TITLE 77
PROCEDURAL RULE
WEST VIRGINIA HUMAN RIGHTS COMMISSION
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

SERIES 2
RULES OF PRACTICE AND PROCEDURE BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

§77-2-1. General.

1.1. Scope. -- The following procedural regulations set forth the practice and procedure established by the West Virginia Human Rights Commission for carrying out its responsibilities in the administration and enforcement of the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq., as amended.

1.1.1. Policy. -- All persons appearing before the West Virginia Human Rights Commission shall have their rights, privileges, or duties determined with due regard for fundamental fairness. Any person may be represented by private legal counsel at any stage of proceedings before the Commission, except as more fully set forth in these rules. In any contested case before the Commission, all parties thereto shall be provided with an adequate notice of hearing; a fair hearing; and an objective decision support by substantial evidence.

1.2. Authority. -- W. Va. Code, §§5-11-8h; §29A-3 et seq.

1.3. Filing date. -- December 1, 1998.

1.4. Effective date. -- January 1, 1999.

1.5. Procedure governed. -- These regulations shall govern all practice and procedure before the West Virginia Human Rights Commission unless otherwise directed by the Commission.

1.6. Liberal construction. -- These regulations shall be liberally construed to permit the Commission to discharge its statutory functions and to secure just and expeditious determination of all matters before the West Virginia Human Rights Commission.

1.7. Deviation from regulations. -- In special cases, where good cause appears and not contrary to statute, the Commission or its administrative law judge may permit deviation from these regulations insofar as it may find compliance therewith to be impractical or unnecessary.

1.8. Practice where regulations do not govern -- In situations where these regulations do not apply, the Commission or its administrative law judge shall exercise discretion in accordance with traditional notions of fairness and justice.

1.9. Severability -- If any of these regulations are held invalid, it shall not be construed to invalidate any of the other provisions of these regulations not otherwise affected.

1.10. Availability of regulations -- The regulations of the Commission shall be on file in the office of the Secretary of State.

1.11. Additional copies -- Additional copies of the regulations of Commission shall be available to the general public at the offices of the Secretary of State.

1.12. Delegation of powers and duties -- Except where contrary to law, the Commission may delegate any of the powers and duties of the Commission to the executive director, administrative law judge, or other employees or agents of the Commission.

1.13. Effect of amendments to the Act -- In the event that the Human Rights Act, W. Va.

Code §5-11 et seq. is amended by the Legislature, these rules and regulations will automatically be amended to conform to such amendments.

§77-2-2. Definitions.

All words defined in W. Va. Code §5-11-8 of the Act shall have the meanings therein ascribed to them for the purposes of these regulations. All other words shall have the meanings herein ascribed to them.

2.1. The term "Act" shall mean the West Virginia Human Rights Act.

2.2. The term "answer" means that response required in Rule 6.1.

2.3. The term "chairperson" shall mean the chairperson of the West Virginia Human Rights Commission elected by the Commission.

2.4. The term "Commissioner" shall mean one of the duly appointed members of the Human Rights Commission.

2.5. The term "Commission's attorney" shall mean an attorney on the staff of the Commission or from the Office of the Attorney General who renders legal services to the Commission.

2.6. The term "complaint" shall mean a written statement alleging that an unlawful discriminatory practice has been committed and which shall be signed under oath and filed with the Commission in conformity with Rule 3.

2.7. The term "complainant" may mean any individual, any organization which has an individual member claiming to be aggrieved by unlawful discrimination, the Commission or the Attorney General, who has filed a complaint with the Commission.

2.8. The term "compliance director" shall mean any member(s) of the staff designated by the executive director as having responsibility in overseeing the activities of compliance functions.

2.9. The term "administrative law judge" shall mean that statutory officer referred to in W. Va. Code §5-11-6 or an attorney assigned by the Commission or its executive director to conduct a public hearing or perform other functions authorized by the Act or the Commission's rules and regulations.

2.10. The term "party" or "parties" shall mean the complainant, the respondent, the Commission, if appropriate, and any person authorized by the Commission to intervene in any proceeding.

2.11. The term "reply" means that response required by Rule 4.2.

2.12. The term "respondent" shall mean any person against whom a complaint has been filed alleging an unlawful discriminatory practice within the meaning of the Act.

2.13. The term "service" when required by these rules shall be that service as is described in Rule 4 of the West Virginia Rules of Civil Procedure.

§77-2-3. Complaint: Content, Filing Time, Amendment, Withdrawal and Dismissal; Preservation of Records.

3.1. Any individual claiming to be aggrieved by an alleged unlawful discriminatory practice may make, sign and file with the Commission a written, verified complaint.

3.2. Any employer whose employees, or some of them, hinder or threaten to hinder compliance with the provisions of the Act may make, sign and file with the Commission a written, verified complaint requesting assistance by conciliation or other remedial action.

3.3. The Commission or the Attorney General may make, sign and file a complaint whenever either has reason to believe that any person has engaged, or is engaging, or proposes to engage in an unlawful discriminatory practice.

3.4. Any organization which has an individual member claiming to be aggrieved by an alleged unlawful discriminatory practice may

make, sign and file with the Commission a written, verified complaint.

3.5. A complaint deferred/referred to the Commission by the United States Equal Employment Opportunity Commission pursuant to the Civil Rights Act of 1964 or the Age Discrimination in Employment Act or by the United States Department of Housing and Urban Development pursuant to the Civil Rights Act of 1968 shall be deemed filed with the Commission as of the date such complaint was received by the Equal Employment Opportunity Commission or the Department of Housing and Urban Development.

3.6. Assistance in drafting and filing complaints shall be available to complainants through the Commission and its staff.

3.7. The complaint shall be in writing, the original being signed and verified before a notary public or other person duly authorized to administer oaths and take acknowledgements. The complaint shall be filed with the Commission and where feasible, shall be upon forms prepared by the Commission, blanks of which shall be supplied by the Commission upon request. Notarial service shall be furnished without charge by the Commission.

3.8. Each complaint shall contain the following to the best information of the complainant:

3.8.a. The name and address of the complainant.

3.8.b. The name and address of the respondent.

3.8.c. A concise statement setting forth the facts deemed to constitute the alleged discrimination.

3.8.d. The date or dates of the alleged unlawful discriminatory practice, or if the alleged unlawful discriminatory practice is of a continuous nature, the date on which the unlawful practice began and the last day on which it occurred.

3.8.e. The verified signature of the complainant.

3.9. Manner of filing a complaint:

3.9.a. A complaint may be filed at any Commission office either by personal delivery or by mail.

3.9.b. The complaint shall be deemed filed as of the date it is received at any Commission office.

3.9.c. When a complaint is received at a Commission office, the person accepting the complaint shall stamp the complaint with the date it was so received. Docketing of all complaints shall be completed promptly.

3.9.d. Timeliness of complaint:

3.9.d.1. A complaint shall be filed within three hundred and sixty-five (365) days after the occurrence of the alleged unlawful discriminatory practice or act.

3.9.d.2. If the alleged unlawful discriminatory practice or act is of a continuing nature, the date of the occurrence of the said alleged unlawful practice shall be deemed to be any date subsequent to the commencement of the alleged unlawful practice up to and including the date upon which the unlawful practice has ceased.

3.9.d.3. Where the Commission is informed by an individual, who is claiming to be aggrieved and who has given sufficient information as set forth below prior to the expiration of the three hundred and sixty-five-day (365) limitation period, the Commission may institute a memorandum of complaint. Such memorandum of complaint shall contain the essential elements of a complaint as required by these regulations, excepting signature and verification by the complainant, and shall be signed, dated and verified before a notary public or other person duly authorized to administer oaths and take acknowledgements by the person

drafting such memorandum of complaint. A complaint received by the Commission subsequent to and based upon said memorandum of complaint shall be deemed filed as of the date that the said memorandum of complaint has been signed and verified.

3.9.d.4. Any complaint alleging acts which are unlawful under the West Virginia Human Rights Act which is filed with federal agencies having deferral/referral arrangements with the Commission, shall be deemed filed with the Commission on the same day as the complaint was received by such federal agency.

