CIVIL RIGHTS COMMISSION[161]

CHAPTER 1
RULES OF PRACTICE

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CHAPTER 1
RULES OF PRACTICE
[Prior to 1/13/88, see Civil Rights 240—1.2, Ch 9, Ch 10]

161—1.1(216) Organization and administration.

1.1(1) *Organization.*

a. Commission. The Iowa civil rights commission is a seven-member body. Members are appointed by the governor pursuant to Iowa Code section 216.3.

b. Location. The Iowa civil rights commission, hereinafter referred to as "commission," is located on the first floor, Grimes State Office Building, 400 East 14th Street, Des Moines, Iowa 50319; telephone (515)281-4121; toll-free in Iowa only 1-800-457-4416; facsimile transmission (fax) (515)242-5840. Office hours are 8 a.m. to 4:30 p.m. Monday through Friday.

1.1(2) *Administration.* The executive director is responsible for the day-to-day administration of the commission's activities.

1.1(3) *Electronic attendance of commissioners.*

a. Notification. A commissioner wishing to attend the commission meeting by electronic means shall notify the executive director of this intent. The executive director will then take all reasonable measures to ensure that the necessary equipment is available at the site selected for the commission meeting. The commissioner attending by electronic means is responsible for ensuring that adequate equipment is available at the commissioner's location.

b. Public participation. Whenever any commissioners attend by electronic means, public access to the conversation of the commission will be allowed at the location of at least one of the commissioners. Unless good cause requires otherwise, the location where public access to the conversation is provided shall be a location reasonably accessible to the public. If the location is not reasonably accessible to the public, the nature of the good cause justifying inaccessibility shall be stated in the minutes.

c. Electronic attendance of multiple commissioners. If at the time a commissioner notifies the executive director of the intent to attend electronically that commissioner's electronic attendance would mean that four or more commissioners would be attending separately via electronic means, then that commissioner may not attend by electronic means unless the in-person attendance of any four of the commissioners attending the meeting at any of the available meeting sites is impossible or impracticable.

d. Conducting electronic meeting. Whenever four or more commissioners are separately attending a commission meeting by electronic means, the commission shall conduct the meeting in accordance with the following requirements:

(1) The commission shall keep detailed minutes of all discussion, all persons present and all action. The commission shall electronically record all proceedings in the meeting and retain such recordings for no less than one year from the date of the meeting.

(2) The minutes of the meeting shall include a statement explaining why a meeting in person was impossible or impracticable.

(3) The public notice of the meeting shall state the location of the meeting to be the location where public access to the conversation is provided.

161—1.2(216) Commission procedure for rule making.

1.2(1) *Initiation of rule-making procedures.*

a. Any person or state agency may file a petition for rule making with the commission at its location as defined in 161—paragraph 1.1(1)"*b*." A petition is deemed filed when it is received by that office. The commission shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the commission an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

BEFORE THE IOWA CIVIL RIGHTS COMMISSION

Petition by (Name of Petitioner) for the (adoption, amendment, or repeal) of rules relating to (state subject matter).	}	PETITION FOR RULE MAKING

The petition must provide the following information:

1. A statement of the specific rule-making action sought by the petitioner including the text or a summary of the contents of the proposed rule or amendment to a rule, a citation and the relevant language to the particular portion or portions of the rule proposed to be amended or repealed.

2. A citation to any law deemed relevant to the commission's authority to take the action urged or to the desirability of that action.

3. A brief summary of petitioner's arguments in support of the action urged in the petition.

4. A brief summary of any data supporting the action urged in the petition.

5. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the proposed action which is the subject of the petition.

b. The commission shall act upon the request within 60 days after its submission in accordance with Iowa Code section 17A.7 as amended by 1998 Iowa Acts, chapter 1202.

c. The commission may initiate rule-making procedures upon its own motion in accordance with Iowa Code section 17A.4.

1.2(2) *Advice on possible rules before notice of proposed rule adoption.* In addition to seeking information by other methods, the commission may, before publication of a Notice of Intended Action under Iowa Code section 17A.4(1)*"a,"* solicit comments from the public on a subject matter of possible rule making by the commission by causing notice to be published in the Iowa Administrative Bulletin of the subject matter and indicating where, when, and how persons may comment.

1.2(3) *Notice of proposed rule making—contents.* At least 35 days before the adoption of a rule, the commission shall cause Notice of Intended Action to be published in the Iowa Administrative Bulletin. The Notice of Intended Action shall include:

a. A brief explanation of the purpose of the proposed rule;

b. The specific legal authority for the proposed rule;

c. Except to the extent impracticable, the text of the proposed rule;

d. Where, when, and how persons may present their views on the proposed rule; and

e. Where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

Where inclusion of the complete text of a proposed rule in the Notice of Intended Action is impracticable, the commission shall include in the notice a statement fully describing the specific subject matter of the omitted portion of the text of the proposed rule, the specific issues to be addressed by that omitted text of the proposed rule, and the range of possible choices being considered by the agency for the resolution of each of those issues.

1.2(4) *Public participation.*

a. Written comments. For at least 20 days after publication of the Notice of Intended Action, persons may submit argument, data, and views, in writing on the proposed rule. Such written submissions should identify the proposed rule to which they relate and should be submitted to the commission at its location as defined in 161—paragraph 1.1(1)*"b,"* or the person designated in the Notice of Intended Action.

b. Oral proceedings. The commission may, at any time, schedule an oral proceeding on a proposed rule. The commission shall schedule an oral proceeding on a proposed rule if, within 20 days after a published Notice of Intended Action, a written request for an opportunity to make oral presentations is submitted to the commission by the administrative rules review committee, a governmental subdivision, an agency, an association having not less than 25 members, or at least 25 persons. That request must also contain the following additional information:

(1) A request by one or more individual persons must be signed by each of them and include the address and telephone number of each of them.

(2) A request by an association must be signed by an officer or designee of the association and must contain a statement that the association has at least 25 members and the address and telephone number of the person signing the request.

(3) A request by an agency or governmental subdivision must be signed by an official having authority to act on behalf of the entity and must contain the address and telephone number of the person signing the request.

c. Conduct of oral proceedings.

(1) Applicability. This paragraph applies only to those oral rule-making proceedings in which an opportunity to make oral presentations is authorized or required by Iowa Code section 17A.4(1)*"b"* as amended by 1998 Iowa Acts, chapter 1202, or subrule 1.2(5)*"f."*

(2) Scheduling and notice. An oral proceeding on a proposed rule may be held in one or more locations and shall not be held earlier than 20 days after notice of its location and time is published in the Iowa Administrative Bulletin. That notice shall also identify the proposed rule by ARC number and citation to the Iowa Administrative Bulletin.

(3) Presiding officer. The commission, a member of the commission, or another person designated by the commission who will be familiar with the substance of the proposed rule, shall preside at the oral proceeding on a proposed rule. If the commission does not preside, the presiding officer shall prepare a memorandum for consideration by the commission summarizing the contents of the presentations made at the oral proceeding unless the commission determines that such a memorandum is unnecessary because the commission will personally listen to or read the entire transcript of the oral proceeding.

(4) Conduct of the proceeding. At an oral proceeding on a proposed rule persons may make oral statements and make documentary and physical submissions, which may include data, views, comments or arguments concerning the proposed rule. Persons wishing to make oral presentations at such a proceeding are encouraged to notify the commission at least one business day prior to the proceeding and indicate the general subject of their presentations. At the proceeding, those who participate shall indicate their names and addresses, identify any persons or organizations they may represent, and provide any other information relating to their participation deemed appropriate by the presiding officer. Oral proceedings shall be open to the public and shall be recorded by stenographic or electronic means.

1. At the beginning of the oral proceeding the presiding officer shall give a brief synopsis of the proposed rule, a statement of the statutory authority for the proposed rule, and the reasons for the commission decision to propose the rule. The presiding officer may place time limitations on individual oral presentations when necessary to ensure the orderly and expeditious conduct of the oral proceeding. To encourage joint oral presentations and to avoid repetition, additional time may be provided for persons whose presentations represent the views of other individuals as well as their own views.

2. Persons making oral presentations are encouraged to avoid restating matters which have already been submitted in writing.

3. To facilitate the exchange of information the presiding officer may, where time permits, open the floor to questions or general discussion.

4. The presiding officer shall have the authority to take any reasonable action necessary for the orderly conduct of the meeting.

5. Physical and documentary submissions presented by participants in the oral proceeding shall be submitted to the presiding officer. Such submissions become the property of the commission.

6. The oral proceeding may be continued by the presiding officer to a later time without notice other than by announcement at the hearing.

7. Participants in an oral proceeding shall not be required to take an oath or to submit to cross-examination. However, the presiding officer in an oral proceeding may question participants and permit the questions of participants about any matter relating to that rule-making proceeding, including any prior written submissions made by those participants in that proceeding; but no participant shall be required to answer any question.

8. The presiding officer in an oral proceeding may permit rebuttal statements and request the filing of written statements subsequent to adjournment of the oral presentations.

d. Additional information. In addition to receiving written comments and oral presentations on a proposed rule according to the provisions of this rule, the commission may obtain information concerning a proposed rule through any other lawful means deemed appropriate under the circumstances.

e. Accessibility. The commission shall schedule oral proceedings in rooms accessible to and functional for persons with physical disabilities. Persons who have special requirements should contact the commission at its location as defined in 161—paragraph 1.1(1)"*b*" in advance to arrange access or other needed services.

1.2(5) *Regulatory analysis.*

a. Definition of small business. A "small business" is defined in 1998 Iowa Acts, chapter 1202, section 10.

b. Qualified requesters for regulatory analysis—economic impact. The commission shall issue a regulatory analysis of a proposed rule that conforms to the requirements of Iowa Code section 17A.4(2a) after a proper request from:

(1) The administrative rules coordinator;

(2) The administrative rules review committee.

c. Qualified requesters for regulatory analysis—business impact. The commission shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b) after a proper request from:

(1) The administrative rules review committee,

(2) The administrative rules coordinator,

(3) At least 25 or more persons who sign the request provided that each represents a different small business,

(4) An organization representing at least 25 small businesses. That organization shall list the name, address and phone number of not less than 25 small businesses it represents.

d. Time period for analysis. Upon receipt of a timely request for a regulatory analysis the commission shall adhere to the time lines described in 1998 Iowa Acts, chapter 1202, section 10(4).

e. Contents for request. A request for a regulatory analysis is made when it is mailed or delivered to the commission. The request shall be in writing and satisfy the requirements of 1998 Iowa Acts, chapter 1202, section 10(1).

f. Contents of concise summary. The contents of the concise summary shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(4,5).

g. Publication of a concise summary. The commission shall make available to the maximum extent feasible, copies of the published summary in conformance with 1998 Iowa Acts, chapter 1202, section 10(5).

h. Regulatory analysis contents—rules review committee or rules coordinator. When a regulatory analysis is issued in response to written request from the administrative rules review committee or the administrative rules coordinator, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2*a*), unless a written request expressly waives one or more of the items listed in the section.

i. Regulatory analysis contents—substantial impact on small business. When a regulatory analysis is issued in response to a written request from the administrative rules review committee, the administrative rules coordinator, at least 25 persons signing that request who each qualify as a small business or by an organization representing at least 25 small businesses, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b).

1.2(6) *Fiscal impact statement.*

a. A proposed rule that mandates additional combined expenditures exceeding $100,000 by all affected political subdivisions or agencies or entities which contract with the political subdivisions to provide service must be accompanied by a fiscal impact statement outlining the costs associated with the rule. A fiscal impact statement must satisfy the requirements of Iowa Code section 25B.6.

b. If the commission determines at the time it adopts a rule that a fiscal impact statement upon which the rule is based contains errors, the commission shall, at the same time, issue a corrected fiscal impact statement and publish the corrected fiscal impact statement in the Iowa Administrative Bulletin.

1.2(7) *Time and manner of rule adoption.*

a. Time of adoption. The commission shall not adopt a rule until the period for making written submissions and oral presentations has expired. Within 180 days after the later of the publication of the Notice of Intended Action, or the end of oral proceedings thereon, the commission shall adopt a rule pursuant to the rule-making proceeding or terminate the proceeding by publication of a notice to that effect in the Iowa Administrative Bulletin.

b. Consideration of public comment. Before the adoption of a rule, the commission shall consider fully all of the written submissions and oral submissions received in that rule-making proceeding or any memorandum summarizing such oral submissions, and any regulatory analysis or fiscal impact statement issued in that rule-making proceeding.

c. Reliance on commission expertise. Except as otherwise provided by law, the commission may use its own experience, technical competence, specialized knowledge, and judgment in the adoption of a rule.

1.2(8) *Variance between adopted rule and published notice of proposed rule adoption.*

a. The commission shall not adopt a rule that differs from the rule proposed in the Notice of Intended Action on which the rule is based unless:

(1) The differences are within the scope of the subject matter announced in the Notice of Intended Action and are in character with the issues raised in that notice; and

(2) The differences are a logical outgrowth of the contents of that Notice of Intended Action and the comments submitted in response thereto; and

(3) The Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question.

b. In determining whether the Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question the commission shall consider the following factors:

(1) The extent to which persons who will be affected by the rule should have understood that the rule-making proceeding on which it is based could affect their interests;

(2) The extent to which the subject matter of the rule or the issues determined by the rule are different from the subject matter or issues contained in the Notice of Intended Action; and

(3) The extent to which the effects of the rule differ from the effects of the proposed rule contained in the Notice of Intended Action.

c. The commission shall commence a rule-making proceeding within 60 days of receipt of a petition for rule making seeking the amendment or repeal of a rule that differs from the proposed rule contained in the Notice of Intended Action upon which the rule is based, unless the commission finds that the differences between the adopted rule and the proposed rule are so insubstantial as to make such a rule-making proceeding wholly unnecessary. A copy of any such finding and the petition to which it responds shall be sent to petitioner, the administrative rules coordinator, and the administrative rules review committee, within 3 days of its issuance.

d. Concurrent rule-making proceedings. Nothing in this rule disturbs the discretion of the commission to initiate, concurrently, several different rule-making proceedings on the same subject with several different published Notices of Intended Action.

1.2(9) *Concise statement of reasons.*

a. General. When requested by a person, either prior to the adoption of a rule or within 30 days after its publication in the Iowa Administrative Bulletin as an adopted rule, the commission shall issue a concise statement of reasons for the rule. Requests for such a statement must be in writing and be delivered to the commission's office as defined in 161—paragraph 1.1(1)*"b."* The request should indicate whether the statement is sought for all or only a specified part of the rule. Requests will be considered made on the date received.

b. Contents. The concise statement of reasons shall contain:

(1) The reasons for adopting the rule;

(2) An indication of any change between the text of the proposed rule contained in the published Notice of Intended Action and the text of the rule as finally adopted, with the reasons for any such change;

(3) The principal reasons urged in the rule-making proceeding for and against the rule, and the commission's reasons for overruling the arguments made against the rule.

c. Time of issuance. After a proper request, the commission shall issue a concise statement of reasons by the later of the time the rule is adopted or 35 days after receipt of the request.

1.2(10) *Contents, style, and form of rule.*

a. Contents. Each adopted rule by the commission shall contain the text of the rule and, in addition:

(1) The date the commission adopted the rule;

(2) A brief explanation of the principal reasons for the rule-making action if such reasons are required by Iowa Code section 17A.4(1)*"b"* as amended by 1998 Iowa Acts, chapter 1202, or the commission in its discretion decides to include such reasons;

(3) A reference to all rules repealed, amended, or suspended by the rule;

(4) A reference to the specific statutory or other authority authorizing adoption of the rule;

(5) Any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule;

(6) A brief explanation of the principal reasons for the failure to provide for waivers to the rule if no waiver provision is included and a brief explanation of any waiver or special exceptions provided in the rule if such reasons are required by Iowa Code section 17A.4(1)*"b"* as amended by 1998 Iowa Acts, chapter 1202, or the commission in its discretion decides to include such reasons; and

(7) The effective date of the rule.

b. References to materials not published in full. When the administrative code editor decides to omit the full text of a proposed or adopted rule because publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient, the commission shall prepare and submit to the administrative code editor for inclusion in the Iowa Administrative Bulletin and Iowa Administrative Code a summary statement describing the specific subject matter of the omitted material. This summary statement shall include the title and a brief description sufficient to inform the public of the specific nature and subject matter of the proposed or adopted rules, and of significant issues involved in these rules. The summary statement shall also describe how a copy of the full text of the proposed or adopted rule, including any unpublished matter, may be obtained from the commission. The commission will provide a copy of that full text at actual cost upon request and shall make copies of the full text available for review at the state law library and may make the standards available electronically.

At the request of the administrative code editor, the commission shall provide a proposed statement explaining why publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient.

c. Style and form. In preparing its rules, the commission shall follow the uniform numbering system, form, and style prescribed by the administrative rules coordinator.

1.2(11) *Filing of rules.* The commission shall file each rule it adopts in the office of the administrative rules coordinator. The filing must be executed as soon after adoption of the rule as is practicable. At the time of filing, each rule must have attached to it any fiscal impact statement and any concise statement of reasons that was issued with respect to that rule. If a fiscal impact statement or statement of reasons for that rule was not issued until a time subsequent to the filing of that rule, the note or statement must be attached to the filed rule within five working days after the note or statement is issued. In filing a rule, the agency shall use the standard form prescribed by the administrative rules coordinator.

1.2(12) *Effectiveness of rules prior to publication.*

a. Grounds. The commission may make a rule effective after its filing at any stated time prior to 35 days after its indexing and publication in the Iowa Administrative Bulletin if it finds that a statute so provides, the rule confers a benefit or removes a restriction on some segment of the public, or that the effective date of the rule is necessary to avoid imminent peril to the public health, safety, or welfare. The commission shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

b. Special notice. When the commission makes a rule effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)*"b"*(3), the commission shall employ all reasonable efforts to make its contents known to the persons who may be affected by that rule prior to the rule's indexing and publication. The term, "all reasonable efforts" requires the commission to employ the most effective and prompt means of notice rationally calculated to inform potentially affected parties of the effectiveness of the rule that is justified and practical under the circumstances considering the various alternatives available for this purpose, the comparative costs to the commission of utilizing each of those alternatives, and the harm suffered by affected persons from any lack of notice concerning the contents of the rule prior to its indexing and publication. The means that may be used for providing notice of such rules prior to their indexing and publication include, but are not limited to, any one or more of the following means: radio, newspaper, television, signs, mail, telephone, or personal notice or electronic means.

A rule made effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)*"b"*(3), shall include in that rule a statement describing the reasonable efforts that will be used to comply with the requirements of 1.2(12)*"b."*

1.2(13) *Review by commission of rules.*

a. Any interested person, association, agency, or political subdivision may submit a written request to the administrative rules coordinator requesting the commission to conduct a formal review of a specified rule. Upon approval of that request by the administrative rules coordinator, the commission shall conduct a formal review of a specified rule to determine whether a new rule should be adopted instead or the rule should be amended or repealed. The commission may refuse to conduct a review if it has conducted such a review of the specified rule within five years prior to the filing of the written request.

b. In conducting the formal review, the commission shall prepare within a reasonable time a written report summarizing its findings, its supporting reasons, and any proposed course of action. The report must include a concise statement of the commission's findings regarding the rule's effectiveness in achieving its objectives, including a summary of any available supporting data. The report shall also concisely describe significant written criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of the rule received by the commission or granted by the commission. The report shall describe alternative solutions to resolve the criticisms of the rule, the reasons any were rejected, and any changes made in the rule in response to the criticisms as well as the reasons for the changes. A copy of the commission's report shall be sent to the administrative rules review committee.

161—1.3(216) Procedures for oral or written presentations.

1.3(1) Except where oral or written presentations are deemed unnecessary by the commission in accordance with section 17A.4(2), the commission shall allow for the submission of oral or written presentations, or both, prior to its adoption of any rules.

1.3(2) Interested persons shall have 20 days from the date of publication of notice in the Iowa Administrative Bulletin to submit written requests for oral presentations or to submit with presentations.

1.3(3) Notice of date, time and place of oral presentations by requesting parties will be published by appropriate media at least 20 days in advance with specific notice to requesting parties given by certified mail.

1.3(4) Interested parties may be limited to submitting written presentations at the discretion of the commission except when oral presentations are required by Iowa Code section 17A.4(1)*"b."*

161—1.4(216) Procedure for obtaining declaratory orders.

1.4(1) *Petition for declaratory order.* Any person may file a petition with the commission for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the commission, at its location as defined in 161—paragraph 1.1(1)*"b."* A petition is deemed filed when it is received by that office. The commission shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the commission an extra copy for this

purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

IOWA CIVIL RIGHTS COMMISSION

Petition by (Name of Petitioner) for a Declaratory Order on (Cite provisions of law involved).	PETITION FOR DECLARATORY ORDER

The petition must provide the following information:

1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
3. The questions petitioner wants answered, stated clearly and concisely.
4. The answers to questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.
8. Any request by petitioner for a meeting provided by 1.4(7).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

1.4(2) *Notice of petition.* Within 15 days after receipt of a petition for a declaratory order, the commission shall give notice of the petition to all persons not served by the petitioner pursuant to 1.4(6) to whom notice is required by any provision of law. The commission may also give notice to other persons.

1.4(3) *Intervention.*

a. Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 30 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

b. Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the commission.

c. A petition for intervention shall be filed at the commission office. Such a petition is deemed filed when it is received by that office. The commission will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

IOWA CIVIL RIGHTS COMMISSION

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).	PETITION FOR INTERVENTION

The petition for intervention must provide the following information:

(1) Facts supporting the intervenor's standing and qualifications for intervention.

(2) The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.

(3) Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.

(4) A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.

(5) The names and addresses of any additional persons, or a description of any additional class of persons known by the intervenor to be affected by, or interested in, the questions presented.

(6) Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

1.4(4) *Briefs.* The petitioner or any intervenor may file a brief in support of the position urged. The commission may request a brief from the petitioner, any intervenor, or from any other person concerning the questions raised.

1.4(5) *Inquiries.* Inquiries concerning the status of a declaratory order proceeding may be made to the executive director at the commission's office.

1.4(6) *Service and filing of petitions and other papers.*

a. When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

b. Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the commission at its location as defined in 161—paragraph 1.1(1)*"b."* All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the Iowa civil rights commission.

c. Method of service, time of filing, and proof of mailing. Method of service shall be by regular mail. Time of filing and proof of mailing shall be as provided by 161—subrule 3.5(8).

1.4(7) *Consideration.* Upon request by petitioner, the commission must schedule a brief and informal meeting between the original petitioner, all intervenors, and the commission, a member of the commission, or a member of the staff of the commission, to discuss the questions raised. The commission may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the commission by any person.

1.4(8) *Action on petition.*

a. Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the executive director or designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

b. The date of issuance of an order or of a refusal to issue an order is as defined in Iowa Code section 216.17(1).

c. Within 20 days of the issuance of a declaratory order, the petitioner or intervenors may appeal that order to the commissioners. The commissioners will consider the appeal at a subsequent commissioners' meeting and will either affirm, overturn, or remand the order.

1.4(9) *Refusal to issue order.*

a. The commission shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

(1) The petition does not substantially comply with the required form.

(2) The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the commission to issue an order.

(3) The commission does not have jurisdiction over the questions presented in the petition.

(4) The questions presented by the petition are also presented in a current rule making, contested case, or other agency or judicial proceeding, that may definitively resolve them.

(5) The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

(6) The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

(7) There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

(8) The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.

(9) The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

(10) The petitioner requests the commission to determine whether a statute is unconstitutional on its face.

b. A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final agency action on the petition.

c. Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue an order.

1.4(10) *Contents of declaratory order—effective date.* In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

1.4(11) *Copies of orders.* A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

1.4(12) *Effect of declaratory order.* A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the commission, the petitioner, and any intervenors who consent to be bound and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the commission. The issuance of a declaratory order constitutes final agency action on the petition.

161—1.5(216) Forms. Forms are available at the commission office without charge. Commission staff is available to assist the public in all matters relative to the forms.

1.5(1) *"Charge of Discrimination,"* EEOC 5c, for a complaint alleging a discriminatory or unfair practice or act in all jurisdictional areas except housing.

1.5(2) *"Housing Discrimination Complaint,"* HUD 903, for a complaint alleging a discriminatory or unfair practice or act in the jurisdictional area of housing.

1.5(3) *"Authorization Release Form,"* to secure authorization for relevant client information.

1.5(4) *"Administrative Release Form,"* to request a "right to sue" letter.

1.5(5) *"Request for Withdrawal of Charge of Discrimination,"* is used by the complainant to withdraw the charge of discrimination previously filed.

1.5(6) *"Amended complaint,"* to amend the charge of discrimination previously filed.

1.5(7) *"Forms notebook."* Other forms commonly used by the commission or its staff are compiled within a "forms notebook." The notebook is available for inspection by the public at the commission offices. Copies of the forms notebook can be obtained for an appropriate copying charge.

1.5(8) *"Purpose of forms."* The existence of standard forms is for the convenience of the commission, the public, and the parties. The existence of a standard form does not imply that the purpose of the standard form cannot be accomplished through a document in a different form.

161—1.6(216) Referral and deferral agencies.

1.6(1) *Statement of purpose.* It is the purpose of the commission, in adopting these rules to promote the efficient enforcement of the Act. To this end, the commission will use referral and deferral agreements to encourage agencies with similar powers and jurisdiction to:

a. Develop procedures with remedies necessary to ensure the protection of rights secured by the Iowa Civil Rights Act.

b. Increase the efficiency of their operations.

c. Cooperate more fully with the commission in the sharing of data and resources, and

d. Coordinate investigations and conciliations with the commission in order to eliminate needless duplication.

1.6(2) *Definitions.*

a. *"Agency"* refers to any agency of municipal government established by ordinance for the purpose of eliminating discrimination on any basis protected by the Act or any state or federal governmental unit with jurisdiction over allegations of discrimination that is capable of obtaining remedies similar to those obtainable by the commission.

b. *"Referral"* means the process by which the commission cross-files a charge of discrimination with a referral agency, which extinguishes the legal ability of the commission to process the charge; provided, however, that the referral agency accepts the referred charge and that the commission has the reciprocal right to accept or reject charges cross-filed by the referral agency.

c. *"Referral agency"* means any agency of local government that has been awarded that status by contract with the commission.

d. *"Deferral"* refers to the process whereby the commission notifies an agency of local, state, or federal government that a complaint has been filed with the commission and that the commission will postpone its investigative activities for a period of 60 days while the deferral agency investigates and attempts to resolve the matter. Extensions of this time period may be granted by the commission or the executive director when just cause is shown by the agency for the time extension requested.

e. *"Deferral agency"* means any agency so designated by contract pursuant to these rules.

1.6(3) *Procedure for obtaining referral status.*

a. *Guidelines for designation.* The executive director will evaluate the applications of agencies and may designate agencies as referral agencies where they conform to the following guidelines:

(1) The agency should have professional staff to enable it to comprehensively investigate complaints and to ensure the processing of the charges expeditiously.

