

This rule was filed as 9 NMAC 1.1.

TITLE 9 HUMAN RIGHTS
CHAPTER 1 HUMAN RIGHTS GENERAL PROVISIONS
PART 1 ADMINISTRATIVE PROCEDURES FOR THE HUMAN RIGHTS
DIVISION/COMMISSION

9.1.1.1 ISSUING AGENCY: New Mexico Department of Labor, Human Rights Division
[9/1/98; Recompiled 10/01/01]

9.1.1.2 SCOPE:

- A. These rules apply to the general public and contain specific limitations from applicability, as noted.
- B. Application of rules of civil procedure: In the absence of a specific provision governing an action in the Human Rights Act [Chapter 28, Article 1 NMSA 1978] or in these rules, the human rights division and the human rights commission may look for guidance to the New Mexico Rules of Civil Procedure for the District Courts, Rules 1-001 to 1-102 NMRA 1998 and as may be revised.
[9/1/98; Recompiled 10/01/01]

9.1.1.3 STATUTORY AUTHORITY: These rules and regulations are adopted by the secretary of the New Mexico department of labor to carry out the provisions of the Human Rights Act, Sections 28-1-1 to 28-1-7, 28-1-9 to 28-1-14 NMSA 1978, as amended, or as such provisions may be amended by law.
[9/1/98; Recompiled 10/01/01]

9.1.1.4 DURATION: Permanent.
[9/1/98; Recompiled 10/01/01]

9.1.1.5 EFFECTIVE DATE: September 1, 1998 [unless a later date is cited at the end of a section]
[9/1/98; Recompiled 10/01/01]

9.1.1.6 OBJECTIVE: These rules and regulations govern procedure for filing complaints with the human rights division, for investigating complaints filed with the human rights division and for conducting administrative hearings of complaints brought before the human rights commission.
[9/1/98; Recompiled 10/01/01]

9.1.1.7 DEFINITIONS: As used in these rules:

- A. “Act” means the Human Rights Act, Sections 28-1-1 to 28-1-7 and 28-1-9 to 28-1-14 NMSA 1978, and its subsequent amendments and provisions.
- B. “Affirmative action” means participation in a voluntary program of self-imposed or self-directed action taken in employment, housing, public accommodation and credit, in order to eliminate discriminatory barriers or underutilization of protected groups. The aim of affirmative action is to promote full participation of all qualified persons in employment, housing, public accommodation and credit.
- C. “Applicant for employment” means a person applying or attempting to apply for a position as an employee.
- D. “Chairperson” and “vice chairperson”:
 - (1) “Chairperson” means a member of the commission designated by the governor to serve as chairman.
 - (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” means any person who claims to be aggrieved by an unlawful discriminatory practice and who has filed a complaint with the human rights division within 180 days after the alleged unlawful discriminatory act was committed.

H. “Complaint” and “commission complaint”:

(1) “Complaint” means a perfected charge of discrimination signed by the complainant on an HRD charge of discrimination form, on an EEOC Form 5 or on such other form as may be deemed acceptable to the human rights division. A charge signed by the complainant is perfected when it is received and date-stamped by the human rights division, indicating the date of filing with the division.

(2) “Commission complaint” means a written complaint issued by the commission on behalf of the complainant against the respondent, setting forth the alleged discriminatory practice, the section of the act alleged to have been violated and the relief requested by complainant. The commission complaint is based upon the complaint filed by complainant with the division.

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

J. “Director” means the director of the human rights division of the New Mexico department of labor.

K. “Division” means the human rights division of the New Mexico department of labor.

L. “Employee” means any person in the employ of an employer or an applicant for employment.

M. “Employer” means any person employing four or more persons and any person acting for an employer, including but not limited to, employment agencies.

N. “Employment agency” means any person regularly undertaking, with or without compensation, to procure opportunities to work, or to procure, recruit or refer employees, including an agent of such a person.

O. “Handicapped person” means any person who has a physical or mental handicap as “physical or mental handicap” is defined in these rules and in Subsection M of Section 28-1-2 NMSA 1978, as amended.

P. “Hearing clerk” means the person designated by the commission to maintain the official record of the proceedings.

Q. “Hearing officer” means the person conducting a hearing of a matter brought before the commission. A hearing officer may be:

(1) the presiding commissioner of a three-member commission panel.