3.9.d.5. In computing any period of time prescribed or allowed by these rules or by any applicable statute, the date of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation period.

3.10. Amending the complaint:

3.10.a. The Commission or the complainant may amend a complaint or any part thereof to cure technical defects or omissions, including but not limited to, failure to verify the complaint, or to clarify and amplify allegations made therein, when such amendments relate back to the original filing date; provided, however, an amendment alleging additional acts constituting unlawful discriminatory practices which are not related to or growing out of the subject matter of the original complaint will be permitted only when, as of the date of the amendment, the allegations could have been timely filed as a separate charge.

3.10.b. A complaint may be amended any time prior to a finding of probable cause, and thereafter for good cause shown at the discretion of the administrative law judge.

3.11. Upon the filing of a complaint or amended complaint, the Commission shall promptly serve the respondent with a copy thereof together with a notice setting forth the requirements of Rule 4.2.

3.12. Withdrawal of a complaint:

3.12.a. Upon written notice to the Commission, or administrative law judge if the case has been noticed for public hearing, a complainant may withdraw the complaint. A complainant may withdraw a complaint at any time.

3.12.b. Upon such withdrawal of complaint, the Commission, by its executive director or chairperson, may initiate its own complaint based on the allegations of the withdrawn complaint. The filing date of such Commission-initiated complaint shall relate back to the original filing date of the withdrawn complaint.

3.13. Dismissal of complaint:

3.13.a. Whenever it appears upon investigation of a complaint that the Commission lacks jurisdiction over the parties or the subject matter of the complaint, the Commission shall dismiss the complaint without further action, except such as is provided by Rule 4.14.

3.13.b. The Commission may, upon its own initiative, dismiss a complaint for the following reasons:

3.13.b.1. A showing of discharge in bankruptcy of the respondent or that the complainant no longer has a right to file as a creditor or that such filing would be unproductive.

3.13.b.2. Failure to locate the complainant; provided, that reasonable effort has been made by the Commission's staff to locate the complainant. Reasonable effort shall be deemed to have been made if there has been a return of certified or regular mail stating that the

complainant has moved and left no forwarding address and an unproductive inquiry into complainant's whereabouts *has been made from the contact person listed in the background information form submitted by the complainant.

3.13.b.3. Refusal by complainant to cooperate with the processing of the complaint or otherwise to cooperate with the Commission's staff or the Commission's attorney, provided that the complainant shall first be notified and warned via certified mail that continued failure or refusal to cooperate shall result in the dismissal of the complaint.

3.13.b.4. Death of the complainant, provided that next-of-kin has indicated verbally or in writing to the Commission that she or he does not wish to proceed in the matter.

3.13.b.5. Mootness of the allegations of the complaint.

3.13.b.6. Failure of the complaint, when construed in a light most favorable to complainant, and after reasonable investigation, to state facts upon which relief can be granted under the Act. Whether a reasonable investigation has been conducted shall be determined on a case-by-case basis.

3.13.b.7. Such other reason, for which there is clear and convincing support in the record, indicating that to proceed on the complaint would be contrary or inimical to the purposes of the Act.

3.13.c. When a complaint has been dismissed, the complainant, and respondent when the complaint has been served, shall be notified in writing of the disposition of the complaint together with the reasons therefor and the complainant shall be notified of the right to request an administrative review as provided in Rule 4.14.

3.14. Respondents shall have the duty to preserve the following records:

3.14.a. When a complaint has been served on an employer, labor organization or employment agency, the respondent shall preserve all personnel records relevant to the investigation until such complaint is finally adjudicated and the respondent shall be so advised in the notice mentioned in Rule 3.11. The term "relevant to the investigation" shall include, but not be limited to, personnel, employment or membership records relating to the complainant and to all other employees, applicants or members holding or seeking positions similar to that held or sought by the complainant, and application forms or test papers completed by any unsuccessful applicant and by all other applicants or candidates for the same position or membership as that for which the complainant applied and was not accepted and any records which are relevant to the scope of the investigation as defined in the notice or complaint.

3.14.b. Where a complaint or notice of investigation has been served on a membership club, respondent in a housing complaint, or respondent in a public accommodation complaint, the respondent shall preserve all records relevant to the investigation until such complaint is finally adjudicated and the respondent shall be so advised in the notice mentioned in Rule 3.11. The term "relevant to the investigation" shall include, but not be limited to, applications on file at the time the complaint was filed and those received following service of the complaint whether or not they have been accepted or rejected, membership lists, records of payment of initiation fees or regular dues, together with the minutes of meetings of the club conducted in conformity with the constitution or by-laws adopted by the membership.

3.14.c. Any other books, papers, documents, or records of any form which are relevant to the scope of any investigation as defined in the notice or complaint shall be preserved during the pendency of any proceedings by all parties to the proceedings unless the Commission specifically orders otherwise.

3.14.d. Violation of this rule may result in prosecution as in W. Va. Code §5-11-14.

3.15. Class actions.

3.15.a. Prerequisites to a class action. One or more members of a class may file a complaint as representative parties on behalf of all, or, upon a determination by the Commission that class wide relief may be appropriate, the Commission may independently file a complaint, when the behavior of the respondent reflects a pattern or practice of discrimination which is illegal under the Human Rights Act, subject to the following provisions.

3.15.b. Class actions maintainable. An action may be maintained as a class action if, in the opinion of the executive director, Rule 3.15.a. is satisfied, and if:

3.15.b.1. The executive director determines that the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

3.15.b.2 The executive director determines that the party opposing the class has acted or refused to act on the grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

3.15.b.3. The executive director determines that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

3.15.b.3.A. The interest of members of the class in individually controlling the prosecution or defense of separate actions;

3.15.b.3.B. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

3.15.b.3.C. The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

3.15.b.3.D. The difficulties likely to be encountered in the management of a class action.

3.15.c. Determination by order whether a class action to be maintained; notice; judgment; actions conducted partially as class actions

3.15.c.1. In a class action maintained under this rule, where the Human Rights Commission pursues the complaint on behalf of the class, as soon as possible after a finding of probable cause, the Commission shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. However, where the Human Rights Commission does not pursue the complaint on behalf of the class, the named complainants shall direct notice to the members of the class. The cost of notification shall be reimbursed by respondents who either agree to a settlement or are found liable of violating the Human Rights Act. Notice shall advise each member that:

3.15.c.1.A. The class action is pending;

3.15.c.1.B. The administrative law judge will exclude the member from the class if the member so requests by a specified date; and

3.15.c.1.C. The judgment will be binding on all members who do not request exclusion or who have not filed a separate and independent complaint.

3.15.c.2. When appropriate, a complaint may be brought or maintained as a class action with respect to particular issues, or a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

3.15.c.3. Settlement procedures. The

parties in a class action may agree to a settlement, of which all class members shall receive notice. The respondent shall pay for the notice of settlement.

3.15.c.4. Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the administrative law judge, and notice of any proposed compromise shall be given to all members of the class in such manner as the administrative law judge directs.

§77-2-4. Investigation; Determination; Conciliation; Request for Review; and Mediation.

4.1. After a complaint has been filed, the compliance director shall within seventy-five (75) days but not to exceed one hundred and fifty (150) days conduct a prompt investigation of the allegations of the complaint.

4.2. Any person against whom a complaint has been filed shall serve upon the Commission and the complainant a written reply to the complaint within ten (10) days of receipt of the complaint. Such reply shall contain a statement of the facts and circumstances surrounding the allegations contained in the complaint and may include any documents or other evidence related to the subject matter of the complaint.

4.3. The Commission may by interview or deposition take the testimony of any person, including a party, relating to the subject matter of a complaint. Any person making a statement may obtain a copy of that statement.

4.4. The Commission may order any person, including a party, to produce and permit the inspection and copying or photographing of any designated documents, papers, books, accounts, letters, photographs, or other tangible things, not privileged, which may constitute or contain evidence relating to the subject matter of a complaint.

4.5. The Commission may order any party to complete a questionnaire or interrogatories relating to the subject matter of a complaint. Such questionnaire or interrogatories shall be completed and returned to the Commission within ten (10) days of receipt thereof. For good cause, the compliance director may grant an extension of time for its completion and return of up to seven (7) calendar days at his/her discretion.

