

This is an amendment to 9.1.1 NMAC Sections 7, 8, 9, 10, 11, 13, 14, 15, 16 and 17 to be effective 10/10/2023.

9.1.1.7 **DEFINITIONS:** As used in these rules incorporates the definitions of 28-1-2 NMSA 1978 and:

A. **“Act or Acts”** means the Human Rights Act, Sections 28-1-1 to 28-1-7, 28-1-9 to 28-1-14 NMSA 1978, The Criminal Offender Employment Act, 28-2-[3] 1 to 28-2-6 NMSA 1978, The Fair Pay for Women Act [and] 28-23-1 to 28-23-6, 50-16-1 to 50-16-4 NMSA 1978, The Lynn and Erin Compassionate Use Act, 26-2B-9 NMSA 1978 and all subsequent amendments and provisions.

B. **“Applicant for employment”** means a person applying or attempting to apply for a position as an employee.

C. **“Bureau”** means the human rights bureau of the labor relations division of the New Mexico department of workforce solutions.

D. **“Chairperson”** and **“vice chairperson”**:

(1) **“Chairperson”** means a member of the commission designated by the governor to serve as chair.

(2) **“Vice chairperson”** means a member of the commission designated by the commission to preside in the absence or incapacity of the chairperson.

E. **“Commission”** means the New Mexico human rights commission.

F. **“Commissioner”** means one of the members appointed by the governor to serve on the New Mexico human rights commission.

G. **“Complainant”** or **“claimant”** means any person who claims to be aggrieved by an unlawful discriminatory practice and who has filed a complaint with the human rights bureau within 300 calendar days after the alleged unlawful discriminatory act was committed.

H. **“Complaint”** or **“charge”** means a charge of discrimination signed by the complainant on a human rights bureau charge of discrimination form, on an equal employment opportunity commission (EEOC) form 5 or on such other form as may be deemed acceptable to the human rights bureau.

I. **“Determination”** means a formal decision made by the division director, relating to a complaint filed with the human rights bureau of the labor relations division of the New Mexico department of workforce solutions.

J. **“Disabled person”** means any person who has a physical or mental disability as defined in these rules as “physical or mental disability” [~~and “physical or mental handicap”~~] as used in [~~Subsection M~~] Subsection O of Section 28-1-2 NMSA 1978, as amended.

K. **“Division”** means the labor relations division of the New Mexico department of workforce solutions.

L. **“Director”** means the director of the human rights bureau of the labor relations division, or other bureau leadership designated by the director to carry out the mission of the bureau.

M. **“Good cause”** means a substantial reason, one that affords a legal excuse, or a legally sufficient ground or reason. The bureau may consider any relevant factors to determine if good cause exists.

N. **“Hearing clerk”** means the person designated by the bureau to maintain the official record of the hearing proceedings.

O. **“Hearing officer”** means the person conducting a hearing of a matter brought before the bureau; a hearing officer may be:

(1) a member of the commission designated by the chairperson to act as the hearing officer; [ø]

(2) a hearing officer employed by the human rights bureau of the New Mexico department of workforce solutions. The hearing officer may also be referred to as an Administrative Law Judge (ALJ); or

(3) an employee of the labor relations division or workforce solutions department designated by the director to act as the hearing officer.

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

Q. “Major life activities” means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working, as provided in ~~Subsection N~~ Subsection P of Section 28-1-2 NMSA 1978, as amended, or as currently defined by regulations governing interpretation of the Americans with Disabilities Act of 1990, as amended.

~~[R. “Person” means one or more individuals, a partnership, association, organization, corporation, joint venture, legal representative, trustees, receivers or the state and all of its political subdivisions.]~~

~~[S.]~~ **R. “Physical or mental ~~handicap~~ or “physical or mental disability”** means a physical or mental impairment that substantially limits one or more of an individual’s major life activities.

(1) An individual is also considered to be physically or mentally disabled, if the individual:

- (a) has a record of a physical or mental disability; or
- (b) is regarded as having a physical or mental disability.

(2) **“Has a record of such a disability”** means has a history or recorded classification of having a mental or physical impairment that substantially limits one or more major life activities.

(3) **“Is regarded as having a disability”** means:

- (a) having a physical or mental impairment that does not substantially limit major life activities, but being treated by a respondent as having such a limitation;
- (b) having a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairments; or
- (c) having none of the impairments described above, but being treated by a respondent as having such an impairment.

~~[T.]~~ **S. “Physical or mental impairment”** is defined to include, but is not limited to, any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; endocrine; or any mental or psychological disorder, such as development disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

~~[U.]~~ **T. “Probable cause” and “no probable cause”:**

(1) **“Probable cause”** means that the allegations in the complaint are supported by evidence providing reasonable grounds to believe an unlawful discriminatory practice occurred, pursuant to the act.

(2) **“No probable cause”** means that the allegations in the complaint are not supported by evidence providing reasonable grounds to believe an unlawful discriminatory practice occurred, pursuant to the act.

~~[V.]~~ **U. “Protected groups”** for complaint purposes are all of the groups identified under the Acts as defined in Subsection A of this section. ~~[by the bases provided in Section 28-1-7 NMSA 1978, as amended.]~~

~~[W.]~~ **V. “Qualified disabled person with respect to employment”** means a disabled person who, with reasonable accommodation, can perform the essential functions of the job in question and shall not, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in employment under any program or activity.

~~[X.]~~ **W. “Qualified disabled person with respect to housing, accommodation, credit and acquisition or maintenance of particular real property”** means a disabled person whose disability does not limit that person’s ability to fulfill the obligations of occupancy, tenancy, ownership or credit responsibilities.

~~[Y.]~~ **X. “Reasonable accommodation”** means, for employment purposes, such modifications or adaptations of the work environment, work schedule, work rules or job responsibilities, and reached through good faith efforts to explore less restrictive or less expensive alternatives ~~[of a disabled person as are necessary]~~ to enable ~~[him or her]~~ an employee to perform the essential functions of the job ~~[in question]~~ and which do not impose an undue hardship on the employer.