(2) The ordinance or enabling legislation under which the agency is established must provide at a minimum the same rights and remedies to discrimination as available under the Act, and

(3) The enabling legislation of the agency shall provide, at a minimum, that the agency may hold public hearings, issue cease and desist orders, and award damages to injured parties which shall include, but are not limited to, actual damages.

b. *Application.* Any agency desiring to be designated as a referral agency by the commission may send a letter of application to the executive director of the commission. Attached to the application must be a copy of the agency's enabling ordinance, a list of its investigatory personnel, the average number of hours worked by each per week, and a report for the previous 12-month period detailing the following:

(1) The number of cases filed with the agency,

(2) The number of probable cause and no probable cause findings,

(3) The number of cases successfully conciliated,

(4) The number of cases taken to public hearing,

(5) The average length of time spent investigating each case,

(6) The cumulative remedies obtained for the previous 12-month period and average remedy obtained per case,

(7) An assessment of the quality of the agency's investigation,

(8) The agency's standards to preserve quality investigations, and

(9) The status of the agency's caseload.

c. Rejection of application. Where the executive director determines that an agency does not qualify as a referral agency, the director shall so inform the agency in writing along with the reasons for the agency's rejection.

If the reasons for the agency's rejection are corrected, the agency will then be designated as a referral agency. The executive director's decision may be appealed to the commission at its subsequent regular meeting.

d. Designation and contract. Where the executive director determines that an agency is qualified as a referral agency, the director will prepare a contract between the commission and the agency containing the terms on which cases will be referred. Upon execution of the contract, the executive director will designate the agency as a referral agency.

e. Terms of the referral contract. The referral contract shall be negotiated with the referral agency, but shall include the following:

(1) Terms prohibiting a complainant who has filed with the commission from cross-filing with a referral agency and vice versa,

(2) Terms permitting the commission to refer complaints filed with it to a referral agency for processing and vice versa,

(3) Terms prohibiting the commission from processing a charge referred to and accepted by the referral agency and vice versa,

(4) Terms permitting the commission or a referral agency to reject a charge referred to it for processing,

(5) Terms ending the contract after two years, subject to renegotiation, and

(6) Any other terms mutually agreed upon.

1.6(4) *Procedure for obtaining deferral status.*

a. Application. Any agency desiring to be designated as a deferral agency by the commission may send a letter of application to the executive director of the commission. Attached to the application must be a copy of the agency's enabling legislation or grant of jurisdiction, a list of its personnel and statement indicating their permanent or part-time status, their functions, and a summary of the agency's prior efforts at preventing and eliminating discrimination. The application must also explain how the agency is capable of obtaining remedies substantially similar to those available under the Act.

b. Guidelines for designation. The executive director will evaluate the applications of all agencies and may designate deferral agencies where the agencies conform to the following guidelines:

(1) The agency should have available resources to enable it to investigate complaints to ensure processing within a reasonable period of time,

(2) The agency's enabling legislation or grant of jurisdiction must permit it to obtain substantially the same remedies as are available under the Act,

(3) The agency must be able to make a diligent effort to investigate and resolve the complaints filed with it, and

(4) The agency is capable of obtaining remedies substantially similar to those available under the Act by informal means.

c. Rejection of application. Where the executive director determines that an agency does not qualify as a deferral agency, the director shall so inform the agency in writing along with the reasons for the agency's rejection.

If the reasons for the agency's rejection are corrected, the agency will then be designated as a deferral agency. The executive director's decision may be appealed to the commission at its subsequent regular meeting.

d. Designation and contract. Where the executive director determines that an agency is qualified as a deferral agency, the director will prepare a contract between the commission and the agency containing the terms on which cases will be deferred. After execution of the contract, the executive director will designate the agency as a deferral agency.

e. Terms of the deferral contract. The deferral contract shall include, subject to negotiations with the agency, the following:

(1) The commission will agree to notify the deferral agency of all complaints filed with the commission which are within the deferral agency's jurisdiction, except where a complainant requests in written form that the deferral agency not be notified.

(2) The deferral agency will agree to aid all complainants whose complaints come within the commission's jurisdiction in completing the commission's complaint forms as well as notarizing them and forwarding the fully executed forms to the commission where the necessity to file a formal complaint exists. If, however, a matter may be resolved informally more expeditiously the deferral agency will simply notify the commission by letter of the complaint and resolution obtained. "Informally resolved complaints" shall refer to complaints that can be resolved within ten days.

(3) The commission will agree to postpone its investigation for at least 60 days of any complaint filed with a deferral agency unless otherwise agreed to by both parties. These waiver agreements will be made on an individual case basis.

(4) The agency will agree not to disclose the filing of a complaint or confidential information pertaining to a complaint until the complaint has been officially set for public hearing.

(5) The commission and the deferral agency shall share copies of all findings, case summaries, and conciliation agreements.

(6) Where a complaint is on file with a deferral agency, the commission will allow the deferral agency access to the contents of the complainant's file provided that the deferral agency allows the commission like privileges and has not previously disclosed confidential information prior to public hearing.

(7) Photocopying of materials from commission files for use by a deferral agency is solely at the discretion of the commission staff, but will not be unreasonably denied. When the commission copies from the agency's file, the agency shall be reasonably compensated for copying costs.

(8) The commission will give substantial weight to the findings of a deferral agency where pertinent and relevant factual evidence exists to support those findings.

(9) The commission will not necessarily be bound by the agency's conclusions of law.

(10) Where a deferral agency reaches a finding of probable cause to support an allegation of discrimination the contract may permit the agency to pursue conciliation, or to refer the case back to the commission for conciliation. The contract may also permit an agency that has attempted conciliation to refer that case back to the commission for public hearing. In no case where a case has been referred back to the commission will it be referred back to the agency. Where a case is conciliated or a hearing is held by the agency or the commission, both will be bound by the final determination.

(11) The period for which the contract will be in effect shall not exceed two years, subject to renegotiation.

(12) The contract may contain other terms agreed to by the parties.

These rules are intended to implement Iowa Code chapter 216.

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[1] Effective date of 161—1.1(1)*"b,"* 1.5(7) and 1.5(8) delayed 70 days by the Administrative Rules Review Committee at its meeting held March 9, 1993; delayed until adjournment of the 1994 Session of the General Assembly by this Committee May 11, 1993.

CHAPTER 2
GENERAL DEFINITIONS

[Prior to 1/13/88, see Civil Rights 240—1.1(601A)]

161—2.1(216) Definitions.

2.1(1) Wherever "Act" is used in rules of the commission it shall mean the Iowa Civil Rights Act of 1965, as amended (Iowa Code chapter 216).

2.1(2) Unless indicated otherwise, the terms "court," "person," "employment agency," "labor organization," "employer," "employee," "unfair practice," or "discriminatory practice," "commission," "commissioner," and "public accommodation" shall have the same meaning as set forth in Iowa Code chapter 216.

2.1(3) The term "chairperson" shall mean the chairperson of the Iowa civil rights commission; and the term "commissioner" shall mean any member, including the chairperson, of the commission. The vice chairperson of the commission shall serve, in the absence of the chairperson, as acting chairperson; and, in the absence of the chairperson, the vice chairperson shall have all the duties, powers and authority conferred upon the chairperson by the Act and commission rules. At all times it shall be necessary that a quorum be present before the commission can transact any official business.

2.1(4) The term "complainant" shall mean the person, as defined in Iowa Code subsection 216.2(11), who makes a complaint of discrimination with the commission.

2.1(5) The term "executive director" shall mean an employee of the commission, selected by and serving at the will of the governor, who shall have the duties, powers and authority conferred upon the director by law.

2.1(6) Except as provided in paragraph *"b,"* the term "issuance" shall mean mailing by regular mail or, when required, U.S. certified mail, a document or letter indicating a decision or other administrative action of the commission. When certified mail is required, the date of issuance of a decision or an administrative action of the commission shall be the date the commission mails by U.S. certified mail a document or letter indicating the decision or action. When mailing is by regular mail, the date of mailing is presumed to be the date on the cover letter accompanying the administrative action or decision unless the date is shown to be in error.

a. Except as provided in paragraph *"b,"* the verb "issue" shall mean to mail by regular mail or, when required, by certified mail, a document or letter indicating a decision or other administrative action of the commission. When certified mail is required, the date an administrative action or decision is "issued" shall be the date the commission mails by U.S. certified mail a document or letter indicating the administrative decision or action. When mailing is by regular mail, the date of mailing is presumed to be the date on the cover letter accompanying the document or letter indicating the administrative decision or action, unless this date is shown to be in error.

b. When used to refer to a decision to administratively close a case, the term "issuance" and the verb "issue" can mean either the mailing of the document indicating administrative closure by regular mail or the mailing of that document by certified mail. The date an administrative closure is issued is the date the administrative closure is mailed to the complainant. When mailing is by regular mail, the date of mailing is presumed to be the date on the cover letter accompanying the administrative closure unless this date is shown to be in error. When certified mail is required, the date an administrative action or decision is "issued" shall be the date the commission mails by U.S. certified mail a document or letter indicating the decision or action.

c. When local mail is permissible, the date of mailing is presumed to be the date on the cover letter.

When used to refer to a subpoena, the term "issuance" and the verb "issue" shall each mean the signing of the subpoena by the issuing authority. The date a subpoena becomes effective is the date service is completed.

2.1(7) The term "respondent" shall mean the person, as that term is defined in Iowa Code subsection 216.2(11), against whom the complaint of discrimination is made with the commission.

2.1(8) The term "right to sue" shall mean the release issued by the commission stating that the complainant has a right to commence an action in the district court. The term "right to sue" is the same as the "release" or "administrative release" described in Iowa Code section 216.16 and these terms may be used interchangeably.

2.1(9) The term "verified" shall mean (a) sworn to or affirmed before a notary public, or other person duly authorized by law to administer oaths and take acknowledgments, or (b) supported by an unsworn declaration which recites that the person certifies the matter to be true under penalty of perjury, states the date of the statement's execution and is subscribed by the person. Such an unsworn declaration may be in substantially the following form: "I certify under penalty of perjury and pursuant to the laws of the state of Iowa that the preceding is true and correct. Executed on (date). (Signature)."

2.1(10) Final actions. The following procedures shall constitute final actions of the commission:

a. The term "administratively closed" shall mean that, in the opinion of the investigating official, no useful purpose would be served by further action by the commission respecting a complaint, such as where the commission staff has not been successful in locating a complainant after diligent efforts, where the respondent has gone out of business, where a right to sue letter has been issued, or where, after a probable cause decision has been made, it is determined that the record does not justify proceeding to public hearing.

b. The term "no jurisdiction" shall mean that the alleged discriminatory act or practice is not one that is prohibited by the Act or where the complaint does not conform to the requirements of the Act.

c. The term "no probable cause finding" shall mean the procedure by which a complainant and respondent are notified that the investigating official has found that there is no probable cause to believe that discrimination exists after reviewing an investigation of a complaint.

d. The term "satisfactorily adjusted" shall mean that the complainant has indicated in writing that the complaint has been resolved to the satisfaction of the complainant, and that no further action is desired from the commission. Whenever the offer of adjustment by a respondent is acceptable to the investigating official, but not to the complainant, the commission may close the case as satisfactorily adjusted. In a case which has been determined by the commission as having probable cause, the respondent's signature must be obtained before the case can be considered to be satisfactorily adjusted.

e. The term "successfully conciliated" shall mean that a written agreement has been executed on behalf of the respondent, on behalf of the complainant, and on behalf of the commission, the contents of which are designed to remedy that alleged discriminatory act or practice and any other unlawful discrimination which may have been uncovered during the course of the investigation.

f. The term "withdrawn" shall mean that a complainant has indicated in writing the desire that no further action be taken by the commission regarding the complaint.

2.1(11) Construction of rules. The rules and regulations promulgated by the Iowa civil rights commission shall be liberally construed to effectuate the purposes and provisions of Iowa Code chapter 216.

2.1(12) The term "terms and conditions of employment," shall include but is not limited to medical, hospital, accident and life insurance or benefits, leave, vacations, and other terms, conditions, and privileges of employment.

[1] **2.1(13)** The term "injury" shall mean a loss of pecuniary benefit, rights, or any offense against a person's dignity.

[1] Objection to 2.1(8) [Prior to 1/13/88 numbered as 1.1(9)] reimposed by ARRC 4/20/88, republished 5/4/88, see full text of objection on following page.

These rules are intended to implement Iowa Code chapter 216.

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1 The Administrative Rules Review Committee at its May 21, 1979, meeting delayed the effective date of 240—subrules 1.1(7) to 1.1(9), 1.3(1), 1.8(2) and rules 1.16 and 1.17 70 days.

2 The Administrative Rules Review Committee at its February 11, 1988, meeting delayed the effective date of subrule 2.1(8) 70 days.

3 Effective date of 161—2.1(4), 2.1(6) to 2.1(11) delayed 70 days by the Administrative Rules Review Committee at its meeting held March 9, 1993; delayed until adjournment of the 1994 Session of the General Assembly by this Committee May 11, 1993.

On July 11th, 1979, the administrative rules review committee voted the following objections:

The committee objects to ARC 0192, item 1, appearing in Vol. 1, IAB 23 (4-18-79), relating to the definition of terms, on the grounds these provisions are beyond the authority of the commission and unreasonable. Specifically, the committee is concerned with subrules 1.1(8) and 1.1(9) appearing under item 1. Subrule 1.1(8) provides:

The term "retirement plan and benefit system" as used in section 601A.12 of the Code relates only to the discontinuation of employment pursuant to the provisions of such retirement plan or system. A retirement plan or benefit system shall be limited to those plans or systems where contributions are limited to those plans or systems where contributions are based upon anticipated financial costs of the needs of the retiree.

It is the opinion of the committee this subrule exceeds the authority of the commission in that it is an overbroad interpretation of §601A.13, the Code. That section in essence exempts from the provisions of the Act retirement plans or benefit systems which discriminate on the basis of age or sex, unless the plan is a "mere subterfuge". The exemption does not appear limited to plans or systems "relating only to the discontinuation of employment" or those "where contributions are based upon the anticipated financial costs of the retiree" as the subrule provides. Under the subrule, a plan or system which fails to meet either of the above criteria would apparently automatically be considered unfair discrimination. If the General Assembly had intended this result it would have so provided within the Act.

It is further the opinion of the committee subrule *1.1(9) defining as "injury", for which damages may be awarded, an offense against a person's dignity, is unreasonable in that it provides no ascertainable standard to determine what damage the offended party has suffered. Under the provisions of §601A.15(8)*"a"*(8) the commission clearly has the authority to award damages for an injury. The committee believes this term to mean that the party has been harmed in some way that damage received can be measured and appropriate recompense awarded for that damage. Dignity, like beauty, is in the eye of the beholder. Absent a showing that physiological or psychological damage has resulted from an "offense against a person's dignity", it appears impossible to accurately measure the financial equivalent of such an injury or to award appropriate damages.

*Renumbered as 2.1(8), IAC 1/13/88; 2.1(8) renumbered as 2.1(13), IAC 2/17/93.
Note: Iowa Code chapter 601A renumbered as chapter 216 in 1993 Iowa Code.

CHAPTER 3
COMPLAINT PROCESS

[Prior to 1/13/88, see Civil Rights 240—1.3 to 1.7, 1.16, 1.17]

161—3.1(216) Anonymity of complaint. For purposes of public commission meetings the complaints shall be identified only by case number so that the anonymity of the complaints and parties can be preserved. Nothing in this provision shall apply to executive sessions of the commission or meetings after the commission has made a decision to hold a public hearing.

161—3.2(216) Access to file information. The disclosure of information, whether a charge has been filed or not, or revealing the contents of any file is prohibited except in the following circumstances:

3.2(1) If a final decision per 161—subrule 2.1(10) has been reached, a party or a party's attorney may, upon showing that a petition appealing the commission action has been filed, have access to the commission's case file on that complaint.

3.2(2) If a case has been approved for public hearing and the letter informing parties of this fact has been mailed, any party or party's attorney may have access to file information through prehearing discovery measures provided in 161—subrule 4.2(2).

3.2(3) If a decision rendered by the commission in a contested case has been appealed, any party or party's attorney may, upon showing that the decision has been appealed, have access to the commission's case file on that complaint.

The fact that copies of documents related to or gathered during an investigation of a complaint are introduced as evidence during the course of a contested case proceeding does not affect the confidential status of all other documents within the file which are not introduced as evidence.

3.2(4) If the commission has issued a right-to-sue letter per subrule 3.9(3), a party or party's attorney may have access to the commission's case file on that complaint.

3.2(5) Only upon written notification from an attorney or a party that the attorney represents may the attorney then obtain access to the commission case file on the same terms as that party.

161—3.3(216) Timely filing of the complaint.

3.3(1) *Limitation.* The complaint shall be filed within the 180 days after the occurrence of an alleged unlawful practice or act.

3.3(2) *Continuing violation.* If the alleged unlawful discriminatory practice or act is of a continuing nature, the date of the occurrence of the alleged unlawful practice shall be deemed to be any date subsequent to the commencement of the alleged unlawful practice up to and including the date upon which the unlawful practice has ceased.

3.3(3) *Tolling of filing period.* By law the filing period described in subrule 3.3(1) and in Iowa Code subsection 216.15(12) is subject to waiver, estoppel and equitable tolling. Whether the filing period shall be equitably tolled in favor of a complainant depends upon the facts and circumstances of the particular case. Equitable tolling suspends the running of the filing period during the period of time in which the grounds for equitable tolling exist.

161—3.4(216) Complaints.

3.4(1) *Filing complaint.* Any person claiming to be aggrieved by a discriminatory or unfair practice may, personally or by an attorney, make, sign, and file with the commission a verified, written complaint. The attorney general, the commission, or a commissioner may initiate the complaint process by filing a complaint with the commission in the same manner as an aggrieved person.

3.4(2) *Contents of complaint.* Each complaint of discrimination should contain the following:

a. The full name, address and telephone number, if any, of the person making the charge;

b. The full name and address of each respondent;

c. A clear and concise statement of the facts, including pertinent dates, if known, constituting each alleged unfair or discriminatory practice;

d. If known and if employment discrimination is alleged, the approximate number of employees of a respondent employer.

3.4(3) *Technical defects in complaint.* Notwithstanding the provisions of subrule 3.4(2), a complaint is sufficient when the commission receives from the complainant a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of. A complaint may be amended to cure technical defects or omissions, including failure to verify the complaint. Such amendments will relate back to the date the complaint was filed.

161—3.5(216) Filing of documents with the Iowa civil rights commission. Any document, including a complaint of discrimination, may be "filed" with the commission by any one of the following methods:

3.5(1) *In person.* By delivery in person to the offices of the commission at the location set forth in 161—paragraph 1.1(1)*"b"* during the office hours set forth in said paragraph *"b."*

3.5(2) *By mail.* By depositing the document in the United States mail, postage prepaid, in an envelope addressed to the Iowa civil rights commission at the address set forth in 161—paragraph 1.1(1)*"b."* In the case of state agencies or other persons served by the state local (interoffice) mail, it is sufficient to deposit the document in Iowa state local (interoffice) mail in an envelope designated "Local" and addressed to the "Iowa Civil Rights Commission."

3.5(3) *By facsimile transmission (fax).* By transmitting via facsimile transmission a copy of the document to the fax number set forth in 161—paragraph 1.1(1)*"b."*

A document filed by fax is presumed to be an accurate reproduction of the original. If a document filed by fax is illegible, a legible copy shall be substituted and the date of filing shall be the date the illegible copy was received.

3.5(4) *By courier service.* By delivering the document to an established courier service for immediate delivery to the Iowa civil rights commission at the address set forth in 161—paragraph 1.1(1)*"b."*

3.5(5) *Suggested procedures for facsimile transmissions (fax).* In order to avoid an incomplete or illegible fax, it is suggested that those desiring to "file" a document via that method follow these procedures:

a. Precede each transmission with a cover sheet setting forth the name of the sender, the specific individual (if any) to whom the transmission is directed, the date of the transmission, and the number of pages including the cover sheet to be transmitted.

b. On the same day as the transmission, speak by telephone to a member of the staff of the commission and confirm that the transmission was received and all pages were legible.

c. After the transmission, promptly mail to the commission the original "hard copy" of the document along with the cover sheet which preceded the transmission (or a copy of the transmission report).

d. After the transmission, mail to the commission a letter setting forth the date and time of the transmission and, if applicable, the specific individual to whom the sender spoke in order to confirm that the transmission was received and all pages were legible.

3.5(6) *Charge for facsimile transmissions in excess of five pages.* For facsimile transmissions in excess of five pages, the commission will bill the sender a reasonable fee for each page in excess of five pages.

3.5(7) *Date a document is deemed to be "filed" with the commission.* The date on which any document is deemed to be "filed" with the commission is determined according to the following:

a. Filing in person. If the document, including a complaint of discrimination, is filed in person as set forth in subrule 3.5(1), then the date of the filing is the date that the document is delivered to the commission offices and date-stamped received.

b. Filing by mail. If the document, except for a complaint of discrimination, is filed by mail as set forth in subrule 3.5(2), then the date of the filing is date of mailing.

c. Filing by facsimile transmission. If the document, including a complaint of discrimination, is filed by facsimile transmission as set forth in subrule 3.5(3), the date of the filing is the date the document is received by the commission as shown on the face of the facsimile. However, if a transmission is received after the office hours set forth in 161—paragraph 1.1(1)*"b,"* the date of filing is the next day

the commission offices are open for business. Transmissions received prior to office hours on a regular business day are deemed filed on that day.

d. Filing by courier service. If the document, except for a complaint of discrimination, is filed by courier service as set forth in subrule 3.5(4), then the date of the filing is the date the document is delivered to the established courier service for immediate delivery to the Iowa civil rights commission at the address set forth in 161—paragraph 1.1(1)*"b."*

e. Presence of commission receipt stamp. Except where the date of the receipt stamp is demonstrated to be in error, the date of filing of a document, including a complaint of discrimination, shall in no event be deemed to be later than the date shown by the dated commission receipt stamp on the document.

3.5(8) *Proof of mailing.* Adequate proof of the date of mailing includes the following:

a. A legible United States Postal Service postmark on the envelope in which the document was enclosed.

b. A legible postage meter mark on the envelope in which the document was enclosed.

c. The date disclosed on a certificate of service.

d. The date disclosed on a notarized affidavit of mailing.

e. The date disclosed on a certification in substantially the following form: "The undersigned certifies under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing) I mailed copies of (describe document) addressed to the Iowa Civil Rights Commission, 400 E. 14th Street, Des Moines, Iowa 50319, and to the names and addresses of the persons listed below by depositing a copy thereof (in a United States post office mailbox with correct postage properly affixed) or (state interoffice mail) (Date) (Signature)."

f. The date listed on the cover letter which was sent by regular mail.

3.5(9) *Conflict among proofs of mailing.* The date of mailing is the date shown by the postmark. In the absence of a legible postmark, the date of mailing is the date shown by the postage meter mark, and only in the absence of both a legible postmark and a legible postage meter mark, the date of mailing is the date shown by the affidavit, certificate, or certification of mailing.

3.5(10) *Filing of complaint.*

a. A complaint of discrimination is filed by any of the methods listed in this rule.

b. The date a complaint of discrimination is filed with the commission is the date the complaint is received by the commission. However, if the complaint is filed by fax and is received after the office hours set forth in 161—paragraph 1.1(1)*"b,"* the date of filing is the next day the commission offices are open for business. Transmissions received prior to office hours on a regular business day of the commission are deemed filed on that day.

c. Except where the date of the receipt stamp is demonstrated to be in error, the date of filing of a complaint of discrimination shall in no event be deemed to be later than the date shown by the dated commission receipt stamp on the complaint.

161—3.6(216) Notice of the complaint. After jurisdictional review and within 20 days of receipt of the complaint, the executive director or designee shall serve the first named respondent with a copy of the complaint by certified mail. If the first named respondent on a complaint is not a governmental entity, service of a true copy on the first named respondent shall be by certified mail. A letter of acknowledgment shall advise the complainant of the right to withdraw the complaint and sue in the appropriate district court according to Iowa Code section 216.16.

161—3.7(216) Preservation of records.

3.7(1) *Employment records.* When a complaint or notice of investigation has been served on an employer, labor organization or employment agency under the Act, the respondent shall preserve all records relevant to the investigation until the complaint or investigation is finally adjudicated. The term "relevant to the investigation" shall include, but not be limited to, personnel, employment or membership records relating to the complainant and to all other employees, applicants or members holding or seeking positions similar to that held or sought by the complainant, and application forms or

test papers completed by any unsuccessful applicant and by all other applicants or candidates for the same position or membership as that for which the complainant applied and was not accepted, and any records which are relevant to the scope of the investigation as defined in the notice or complaint.

3.7(2) *Other records.* Any books, papers, documents, or records of any form which are relevant to the scope of any investigation as defined in the notice or complaint shall be preserved during the pendency of any proceedings by all parties to the proceedings unless the commission specifically orders otherwise.

3.7(3) *Adverse inference.* If after a public hearing the administrative law judge determines:

a. That a party or agent, employee, or person acting for the party has destroyed evidence in violation of subrule 3.7(1) or 3.7(2), and

b. That the destruction was done at a time when the party knew or should have known that the evidence destroyed was relevant to the investigation, and

c. There is no satisfactory explanation for the destruction of the evidence, then the administrative law judge may infer that the destroyed evidence was adverse to the party who destroyed the evidence or whose agent or employee destroyed the evidence or on behalf of whom any other person was acting when destroying the evidence.

161—3.8(216) The complaint.

3.8(1) *Amendment of complaint.*

a. A complaint or any part may be amended by the complainant or by the commission anytime prior to the hearing thereon and, thereafter, at the discretion of the administrative law judge. The complaint may be amended to include additional material allegations the investigation may have disclosed.

To prevent unnecessary litigation or duplication, the commission may amend a complaint based upon information gained during the course of the investigation. The scope of the issues at public hearing shall include the facts as uncovered in the investigation and shall not be limited to the allegations as stated in the original complaint. Provided, however, that when an amendment is made, the respondent may be granted a continuance within the discretion of the administrative law judge if it is needed to allow the respondent to prepare to defend on the additional grounds.

b. Amendments alleging additional acts which constitute unfair or discriminatory practices related to or growing out of the subject matter of the original complaint will relate back to the date the original complaint was filed. If a reasonable investigation of the initial complaint would encompass an alleged unfair or discriminatory practice then that alleged unfair or discriminatory practice grows out of the subject matter of the original complaint.

c. Amendments alleging additional acts which constitute unfair or discriminatory practices which are not related to and which do not grow out of the subject matter of the original complaint will be permitted only where at the date of the amendment the allegation could have been filed as a separate complaint. The complaint as so amended shall then be processed by the commission as a single complaint of discrimination.

3.8(2) *Amendments adding those allegedly liable as successors and relation back.* Whenever the commission or complainant learns subsequent to the filing of the original complaint that an entity may be liable as a successor to the respondent named in the original complaint, the complainant or the commission may at any time amend the complaint to add the alleged successor as a respondent. Provided, however, that when such an amendment is made after issuance of the notice of hearing the alleged successor added by the amendment may be granted a continuance within the discretion of the administrative law judge, if it is needed to allow the alleged successor to prepare its defense. An amendment adding an alleged successor always relates back to the date of the filing of the original complaint.

3.8(3) *Withdrawal of complaint.* A complaint or any part thereof may be withdrawn by the complainant at any time prior to the hearing thereon and, thereafter, at the discretion of the commissioners. However, nothing herein shall preclude the commission from continuing the

investigation and initiating a complaint on its own behalf against the original respondent, as provided for in the Act, whenever it deems it in the public interest.

161—3.9(216) Jurisdictional review. Upon the receipt of a statement offered as a complaint, the executive director or designee shall review the complaint to determine whether the commission has jurisdiction of the complaint. A no jurisdiction determination shall constitute final agency action for purposes of judicial review.

161—3.10(216) Right to sue.

