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Testimony with Respect to Rochester's Proposed  
**Human Rights Ordinance**  
Matt Foreman, Executive Director  
Empire State Pride Agenda  
May 15, 2001

On behalf of the 25,000 members of the Empire State Pride Agenda across New York, I offer the following comments and recommendations concerning the Human Rights Ordinance now being considered by the Rochester City Council. We commend Council President Geiss and Councilmembers Mains and Norwood for their hard work on this legislation. It represents a significant improvement and continues Rochester's long and proud history of progressive action in the area of human rights. We believe that it can be made even better.

The Pride Agenda's mission is to end discrimination on the basis of sexual orientation. Over the last three years, we have aggressively and successfully pursued non-discrimination legislation at the local level. In Westchester County, for example, we helped pass a tough human rights law that created a human rights commission with real enforcement powers. In Nassau, we helped add sexual orientation as a protected category to that county's human rights law. In Ithaca, we helped write and pass a hate crimes law that covers transgender persons. In Suffolk, we helped with a bill (that just passed the legislature) that creates both civil and criminal penalties for acts of discrimination and significantly enhances the enforcement powers of that county's human rights commission. We are now pushing a bill in the New York City Council to extend non-discrimination protections to transgender persons and have helped secure the co-sponsorship of 25 of the council's 51 members.

We offer this information for two reasons. First, through this work we have acquired some expertise in the ways in which local jurisdictions can and have addressed non-discrimination legislation. Second, given that other jurisdictions without Rochester's history of progressive government have been able to act—forcefully—in a bipartisan way against discrimination, we believe the amendments we are suggesting are relatively minimal.

Our comments fall into four areas: (1) strengthening the definition of gender; (2) establishing some requirements about the implementation of this legislation; (3) specifying penalties for violations; and (4) a technical amendment to make another section of the code conform with this one. Our proposed amending language appears in boxes. Underscoring indicates new language and strike-throughs indicate language in the current bill that would be deleted.

1. Definition of Gender. The definition of gender should be strengthened so there is no question about its applicability to transgender persons. This is particularly important because this legislation would extend a private cause of action to transgender persons and courts should be given a clear standard for judging these complaints. We suggest using the definition that appears in the bill before the New York City Council that has nearly unanimous support within the transgender community:<sup>1</sup>

GENDER includes ~~the biological and social characteristics of gender and gender identity~~ actual or perceived sex and shall also include a person's gender identity, self image, appearance, behavior, or expression, whether or not that gender identity, self image, appearance, behavior, or expression is different from that traditionally associated with the legal sex assigned to that person at birth.

2. Implementation & Enforcement Provisions. This legislation has no provisions fixing responsibility for its implementation or providing penalties for those who violate this new law. This is in stark contrast to virtually every other section of the City Code and is not in keeping with the stated intent of the co-sponsors that this legislation “will be simple to understand and implement.”

Moreover, this bill does not restate or strengthen the two implementation directives contained in Resolution 94-12 (“Resolution Prohibiting Discrimination,” April 12, 1994) that obligate the Mayor to promulgate procedures or guidelines regarding non-discrimination in public employment and the investigation of complaints of discrimination.<sup>2</sup> Obviously, it makes sense to incorporate the provisions of Resolution 94-12 wherever possible.<sup>3</sup>

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<sup>1</sup> This is not a “radical” definition. Atlanta, Georgia recently adopted an even more expansive one:

Gender identity means self-perception as male or female, and shall include a person's identity, expression, or physical characteristics, whether or not traditionally associated with one's biological sex or one's sex at birth, including transsexual, transvestite, and transgendered, and including a person's attitudes, preferences, beliefs, and practices pertaining thereto, including but not limited to assumption of male or female identity by appearance or medical treatment.

Atlanta Code of Ordinances, Art. II § 94-10.

<sup>2</sup> Resolution 94-12, Sections 4 and 6. The resolution also obligates the Mayor to “promulgate clear and consistent guidelines prohibiting discrimination ... in the granting of health and leave benefits to the domestic partners of City employees.” Resolution 94-12, Section 5.