4.6. To effectuate the purposes of the Act, whenever possible the Commission will seek to obtain documentary evidence, statements, and testimony from witnesses by voluntary compliance with the request of the Commission for such discovery. However, if there is non-compliance with such voluntary requests for discovery, such actions shall, at the discretion of the executive director, result in the application of an adverse inference against the party to whom the request for discovery is propounded regarding all unanswered inquiries. If it is decided to apply such adverse inference against a party, such party must be notified of this action in writing.

4.7. In addition to the adverse inference mentioned in Rule 4.6., if there has been non-compliance with the request of the Commission for such discovery, the executive director or the chairperson may issue subpoenas and subpoenas duces tecum in the name of the Commission for the purpose of obtaining any information relevant to any lawful activity of the Commission. Such subpoenas may be signed by the chairperson, or her/his representative in her/his absence, and/or the executive director.

4.8. If the Commission conducts an interview of any person at the place of work of that person, the Commission shall conduct the interview so as not to interfere with the party's duties and responsibilities to his employer. Where the Commission conducts such interview, the employer shall be given reasonable notice. Failure of the employer to cooperate subjects the employer to the penalties described in W. Va. Code §5-11-14.

4.9. If during the investigation of a complaint, terms of settlement are agreed to between complainant and respondent, the same shall be reduced to writing, signed by the parties and

attached to a withdrawal executed by the complainant, whereupon the case shall be closed unless the Commission has determined that it has a continuing interest in the case independent of that of the complainant.

4.10. The executive director, or the compliance director, or the Commission's attorney, as designated by the executive director, shall authorize a ruling dismissing a complaint when it has been determined after a reasonable investigation of the allegations of such complaint that there is no probable cause to believe that respondent has engaged in an unlawful discriminatory practice. A copy of a ruling dismissing a complaint shall be served upon the complainant and respondent within fifteen (15) days of such determination. The ruling shall contain a notice of the complainant's right to review under Rule 4.14.

4.11. If it is decided that there is no probable cause to credit the allegations of an individual complainant as such allegations pertain to that individual, but it appears that there is probable cause to credit allegations or findings of a pattern and practice of discrimination by the respondent, no matter whether such pattern and practice was alleged by complainant or discovered through investigation, in such case the individual complainant shall be dismissed from further proceedings by the Commission, pending appeal pursuant to Rule 4.14., and the Commission shall proceed to prosecute the complaint, as amended, in its own name.

4.12. If the executive director, or compliance director, or the Commission's attorney, as designated by the executive director, finds that probable cause exists for crediting the allegations of the complaint, the Commission shall promptly notice the case for public hearing.

4.13. The Commission encourages settlement efforts during all phases of its procedures. When engaging in conciliation endeavors, the Commission shall adhere to the following guidelines:

4.13.a. Nothing that is said or done during and as a part of the endeavors of the Commission to eliminate unlawful discriminatory practices by methods of conference, conciliation, and persuasion may be made a matter of public information by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the parties concerned: provided, that the Commission may publish the terms of a conciliation agreement when the complaint has been settled without disclosing the identities of the parties involved.

4.13.b. This subsection does not apply to such disclosures to the representatives of federal, state, and local agencies as may be appropriate or necessary to the carrying out of the Commission's functions under the Act: provided, that the Commission may refuse to make disclosures to any such agency which does not maintain the confidentiality of such endeavors in accord with this section or in any circumstance where the disclosures will not serve the purposes of the effective enforcement of the Act.

4.13.c. The requirements of this subsection shall not be construed to limit the power of the Commission to conduct further investigations in preparation for a hearing or for other purposes in connection with its statutory duties while it is engaging in conciliation endeavors, nor shall they be construed to prohibit the use of evidence obtained through such investigations.

4.13.d. If the Commission or its executive director determines that either party or its agents, assigns, or successors has violated or is violating the terms of settlement and adjustment, the Commission or any party may initiate action in the circuit court of the county where the respondent resides or transacts business, as set forth in W. Va. Code §5-11-8(d)(5) or may take any action consistent with the Act which it deems appropriate.

4.13.e. In appropriate circumstances to be determined by the executive director or her/his designee, the Commission may exercise its statutory authority to conciliate a complaint without the approval or agreement of the

complainant. In such circumstances, the following guidelines shall apply:

4.13.e.1. If, after a reasonable investigation, the respondent and the Commission, but not the complainant, agree upon conciliation terms consistent with the requirements of the complaint, the Commission shall serve upon the complainant a copy of the proposed conciliation agreement. If the complainant now agrees to the terms of the agreement, or fails to object to such terms in writing within fifteen (15) days after its service upon her/him, the Commission shall issue an order embodying such conciliation agreement.

4.13.e.2. If complainant does file written objections, unless they are met or withdrawn within ten (10) days after service thereof, the Commission shall either end its conciliation efforts and notice the complaint for hearing or, upon a written finding by the Commission or its executive director that the terms of the proposed conciliation agreement are in the public interest and the specific reason(s) therefor, execute the agreement regardless of complainant's objections and notice the parties for hearing solely as to the merits of the complainant's objections to the agreement. The agreement may be executed on behalf of the Commission by its executive director or her/his designee.

4.13.e.3. Each conciliation agreement shall include provisions requiring the respondent to refrain from the commission of unlawful discriminatory practices in the future and shall contain such further provisions as may be agreed upon by the Commission and the respondent.

4.13.e.4. Not later than one year from the date of a conciliation agreement, the Commission shall investigate whether the respondent is complying with the terms of such agreement. Upon a findings of non-compliance, the Commission shall take appropriate action to assure compliance.

4.13.e.5. If, after a hearing regarding the merits of the complainant's objections to the conciliation agreement, the administrative law judge finds that the agreement, when compared to the merits of the complainant's underlying case, is arbitrary, capricious, an abuse of discretion or based upon incorrect assessments of fact or conclusions of law, the administrative law judge may void the agreement, in whole or in part, and schedule a public hearing on the complaint or that portion of the agreement which has been voided. Otherwise, the administrative law judge shall affirm the agreement and enter a final decision dismissing complainant's objections and adopting the agreement.

4.14. The following procedures shall apply whenever a complaint is dismissed, except when a complaint is dismissed by an administrative law judge or pursuant to a settlement reached by the parties or pursuant to a conciliation agreement between the Commission and the respondent, in which cases these procedures do not apply:

4.14.a. A complainant may apply to the Commission, through its compliance director or such other person as the executive director may designate, for an administrative review of the dismissal of her/his complaint. Requests for review shall be in writing, shall state specifically the grounds relied on, may contain new evidence not previously considered by the Commission and shall be filed at the Commission office within ten (10) days from the date of complainant's receipt of such copy.

4.14.b. The Commission shall forward a copy of the request for administrative review of a dismissal and any material in support thereof to the respondent, who may respond thereto within ten (10) days of receipt of such copy.

4.14.c. Within twenty (20) days after receipt by the Commission of the request for review, the matter will be referred to the Commission's attorney, or such other person as the executive director may designate, who will consider any new evidence and secure new information as may be necessary and appropriate. A review may be scheduled to be heard by the attorney or other designated person. If a meeting is granted, it shall be scheduled within forty (40) days after such referral.

4.14.d. The complainant and respondent shall be given at least ten (10) days' written notice of the time and place of the review hearing. The notice shall be given by personal delivery or by certified mail, return receipt requested, and shall advise the complainant that she/he must be present at the review hearing and may be accompanied by counsel.

4.14.e. If after having received proper notice, the complainant does not appear at the review hearing, the complainant shall be deemed to have waived all rights to administrative review unless it is shown to the satisfaction of the executive director or the chairperson that the failure to appear was due to circumstances beyond the complainant's control.

4.14.f. The review process shall be conducted as follows:

4.14.f.1. All decisions and actions growing out of or upon any such review shall be reserved for determination by the chairperson or the executive director.