3.10(1) *Request for right to sue.* After the expiration of 60 days from the timely filing of a complaint with the commission, the complainant may request a letter granting the complainant the right to sue for relief in the state district court.

3.10(2) *Conditions precedent to right to sue.* Upon a request under subrule 3.10(1), the commission shall mail to the complainant a right-to-sue letter where the following conditions have been met.

a. The complaint was filed with the commission as provided in rule 3.5(216);

b. The complaint has been on file with the commission for at least 60 days.

3.10(3) *Letter of right to sue.* Where the above conditions have been met, a right-to-sue letter will be mailed stating that complainant has a right to commence an action in the state district court within 90 days of the date of mailing of the right-to-sue letter.

3.10(4) *Exceptions to issuance of right to sue.* Notwithstanding the provisions of any other rule a right-to-sue letter shall not be sent if on the date the request for a right to sue was filed any of the following is true:

a. A finding of "no probable cause" has been made on the complaint by the administrative law judge charged with that duty under Iowa Code subsection 216.15(3); or

b. A conciliation agreement has been executed under Iowa Code section 216.15; or

c. The commission has served notice of hearing upon the respondent pursuant to Iowa Code subsection 216.15(5); or

d. The complaint has been administratively closed and two years have elapsed since the issuance date of the administrative closure; or

e. A finding that the complaint was not timely filed has been made by the commission pursuant to rule 3.9(216) or by the administrative law judge charged with the duty of determining "probable cause" under Iowa Code subsection 216.15(3); or

f. A finding that the commission does not have jurisdiction of the complaint has been made pursuant to rule 3.9(216) or by the administrative law judge charged with the duty of determining "probable cause" under Iowa Code subsection 216.15(3).

3.10(5) *Closure by commission.* When the commission has sent a right-to-sue letter, a commission staff member shall close the case by an administrative closure. Notice of the closure shall be mailed to all parties.

161—3.11(216) Mediation. The executive director or designee may conduct an impartial mediation of the complaint by offering the complainant and the respondent an opportunity to negotiate a no-fault predetermination settlement for the purpose of amicably resolving the complaint prior to full investigation.

161—3.12(216) Administrative review and closure.

3.12(1) *Preliminary screening.*

a. Questionnaire. As soon as practicable after receipt of a complaint, the commission may draft and mail to the parties written questionnaires. Complainant and respondent will receive different sets of questions as they typically have different items of information and different interpretations of the facts. The questionnaire will be as specific as practicable to the particular complaint.

b. Responses to the questionnaire.

(1) Respondent and complainant are required to respond in writing to their respective questionnaires. The answers ordinarily should be responsive to the questions asked, though elaboration is encouraged. If a question does not apply, the responder can so indicate. In lieu of answers responsive to the particular questions, the commission will accept written position statements. The position statements should cover the same general subject areas covered by the questionnaire.

(2) Responses are due 30 days from the mailing of the questionnaire. Extensions will be granted on an informal basis. Requests for extensions may be oral and may be granted or denied orally. No notice of the request for an extension or of the disposition of that request need be given the nonrequesting party. The legislature encourages preliminary screening to be completed within 120 days of the filing of the complaint; therefore, requests for extensions are strongly discouraged. A request for an extension by a party shall constitute a waiver by that party of any objection to the commission taking longer than the 120-day period to screen the complaint.

c. Failure to respond.

(1) Complainant. A complaint may be administratively closed when a complainant fails to respond to the questionnaire.

(2) Respondent. A complaint may be screened in and assigned to investigation when a respondent fails to respond to the questionnaire. Also, information may be sought pursuant to the commission's subpoena procedures.

d. Suggested procedure in answering questionnaire. Answers should be as clear and as precise as possible. Answers too long to be placed on the questionnaire itself should be numbered by part and question number and placed on a separate sheet. The parties are encouraged to submit as much supporting documentation as possible including affidavits of witnesses and documentation of treatment of individuals comparable to the complainant. Where not readily apparent, the significance of the submitted supporting documentation should be explained. This may be done through an answer that refers the commission to a particular item of the submitted supporting documentation.

e. Preliminary screening committee. As soon as practicable after the receipt of all materials responsive to the questionnaires, a committee of commission staff members may meet and review the submitted answers and materials. This preliminary screening committee will then determine whether the case will be "screened in" for further processing or "screened out" as not warranting further investigation.

f. Standard for screening. A case will be screened in when further processing is warranted. Further processing is warranted when the collected information indicates a reasonable possibility of a probable cause determination or the legal issues in the complaint need development.

g. Effect of screen out. A complaint determined not to warrant further processing shall be administratively closed.

h. Effect of failure to follow screening procedure. Preliminary screening is a tool to remove from the commission's active complaints those cases which the collected preliminary information indicates do not warrant further processing. Irregularities in the preliminary screening of a complaint, failure to complete preliminary screening within 120 days of the filing of the complaint, or failure to follow the preliminary screening procedure altogether shall not, by itself, in any way prejudice the rights of either party.

3.12(2) *Periodic review and administrative closure.*

a. Periodic evaluation of evidence. The executive director or designee may periodically review the complaint to determine whether further processing is warranted. Where the periodic review occurs prior to the determination of whether there is probable cause, then processing is warranted when the collected information indicates a reasonable possibility of a probable cause determination or the legal issues in the complaint need development. A complaint determined not to warrant further processing shall be administratively closed.

b. Uncooperative complainant. A complaint may be administratively closed at any time if the complainant cannot be contacted after diligent efforts or is uncooperative, causing unreasonable delay in the processing of the complaint.

c. Involuntary satisfactory adjustment. A complaint may be closed as satisfactorily adjusted when the respondent has made an offer of adjustment acceptable to the executive director or designee but not to the complainant. Notice of intended closure shall state reasons for closure and shall be mailed to the complainant. The complainant shall be allowed 30 days to respond. The response shall be in writing and state the reasons why the complaint should remain open. The executive director or designee shall review and consider the response before making a closure decision.

d. Litigation review. The complaint may be administratively closed after a probable cause determination has been made where it is determined that the record does not justify proceeding to public hearing.

3.12(3) *Purpose and effect of administrative closures.* An administrative closure need not be made as a result of the procedures governing a determination of whether there is probable cause. Unlike a "no probable cause determination" an administrative closure is not a final determination of the merits of the case. An administrative closure resulting from preliminary screening is merely an estimation of the probable merits of the case based on the experience and expertise of the commission. An administrative closure does not have the same effect as a determination of "no probable cause."

161—3.13(216) Investigation. The executive director or designee shall make a prompt investigation of the complaint and make a recommendation. An administrative law judge shall review the recommendation and issue a determination of probable cause or no probable cause.

3.13(1) *Cause determinations.* After a complaint has been filed, the executive director or a designated staff member shall assign a member of the investigatory staff to make a prompt investigation of the complaint. The investigator shall review all of the evidence and make a recommendation of probable cause or no probable cause or other appropriate action to the administrative law judge designated to issue findings. The administrative law judge shall review the case file and issue an independent determination of probable cause or no probable cause, or other appropriate action.

3.13(2) *Rejection of investigator's recommendation.* Where the administrative law judge rejects the recommendation of the staff, the reasons shall be stated in writing and placed in the case file.

3.13(3) *Notice of decision.* Both the complainant and respondent may be notified of the decision in writing by regular or certified mail within 15 days of the administrative law judge's decision.

3.13(4) *Conflicts prohibited.* The administrative law judge designated to issue a finding shall not be permitted to serve as administrative law judge in a contested case where that administrative law judge has issued a finding in the same case.

3.13(5) *Administrative closure and satisfactory adjustments.* Designated staff of the commission may rule that a case be "administratively closed" as defined in 161—paragraph 2.1(10)*"a,"* where no useful purpose would be served by further action by the commission, such as where the complainant has not been located after diligent efforts, issuance of a right-to-sue letter, or where, after a probable cause decision has been made, it is determined that the record does not justify proceeding to public hearing. Designated staff of the commission may close a case as "satisfactorily adjusted" as defined in 161—paragraph 2.1(10)*"d."* This provision does not contemplate administrative closure where an alternative resolution, such as full investigation, is warranted.

3.13(6) *Conciliation.* All cases that result in findings of probable cause shall be assigned to a staff conciliator for the purpose of initiating attempts to eliminate the discriminatory or unfair practice by conference, conciliation, or persuasion. When a conference is held, a synopsis of the facts which led to the finding of probable cause along with written recommendations for resolution will be presented to the respondent.

3.13(7) *Participants.* Both the complainant and respondent shall be notified in writing of the time, date, and location of any conciliation meeting. The complainant may be present during attempts at conciliation.

3.13(8) *Minimum period for conciliation attempts.* Upon the commencement of conciliation efforts, the commission must allow at least 30 days for the parties to reach an agreement. Conciliation efforts may be conducted by mail, teleconferencing, or face-to-face meetings with the parties at the discretion of the commission. The mandatory 30-day period for conciliation begins when the complainant and

the commission's offer of settlement is communicated to respondent or respondent's attorney. After the passage of 30 days the executive director may order further conciliation attempts bypassed if it is determined that the procedure is unworkable. The director must have the approval of a commissioner before bypassing conciliation.

3.13(9) *Conciliation agreements.* A conciliation agreement shall become effective after it has been signed by the respondent or authorized representative, by the complainant or authorized representative, and by either a commissioner, the executive director or designee on behalf of the commission. Copies of the agreement shall be mailed to all parties.

3.13(10) *Breach of conciliation agreement.*

a. At any time in its discretion the commission may investigate whether the terms of a conciliation agreement are being complied with by the respondent. Upon a finding that the terms of the conciliation agreement are not being complied with by the respondent, the commission shall take appropriate action to ensure compliance.

b. Enforcement in court. Appropriate action to ensure compliance as used in the preceding paragraph includes the filing of an action in district court seeking specific performance of the terms of the conciliation agreement or other remedies which may be available.

161—3.14(216) Investigative subpoenas.

3.14(1) *Application of rule.* The provisions of rule 3.13(216) apply to subpoenas served prior to the issuance of the notice of hearing described in rule 161—4.1(216).

3.14(2) *Prior to notice of hearing.* The executive director, or designee, may issue subpoenas prior to the issuance of a notice of hearing. Neither the complainant, other than the commission, nor the respondent shall have the right to demand that a subpoena be issued.

3.14(3) *Initial information request.* Before a subpoena is sought to determine whether the agency should institute a contested case proceeding, the commission staff shall make a request in written form of the person having possession, custody, or control of the requested material or real evidence. The written request shall be either hand delivered by a member of the commission staff or sent by certified mail, return receipt requested. Where a person fails to provide requested information a subpoena may be issued. A subpoena may be issued not less than seven days after the written request has been delivered to the person having possession, custody, or control of the requested materials.

3.14(4) *Form of subpoena.* Every subpoena shall state the name of the commission and the purpose for which the subpoena is issued.

3.14(5) *To whom directed.* The subpoena shall be directed to a specific person, or the person's attorney, or an officer, partner, or managing agent of any person who is not a natural person. If the person having possession, custody, or control of the requested material is unknown, the subpoena may be directed to the "custodian of records" for the person who is known to have possession, custody, or control of the requested material or real evidence. The subpoena shall command the person to whom it is directed to produce designated books, papers, or other real evidence in the possession, custody, or control of that person at a specified time and place. Where a public hearing has been scheduled, the subpoena may command the person to whom it is directed to attend and give testimony.

3.14(6) *Method of service.* The subpoena shall be served either by personal service by an official authorized by law to serve subpoenas or by any member of the commission staff by delivery of a copy to the person named therein. Service which is accomplished in accord with the Iowa Rules of Civil Procedure governing personal service is sufficient for the purpose of service of subpoenas under these rules.

3.14(7) *Proof of service.* Where service is accomplished by personal service, proof of service will be by acknowledgment of receipt by the person served or by the affidavit of the person serving the subpoena. Failure to make proof of service shall not affect the validity of the service.

3.14(8) *Objections to subpoena.*

a. Any person served with a subpoena issued by the commission who intends not to comply with all or part of it shall promptly, after the date of service of the subpoena upon that person, petition the executive director to revoke or modify the subpoena. The petition shall separately identify each portion

of the subpoena with which the petitioner does not intend to comply and shall state, with respect to each such portion, the grounds upon which the petitioner relies. A copy of the subpoena shall be attached to the petition. The executive director or designee may as soon as practicable make a final determination upon the petition. The commission shall then mail the determination of the petition by regular mail to the petitioner.

b. In general, the grounds for modification or revocation of a subpoena are:

(1) The subpoena is not within the statutory authority of the commission;

(2) The subpoena is not reasonably specific;

(3) The subpoena is unduly burdensome;

(4) The subpoena is not reasonably relevant to matters under investigation.

c. To ensure prompt processing of a petition to revoke or modify a subpoena such a petition should be captioned "Motion to Quash" or "Petition to Modify/Revoke Subpoena" or some substantially similar title. The case number assigned to the case should appear on the petition. The petition should be directed to the attention of the executive director of the commission.

3.14(9) *Failure to comply.* Where a person fails to comply with a subpoena, the executive director or designee may authorize the filing of a petition for enforcement in the district court.

3.14(10) *Open public records law.* The inclusion of a record as a confidential public record under Iowa Code chapter 22 does not in any way affect the authority of the commission to subpoena and compel the production of that record. Iowa Code chapter 22 does not govern or affect the access by the commission to public records through its subpoena power.

161—3.15(216) Injunctions. If the executive director or an appropriately designated staff person determines that a complainant may be irreparably injured before a public hearing can be called to determine the merits of the complaint, the executive director or designee may instruct an attorney for the commission to seek injunctive relief as may be appropriate to preserve the rights of the complainant and the public interest.

161—3.16(216) Procedure to reopen.

3.16(1) *Application of rule.* The provisions of this rule apply only to commission decisions and actions taken prior to the issuance of the notice of hearing described in rule 161—4.1(216).

3.16(2) *Reopening by commission—general rule.*

a. At any time during which the commission would be required to issue a right-to-sue letter if the complainant were to request one, the commission may, in its discretion, reopen and reconsider any administrative closure of the commission.

b. The parties shall be notified whenever the commission is considering the reopening of a matter closed by an "administrative closure," which notification shall include the reasons therefor. The parties shall be afforded no less than 14 and no more than 30 days to submit their positions, in writing, on the reopening.

c. The commission may reopen and reconsider an administrative closure where the commission finds that the administrative closure was substantially influenced by any of the following grounds:

(1) Willfully false information provided to the commission concerning a material issue in the case;

(2) Fraud perpetrated upon the commission by a witness, the respondent, or some person not the complainant;

(3) Material misrepresentations made by the respondent to the commission or complainant; or

(4) Gross and material error by the commission staff.

3.16(3) *Applications for reopening.*

a. Except where specifically otherwise provided, a complainant or respondent may apply for reopening of a previously closed proceeding.

b. The commission shall grant reopening upon good cause shown by the applicant.

c. An application for reopening under this subrule must be in writing alleging the grounds and must be filed within 30 days after the issuance of the decision or action to be reconsidered.

d. Written objections to a commission closure shall be liberally construed, where appropriate, as an application for reopening.

e. Unless the application for reopening is disposed of by summary denial, all parties shall be notified whenever an application for reopening is made. A copy of the request for reopening along with the grounds asserted in the request for reopening shall be provided to all respondents. The parties shall be afforded no less than 14 and no more than 30 days to submit their positions, in writing, on the motion for reopening.

The commission may summarily deny an application for reopening without seeking additional information and without following any of the procedures set forth in paragraph 3.16(3)*"e."* Summary denial is appropriate when the application for reopening either fails to assert any grounds for reopening or asserts grounds which are inadequate to justify reopening.

f. The commission, a commissioner, the executive director or designee may grant or deny the application for reopening. If the application for reopening is granted, the matter shall be referred back to the investigating staff. If no further investigation is required, the commission shall decide the matter on the accumulated record of the case. Each of the parties shall be informed of the action taken on the application to reopen, in writing, either by regular or certified mail.

g. When the commission denies an application for reopening of an administrative closure, the notice of the denial may be made by regular mail. The date of the denial is the date the denial decision is mailed. The date of mailing is presumed to be the date on the cover letter accompanying the denial unless this date is shown to be in error.

3.16(4) *No probable cause determination reopening.* In addition to the reopening provisions of subrule 3.16(3), within one year after issuance of a no probable cause, the commission may, in its discretion, reopen and reconsider that no probable cause order where either:

a. The commission finds that the no probable cause order was influenced in substantial part by any of the following:

(1) Fraud perpetrated upon the commission by some person who is not the complainant; or

(2) Material misrepresentations made by the respondent to the commission or complainant.

b. Less than 30 days have elapsed since the issuance of the no probable cause order and the commission determines, in its discretion, that the interests of justice require the matter to be reopened and reconsidered.

3.16(5) *Successful conciliation, mediation, satisfactorily adjusted and withdrawal reopening.*

a. Breach.

(1) Application. A party to a settlement agreement may within 90 days of the date respondent's performance under the agreement was to be completed apply for reopening of a case which has been closed as satisfactorily adjusted on the grounds that the other party has materially breached the agreement. The commission shall not consider such an application for reopening if the commission is a party to the agreement alleged to have been breached. Also, the commission shall not consider such an application for reopening unless, as a part thereof, the party seeking the reopening agrees in writing that if the reopening is granted the agreements allegedly breached shall be null and void, and that such party waives and releases any rights to seek specific performance or damages for the alleged breach in court. If the commission finds that the agreement has been materially breached and that the respondent did not negotiate the agreement in good faith, the case shall be reopened.

(2) Notification of parties. All parties shall be notified that an application for reopening has been made. A copy of the request for reopening along with the grounds asserted in the request for reopening shall be provided to all respondents. The parties shall be afforded no less than 14 and no more than 30 days to submit their position on the motion for reopening in writing.

(3) Court action upon breach. The right to seek reopening under the provisions of paragraph *"a"* shall not affect a party's right to proceed in district court on an action for breach of contract based on the settlement agreement. Upon confirmation that a party has filed such an action for breach of contract, however, the commission shall close the case as that party's remedy shall lie in the district court. If so ordered by the court in such an action, the commission shall reopen a matter that had been closed as a result of the satisfactory adjustment.

b. Coercion or duress.

(1) Application. A party to an agreement may within 90 days after the closure apply for reopening of a case which has been closed as conciliated, mediated or satisfactorily adjusted on the grounds that the agreement was not entered into voluntarily.

(2) Notice to parties. All parties shall be notified that an application for reopening has been made. A copy of the request for reopening along with the grounds asserted in the request for reopening shall be provided to all respondents. The parties shall be afforded no less than 14 and no more than 30 days to submit their position on the motion for reopening in writing.

(3) Standard. An application for reopening under this paragraph must be supported by affidavit. There is a presumption that a person signing a settlement agreement has done so voluntarily. If the commission finds that the agreement was not entered into voluntarily, then the case shall be reopened.

(4) Ratification. Where a party has voluntarily accepted all the benefits of an agreement, that party is barred from applying for reopening of the case on the ground that the agreement was not voluntary.

c. Withdrawal.

(1) In general. A person whose case has been closed as "withdrawn" may within 90 days after the closure apply for reopening of that case.

(2) Standard. An application for reopening under this paragraph must be supported by affidavit. There is a presumption that a person filing a withdrawal has done so voluntarily and with the intent that the charge be withdrawn. If the commission finds that the request for withdrawal either was not filed voluntarily or was filed as a result of a mistake concerning the effect of the request for withdrawal, the case shall be reopened.

(3) Ratification. Where the withdrawal is filed pursuant to a conciliation, mediation or other settlement agreement and the complainant has ratified that agreement, the complainant is barred from applying for reopening of the case on the ground that the agreement was not voluntary.

3.16(6) *Probable cause determination.* The provisions of subrule 3.16(3) notwithstanding, a respondent may not apply for reconsideration of a finding of probable cause.

3.16(7) *Decision to proceed to hearing.* The provisions of subrule 3.16(3) notwithstanding, a complainant may not apply for reopening of a case which has had a finding of probable cause but which is administratively closed because it is determined that the record does not justify proceeding to hearing.

3.16(8) *Request for right-to-sue reopening.* The commission may reopen any case which has been administratively closed whenever: a request for an administrative release is received, all the conditions for issuance of the administrative release are satisfied, and none of the exceptions set forth in subrule 3.10(4) apply. This type of reopening is made in order to effect the complainant's statutory right to receive an administrative release. A reopening under this subrule need not be separately made and issued, but instead is inherent in the issuance of the right to sue.

3.16(9) *Issuance of right to sue.*

a. The issuance of a right-to-sue letter may not be reconsidered and a case closed after such an issuance may not be reopened.

b. Where the right-to-sue letter was issued to a complainant who had not requested it and the commission notifies the parties of this error within 90 days of the erroneous issuance then the closure after the erroneous issuance of the right-to-sue letter will be deemed void and the case reopened.

3.16(10) *Notice of reopening.* Whenever the commission reopens or reconsiders a decision, case closure, or other action of the commission, the commission shall mail each of the parties notice of the reopening in writing sent by regular or certified mail to the last-known mailing address.

3.16(11) *Effect of reopening.* Whenever a case is reopened by the commission, whether upon application or otherwise, the previous closure of the case is made void. The previous closure of a reopened case has no effect whatsoever on the case after the reopening. A reopening constitutes a reversal of the prior determination to close the case.

161—3.17(216) Arbitration.

3.17(1) Arbitration shall be available once a case has been preliminarily screened in for investigation pursuant to the procedures set forth in 3.12(216). Arbitration is available only to those

parties represented by counsel. Arbitration shall remain available with respect to any allegation of discrimination or retaliation set forth in a complaint at any point prior to issuance of the notice of hearing or a final action of the commission with respect to the complaint as set forth in 161—subrule 2.1(10). The arbitration shall encompass all issues in the case which could have been investigated by the commission as issues in the complaint including any claims for unlawful retaliation that may exist through the date of the Notice of Arbitration.

3.17(2) Once cases have been preliminarily screened in for investigation, the respective complainants and respondents shall be notified that they may, by mutual agreement, submit the case to arbitration in lieu of the investigation-conciliation-public hearing process set forth by the Iowa civil rights Act.

3.17(3) In the event either party indicates an interest in arbitration to the commission, the other party shall be so notified. A copy of the commission's rules on arbitration shall be provided to both parties.

3.17(4) If the parties agree to arbitrate, they shall so notify the commission through submission of an agreement to arbitrate which shall be styled a Notice of Arbitration. A valid Notice of Arbitration must include provisions implementing the requirements set forth in subsections 3.17(4)*"a"* to *"l."* Any Notice of Arbitration determined by the executive director or the director's designee to not meet these requirements is invalid unless the executive director or designee approves the variance. In that case, the parties shall be notified that the Notice of Arbitration is invalid and that the commission shall not close the case as a satisfactory adjustment unless the Notice of Arbitration is amended by the parties. A Notice of Arbitration shall be deemed valid unless the executive director or designee informs the parties by certified letter, mailed within 20 days after the commission's receipt of the Notice, that the Notice is invalid. If an agreement is deemed valid, the commission shall close with prejudice the case to which the agreement relates as satisfactorily adjusted. The requirements for a valid Notice of Arbitration are:

a. The complainant must agree that, in exchange for the respondent's agreement to arbitrate the case, the commission may close the case as a satisfactory adjustment with respect to those allegations being submitted to arbitration. The parties must agree that this closure in no way affects the arbitrator's authority to find liability or to award appropriate remedies. The parties must also agree that, if litigation in any forum is pending with respect to the issues submitted, the litigation shall be dismissed with prejudice when the agreement is executed. If complaints are pending with other antidiscrimination agencies concerning the issues submitted to arbitration, the complainant shall seek the closure of those complaints with respect to those issues as being satisfactorily adjusted. An agreement may provide that unless the antidiscrimination agencies make the closures as requested by the complainant, the arbitration agreement is void.

b. The agreement must state all of the liability, remedial, and other issues to be determined by the arbitrator or arbitration panel.

c. The agreement must either set forth the names of the arbitrator(s) selected by the parties or set forth a method of selection of the arbitrator or arbitration panel. The case shall be heard by only one arbitrator unless both parties agree to having it heard by a panel of three. The agreement shall acknowledge that, if all other methods of selection provided in the contract fail or cannot be followed, the district court may, by application of any one of the parties, be asked to appoint one or more arbitrators pursuant to Iowa Code section 679A.3. Unless the parties agree otherwise, they shall provide the district court with the commission's list of pro bono arbitrators as a possible, but not exclusive, source of arbitrators.

d. All parties must agree that copies of all written communications to the arbitrator concerning the facts or law of the case shall be simultaneously sent to the other parties. Such writings shall specifically indicate that copies were sent to the other parties. All verbal communications to the arbitrator(s) concerning the facts or law of the case shall be made only in the presence of the other parties. In the event the arbitrator(s) receive(s) any verbal or written ex parte communication from a party concerning the law or facts of the case, the arbitrator shall notify the other parties in writing completely describing any oral communication and including with the notification a copy of any written communication. The opposing party shall have the opportunity to respond.

e. In the event one of the parties believes that there are grounds for disqualification of an arbitrator, the arbitrator shall consider and rule on any motion for such disqualification. The arbitrator cannot serve when the arbitrator has any personal or financial interest in the result. The arbitrator shall disclose any and all circumstances which, under Iowa law, would constitute a bias or interest which would disqualify the arbitrator. If an arbitrator is disqualified, a new one shall be selected using any of the methods of selection set forth in the agreement to choose the original arbitrator. An arbitrator's failure to exercise self-disqualification when required by Iowa law may constitute grounds for vacation of the award under Iowa Code subsection 679A.12(1)*"b."*

f. The arbitrator(s) shall make all decisions on procedure, liability, and remedies based on the arbitration agreement and the law of Iowa. Iowa Code chapters 216 and 679A, the reported decisions of the Iowa Supreme Court and reported decisions of the Iowa Court of Appeals, and the commission's administrative rules on substantive law are controlling authority with respect to any disputes resolved through this arbitration process. Decisions of the Iowa civil rights commission, decisions of the federal courts, and of other states, legal treatises, and other legal authorities, may be considered as persuasive authority.

g. The discovery procedures set forth in Iowa Code section 679A.7 are available to the parties. Discovery disputes are resolved by the arbitrator. Arbitrators may issue subpoenas and permit depositions as provided by Iowa Code section 679A.7.

h. The time and place for the arbitration hearing, and any motions for continuance, shall be determined by the arbitrator(s) as set forth in Iowa Code section 679A.5. The arbitration hearing is not open to the public.

i. The parties shall agree that costs for a court reporter shall be borne by the party requesting the reporter or by both equally if both parties desire a reporter. However, transcript costs are borne by the individual party requesting transcripts. When the arbitrator is serving pro bono, the parties shall split the reimbursement of the arbitrator's travel and meal expenses.

j. The parties shall agree that the arbitrator(s) shall issue their award within a specific time period which may be greater than but which shall not be less than 60 days after the hearing. The parties may agree that the arbitrator is not required to set forth findings of fact and conclusions of law and that the award shall consist solely of findings of ultimate fact as to liability and an order either denying relief or specifying the relief to be granted.

k. The parties shall agree to the exclusive jurisdiction of the arbitrator or arbitration panel to resolve the issues submitted. The decision of the arbitrator or panel is final and binding with no right of rehearing or appeal to any other forum or court of competent jurisdiction other than that provided in Iowa Code chapter 679A. The parties shall agree that for the purposes of determining the grounds for vacating an award, the arbitration proceedings shall be treated as if they had been conducted under the auspices of the American Arbitration Association.

l. The parties shall agree that the arbitration agreement is a binding contract which is enforceable in court. The parties may agree that in the event a court determines that the agreement has been violated, the court shall award a reasonable attorney's fee to the party enforcing the contract for the services rendered by that party's attorney for enforcement of the contract.