(2) a member of the commission designated by the chairman to act as the hearing officer; or

(3) a hearing officer employed by the human rights division of the department of labor.

R. “Housing accommodation” means any building or portion of a building which is constructed or is to be constructed, which is used or intended for use as the residence or sleeping place of any individual.

S. “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.

T. “Major life activities” means functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working, as provided in Subsection N of Section 28-1-2 NMSA 1978, as amended.

U. “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.

V. “Physical or mental handicap” 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 handicapped, if he or she:

(a) has a record of a physical or mental handicap; or

(b) is regarded as having a physical or mental handicap.

(2) “Has a record of such a handicap” 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 handicap” 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.

W. “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 mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities.

X. "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.

Y. "Protected groups" for complaint purposes are all of the groups identified by the bases provided in Section 28-1-7 NMSA 1978, as amended.

Z. "Public accommodation" means any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment which is by its nature and use distinctly private.

AA. "Qualified handicapped person with respect to employment" means a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question and shall not, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in employment under any program or activity.

BB. "Qualified handicapped person with respect to housing, accommodation, credit and acquisition or maintenance of particular real property" means a handicapped person whose handicap does not limit that person's ability to fulfill the obligations of occupancy, tenancy, ownership or credit responsibilities.

CC. "Real property" means land, leaseholds or commercial or industrial buildings, whether constructed or to be constructed, offered for sale or rent, and any land rented or leased for the use, parking or storage of house trailers.

DD. "Reasonable accommodation" means, for employment purposes, such modifications or adaptations of the work environment or job responsibilities of a handicapped person as are necessary to enable him or her to perform the essential functions of the job in question and which do not impose an undue hardship on the employer.

EE. "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.

FF. "Secretary" means the secretary of the New Mexico department of labor.

GG. "Serious medical condition" means a serious health-related impairment other than a handicap, 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 he or she:

- (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/or duration of the impairment or due to having a record of such impairment.

HH. "Sex discrimination" is defined to include, but is not limited to, the following:

(1) "Sexual harassment" means any unwanted and/or repeated physical or verbal act that is sexual, including sexual advances, sexual conduct, verbal or nonverbal sexual suggestions, sexual ridicule or sexual innuendoes in order to:

- (a) affect employment status relating to matters of compensation or the terms and conditions of employment;
- (b) obtain credit;
- (c) obtain housing, continue housing agreements; or
- (d) be denied access to or limit public accommodations;

(2) "Pregnancy, childbirth, or related medical condition." Women 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 under fringe 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.

(3) "Marital status" means rules restricting persons because of their marital status which do not apply equally to the opposite sex with the same status.

II. "Unlawful discriminatory practices" means those unlawful practices and acts specified in Section 28-1-7 NMSA 1978, as amended.

[9/1/98; Recompiled 10/01/01]

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 may by himself or herself, or through his or her legally authorized representative, make and sign a complaint and file said complaint with the division. An amendment to a complaint may be filed at any time prior to the director making a determination; provided that the amendment is timely and jurisdictional.

(2) Any member of the commission who has reason to believe that an unlawful discriminatory practice has occurred may make, sign and file a written complaint with the division, on behalf of a complainant. The complaint must state the facts which gave the member of the commission reason to believe that an unlawful discriminatory practice has occurred.

B. Time limit for filing: All complaints and amendments to complaints shall be filed with the division within 180 days after the last alleged act of unlawful discrimination was committed.

C. Form of complaint:

(1) The complaint of any person claiming to be aggrieved or the complaint of a commissioner who has reason to believe an unlawful discriminatory practice has occurred shall be in writing on an HRD Charge of Discrimination form, on an EEOC form 5 or on such other form as the human rights division may deem acceptable. A sample form is attached to these rules as Appendix A [9.1.1.18 NMAC]. The complainant may be assisted by the staff of the human rights division in preparing his or her complaint.

(2) A relief requested form shall be signed by the complainant and made part of the investigative file.