4.14.f.2. The Commission's attorney or other designated person shall preside at the review and shall be provided with all information in the Commission file pertaining to the complaint under review. In the discretion of the presiding person, testimony taken at such review hearing may be transcribed or taken under oath or affirmation. The complainant shall have the burden of showing that the dismissal of the complaint is arbitrary, capricious, or not in accordance with law. The presiding person, after considering the evidence, shall file a report and recommendation with the executive director which shall recommend that the dismissal of the complaint be upheld, reversed, or modified or that the complaint be remanded for further investigation. The report shall be filed within fifteen (15) days after the review.

4.14.f.3. If, upon administrative review of a complaint dismissed upon a finding of no probable cause, it is determined that probable cause exists to credit the allegations of the complaint, a recommended finding of probable cause will be made and reported to the chairperson or executive director. The chairperson or executive director may reopen the case or may make such other disposition as she/he deems appropriate.

4.14.f.4. If, upon administrative review of a complaint dismissed upon a finding of no jurisdiction, it is determined that jurisdiction exists to investigate the complaint, a finding of jurisdiction shall be made and reported to the chairperson or executive director. Thereafter, upon agreement of the chairperson or executive director, the case will proceed as if it had not been dismissed.

4.14.f.5. If, upon administrative review of a complaint dismissed upon a finding of no probable cause, it is determined that probable cause does not exist to credit the allegations of the complaint, a recommended finding of no probable cause will be made and reported to the chairperson or executive director. If the executive director determines that the original finding of no probable cause should be upheld, the complaint shall be dismissed and the complainant and respondent shall be sent notice of such finding by certified mail, return receipt requested.

4.14.f.6. The determination of the Commission or executive director regarding an administrative review is not a determination on the merits of the case. Upon a finding of no probable cause, a dismissal order, accompanied by a "right to sue" letter, shall be provided to the complainant.

4.15. The Commission, in cooperation with the West Virginia State Bar and other organizations and individuals, has adopted the following procedure with regard to mediation of complaints alleging a violation of the Act:

4.15.a. Scope. These rules shall govern mediation of complaints filed with the West Virginia Human Rights Commission.

4.15.b. Mediation defined. Mediation is an informal, non-adversarial process whereby a neutral third person, the mediator, assists parties

to a dispute to resolve by agreement some or all of the differences between them. In mediation, decision-making authority remains with the parties; the mediator has no authority to render a judgment on any issue of the dispute. The role of the mediator is to encourage and assist the parties to reach their own mutually-acceptable settlement by facilitating communication, helping to clarify issues and interests, identifying what additional information should be collected or exchanged, fostering joint problem-solving, exploring settlement alternatives and other similar means. The procedures for mediation are extremely flexible, and may be tailored to fit the needs of the parties to the particular dispute.

4.15.c. Selection of cases for mediation. Pursuant to these rules, the executive director of the Commission may choose, or an administrative law judge may on his or her own motion, upon motion of any party, or by stipulation of the parties, refer a case to mediation. Upon entry of an order referring a case to mediation, the parties shall have fifteen (15) days within which to file a written objection, specifying the grounds. The administrative law judge shall promptly consider any such objection, and may modify his or her original order for good cause shown. A case ordered for mediation shall remain on the docket and hearing calendar.

4.15.d. Listing of mediators. The West Virginia State Bar shall maintain and make available to the administrative law judges, interested parties and the public, a listing of persons willing and qualified to serve as mediators before the West Virginia Human Rights Commission. The State Bar shall establish minimum qualifications for training and experience, application procedures and fees, and other appropriate requirements for persons interested in being listed. The listing shall identify those persons who are willing to serve as mediators on a volunteer basis (i.e., without compensation). The listing shall be open to all persons who meet the qualifications and complete the application required by the State Bar.

4.15.e. Selection of mediator. Within fifteen (15) days after entry of an order or stipulation referring a case to mediation, the parties, upon approval of the Commission, may choose their own mediator, who may or may not be a person listed on the State Bar listing. In the absence of such agreement, the administrative law judge shall designate the mediator from the State Bar listing, either by rotation or by some other neutral administrative procedure established by the Commission.

4.15.f. Compensation of mediator. If the parties by their own agreement choose a mediator who requires compensation, then the parties shall by written agreement determine how the mediator will be compensated. If the Commission designates the mediator, then it shall whenever possible select a mediator who is willing to serve without compensation. The Commission may reimburse a volunteer mediator for reasonable travel expenses. If a voluntary mediator is not available, then the administrative law judge shall inquire of the parties whether they are willing to pay the fees of a mediator. If so, then either the parties by stipulation or the Commission shall select the mediator, and the parties by written agreement shall determine how the mediator will be compensated.

4.15.g. Mediator disqualification. A mediator shall be subject to Canon 3 of the Code of Judicial Conduct regarding disqualification for partiality or conflict of interest. Any party may move the administrative law judge to disqualify a mediator for good cause. In the event a mediator is disqualified, the parties or the administrative law judge shall select a replacement in accordance with Rules 4.15.e. and 4.15.f.

4.15.h. Provision of preliminary information to the mediator. The administrative law judge may require the parties to provide pertinent information to the mediator prior to the first mediation session. Such information may include, but is not limited to: (1) copies of the pleadings, transcripts or other litigation-related documents or (2) a confidential statement summarizing a party's position on the issues, status of settlement discussions, and what relief would constitute an acceptable settlement.

4.15.i. Timeframes for conduct of mediation. Unless otherwise agreed by the parties and the mediator, or otherwise ordered by the administrative law judge, the first mediation session will be conducted within sixty (60) days after appointment of the mediator. Mediation shall be completed within forty-five (45) days after the first mediation session, unless extended by agreement of the parties and the mediator, or by order of the administrative law judge. The mediator is empowered to set the date and time of all mediation sessions, upon reasonable notice to the parties.

4.15.j. Appearances; sanctions. The following persons, if furnished reasonable notice, are required to appear at any mediation session scheduled by the mediator, unless excused by the mediator or the administrative law judge: (1) each party, or the party's representative, having full authority to settle without further consultation; (2) each party's counsel of record; and (3) a representative with settlement authority of the insurance carrier for any insured party. If a party, or its representative, counsel, or insurance carrier, fails to appear at a duly noticed mediation session without good cause, the Commission upon motion may impose sanctions including an award of reasonable mediator and attorney fees and other costs, against the responsible party.

4.15.k. Participation. No party may be compelled by these rules, the administrative law judge or the mediator to settle a case involuntarily or against the party's own judgment or interest. All parties involved in the mediation, however, and their respective representatives, counsel and insurance carriers, shall be prepared to negotiate openly and knowledgeably about the case in a mutual effort to reach a fair and reasonable settlement.

4.15.l. Confidentiality of mediation process. Mediation shall be regarded as confidential settlement negotiations, subject to Rule 408 of the West Virginia Rules of Evidence. A mediator shall maintain and preserve the confidentiality of all mediation proceedings and records. A mediator shall keep confidential from opposing parties information obtained in an individual session unless the party to that session or the party's counsel authorizes disclosure. A mediator may not be subpoenaed or called to testify or otherwise be subject to process requiring disclosure of confidential information in any proceeding relating to or arising out of the dispute mediated.

4.15.m. Immunity. A person acting as mediator under these rules shall have immunity in the same manner and to the same extent as a circuit court judge.

4.15.n. Enforceability of settlement agreement. If the parties reach a settlement and execute a written agreement, the agreement is enforceable in the same manner as any other written contract.

4.15.o. Report of mediator. Within ten (10) days after mediation is completed or terminated, the mediator shall report to the Commission the outcome of the mediation. With the consent of the parties, the mediator may identify any pending motions, discovery, or other issues which, if resolved, would facilitate the possibility of settlement.

4.15.p. Statistical information. The West Virginia Human Rights Commission shall determine the need and method for statistical reporting on disputes referred for mediation under these rules. The administrative law judges, mediators, parties and counsel shall cooperate with requests for information under this rule.

§77-2-5. Notice of Hearing; Continuances.

5.1. After a finding of probable cause to credit the allegations of the complaint, the Commission shall cause to be issued and served in the name of the Commission, a written notice of hearing, together with a copy of the verified complaint, as the same may have been amended. Service of said notice and complaint upon the respondent shall be in the manner provided by law for the service of summons in civil actions and shall be served at least thirty (30) days prior to the time set for the hearing. Service upon other parties shall be by personal delivery or certified

mail, return receipt requested.

