appellate rules. The court of appeals shall have jurisdiction of the proceeding and the questions determined therein and shall have power to grant such temporary relief or restraining order as it deems just and proper and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order enforcing, modifying, and enforcing as so modified or setting aside the order of the commission in whole or in part.

(4) An objection that has not been urged before the commission shall not be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

(5) Any party may move the court to remit the case to the commission in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereof, if such party shows reasonable grounds for the failure to adduce such evidence before the commission.

(6) The findings of the commission as to the facts shall be conclusive if supported by substantial evidence.

(7) The jurisdiction of the court shall be exclusive and its judgment and order shall be final, subject to review as provided by law and the Colorado appellate rules.

(8) The commission's copy of the testimony shall be available to all parties for examination at all reasonable times, without cost, and for the purpose of judicial review of the commission's orders.

(9) The commission may appear in court by its own attorney.

(9.5) Upon application by a person alleging a discriminatory housing practice under section 24-34-502 or a person against whom such a practice is alleged, the court may appoint an attorney for such person or may authorize the commencement or continuation of a civil action without the payment of fees, costs, or security, if in the opinion of the court such person is financially unable to bear the costs of such action.

(10) The commission or court upon motion may grant a stay of the commission order pending appeal.

(11) Appeals filed under this section shall be heard expeditiously and determined upon the transcript filed, without requirement for printing. Hearings in the court of appeals under this part 3 shall take precedence over all other matters, except matters of the same character.

(12) If no proceeding to obtain judicial review is instituted by a complainant or respondent within forty-five days from the service of an order of the commission pursuant to section 24-34-306, the commission may obtain a decree of the district court for the enforcement of such order upon showing that such respondent is subject to the jurisdiction of the commission and resides or transacts business within the county in which the petition for enforcement is brought.

24-34-308. Enforcement of federal law prohibited. Nothing in parts 3 to 8 of this article shall be construed to authorize the commission, the director, or the division to enforce any provision of federal law. Nothing in this section shall prevent the commission from accepting federal grants for the enforcement of parts 3 to 7.

Part 4 - Employment Practices

24-34-401. Definitions. As used in this part 4, unless the context otherwise requires:

(1) "Apprenticeship" means any program for the training of apprentices.

(2) "Employee" means any person employed by an employer, except a person in the domestic service of any person.

(3) "Employer" means the state of Colorado or any political subdivision, commission, department, institution, or school district thereof, and every other person employing persons within the state; but it does not mean religious organizations or associations, except such organizations or associations supported in whole or in part by money raised by taxation or public borrowing.

(4) "Employment agency" means any person undertaking to procure employees or opportunities to work for any other person or holding itself out to be equipped to do so.

(5) "Joint apprenticeship committee" means any association of representatives of a labor organization and an employer providing, coordinating, or controlling an apprentice training program.

(6) "Labor organization" means any organization which exists for the purpose in whole or in part of collective bargaining, or of dealing with employers concerning grievances, terms, or conditions of employment, or of other mutual aid or protection in connection with employment.

(7) "On-the-job training" means any program designed to instruct a person who, while learning the particular job for which he is receiving instruction, is also employed at that job or who may be employed by the employer conducting the program during the course of the program or when the program is completed.

(8) "Unfair employment practice" means those practices specified as discriminatory or unfair in section 24-34-402.

(9) "Vocational school" means any school or institution conducting a course of instruction, training, or retraining to prepare individuals to follow an occupation or trade or to pursue a manual, mechanical, technical, industrial, business, commercial, office, personal service, or other nonprofessional occupation.