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

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

(2) the name and address of the respondent;

(3) a short and plain statement describing the occurrence of an unlawful discriminatory practice, by which complainant alleges he or she was aggrieved. This description is to include:

(a) a brief statement of the general nature of complainant's claim, set out without detail;

(b) an identification of the particular provision of law upon which complainant bases his claim;

and

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

(4) the factual basis or grounds supporting complainant's allegation that he or she was aggrieved by an unlawful discriminatory practice; and

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

E. Complainant's affidavit accompanying the complaint: The complainant shall prepare and submit an affidavit to accompany the complaint. The complainant's affidavit shall describe in detail the alleged unlawful discriminatory practice and shall include the names and telephone numbers of possible witnesses. The complainant shall sign the affidavit and thereby swear or affirm that the information provided is true and correct.

F. Manner of filing the complaint:

(1) The complaint must be delivered to the division either by personal delivery or by mail.

(2) The complaint shall be deemed filed as of the date it is received at the division office. For the purpose of complying with the filing time limit of one hundred eighty (180) 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 division shall be deemed to have been filed with the division as of the date on which the complaint was first filed with any of these agencies.

(3) When the complaint is received at the division office, the person accepting the complaint shall stamp the complaint with the date it is received.

G. Jurisdiction:

(1) At the time of filing, the director shall determine initially whether the allegations in the complaint sufficiently state a claim under the act, so that the division may proceed with the investigation. During the investigation, the director may also determine, based upon the facts established, whether the division has jurisdiction of 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. The complainant shall be promptly notified of the dismissal by certified mail with return receipt requested. The respondent shall be notified of the dismissal by regular mail.

(3) When a serious medical condition is alleged in the complaint, the complainant must offer evidence of the serious medical condition during the course of the investigation. Evidence documenting a serious medical condition may be provided by the written certification of a physician or other appropriate medical authority, or by the written verification of a witness with direct observation of a clearly visible health-related impairment.

H. Notice to respondent: Upon the filing of a complaint or amendment, the division shall, within ten days, furnish the respondent with a copy thereof by certified mail, return receipt requested. The respondent will be required to respond and submit documents requested within 30 days of receipt of a complaint. The response time may be extended for good cause by the director, pursuant to division policy.

I. Withdrawal or dismissal of the complaint and requests to reopen the case.

(1) The complainant may withdraw the complaint, an amendment thereto or supplemental complaints at any time by signing a letter requesting dismissal of the complaint and submitting it to the director, or by signing a withdrawal form provided by the division and submitting it to the director.

(2) In the event that the complainant cannot be contacted for a 30 day period at his or her last known address or forwarding address, or in the event that the complainant refuses to cooperate with the division, the director shall dismiss the complaint without prejudice and administratively close the case.

(3) Requests for reopening a case will be made to the director based on the specific situation. 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 shown establishing reasonable grounds for reopening the case. The complainant and the respondent will be notified in writing, when the director decides whether he or she will reopen the case.

(4) In the event of a withdrawal or closure of a complaint, the director shall promptly notify the respondent of such action by mail, provided that the respondent has been notified of the complaint.

J. Request for director's order of nondetermination:

(1) One hundred and eighty days after the division's receipt of a complainant's complaint, a complainant who seeks to remove the complaint from the division and pursue the complaint in district court may request and shall receive from the director an order of nondetermination.

(2) The director's order of nondetermination may be appealed to the district court, pursuant to the provisions of Section 28-1-13 NMSA 1978, or as these provisions may otherwise be amended. The director's order of nondetermination shall be deemed a final order of the commission for purposes of appeal, pursuant to Section 28-1-13 NMSA 1978.

[9/1/98; Recompiled 10/01/01]

9.1.1.9 INVESTIGATIONS AND ALTERNATIVE DISPUTE RESOLUTION (ADR):

A. As a part of the investigative process, the director may require a fact-finding conference and/or on-site investigation with the parties prior to a determination on a complaint of discrimination. The conference is primarily an investigative forum intended to define the issues, to determine which elements are undisputed, to resolve those issues that can be resolved and to ascertain whether there is a basis for mediation or conciliation of the complaint.

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

C. Prior to an investigation, the director will invite the parties to engage in mediation or conciliation discussions. Should mediation or conciliation be reached, 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 director shall dismiss the complaint upon receipt of the settlement agreement and the complainant's written request for dismissal of the complaint.