~~[Z.]~~ **Y. “Respondent”** means the person, company, union, association, organization, agency or any other enterprise named in a complaint as having allegedly engaged in an unlawful discriminatory practice.

~~[AA.]~~ **Z. “Serious medical condition”** means a serious health-related impairment other than a disability, which substantially limits one or more of an individual’s major life activities, as “major life activities” is defined within these rules, and which is verifiable by medical diagnosis.

- (1) An individual is also considered to have a serious medical condition, if that individual:
 - (a) has a record of a serious health-related impairment; or
 - (b) is regarded as having a serious health-related impairment.
- (2) **“Has a record of serious health-related impairment”** means has a history or recorded classification of having a serious medical condition that substantially limits one or more major life activities.
- (3) **“Is regarded as having a serious health-related impairment”** means:
 - (a) having a serious medical condition that does not substantially limit major life activities, but being treated by a respondent as having such a limitation;
 - (b) having a serious medical condition that substantially limits major life activities only as a result of the attitudes of others toward such impairments; or
 - (c) having none of the impairments described above, but being treated by a respondent as having such an impairment.
- (4) The term **“serious medical condition”** is intended to apply to a serious health-related impairment that requires protection against discrimination due to the severity and duration of the impairment or due to having a record of such impairment.

~~[BB.]~~ **AA.** **“Sex discrimination”** is defined to include, but is not limited to, the following:

(1) **“Sexual harassment”** ~~[means any unwanted or repeated physical or verbal act that is sexual, including sexual advances, sexual conduct, verbal or nonverbal sexual suggestions, sexual ridicule or sexual innuendoes that:~~

~~_____ (a) _____ affects employment status relating to matters of compensation or the terms and conditions of employment;~~

~~_____ (b) _____ affects one’s ability to obtain credit;~~

~~_____ (c) _____ affects one’s ability to obtain housing, continue housing agreements; or~~

~~_____ (d) _____ affects one’s access to public accommodations.]~~ means unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal or physical conduct of a sexual nature, that can include offensive remarks about a person’s sex, gender, gender identity or sexual orientation.

(2) **“Pregnancy, childbirth, or related medical condition”** ~~[means women people affected by pregnancy, childbirth or related medical conditions shall be treated the same as other persons who are temporarily disabled for all employment-related purposes, including receipt of benefits including benefits and benefit programs; further, women affected by pregnancy, childbirth or related medical conditions shall be treated the same as other persons who are temporarily disabled in the areas of credit, housing and public accommodations.]~~ means, for example, current, past, potential or intended pregnancy issues related to reproductive risk, choosing to have or not have an abortion, use of contraception, fertility treatment, or medical conditions related to pregnancy or childbirth including chestfeeding or lactation.

~~[CC.]~~ **BB.** **“Unlawful discriminatory practices”** means those unlawful practices and ~~[aets]~~ conduct specified under the Acts as defined in Subsection A of this section.

[9.1.1.7 NMAC - Rp, 9.1.1.7 NMAC, 1/1/2020; A, 1/12/2021; A, 10/10/2023]

9.1.1.8 FILING A COMPLAINT:

A. Persons who may file a complaint:

(1) any person claiming to be aggrieved by an unlawful discriminatory practice under the New Mexico Humans Rights Act as provided in Section 28-1-1 NMSA 1978 et seq. or federal anti-discrimination laws enforced by the Equal Employment Opportunity Commission (EEOC);

(2) any person claimant to be aggrieved by an employer in violation of the Criminal Offender Employment Act as provided in Section ~~28-2-3 and 28-2-3.1~~ NMSA 1978;

~~(3) any employee claiming to be aggrieved by an employer in violation of the Caregiver Leave Act as provided in Section 50-16-3 NMSA 1978;~~

~~(4)~~ (3) any person claiming to be aggrieved by an employer in violation of the Lynn and Erin Compassionate Use Act as provided in Section 26-2B-9 NMSA 1978; or

~~(5)~~ (4) any person claiming to be aggrieved by an employer in violation of the Fair Pay for Women Act as provided in Section ~~[28-2B-9]~~ 28-23-3 or 28-23-5 NMSA 1978.

B. Time limit for filing: All complaints shall be filed with the bureau within 300 calendar days after the last alleged act of unlawful discrimination was committed. The bureau does not have jurisdiction over complaints that are filed more than 300 calendar days after the last alleged act of discrimination.

C. Form of complaint:

(1) Complainants may make, sign, and file a written complaint with the bureau individually or through a legally authorized representative.

(2) The complaint of any person claiming to be aggrieved under Paragraph (1) of Subsection A of this section shall be in writing on a human rights bureau charge of discrimination form, on an EEOC form 5, or on such other form as the human rights bureau deems acceptable.

(3) The complaint of any person claiming to be aggrieved under Paragraphs (2), (3), or (4) of Subsection A of this section may only be submitted on a human rights bureau charge form or other such form as the human rights bureau deems acceptable.

(4) The complainant may be assisted by the staff of the human rights bureau in preparing a complaint, unless the complainant is represented by legal counsel, in which case complainant's counsel will be required to prepare and file the complaint on behalf of the complainant.

D. Contents of the written complaint. Each complaint shall contain:

(1) the name and current mailing address of the complainant;

(2) the name and mailing address of the respondent;

(3) a statement describing the occurrence of an unlawful discriminatory practice that the complainant alleges. This description shall include:

(a) a statement of the general nature of complainant's claim; and

(b) an identification of the particular provisions of the state or federal statutes or of the specific regulations upon which the complainant bases the claim; and

(c) the time, date, place and nature of the occurrences alleged to be an unlawful discriminatory practice;

(4) the factual basis or grounds supporting complainant's allegation of unlawful discriminatory practice; ~~and~~

(5) the first alleged date and the most recent alleged date an unlawful discriminatory practice occurred; and

~~(5)~~ (6) the signature of the complainant and the date of signing.

E. Manner of filing the complaint:

(1) The complaint shall be deemed filed as of the date the perfected complaint is received by the bureau office. A perfected complaint contains all the information required in Subsection D of this section. If the complaint is missing any of the listed requirements, it shall be returned to the complainant or their legal representative for completion before the complaint will be deemed perfected.