<sup>3</sup> Given the provisions of the City Charter (Art. V §5-12), it seems advisable that as much as possible of Resolution 94-12 be codified through this legislation.

The need for implementation provisions is particularly important because there is no “human rights commission”-like agency in Rochester to act as a clearinghouse, to promulgate rules and regulations, or to enforce the law. Therefore, we recommend amending the legislation to:

- ☑ Incorporate the non-discrimination provisions of Resolution 94-12 concerning discrimination by the City in programs or services and employment matters and require the Mayor to promulgate rules and regulations to implement these provisions.
- ☑ Specifically provide that penalties for a City employee who engages in discrimination can include dismissal.
- ☑ Require the Mayor to promulgate rules and regulations with respect to discrimination by contractors with the City and provide for a range of sanctions for contractors who are found to have engaged in discrimination.

Please note that text that comes from Resolution 94-12 is indicated by double-underscoring.

Section 63-7. Discrimination in City Services, Employment and Contracts with the City.

A. No City agency or department shall discriminate in the provision of any benefits, programs or services by such City agency or department.

B. All City agencies and departments shall prohibit discrimination in any matter pertaining to employment by the City including, but not limited to, hiring, job appointment, promotion, tenure, recruitment and compensation.

C. The Mayor shall promulgate rules and regulations to implement the provisions of this section and which shall insure the swift and thorough investigation of complaints of discrimination in the provision of City benefits, programs or services, or in City employment matters. Particular effort shall be made to conduct any such investigations with due regard for confidentiality and privacy. Whenever a City employee is found to be in violation this section, appropriate disciplinary action up to and including dismissal may result.

A. D. The City and any person under agreement with the City Contractors shall not discriminate in the provision of any City benefits, programs or services. B. All City agreements contracts shall stipulate that the contractor shall not engage in any discrimination in violation of this Chapter and that any such violation may be deemed to be a material breach of the contract. The Mayor shall promulgate rules and regulations to implement and enforce this provision and shall have the authority to monitor, inspect, and investigate to insure that contractors are compliant. Each contract awarding authority shall cooperate to the fullest extent with the Mayor in his/her enforcement activities. Appropriate sanctions for violations of this paragraph include, but are not limited to: (i) disqualification of the contractor from bidding on or being awarded a contract for a period of up to five years; (ii) withholding from the contractor in violation all future payments under the involved contract until it is determined

that the contractor is in compliance with the provisions of the contract; and (iii) contractual remedies, including, but not limited to, liquidated damages and termination of the contract.

To implement this provision concerning discrimination by contractors with the City, we recommend the following definitions be added to the definitions section of the legislation (§63-2):

CONTRACT means all types of contracts, agreements and orders between a contract awarding authority, as defined herein, and a contractor, as defined herein, for public works, consulting, leasing, rentals, supplies, materials, equipment or services.

CONTRACTOR means any person or persons, firm, partnership, corporation or combination thereof, who enters into a contract with the City.

CONTRACT AWARDING AUTHORITY means the City officer, department, commission, employee, or board authorized to enter into or administer agreements or contracts on behalf of the City.

3. Rights & Remedies. We understand that the City, given its current fiscal constraints, is unable to spend money to enforce this law through the creation of a human rights commission or by designating a City agency/official to handle discrimination complaints that do not pertain to City employment, services or contractors. The legislation does, however, establish a private right of action for aggrieved persons to bring an action in “any court of appropriate jurisdiction.” (Section 63-10.B.) It is important to recognize the practical limitations of this right, namely, the victim has to be able to afford an attorney or have the ideal case to get an attorney to take the case on a contingency fee basis.