D. Failure of the respondent or the complainant to abide by a settlement agreement will require the director to either continue the investigation and make a determination, or request the attorney general to secure enforcement.

[9/1/98; Recompiled 10/01/01]

9.1.1.10 DIRECTOR'S DETERMINATION OF PROBABLE CAUSE OR NO PROBABLE CAUSE:

A. Before a determination is issued, the director may order a reinvestigation of any complaint.
B. After an investigation is completed, the director will issue a determination, unless the director has received written notification from the parties that a settlement agreement between the complainant and the respondent has been signed by the parties and the director has received a written request, signed by the complainant, for an order dismissing his or her complaint because settlement has been reached.

C. 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, return receipt requested, and the respondent will be notified by regular mail. Upon dismissing the complaint, the director will advise the complainant of his or her right to appeal the determination in district court within 30 days after receipt of the determination.

D. If the director determines that probable cause exists, the director will attempt to conciliate the matter. Both parties will be notified of the determination by certified mail, return receipt requested. If conciliation attempts fail, the director shall have a commission complaint issued, setting the matter for hearing before the commission; provided that the complainant has not requested a waiver of right to hearing pursuant to Subsection J of Section 28-1-10 NMSA 1978.

[9/1/98; Recompiled 10/01/01]

9.1.1.11 PROCEDURES FOLLOWING A PROBABLE CAUSE DETERMINATION: WAIVER

REQUEST, CONCILIATION AND HEARING PREPARATION: Following a probable cause determination, the case will proceed with conciliation attempts and with the parties' preparation for a commission hearing, unless the complainant has sought a waiver to pursue a trial in district court, in lieu of a commission hearing.

A. Waiver requests for district court trial in lieu of commission hearing:

(1) Within 60 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.

(2) 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.

(3) Within 30 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.

B. Conciliation:

(1) The director will attempt to achieve a satisfactory adjustment of the complaint by means of conciliation with the complainant and the respondent.

(2) If conciliation attempts are successful, the parties shall prepare and sign a written settlement agreement. When the complainant and the respondent have executed a written settlement agreement by signing it, they shall provide the director with written notification that a settlement agreement between the parties has been executed. At the same time, the complainant shall also submit a written request, signed by the complainant, for the dismissal of the complaint. The execution of a settlement agreement does not imply that an unlawful discriminatory practice has occurred.

(3) If a settlement agreement is reached between the complainant and the respondent through division 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. The complainant shall also submit to the director a written request, signed by the complainant, for dismissal of the complaint.

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

(5) Failure by the respondent or the complainant to abide by an executed settlement agreement will require the director to request the attorney general to secure enforcement.

(6) Failure of the complainant to accept full relief, pursuant to an executed settlement agreement, may result in the case being administratively closed and the complaint being dismissed.

(7) If conciliation attempts are not successful or if, in the opinion of the director, an informal conference cannot result in conciliation, the director will have a commission complaint issued setting the matter for hearing before the commission.

C. Hearing preparation:

(1) Time limits:

(a) Unless the complaint has already been dismissed or a satisfactory adjustment of the complaint has been reached, a commission complaint will be issued on behalf of the complainant within one year of the complainant's filing of a complaint with the division, 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.

(b) A hearing date will be set not more than fifteen days or less than ten 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.

(2) Case preparation for commission hearing:

(a) Case presentation: Each party is responsible for preparing its case for presentation to the commission at hearing. Each party may represent himself or herself at hearing or may be represented by an attorney or another qualified representative.

(b) Evidence:

(i) 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.

(ii) Any materials or information contained in the division 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 and the notice of hearing.

(iii) 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.

(3) Exhibit requirements:

(a) 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.

(b) Number of copies: The original and six copies of each exhibit shall be provided at the commission hearing. 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.

(c) 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.

(4) Witness identification:

(a) 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:

testify at the hearing;

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

(b) 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.

(c) Response to request for identity of witnesses: A party's request for the identity of witnesses shall be answered within ten days of service, unless otherwise ordered by the commission or the hearing officer, upon a motion for a protective order and a showing of good cause.

(d) 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.

(5) Subpoenas and subpoenas duces tecum:

(a) The commission, through the director, may issue subpoenas commanding the appearance and testimony of witnesses at the hearing. The commission, through the director, may also issue subpoenas duces tecum commanding the appearance of witnesses and their production of certain specific documents or other items at the hearing.