5.2. Notice of the hearing shall be issued no later than the 76th day after docketing if probable cause has been determined, but in any event, a notice of hearing shall be issued no later than the 150th day after docketing.

5.3. The notice of hearing shall state the time and place of the hearing, inform the respondent that she/he must file a written, verified answer to the complaint and that a failure to answer may be deemed an admission of the allegations of the complaint.

5.4. The respondent and complainant shall be advised in writing of the right to appear at such hearing in person and be represented by an attorney. If an attorney has previously appeared in this action on behalf of a party, a copy of the notice of hearing and complaint, as the same may have been amended, shall be furnished to said attorney.

5.5. The notice of hearing shall contain a statement that the public hearing will be conducted by an administrative law judge whose name will be designated or will be subsequently designated by the Commission's chairperson or executive director. The executive director shall have the authority to appoint qualified attorneys as administrative law judges pro tempore to hear any and all matters that may be heard by an administrative law judge.

5.6. The following rules shall govern the granting or denial of a continuance once a date and time for a public hearing has been set:

5.6.a. The grant or denial of continuances lies within the sound discretion of the administrative law judge, balancing the inconvenience and unfairness to others and the public interest of the State of West Virginia against the asserted hardship to the requesting party should the continuance be denied.

5.6.b. For good cause shown, the administrative law judge may grant a continuance on the application of any party. If a continuance is granted, costs incurred on account of the continuance may be assessed against the party moving for the continuance at the discretion of the administrative law judge.

5.6.c. Motions for continuances shall be filed without delay with the administrative law judge after the grounds therefor become known to the party.

5.6.d. All such motions for continuance shall be in writing and must be supported by a showing of good cause why the request should be granted.

5.6.e. It is the responsibility of the party requesting a continuance to duly serve on all other parties the motion for continuance. Objections raised to the filing of such motion shall be submitted in writing to the administrative law judge within five (5) days of receipt of said motion for continuance.

5.6.f. Oral motions for continuance will only be allowed when the opposing party, or the agent for the opposing party, or the opposing party's attorney has been notified, and when the administrative law judge is satisfied that there is no time for a written motion and the lateness of the motion was not caused by undue delay or lack of diligence by the moving party. If the motion for continuance is oral, the resistance may be oral, but the administrative law judge shall make and submit a written memorandum reflecting the event.

5.6.g. Written notice of the grant or denial of a continuance request shall be provided to all parties by the administrative law judge.

5.6.h. Within five (5) days of the notice of a grant of continuance, the administrative law judge will cause to be served on all parties an order setting forth the alternative date for said hearing to convene.

5.7. Copies of all pleadings and papers filed in connection with a public hearing shall be served on all parties, and/or their attorneys, and the administrative law judge by the party filing

such pleadings or papers.

§77-2-6. Answer.

6.1. The respondent against whom a verified complaint, as the same may have been amended, is filed and upon whom a notice of hearing and a copy of such complaint has been served, shall file a written, verified answer within ten (10) days from the service of such complaint and notice of hearing. Upon application in writing made to the administrative law judge prior to the end of said ten-day period, the administrative law judge may, for good cause shown, extend the time in which the answer shall be filed. This answer is in addition to the reply required to be filed by Rule 4.2.

6.2. The filing shall be made by personal delivery or by certified mail, return receipt requested, to the administrative law judge, and by personal delivery or first class mail to all parties.

6.3. The answer shall be in the following form:

6.3.a. The answer shall be in writing, the original being signed and verified by the respondent or respondent's attorney. The answer shall contain the post office address of the respondent and, if represented by an attorney, the name, mailing address, and telephone number of said attorney.

6.3.b. The answer shall contain a general or specific denial of each and every allegation of the complaint controverted by the respondent or a denial of any knowledge or information thereof sufficient to form a belief as to the truth or falsity, and a statement of any matter constituting a defense.

6.3.c. Any allegation in the complaint which is not denied or admitted in the answer, unless the respondent shall state in the answer that it is without knowledge or information sufficient to form a belief, may be, in the discretion of the administrative law judge, deemed admitted.

6.3.d. Any allegation of new matter contained in the answer shall be deemed denied by the complainant without the necessity of a reply being filed, unless otherwise ordered by the administrative law judge.

6.4. The answer or any part thereof may be amended at the discretion of the administrative law judge on motion duly made.

6.5. In any case where a complaint has been amended, the respondent shall have the opportunity to amend its answer within such period as may be fixed by the administrative law judge.

6.6. The administrative law judge may proceed to hold a hearing and may make findings of fact and enter an appropriate order upon the testimony taken at the hearing, notwithstanding any failure of the respondent to appear or to file an answer within the time provided herein.

§77-2-7. Hearings: Administrative Law Judge; Appearances; Subpoenas; Discovery; and Procedure.

7.1. All hearings shall be open to the public except in extraordinary circumstances when the administrative law judge determines, with the consent of the parties, that substantial justice would not be effectuated thereby.

7.2. Hearings shall be held in the county where the respondent resides or transacts business, or, when agreed to by the parties, where the acts complained of occurred or any other mutually agreeable place. The place of the hearing will be designated by the administrative law judge.

7.3. In the discretion of the administrative law judge two or more proceedings against the same respondent arising out of the same set of circumstances, or two or more proceedings by the same complainant against two or more respondents arising out of the same set of circumstances, may be consolidated for the purpose of hearing.

7.4. A qualified administrative law judge

designated by the chairperson or the executive director shall preside over the hearing.

7.4.a. The conduct of the administrative law judge shall, where applicable, be guided by the Judicial Code of Ethics.

7.4.b. Any party may file with the administrative law judge a motion, made in good faith, alleging that the administrative law judge should not be allowed to hear the case. The motion shall be determined by the administrative law judge prior to the taking of other evidence. If the motion is denied by the administrative law judge, the moving party may file an appeal within ten (10) days after receipt of such written denial to the executive director, whose decision to affirm, reverse or modify the decision of the administrative law judge shall be final. If the motion is granted by the administrative law judge, any party may appeal to the executive director who may affirm, reverse or modify the decision of the administrative law judge. The decision of the executive director shall be final.

7.5. The complainant shall be present at the hearing unless excused by the administrative law judge because of extraordinary circumstances, provided, that if the respondent shows that the complainant's absence will cause undue hardship to the presentation of its case, the respondent shall be entitled to a continuance.

7.5.a. In the event that complainant fails to appear and has not been excused, the administrative law judge may proceed with the hearing and take evidence or the administrative law judge may take any other action, including but not limited to, dismissing the complaint without the taking of testimony.

7.6. The respondent may appear at the hearing with or without counsel. Failure of a respondent to appear shall not prevent presentation of the case or the entering of a final decision.

7.7. The case in support of the complaint shall be presented by the Commission's attorney or agent. In cases in which the complainant is represented by private counsel, and with the consent of the chairperson or the executive director or their designee, and after a determination that the Commission has no independent interest in the matter, the case in support of the complaint shall be presented solely by the complainant's attorney and the Commission shall not itself be represented by counsel at the hearing.

7.8. Any person not initially joined in the proceeding shall be permitted to timely petition the administrative law judge for intervention by counsel upon the filing of a motion and notice to the parties, which shall set forth the grounds for said intervention. The administrative law judge shall rule upon the motion and set forth in an order such matters as may be required.

7.9. All attorneys intending to appear at a Commission proceeding shall file a notice of appearance with the administrative law judge. The filing of an answer executed or prepared by an attorney shall constitute a notice of appearance. An attorney at law who appears for a party to the proceeding at any stage therein shall be deemed to remain that party's attorney throughout the proceeding until:

7.9.a. The party represented files with the administrative law judge a written revocation of the attorney's authority; or

7.9.b. The attorney files with the administrative law judge a written statement of her/his withdrawal from the case; or

7.9.c. The administrative law judge receives notice of the attorney's death or disqualification.

7.10. Service of any document or paper (except subpoenas, subpoenas duces tecum, final decisions, final orders) on an attorney for a party shall be deemed service on the party she/he represents.