(2) For the purpose of complying with the filing time limit of 300 calendar days, as provided in Subsection A of Section 28-1-10 NMSA 1978, as amended, a complaint which is first filed with any duly authorized civil rights agency holding a work sharing agreement or memorandum of understanding with the bureau shall be deemed to have been filed with the bureau as of the date on which the perfected complaint was first filed with any of these agencies.

(3) When the perfected complaint is received at the bureau office, the person accepting the perfected complaint shall stamp the complaint with the date it is received. An electronically delivered copy of the perfected complaint will be stamped and accepted as filed on the date it is received electronically.

F. Jurisdiction:

(1) At the time of filing, the bureau shall determine initially whether the allegations in the complaint sufficiently state a claim under the act in order to proceed with the investigation. During the investigation, the bureau may also determine, based upon the facts established, whether the bureau has jurisdiction ~~over~~ over the complaint.

(2) If at the time of filing or at any subsequent time it is determined that there is a lack of jurisdiction, the complaint shall be dismissed, without prejudice. The complainant shall be promptly notified of the dismissal by certified mail or electronic mail, if elected. The respondent shall be notified of the dismissal by regular mail or electronic mail, if elected.

(3) When a disability or serious medical condition is alleged in the complaint, the complainant must offer evidence of the disability or serious medical condition during the course of the investigation. Evidence documenting a disability or serious medical condition may be provided by the written certification of a physician or other appropriate medical authority unless the existence of the disability or serious medical condition is not a matter in dispute.

G. Notice to respondent: Upon the filing of a perfected complaint, the bureau shall, within 10 calendar days, furnish the respondent with a copy thereof by certified mail or electronic mail, if elected.

H. Electronic Correspondence.

(1) A party can agree, in writing, to receive all correspondence and documents from the bureau through electronic mail, in which case the recipient will not receive any correspondence by US mail. A person communicating with the bureau electronically bears the responsibility of ensuring that the information submitted and the methods by which the person can be contacted are accurate. It is the recipient's obligation to exercise due diligence in checking the email address of record and to notify the bureau of any change in contact information.

(2) A party may rescind the election to receive electronic correspondence at any time by submitting a written request stating that intention to the bureau.

(3) Use of electronic notification, correspondence, and document transmission constitutes reasonable and proper notice for all purposes, laws, rules, and regulations.

~~[H.]~~ I. Withdrawal or dismissal of the complaint and requests to reopen the case.

(1) The complainant may withdraw the complaint by submitting a written request or by completing the ~~[withdrawal]~~ form for withdrawal provided by the bureau at any time prior to the issuance of a determination. The complainant may refile a complaint by submitting a new complaint in accordance with Subsection A of 9.1.1.8 through Subsection D of 9.1.1.8 NMAC 1978.

(2) In the event that the complainant cannot be contacted for a 30-day period at the last known address or a forwarding address, or ~~[in the event that]~~ if the complainant refuses to cooperate with the bureau, the complaint ~~[shall]~~ may be dismissed without prejudice and the bureau ~~[shall]~~ may administratively close the case.

(3) If the bureau administratively closes a case, notice of case closure shall be sent to all parties to their preferred mailing or electronic address of record.

~~[(3)]~~ (4) Requests for reopening a case [will] may be [made] submitted to the bureau by sending a written request to include the reason for the request. The complainant must establish good cause to reopen the case. The director shall consider all circumstances relative to the request and determine whether the request is jurisdictional and timely made and whether good cause has been established for reopening the case. The complainant and the respondent will be notified in writing when the director decides whether the case will be reopened.

~~[(4)]~~ (5) In the event of a withdrawal or closure of a complaint, the bureau shall promptly notify the respondent of such action, provided that the respondent has been notified of the complaint.

~~[I.]~~ J. Request for director's order of nondetermination:

(1) After the bureau's receipt of a complaint, a complainant who seeks to remove the complaint from the bureau and pursue the complaint in district court may submit a written request, to the director, any time prior to issuance of a determination and shall receive an order of nondetermination. The director may consider requests for orders of nondetermination after the closure of a case if it is determined good cause for the request exists.

(2) The director's order of nondetermination shall be deemed a final order of the bureau for purposes of exhausting administrative remedy, affording the complainant the opportunity to proceed in district court, pursuant to Section 28-1-13 NMSA 1978.

[9.1.1.8 NMAC - Rp, 9.1.1.8 NMAC, 1/1/2020; A, 1/12/2021; A, 10/10/2023]

9.1.1.9 INVESTIGATIONS AND ALTERNATIVE DISPUTE RESOLUTION (ADR):

A. Investigation deadlines:

(1) The bureau shall send the respondent a request for information and the respondent will be required to answer and submit documents within 30 calendar days from the date of the request. The deadline may

be extended by the investigator for up to 20 calendar days. Any requests for additional time beyond that must be made in writing, to the director, detailing the reason for the request, and may only be granted for good cause.

(2) When the respondent answers the complaint, the bureau shall provide the response without the exhibits to the complainant. The complainant will be required to provide a rebuttal to the response within 30 calendar days of the bureau's correspondence. The deadline may be extended by the investigator for up to 20 calendar days. Any requests for additional time beyond that must be made in writing, to the director, detailing the reason for the request, and may only be granted for good cause. If no position statement is submitted by the respondent, the complainant may submit additional evidence to the bureau within 30 calendar days of notice.

(3) The complainant may file an amendment to the complaint ~~[an]~~ at any time prior to the bureau's receipt of the respondent's position statement ~~[and exhibits]~~. If the complainant wishes to amend the complaint after that time, the complainant must submit a request for withdrawal of the original complaint and file a new complaint. The new filing must be filed within 300 calendar days of the most recent alleged act of discrimination to be considered timely.

(4) If either party does not provide a response by the deadline, the bureau may conduct the investigation with the information available at the time and issue a final decision based on that evidence.

(5) If a complainant files multiple cases against the same respondent, the bureau may, in its discretion, consolidate the cases for purposes of investigation and determination any time after noticing the new charge to the respondent.

B. The bureau's authority to investigate a complaint is not limited to the procedure outlined in Subsection A of this section.