(b) The commission may issue subpoenas and subpoenas duces tecum upon the request of a party to the proceeding.

(c) 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.

(d) 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.

(e) Requests for subpoenas or subpoenas duces tecum will be submitted to the director no later than seven working days prior to the hearing date.

(6) Filing, service and form of documents submitted by parties:

(a) 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 division in Santa Fe, New Mexico. 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.

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

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

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

(ii) 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.
(Name of Respondent),
Respondent,

HRD No. _____

[DESCRIPTIVE TITLE OF THE DOCUMENT]

(7) Motions:

(a) General matters: All motions, 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.

(b) 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.

(c) Opposed motions: Any opposed motion shall state that concurrence was sought and denied, or shall state why concurrence was not sought. An opposed motion shall be accompanied by a memorandum brief in support of the motion. A moving party failing to submit a memorandum brief with an opposed motion shall be deemed to have waived any objection to denial of the motion.

(d) Response to motions: Any party upon whom an opposed motion is served shall have ten 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 hearing officer shall be deemed to have waived any objection to the granting of that motion.

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

(8) 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 or by first-class mail.

(9) Statement of intent to present evidence at hearing:

(a) Filing requirement: No later than five days prior to the hearing, each party shall file with the hearing clerk an original and four copies 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.

(b) Content of statement: The statement of intent to present evidence shall include:

(i) the name of the party filing the statement;

(ii) 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

(iii) a list of the exhibits, if any, to be offered into evidence at the hearing.

(c) 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 and all parties of record before the hearing or at the hearing.

[9/1/98; Recompiled 10/01/01]

9.1.1.12 COMMISSION HEARING:

A. Issuance of commission complaint:

(1) If after a probable cause determination, efforts at conciliation have failed or, in the opinion of the director, an informal conference cannot result in conciliation, 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 [Chapter 28, Section 1 NMSA 1978] 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 respondent that failure to appear at the hearing may result in the entry of a judgment or order against the respondent.

(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 division level.

B. Scheduling the hearing:

(1) Hearing date: The hearing clerk in coordination with the commission, the hearing officer and the parties, shall schedule a hearing date which shall not be more than fifteen (15) nor less than ten 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: Promptly after scheduling the 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:

(1) Appearance and representation:

(a) 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) 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) The respondent to a complaint may file a written answer to the complaint, may appear at the hearing, may give testimony 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) Commission counsel 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) Submission of witness lists, exhibit lists and exhibits at hearing: At hearing, each party shall provide the commission with the original and six copies of each of the following:

(a) the party's witness list;

(b) the party's exhibit list; and

(c) the party's exhibits.

(3) Sequence of the proceeding:

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

(b) presentation by each party of the party's witness list and the party's affirmation of readiness to present exhibits;

(c) consideration of any preliminary matters or motions;

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

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

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

(g) presentation of the complainant's case;

(h) presentation of the respondent's case;

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

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

(k) 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) final adjournment of the hearing.

(4) 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.

(5) Custody of evidence: Evidence introduced as exhibits at the hearing will be retained in the custody of the hearing clerk at the division for commission purposes.

(6) Matters of proof:

(a) Burden of proof: Complainant has the burden of proof.

(b) Standard of proof: The complainant must prove his or her case by a preponderance of the evidence.

(7) Evidentiary matters at hearing:

(a) Formal rules of evidence not binding on the commission: 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) Objections to evidence offered: A party who has an objection to the evidence offered or to procedural matters in the proceeding may 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) 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. 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.

(8) 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.

(9) Improper conduct: The commission may exclude from the hearing room any person who engages in improper conduct.

(10) Closing arguments, briefs and findings of fact and conclusions of law:

(a) Closing arguments: At the hearing, a party or the party's attorney may present an oral closing argument in support of the party's position. A party may elect to present a written closing argument in place of an oral closing argument. If a party elects to present a written closing argument, it shall be filed with the commission and served on all parties of record within ten calendar days after the final adjournment of the hearing, unless the commission or the hearing officer directs otherwise.

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

(c) Briefs and answer briefs:

(i) 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) Answer briefs: When a party has filed a brief, the opposing party may submit an answer brief to the commission 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) Attorney fees:

(i) 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 attorney affidavit setting forth his or her 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) 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.