3.17(5) As an option, the parties may, but are not required to, separately stipulate that, in the event the arbitrator finds liability, the complainant shall receive an amount not less than the respondent's last offer prior to signing the arbitration agreement nor more than the complainant's last offer. These amounts shall be stated in a separate contract. Therefore, if an award is made for an amount less than the minimum listed, the parties agree that complainant shall receive the minimum. In the event an award is made for an amount over the maximum listed, the parties agree that the complainant shall receive only the maximum stated. This agreement shall not be revealed to the arbitrator without the mutual consent of the parties.

3.17(6) Unless a Notice of Arbitration is determined to be invalid pursuant to 3.17(4), the commission shall close the case as a "satisfactory adjustment," with respect to all issues submitted to arbitration, after its receipt of the Notice. The submission to arbitration divests the commission of further jurisdiction over the matters submitted.

These rules are intended to implement Iowa Code chapter 216.

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[1] The Administrative Rules Review Committee at its May 21, 1979, meeting delayed the effective date of 240—subrules 1.1(7) to 1.1(9), 1.3(1), 1.8(2) and rules 1.16 and 1.17 70 days.

[2] Effective date of 161—3.2(4), 3.2(5), 3.3(3), 3.4(216), 3.5(216), 3.7(3), 3.8(216), 3.10(216), 3.12(216), 3.13(8) to 3.13(10), 3.14(216) and 3.16(216) delayed 70 days by the Administrative Rules Review Committee at its meeting held March 9, 1993; delayed until adjournment of the 1994 Session of the General Assembly by this Committee May 11, 1993.

CHAPTER 4
CONTESTED CASES

[Prior to 1/13/88, see Civil Rights 240—1.5(2), 1.5(3), 1.8 to 1.15, 1.18]

161—4.1(17A) General provisions.

4.1(1) *Scope and applicability.* This chapter applies to contested case proceedings conducted by the Iowa civil rights commission.

4.1(2) *Prosecutory representative of commission.* The commission's case in support of the complaint shall be presented by the attorney or agent of the commission. An assistant attorney general may represent the Iowa civil rights commission at a contested case proceeding.

4.1(3) *Time.* Time shall be computed as provided in Iowa Code subsection 4.1(34).

4.1(4) *Modification of time limits.* For good cause shown, the presiding officer may extend or shorten the time to take any action, except as precluded by statute. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

4.1(5) *Extension of time for service by mail.* Whenever a party has the right or is required by this chapter to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon that party and the notice or paper is served upon that party by mail, three days shall be added to the prescribed period. Such additional time shall not be applicable where the presiding officer has prescribed the method of service of notice and the number of days to be given. This rule has no effect on actions which must be taken within a prescribed period after the issuance of a proposed decision or final order.

161—4.2(17A) Notice of hearing and answer.

4.2(1) *Statement of charges.*

a. Where conciliation efforts fail and it is determined that the record justifies proceeding to hearing, the commission's attorney or the executive director shall prepare a written statement of charges in support of the complaint and forward it to the presiding officer together with a request for a hearing date.

b. The statement of charges shall contain:

(1) An allegation that the respondent is a proper respondent within the meaning of and subject to provisions of the Iowa civil rights Act.

(2) A factual allegation or allegations of an unfair or discriminatory practice or practices, substantially as uncovered in the investigation, stated in the complaint (including amendments thereto), stated in the order of probable cause, or stated in the investigative summary.

c. A statement of charges is sufficient if it:

(1) Names the respondents and complainants;

(2) States the section(s) of the statute alleged to be violated; and

(3) Incorporates by reference the complaint and any amendments to the complaint.

d. The statement of charges shall also specifically identify all allegations, if any, in the complaint, as amended, which:

(1) Have been closed by other than a probable cause finding, or

(2) The commission has elected not to prosecute despite a probable cause finding.

e. None of the allegations identified pursuant to paragraph 4.2(1)*"d"* shall be considered as a claim of discrimination in the contested case proceeding, but evidence on such allegations may be considered when relevant to other allegations of discrimination or as background evidence.

4.2(2) *Scheduling conference.*

a. The presiding officer may set the matter for a scheduling conference in order that the parties, including the commission, and the presiding officer may arrive at a mutually agreed date for the public hearing. If practicable, the scheduling conference should be set for no sooner than 7 and no later than 30 days after the presiding officer receives the statement of charges. The parties may be notified by regular

mail of the date of the scheduling conference. The scheduling conference may be conducted in whole or in part by telephone.

b. If no date can be agreed upon, the date of the public hearing may be set according to the presiding officer's discretion.

c. A public hearing should be scheduled for as early a date as practicable. In setting the date of hearing the availability of the presiding officer, the parties, the attorneys involved, likely witnesses, and any special circumstances shall be considered.

d. In setting the place of hearing, the location of the presiding officer, the parties, the attorneys involved, likely witnesses, and any special circumstances shall be considered.

4.2(3) *Notice of hearing.* Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. Delivery shall be executed by any of the following means: certified mail with return receipt requested, personal service as provided in the Iowa Rules of Civil Procedure, first-class mail, or publication as provided by the Iowa Rules of Civil Procedure to all interested parties or their attorneys at least 30 days before the date of the hearing. Certified mail return receipts, returns of service, or similar evidence of service shall be filed with the presiding officer. The notice shall include:

a. The time and place of hearing;

b. The nature of the hearing, the legal authority and jurisdiction under which the hearing is being held;

c. A short and plain statement of the matters asserted. This requirement may be satisfied by a statement of the issues as described by the statement of charges or an incorporation of the attached statement of charges;

d. The reference to the sections of the statute and rules involved;

e. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the commission and of parties' counsel where known;

f. Reference to the procedural rules governing conduct of the contested case proceeding;

g. Identification of the presiding officer, if known.

4.2(4) *Answer to notice of hearing.* The respondent is encouraged to file an answer to the allegations contained within the notice of hearing within 20 days of the service of the notice of hearing. Answers are encouraged as a means of sharpening the issues and preserving claimed error.

a. If an answer is filed, it should show on whose behalf it is filed and specifically admit, deny, or otherwise answer all material allegations contained within the notice of hearing. The answer should also state any facts alleged to show an affirmative defense and contain as many additional defenses as the respondent may claim.

b. An answer should state the name, address and telephone number of the person filing the answer, the person or entity on whose behalf the answer is filed, and the attorney, if any, representing that person.

c. Failure to file an answer or failure to follow the guidelines of this rule does not by itself constitute a waiver of any argument nor an admission of any issue. The optional nature of the answer, however, does not affect the respondent's obligations to raise issues in a timely fashion, to reply to discovery, or to fulfill any other obligation which is imposed upon respondent by law.

4.2(5) *Presiding officer.*

a. The presiding officer assigned to render a proposed decision shall be an administrative law judge employed by the department of inspections and appeals.

b. As used in these rules the term "presiding officer" shall mean the administrative law judge employed by the department of inspections and appeals assigned to render a proposed decision in the contested case.

c. As used in rules 4.13(17A) and 4.14(17A) the term "presiding officer" shall include the commissioners of the Iowa civil rights commission as well as the administrative law judge assigned to render a proposed decision in the contested case.

161—4.3(17A) Amendment.

4.3(1) Any notice of hearing, petition, statement of charges, or other charging document may be amended before a responsive pleading has been filed. Amendments to pleadings after a responsive

pleading has been filed and to an answer may be allowed with the consent of the other parties or in the discretion of the presiding officer who may impose terms or grant a continuance. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

4.3(2) Amendment to conform to proof. When issues not raised by the notice of hearing or the answer are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after the final decision; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the hearing on the ground that it is not within the issues made by the pleadings, the presiding officer may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the presiding officer that the admission of such evidence would prejudice that party in maintaining the action or defense upon the merits. The presiding officer may grant a continuance to enable the objecting party to meet such evidence.

161—4.4(17A) Default.

4.4(1) If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

4.4(2) Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

4.4(3) Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final agency action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 4.23(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

4.4(4) The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

4.4(5) Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

4.4(6) "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

4.4(7) A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 4.25(17A).

4.4(8) If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

4.4(9) A default decision may award any relief consistent with the notice of hearing and the commission's remedial authority under the Iowa civil rights Act.

4.4(10) A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately.

161—4.5(17A) Consolidation and severance.

4.5(1) *Grounds for consolidation.* The presiding officer may, upon motion, consolidate any or all matters at issue in two or more contested case proceedings where:

a. The matters at issue involve common parties or common questions of fact or law;

b. Consolidation would expedite and simplify consideration of the issues involved; and

c. Consolidation would not adversely affect the rights of any of the parties to those proceedings.

4.5(2) *Effect of consolidation.* Where consolidated hearings are held, a single record of the proceedings may be made and the evidence introduced in one matter may be considered as introduced in the other, and a separate or joint decision shall be made at the discretion of the presiding officer.

4.5(3) *Severance.* The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

161—4.6(17A) Filing and service of documents.

4.6(1) *When service required.* Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every other paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the commission, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

4.6(2) *Service—how made.* Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivering, mailing, or transmitting by fax (facsimile) a copy to the attorney or to the party at the attorney's or party's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule or order.

4.6(3) *Filing—when required.* After the notice of hearing, all pleadings, motions, documents or other papers shall be filed with the presiding officer at the following address: Civil Rights Administrative Law Judge (or the name of the presiding officer), Department of Inspections and Appeals, Lucas State Office Building, Des Moines, Iowa 50319. Except as provided by these rules, the Iowa Rules of Civil Procedure pertaining to discovery, or other law, all pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the presiding officer.

4.6(4) *Filing—how and when made.* In a contested case before the commission a document is filed by any of the methods described in 481—subrule 10.12(3). The date a document is deemed to be filed in a contested case before the commission is determined according to 481—subrule 10.12(3).

4.6(5) *Proof of mailing.*

a. In a contested case before the commission proof of mailing is made according to 481—subrule 10.12(4).

b. Conflict among proofs of mailing . The date of mailing is the date shown by the legible United States Postal Service postmark and, only in the absence of a legible postmark, the date of mailing is the date shown by the affidavit, certificate, or certification of mailing.

161—4.7(17A) Discovery.

4.7(1) *Civil procedure rules govern discovery.* Discovery procedures applicable in civil actions, as set forth in the Iowa Rules of Civil Procedure, are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

4.7(2) *Motions relating to discovery.* Any motion relating to discovery shall allege that the moving party has made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 4.7(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

4.7(3) *Use at hearing.* Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

4.7(4) *Sanctions available.* The Iowa Rules of Civil Procedure govern what sanctions may be imposed by the presiding officer for the failure to comply with a discovery order, the failure to respond to discovery, or failing to otherwise comply with the rules of discovery.

4.7(5) *Discovery on commission and complainant.* When discovery of information from the complainant is sought, discovery should be made upon the complainant with a copy thereof provided to the commission's representative. When discovery of information from the commission is sought, discovery should be made upon the commission with a copy thereof provided to the complainant or the complainant's representative. Discovery of the commission's investigative file may be made pursuant to Iowa Code section 17A.13(2).

4.7(6) *Discovery materials not filed.* Unless otherwise ordered by the presiding officer, no deposition, notice of deposition, interrogatory, request for production of documents, request for admission, or response, document or thing produced, or objection thereto shall be filed. Any motion attacking the sufficiency of a response to a discovery request must have a copy of the request and response attached or the motion may be denied. This rule does not apply to depositions to perpetuate testimony.

4.7(7) *Discovery conference.* A discovery conference may be ordered, requested, and held in the same manner and upon the same terms as are provided for in Iowa Rule of Civil Procedure 124.2.

4.7(8) *Duplication of civil procedure rules.* The duplication in these rules of provisions contained within the Iowa Rules of Civil Procedure relating to discovery does not imply that other portions of the civil procedure rules do not govern discovery in contested cases before the commission.

161—4.8(17A) Subpoenas.

4.8(1) *Issuance of subpoenas.*

a. A commission subpoena shall be issued to a party upon request. Such a request should be in writing, but oral requests may be honored by the presiding officer. The request shall include the name, address, and telephone number of the requesting party. The presiding officer may issue a subpoena, or a subpoena for the production of documentary evidence, signed but otherwise in blank to a party requesting it, who shall fill it in before service.

b. Parties are responsible for service of their own subpoenas and payment of witness fees and mileage expenses.

4.8(2) *Motion to quash or modify.* The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

161—4.9(17A) Motions.

4.9(1) *Form.* No technical form for motions is required. However prehearing motions must be in writing, state the grounds for relief, and state the relief sought. Any motion for summary judgment shall comply with the Iowa Rules of Civil Procedure. Motions made during the hearing may be stated orally upon the record.

4.9(2) *Response.* Any party may file a written response to a motion within 14 days after the motion is served, unless the time period is extended or shortened by the rules of the commission or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

4.9(3) *Oral argument.*

a. The presiding officer may schedule oral argument on any motion.

b. Oral arguments on motions shall be held in Des Moines or by telephone conference call, unless the presiding officer orders otherwise.

c. A record of arguments will be made at the discretion of the presiding officer. A record may be made by tape recording or by certified shorthand reporter.

d. The expense of transcribing a record of the oral argument or any part thereof shall be charged to the requesting party.

4.9(4) *Motions regarding hearing.*

a. Motions pertaining to the hearing, except motions for summary judgment, must be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action

or the time for such action is lengthened or shortened by rule of the agency or an order of the presiding officer.

b. Motions regarding sequestration of witnesses need not be made ten days prior to the hearing.

4.9(5) *Motions for summary judgment.* Motions for summary judgment shall comply with the requirements of Iowa Rule of Civil Procedure 237 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.

Motions for summary judgment must be filed and served at least 45 days prior to the scheduled hearing date, or other time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 15 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or nonoral submission shall be not less than 20 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order rendered on all issues in a contested case is subject to rehearing pursuant to rule 4.30(17A) and appeal pursuant to rule 4.23(17A).

161—4.10(17A) Prehearing conferences.

4.10(1) Subject matter of conference. Upon the presiding officer's own motion or the motion of the parties, the presiding officer may direct the parties or their counsel to meet with the presiding officer for a conference to consider:

a. Simplification of the issues;

b. Necessity or desirability of amendments to pleadings for purposes of clarification, simplification, or limitation;

c. Stipulations, admissions of fact and of contents and authenticity of documents;

d. Limitation of number of witnesses;

e. Scheduling dates for the exchange of witness lists and proposed exhibits;

f. Identifying matters which the parties intend to request be officially noticed;

g. Such other matters, including discovery matters, as may tend to expedite the disposition of the proceedings.

4.10(2) Prehearing conferences shall be conducted by telephone unless otherwise ordered. A record of the conference will be kept unless otherwise ordered by the presiding officer. A record of the conference may be by tape recording or by certified shorthand reporter. A party may request a copy of the tape recording or transcript of the conference, if it was recorded; or a transcript of the conference, if it was reported, and the requesting party will bear the cost of the recording or transcription.

4.10(3) Effect of conference. The record shall show the matters disposed of by order and by agreement in such pretrial conferences. The subsequent course of the proceeding shall be controlled by such action.

161—4.11(17A) Continuances. Unless otherwise provided, applications for continuances shall be made to the presiding officer.

4.11(1) Written or oral motions for continuance. A written motion for a continuance shall:

a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;

b. State the specific reasons for the request; and

c. Be signed by the requesting party or the party's representative.

An oral motion for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making an oral motion for a continuance must confirm that request by written motion within five days after the oral request unless that requirement is waived by the presiding officer. No motion for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible.

4.11(2) Factors to consider. In determining whether to grant a continuance, the presiding officer may consider:

a. Prior continuances;

b. The interests of all parties;
c. The likelihood of informal settlement;
d. The existence of an emergency;
e. Any objection;
f. Any applicable time requirement;
g. The existence of a conflict in the schedules of counsel, parties, and witnesses;
h. The timeliness of the request; and
i. Other relevant factors.

4.11(3) The presiding officer may require documentation of any grounds for continuance.

4.11(4) Failure of a party to timely obtain counsel, after clear and adequate notice of the right to be represented by an attorney, will not be considered grounds for a continuance in order to allow time to obtain counsel.

161—4.12(17A) Telephone proceedings. The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties or by order of the presiding officer. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

161—4.13(17A) Disqualification.

4.13(1) A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that: (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

4.13(2) The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by 1998 Iowa Acts, chapter 1202, section 19(3), and subrules 4.13(3) and 4.14(8).

4.13(3) In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary,

that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

4.13(4) If a party asserts disqualification on any appropriate ground, including those listed in subrule 4.13(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party. If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 4.25(17A).

4.13(5) Remittal of disqualification. A presiding officer disqualified by the terms of 4.13(1)*"e"* or *"f"* may, instead of withdrawing from the proceeding, disclose, either in writing or orally, on the record the basis of the disqualification. If, based on such disclosure, the parties and lawyers, independently of the administrative adjudicator's participation, all agree in writing that the adjudicator's relationship is immaterial or that the adjudicator's financial interest is insubstantial, the adjudicator is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

4.13(6) Partial disqualification of commission. The disqualification of one or more members of the commission who are considering adoption of a proposed decision of the presiding officer shall not prevent the remaining commissioners from considering the proposed decision.

161—4.14(17A) Ex parte communication.

4.14(1) Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned to render a proposed or final decision or to make findings of fact or conclusions of law in the contested case from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the agency or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 4.13(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

4.14(2) Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

4.14(3) Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

4.14(4) To avoid prohibited ex parte communications notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 4.6(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

4.14(5) Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

4.14(6) Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties

prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 4.11(17A).

4.14(7) Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

4.14(8) Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

4.14(9) The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the agency. Violation of ex parte communication prohibitions by agency personnel shall be reported to the executive director for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

161—4.15(17A) Powers of presiding officer. The presiding officer who presides at the hearing shall have all powers necessary to the conduct of a fair and impartial hearing including, but not limited to, the power to:

1. Conduct formal hearings in accordance with the provisions of this chapter;
2. Administer oaths and examine witnesses;
3. Compel the production of documents and appearance of witnesses in control of the parties;
4. Issue subpoenas;
5. Issue decisions and orders;
6. Rule on motions, and other procedural items or matters pending before the presiding officer;
7. Require the submission of briefs;
8. Issue such orders and rulings as will ensure the orderly conduct of the proceedings;
9. Receive, rule on, exclude or limit evidence and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;
10. Maintain the decorum of the hearing including the power to refuse to admit or to expel anyone whose conduct is disorderly;
11. Take any action authorized by these rules;
12. Impose appropriate sanctions against any party or person failing to obey an order under these rules which may include:

- Refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters in evidence;
- Excluding all testimony of an unresponsive or evasive witness, or determining that the answer of such witness, if given, would be unfavorable to the party, if any, having control over the witness; and
- Expelling any party or person from further participation in the hearing.

161—4.16(17A) Hearing procedures.

4.16(1) Objections. All objections shall be timely made and stated in the record. Any objection not duly made before the presiding officer shall be deemed waived.

4.16(2) Representation of parties. Parties have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Partnerships, corporations, or associations may be represented by any member, officer, director or duly authorized agent. Any party may be represented by an attorney or another person authorized by law.

4.16(3) Rights of parties. Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

4.16(4) Sequestration of witnesses. At the request of a party, a presiding officer may order witnesses sequestered so they cannot hear the testimony of other witnesses, and the judge may make the order sua sponte. This rule does not authorize sequestration of (a) a party who is a natural person, or (b) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (c) a person whose presence is shown by a party to be essential to the presentation of the cause.

4.16(5) The presiding officer shall conduct the hearing in the following manner:

a. The presiding officer shall give an opening statement briefly describing the nature of the proceeding;

b. The parties shall be given an opportunity to present an opening statement;

c. Parties shall present their cases in the sequence determined by the presiding officer;

d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law;

e. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

4.16(6) Marking of exhibits. Exhibits entered into evidence which are offered by the commission or the complainant shall be numbered serially, i.e., 1, 2, 3, etc.; whereas those offered by the respondent shall be lettered serially, i.e., A, B, C, ... AA, BB, etc.; and those offered jointly shall be designated by "joint exhibit" and numbered serially.

4.16(7) Contents of record. The record in a contested case before the presiding officer shall include:

a. All pleadings, motions, and rulings;

b. All evidence received or considered and all other submissions;

c. A statement of matters officially noticed;

d. All questions and offers of proof, objections, and rulings thereon;

e. All proposed findings and exceptions;

f. Any decision, opinion or report by the officer presiding at the hearing.

The term "all other submissions" as used in this rule includes, but is not limited to, all written arguments filed with the presiding officer or the commission plus any attachments to such arguments.

Deliberations of the commission when deciding whether to adopt a proposed decision are not part of the record unless expressly made part of the record by order of the commission or the presiding officer.

4.16(8) Standards of conduct.

a. All persons appearing in proceedings before the presiding officer are expected to act with integrity, and in an ethical manner.

b. The presiding officer may exclude from proceedings parties, witnesses, and their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violation of the prohibition against ex parte communications. The presiding officer shall state in the record the cause for barring an attorney or other individual from participation in a particular proceeding. The presiding officer may suspend the proceeding for a reasonable time for the purpose of enabling a party to obtain another attorney or representative. In accordance with Rule 1.2 of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association, the presiding officer may also file a complaint with the committee if the judge believes that there has been a violation by an attorney of the Iowa Code of Professional Responsibility for Lawyers.

c. An order barring an individual from participation in a proceeding should be made only in exceptional circumstances.

161—4.17(17A) Evidence.

4.17(1) The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

4.17(2) Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts. Stipulated facts are binding on the presiding officer and the commission when it has not been proven that the stipulation was the result of fraud, wrongdoing, misrepresentation, or was not in accord with the intent of the parties.

4.17(3) Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice by express or implied waiver, or the presiding officer determines that good cause justifies their expansion. If the presiding officer decides to admit evidence on issues outside the scope of notice over the objection of a party who did not have actual notice of those issues, that party, upon timely motion, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue. The scope of the issues at public hearing may include the facts as uncovered in the investigation and need not be limited to the allegations as stated in the original complaint.

4.17(4) The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties. All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

4.17(5) Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve ruling until the written decision. Evidentiary objections, other than those based on relevancy, materiality, unduly repetitious evidence, privilege, discovery rules, or scope of examination, or any ground for which a ruling is compulsory as a matter of law, shall be simply noted in the record by the presiding officer.

4.17(6) Whenever evidence is ruled inadmissible, the party offering that exhibit may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document of exhibit, it shall be marked as part of an offer of proof and inserted in the record.

4.17(7) Although the rules of evidence do not apply in a contested case hearing, a finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The commission shall give effect to the rules of privilege recognized by law.

4.17(8) The authenticity of all documents submitted as proposed exhibits at the prehearing conference shall be deemed admitted unless objection is made at the prehearing conference or a written objection to authenticity of a document is filed at least ten days prior to the hearing. A party will be permitted to challenge authenticity at a later time upon a clear showing of good cause for failure to have made the objection earlier. A party's objection to authenticity is that party's refusal to admit the fact of authenticity and need not be ruled upon to be effective. If authenticity is not admitted under this rule it may be proved at hearing by any means permitted by law.

4.17(9) No evidence shall be received at any hearing concerning offers or counter-offers of adjustment during efforts to conciliate or settle an alleged unfair or discriminatory practice.

161—4.18(17A) Evidence of past sexual practices.

4.18(1) Discovery regarding past sexual practices. In a contested case alleging conduct which constitutes sexual harassment, a party seeking discovery of information concerning the complainant's sexual conduct with persons other than the person who committed the alleged act of sexual harassment, must establish specific facts showing good cause for that discovery, and that the information sought is relevant to the subject matter of the action, and reasonably calculated to lead to the discovery of admissible evidence.

4.18(2) Evidence of past sexual practices inadmissible. In a contested case against a respondent who is accused of sexual harassment, or whose agent or employee is accused of sexual harassment, evidence concerning the past sexual behavior of the alleged victim is not admissible.

161—4.19(17A) Cost of copies of record. Upon request the commission shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record shall be paid by the requesting party.

161—4.20(17A) Posthearing briefs.

4.20(1) In general. The presiding officer may fix times for submission of posthearing briefs. Unless otherwise ordered by the presiding officer, such briefs shall be filed simultaneously by all parties and there shall be no page limit nor any other formal requirements.

4.20(2) Reply briefs. If simultaneous briefs are filed then any party may file a reply brief within 10 days after service of the brief to which the reply is made.

4.20(3) Supplemental briefs. Posthearing briefs in addition to those ordered by the presiding officer under subrule 4.20(1) or those allowed by subrule 4.20(2) may be filed only upon application to the presiding officer.

4.20(4) Extensions. A motion for an extension of the time to file a brief shall be made no later than the day before the brief is due. A motion for an extension to file a brief may be oral and may be granted ex parte where the movant represents either (*a*) that the other parties who are filing briefs have been notified and that the motion is unopposed or (*b*) that there is an emergency which justifies such a request. An order granting an extension shall be in writing.

4.20(5) Late filing. Upon motion and within the discretion of the presiding officer a brief which is filed late may be struck.

4.20(6) Failure in a party's briefs to state, to argue, or to cite authority in support of an issue may be deemed waiver of that issue by that party before the presiding officer.

161—4.21(17A) Requests to present additional evidence.

4.21(1) *In general.* A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence.

4.21(2) *After proposed decision issued.* If a request to present additional evidence is made after the issuance of the proposed decision by the presiding officer then the request must be filed with the appeal or, by a nonappealing party, within 14 days after the service of the appeal. If the commission grants the motion to present additional evidence, the commission shall remand the case to the presiding officer for the taking of the additional evidence and any appropriate modification of the proposed order.

161—4.22(17A) Proposed decision.

4.22(1) *Written decision.* After a review of the transcript, the evidence, and the briefs, the presiding officer shall set forth, in writing, findings of fact, conclusions of law, and a proposed decision and order. The proposed decision becomes the final decision of the commission without further proceedings unless there is an appeal to, or review on motion of, the Iowa civil rights commission within the time provided in rule 4.23(17A).

4.22(2) *Notification.* Upon receipt of the presiding officer's proposed decision, the commission shall forward a copy of the proposed decision to each of the parties by certified mail. A copy shall also be sent to counsel and to each commissioner.

161—4.23(17A) Review of proposed decision on appeal to the commission.

4.23(1) Appeal by party. Any adversely affected party may appeal a proposed decision to the commission within 30 days after issuance of the proposed decision.

4.23(2) Review. The commission may initiate review of a proposed decision on its own motion at any time within 60 days following the issuance of such a decision.

4.23(3) Notice of appeal. An appeal of a proposed decision is initiated by filing a timely notice of appeal with the Iowa civil rights commission. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

a. The parties initiating the appeal;

b. The proposed decision or order appealed from;

c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;

d. The relief sought;

e. The grounds for relief.

4.23(4) If an appeal or motion for review is filed, the executive director shall set a review date. The parties shall be notified of this date by certified mail. Copies of this notification shall also be sent to counsel and the commissioners.

4.23(5) An appeal is filed with the commission by delivering the notice of appeal to the commission at its offices in Des Moines. All appeals and briefs shall be sent to the executive director of the Iowa civil rights commission in care of the commission at its Des Moines address. An appeal may be filed by any of the methods described in 161—subrules 3.5(1) to 3.5(4). Regardless of the method used to file an appeal, the date an appeal is filed is the date it is actually received by the commission in Des Moines.