7.11. All motions other than those made during a hearing shall be in writing and shall state briefly the order or relief applied for and the

grounds for such motion. Any such motion shall be filed with the administrative law judge. A copy of the motion shall be served at the same time upon the Commission's attorney and other parties to the hearing. A response, if any, shall be filed in writing with the administrative law judge, within five (5) days after service of the motion and a copy thereof shall be served within the same period upon the Commission's attorney and other parties to the hearing. Such motions shall be decided by the administrative law judge, without oral argument thereon, unless the administrative law judge, as appropriate, shall determine to hear oral argument, in which case the parties shall be notified of such fact and of the time and place for such oral argument. In the discretion of the administrative law judge, oral argument on a motion may be heard by telephone.

7.12. Subject to the pertinent provisions of the Act, the Commission may issue subpoenas and subpoenas duces tecum either at its own instance or upon written application of a party to the administrative law judge whenever necessary to compel the attendance of witnesses and the introduction of books, records, correspondence, documents, papers or any other evidence which relates to any matter before the Commission.

7.12.a. Where a subpoena is issued at the instance of a party to the hearing, the cost of service, witness and mileage fees shall be borne by the party at whose request the subpoena is issued. Where the subpoena is issued at the instance of the Commission, the cost of such service shall be borne by the Commission. Such witness and mileage fees shall be the same as are paid witnesses in the courts of this state. All requests by parties for subpoenas and subpoenas duces tecum shall contain a statement acknowledging that the requesting party agrees to pay such fees.

7.12.b. Subpoenas and subpoenas duces tecum shall be enforced as provided in W. Va. Code §29A-5-1(b).

7.13. Subject to the provisions of these regulations, the administrative law judge shall have full authority and discretion to control the procedure of the hearing, to admit or exclude testimony or other evidence, and to rule upon all motions and objections. The administrative law judge may inquire of any witness presented by any party. After notice of the hearing is issued and subject to the provisions of the Act, the administrative law judge, may issue subpoenas duces tecum in furtherance of her/his duties and responsibilities.

7.13.a. On any question which would be determinative of the jurisdiction of the Commission, or might otherwise result in the dismissal of the complaint, the administrative law judge may issue a final decision on the merits accompanied by findings of fact and conclusions of law, either before or after the taking of testimony.

7.13.b. The administrative law judge may continue a hearing from day to day or adjourn it to a later date or to a different place by announcement thereof at the hearing or by appropriate notice to all parties.

7.13.c. Motions made during a hearing and objections with respect to the conduct of a hearing, including objections to the introduction of evidence, shall be stated orally and shall, along with the ruling of the administrative law judge, be included in the transcript of the hearing.

7.14. Subsequent to the issuance and service of notice of public hearing upon a respondent, the parties may employ the pre-hearing discovery measures set forth throughout Rule 7 of these Rules and Regulations, in addition to oral interviews and informal requests for documents or other materials and information.

7.14.a. Discovery shall commence upon notice of hearing and extend over such time as determined by the administrative law judge.

7.14.b. The staff of the Commission shall not be examined either by interrogatory or deposition except when leave to undertake such examination is granted by the administrative law judge upon motion alleging that:

7.14.b.1. The staff person has direct personal knowledge of evidence relevant to the proceeding other than evidence gathered as a result of investigation;

7.14.b.2. For other reasons, which shall be set forth with particularity, justice requires that the petition be granted; or

7.14.b.3. Discovery has revealed that the staff person will be called as a witness.

7.14.c. Information which is exempt from discovery includes but is not limited to:

7.14.c.1. Any record, report, memorandum, or communication dealing with the internal practice, policy and procedure of the Commission.

7.14.c.2. Any record, report, memorandum, or communication of staff or any staff meeting regarding the institution, progress or result of an investigation of a complaint or regarding matters prepared in anticipation of a hearing.

7.14.c.3. Any record, report, memorandum, or communication regarding any endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation or persuasion.

7.14.c.4. The work product of an investigator or other staff member made in the course of an investigation of a complaint or in anticipation of or in preparation for a hearing on the complaint, or any report, record, memorandum, or communication made by staff during the investigation of a complaint or in anticipation of or in preparation for a hearing on the complaint which is otherwise privileged.

7.14.c.5. Any memorandum, statement or mental impression prepared or obtained by the Commission's attorney.

7.14.c.6. The identity of confidential informants and sources, unless they are to be used as witnesses.

7.15. In any action, the administrative law judge may direct the parties or the attorneys for the parties and the Commission to appear before her/him for a conference to consider, or to submit by a pre-hearing memorandum, the following:

7.15.a. Stipulations of uncontested facts, which shall be deemed to be proven facts for purposes of the hearing record.

7.15.b. The necessity or desirability of amendments to the pleadings.

7.15.c. A list of all exhibits each party is going to offer into evidence at trial, including any objections to be raised by the opposing party, or stipulations regarding admissibility or authenticity.

7.15.d. A list of all witnesses who shall be called by any party. If such witness shall be called as an expert, the party to call such expert shall briefly describe the topic which the expert's testimony shall address.

7.15.e. Such other matters as may aid in the disposition of the action.

7.15.f. Should any party fail to comply with the pre-hearing memorandum requirement, the administrative law judge, on motion or sue sponte, may file a recommendation of dismissal or default or other appropriate order imposing sanctions as justice may require, including those delineated in rule 7.27.

7.15.g. The administrative law judge shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by stipulations or agreements of counsel. After said order has been examined by counsel and entered, it controls the subsequent course of the action, unless modified at the hearing to prevent manifest injustice. The administrative law judge may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided. Objections to the prehearing order may

be noted on the record for appeal purposes.

7.16. Parties may obtain discovery from one or more of the following methods:

7.16.a. Depositions may be obtained only by motion served upon the parties and by order of the administrative law judge.

7.16.b. Written interrogatories may be used but are limited to a total of forty (40) questions to be answered by any person, party, agent, or witness to whom the interrogatories are propounded. This numerical limitation of questions applies whether or not the questions appear in sets, subsets, sections, or otherwise.

7.16.c. Requests to produce documents or things or permission to enter upon land or other property, for inspection and other purposes. Unless the administrative law judge orders otherwise, the frequency of use of this method is not limited, provided, however, in those cases in which a party is proceeding pro se the party requesting the discovery shall file a written motion with the administrative law judge requesting leave to perfect the same. The administrative law judge shall review said motion and issue an order either denying the request or providing the conditions by which the discovery shall be conducted.

7.17. Unless otherwise limited by order of the administrative law judge in accordance with these rules, the scope of discovery is as follows:

7.17.a. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not a ground for objection that the information sought will be inadmissible if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

7.17.b. Subject to the provisions of subsection 7.17.c. of this rule, a party may obtain discovery of documents and tangible things otherwise not discoverable under subsection 7.17.a. of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that she/he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the administrative law judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

7.17.c. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection 7.17.1. of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

7.17.c.1. A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

7.17.c.2. Upon motion, the administrative law judge may order further discovery by other means, subject to such restrictions as the administrative law judge may deem appropriate.

7.18. Protective orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the administrative law judge may make such order as justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following measures:

7.18.a. That the discovery not be had;

7.18.b. That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

7.18.c. That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

7.18.d. That certain matters may not be inquired into, or that the scope of the discovery be limited to certain matters;

7.18.e. That discovery be conducted with no one present except persons designated by the administrative law judge;

7.18.f. That a deposition after being sealed be opened only by order of the administrative law judge or Commission;

7.18.g. That a trade secret or other confidential research development, or commercial information not be disclosed or be disclosed only in a designated way;

7.18.h. That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the administrative law judge;

7.18.i. If the motion for a protective order is denied, in whole or in part, the administrative law judge may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 7.27.d. apply to the award of expenses incurred in relation to a motion for a protective order.

7.19. Unless the administrative law judge upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

7.20. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement such response to include information thereafter acquired, except as follows:

7.20.a. A party is under a duty seasonably to supplement a response with respect to any question directly addressed to the identity and location of persons having knowledge of discoverable matters, or the identity of each person expected to be called as an expert witness at trial, the subject matter on which she/he is expected to testify, and the substance of her/his testimony.