C. Mediation: Throughout the investigation, the bureau ~~[will]~~ may provide opportunity for the parties to engage in mediation discussions. Should an agreement resolving the complaint be reached through mediation, the terms shall be reduced to writing in a settlement agreement and will be signed by the parties. If a settlement agreement is signed, no determination will be issued by the director. The bureau shall ~~[dismiss]~~ close the complaint upon receipt of the fully-executed settlement agreement.

D. Failure of the respondent or the complainant to abide by a fully-executed settlement agreement will require the aggrieved party to seek enforcement of the agreement in court.
[9.1.1.9 NMAC - Rp, 9.1.1.9 NMAC, 1/1/2020; A, 12/29/2020; A, 1/12/2021; A, 10/10/2023]

9.1.1.10 DIRECTOR'S DETERMINATION OF PROBABLE CAUSE OR NO PROBABLE CAUSE AND NOTICE OF HEARING:

A. After an investigation is completed, the director will issue a determination of probable or no probable cause.

B. If the director determines that no probable cause exists, the director shall dismiss the complaint and notify the parties of the dismissal. The complainant will be notified by certified mail or electronic mail, if elected, and the respondent will be notified by regular-mail or electronic mail, if elected. Upon dismissing the complaint, the director will advise the complainant of the right to appeal the determination in district court within 90 calendar days after receipt of the determination.

C. If the director determines that probable cause exists, both parties will be notified of the determination by certified mail or electronic mail, if elected. Such determination will also notify the parties of the date, time, and location of the hearing, and advise the parties that failure to appear may result in the entry of a judgment or order against the party that failed to appear.

D. Conciliation: The bureau will attempt to conciliate the matter. If conciliation attempts fail, the matter will be set for hearing before the commission or hearing officer, provided that the complainant has not requested a waiver of right to hearing pursuant to Subsection J of Section 28-1-10 NMSA 1978.

[9.1.1.10 NMAC - Rp, 9.1.1.10 NMAC, 1/1/2020; A, 10/10/2023]

9.1.1.11 WAIVER OF COMPLAINANT'S RIGHT TO HEARING:

A. Within 60 calendar days of service of the director's determination of probable cause, the complainant may make a written request to the director for a waiver of complainant's right to a commission hearing and seek a trial de novo in district court, pursuant to Subsection J of Section 28-1-10 NMSA 1978, as amended.

B. The director shall approve a waiver request which is timely made and shall serve notice of the waiver upon the complainant and the respondent. The director's issuance of a waiver notice shall be deemed a final order of the commission for the purpose of appeal, pursuant to Section 28-1-13 NMSA 1978, as amended.

C. Within 90 calendar days from the date of service of the waiver notice, the complainant may request a trial de novo, pursuant to Section 28-1-13 NMSA 1978, as amended.

D. After 60 calendar days from the date of service of the director's determination of probable cause and any time prior to final adjournment of the hearing, the complainant may file a "motion for dismissal with leave to file in district court". The motion will be deliberated and decided upon at a commission review panel.

[9.1.1.11 NMAC - Rp, 9.1.1.11 NMAC, 1/1/2020; A, 10/10/2023]

9.1.1.12 MEDIATION AND CONCILIATION PROCESSES

A. Mediation prior to issuance of commission complaint:

(1) The bureau may attempt to achieve a satisfactory adjustment of the complaint by means of mediation with the complainant and the respondent.

(2) If mediation attempts are successful, the parties shall prepare and sign a written settlement agreement. If the complainant and the respondent execute a written and signed settlement agreement, they shall provide the bureau with written notification that a settlement agreement between the parties has been executed.

(3) If a settlement agreement is reached between the complainant and the respondent through bureau mediation, the executed settlement agreement shall be forwarded to the director and will serve as the parties' written notification to the director of the executed settlement agreement.

(4) Once the director has received the parties' written notification that a settlement agreement has been executed, the complaint will be ~~dismissed and the case will be~~ administratively closed. The parties will be provided with notice of ~~the dismissal of the complaint and the administrative~~ case closure. ~~[of the case.]~~

(5) Failure by the respondent or the complainant to abide by a fully-executed settlement agreement will require the aggrieved party to seek enforcement of the agreement in court.

B. Conciliation process after issuance of commission complaint:

(1) If a settlement agreement is reached between the complainant and the respondent through private mediation or the conciliation process after issuance of the commission complaint, the complainant will be required to submit a motion to dismiss pursuant to this rule.

(2) The motion to dismiss will be deliberated and decided upon at a commission review panel.

(3) Following its deliberation, the commission will issue an order on the matter and notify the parties pursuant to Subsection E of Section 28-1-11 NMSA 1978.

[9.1.1.12 NMAC - Rp, 9.1.1.11 NMAC, 1/1/2020; A, 1/12/2021; A, 10/10/2023]

9.1.1.13 HEARING PREPARATION:

~~[A. Time limits:~~

~~(1) Unless the complaint has already been dismissed or [a satisfactory adjustment]resolution of the complaint has been reached, a commission complaint shall be issued on behalf of the complainant within one year of the complainant's filing of a complaint with the bureau, as provided in Subsection G of Section 28-1-10 NMSA 1978 of the New Mexico Human Rights Act, or as such time limit may be otherwise amended by law.~~

~~(2) A hearing date will be set not more than 15 calendar days or less than 10 calendar days after service of the commission complaint, pursuant to Subsection F of Section 28-1-10 NMSA 1978 of the New Mexico Human Rights Act, or as such provision may be otherwise amended by law.]~~

~~A. Issuance of commission complaint:~~

~~(1) If, after a probable cause determination, efforts at conciliation have failed, the commission shall issue a written complaint in its own name, on behalf of the complainant, against the respondent. The commission shall set forth the alleged discriminatory practice, the section of the Acts alleged to have been violated and the relief requested.~~

(2) The commission complaint shall require the respondent to answer the allegations of the commission complaint by appearing at a hearing before the commission on the date, time and place specified in the commission complaint. The respondent may also file a written answer to the commission complaint.