24-34-402. Discriminatory or unfair employment practices. (1) It shall be a discriminatory or unfair employment practice:

(a) For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against any person otherwise qualified because of disability, race, creed, color, sex, age, national origin, or ancestry; but, with regard to a disability, it is not a discriminatory or an unfair employment practice for an employer to act as provided in this paragraph (a) if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from the job, and the disability has a significant impact on the job;

(b) For an employment agency to refuse to list and properly classify for employment or to refer an individual for employment in a known available job for which such individual is otherwise qualified because of disability, race, creed, color, sex, age, national origin, or ancestry or for an employment agency to comply with a request from an employer for referral of applicants for employment if the request indicates either directly or indirectly that the employer discriminates in employment on account of disability, race, creed, color, sex, age, national origin, or ancestry; but, with regard to a disability, it is not a discriminatory or an unfair employment practice for an employment agency to refuse to list and properly classify for employment or to refuse to refer an individual for employment in a known available job for which such individual is otherwise qualified if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the applicant from the job, and the disability has a significant impact on the job;

(c) For a labor organization to exclude any individual otherwise qualified from full membership rights in such labor organization, or to expel any such individual from membership in such labor organization, or to otherwise discriminate against any of its members in the full enjoyment of work opportunity because of disability, race, creed, color, sex, age, national origin, or ancestry;

(d) For any employer, employment agency, or labor organization to print or circulate or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment or membership, or to make any inquiry in connection with prospective employment or membership which expresses, either directly or indirectly, any limitation, specification, or discrimination as to disability, race, creed, color, sex, age, national origin, or ancestry or intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification or required by and given to an agency of government for security reasons;

(e) For any person, whether or not an employer, an employment agency, a labor organization, or the employees or members thereof:

(I) To aid, abet, incite, compel, or coerce the doing of any act defined in this section to be a discriminatory or unfair employment practice;

(II) To obstruct or prevent any person from complying with the provisions of this part 4 or any order issued with respect thereto;

(III) To attempt, either directly or indirectly, to commit any act defined in this section to be a discriminatory or unfair employment practice;

(IV) To discriminate against any person because such person has opposed any practice made a discriminatory or an unfair employment practice by this part 4, because he has filed a charge with the commission, or because he has testified, assisted, or participated in any manner in an investigation, proceeding, or hearing conducted pursuant to parts 3 and 4 of this article;

(f) For any employer, labor organization, joint apprenticeship committee, or vocational school providing, coordinating, or controlling apprenticeship programs or providing, coordinating, or controlling on-the-job training programs or other instruction, training, or retraining programs:

(I) To deny to or withhold from any qualified person because of disability, race, creed, color, sex, age, national origin, or ancestry the right to be admitted to or participate in an apprenticeship training program, an on-the-job training program, or any other occupational instruction, training, or retraining program; but, with regard to a disability, it is not a discriminatory or an unfair employment practice to deny or withhold the right to be admitted to or participate in any such program if there is no reasonable accommodation that can be made with regard to the disability, the disability actually disqualifies the applicant from the program, and the disability has a significant impact on participation in the program;

(II) To discriminate against any qualified person in pursuit of such programs or to discriminate against such a person in the terms, conditions, or privileges of such programs because of disability, race, creed, color, sex, age, national origin, or ancestry;

(III) To print or circulate or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for such programs, or to make any inquiry in connection with such programs which expresses, directly or indirectly, any limitation, specification, or discrimination as to disability, race, creed, color, sex, age, national origin, or ancestry or any intent to make any such limitation, specification, or discrimination, unless based on a bona fide occupational qualification;

(g) For any private employer to refuse to hire, or to discriminate against, any person, whether directly or indirectly, who is otherwise qualified for employment solely because the person did not apply for employment through a private employment agency; but an employer shall not be deemed to have violated the provisions of this section if such employer retains one or more employment agencies as exclusive suppliers of personnel and no employment fees are charged to an employee who is hired as a result of having to utilize the services of any such employment agency.

(h) (I) For any employer to discharge an employee or to refuse to hire a person solely on the basis that such employee or person is married to or plans to marry another employee of the employer; but this subparagraph (I) shall not apply to employers with twenty-five or fewer employees.

(II) It shall not be unfair or discriminatory for an employer to discharge an employee or to refuse to hire a person for the reasons stated in subparagraph (I) of this paragraph (h) under circumstances where:

(A) One spouse directly or indirectly would exercise supervisory, appointment, or dismissal authority or disciplinary action over the other spouse;

(B) One spouse would audit, verify, receive, or be entrusted with moneys received or handled by the other spouse; or

(C) One spouse has access to the employer's confidential information, including payroll and personnel records.