7.20.b. A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which she/he knows that the response was incorrect when made, or she/he knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

7.20.c. A duty to supplement responses may be imposed by order of the administrative law judge, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

7.21. The parties may by written stipulation filed with the administrative law judge:

7.21.a. Provide that depositions may be taken before any persons, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

7.21.b. Modify the procedures provided by these rules for other methods of discovery.

7.22. Depositions of any person may be requested upon motion by any party and the administrative law judge by order may establish the circumstances under which the depositions are to be taken. This rule does not prevent the administrative law judge from refusing to allow the taking of any deposition or in any way limit the administrative law judge's discretion as

provided in these rules.

7.23. Physical and mental examinations for discovery purposes will be allowed only for good cause shown upon motion to the administrative law judge and only when medical testimony is to be substantially relied upon in the action. In those circumstances, the administrative law judge may order the examination of any person, the cost of which, including reasonable travel expenses, loss of wages, etc., shall be borne by the requesting party. Under certain circumstances the requesting party may also be required to pay the expenses of a necessary traveling companion and the examined party's attorney and/or physician.

7.24. The administrative law judge shall take notice of the Commission's Rules Governing Discrimination Against the Handicapped and all other pertinent rules duly promulgated by the Commission.

7.25. Subject to the limitations and proviso of Rule 7.16.b. any party or the Commission may serve upon any other party, their attorney or agent, written interrogatories to be answered by the party designated or, if the party designated is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party.

7.25.a. Each interrogatory shall be answered separately and fully in writing, under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections, if any, within twenty (20) days after service of the interrogatories. Upon motion, the administrative law judge may allow a shorter or longer time or expand the number of questions limited by Rule 7.16.b. The party submitting the interrogatories may move for an order under Rule 7.27. with respect to any objection to or other failure to answer an interrogatory.

7.25.b. Interrogatories may relate to any matters which can be inquired into under rule 7.17., and the answers may be used to the extent permitted by the Rules of Evidence as set forth in Rule 7.30.

7.25.c. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the administrative law judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

7.26. Any party, subject to the proviso of Rule 7.16., may serve on any other party a request to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the responding party through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 7.17. and which are in the possession, custody, or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property of any designated object or operation thereon, within the scope of Rule 7.17.

7.26.a. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

7.26.b. The party upon whom the request is served shall serve a written response within twenty (20) days after service of the request. The administrative law judge may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and

related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 7.27. with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

7.26.c. This rule does not preclude an independent request directed to a person not a party for production of documents and things and permission to enter upon land.

7.27. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

7.27.a. A motion for an order to compel discovery shall be made to the administrative law judge. The administrative law judge may set the motion for hearing or rule upon the motion without a hearing.

7.27.b. If a party fails to answer an interrogatory submitted under Rule 7.25., or if a party, in response to a request for production or inspection submitted under Rule 7.26. fails to respond or to permit inspection or production as requested, the discovering party may move for an order compelling an answer, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order as set forth in this rule. If the administrative law judge denies the motion in whole or in part, she/he may make such protective order as she/he would have been empowered to make on a motion made pursuant to Rule 7.18.

7.27.c. For purposes of this subsection an evasive or incomplete answer is to be treated as a failure to answer.

7.27.d. If the motion to compel is granted the administrative law judge may, after opportunity for hearing, require as part of his or her final decision that the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the administrative law judge finds that the opposition to the motion was reasonably justified or that other circumstances make an award of expenses unjust. If the motion is denied, the administrative law judge may, after opportunity for hearing, require as part of his or her final decision that the moving party or the attorney advising such conduct or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the administrative law judge finds that the making of the motion was reasonable or that other circumstances make the award of expenses unjust. If the motion is granted in part and denied in part, the administrative law judge may recommend apportioning the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

7.27.e. If a party or an officer, director, or managing agent of a party or a person designated to testify on behalf of a party fails to obey an order to provide or permit discovery, the administrative law judge may make such orders in regard to the failure as are just, and among others, the following:

7.27.e.1. An order that the matters regarding which the order was made, or any other designated facts, shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

7.27.e.2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence.

7.27.e.3. An order striking pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action

or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

7.27.e.4. In lieu of any of the foregoing orders, or in addition thereto, an order treating as a contempt of the Commission the failure to obey any orders.

7.27.e.5. In lieu of any of the foregoing orders, or in addition thereto, the administrative law judge may require as part of his or her final decision that the party and/or attorney failing to obey these rules pay the reasonable expenses, including attorney's fees, caused by the failure, unless the administrative law judge finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

7.28. If a party or an officer, director, or managing agent of a party or a person designated to testify on behalf of a party fails:

7.28.a. To appear before the officer who is to take his deposition, after being served with proper notice, and order, or

7.28.b. To serve answers or objections to interrogatories submitted under Rule 7.25., after proper service of the interrogatories, or

7.28.c. To serve a written response to a request for production or inspection submitted under Rule 7.26., after proper service of the request, Rule 7.28.d., then the administrative law judge, on motion, may make such orders in regard to the failure as are just. In lieu of any order or in addition thereto, the administrative law judge may require as part of her/his final decision that the party failing to act or the attorney advising him or both pay the reasonable expenses, including attorney's fees, caused by the failure, unless the administrative law judge finds that the failure was reasonable or that other circumstances make an award of expenses unjust. The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 7.18.

7.29. Upon notice to the parties and the Commission, clerical mistakes and inadvertence in orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the administrative law judge, or the Commission at any time on its own initiative, or on the motion of any party and, after such notice, if any, as the administrative law judge or the Commission orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the court, and thereafter while the appeal is pending may be so corrected with leave of the court.

7.30. The established Rules of Evidence shall apply, as modified by W. Va. Code § 29A-5-2, except when contrary to the Act or these rules.

7.31. Evidentiary depositions may be taken upon a motion and order as provided in Rule 7.21. The extent of use shall be determined by the administrative law judge.

7.32. When issues not raised in the complaint, as amended, or answer, as amended, are heard by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence may be made upon motion of any party at any time, even after a final decision; but failure to so amend shall not affect the adjudication of the hearing of these issues. If evidence is objected to at the hearing on the ground that it is not within the issued raised by the pleadings, the administrative law judge may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to show that admission of such evidence would prejudice her/him in maintaining a defense on the merits. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

7.33. The administrative law judge may exclude from the hearing room or from further participation in the preceding any person who engages in improper conduct, including a party to the proceeding, attorney of record, a witness

engaged in testifying, or an observer.

7.34. Television, newsreel, motion picture, still or other cameras may be operated in the hearing room while the public hearing is in progress only with the permission of the administrative law judge. Mechanical recording devices other than those provided by the Commission or at its direction may be operated in the hearing room during the course of the hearing only with the permission of the administrative law judge.

7.35. The Commission shall cause the hearing to be recorded by a reporter or by an electronic recording device. If an electronic recording device is used, the parties shall be given the opportunity to provide a reporter at their own expense, however, the reporter's transcript, if one is made, will not be considered the official record of the hearing. At the request of the parties, copies of the official hearing transcript will be furnished to the parties upon their payment, in advance, of the reasonable costs thereof to the Commission, provided that a copy of the transcript shall be forwarded to the Commission's attorney without charge.

7.36. At any time after a hearing has closed, but prior to rendering a decision, the administrative law judge upon her/his own motion or upon motion by any party, may reopen the hearing for good cause to receive further evidence or argument. Should the administrative law judge reopen the hearing, notice shall promptly be given to all the parties as to the time and place further proceedings will occur.

7.37. The administrative law judge may permit the parties or their attorneys to present oral arguments at the hearing and may require briefs to be filed within such time limit as the administrative law judge shall determine. Oral argument shall not be included in the transcript of testimony unless the administrative law judge so directs.

7.37.a. At the close of the hearing the administrative law judge may order or may permit the parties to submit a recommended decision to the administrative law judge within a time to be specified by the administrative law judge. A recommended decision shall include suggested findings of fact, conclusions of law and arguments in support thereof, along with the final decision by the administrative law judge which the party desires.