(3) The commission complaint shall be served on the complainant and the respondent or their legal representatives by certified mail, return receipt requested. Such complaint shall advise the parties that failure to appear at the hearing may result in the entry of a judgment or order against the party that fails to appear.

(4) The complainant shall review the commission complaint and verify that the complaint sets forth the discriminatory practice that is alleged to have occurred. Any motion by the complainant to amend the commission complaint should be made as soon as possible and in advance of the hearing. If a motion to amend the complaint is made on the day the hearing is set to commence, the commission may allow the respondent additional time to prepare. The commission will not allow an amendment to the complaint which alleges a discriminatory practice that was not raised and investigated at the bureau level or that was dismissed at the bureau level.

B. Scheduling the hearing:

(1) Hearing date: The hearing clerk, in coordination with the commission and the hearing officer, shall schedule a hearing date which shall not be more than 15 calendar days nor less than 10 calendar days after service of the complaint.

(2) Location of hearing: Hearings shall be conducted virtually by video or telephone conference. Any party may object to a virtual hearing by submitting their objection in writing to the commission at least 30 calendar days prior to the hearing. In the event a hearing is held in-person, it will take place in the county where the respondent is doing business or where the alleged discriminatory practice occurred.

(3) Hearing mode: A hearing may be scheduled to be heard by a three-member panel of commissioners or a single hearing officer.

(4) Notice of hearing: The hearing clerk shall:

(a) serve a copy of the written commission complaint and notice of hearing upon each party;

(b) post the notice on the department of workforce solutions website; and

(c) file the following documents in the official case file: a copy of the commission complaint; a copy of the notice of hearing with affidavits of publication attached; and documentation of how and when the commission complaint and the notice of hearing was served on the parties.

~~[B.]~~ **C. Case preparation for hearing:**

(1) Case presentation: Each party is responsible for preparing its case for presentation to the commission or hearing officer. Each party may self-represent at the hearing or may be represented by an attorney or another qualified representative. If represented by an attorney or other qualified representative, the party must notify the bureau of such representation no less than 10 calendar days prior to the hearing by submitting an Entry of Appearance.

(2) Evidence:

(a) Each party, either in person or through its attorney or other representative, may present evidence in support of its case at hearing, by calling witnesses to testify and introducing exhibits. Each party, either in person or through its attorney or other representative, may examine and cross-examine witnesses.

(b) Any materials or information contained in the bureau investigative files are not before the commission or the hearing officer at hearing, unless a party has obtained these materials before the time of hearing and seeks to introduce them as evidence at the hearing. Once a commission complaint is issued and the matter is set for hearing, the materials generally before the commission or the hearing officer are the commission complaint, the notice of hearing, and the statement of intent to present evidence.

(c) A party's preparation for hearing should include, but is not limited to: determining what evidence a party intends to present at hearing; identifying the witnesses whom a party wishes to call at hearing; verifying the witnesses' availability to appear at hearing; determining whether subpoenas will be needed to secure the witnesses' appearance at hearing, requesting issuance of subpoenas and subpoenas duces tecum, if needed; arranging for service of subpoenas; identifying materials to be introduced as exhibits through witness testimony; obtaining the materials to be introduced as exhibits; and preparing exhibits for presentation at hearing.

~~[C.]~~ **D. Exhibit requirements:**

(1) Marking to identify exhibits: Each party shall have its exhibits marked for identification before the hearing. Complainant's exhibits shall be marked with numbers, for example: EXHIBIT 1, EXHIBIT 2, etc. Respondent's exhibits shall be marked with alphabetical letters, for example: EXHIBIT A, EXHIBIT B, etc. Identification of an exhibit is to be placed on the lower right corner of the first page of each exhibit, if there is space available. If space is not available on the lower right corner, identification should be placed on the first page of the exhibit, at the top or bottom of the page where space is available. The identification number or letter of an exhibit shall remain the same, whether the exhibit is accepted or rejected. Separate documents, photographs, papers and other written or printed instruments shall each be given a separate exhibit number or exhibit letter. An exhibit consisting of more than one page shall be fastened, and each page shall be numbered.

(2) ~~Number of copies: Exhibits are to be provided only at the hearing and not provided to the commission or hearing officer prior to the hearing. The original and six copies of each exhibit shall be provided at the commission hearing when the matter is to be heard by a three member panel of commissioners. The original is filed with the hearing clerk, and four copies are retained by the commission for commission purposes. The two remaining copies include one copy for the opposing party and one copy for the witness testifying. When the matter is to be heard by a single hearing officer, the original and three copies of each exhibit shall be provided at the hearing.] Exhibits shall be filed with the hearing officer either electronically or by US mail and shall be provided to the opposing party at least 48 hours prior to the hearing. The commissioners or hearing officer shall not have access to the exhibits prior to the commencement of the hearing. Originals will be retained by the commission for commission purposes.~~

(3) Large exhibits: ~~[The use of large charts and diagrams, models and other bulky items for illustrative purposes is permitted. The introduction of such large items in evidence is discouraged.]~~ Exhibits offered in evidence should be limited to 8.5 x 11 inches, or capable of being folded and placed in 8.5 x 11 inch envelopes, unless otherwise necessary for adequate presentation of evidence or illustrative purposes.

~~D.~~ E. Witness identification:

(1) Request for identity of witnesses: Prior to the hearing any party is entitled to obtain and may request from another party witness information, to the extent that it is known, unless a protective order is issued to protect such information from disclosure. The following information may be requested:

- (a) the names and addresses of witnesses whom a party anticipates may be called to testify at the hearing;
- (b) the relationship, if any, of each witness to the party intending to call the witness;
- (c) a brief description of the general subject matter about which the witness is anticipated to testify.

(2) The witness information specified above need not be provided as to any officer, employee or agent of the party from whom the witness information is requested, unless the party responding to the request intends to call the officer, employee or agent to testify at the hearing.

(3) Response to request for identity of witnesses: A party's request for the identity of witnesses shall be answered within 10 calendar days of service or no later than three calendar days prior to the hearing, whichever is sooner, unless otherwise ordered by the commission or the hearing officer, upon a motion for a protective order and a showing of good cause.