(11) 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.
[9/1/98; Recompiled 10/01/01]

9.1.1.13 COMMISSION RULING AND FINAL ORDER:

A. The final decision and ruling on the merits in each case is reserved to the commission.
B. Where a hearing is before a three-member panel of commissioners, the commission will publicly announce its decision and final order within 30 days, or at such other time as the commission may direct. The decision and final order will be announced orally at a public meeting, for which notice will be given. Within five 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 to the party's attorney, if any, at the address of record for the party and for the party's attorney.

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 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 to the party's attorney, if any, at the address of record for the party and for the party's attorney.

[9/1/98; Recompiled 10/01/01]

9.1.1.14 TRANSCRIPTS:

A. Upon receipt of a notice of appeal, the division will supply as much of the transcript of the record 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.

[9/1/98; Recompiled 10/01/01]

9.1.1.15 CONFIDENTIALITY AND PUBLIC RECORDS:

A. The commission complaint, commission decision and commission orders will be considered public records. Any other information contained within a division investigation file will not be considered public records, except as determined by law. The deliberations of the commission related to a case which the commission is hearing 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 division to a representative of any duly authorized civil rights agency holding a work sharing agreement or memorandum of understanding with the division.

[9/1/98; Recompiled 10/01/01]

9.1.1.16 PROCEDURES FOR FILING AN AFFIRMATIVE ACTION PLAN WITH THE HUMAN RIGHTS DIVISION:

A. If directed to do so by a prevailing executive order of the governor, all New Mexico state departments, agencies and state institutions of higher learning shall submit an updated affirmative action plan to the division in accordance with the prevailing executive order.

B. If a prevailing executive order of the governor requires submission of an updated affirmative action plan to the division, all state departments and agencies under the provisions of the executive order shall submit their plans no later than July 1st, and state institutions of higher learning shall submit their plans no later than October 1 each year.

[9/1/98; Recompiled 10/01/01]

9.1.1.17 AFFIRMATIVE ACTION PLAN CONTENTS: The following items represent standard affirmative action compliance in employment:

A. Equal employment opportunity statement:

(1) The employer must indicate a positive attitude toward equal employment opportunity and indicate that decisions regarding recruitment, hiring, training, promotion and terms and conditions will be made without regard to race, color, religion, national origin, physical or mental handicap, age, sex, ancestry or serious medical condition, except when one of these criteria is a bona fide qualification for the occupation involved. It will also be regarded as a violation of equal employment opportunity values to use hiring criteria which set up barriers to employment or promotion of qualified persons without a strict foundation in occupational necessity.

(2) The employer shall take all reasonable steps to ensure the elimination of conduct that results in the harassment of any employee because of race, color, religion, national origin, physical or mental handicap, age, sex, ancestry or serious medical condition.

(3) The employer's full commitment to the principles of equal employment opportunity should be contained in the policy statement as well as an elaboration of all essential procedures related to the equal opportunity policy.

(4) The employer's civil rights or equal opportunity specialist shall be named in the policy statement.

(5) The statement must also pledge that all conversations and materials submitted by an employee in the informal grievance process, as well as the employee's identity, shall remain confidential and will not be disclosed to management except by written permission of the complaining party.

(6) The highest ranking official shall sign the policy statement and date it appropriately.

B. Assignment of responsibility: The employer must select qualified staff persons of the facility to be appointed as the civil rights or equal opportunity specialist of the employer's affirmative action program. Among the duties of the civil rights/equal opportunity specialist will be the responsibility to assist in the identification and solution of problems. The employer must give the civil rights/equal opportunity specialist the necessary top management support and staffing to fulfill his or her job duties.

C. Establishment of procedure for disseminating policy: A policy of affirmative action is considered to be of little value unless it goes beyond the words on a piece of paper and is put into effect. The civil rights/equal opportunity specialist is responsible for establishing procedure for disseminating the agency's affirmative action program both within the facility (internally) and outside the facility (externally).