7.37.b. During the time period specified by the administrative law judge for submission of the parties' recommended decision as set forth above, the parties shall be permitted to file by affidavit an itemized statement of reasonable attorney fees and costs, clearly setting forth the hourly rate and total amount, and any argument in support thereof. A party shall be given fifteen (15) days during which to file exceptions to the attorney(s) fee affidavit filed by any other party or as recommended by the administrative law judge.

§77-2-8. The Record.

8.1. The record of the proceedings before the Commission shall consist of the complaint and amended complaint, if any, answer, notices of hearing, written applications, stipulations, motions, orders, transcript or recording of the record of the hearing, exhibits, depositions, briefs, any recommended decision, the final decision of the administrative law judge, and the final order the Commission.

§77-2-9. Final Decision of the Administrative Law Judge.

9.1. Within one year of the filing of the complaint, the administrative law judge shall issue a final decision on the merits which shall contain all findings of fact and conclusions of law necessary to support the decision, and, in the administrative law judge's discretion, an opinion containing the reasons for the decision.

9.2. If upon all the testimony, evidence and record of the hearing the administrative law judge shall find that the respondent has engaged in or is engaging in any unlawful discriminatory practice as defined by the Act, the administrative law judge shall issue an order requiring such respondent to cease and desist from such unlawful

discriminatory practice and to take such affirmative action as will effectuate the purpose of the Act, and to report from time to time on the manner and extent of compliance with the final decision and which shall include an award reimbursing complainant for out-of-pocket losses.

9.3. In addition to the remedies outlined in Rule 9.2. above, the administrative law judge may:

9.3.a. Assess against a respondent an award of backpay to the victim or victims of discrimination pursuant to W. Va. Code §5-11-10. For cases involving discriminatory acts which occurred after the effective date of the Human Rights Act, July 1, 1967, the period for which backpay may be awarded shall commence with the date of the discriminatory act and end when such backpay is actually tendered by the respondent. For cases involving discriminatory acts which occurred before the effective date of the West Virginia Human Rights Act, the effects of such discriminatory acts continuing to a time after the effective date of the Human Rights Act, the period for which backpay may be awarded may commence with the effective date of the Human Rights Act, July 1, 1967, and end when such backpay is actually tendered by the respondent. Interest may also be included in such award of backpay as the administrative law judge may determine.

9.3.b. Award to complainant incidental damages up to $2,950.00, or such amount as may be adjusted from time to time by the Commission in accord with the standard established in ***Bishop Coal Co. v. Salyers***, 380 S.E.2d 238 (W. Va. 1989).

9.3.c. Award such other equitable relief as will make the complainant whole, including, but not limited to, an award of attorney's fees and costs.

9.3.d. If upon all the testimony, evidence and record of the hearing the administrative law judge shall find that the respondent has not engaged in any unlawful discriminatory practice as defined in the Act, the administrative law judge shall issue a decision dismissing the complaint as to such respondent.

9.4. Reserved

9.5. Copies of the administrative law judge's final decision shall be served by certified mail, return receipt requested, on the complainant, the respondent, all intervenors, and counsel of record, and by personal delivery or first class mail on the Commission's attorney and all other persons, offices or agencies deemed appropriate by the administrative law judge or the Commission.

9.6. All final decisions rendered by an administrative law judge shall be filed at the central office of the Commission and shall be open to public inspection during regular office hours of the Commission.

§77-2-10. Appeal to the Commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the Commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the administrative law judge the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the Commission from the administrative law judge shall not operate as a stay of the decision of the administrative law judge unless a stay is specifically requested by the appellant in a separate application for the same and approved by the Commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of

appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the Commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before an administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the Commission, neither the parties nor their counsel may appear before the Commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before an administrative law judge, the Commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the administrative law judge on remand.

10.8. In considering a notice of appeal, the Commission shall limit its review to whether the administrative law judge's decision is:

10.8.a. In conformity with the Constitution and laws of the state and the United States;

10.8.b. Within the Commission's statutory jurisdiction or authority;

10.8.c. Made in accordance with procedures required by law or established by appropriate rules or regulations of the Commission;

10.8.d. Supported by substantial evidence on the whole record; or

10.8.e. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from an administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the Commission shall issue a final order affirming the administrative law judge's final decision; provided, that the Commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the Commission. The final order of the Commission shall be served in accordance with Rule 9.5.

§77-2-11. Judicial Appeal.

11.1. Judicial review of a final order of the Commission may be obtained by the complainant, respondent or other person aggrieved by such order.

11.2. A party who seeks judicial review must file his/her appeal within thirty (30) days after receipt of the final order of the Commission.

11.3. For purposes of judicial appeal, the decision of the Commission affirming, modifying or setting aside the final decision of the administrative law judge shall constitute the final order of the Commission.

§77-2-12. General Investigations.

12.1. The Commission may, at its discretion and in accord with the power conferred upon it by the Act, conduct such general investigations and hearings into problems of discrimination as it deems necessary or desirable and may study and report upon the problems of the effect of discrimination on any field of human relationships.

12.2. In pursuing its functions authorized by the Act and by this section, the Commission may exercise its full powers of discovery as set forth in the Act and in these regulations.

§77-2-13. Declaratory Rulings and Guidelines.

13.1. Petitions for declaratory rulings filed with the Commission pursuant to W. Va. Code §29A-4-1 shall contain the following:

13.1.a. A statement of the question on which the declaratory ruling is sought.

13.1.b. A full statement of the facts giving rise to the question.

13.1.c. A statement of the basis for the petitioner's interest in the question.

13.1.d. Any legal argument which petitioner wishes to submit.

13.2. In order to determine the full facts giving rise to the question the Commission may require the petitioner to submit additional information, and it may make an independent investigation.

13.3. When the Commission is satisfied that it understands the question on which the declaratory ruling has been sought, it shall:

13.3.a. Issue a nonbinding declaratory ruling; or

13.3.b. Notify the petitioner that no declaratory ruling will be issued; or

13.3.c. Set a time and place for hearing argument on the question, notify the petitioner and other interested parties of the same, and issue either a binding or nonbinding declaratory ruling after the hearing, or decide that no declaratory ruling will be issued.

13.4. In order to educate the public and insure compliance with the Human Rights Act, the Commission may from time to time promulgate guidelines for various areas of employment, housing, and public accommodations as are covered by the West Virginia Human Rights Act. Such guidelines shall be administered by the Commission staff and shall become a part of these rules and regulations by reference when adopted by the Commission. All guidelines in existence at the time of the adoptions of these rules and regulations shall also be incorporated by reference.

§77-2-14. Certification.

14.1. The chairperson, executive director, or such other person as may be designated or authorized by the Commission are authorized to certify all documents or records which are part of the files and records of the Commission.

§77-2-15. Public Information.

15.1. The documents listed below shall be available for inspection upon request. Duplication of materials available for inspection shall be subject to whatever charges the Commission may require for copying. Upon a showing of economic hardship, the Commission may waive or reduce normal fees for the copying of documents within its control or possession. The documents available are as follows:

15.1.a. Complaint

15.1.b. Answer

15.1.c. Consent Order

15.1.d. Determinations and final dispositions of the Commission, any pleadings, briefs, subpoenas, answers, motions, responses, and orders filed or issued

15.1.e. Notice of public hearing

15.1.f. Transcript, exhibits and other evidence of record or of the hearing

15.1.g. Decisions issued by the administrative law judge or Commission after public hearing

15.1.h. Notice of appeal from decision issued by the administrative law judge or the Commission

15.2. The following materials shall not constitute public information:

15.2.a. Interrogatories and answers of respondent

15.2.b. Those materials set forth in Rule 7.14.b.

15.3. Notwithstanding the provisions of Rule 7.14.b., materials cited therein may be made available by order of the executive director or administrative law judge as provided below:

15.3.a. To counsel retained by the Commission or by complainant, for the purpose of conciliation, enforcement of a consent order or predetermination settlement, or presentation of the cases at public hearing.

15.3.b. To the complainant or to counsel retained by the complainant for the purpose of determining whether the case shall be removed to another forum pursuant to W. Va. Code § 5-11-13.

15.3.c. To local, state or federal agencies having concurrent jurisdiction over the case.

15.3.d. In response to an order of any court having competent jurisdiction.