(4) Protective order: Upon a motion for a protective order and upon a showing of good cause, the commission or the hearing officer may grant a motion for a protective order and issue an order to protect such witness information from disclosure. If the motion for a protective order is denied, the requested information shall be disclosed.

~~E.~~ F. Subpoenas and subpoenas duces tecum:

(1) Upon application of a party showing the general relevance and reasonableness of the scope of the testimony or other evidence sought, the commission or hearing officer may issue subpoenas and subpoenas duces tecum commanding the appearance of witnesses and their production of certain specific documents or other physical evidence at the hearing upon request of a party to the proceedings.

(2) Any subpoena must name the individual or document requested with sufficient specificity to identify who or what is being subpoenaed.

(3) Service of the subpoenas and subpoenas duces tecum shall be made by the requesting party, in the same manner as prescribed by law for civil actions in the district courts of the state of New Mexico.

(4) The cost of service and witness and mileage fees for all hearings shall be borne by the party at whose request the subpoenas and the subpoenas duces tecum are issued. The fees paid [~~therefore,~~] shall be the same as those paid by the district courts of the state of New Mexico.

(5) Requests for subpoenas or subpoenas duces tecum will be submitted to the commission or hearing officer through the hearing clerk no later than 21 calendar days prior to the hearing date. Requests must be made in writing to include the name and last known address for each person for whom a subpoena is requested and shall command each person to whom it is directed to attend and give testimony or to produce enumerated documentation at the time and place of the administrative hearing or at another date as ordered by the commission or hearing officer. Requests for subpoenas duces tecum must include a separate list of documents for attachment to the subpoena.

(6) Subpoenas must be served no later than seven calendar days prior to the hearing.

(7) Objections to the subpoenas or motions concerning the subpoenas must be filed in district court as prescribed by law for civil actions in district courts in the state of New Mexico.

~~[F.]~~ **G.** Filing, service and form of documents submitted by parties:

(1) Filing of documents: Except as otherwise provided, a party shall file the originals of all documents served in the proceeding with the hearing clerk at the human rights bureau. A party shall also serve copies thereof upon all other parties. Service shall be attested by a certificate of service, indicating the date of service, the means of service, who was served and by whom service was made.

(2) Service of documents: Except as otherwise provided, all documents shall be served in person or by mail. If service is by mail, three calendar days shall be added to time allowed by these rules for filing of a responsive document.

(3) Form of motions, responses and other documents submitted to the commission: Unless otherwise provided by these rules or by order of the commission or hearing officer, all documents, except exhibits, shall comply with the following requirements:

(a) documents shall be prepared on 8.5 x 11-inch white paper;

(b) the first page of each document shall contain a centered heading, a caption beginning at the left margin which designates the parties and the case number, and a descriptive title identifying the nature and purpose of the document, as follows:

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF NEW MEXICO

(Name of Complainant),
Complainant,

v.

HRB No. _____

(Name of Respondent),
Respondent,

[DESCRIPTIVE TITLE OF THE DOCUMENT]

~~[G.]~~ **H.** Motions:

(1) General matters: All motions ~~shall be submitted in writing prior to the hearing,~~ except those made orally during the hearing [~~shall be in writing, shall state the grounds for the motion,~~] and shall specify the relief sought. The commission or the hearing officer may direct that an oral motion made at hearing shall be made in writing, stating the grounds for the motion and specifying the relief sought. If the motion relies upon facts which are not in the hearing records, each motion shall be accompanied by an affidavit, certificate or other evidence relied upon. Motions shall be filed and served, as provided in these rules for the filing and service of documents.

(2) Unopposed motions: An unopposed motion shall state that the concurrence of all other parties was sought and granted. With an unopposed motion, the moving party shall also submit a proposed order, approved by all parties, for the commission's or the hearing officer's consideration.

(3) Opposed motions: Any opposed motion shall state that concurrence was sought and denied, or shall state why concurrence was not sought. An opposed motion may be accompanied by a memorandum brief in support of the motion.

(4) Response to motions: Any party upon whom an opposed motion is served shall have 10 calendar days after service of the motion to file a response unless the commission or the hearing officer directs otherwise. A non-moving party who fails to file a response within that period or within any extension of time

granted by the commission or hearing officer shall be deemed to have waived any objection to the granting of that motion.

(5) Decisions: All motions shall be decided by the ~~[commission]~~ chairperson or the hearing officer without a hearing, unless the commission or the hearing officer orders otherwise. Any party may submit a written request for an order granting a hearing on a motion.

~~[H.]~~ I. Issuance of documents by the commission or the hearing officer: All documents issued by the commission or the hearing officer shall be filed with the hearing clerk. As soon as is practicable or otherwise provided by law, the hearing clerk shall serve copies of the documents upon all the parties ~~[in person]~~ electronically or by first-class mail.

~~[I.]~~ J. Statement of intent to present evidence at hearing:

(1) Filing requirement: No later than five calendar days prior to the hearing, each party shall file with the hearing clerk ~~[an original and four copies]~~ a copy of the party's statement of intent to present evidence at the hearing. Each party shall also serve a copy of this statement on all parties of record.

(2) Content of statement: The statement of intent to present evidence shall include:
(a) the name of the party filing the statement;
(b) a witness list, including the name of each witness who will testify at hearing and an estimate of the length of time required for the direct testimony of each witness named; and

(c) ~~[a list of]~~ the exhibits, if any, to be offered into evidence at the hearing.
(3) ~~[Modifications to witness list or exhibit list after filing of statement of intent: If there are any modifications to a party's witness list or exhibit list after filing the statement of intent to present evidence, the party shall provide its modified witness list or exhibit list to the commission or hearing officer and all parties of record before the hearing or at the hearing.]~~ Any modifications to the witness list or exhibits may not be considered at the hearing by the commission or hearing officer.