4.23(6) Oral argument. All parties or their attorneys shall be allowed ten minutes to present oral argument to the commission whenever the commission reviews a proposed decision pursuant to this rule. The commission may, in its discretion, allow oral argument to continue longer.

4.23(7) Briefs and arguments. Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter, any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. The commission may shorten or extend the briefing period as appropriate. When filing a brief the party shall file an original and nine copies.

161—4.24(17A) Scope of review by commission.

4.24(1) *In general.* Whenever the commission reviews a proposed decision, it has all the power it would have in initially making the final decision. The commission may adopt, modify or reject the presiding officer's proposed decision or it may remand the case to the presiding officer for the taking of additional evidence and the making of any further proposed findings of fact, conclusions of law, or decision and order the commission deems necessary.

4.24(2) *Limitation of issues.* Whenever the commission reviews a proposed decision it shall consider only those issues actually presented to the presiding officer unless the issue was one which either:

a. Was raised prior to the proposed decision by a party, but not ruled upon, or

b. Was discussed in the proposed decision, but not argued on brief by the parties.

This rule does not affect a party's right to seek disqualification of a commissioner under rule 4.13(17A) or 4.14(17A).

161—4.25(17A) Interlocutory appeals. Upon written request of a party or on its own motion, the commission may review an interlocutory order of the presiding officer. In determining whether to do so, the commission shall weigh the extent to which its granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the agency at the

time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request or motion for interlocutory review must be filed within seven days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

161—4.26(17A) Intervention.

4.26(1) *Motion.* A motion for leave to intervene in a contested case proceeding shall state the grounds for the proposed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the presiding officer.

4.26(2) *When filed.* Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

4.26(3) *Grounds for intervention.* The movant shall demonstrate that: (*a*) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (*b*) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (*c*) the interests of the movant are not adequately represented by existing parties.

4.26(4) *Effect of intervention.* If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

161—4.27(17A) No factual dispute contested cases. If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable. If the parties cannot agree, any party may file and serve a motion for summary judgment pursuant to the rules governing such motions.

161—4.28(17A) Awards of attorney's fees.

4.28(1) *Retention of jurisdiction.* In any final decision in which it is determined that the complainant is entitled to an award of attorney's fees, but the actual amount has not yet been determined, there is, by operation of this rule, an express retention of jurisdiction of the case by the commission in order to determine the actual amount of attorney's fees to which the party is entitled and to enter a subsequent order awarding those fees, regardless of whether or not such retention of jurisdiction is expressed in the final decision. In such case, the decision is final in all other respects except the determination of the amount of the attorney's fees.

4.28(2) *Stipulation.* A final decision, in which it is determined that the complainant is entitled to an award of attorney's fees, may provide for an opportunity for the parties to file a written stipulation concerning the amount of the fees to be awarded. Any such stipulation entered into by the complainant(s) and respondent(s) is binding on the commission in the absence of evidence of fraud, wrongdoing, misrepresentation, or evidence that the stipulation is not in accord with the intent of the parties.

4.28(3) *Hearing.* If the amount of attorney's fees is not stipulated to by the parties, the presiding officer shall schedule a hearing on the issue of the amount of the attorney's fees. The hearing shall

be governed by the same procedures as a hearing on the merits of a complaint except where otherwise ordered by the presiding officer. The parties may elect, by written stipulation, to utilize some method, such as stipulation of facts or submission of a documentary record, other than or complementary to a hearing, in order to make a record on attorney's fees which may then be reviewed by the presiding officer. By operation of this rule, the commission expresses its consent to such stipulations if agreed to by the parties seeking and contesting attorney's fees. The record of the original hearing is part of the record on the attorney's fee issue. Regardless of the method by which the record is made, the complainant has the burden of persuasion in proving attorney's fees.

161—4.29(17A) Waiver, modification of rules.

4.29(1) *By presiding officer.* Upon notice to all parties, the presiding officer may, with respect to matters pending before the presiding officer, modify or waive any rule herein upon a determination that no party will be prejudiced and that the ends of justice will be served.

4.29(2) *By parties.* Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the presiding officer, in the discretion of the presiding officer, may refuse to give effect to such a waiver when the presiding officer deems the waiver to be inconsistent with the public interest.

161—4.30(17A) Application for rehearing.

4.30(1) *By whom filed.* Any party to a contested case proceeding may file an application for rehearing from a final order.

4.30(2) *Content of application.* The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the agency decision on the existing record and whether, on the basis of the grounds enumerated in rule 4.21(17A), the applicant requests an opportunity to submit additional evidence.

4.30(3) *Time of filing.* The application shall be filed with the commission at its offices in Des Moines within 20 days after the issuance of the final decision.

4.30(4) *Notice to other parties.* A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the commission shall serve copies on all parties.

4.30(5) *Disposition.* Any application for a rehearing shall be deemed denied unless the agency grants the application within 20 days after its filing.

161—4.31(17A) Hearing—other reasons. At any other time, the commission, executive director, or designee may, in its discretion, convene a hearing: whenever a problem of discrimination arises; in order to expedite the disposition of preliminary matters in any action before it; or when in the judgment of the commission, executive director or designee, the circumstances warrant.

161—4.32(216) Assessment of costs of hearing.

4.32(1) *General rule.* If the complainant or the commission prevails in the hearing, the respondent shall pay the "contested case costs" incurred by the commission. If the respondent prevails in the hearing, the commission shall itself bear the "contested case costs" incurred by the commission.

4.32(2) *Mixed results.* Where the complainant or commission is successful as to part of the remedies sought at the hearing and unsuccessful as to part of the remedies, the administrative law judge may recommend an equitable apportionment of "contested case costs" between the commission and the respondent.

4.32(3) *Costs allowable.* The following "contested case costs" and no others will be assessed or apportioned as provided in subrule 4.32(1) or 4.32(2):

a. The daily charge of the court reporter for attending and transcribing the hearing.

b. All mileage charges of the court reporter for traveling to and from the hearing.

c. All travel time charges of the court reporter for traveling to and from the hearing.

d. The cost of the original of the transcripts of the hearing.

e. Postage incurred by the administrative law judge in sending by mail (regular or certified) any papers which are made part of the record.

4.32(4) *Remedial orders.* This rule does not affect those costs which may be recoverable under Iowa Code section 216.15(8)*"a"*(8).

161—4.33(216) Appeals to the district court. Appeals to the district courts from the decision of the commission shall be perfected pursuant to the provisions of Iowa Code section 216.17 and Iowa Code chapter 17A.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code chapter 216.

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[1] The Administrative Rules Review Committee at its May 21, 1979, meeting delayed the effective date of 240—subrules 1.1(7) to 1.1(9), 1.3(1), 1.8(2) and rules 1.16 and 1.17 70 days.

CHAPTER 5
DISCRIMINATION IN AIDING/ABETTING AND RETALIATION

Reserved

CHAPTER 6
DISCRIMINATION IN CREDIT
[Prior to 1/13/88, see Civil Rights 240—Ch 4]

161—6.1(216) Definitions.

"Credit" means an amount or limit to the extent a person may receive goods, services or money for payment in the future, and includes but is not limited to, loans for any purpose and in any amount, checking accounts, charge accounts, mortgages and other home financing, credit cards and credit ratings.

"Credit card" means a small card (as one issued by hotels, restaurants, stores, petroleum companies or banks) authorizing the person or company named or its agent to charge goods or services or borrow money.

"Credit institution" means banks, savings and loan associations, finance companies, credit departments of all retail businesses, credit rating services, credit card issuers, credit bureaus, credit unions and all other loan, credit, financing and mortgaging institutions.

161—6.2(216) Practices prohibited.

6.2(1) The criteria used to evaluate applicants for credit and the standards necessary to be met by the successful applicants shall be the same regardless of the age, color, creed, national origin, race, religion, marital status, sex or physical disability of the applicant.

6.2(2) No credit institution shall require any information, reference or countersignature of any applicant for credit which would not be required of all applicants, regardless of their age, color, creed, national origin, race, religion, marital status, sex or physical disability.

6.2(3) It shall be an unlawful practice for any credit institution to discount or disregard the earnings or income of a spouse in computing family income.

6.2(4) It shall be an unlawful practice for any credit institution to refuse to loan money or extend credit to a woman solely because she is in the childbearing years or solely because she is divorced, or solely because she is unmarried.

6.2(5) It shall be an unlawful practice for any credit institution to extinguish the established credit of any woman upon her marriage or to require that a new account be opened in the husband's name.

6.2(6) It shall be an unlawful practice for any credit institution to refuse to retain any records of credit transactions in the name of a married woman when she so requests in writing.

161—6.3(216) Credit inquiries.

6.3(1) A credit application or credit interviewer may inquire as to age, disability, sex or marital status provided the inquiry is made in good faith for a nondiscriminatory purpose. Any inquiry which expresses directly or indirectly any limitation, specification, or discrimination as to age, disability, sex or marital status shall be unlawful.

6.3(2) The information required to be given by the applicant for credit should be limited to what is necessary for determining the applicant's financial conditions and prospects for repayment regardless of the applicant's age, color, creed, national origin, race, religion, marital status, sex or physical disability. The consent of a spouse shall not be required where the applicant is otherwise eligible for credit.

161—6.4(216) Exceptions.

6.4(1) Cosignatures may be required of a married couple intending to establish a joint account with the company or business issuing the credit card.

6.4(2) The exception for cosignatures is limited, and the issuer should presume the applicant is seeking a credit card in the applicant's own name regardless of the marital status of the applicant.

6.4(3) These rules shall not prohibit any party to a credit transaction from considering the application to the particular case of Iowa law on dower, title, descent, and distribution, or from taking constructive action thereon.

These rules are intended to implement Iowa Code chapter 216.

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CHAPTER 7
DISCRIMINATION IN EDUCATION

Reserved

CHAPTER 8
DISCRIMINATION IN EMPLOYMENT

EMPLOYMENT SELECTION PROCEDURE
[Prior to 1/13/88, see Civil Rights 240—Chs 2, 3, 5, 6]

161—8.1(216) General provisions—employee selection procedures.

8.1(1) *"Test" defined.* For the purpose of the rules in this chapter, the term "test" is defined as any paper-and-pencil or performance measure used as a basis for any employment decision. The rules in this chapter apply, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, membership, training, referral or retention. This definition includes, but is not restricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament. The term "test" includes all formal, scored, quantified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

8.1(2) *"Discrimination" defined.* The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by Title VII, Civil Rights Act of 1964 and Iowa Code chapter 216 constitutes discrimination unless: The test has been validated and evidences a high degree of utility as described in subrule 8.1(3), and the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable.

8.1(3) *Evidence of validity.*

a. Each person using tests to select from among candidates for a position or for membership shall have available for inspection evidence that the tests are being used in a manner which does not violate 8.1(2). Such evidence shall be examined for indications of possible discrimination, such as instances of higher rejection rates for minority candidates than nonminority candidates. Furthermore, where technically feasible, a test should be validated for each minority group with which it is used; that is, any differential rejection rates that may exist, based on a test, must be relevant to performance on the jobs in question.

b. The term "technically feasible" as used in commission rules means having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc. It is the responsibility of the person claiming absence of technical feasibility to positively demonstrate evidence of this absence.

c. Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of, or significantly correlated with, important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.

(1) If job progression structures and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it shall be considered that candidates are being evaluated for a job at or near the entry level. This point is made to underscore the principle that attainment of or performance at a higher level job is a relevant criterion in validating employment tests only when there is a high probability that persons employed will in fact attain that higher level job within a reasonable period of time.

(2) Where a test is to be used in different units of multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may suffice for the others. Similarly, where the validation process requires the collection of data throughout a multiunit organization, evidence of validity specific to each unit may not be required. There may also

be instances where evidence of validity is appropriately obtained from more than one company in the same industry. Both in this instance and in the use of data collected throughout a multiunit organization, evidence of validity specific to each unit may not be required: Provided, that no significant differences exist between units, jobs, and applicant populations.

8.1(4) *Minimum standards for validation.*

a. For the purpose of satisfying the requirements of this chapter, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in "Standards for Educational and Psychological Tests and Manuals" published by American Psychological Association, 1200 17th Street, N.W., Washington, D.C. 20036. Evidence of content or construct validity, as defined in that publication, may also be appropriate where criterion-related validity is not feasible. However, evidence for content or construct validity should be accompanied by sufficient information from job analyses to demonstrate the relevance of the content (in the case of job knowledge or proficiency tests) or the construct (in the case of trait measures). Evidence of content validity alone may be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behavior composing the job in question. The types of knowledge, skills or behavior contemplated here do not include those which can be acquired in a brief orientation to the job.

b. Although any appropriate validation strategy may be used to develop empirical evidence, the following minimum standards, as applicable, must be met in the research approach and in the presentation of results which constitute evidence of validity:

(1) Where a validity study is conducted in which tests are administered to applicants, with criterion data collected later, the sample of subjects must be representative of the normal or typical candidate group for the job or jobs in question. This further assumes that the applicant sample is representative of the minority population available for the job or jobs in question in the local labor market: Where a validity study is conducted in which tests are administered to present employees, the sample must be representative of the minority groups currently included in the applicant population. If it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any person of that person's subsequent obligation for validation when inclusion of minority candidates becomes technically feasible.

(2) Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores and to ensure that scores do not enter into any judgments of employee adequacy that are to be used as criterion measures. Copies of tests and test manuals, including instructions for administration, scoring, and interpretation of test results, that are privately developed and are not available through normal commercial channels must be included as part of the validation evidence.

(3) The work behavior or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behavior as revealed by careful job analyses.

(4) In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias. In addition, minorities might obtain unfairly low performance criterion scores for reasons other than supervisors' prejudice, as, when as new employees, they have had less opportunity to learn job skills. The general point is that all criteria need to be examined to ensure freedom from factors which would unfairly depress the scores of minority groups.

(5) Differential validity. Data must be generated and results separately reported for minority and nonminority groups wherever technically feasible. Where a minority group is sufficiently large to constitute an identifiable factor in the local labor market, but validation data have not been developed and presented separately for that group, evidence of satisfactory validity based on other groups will be regarded as only provisional compliance with these rules, pending separate validation of the test for the

minority group in question. See 8.1(8). A test which is differentially valid may be used in groups for which it is valid but not for those in which it is not valid. In this regard, where a test is valid for two groups but one group characteristically obtains higher test scores than the other without a corresponding difference in job performance, cutoff scores must be set so as to predict the same probability of job success in both groups.

c. In assessing the utility of a test the following considerations will be applicable:

(1) The relationship between the test and at least one relevant criterion must be statistically significant. This ordinarily means that the relationship should be sufficiently high as to have a probability of no more than 1 to 20 to have occurred by chance. However, the use of a single test as the sole selection device will be scrutinized closely when that test is valid against only one component of job performance.

(2) In addition to statistical significance, the relationship between the test and criterion should have practical significance. The magnitude of the relationship needed for practical significance or usefulness is affected by several factors, including:

1. The larger the proportion of applicants who are hired for or placed on the job, the higher the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few job vacancies are available;

2. The larger the proportion of applicants who become satisfactory employees when not selected on the basis of the test, the higher the relationship needs to be between the test and criterion of job success for the test to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few applicants turn out to be satisfactory;

3. The smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant, the greater the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when the former risks are relatively high.

8.1(5) *Presentation of validity evidence.* The presentation of the results of a validation study must include graphic and statistical representations of the relationships between the test and the criteria, permitting judgments of the test's utility in making predictions of future work behavior. (See 8.1(4)*"c,"* concerning assessing utility of a test.) Average scores for all tests and criteria must be reported for all relevant subgroups, including minority and nonminority groups where differential validation is required. Whenever statistical adjustments are made in validity results for less than perfect reliability or for restriction of score range in the test or the criterion, or both, the supporting evidence from the validation study must be presented in detail. Furthermore, for each test that is to be established or continued as an operational employee selection instrument, as a result of the validation study, the minimum acceptable cutoff (passing) score on the test must be reported. It is expected that each operational cutoff score will be reasonable and consistent with normal expectations of proficiency within the work force or group on which the study was conducted.

8.1(6) *Use of other validity studies.* In cases where the validity of a test cannot be determined pursuant to 8.1(3) and 8.1(4) (e.g., the number of subjects is less than that required for a technically adequate validation study, or an appropriate criterion measure cannot be developed), evidence from validity studies conducted in other organizations, such as that reported in test manuals and professional literature, may be considered acceptable when:

a. The studies pertain to jobs which are comparable (i.e., have basically the same task elements), and

b. There are no major differences in contextual variables or sample composition which are likely to significantly affect validity.

Any person citing evidence from other validity studies as evidence of test validity for their own jobs must substantiate in detail job comparability and must demonstrate the absence of contextual or sample differences cited in *"a"* and *"b"* of this subrule.

8.1(7) *Assumption of validity.*

a. Under no circumstances will the general reputation of a test, its author or its publisher, or casual reports of test utility be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions

of validity based on test names or descriptive labels; all forms of promotional literature; data bearing on the frequency of a test's usage; testimonial statements of sellers, users, or consultants; and other nonempirical or anecdotal accounts of testing practices or testing outcomes.

b. Although professional supervision of testing activities may help greatly to ensure technically sound and nondiscriminatory test usage, this alone shall not be regarded as constituting satisfactory evidence of test validity.

8.1(8) *Continued use of tests.* Under certain conditions, a person may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity. If, for example, determination of criterion-related validity in a specific setting is practicable and required but not yet obtained, the use of the test may continue, provided: the person can cite substantial evidence of validity as described in 8.1(6); and the person has in progress validation procedures which are designed to produce, within a reasonable time, the additional data required. It is expected also that the person may have to alter or suspend test cutoff scores so that score ranges broad enough to permit the identification of criterion-related validity will be obtained.

161—8.2(216) Employment agencies and employment services.

8.2(1) An employment service, including private employment agencies, state employment agencies, and the U.S. Training and Employment Service, as defined in Section 701(c) of Title VII, Civil Rights Act of 1964, or Iowa Code section 216.2, shall not make applicant or employee appraisals or referrals based on the results obtained from any psychological test or other selection standard not validated in accordance with commission rules.

8.2(2) An employment agency or service which is requested by an employer or union to devise a testing program is required to follow the standards for test validation as set forth in commission rules. An employment service is not relieved of its obligation because the test user did not request validation or has requested the use of some lesser standard than is provided in commission rules.

8.2(3) Where an employment agency or service is requested only to administer a testing program which has been elsewhere devised, the employment agency or service shall request evidence of validation, as described in the rules in this chapter, before it administers the testing program or makes referral pursuant to the test results. The employment agency must furnish on request evidence of validation. An employment agency or service will be expected to refuse to administer a test where the employer or union does not supply satisfactory evidence of validation. Reliance by the test user on the reputation of the test, its author, or the name of the test shall not be deemed sufficient evidence of validity. See 8.1(7). An employment agency or service may administer a testing program where the evidence of validity comports with the standards provided in 8.1(6).

161—8.3(216) Disparate treatment. The principle of disparate or unequal treatment must be distinguished from the concepts of test validation. A test or other employee selection standard—even though validated against job performance in accordance with the rules in this chapter—cannot be imposed upon any individual or class protected by Title VII, Civil Rights Act of 1964, or Iowa Code chapter 216 where other employees, applicants or members have not been subjected to that standard. Disparate treatment, for example, occurs where members of a minority or sex group have been denied the same employment, promotion, transfer or membership opportunities as have been made available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, no new test or other employee selection standard can be imposed upon a class of individuals protected by Title VII or Iowa Code chapter 216 who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force.

161—8.4(216) Retesting. Employers, unions, and employment agencies should provide an opportunity for retesting and reconsideration of candidates who have previously failed and have availed themselves of

more training or experience. In particular, if any applicant or employee during the course of an interview or other employment procedure claims more education or experience, that individual should be retested.

161—8.5(216) Other selection techniques. Selection techniques other than tests, as defined in 8.1(1), may be improperly used so as to have the effect of discriminating against minority groups. These include, but are not restricted to, unscored or casual interviews and unscored application forms. Where there are data suggesting employment discrimination, the person may be called upon to present evidence concerning the validity of that person's unscored procedures as well as of any tests which may be used, the evidence of validity being of the same types referred to in 8.1(3) and 8.1(4). Data suggesting the possibility of discrimination exists, for example, when there are differential rates of applicant rejection between minority and nonminority or between the sexes for the same job or group of jobs, or when there are disproportionate representations of minority and nonminority or members of one sex among present employees in different types of jobs. If the person is unable or unwilling to perform validation studies, that person has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination.

161—8.6(216) Affirmative action. Nothing in commission rules shall be interpreted as diminishing a person's obligation under Title VII, Civil Rights Act of 1964, Executive Order 11246 as amended by Executive Order 11375, or Iowa Code chapter 216 to undertake affirmative action to ensure that applicants or employees are treated without regard to race, color, religion, sex, or national origin. Specifically, the use of tests which have been validated pursuant to commission rules does not relieve employers, unions or employment agencies of their obligations to take positive action in affording employment and training to members of classes protected by Title VII and chapter 216.

161—8.7(216) Remedial and affirmative action.

8.7(1) *Policy statement.* Employers and other persons subject to the Act, Iowa Code chapter 216, are required to maintain nondiscriminatory employment and personnel systems and therefore are obligated to comply with the statute without awaiting the action of any governmental agency. Thus, employers and other persons subject to the Act who, after a self-analysis, have concluded that there is a likelihood that they may be found in violation of the Act because of some aspect of their employment and personnel system, are required by the statute to take remedial and affirmative action to correct the situation. An employer or other person subject to the Act who has a reasonable basis for concluding that it might be held in violation of the Act and who takes remedial and affirmative action reasonably calculated to avoid that result on the basis of self-analysis does not, in the opinion of the commission, thereby violate the Act with respect to any employee or applicant for employment who is denied an employment opportunity as a result of action. In the opinion of the commission, the lawfulness of remedial and affirmative action programs is not dependent upon an admission, or a finding, or evidence sufficient to prove that the employer or other person subject to the Act taking the action has violated the Act.

8.7(2) *Type of affirmative action covered.* In the opinion of the commission, an employer or other person subject to Executive Order Number 15 who has adopted an affirmative action program pursuant to and in conformity with Executive Order and federal and state regulations does not violate the Act by reason of its adherence to its affirmative action program. Furthermore, for purposes of demonstrating to the commission that an employer or other person has reasonably concluded that it might be held in violation of the Act and that the remedial and affirmative action it has taken is reasonably calculated to avoid that result, the employer or other person may rely on an analysis which has been conducted in order to comply with Revised Order 4 or related orders issued by the Office of Federal Contract Compliance Programs under Executive Order 11246, as amended, or similar analysis required under federal, state, and local laws prohibiting employment discrimination.

8.7(3) *Use of goals and numerical remedies.* The remedial and affirmative action programs contemplated by commission rules, whether taken by private employers or governmental employers or other persons covered by the Act, include the use of race, color, creed, sex, age, religion, disability, and ethnic-conscious goals and timetables, ratios, or other numerical remedies intended to remedy

the prior discrimination against, or exclusion of, protected classes or to ensure that the employer's practices presently operate in a nondiscriminatory manner. Employers or other persons subject to the Act must be attentive to the effect of their employment practices in light of past discrimination by others. *Griggs v. Duke Power,* 401 U.S. 424(1971). Numerical remedies must be reasonable under the facts and circumstances which include any discrimination to be remedied and the relevant work force. Benefits under remedial and affirmative action programs need not be restricted to identifiable victims of past discrimination by the employer or other persons subject to the Act. Specific remedial and affirmative measures may include, but are not limited to, those described in the Equal Employment Opportunity Coordinating Council's "Policy Statement on Affirmative Action Programs for State and Local Government Agencies." (41 Federal Register 38814, September 13, 1976), which reads, in relevant part:

"2. Voluntary affirmative action to assure equal employment opportunity is appropriate at any stage of the employment process. The first step in the construction of any affirmative action plan should be an analysis of the employer's work force to determine whether percentages of sex, race, or ethnic groups in individual job classifications are substantially similar to the percentages of those groups available in the work force in the relevant job market who possess the basic job related qualifications.

"When substantial disparities are found through such analysis, each element of the overall selection process should be examined to determine which elements operate to exclude persons on the basis of sex, race, or ethnic group. Such elements include, but are not limited to, recruitment, testing, ranking, certification, interview, recommendations for selection, hiring, promotion, etc. The examination of each element of the selection process should at a minimum include a determination of its validity in predicting job performance.

"3. When an employer has reason to believe that its selection procedures have the exclusionary effect described in paragraph 2 above, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex or ethnic 'conscious,' include, but are not limited to, the following:

"The establishment of a long term goal and short range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

"A recruitment program designed to attract qualified members of the group in question;

"A systematic effort to organize work and redesign jobs in ways that provide opportunities for persons lacking 'journeyperson' level knowledge or skills to enter and, with appropriate training, to progress in a career field;

"Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

"The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

"A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and

"The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated."

8.7(4) *Written opinions.* If during the investigation of a charge an employer or other person asserts that the action complained of was taken pursuant to a program such as those described in these rules, the investigating official shall determine whether the program conformed to the requirements stated in these rules for a program. If the investigating official so finds, the investigating official will set forth the facts on which the findings are based and will issue a "no probable cause" finding on the complaint. If the employer or other person also asserts that the action complained of was taken in good faith, in conformity with and in reliance upon commission rules, the investigating official shall determine whether the assertion is true. If the investigating official so finds, the investigating official will set forth the facts

on which this finding is based and include the finding with the other findings described in this section in the "no probable cause" finding.

8.7(5) *Reliance.* The commission shall apply the foregoing principles where the challenged person's action is taken pursuant to any attempt to comply with the antidiscrimination requirements of any federal, state, or local government laws.

8.7(6) *Limitations of standards.* The specifications of remedial and affirmative action in commission rules is intended only to identify certain types of actions which an employer or other person may take consistent with the Act but does not attempt to provide standards for determining whether voluntary attempts to eliminate discrimination against minorities and women have been successful. Whether, in any given case, the employer who takes remedial and affirmative action will have done enough to remedy discrimination against those protected by the Act will be a question of fact in each case.

161—8.8 to **8.14** Reserved.

AGE DISCRIMINATION IN EMPLOYMENT

161—8.15(216) Age discrimination in employment.

8.15(1) Any person who has reached 18 years of age may not be excluded from an employment right because of an arbitrary age limitation and shall be an aggrieved party for the purposes of Iowa Code section 216.15, regardless of whether the person is excluded by reason of excessive age or insufficient age, and shall possess all the rights and remedies for discrimination provided in section 216.15.

8.15(2) No employer, employment agency, or labor organization shall set an arbitrary age limitation in relation to employment or membership except as otherwise provided by commission rules or by the Iowa Code.

8.15(3) Help wanted notices. No newspaper or other publication published within the state of Iowa shall accept, publish, print or otherwise cause to be advertised any notice of an employment opportunity from an employer, employment agency, or labor organization containing any indication of a preference, limitation, or specification based upon age, except as provided in commission rules, unless the newspaper or publication has first obtained from the employer, employment agency, or labor organization an affidavit indicating that the age requirement for an applicant is a bona fide occupational qualification.

8.15(4) Help wanted notices of advertisements shall not contain terms and phrases such as "young," "boy," "girl," "college student," "recent college graduate," "retired person," or others of a similar nature unless there is a bona fide occupational requirement for the position.