(2) Notwithstanding any provisions of this section to the contrary, it is not a discriminatory or an unfair employment practice for the division of employment and training of the department of labor and employment to ascertain and record the disability, sex, age, race, creed, color, or national origin of any individual for the purpose of making such reports as may be required by law to agencies of the federal or state government only. Said records may be made and kept in the manner required by the federal or state law, but no such information shall be divulged by said division or department to prospective employers as a basis for employment, except as provided in this subsection (2).

(3) Nothing in this section shall prohibit any employer from making individualized agreements with respect to compensation or the terms, conditions, or privileges of employment for persons suffering a disability if such individualized agreement is part of a therapeutic or job-training program of no more than twenty hours per week and lasting no more than eighteen months.

(4) Notwithstanding any other provision of this section to the contrary, it shall not be a discriminatory or an unfair employment practice with respect to age:

(a) To take any action otherwise prohibited by this section if age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular employer or where the differentiation is based on reasonable factors other than age; or

(b) To observe the terms of a bona fide seniority system or any bona fide employee benefit plan, such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this section; except that, unless authorized in paragraph (a) of this subsection (4), no such employee benefit plan shall require or permit the involuntary retirement of any individual because of the age of such individual; or

(c) To compel the retirement of any employee who is sixty-five years of age or older and under seventy years of age and who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policy-making position if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee and if such plan equals, in the aggregate, at least forty-four thousand dollars; or

(d) To discharge or otherwise discipline an individual for reasons other than age.

24-34-402.5. Unlawful prohibition of legal activities as a condition of employment. (1) It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction:

(a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or

(b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.

(2) (a) Notwithstanding any other provisions of this article, the sole remedy for any person claiming to be aggrieved by a discriminatory or unfair employment practice as defined in this section shall be as follows: He may bring a civil suit for damages in any district court of competent jurisdiction and may sue for all wages and benefits which would have been due him up to and including the date of the judgment had the discriminatory or unfair employment practice not occurred; except that nothing in this section shall be construed to relieve such person from the obligation to mitigate his damages.

(b) The court shall award the prevailing party in such action court costs and a reasonable attorney fee.

24-34-403. Time limits on filing of charges. Any charge alleging a violation of this part 4 shall be filed with the commission pursuant to section 24-34-306 within six months after the alleged discriminatory or unfair employment practice occurred, and if not so filed, it shall be barred.

24-34-404. Charges by employers and others. Any employer, labor organization, joint apprenticeship committee, or vocational school whose employees or members, or some of them, refuse or threaten to refuse to comply with the provisions of this part 4 may file with the commission a verified written charge in duplicate asking the commission for assistance to obtain their compliance by conciliation or other remedial action.

24-34-405. Relief authorized. In addition to the relief authorized by section 24-34-306 (9), the commission may order a respondent who has been found to have engaged in an unfair or discriminatory employment practice to take affirmative action regarding: Back pay; hiring, reinstatement, or upgrading of employees, with or without back pay; the referring of applicants for employment by any respondent employment agency; the restoration to membership by any respondent labor organization; the admission to or continuation in enrollment in an apprenticeship program, on-the-job training program, or a vocational school; the posting of notices; and the making of reports as to the manner of compliance. The commission, in its discretion, may order such remedies singly or in any combination.

24-34-406. Ruling on unemployment benefits not a bar. No findings, conclusions, or orders made pursuant to the provisions of articles 70 to 82 of title 8, C.R.S., shall be binding upon the commission in the exercise of its powers pursuant to parts 3 and 4 of this article; except that the commission may consider any explicit findings or conclusions on the issue of discrimination. If the decision under parts 3 and 4 of this article is in favor of the complainant, the respondent may present evidence of any unemployment benefits pursuant to articles 70 to 82 of title 8, C.R.S., which were received by the complainant based on the same occurrence. The relief granted to the complainant shall be reduced by the amount of such benefits, as provided in section 8-2-119, C.R.S.