[9.1.1.13 NMAC - Rp, 9.1.1.12 NMAC, 1/1/2020; A, 1/12/2021; A, 10/10/2023]

9.1.1.14 HEARING PROCEDURES:

~~[A.]~~ Issuance of commission complaint:

~~(1) If, after a probable cause determination, efforts at conciliation have failed, the commission shall issue a written complaint in its own name, on behalf of the complainant, against the respondent. The commission shall set forth the alleged discriminatory practice, the section of the Human Rights Act alleged to have been violated and the relief requested.~~

~~(2) The commission complaint shall require the respondent to answer the allegations of the commission complaint by appearing at a hearing before the commission on the date, time and place specified in the commission complaint. The respondent may also file a written answer to the commission complaint.~~

~~(3) The commission complaint shall be served on the complainant and the respondent or their legal representatives by certified mail, return receipt requested. Such complaint shall advise the parties that failure to appear at the hearing may result in the entry of a judgment or order against the party that fails to appear.~~

~~(4) The complainant shall review the commission complaint and verify that the complaint sets forth the discriminatory practice that is alleged to have occurred. Any motion by the complainant to amend the commission complaint should be made as soon as possible and in advance of the hearing. If a motion to amend the complaint is made on the day the hearing is set to commence, the commission may allow the respondent additional time to prepare. The commission will not allow an amendment to the complaint which alleges a discriminatory practice that was not raised and investigated at the bureau level or that was dismissed at the bureau level.~~

~~[B.]~~ Scheduling the hearing:

~~(1) Hearing date: The hearing clerk, in coordination with the commission and the hearing officer, shall schedule a hearing date which shall not be more than 15 days nor less than 10 days after service of the complaint.~~

~~(2) Location of hearing: Such hearings shall be held in the county where respondent is doing business or where the alleged discriminatory practice occurred.~~

~~(3) Hearing mode: A hearing may be scheduled to be heard by a three member panel of commissioners or a single hearing officer.~~

~~(4) Notice of hearing: The hearing clerk shall:~~

~~(a)~~ serve a copy of the written commission complaint and notice of hearing upon each party;

~~(b)~~ send copies of the notice of hearing, with a request for publication, to at least one newspaper of general circulation in the state; and

~~(c)~~ file the following documents in the official case file: a copy of the commission complaint; a copy of the notice of hearing with affidavits of publication attached; and documentation of how and when the commission complaint and the notice of hearing was served on the parties.

~~C.~~ Hearing procedures:]

~~(4)~~ A. Appearance and representation:

~~(a)~~ (1) The complainant shall be present at the hearing, may present testimony or evidence and may be represented by an attorney or other representative. The complainant or complainant's representative shall present the case supporting the complaint at hearing.

~~(b)~~ (2) If the complainant does not appear at the hearing after proper notice has been served, the complaint may be dismissed for failure of the complainant to appear and present the complainant's case at hearing as required in Subsections A and C of Section 28-1-11 NMSA 1978, as amended.

~~(c)~~ (3) The respondent to a complaint shall file a written answer to the complaint appear at the hearing, may present testimony or evidence and may be represented by an attorney or other representative. If the respondent is an entity, the respondent may designate a person to serve as its representative at the hearing. The respondent, respondent's representative or respondent's counsel may present the case responding to the complaint at hearing.

~~(d)~~ (4) Commission counsel, or an attorney representative from the Office of the Attorney General, may advise the commission during the hearing on legal matters and will assist in the preparation of the findings of fact, the conclusions of law and the order.

~~(2)~~ B. Sequence of the proceeding:

~~(a)~~ (1) introduction to the proceeding by the presiding commissioner or the hearing officer;

~~(b)~~ (2) invitation to the parties to attempt a settlement resolution prior to commencing the hearing;

~~(c)~~ (3) consideration of any preliminary matters or motions;

~~(d)~~ (4) administration of oath of the parties and the witnesses by presiding commissioner or hearing officer;

~~(e)~~ (5) opening statement by the complainant or the complainant's attorney or other representative;

~~(f)~~ (6) opening statement by the respondent or the respondent's attorney or other representative;

~~(g)~~ (7) presentation of the complainant's case;

~~(h)~~ (8) presentation of the respondent's case;

~~(i)~~ (9) closing argument by the complainant or the complainant's attorney or other representative;

~~(j)~~ (10) closing argument by the respondent or the respondent's attorney or other representative;

~~(k)~~ (11) instructions to the parties as to the schedule for filing findings of fact, conclusions of law, briefs or other documents with the commission following the hearing; and

~~(l)~~ (12) final adjournment of the hearing.

~~(3)~~ C. Sequestering witnesses: The commission shall sequester the witnesses from the hearing until the time of their testimony. A complainant or the designated representative for respondent will be allowed to be present throughout the hearing, even though the complainant or the designated representative for respondent may be called to testify.

~~(4)~~ D. Custody of evidence: Evidence introduced as exhibits at the hearing will be retained in the custody of the hearing clerk at the bureau for commission purposes.

~~(5)~~ E. Matters of proof:

~~(a)~~ (1) Burden of proof: complainant has the burden of proof.

~~(b)~~ **(2)** Standard of proof: The complainant must prove the case by a preponderance of the evidence.

~~(6)~~ **F.** Evidentiary matters at hearing:

~~(a)~~ **(1)** Formal rules of evidence not binding on the commission or hearing officer: The formal rules of evidence governing the courts of law or equity shall not bind the commission or the hearing officer in hearing the evidence, as provided in Subsection D of Section 28-1-11 NMSA 1978, as amended.

~~(b)~~ **(2)** Objections to evidence offered: A party who has an objection to the evidence offered or to procedural matters in the proceeding must raise the objection orally during the hearing. The party raising the objection must state the grounds for the objection. The ruling on the objection, made by the presiding commissioner or hearing officer, shall be made a part of the record. A party's exception to each overruled objection shall be automatic and is not waived by the party's further participation in the hearing.

~~(c)~~ **(3)** Offers of proof: Whenever there is a ruling to exclude the evidence offered, the party offering the evidence may make an offer of proof, which shall be included in the record. An offer of proof for excluded evidence consists of a brief description of the nature of the evidence excluded, the purpose for which it is offered and its relevance to the issues before the commission or hearing officer. An offer of proof for excluded documents or exhibits shall additionally include the insertion into the record of the excluded documents or exhibits. If the commission decides that a hearing officer's ruling to exclude evidence was both erroneous and prejudicial, the commission may consider the excluded evidence and may reopen the proceedings to take such evidence.