8.15(5) Job applications for and other preemployment inquiries. An employer, employment agency or labor organization may make preemployment inquiry regarding the age of an applicant, provided that the inquiry is made in good faith for a nondiscriminatory purpose. Any preemployment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to age shall be unlawful unless based upon a bona fide occupational qualification. The burden shall be on the employer, employment agency or labor organization to demonstrate that the direct or indirect preemployment inquiry is based upon a bona fide occupational qualification.

8.15(6) Nothing in the above shall be construed to prohibit any inquiry as to whether an applicant is over 18 years of age.

8.15(7) Nothing in the above shall be construed to prohibit postemployment inquiries as to age where the inquiries serve legitimate record-keeping purposes.

8.15(8) Bona fide occupational qualifications.

a. An employer, employment agency, or labor organization may take any action otherwise prohibited under commission rules where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.

b. The concept of the bona fide occupational qualification is narrow in scope and will not be applied to include the mere preference or convenience of the employer.

c. Age requirements set by federal or state statute or regulatory agency shall be considered to be bona fide occupational qualifications where requirements are necessarily related to the work which the employee must perform.

d. A bona fide occupational qualification will also be recognized where there exist special, individual occupational circumstances such as where actors are required for characterizations of individuals of a specified age, or where persons are used to advertise or promote the sale of products designed for, and directed to, certain age groups.

161—8.16(216) Bona fide apprenticeship programs. Where an age limit is placed upon entrance into an apprenticeship program, the limitation shall not be a violation of Iowa Code chapter 216 where the employer can demonstrate a legitimate economic interest in the limitation in terms of the length of the training period and the costs involved in providing the training. The age limit shall not be set any lower than reasonably necessary to enable the employer to recover the costs of training the employee and a reasonable profit.

161—8.17(216) Employment benefits.

8.17(1) An employer is not required to provide the same pension, retirement, or insurance benefits to all employees where the cost varies with the age of the individual employee. Business necessity or bona fide underwriting criteria shall be the only basis used by employers for providing different benefits to employees of different ages unless the benefits are provided under a retirement plan or benefit system not adopted as a mere subterfuge to evade the purposes of the Act.

8.17(2) The existence of a provision in a retirement plan stating a maximum eligibility age for entrance into a retirement plan shall not authorize rejecting from employment an applicant who is over the maximum eligibility age for the retirement plan.

161—8.18(216) Retirement plans and benefit systems.

8.18(1) Commission rules shall not be construed so as to prohibit an employer from retiring an employee, or to require an employer to hire back an employee following retirement, or to hire an applicant for employment whose age is the retirement age under the employer's retirement plan or benefit system, provided that the plan or system is not a mere subterfuge for the purpose of evading the provisions of the Act.

8.18(2) However, a retirement plan or benefit system shall not require the involuntary retirement of a person under the age of 70 because of that person's age, with the following exceptions:

a. Peace officers, in the divisions of highway safety and uniformed force, criminal investigation and bureau of identification, drug law enforcement, beer and liquor law enforcement, police officers, firefighters, and conservation officers, so long as their maximum age by statute is 65 years;

b. Bona fide executives and high policymaking employees who have served in that capacity for the two prior years who are entitled to an immediate, nonforfeitable annual retirement benefit from a pension, profit-sharing, savings or deferred compensation plan of the employer which equals $27,000; and

c. The involuntary retirement of a person covered by collective bargaining agreement which was entered into by a labor organization and was in effect on September 1, 1977. This exemption does not apply after termination of that agreement or January 1, 1980, whichever first occurs.

8.18(3) State employees who are members of the Iowa public employee's retirement system are not subject to mandatory retirement based on age.

161—8.19 to **8.25** Reserved.

DISABILITY DISCRIMINATION IN EMPLOYMENT

161—8.26(216) Disability discrimination in employment.

8.26(1) The term "substantially handicapped person" shall mean any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

8.26(2) The term "physical or mental impairment" means:

a. 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; genito-urinary; hemic and lymphatic; skin; and endocrine; or

b. Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

8.26(3) The term "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

8.26(4) The term "has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

8.26(5) The term "is regarded as having an impairment" means:

a. Has a physical or mental impairment that does not substantially limit major life activities but that is perceived as constituting such a limitation;

b. Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

c. Has none of the impairments defined to be "physical or mental impairments," but is perceived as having such an impairment.

8.26(6) The term "employer" shall include any employer, as defined in Iowa Code section 216.2(5), and labor organization, or employment agency insofar as their action or inaction may adversely affect employment opportunities.

161—8.27(216) Assessment and placement.

8.27(1) If examinations or other assessments are required, they should be directed toward determining whether an applicant for a job:

a. Has the physical and mental ability to perform the duties of the position. An individual applicant would have to identify the position for which the applicant has applied.

b. Is physically and mentally qualified to do the work without adverse consequences such as creating a danger to life or health of coemployees.

c. Is professionally competent or has the necessary skills or ability to become professionally competent to perform the duties and responsibilities which are required by the job.

8.27(2) Examinations or other assessments should consider the degree to which the person has compensated for the person's limitations and the rehabilitation service that person has received.

8.27(3) Physical standards for employment should be fair, reasonable, and adapted to the actual requirements of the employment. They shall be based on complete factual information concerning working conditions, hazards, and essential physical requirements of each job. Physical standards will not be used to arbitrarily eliminate the disabled person from consideration.

8.27(4) Where preemployment tests are used, the opportunity will be provided applicants with disabilities to demonstrate pertinent knowledge, skills and abilities by testing methods adapted to their special circumstances.

8.27(5) Probationary trial periods in employment for entry-level positions which meet the criteria of business necessity may be instituted by the employer to prevent arbitrary elimination of the disabled.

8.27(6) Reasonable accommodation. An employer shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless

the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

a. Reasonable accommodation may include:

(1) Making facilities used by employees readily accessible to and usable by handicapped persons, and

[1](2) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

[1]*b.* In determining pursuant to the first paragraph of this subrule whether an accommodation would impose an undue hardship on the operation of an employer's program, factors to be considered include:

(1) The overall size of the employer's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the employer's operation, including the composition and structure of the employer's workforce; and

(3) The nature and cost of the accommodation needed.

c. An employer may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

8.27(7) Occupational training and retraining programs, including but not limited to guidance programs, apprentice training programs, on-the-job training programs and executive training programs, shall not be conducted in a manner to discriminate against persons with physical or mental disabilities.

[1] Objection to 8.27(6)*"a"*(2) and 8.27(6)*"b"* [prior to 1/13/88 numbered as 6.2(6)*"a"*(2) and 6.2(6)*"b,"* respectively,] reimposed 4/20/88, republished 5/4/88; see full text of objection at end of chapter.

161—8.28(216) Disabilities arising during employment. When an individual becomes disabled, from whatever cause, during a term of employment, the employer shall make every reasonable effort to continue the individual in the same position or to retain and reassign the employee and to assist that individual's rehabilitation. No terms in this rule shall be construed to mean that the employer must erect a training and skills center.

161—8.29(216) Wages and benefits.

8.29(1) While employers may reengineer the conditions of work for the disabled person, the salary paid to the person shall be no lower than the lowest listed on the applicable wage grade schedule.

8.29(2) The wage schedule must be unrelated to the existence of physical or mental disabilities.

8.29(3) It shall be an unfair employment practice for an employer to discriminate between persons who are disabled and those who are not, with regard to fringe benefits, unless there are bona fide underwriting criteria.

8.29(4) A condition of disability shall not constitute a bona fide underwriting criteria in and of itself.

161—8.30(216) Job policies.

8.30(1) Written personnel policies relating to this subject area must expressly indicate that there shall be no discrimination against employees on account of disability.

8.30(2) If the employer deals with a bargaining representative for the employees and there is a written agreement on conditions of employment, it shall not be inconsistent with these guidelines.

161—8.31(216) Recruitment and advertisement.

8.31(1) It shall be an unfair employment practice for any employer to print or circulate or cause to be printed or circulated any statement, advertisement, or publication or to use any form of application preemployment inquiry regarding mental or physical disability for prospective employment which is not a bona fide occupational qualification for employment and which directly or indirectly expresses any negative limitations, specifications, or discrimination as to persons with physical or mental disabilities. The burden shall be on the employer to demonstrate that the statement, advertisement, publication or

inquiry is based upon a bona fide occupational qualification. This is subject, however, to the provisions of Iowa Code section 216.6(1)*"c."*

8.31(2) It shall be an unfair employment practice to ask any question on the employment application form regarding a physical or mental disability unless the question is based upon a bona fide occupational qualification. The burden will be on the employer to demonstrate that the question is based upon a bona fide occupational qualification.

8.31(3) An employment interviewer may inquire as to a physical or mental disability provided the inquiry is made in good faith for a nondiscriminatory purpose.

161—8.32(216) Bona fide occupational qualifications.

8.32(1) It shall be lawful for an employer, employment agency, or labor organization to take any action otherwise prohibited under these rules where mental or physical ability is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.

8.32(2) The concept of the bona fide occupational qualification is narrow in scope and will not be applied to include the mere preference or convenience of the employer.

8.32(3) Physical or mental disability requirements set by federal or state statute or regulatory agency shall be considered to be bona fide occupational qualifications where the requirements are necessarily related to the work which the employee must perform.

161—8.33 to **8.45** Reserved.

SEX DISCRIMINATION IN EMPLOYMENT

161—8.46(216) General principles. References to "employer" and "employers" in these rules state principles that are applicable not only to employers but also to labor organizations and to employment agencies insofar as their action or inaction may adversely affect employment opportunities as defined in the Act, (Iowa Code section 216.6).

161—8.47(216) Sex as a bona fide occupational qualification. The bona fide occupational qualification exception as to sex is strictly and narrowly construed. Labels—"men's jobs" and "women's jobs"—tend to unnecessarily deny employment opportunities to one sex or the other.

8.47(1) The following situations do not warrant the application of the bona fide occupational qualification exception:

a. The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general, for example, the assumption that the turnover rate among women is higher than among men;

b. The refusal to hire an individual based on stereotypical characterizations of the sexes, for example, that men are less capable of assembling intricate equipment or that women are less capable of aggressive sales work. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group;

c. The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers, except as covered specifically in 8.47(2).

8.47(2) Where it is necessary for the purpose of authenticity or genuineness, sex is a bona fide occupational qualification, e.g., an actor or actress.

161—8.48(216) Recruitment and advertising.

8.48(1) Employers engaged in recruiting activity must recruit employees of both sexes for all jobs unless sex is a bona fide occupational qualification.

8.48(2) Advertisement in newspapers and other media for employment must not express a sex preference unless sex is a bona fide occupational qualification. The placement of an advertisement in columns headed "male" or "female" will be considered an expression of a preference, limitation, specification or discrimination based on sex.

161—8.49(216) Employment agencies.

8.49(1) Iowa Code sections 216.6(1)*"a"* and *"c"* specifically state that it shall be unlawful for an employment agency to discriminate against any individual because of sex. Private employment agencies which deal exclusively with one sex are engaged in an unlawful employment practice, except to the extent that agencies limit their services to furnishing employees for particular jobs for which sex is a bona fide occupational qualification.

8.49(2) An employment agency that receives a job order containing an unlawful sex specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the sex specification is not based upon a bona fide occupational qualification. However, an employment agency is not in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupational qualification is without substance and the agency makes and maintains a written record available to the commission of each job order. The record shall include the name of the employer, the description of the job and the basis for the employer's claim of bona fide occupational qualification.

8.49(3) It is the responsibility of employment agencies to keep informed of opinions and decisions of the commission on sex discrimination.

161—8.50(216) Preemployment inquiries as to sex. A preemployment inquiry may ask "male . . ., female . . .,"; or "Mr., Mrs., Miss" provided that the inquiry is made in good faith for a nondiscriminatory purpose. Any preemployment inquiry which expresses directly or indirectly a limitation, specification, or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification.

161—8.51(216) Job policies and practices.

8.51(1) Written personnel policies relating to this subject area must expressly indicate that there shall be no discrimination against employees on account of sex. If the employer deals with a bargaining representative for the employer's employees and there is a written agreement on conditions of employment, the agreement shall not be inconsistent with these guidelines.

8.51(2) Employees of both sexes shall have an equal opportunity to any available job that the employee is qualified to perform, unless sex is a bona fide occupational qualification.

8.51(3) No employer shall make any distinction based upon sex in employment opportunities, wages, hours, or other conditions of employment. In the area of employer contributions for insurance, pensions, welfare programs and other similar "fringe benefits" the employer will not violate these guidelines if the employer's contributions are the same for both sexes or if the resulting benefits are equal.

8.51(4) Any distinction between married and unmarried persons of one sex that is not made between married and unmarried persons of the opposite sex will be considered to be a distinction made on the basis of sex. Similarly, an employer must not deny employment to women with young children unless it has the same exclusionary policies for men; nor terminate an employee of one sex in a particular job classification upon reaching a certain age unless the same rule is applicable to members of the opposite sex.

8.51(5) The employer's policies and practices must ensure appropriate physical facilities to both sexes. The employer may not refuse to hire either sex, or deny either sex a particular job because there are no restroom or associated facilities, unless the employer is able to show that the construction of the facilities would be unreasonable for such reasons as excessive expense or lack of space.

8.51(6) An employer must not deny a female employee the right to any job that she is qualified to perform. For example, an employer's rules cannot bar a woman from a job that would require more than a certain number of hours or from working at jobs that require lifting or carrying more than designated weights.

161—8.52(216) Separate lines of progression and seniority systems.

8.52(1) It is an unlawful employment practice to classify a job as "male" or "female" or to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect

any employee unless sex is a bona fide occupational qualification for that job. Accordingly, employment practices are unlawful which arbitrarily classify jobs so that:

a. A female is prohibited from applying for a job labeled "male," or for a job in a "male" line of progression, and vice versa;

b. A male scheduled for layoff is prohibited from displacing a less senior female on a "female" seniority list; and vice versa.

8.52(2) A seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice if it operates as a disguised form of classification by sex, or creates unreasonable obstacles to the advancement by members of either sex into jobs which members of that sex would reasonably be expected to perform.

161—8.53(216) Discriminatory wages.

8.53(1) The employer's wage schedules must not be related to or based on the sex of the employees.

8.53(2) The employer may not discriminatorily restrict one sex to certain job classifications. The employer must take steps to make jobs available to all qualified employees in all classifications without regard to sex.

161—8.54(216) Terms and conditions of employment.

8.54(1) It shall be an unlawful employment practice for an employer to discriminate between either sex with regard to terms and conditions of employment.

8.54(2) Difference in benefits on a sexual basis.

a. Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the "head of the household" or "principal wage earner" in the family unit, the benefits tend to be available only to male employees and their families. Due to the fact that these conditions discriminatorily affect the rights of women employees, and that "head of household" or "principal wage earner" status bears no relationship to job performance, benefits which are so conditioned will be found to be a prima facie violation of the prohibition against sex discrimination contained in the Act.

b. It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees.

c. It shall not be a defense to a charge of sex discrimination in benefits under Iowa Code chapter 216 that the cost of benefits is greater with respect to one sex than the other.

8.54(3) A health insurance program provided in whole or in part by an employer shall include coverage for pregnancy-related conditions; the plan may exclude coverage of abortion, except where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from an abortion.

161—8.55(216) Employment policies relating to pregnancy and childbirth.

8.55(1) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is a prima facie violation of Iowa Code chapter 216, and may be justified only upon showing of business necessity.

8.55(2) Disabilities caused or contributed to by pregnancy, miscarriage, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

8.55(3) Disabilities caused or contributed to by legal abortion and recovery are, for all job-related purposes, temporary disabilities and should be treated as such under any temporary disability or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to legal abortion on the same terms and conditions as they are applied to other temporary disabilities. The employer may elect to exclude health insurance coverage for abortion from a plan provided by the employer, except where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from an abortion.

8.55(4) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, the termination violates the Act if it has a disparate impact on employees of one sex and is not justified by a business necessity.

161—8.56(216) Cease use of sex-segregated want ads.

8.56(1) All newspapers within the state of Iowa shall cease to use sex-segregated want ads—e.g., "Male Help Wanted," "Female Help Wanted," and "Male and Female Help Wanted" or "Men—Jobs of Interest," "Women—Jobs of Interest," and "Men and Women."

8.56(2) Any newspapers failing to comply with 8.56(1) shall be deemed in violation of the Act, Iowa Code section 216.6, and legal proceedings shall henceforth be initiated against them.

8.56(3) The commission will regard any publication of sex preference for a job to be in violation of the Act and, therefore, suggests that all Iowa newspapers refrain from publishing any sex preference which an employer in its job order may want printed.

8.56(4) The commission suggests that Iowa newspapers, instead of using sex-titled, sex-segregated want ads, use neutral want ads, e.g., "Help Wanted," "Jobs of Interest," "Positions Available."

161—8.57(216) Exception to ban on sex-segregated want ads.

8.57(1) The commission recognizes that sex may, in very limited circumstances, be a bona fide occupational qualification, e.g., a woman to be a women's fashion model. Therefore, an employer seeking to place a job order or a want ad which shows sex preference, must, by affidavit, claim that the preference is based upon bona fide occupational qualification.

8.57(2) The affidavit referred to in 8.57(1) must set out the complete basis upon which the employer believes that a person of a particular sex is required for the job the employer wishes to fill. The affidavit must also clearly state that the employer truly believes the sex preference is bona fide and that the employer, and not the newspaper or publisher of the ad, is responsible for the content of the ad.

8.57(3) Any newspaper, or other publisher which prints want ads, can publish a want ad with a sex preference if, and only if, that newspaper or publisher has received from the employer the affidavit referred to in 8.57(1) and 8.57(2). The newspaper or publisher, upon receipt of such affidavit, will submit a copy to the commission.

161—8.58 to **8.64** Reserved.

EMPLOYMENT PRACTICES IN STATE GOVERNMENT

161—8.65(216) Declaration of policy.

8.65(1) Equal opportunity and affirmative action toward its achievement is the policy of all units of Iowa state government. This policy shall apply in all areas where the state funds are expended, in employment, public service, grants and financial assistance, and in state licensing and regulation. All policies, programs and activities of state government shall be periodically reviewed and revised to ensure their fidelity to this policy.

8.65(2) Affirmative action required. All appointing authorities, and state agencies in the executive branch of government, shall abide by the requirements of Governor Robert D. Ray's Executive Order Number 15 and Iowa Code chapter 216.

Each agency shall designate an equal opportunity officer to be responsible for affirmative action policies intra-agency. Each agency shall prepare an affirmative action plan for that department in accordance with the criteria set forth in 8.7(216). All plans shall be subject to the review and comment of the affirmative action director of the commission. The affirmative action director shall make every effort to achieve compliance with affirmative action requirements by informal conference, conciliation and persuasion. Where failure to comply with Executive Order Number 15 results, the commission may initiate complaints against the noncomplying agencies.

8.65(3) Employment policies of state agencies. Each appointing authority shall review the recruitment, appointment, assignment, upgrading and promotion policies and activities for state employees to correct policies that discriminate on the basis of race, color, religion, sex, age, national origin or physical or mental handicap. All appointing authorities shall hire and promote employees without discrimination. Special attention shall be given to the allocation of funds for on-the-job training, the parity of civil service classes doing similar work, and the training of supervisory personnel in equal opportunity principles and procedures. Annually each appointing authority shall review their EEO-4 reports and include in their budget presentation necessary programs, goals and objectives, to improve the equal opportunity aspects of their department's employment policies. Each appointing authority shall make an annual report to the affirmative action director of the commission on persons hired, disciplined, terminated and vacancies occurring within their department.

8.65(4) State services and facilities. Every state agency shall render service to the citizens of this state without discrimination based on race, color, religion, sex, age, national origin or physical or mental handicap. No state facility shall be used in furtherance of any discriminatory practice nor shall any state agency become a party to any agreement, arrangement, or plan which has the effect of sanctioning such patterns or practices.

8.65(5) State employment services. All state agencies which provide employment referral or placement services to public or private employers shall accept job orders, refer for employment, test, classify, counsel, and train only on a nondiscriminatory basis. They shall refuse to fill any job orders designed to exclude anyone because of race, color, religion, creed, sex, national origin, age or disability. All agencies shall report to the commission any violations by state agencies and any private employers or unions which are known to persist in restrictive hiring practices.

8.65(6) State contracts and subcontracts. Every state contract for goods or services and for public works, including construction and repair of buildings, roads, bridges, and highways, shall contain a clause prohibiting discriminatory employment practices by contractors and subcontractors based on race, color, religion, creed, national origin, sex, age or disability. The nondiscrimination clause shall include a provision requiring state contractors and subcontractors to give written notice of their commitments under this clause to any labor union with which they have bargaining or other agreements. Contractual provisions shall be fully and effectively enforced and any breach of them shall be regarded as a material breach of contract.

8.65(7) State licensing and regulatory agencies. No state department, board, commission, or agency shall grant, deny, or revoke a license on the grounds of race, color, religion, creed, national origin, sex, age or disability. License, as defined in Iowa Code section 17A.2(5), includes the whole or a part of any agency permit, certificate, approval, registration, charter or similar form of permission required by statute. Any licensee, or any applicant for a license issued by a state agency, who operates in an unlawful discriminatory manner, shall, when consistent with the legal authority and rules and regulations of the appropriate licensing or regulatory agency, be subject to disciplinary action by the appropriate agencies as provided by law, including the denial, revocation, or suspension of the license. In determining whether to apply sanctions or not, a final decision of discrimination certified to the licensing agency by the commission shall be binding upon the licensing agency.

8.65(8) State financial assistance. Race, color, religion, creed, national origin, sex, age, physical or mental disability shall not be considered as limiting factors in state-administered programs involving the distribution of funds to qualified applicants for benefits authorized by law; nor shall state agencies provide grants, loans, or other financial assistance to public agencies, private institutions or organizations which engage in discriminatory practices.

8.65(9) Reports. All state agencies in the executive branch shall report annually to the commission. Reports shall cover both internal activities and relations with the public and with other state agencies and shall contain other information as may be specifically requested by the commission in order to enable it to compile the Governor's Annual Affirmative Action Report.

8.65(10) Cooperation in investigations. All state agencies shall cooperate fully with the commission and authorized federal agencies in their investigations of allegations of discrimination.

These rules are intended to implement Iowa Code chapter 216.

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[1] Effective date of 240—6.2(6) delayed 70 days by the Administrative Rules Review Committee.

[2] Effective date of 8.27(6)*"a"*(2) and 8.27(6)*"b"* delayed 70 days by the Administrative Rules Review Committee at their February 11, 1988, meeting.

OBJECTION

On July 11th, 1979, the administrative rules review committee voted the following objections:

The committee objects to ARC 0192, item 7, [appearing in IAB, 4/18/79] subparagraph *6.2(6)*"a"*(2), relating to reasonable accommodation, on the grounds the provisions are beyond the authority of the commission. Subrule 6.2(6) requires that employers make "reasonable accommodation to the physical or mental handicaps of an applicant, unless it can be shown to be an "undue hardship". The above cited paragraph provides that reasonable accommodation may include:

Job restructuring, part-time or modified work schedules, acquisition or modifications of equipment or devices, the provision of readers or interpreters, and other similar actions.

It is the opinion of the committee this definition of reasonable accommodation far exceeds that which may fairly be imputed from section 601A.6(1)*"a,"* which in part declares it to be "unfair discrimination" to:

. . . refuse to hire . . . any applicant for employment . . . because of . . . disability of such applicant or employee, unless based upon the nature of the occupation. If a disabled person is qualified to perform a particular occupation by reason of training or experience, the nature of that occupation shall not be the basis of exception to the unfair or discriminating practices prohibited by this subsection.

For the purposes of the above paragraph, section 601A.2(11) defines disability as:

. . . the physical or mental condition of a person which constitutes a substantial handicap, but is unrelated to such person's ability to engage in a particular occupation.

In reading these two sections together and giving effect to each, it appears that the Civil Rights Act prohibits employment discrimination on the grounds of disability only if either of the following criteria are met: (1) The handicap is not related to that particular occupation, or (2) The applicant is qualified by training or experience to perform that occupation, even if the handicap does relate to the occupation.

The General Assembly clearly has the authority to ban any or all discrimination against disabled persons, or to require employers to make the type of "reasonable accommodation" mandated by subrule *6.2(6)*"a"*(2). However, the statute does neither. Instead the criteria listed in the above paragraph are established to prohibit discrimination only against a "qualified" disabled applicant. The statute is designed to benefit the handicapped individual who has managed to overcome his or her disability. To mandate this type of reasonable accommodation would, in the case of more affluent employers, require that the handicap be ignored, and require these employers to overcome the handicap for the applicant. If employers are to make this type of reasonable accommodation the General Assembly should so provide by law, or specifically authorize the civil rights commission to make rules on the subject. To proceed otherwise implies that an administrative agency may interpret a broadly worded statute to mean whatever the agency chooses, and reduces the statute itself to a mere tool for the transferring of law making power to administrative agencies.

The committee also objects to paragraph *6.2(6)*"b"* in its entirety, on the grounds it is unreasonable. The paragraph lists the criteria to be used in determining whether an employer must make any reasonable accommodation at all. Under the provisions of paragraph 6.2(6)*"a"*(1), employers must make the job site accessible to and usable by handicapped persons. If this type of accommodation is to be mandated at all, the burden should be equally imposed upon all employers, without singling out any specific groups to be exempt from the burden imposed.

Renumbered as 8.27(6)"a"*(2) and 8.27(6)*"b"* IAC 1/13/88.

NOTE: Iowa Code chapter 601A renumbered as chapter 216 in 1993 Iowa Code.

CHAPTER 9
DISCRIMINATION IN HOUSING

161—9.1(216) Construction of chapter.

9.1(1) *Limitation of chapter.* All the rules contained herein apply only to:

a. Complaints which allege a violation of the prohibitions contained in Iowa Code section 216.8 or 216.8A;

b. Complaints which allege a violation of Iowa Code section 216.11 or 216.11A arising out of alleged violations of the prohibitions contained in Iowa Code section 216.8 or 216.8A; and the interpretation of the provisions of the Iowa Code which relate to such complaints or to unfair or discriminatory practices in the area of housing.

9.1(2) *Conflicting rules.* Where a provision of this chapter applies under the terms of subrule 9.1(1) and that provision conflicts with a rule of the commission not contained within Chapter 9, then the provision contained within Chapter 9 shall prevail.

161—9.2(216) Definitions. As used in this chapter, the following definitions shall apply:

"Party" means any complainants and respondents involved in the complaint of discrimination under investigation.

"Presiding officer for discovery" means an administrative law judge employed by the department of inspections and appeals and assigned to render decisions regarding discovery disputes arising in the course of civil rights commission investigations.

161—9.3(216) Interpretation of various housing provisions.

"Aggrieved person." As used in the Iowa civil rights Act provisions relating to discrimination in housing, the term "aggrieved person" includes any person who claims to have been injured by a discriminatory housing practice, or any person who believes that that person will be injured by a discriminatory housing practice that is about to occur.

"Discriminatory housing or real estate practice." A person who violates the prohibitions contained in Iowa Code section 216.8 or 216.8A commits an "unfair or discriminatory practice" in the area of housing or real estate. A person who commits a violation of Iowa Code section 216.11 or 216.11A arising out of alleged violations of the prohibitions contained in Iowa Code section 216.8 or 216.8A commits an "unfair or discriminatory practice" in the area of housing or real estate.

"Dwelling." As used in Iowa Code chapter 216, the term "dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, or any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure or portion thereof.