D. Analysis of the utilization of protected groups: The employer must identify those areas within the employer's work force in which protected groups are being underutilized. A utilization analysis is composed of four different parts: a work force analysis; identification of job groups within the facility; an availability analysis; and an underutilization analysis. Each employer must show utilization for each facility according to geographic location within the context of local work force availability. (It is understood that the limitation of data would affect the capacity of an agency to determine specific work force availability with precision.)

E. Establishment of goals and timetables: For each job group in which underutilization of protected groups is found, the employer must set up a system of goals and timetables for correcting the deficiencies. (It is understood that the limitation of data would affect the capacity of an agency to determine specific work force availability with precision.)

F. Identification of problem areas and employment practices with an adverse effect on protected groups: The employer must identify key job titles in which protected groups are under-represented in relation to their known availability in the work force and those employment practices which have an adverse effect on protected groups so as to discourage their employment or full utilization. Employers must study flow recruitment procedures, selection and placement procedures, promotions and transfers, seniority systems and terminations. (It is understood that the limitation of data would affect the capacity of an agency to determine specific work force availability with precision.)

G. Establishment of system for monitoring compliance: The employer is obligated to set up a system of monitoring to determine if the affirmative action program is working and, if not, why not. The division may require periodic reviews of the agency and/or employer's affirmative action program.

H. Establishment of system of record keeping in preparation for compliance review: At any time during the initial stages of review or at any time in subsequent stages, the employer will be asked to supply the human rights division staff with certain records such as applicant flow data, hiring records and records of termination and demotion. The employer must devise a system by which this information can be compiled for use as needed.

I. Grievance: The grievance procedure is an internal process whereby employees may file complaints, including allegations of discrimination, to an impartial party or parties without fear of reprisal. Findings

and recommendations shall be submitted to the highest administrative officer of the employer for review and appropriate action.

J. Statement of utilization of handicapped: The employer shall demonstrate a positive attitude in relation to the hiring, training and promotion of the handicapped. It shall declare a policy of support for removing all barriers to employment of the handicapped. The employer will, through a voluntary process of employee self-identification, identify its handicapped population.

K. Reasonable accommodations for the handicapped: Reasonable accommodations shall be accorded to persons identified as handicapped or having a serious medical condition as provided by Subsection J of Section 28-1-7 NMSA 1978, of the Human Rights Act, or as such provision may be otherwise amended.
[9/1/98; Recompiled 10/01/01]

9.1.1.18 APPENDIX A:
[APPENDIX A]

[9/1/98; Recompiled 10/01/01]

HISTORY OF 9.1.1 NMAC:

Pre-NMAC Regulatory Filing History: The material in this part was derived from that previously filed with the State Records Center and Archives under:

- HRC 70-1, Rules and Regulations for Implementation of the Human Rights Act, filed 3/11/70;
- HRC 72-1 Rules and Regulations for Implementation of the Human Rights Act, filed 7/11/72;
- HRC 74-1, Rules and Regulations, filed 3/26/74;
- HRC 77-1, Rules and Regulations, filed 6/10/77;
- HRC-I, Definitions, filed 5/26/80;
- HRC-II, Filing a Complaint, filed 5/26/80;
- HRC-III, Investigations, filed 5/26/80;
- HRC-IV, Pre-Determination Procedures, filed 5/26/80;
- HRC-V, Dismissal, filed 5/26/80;
- HRC-VI, Review Hearing by Commission, filed 5/26/80;
- HRC-VII, Conciliation and Persuasion, filed 5/26/80;
- HRC-VIII, Confidentiality, filed 5/26/80;
- HRC-IX, Hearing, filed 5/26/80;
- HRC-X, Subpoenas and Subpoenas Duces Tecum, filed 5/26/80;
- HRC-XI, Final Order, filed 5/26/80;
- HRC-XII, Transcripts, filed 5/26/80;
- HRC-XIII, Affirmative Action Definition, filed 5/26/80;
- HRC-XIV, Procedures for Filing an Affirmative Action Plan with the Human Rights Commission, filed 5/26/80;
- HRC-XV, Affirmative Action Plan Contents, filed 5/26/80;
- FEPC 68-1, Rules and Regulations for the State of New Mexico, Fair Employment Practices Commission, filed 5/31/68;
- HRC 83-1, Rules and Regulations, filed 11/10/83 and HRC 88-1, Rules and Regulations, filed 10/13/88.

History of Repealed Material: [Reserved]