Of course, all victims of discrimination – *except those discriminated against because of their sexual orientation or gender identity* – already have a private right of action under state law or may file a complaint with the State Division of Human Rights, which does have significant enforcement powers.<sup>4</sup>

Given the limitations of a private cause of action and that this legislation serves to extend this right to victims of anti-gay and anti-transgender discrimination, we believe it is important that the legislation give greater guidance to the court regarding costs and attorney fees and that it emphasize the seriousness with which complaints of discrimination should be taken. The City already provides for “enhanced” damages for violations of the recently enacted “Rochester Living Wage Ordinance” [City Code Part I, §8A-18.D.(3)(h)]. We recommend that the *same* remedy be added to this legislation:

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<sup>4</sup> While the delays in DHR processing complaints are egregious, legal action is bringing hope on the horizon. Furthermore, in addition to DHR – and at least on paper – Rochester residents who are victims of discrimination not based on sexual orientation or gender identity may seek recourse through the Monroe County Human Rights Commission.

Section 63-10. Remedy:

- B. Any person claiming to be aggrieved by an alleged discriminatory practice in violation of this chapter shall have a cause of action in any court of appropriate jurisdiction for injunctive relief, damages and such other remedies as may be appropriate. In the event that the aggrieved person prevails in such action, the court may award damages and reasonable costs and attorney fees, and if said action is brought by an individual for back or front pay, the court shall also award said individual an additional amount as liquidated damages equal to 25% of the back or front pay found to be due.

We also believe that the City should use this opportunity to exercise its police power and make violations of this new law a criminal offense punishable by a fine and/or imprisonment. Acts of discrimination affect not just the individual involved but can tear at the very fabric of the City. Therefore, the City should have the same ability to prosecute those who engage in discrimination as it does with those who violate so many other City laws – ranging from the Living Wage Ordinance to “resistance” to an order issued by the Mayor in a nuisance abatement case to the “secrecy” provisions of the Utilities Gross Income Tax law. Passing this legislation without similar enforcement authority sends a clear message about how seriously the City considers acts of discrimination vis-à-vis other areas covered in the City Code.

Other local jurisdictions have exercised their police powers in this way. Ithaca, for example, provides for up to a \$500 fine and up to 15 days in jail per violation for sexual orientation housing discrimination cases. A bill just passed by the Suffolk County Legislature provides for up to a \$5,000 fine and 6 months in jail for an act of discrimination in housing, public accommodations, and employment. Even the Village of Alfred provides for a fine of \$50 to \$100 for acts of discrimination.

We wish to emphasize that creating this criminal penalty does not obligate the City to spend any money. As with all other offenses, the City has the absolute discretion to choose when to prosecute. This would, however, give the City the authority to act and could be employed in egregious cases. This route does not yield any monetary damages to the victim, but the existence of this law could serve as a incentive for offenders to arrive at some form of agreement with the victim. Obviously, any fine is payable to the City.

We therefore recommend the addition of the following new section to the legislation:

Section 63-11. Penalties.

Any person, firm, partnership, association or corporation convicted of willfully violating Section 63-3, 63-4, or 63-5 of this Chapter shall be guilty of a misdemeanor punishable by a fine up to One Thousand Dollars (\$1,000.00) and/or six months imprisonment for each separate violation.

4. Technical Amendment. Finally, in our review of the Municipal Code, we found a non-discrimination provision that does not encompass all the categories included in this legislation. This section should be amended to conform with the new law:

Code of the City of Rochester, Part II, §78-17. Nondiscrimination.

Subject to compliance with these regulations and the licensee's right to charge for use of his parking places, all reasonable requests therefor shall be furnished to any person without discrimination based on age, race, creed, color, ~~sex~~ gender, ~~or~~ national origin, sexual orientation, disability or marital status.

We would be happy to provide you any additional information you may need to consider these comments.

Thank you for your consideration, leadership, and hard work on this important measure.

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*Founded in 1990, the Empire State Pride Agenda is New York's statewide, non-partisan lesbian and gay political advocacy organization. Our mission is to end discrimination and prejudice on the basis of sexual orientation. The Pride Agenda fights for equal rights under the law by lobbying state and local elected officials, electing supportive candidates to office, organizing constituent pressure, and educating the public. Recent victories include the enactment of a statewide hate crimes law, repeal of the consensual sodomy statute, and the passing of local non-discrimination measures in Westchester County, Nassau County, and Buffalo. With 25,000 supporters statewide, it has offices and staff in Albany, Buffalo, Long Island, New York City, and Rochester.*