"Exceptions." The exceptions found in Iowa Code sections 216.12(2), 216.12(3), and 216.12(5) do not apply to Iowa Code section 216.8(3) relating to advertising.

"Handicap." As used in Iowa Code section 216.2(5), the term "handicap" with respect to a person means:

1. A physical or mental impairment which substantially limits one or more of such person's major life activities,
2. A record of having such an impairment, or
3. Being regarded as having such an impairment.

Such term does not include current, illegal use of or addiction to a controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802).

"Housing accommodation." As used in Iowa Code chapter 216, the term "housing accommodation" has the same meaning as is given the term "dwelling" in this rule.

"Housing for older persons." The exception found in Iowa Code section 216.12(4) is limited to discrimination based upon "familial status."

Iowa Code section 216.15A(10)"c." The word "continued" as used in this paragraph means "carried on or kept up without cessation." This paragraph does not refer to the adjournment or postponement of a hearing to a subsequent date or time.

Iowa Code section 216.16A(1)"a." Election to proceed in court. The election to have the charges of a complaint decided in a civil action as provided in Iowa Code section 216.16A(1) *"a"* is only available where:

1. It is alleged that there has been a violation of some portion of Iowa Code section 216.8 or 216.8A, or
2. It is alleged that there has been a violation of Iowa Code section 216.11 or 216.11A arising out of alleged violations of the prohibitions contained in Iowa Code section 216.8 or 216.8A.

Iowa Code section 216.16A(2). The phrase "mediation agreement" in Iowa Code section 216.16A(2) refers to the agreement described in Iowa Code section 216.15A(2)*"a"* to *"e."*

"Person." As used in the Iowa civil rights Act provisions relating to discrimination in housing, the term "person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 of the United States Code, receivers, and fiduciaries. The specific inclusion of an individual or entity within this definition of "person" does not imply that that individual or entity is excluded from the definition of "person" in Iowa Code section 216.2(11).

Referral and deferral to local agencies in housing cases. If a complaint alleges either a violation of the prohibitions contained in Iowa Code section 216.8 or 216.8A or a violation of Iowa Code section 216.11 or 216.11A arising out of alleged violations of the prohibitions contained in Iowa Code section 216.8 or 216.8A, then deferral and referral of that complaint to a local commission are governed by the provisions of Iowa Code section 216.5(14) and that section takes precedence over Iowa Code section 216.19.

161—9.4(216) Interpretation of provisions affecting court actions regarding alleged discriminatory housing or real estate practices occurring after July 1, 1991.

9.4(1) *Time limitation of rule.* This rule applies only to alleged discriminatory housing or real estate practices occurring after July 1, 1991.

9.4(2) *Aggrieved person's direct action in district court.*

a. Filing of complaint not necessary. A complaint which alleges either (1) a violation of the prohibitions contained in Iowa Code section 216.8 or 216.8A, or (2) a violation of Iowa Code section 216.11 or 216.11A arising out of alleged violations of the prohibitions contained in Iowa Code section 216.8 or 216.8A need not be filed with the commission in order for an aggrieved person to seek judicial remedies for that alleged violation. An aggrieved person may file an action alleging such violations directly in district court pursuant to Iowa Code section 216.16A(2).

b. Effect of commission processing.

(1) In general. The status of commission processing of a complaint alleging a discriminatory housing or real estate practice does not affect the rights of an aggrieved party to file a civil action under Iowa Code section 216.16A(2) based on that same or any other alleged discriminatory housing or real estate practice.

(2) Exceptions. Commission processing will bar an aggrieved person from filing a civil action under Iowa Code section 216.16A(2) based on an alleged discriminatory housing or real estate practice only where either:

1. The commission has obtained a mediation agreement with the consent of that aggrieved person regarding that alleged discriminatory housing or real estate practice, or
2. The commission has begun a contested case hearing on the record regarding that same alleged discriminatory housing or real estate practice.

c. Notification of commission. If a person has filed a complaint alleging a discriminatory housing or real estate practice with the commission and that person subsequently commences a civil action under Iowa Code section 216.16A(2) based on that same alleged discriminatory housing or real estate practice,

the aggrieved person is encouraged to immediately notify the Iowa civil rights commission of the filing of the civil action.

d. Remedies. In an action filed directly in district court pursuant to Iowa Code section 216.16A(2), the court may, upon a finding of discrimination, order any of the remedies provided for in Iowa Code section 216.17A(6).

9.4(3) *Election to proceed in district court.*

a. In general. An aggrieved person on whose behalf a complaint was filed, a complainant, or a respondent may, pursuant to Iowa Code section 216.16A(1), elect to have the allegations asserted in the complaint decided in a civil action in district court. An election is made by filing a written notice of election with the commission. The date of filing of an election is the date the election is received by the commission at its offices in Des Moines. If such an election is made, the commission shall authorize and, within 30 days of the election, the attorney general shall file a civil action in district court on behalf of the aggrieved person. Failure to file within the 30-day period shall not, by itself, prejudice the rights of any of the parties.

b. Limitation. An election made under the previous paragraph must be made within 20 days of the receipt by the electing person of the determination of probable cause. The date of election is the date that the written notice of elections is filed with the commission.

c. Probable cause determination a prerequisite. No person may make an election pursuant to Iowa Code section 216.16A(1) until the commission has found probable cause regarding the complaint which is the subject of the election.

d. Notice required. An election to proceed in district court made under Iowa Code section 216.16A(1) is effective only if the electing person gives notice of the election to the commission and all other complainants and respondents to whom the election relates. Such notice shall be in writing, shall be delivered at the time the election is made, and may be made by regular mail.

e. Intervention. Once the commission commences an action in district court pursuant to Iowa Code section 216.17A(1) an aggrieved person may intervene in the action.

9.4(4) *Right-to-sue letter inapplicable.* A complainant need not, and should not, request a right-to-sue letter in order to file a civil action under Iowa Code section 216.16A(2) or to make an election as provided in Iowa Code section 216.16A(1).

9.4(5) *Appointment of attorney by court.* Upon application by a person alleging a discriminatory housing practice or a person against whom such a practice is alleged, the court may:

a. Appoint an attorney for the person, or

b. Authorize the commencement or continuation of a civil action under Iowa Code section 216.16A(2) without the payment of fees, costs, or security if, in the opinion of the court, the person is financially unable to bear the costs of such action.

161—9.5(216) Commission procedures regarding complaints based on alleged unfair or discriminatory practices occurring after July 1, 1991.

9.5(1) *Time limitation of rule.* This rule applies only to alleged discriminatory housing or real estate practices occurring after July 1, 1991.

9.5(2) *Time limit for administrative complaint.* A complaint which alleges a discriminatory housing or real estate practice is governed by the 180-day time limit provided in Iowa Code section 216.15(12).

9.5(3) *Processing of complaint.*

a. Service. Upon the filing of a complaint:

(1) The commission shall, not later than ten days after such filing or the identification of an additional respondent under 9.5(3)*"d,"* serve on the respondent a notice identifying the alleged discriminatory housing practice and advising the respondent of the procedural rights and obligations of respondents under the applicable sections of Iowa Code chapter 216, together with a copy of the original complaint; and

(2) Each respondent may file, not later than ten days after receipt of notice from the commission, an answer to the complaint.

(3) The commission shall, not later than ten days after the filing of a complaint, serve the complainant a notice acknowledging receipt of the complaint and advising the complainant of the time limits and choice of forums provided under Iowa Code chapter 216.

b. Timely investigation. The commission will begin the investigation within 30 days of filing. If the commission is unable to complete the investigation within 100 days after the filing of the complaint, the commission shall notify the complainant and respondent in writing of the reasons for not doing so.

c. Amendments. Complaints and answers shall be under oath or affirmation and may be reasonably and fairly amended at any time.

d. Additional respondents.

(1) A person who is not named as a respondent in a complaint, but who is identified as a respondent in the course of investigation, may be joined as an additional or substitute respondent upon written notice, under 9.5(3)*"a,"* to such person from the commission.

(2) Such notice, in addition to meeting the requirements of 9.5(3)*"a,"* shall explain the basis for the commission's belief that the person to whom the notice is addressed is properly joined as respondent.

e. Closure within one year. Within one year of the date of receipt of a complaint alleging a discriminatory housing or real estate practice, the commission shall take final administrative action with respect to that complaint unless it is impracticable to do so. If the commission is unable to make final disposition of the case within the one-year period, the commission shall notify the complainant and respondent in writing of the reasons for not doing so.

9.5(4) *Probable cause determination.*

a. Final investigative report. After the completion of the commission's investigation, the investigator shall prepare a final investigative report. This final investigative report shall include:

(1) The names and dates of contacts with witnesses excepting those witnesses who request to remain anonymous. The commission, however, may be required to disclose the names of such witnesses in the course of an administrative hearing or a civil action conducted pursuant to the Iowa civil rights Act;

(2) A summary and the dates of correspondence and other contacts with the aggrieved person and the respondent;

(3) A summary description of other pertinent records;

(4) A summary of witness statements; and

(5) Answers to interrogatories.

b. Determination procedure. If, after the completion of investigation, a mediation agreement under Iowa Code section 216.15A(2)*"a"* to *"e"* has not been executed by the complainant and the respondent and approved by the commission, the commission shall conduct a review of the factual circumstances revealed as part of the investigation.

(1) If the commission determines that, based on the totality of the factual circumstances known at the time of the commission's review, no probable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the commission shall: issue a short and plain written statement of the facts upon which the no probable cause determination was based; dismiss the complaint; notify the aggrieved person(s) and the respondent(s) of the dismissal (including the written statement of facts) by regular or certified mail or personal service; and make public disclosure of the dismissal.

Respondent(s) may request that no public disclosure be made. Notwithstanding such request, the fact of dismissal, including the names of the parties, shall be public information available on request.

The commission's determination shall be based solely on the facts concerning the alleged discriminatory housing practice provided by complainant and respondent(s) and otherwise disclosed during the investigation.

(2) If the commission believes that probable cause may exist to believe that a discriminatory housing practice has occurred or is about to occur, the commission shall forward the matter to the executive director or designee for consideration. In all such cases the executive director or designee shall determine, with advice from the office of the attorney general, whether, based on the totality of the factual circumstances known at the time of the decision, probable cause exists to believe that a discriminatory housing practice has occurred or is about to occur. The determination shall be based

solely on the facts concerning the alleged discriminatory housing practice provided by complainant and respondent and otherwise disclosed during the investigation.

c. Determination of probable cause. A determination of probable cause shall be followed by the issuance of a probable cause order. A probable cause order:

(1) Shall consist of a short and plain written statement of the facts upon which the commission has found probable cause to believe that a discriminatory housing practice has occurred or is about to occur;

(2) Shall be based on the final investigative report; and

(3) Need not be limited to facts or grounds that are alleged in the complaint. If the probable cause order is based on grounds that are alleged in the complaint, the commission will not issue the probable cause order with regard to those grounds unless the record of the investigation demonstrates that the respondent has been given an opportunity to respond to the allegation.

d. Timely determination. The commission shall make the probable cause determination within 100 days after the filing of the complaint unless it is impracticable to do so. If the commission is unable to make the determination within this 100-day period, the commission will notify the aggrieved person and the respondent by regular mail or personal service of the reasons for the delay.

e. Effect of probable cause determination. A finding of probable cause regarding a complaint alleging a discriminatory housing or real estate practice commences the running of the period during which an aggrieved person on whose behalf a complaint was filed, a complainant, or a respondent may, pursuant to Iowa Code section 216.16(1), elect to have the charges asserted in the complaint decided in a civil action in district court. If an election is made, the commission shall authorize the attorney general to file a civil action on behalf of the aggrieved person seeking relief. If no election is made, then the commission must schedule a hearing on the charges in the complaint.

f. Effect of no probable cause determination. A finding of "no probable cause" regarding a complaint alleging a discriminatory housing or real estate practice results in prompt dismissal of the complaint. If the finding is not reconsidered, the commission may take no further action to process that complaint except as may be necessary to carry out the commission's administrative functions.

g. Standard. The standard to determine whether a complaint alleging a discriminatory housing or real estate practice is supported by probable cause shall include consideration of whether the facts are sufficient to warrant initiation of litigation against the respondent.

9.5(5) *Hearing.*

a. Conduct. A contested case hearing regarding a complaint alleging a discriminatory housing or real estate practice is conducted on the same terms and in the same manner as any other contested case hearing conducted by the commission.

b. Hearing time frames.

(1) Trial date. The administrative law judge shall commence the hearing regarding a complaint alleging a discriminatory housing or real estate practice no later than 120 days following the issuance of the finding of probable cause, unless it is impracticable to do so. If the administrative law judge is unable to commence the hearing within 120 days after the issuance of the probable cause order, the administrative law judge shall notify the executive director, the aggrieved person on whose behalf the charge was filed, and the respondent, in writing, of the reasons for not doing so.

(2) Decision date. The administrative law judge shall make findings of fact and conclusions of law within 60 days after the end of the hearing regarding a complaint alleging a discriminatory housing or real estate practice unless it is impracticable to do so. If the administrative law judge is unable to make findings of fact and conclusions of law within this period, or any succeeding 60-day period thereafter, the administrative law judge shall notify the executive director, the aggrieved person on whose behalf the charge was filed, and the respondent, in writing, of the reasons for not doing so.

9.5(6) *Access to file information in housing cases.*

a. Nothing that is said or done in the course of mediation of a complaint of housing or real estate discrimination may be made public or used as evidence in a subsequent administrative hearing under subrule 9.5(5) or in civil actions under Iowa Code chapter 216, without the written consent of the persons concerned.

b. Notwithstanding the prohibitions and requirements with respect to disclosure of information contained in paragraph 9.5(6)*"a"* the commission will make information derived from an investigation, including the final investigative report, available to the aggrieved person and the respondent. Following completion of the investigation, the commission shall notify the aggrieved person and the respondent that the final investigative report is complete and will be provided upon request.

c. Where the commission has made a finding of no probable cause regarding a complaint alleging a discriminatory housing or real estate practice, the aggrieved person and the respondent may obtain information derived from the investigation and the final investigative report. Provided, however, that the phrase "information derived from the investigation" as used in this rule and in Iowa Code section 216.15A(2)*"f"* shall not include the contents of statements by witnesses other than the complainant or respondent.

d. Prior to a finding of either probable cause or no probable cause regarding a complaint alleging a discriminatory housing or real estate practice no access may be had to the information contained within the commission investigatory file except that:

(1) Any witness may request a copy of the witness's own statement made to the commission as part of the commission's investigation of the complaint,

(2) Any person may request copies of any information that that person sent to the commission in the course of processing the complaint,

(3) Any person may request copies of any information that the commission had previously sent to that person in the course of processing the complaint.

161—9.6(216) Discovery methods in cases of alleged discrimination in housing.

9.6(1) When investigating a complaint of alleged discriminatory housing or real estate practices, the commission may, in addition to any other method of investigation authorized by law, obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

9.6(2) The rules providing for discovery and inspection in this chapter shall be liberally construed and shall be enforced to provide the commission with access to all relevant facts. Discovery shall be conducted in good faith, and responses to discovery requests, however made, shall fairly address and meet the substance of the request.

9.6(3) Notice of person's rights in the discovery process shall be given to the person from whom discovery is sought. This notice is sufficient if it sets out in brief the person's rights under these rules: to object to the discovery method; to seek a protective order; and to legal counsel.

9.6(4) A rule in this chapter requiring a matter to be under oath may be satisfied by an unsworn written statement in substantially the following form: "I certify under penalty of perjury and pursuant to the laws of the state of Iowa that the preceding is true and correct.

_____ _____"

Date Signature

161—9.7(216) Scope of discovery. Unless otherwise limited by order of the presiding officer for discovery in accordance with these rules, the scope of discovery is as follows:

9.7(1) *In general.* The commission may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending investigation, whether it relates to the claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not grounds for objection that the information sought will be inadmissible at a trial or contested case hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

9.7(2) *Supplementation of responses.* A party who has responded to a commission request for discovery is under a duty to supplement or amend the response to include information thereafter acquired as follows:

a. A party is under a duty seasonably to supplement the response with respect to any question directly addressed to:

(1) The identity and location of persons having knowledge of discoverable matters; and

(2) Any matter that bears materially upon a claim or defense asserted by any party.

b. A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which:

(1) The party knows that the response was incorrect when made; or

(2) The party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

161—9.8(216) Protective orders.

9.8(1) Upon motion by a party or by the person from whom discovery is sought or by any person who may be affected thereby, and for good cause shown, the presiding officer for discovery:

a. May make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only by a method of discovery other than that selected by the commission;

(4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the presiding officer for discovery;

(6) That a deposition after being sealed be opened only by order of a court, a commission contested case presiding officer, or the presiding officer for discovery;

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the presiding officer for discovery.

b. Shall limit the frequency of use of the methods described in subrule 9.6(1) if the presiding officer for discovery determines that:

(1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(2) The commission has had ample opportunity by discovery in the action to obtain the information sought; or

(3) The discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the objecting party's resources, and the importance of the issues at stake in the investigation.

9.8(2) If the motion for a protective order is denied in whole or in part, the presiding officer for discovery may, on such terms and conditions as are just, order that any party or other person provide or permit discovery.

9.8(3) Award of expenses of motion. If the motion is granted, the presiding officer for discovery shall, after opportunity for hearing, require the commission, if it opposed the motion, to pay to the party or other person making the motion the reasonable expenses incurred in obtaining the order, including attorneys' fees, unless the presiding officer for discovery finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the presiding officer for discovery shall, after opportunity for hearing, require the party or deponent who made the motion or the party or attorney advising such a motion or both of them

to pay to the commission the reasonable expenses incurred in opposing the motion, including attorneys' fees, unless the presiding officer for discovery finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the presiding officer for discovery may apportion in a just manner the reasonable expenses incurred in relation to the motion.

161—9.9(216) Interrogatories.

9.9(1) *Availability; procedures for use.* The commission may serve written interrogatories to be answered by a party or, if the party from whom the information is sought is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party.

Each interrogatory shall be followed by a reasonable space for insertion of the answer. An interrogatory which does not comply with this requirement shall be subject to objection. The interrogatories must be accompanied by a written notice informing the person to whom the interrogatories are directed that a response is mandatory and that sanctions can be levied for a failure to respond.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer.

A party answering interrogatories must answer in the space provided or must set out each interrogatory immediately preceding the answer to it. A failure to comply with this rule shall be deemed a failure to answer and shall be subject to sanctions as provided in rule 9.16(216). Answers are to be signed by the person making them. Objections, if any, shall be served within 30 days after the interrogatories are served. The commission may move for an order under subrule 9.16(1) with respect to any objection to or other failure to answer an interrogatory.

The commission shall not serve more than 30 interrogatories on any party under the authority of this rule except upon agreement by the person from whom information is sought or leave of the presiding officer for discovery granted upon a showing of good cause. A motion for leave to serve more than 30 interrogatories must be in writing and shall set forth the proposed interrogatories and the reasons establishing good cause for their use.

Notwithstanding the provisions of this subrule the commission may, without limitation on the number of questions, solicit information from the parties in the form of a written questionnaire. The response to these questions, however, cannot be compelled under rule 9.16(216).

9.9(2) *Scope.* An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the presiding officer for discovery may order that such an interrogatory need not be answered until a later time.

9.9(3) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the commission as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the commission reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the commission to locate and identify as readily as can the party served, the records from which the answer may be ascertained.

161—9.10(216) Requests for admission.

9.10(1) *Availability; procedures for requests.* The commission may serve upon any party a written request for the admission, for purposes of all proceedings relating to the pending complaint only, of the truth of any matters within the scope of rule 9.7(216) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents

described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying.

Each matter of which an admission is requested shall be separately set forth.

Notice of the effect of an admission shall be given to the person from whom the admission is sought.

The commission shall not serve more than 30 requests for admission on any party except upon agreement of the party from whom admissions are sought or leave of the presiding officer for discovery granted upon a showing of good cause. A motion for leave of the presiding officer for discovery to serve more than 30 requests for admission must be in writing and shall set forth the proposed requests and the reasons establishing good cause for their use.

9.10(2) *Time for and content of responses.* The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the presiding officer for discovery may on motion allow, the party to whom the request is directed serves upon the commission a written answer or objection addressed to the matter, signed by the party or by the party's attorney.

If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the party's answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of subrule 9.16(3), deny the matter or set forth reasons why the party cannot admit or deny it.

9.10(3) *Determining sufficiency of responses.* The commission may move to determine the sufficiency of the answers or objections. Unless the presiding officer for discovery determines that an objection is justified, the presiding officer for discovery shall order that an answer be served. If the presiding officer for discovery determines that an answer does not comply with the requirements of this rule, the presiding officer for discovery may order either that the matter be admitted or that an amended answer be served. The presiding officer for discovery may, in lieu of these orders, determine that final disposition of the request be made at a designated time prior to completion of the investigation. The provisions of paragraph 9.16(1)*"d"* apply to the award of expenses incurred in relation to the motion.

161—9.11(216) Effect of admission. Any matter admitted under rule 9.10(216) is conclusively established in all proceedings relating to the pending complaint unless the court or contested case administrative law judge on motion permits withdrawal or amendment of the admission. The court or contested case administrative law judge may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the commission or the party opposing the motion fails to satisfy the court or contested case administrative law judge that withdrawal or amendment will prejudice the commission in maintaining the commission's action on the merits.

161—9.12(216) Production of documents and things and entry upon land for inspection and other purposes. The commission may serve on any party a request:

9.12(1) To produce and permit the commission, or someone acting on the commission's behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, and other data compilations from which information can be obtained, translated, if necessary, by the party upon whom the request is served through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of rule 9.7(216) and which are in the possession, custody or control of the party upon whom the request is served; or

9.12(2) Except as otherwise provided by statute, to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose

of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of rule 9.7(216).

161—9.13(216) Procedures for documents and inspections. The request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. The presiding officer for discovery may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified.

The commission may move for an order under rule 9.16(216) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

161—9.14(216) Physical and mental examination of persons. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the presiding officer for discovery may order the party to submit to a physical or mental examination by a health care practitioner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion of the commission for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

161—9.15(216) Report of health care practitioner.

9.15(1) If requested by the party against whom an order is made under rule 9.14(216) or the person examined, the commission shall deliver a copy of the examiner's detailed written report setting out the findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition. After delivery, if requested by the commission, the party against whom the order is made shall deliver a like report of any examination of the same condition, previously or thereafter made, unless the party shows an inability to obtain a report of examination of a nonparty. The presiding officer for discovery on motion may order a party or the commission to deliver a report on such terms as are just. If an examiner fails or refuses to make a report, a court or administrative law judge hearing a case based on the complaint at issue may exclude the examiner's testimony.

9.15(2) By requesting and obtaining a report of the examination so ordered, the party examined waives any privilege the party may have in that action or any other proceeding involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

9.15(3) This rule applies to examination made by agreement, unless the agreement expressly provides otherwise.

161—9.16(216) Consequences of failure to make discovery.

9.16(1) *Motion for order compelling discovery.* The commission, upon reasonable notice to the party from whom discovery was sought and all persons affected thereby, may move for an order compelling discovery as follows:

a. Appropriate officer. A motion to compel discovery shall be made to the presiding officer for discovery.

b. Motion. If a deponent fails to answer a question propounded or submitted under rule 9.17(216), or a corporation or other entity fails to make a designation under subrule 9.18(5), or a party fails to answer an interrogatory submitted under rule 9.9(216), or if a party, in response to a request for inspection submitted under rule 9.12(216), fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the commission may move for an order compelling an answer,

a designation, or an inspection in accordance with the request. When taking a deposition on oral examination, the commission may complete or adjourn the examination before moving for an order.

Any order granting a motion made under this rule shall include a statement that a failure to comply with the order may result in the imposition of sanctions pursuant to rule 9.16(216).

In ruling on such motion, the presiding officer for discovery may make such protective order as the presiding officer for discovery would have been empowered to make on a motion pursuant to subrule 9.8(1).

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

d. Award of expenses of motion. If the motion is granted, the presiding officer for discovery shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the commission the reasonable expenses incurred in obtaining the order, including attorneys' fees, unless the presiding officer for discovery finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the presiding officer for discovery shall, after opportunity for hearing, require the commission to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorneys' fees, unless the presiding officer for discovery finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the presiding officer for discovery may apportion in a just manner the reasonable expenses incurred in relation to the motion.

e. Notice to party. If the motion is granted, the presiding officer for discovery shall mail or cause to have mailed a copy of the order to counsel and to the party or parties whose conduct, individually or by counsel, necessitated the motion.

9.16(2) *Failure to comply with order.*

a. Sanctions by court in district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the presiding officer for discovery, the office of the attorney general may petition for enforcement of that order in the judicial district in which the deposition is being taken. Failure by the deponent to obey an order of enforcement from the district court may be considered a contempt of that court.

b. Sanctions by the presiding officer for discovery. If a party or an officer, director, or managing agent of a party or a person designated under subrule 9.18(5) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under 9.16(1) or under rule 9.14(216), the presiding officer for discovery may make such orders in regard to the failure as are just, and among others, the following:

(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of any action or proceeding relating to the subject matter of the investigation in accordance with the claim of the party opposing the position of the disobedient party;

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting such party from introducing designated matters in evidence in any action or proceeding relating to the subject matter of the investigation;

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(4) In lieu of any of the foregoing orders or in addition thereto, the presiding officer for discovery shall require the disobedient party or the attorney advising such party or both to pay the reasonable expenses, including attorneys' fees, caused by the failure, unless the presiding officer for discovery finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

c. Enforcement petition. In addition to any of the alternatives of paragraph *"b"* above, the office of the attorney general may petition for enforcement of the order compelling discovery in the appropriate

judicial district. Failure by a party to obey an order of enforcement from the district court may be considered a contempt of that court.

9.16(3) *Expenses on failure to admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 9.10(216), and if the commission thereafter proves the genuineness of the document or the truth of the matter, the commission may move for an order requiring the party to pay the reasonable expenses incurred in making that proof, including reasonable attorneys' fees. The presiding officer for discovery shall make the order unless the presiding officer for discovery finds that:

a. The request was held objectionable pursuant to rule 9.10(216),

b. The admission sought was of no substantial importance,

c. The party failing to admit had reasonable ground to believe that the party might prevail on the matter, or

d. There was other good reason for the failure to admit.

9.16(4) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.* If a party or an officer, director, or managing agent of a party or a person designated under subrule 9.18(5) to testify on behalf of a party fails to appear before the officer who is to take the person's deposition, after being served with a proper notice; or to serve answers or objections to interrogatories submitted under rule 9.9(216), after proper service of the interrogatories; or to serve a written response to a request for inspection submitted under rule 9.12(216), after proper service of the request, the presiding officer for discovery on motion of the commission may make such orders in regard to the failure as are just, and among others it may take any action authorized under 9.16(2)*"b"*(1) to (4).

The failure to act described in this subrule may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by rule 9.8(216).

9.16(5) *Motions relating to discovery.* No motion relating to depositions or discovery shall be filed or considered by the presiding officer for discovery unless the motion alleges that the movant has made a good-faith but unsuccessful attempt to resolve the issues raised by the motion with counsel for the party or entity whom the motion concerns without intervention of the presiding officer for discovery.

161—9.17(216) Depositions upon oral examination.

9.17(1) *When depositions may be taken.* The commission may take a deposition in an investigation of a complaint of housing discrimination at any time during the pendency of that investigation.