~~(7)~~ **G.** Continuation and adjournment: The presiding commissioner or the hearing officer may continue a hearing from day to day or adjourn it to a later date.

~~(8)~~ **H.** Improper conduct: The commission or hearing officer may exclude from the hearing room any person who engages in improper conduct.

~~(9)~~ **I.** Closing arguments, briefs and findings of fact and conclusions of law:

~~(a)~~ **(1)** Closing arguments: At the hearing, a party or the party's attorney or representative may present an oral closing argument in support of the party's position. The commission or hearing officer may elect to allow the parties to present a written closing argument in addition to or in place of an oral closing argument. Written closing arguments, where applicable, shall be filed with the commission and served on all parties of record within 10 calendar days after the final adjournment of the hearing, unless the commission or the hearing officer directs otherwise.

~~(b)~~ **(2)** Findings of fact and conclusions of law: Each party may submit proposed findings of fact and conclusions of law to the commission within 10 calendar days after the final adjournment of the hearing, unless the commission or the hearing officer directs otherwise.

~~(c)~~ **(3)** Briefs and answer briefs:

~~(i)~~ **(a)** Briefs: Each party may submit a brief in support of its position, including an argument of how the law applies to the facts in the case. If a party elects to submit a brief, it shall be filed with the commission and a copy served on all parties of record within 10 calendar days after the final adjournment of the hearing, unless the commission or the hearing officer directs otherwise.

~~(ii)~~ **(b)** Answer briefs: When a party has filed a brief, the opposing party may submit an answer brief to the commission or hearing officer and serve a copy on all parties of record within five calendar days of the filing of the brief, unless the commission or the hearing officer directs otherwise.

~~(d)~~ **(4)** Attorney fees:

~~(i)~~ **(a)** If the complainant is represented by private legal counsel and seeks to recover attorney fees from the respondent, complainant's counsel is required to submit an affidavit setting forth the attorney fees. The attorney affidavit shall be submitted to the commission and a copy served on the respondent within 15 calendar days after the final adjournment of the hearing, unless the commission or the hearing officer directs otherwise. The attorney affidavit shall include an itemization of fees, be signed by the attorney and be notarized.

~~(ii)~~ **(b)** The respondent may submit a written objection, if any, to the attorney fees requested by the complainant. The objection to attorney fees shall be submitted to the commission and a copy served on the complainant within five calendar days after the submission of the attorney affidavit setting forth fees, unless the commission or the hearing officer directs otherwise.

~~(10)~~ **J.** Close of the hearing record: The hearing record closes following the final adjournment of the hearing, when the last time set for the submission of all documents to the commission has expired.

[9.1.1.14 NMAC - Rp, 9.1.1.12 NMAC, 1/1/2020; A, 1/12/2021; A, 10/10/2023]

9.1.1.15 RULING AND FINAL ORDER:

- A.** The final decision and ruling on the merits in each case is reserved to the commission or hearing officer.
- B.** Where a hearing is before a three-member panel of commissioners, the commission will announce its decision and final order orally at a public meeting within 90 calendar days, for which notice will be given. Within five business days thereafter, the commission shall cause a written copy of the decision and final order to be sent by certified mail, return receipt requested, to each party or to the party's attorney, if any, at the attorney's address of record.
- C.** Where a hearing is conducted by a hearing officer, the hearing officer shall prepare a written report, setting forth proposed findings of fact, proposed conclusions of law and a recommended action to be taken by the commission, after the last time set for the submission of all documents following the final adjournment of a hearing, or at such other time as the commission may direct. The hearing officer's report shall be submitted for consideration by a review panel, consisting of no more than three commissioners designated by the chairperson. The commission may adopt, modify or reject the findings of fact, the conclusions of law and the recommended action proposed by the hearing officer. The commission's decision and final order will be announced orally at a public meeting, for which notice will be given. Within five business days thereafter, the commission shall cause a written copy of the decision and final order to be sent by certified mail, return receipt requested, to each party ~~[and]~~ or to the party's attorney, if any, at the attorney's address of record. ~~[for the party and for the party's attorney.]~~
[9.1.1.15 NMAC - Rp, 9.1.1.13 NMAC, 1/1/2020; A, 10/10/2023]

9.1.1.16 TRANSCRIPTS:

- A.** Upon receipt of a notice of appeal, if the hearing was transcribed, the bureau will supply as much of the transcript of the as is requested by the parties or the district court, pursuant to Subsection B of Section 28-1-13 NMSA 1978.
- B.** All costs of providing the transcript of record on appeal will be paid by the party requesting the transcript. However, nothing in these rules will be deemed as prohibiting an agreement between a complainant and a respondent concerning the cost of providing the transcript on appeal.
[9.1.1.16 NMAC - Rp, 9.1.1.14 NMAC, 1/1/2020; A, 10/10/2023]

9.1.1.17 CONFIDENTIALITY AND PUBLIC RECORDS:

- A.** The commission complaint, decision and orders will be considered public records. Any other information contained within a division investigation file or bureau records related to the case will not be considered public records, except as determined by law, and therefore is not available for inspection under the Inspection of Public Records Act until a determination is issued or the case is closed, at which point the entire investigation file will be considered public record. The deliberations of the commission or hearing officer are not part of an open public meeting and are not considered to be public records.
- B.** These provisions will not be applicable to the request for information about a pending case by the complainant, the respondent or their respective attorneys in that particular pending case prior to hearing. Nor do they apply to the disclosure of necessary information by the bureau to a representative of any duly authorized civil rights agency holding a work sharing agreement or memorandum of understanding with the bureau.
- C.** Requests for records under the Inspection of Public Records Act (NMSA 1978 Chapter 14, Article 2) should be submitted in writing to the record custodian of the department of workforce solutions. Documents that are part of complaints dually filed with the EEOC are not available from the department of workforce solutions pursuant to Subsection 8 of Section 14-2-1 NMSA 1978.
[9.1.1.17 NMAC - Rp, 9.1.1.15 NMAC, 1/1/2020; A, 10/10/2023]