9.17(2) *Recording.* The administrative law judge charged with the duty of determining probable cause under Iowa Code subsection 216.15(3) may order that the testimony at such an investigative deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording the deposition, and may include other provisions to ensure that the recorded testimony will be accurate and trustworthy. If the order is made, the party from whom discovery is sought or the deponent may nevertheless arrange to have a stenographic transcription made at that party's or deponent's own expense. An order of the administrative law judge is not required to record testimony by nonstenographic means if the deposition is also to be recorded stenographically.

9.17(3) *Place of deposition.*

a. Oral depositions may be taken only within this state.

b. If the deponent is a party or the officer, partner or managing agent of a party which is not a natural person, the deponent shall be required to submit to examination in Polk County, unless otherwise ordered by the presiding officer for discovery.

9.17(4) *Failure to attend; expenses.* If the commission official fails to attend and proceed with a noticed deposition and the party from whom discovery is sought attends in person or by attorney pursuant to the notice, the presiding officer for discovery may order the commission to pay to such party the reasonable expenses incurred by the party and the other party's attorney in attending, including reasonable attorneys' fees.

9.17(5) *Depositions by telephone.* Any deposition permitted by these rules may be taken by telephonic means.

When the commission intends to take the deposition of any person upon oral examination by telephonic means, the commission shall give reasonable notice thereof in writing to any party who is to be deposed and to any other deponent. Such notice shall contain all other information required by subrule 9.18(1) and shall state that the telephone conference will be arranged and paid for by the commission. No part of the expense for telephone service shall be taxed as costs.

If the commission desires to present exhibits to the witness during the deposition, copies shall be sent to the deponent and any party who is to be deposed, prior to the taking of the deposition.

Nothing in this rule shall prohibit a party from whom the discovery is sought or counsel for that party or for the deponent from being in the presence of the deponent when the deposition is taken.

161—9.18(216) Notice for oral deposition.

9.18(1) Whenever the commission desires to take the deposition of any person upon oral examination, the commission shall give reasonable notice in writing to the deponent and any party who is to be deposed. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs.

9.18(2) If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

9.18(3) The notice to a party deponent may be accompanied by a request made in compliance with rules 9.12(216) and 9.13(216) for the production of documents and tangible things at the taking of deposition. The procedure of rule 9.13(216) shall apply to the request.

9.18(4) No subpoena is necessary to require the appearance of a party for a deposition. Service on the party or the party's attorney of record of notice of the taking of a deposition of the party or of an officer, partner or managing agent of any party who is not a natural person, as provided in 9.18(1), is sufficient to require the appearance of a deponent for the deposition.

9.18(5) A notice or subpoena may name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the witness will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subrule does not preclude taking a deposition by any other procedure authorized in these rules.

161—9.19(216) Conduct of oral deposition.

9.19(1) *Examination; recording examination; administering the oath; objections.* Examination of witnesses by the commission may proceed as permitted at the hearing. The commission investigator or other officer before whom the deposition is to be taken shall put the witness under oath and shall personally, or by someone acting under the investigator or officer's direction and in the investigator or officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subrule 9.17(2). All objections made at the time of the examination to the qualifications of the investigator or other officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the investigator or officer upon the deposition. Evidence objected to shall be taken subject to the objections.

9.19(2) *Motion to terminate or limit examination.* At any time during the taking of the deposition, on motion of the party being deposed or other deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the presiding officer for discovery may order the commission to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in rule 9.8(216). If the order made terminates the examination, it shall be resumed thereafter only upon the

order of the presiding officer for discovery. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.

If the motion is granted, the presiding officer for discovery shall, after opportunity for hearing, require the commission to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorneys' fees, unless the presiding officer for discovery finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the presiding officer for discovery shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the commission the reasonable expenses incurred in opposing the motion, including attorneys' fees, unless the presiding officer for discovery finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the presiding officer for discovery may apportion in a just manner the reasonable expenses incurred in relation to the motion.

161—9.20(216) Reading and signing depositions.

9.20(1) *Where reading or signing not required.* No oral deposition reported and transcribed by an official court reporter or certified shorthand reporter of Iowa need be submitted to, read or signed by the deponent.

9.20(2) *Submission to witness; changes; signing.* In other cases, if and when the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the witness is ill or dead or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission, the investigator or officer shall sign it and state on the record the fact of the waiver or of the illness, death, or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor. The deposition may then be used as fully as though signed unless on a motion to suppress the tribunal hearing the motion holds that the reason given for the refusal to sign requires rejection of the deposition in whole or in part.

161—9.21(216) Certification and return; copies.

9.21(1) When the deposition is transcribed, the investigator or other officer shall certify on the deposition that the witness was duly sworn and that the deposition is a true record of the testimony given by the witness. Documents and things produced for inspection during the deposition shall, upon the request of the investigator, be marked for identification and annexed to the deposition, except that:

a. The person producing the materials may substitute copies to be marked for identification, if the investigator is provided fair opportunity to verify the copies by comparison with the originals;

b. If the person producing the materials requests their return, the investigator shall mark, copy, and, at some time prior to the completion of the investigation, return them to the person producing them. The materials may then be used in the same manner as if annexed to the deposition.

9.21(2) Upon payment of reasonable charges therefor, the commission shall furnish a copy of the deposition to the party who was deposed or to the deponent.

161—9.22(216) Before whom taken. The officer taking the deposition shall not be a party, a person financially interested in the action, an attorney or employee of any party, an employee of any such attorney, or any person related within the fourth degree of consanguinity or affinity to a party, a party's attorney, or an employee of either of any party.

161—9.23(216) Deposition subpoena.

9.23(1) The commission may issue subpoenas for persons named in and described in a notice to take depositions under rule 9.18(216). Subpoenas may also be issued as provided by statute or by rule 161—3.14(216).

9.23(2) No resident of Iowa shall be subpoenaed to attend a deposition out of the county where the deponent resides, or is employed, or transacts business in person.

161—9.24(216) Costs of taking deposition. Costs of taking and proceeding to procure a deposition shall be paid by the commission.

161—9.25(216) Irregularities and objections.

9.25(1) *Notice.* All objections to any notice of taking any depositions are waived unless promptly served in writing upon the commission.

9.25(2) *Officer.* Objection to the commission investigator or other officer's qualification to take a deposition is waived unless made before such taking begins, or as soon thereafter as objector knows it or could discover it with reasonable diligence.

9.25(3) *Taking depositions.* Errors or irregularities occurring during an oral deposition as to any conduct or manner of taking it, or the oath, or the form of any question or answer, and any other errors which might thereupon have been cured, obviated or removed, are waived unless seasonably objected to during the deposition.

161—9.26(216) Service of discovery. Service of documents pertaining to discovery procedures described in this chapter, other than subpoenas, may be accomplished by the same means as in rule 161—4.6(17A).

161—9.27(216) Appeals. Appeals from an imposition of sanctions by the presiding officer for discovery under rule 9.16(216) are filed and processed in the same manner as appeals under rule 161—4.23(17A). Appeals from other decisions rendered by the presiding officer for discovery are filed and processed in the same manner as appeals under rule 161—4.25(17A).

161—9.28(216) Representation of commission. At all discovery hearings, motions, and appeals, including those proceedings before the presiding officer for discovery, the commission may be represented by a member of the attorney general's office.

These rules are intended to implement Iowa Code sections 216.5(13), 216.8 and 216.8A.

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CHAPTER 10
DISCRIMINATION IN PUBLIC ACCOMMODATIONS

[Prior to 1/13/88, see Civil Rights 240—Ch 7]

161—10.1(216) Statement of purpose. The commission's purpose in adopting these rules is to provide guidelines on what actions or activities may produce a discriminatory impact in public accommodations.

161—10.2(216) Discrimination prohibited. No person shall be discriminated against on the basis of race, creed, color, sex, national origin, religion or disability by any public accommodation by:

10.2(1) Providing any disposition, service, financial aid, or benefit to an individual which is different, or is provided in a different manner, from that provided to other members of the general public, except to reasonably accommodate a member of the protected classes who otherwise might be totally precluded from receiving a benefit, access to, or participation in a program.

10.2(2) Subjecting any individual to segregation or separate treatment in any matter related to that individual's receipt of any disposition, service, financial aid, or benefit provided to other members of the general public.

10.2(3) Restricting an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any disposition, service, financial aid, or benefit provided to other members of the general public.

10.2(4) Treating an individual differently from others in determining whether that individual satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided any disposition, service, financial aid, function, or benefit available to other members of the general public.

10.2(5) Denying an individual an opportunity to participate in a program through the provision of service or otherwise afford that individual an opportunity to do so which is different from that afforded to other members of the general public.

These rules are intended to implement Iowa Code chapter 216.

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[1] Effective date of Ch 7 delayed by the Administrative Rules Review Committee 70 days.
Effective date of 7.2(1) and 7.3 delayed by the Administrative Rules Review Committee until 45 days after convening of the next General Assembly.

CHAPTER 11
PUBLIC RECORDS AND FAIR INFORMATION PRACTICES

161—11.1(17A,22,216) Definitions. As used in this chapter:

"Agency" means the Iowa civil rights commission.

"Confidential record" means a record which is not available as a matter of right for examination and copying by members of the public under applicable provisions of law. Confidential records include records or information contained in records that the agency is prohibited by law from making available for examination by members of the public, and records or information contained in records that are specified as confidential by Iowa Code section 22.7, or other provision of law, but that may be disclosed upon order of a court, the lawful custodian of the record, or by another person duly authorized to release the record. Mere inclusion in a record of information declared confidential by an applicable provision of law does not necessarily make that entire record a confidential record.

"Custodian" means the executive director, or a person lawfully delegated authority by the executive director to act for the agency in implementing Iowa Code chapter 22.

"Open record" means a record other than a confidential record.

"Personally identifiable information" means information about or pertaining to an individual in a record which identifies the individual and which is contained in a record system.

"Record" means the whole or a part of a "public record" as defined in Iowa Code section 22.1.

"Record system" means any group of records under the control of the agency from which a record may be retrieved by a personal identifier such as the name of an individual, number, symbol, or other unique retriever assigned to an individual.

161—11.2(17A,22,216) Statement of policy. This chapter implements Iowa Code section 22.11 and chapter 216 by establishing agency policies and procedures for the maintenance of records. The purpose of this chapter is to facilitate public access to open records. It also seeks to facilitate sound agency determinations with respect to the handling of confidential records and the implementation of the fair information practices Act. This agency is committed to the policies set forth in Iowa Code chapter 22; agency staff shall cooperate with members of the public in implementing the provisions of that chapter.

161—11.3(17A,22,216) Requests for access to records.

11.3(1) *Location of record.* A request for access to a record should be directed to the Iowa civil rights commission or the particular agency office where the record is kept. The request shall be directed to the Iowa Civil Rights Commission, 211 E. Maple Street, c/o Grimes State Office Building, Des Moines, Iowa 50319. If a request for access to a record is misdirected, agency personnel will promptly forward the request to the appropriate person within the agency.

11.3(2) *Office hours.* Open records shall be made available during all customary office hours, which are 8 a.m. to 4:30 p.m., Monday through Friday, except legal holidays.

11.3(3) *Request for access.* Requests for access to open records may be made in writing or in person. The office may also accommodate telephone requests where appropriate. Requests shall identify the particular records sought by name or description in order to facilitate the location of the record. Mail or telephone requests shall include the name, address, and telephone number of the person requesting the information. A person shall not be required to give a reason for requesting an open record.

11.3(4) *Response to requests.* Access to an open record shall be provided promptly upon request unless the size or nature of the request makes prompt access infeasible. If the size or nature of the request for access to an open record requires time for compliance, the custodian shall comply with the request as soon as feasible. Access to an open record may be delayed for one of the purposes authorized by Iowa Code section 22.8(4) or 22.10(4). The custodian shall promptly give notice to the requester of the reason for any delay in access to an open record and an estimate of the length of that delay and, upon request, shall promptly provide that notice to the requester in writing.

The custodian of a record may deny access to the record by members of the public only on the grounds that such a denial is warranted under Iowa Code sections 22.8(4) and 22.10(4), or that it is a

confidential record, or that its disclosure is prohibited by a court order. Access by members of the public to a confidential record is limited by law and, therefore, may generally be provided only in accordance with the provisions of rule 11.4(17A,22,216) and other applicable provisions of law.

11.3(5) *Security of record.* No person may, without permission from the custodian, search or remove any record from agency files. Examination and copying of agency records shall be supervised by the custodian or a designee of the custodian. Records shall be protected from damage and disorganization.

11.3(6) *Copying.* A reasonable number of copies of an open record may be made in the agency's office. If photocopy equipment is not available in the agency office where an open record is kept, the custodian shall permit its examination in that office and shall arrange to have copies promptly made elsewhere.

11.3(7) *Fees.*

a. When charged. To the extent permitted by applicable provisions of law, the payment of fees may be waived when the imposition of fees is inequitable or when a waiver is in the public interest.

b. Copying and postage costs. Price schedules for published materials and for photocopies of records shall be prominently posted in agency offices. Copies of records may be made by or for members of the public on agency photocopy machines or from electronic storage systems at cost as determined and posted in agency offices by the custodian. When the mailing of copies of records is requested, the actual costs of such mailing may also be charged to the requester.

c. Supervisory fee. An hourly fee may be charged for actual agency expenses in supervising the examination and copying of requested records when the supervision time required is in excess of one-half hour. The custodian shall prominently post in agency offices the hourly fees to be charged for supervision of records during examination and copying. That hourly fee shall not be in excess of the hourly wage of an agency clerical employee who ordinarily would be appropriate and suitable to perform this supervisory function.

d. Search fees. If the request requires research or if the record or records cannot reasonably be readily retrieved by the office, the requester will be advised of this fact. Reasonable search fees may be charged where appropriate. In addition, all costs for retrieval and copying of information stored in electronic storage systems may be charged to the requester.

e. Advance deposits.

(1) When the estimated total fee chargeable under this subrule exceeds $25, the custodian may require a requester to make an advance payment to cover all or a part of the estimated fee.

(2) When a requester has previously failed to pay a fee chargeable under this subrule, the custodian may require advance payment of the full amount of any estimated fee before the custodian processes a new request from that requester.

161—11.4(17A,22,216) Access to confidential records. Under Iowa Code section 22.7 or other applicable provisions of law, the lawful custodian may disclose certain confidential records to one or more members of the public. Other provisions of law may authorize or require the custodian to release specified confidential records under certain circumstances or to particular persons. In requesting the custodian to permit the examination and copying of such a confidential record, the following procedures apply and are in addition to those specified for requests for access to records in rule 11.3(17A,22,216).

11.4(1) *Proof of identity.* A person requesting access to a confidential record may be required to provide proof of identity or authority to secure access to the record.

11.4(2) *Requests.* The custodian may require that a request to examine and copy a confidential record be in writing. A person requesting access to such a record may be required to sign a certified statement or affidavit enumerating the specific reasons justifying access to the confidential record and to provide any proof necessary to establish relevant facts.

11.4(3) *Notice to subject of record and opportunity to obtain injunction.* After the custodian receives a request for access to a confidential record, and before the custodian releases such a record, the custodian may make reasonable efforts to notify promptly any person who is a subject of that record, is identified in that record, and whose address or telephone number is contained in that record. To the extent such a delay is practicable and in the public interest, the custodian may give the subject of such a confidential

record to whom notification is transmitted a reasonable opportunity to seek an injunction under Iowa Code section 22.8, and indicate to the subject of the record the specific period of time during which disclosure will be delayed for that purpose.

11.4(4) *Request denied.* When the custodian denies a request for access to a confidential record, the custodian shall promptly notify the requester. If the requester indicates to the custodian that a written notification of the denial is desired, the custodian shall promptly provide such a notification that is signed by the custodian and that includes:

a. The name and title or position of the custodian responsible for the denial; and

b. A citation to the provision of law vesting authority in the custodian to deny disclosure of the record and a brief statement of the reasons for the denial to this requester.

11.4(5) *Request granted.* When the custodian grants a request for access to a confidential record to a particular person, the custodian shall notify that person and indicate any lawful restrictions imposed by the custodian on that person's examination and copying of the record.

161—11.5(17A,22,216) Requests for treatment of a record as a confidential record and its withholding from examination. The custodian may treat a record as a confidential record and withhold it from examination only to the extent that the custodian is authorized by Iowa Code section 22.7, another applicable provision of law, or a court order, to refuse to disclose that record to members of the public.

11.5(1) *Persons who may request.* Any person who would be aggrieved or adversely affected by disclosure of a record and who asserts that Iowa Code section 22.7, another applicable provision of law, or a court order, authorizes the custodian to treat the record as a confidential record, may request the custodian to treat that record as a confidential record and to withhold it from public inspection.

11.5(2) *Request.* A request that a record be treated as a confidential record and be withheld from public inspection shall be in writing and shall be filed with the custodian. The request must set forth the legal and factual basis justifying such confidential record treatment for that record, and the name, address, and telephone number of the person authorized to respond to any inquiry or action of the custodian concerning the request. A person requesting treatment of a record as a confidential record may also be required to sign a certified statement or affidavit enumerating the specific reasons justifying the treatment of that record as a confidential record and to provide any proof necessary to establish relevant facts. Requests for treatment of a record as such a confidential record for a limited time period shall also specify the precise period of time for which that treatment is requested.

A person filing such a request shall, if possible, accompany the request with a copy of the record in question from which those portions for which such confidential record treatment has been requested have been deleted. If the original record is being submitted to the agency by the person requesting such confidential treatment at the time the request is filed, the person shall indicate conspicuously on the original record that all or portions of it are confidential.

11.5(3) *Failure to request.* Failure of a person to request confidential record treatment for a record does not preclude the custodian from treating it as a confidential record. However, if a person who has submitted business information to the agency does not request that it be withheld from public inspection under Iowa Code section 22.7(3) or 22.7(6), the custodian of records containing that information may proceed as if that person has no objection to its disclosure to members of the public.

11.5(4) *Timing of decision.* A decision by the custodian with respect to the disclosure of a record to members of the public may be made when a request for its treatment as a confidential record that is not available for public inspection is filed, or when the custodian receives a request for access to the record by a member of the public.

11.5(5) *Request granted or deferred.* If a request for such confidential record treatment is granted, or if action on such a request is deferred, a copy of the record from which the matter in question has been deleted and a copy of the decision to grant the request or to defer action upon the request will be made available for public inspection in lieu of the original record. If the custodian subsequently receives a request for access to the original record, the custodian will make reasonable and timely efforts to notify

any person who has filed a request for its treatment as a confidential record that is not available for public inspection of the pendency of that subsequent request.

11.5(6) *Request denied and opportunity to seek injunction.* If a request that a record be treated as a confidential record and be withheld from public inspection is denied, the custodian shall notify the requester in writing of that determination and the reasons therefor. On application by the requester, the custodian may engage in a good faith, reasonable delay in allowing examination of the record so that the requester may seek injunctive relief under the provisions of Iowa Code section 22.8, or other applicable provision of law. However, such a record need not be withheld from public inspection for any period of time if the custodian determines that the requester had no reasonable grounds to justify the treatment of that record as a confidential record. The custodian shall notify requester in writing of the time period allowed to seek injunctive relief or the reasons for the determination that no reasonable grounds exist to justify the treatment of that record as a confidential record. The custodian may extend the period of good faith, reasonable delay in allowing examination of the record so that the requester may seek injunctive relief only if no request for examination of that record has been received, or if a court directs the custodian to treat it as a confidential record, or to the extent permitted by another applicable provision of law, or with the consent of the person requesting access.

161—11.6(17A,22,216) Procedure by which additions, dissents, or objections may be entered into certain records. Except as otherwise provided by law, a person may file a request with the custodian to review, and to have a written statement of additions, dissents, or objections entered into, a record containing personally identifiable information pertaining to that person. However, this does not authorize a person who is a subject of such a record to alter the original copy of that record or to expand the official record of any agency proceeding. Requester shall send the request to review such a record or the written statement of additions, dissents, or objections to the custodian. The request to review a written statement must be dated and signed by requester, and shall include the current address and telephone number of the requester or the requester's representative.

161—11.7(17A,22,216) Consent to disclosure by the subject of a confidential record. To the extent permitted by any applicable provision of law, a person who is the subject of a confidential record may have a copy of the portion of that record concerning the subject disclosed to a third party. A request for such a disclosure must be in writing and must identify the particular record or records that may be disclosed, and the particular person or class of persons to whom the record may be disclosed and, where applicable, the time period during which the record may be disclosed. The person who is the subject of the record and, where applicable, the person to whom the record is to be disclosed, may be required to provide proof of identity. Additional requirements may be necessary for special classes of records. Appearance of counsel on behalf of a person who is the subject of a confidential record is deemed to constitute consent for the agency to disclose records about that person to the person's attorney.

161—11.8(17A,22,216) Notice to suppliers of information. When the agency requests a person to supply information about that person, the agency shall notify the person of the use that will be made of the information, which persons outside the agency might routinely be provided this information, which parts of the requested information are required and which are optional, and the consequences of a failure to provide the information requested. This notice may be given in these rules, on the written form used to collect the information, on a separate fact sheet or letter, in brochures, in formal agreements, in contracts, in handbooks, in manuals, verbally, or by other appropriate means. Notice need not be given in connection with discovery requests in litigation or administrative proceedings, subpoenas, investigations of possible violations of law, or similar demands for information.

161—11.9(17A,22,216) Disclosures without the consent of the subject.

11.9(1) Open records are routinely disclosed without the consent of the subject.

11.9(2) To the extent allowed by law, disclosure of confidential records may occur without the consent of the subject. Following are instances where disclosure, if lawful, may generally occur without notice to the subject:

a. For a routine use as defined in rule 11.10(17A,22,216) or in any notice for a particular record system.

b. To a recipient who has provided the agency with advance written assurance that the record will be used solely as a statistical research or reporting record; provided that the record is transferred in a form that does not identify the subject.

c. To another government agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if any authorized representative of such government agency or instrumentality has submitted a written request to the agency specifying the record desired and the law enforcement activity for which the record is sought.

d. To an individual pursuant to a showing of compelling circumstances affecting the health or safety of any individual if a notice of the disclosure is transmitted to the last-known address of the subject.

e. To the legislative services agency under Iowa Code section 2A.3.

f. To the citizens' aide/ombudsman under Iowa Code section 2C.9.

g. Disclosures in the course of employee disciplinary proceedings.

h. In response to a court order or subpoena.

161—11.10(17A,22,216) Routine use.

11.10(1) Defined. "Routine use" means the disclosure of a record without the consent of the subject or subjects for a purpose which is compatible with the purpose for which the record was collected. It includes disclosures required to be made by statute other than the public records law, Iowa Code chapter 22.

11.10(2) To the extent allowed by law, the following uses may be considered routine uses of all agency records:

a. Disclosure to those officers, employees, and agents of the agency who have a need for the record in the performance of their duties. The custodian of the record may upon request of any officer or employee, or on the custodian's initiative, determine what constitutes legitimate need to use confidential records.

b. Disclosure of information indicating an apparent violation of the law to appropriate law enforcement authorities for investigation and possible criminal prosecution, civil court action, or regulatory order.

c. Disclosure to the agency or officer which this office is advising or representing in the matter in question or to the department of inspections and appeals for matters in which it is performing services or functions on behalf of the agency.

d. Transfers of information within the agency, to other state agencies, or to local units of government as appropriate to administer the program for which the information is collected.

e. Information released to staff of federal and state entities for audit purposes or for purposes of determining whether the agency is operating a program lawfully.

f. Any disclosure specifically authorized by the statute under which the record was collected or maintained.

161—11.11(17A,22,216) Consensual disclosure of confidential records.

11.11(1) *Consent to disclosure by a subject individual.* The subject may consent in writing to agency disclosure of confidential records as provided in rule 11.7(17A,22,216).

11.11(2) *Complaints to public officials.* A letter from a subject of a confidential record to a public official which seeks the official's intervention on behalf of the subject in a matter that involves the agency may to the extent permitted by law be treated as an authorization to release sufficient information about the subject to the official to resolve the matter.

161—11.12(17A,22,216) Availability of records.

11.12(1) *General.* Agency records are open for public inspection and copying unless otherwise provided by rule or law. The office also has possession of records which may be open records but which are copies of materials from another agency, which have been filed in judicial or administrative proceedings, or which are available in the state law library. This office will often refer persons to the originating agency, the clerk of the appropriate court, or the law library for those records. This is consistent with the functions of those entities, ensures that the requester get a clean official copy of the record, and protects the integrity of attorney files against unintended disclosures of confidential information.

11.12(2) *Confidential records.* The following records may be withheld from public inspection. Records are listed by category, according to the legal basis for withholding them from public inspection.

a. Tax records made available to the agency. (Iowa Code sections 422.72,422.20)

b. Records which are exempt from disclosure under Iowa Code section 22.7.

c. Minutes of closed meetings of a government body. (Iowa Code section 21.5(4))

d. Identifying details in final orders, decisions and opinions to the extent required to prevent a clearly unwarranted invasion of personal privacy or trade secrets under Iowa Code section 17A.3 (1)*"d."*

e. Those portions of agency staff manuals, instructions or other statements issued which set forth criteria or guidelines to be used by agency staff in auditing, in making investigations, or in the selection or handling of cases, such as operational tactics or allowable tolerances or criteria for the defense, prosecution or settlement of cases, when disclosure of these statements would:

(1) Enable law violators to avoid detection;

(2) Facilitate disregard of requirements imposed by law; or

(3) Give a clearly improper advantage to persons who are in an adverse position to the agency. (Iowa Code sections 17A.2, 17A.3, 216.15)

f. Records which constitute attorney work product, attorney-client communications, or which are otherwise privileged. Attorney work product is confidential under Iowa Code sections 22.7(4), 622.10, 622.11, Iowa R.C.P. 122(c), Fed. R.Civ.P. 26(b)(3), and case law. Attorney-client communications are confidential under Iowa Code sections 622.10 and 622.11, the rules of evidence, the Code of Professional Responsibility, and case law.

g. Records collected or generated by Iowa civil rights commission staff or commissioners relating to any step in the civil rights complaint process which contain personally identifiable information.

h. Any other records made confidential by law. (Iowa Code section 216.15)

11.12(3) *Authority to release confidential records.* The agency may have discretion to disclose some confidential records which are exempt from disclosure under Iowa Code section 22.7 or other law. Any person may request permission to inspect these records withheld from inspection under a statute which authorizes limited or discretionary disclosure as provided in rule 11.4(17A,22,216). If the agency initially determines that it will release such records, the agency may, where appropriate, notify interested persons and withhold the records from inspection as provided in subrule 11.4(3).

161—11.13(17A,22,216) Personally identifiable information. This rule describes the nature and extent of personally identifiable information which is collected, maintained, and retrieved by the agency by personal identifier in record systems as defined in rule 11.1(17A,22,216). Unless otherwise stated, the authority for this office to maintain the record is provided by Iowa Code chapter 216, the statutes governing the subject matter of the record, and the enabling statutes of the agency client, where applicable. The record systems maintained by the agency shall include but are not limited to the following:

11.13(1) *Investigatory files.* These files or records contain information collected or generated by Iowa civil rights commission staff or commissioners relating to any step in the complaint process beginning with the consideration or contemplation of filing a complaint up to the issuance of a notice of public hearing. Most of these records are paper files. However, some case management records and other records are in computer form. Those files are commonly indexed by the name of the opposing party. Some files are indexed by subject matter, witness, agency or other category.

11.13(2) *Litigation files.* These files or records contain information regarding litigation or anticipated litigation, which includes judicial and administrative proceedings. The records include pleadings, briefs, depositions, discovery material, docket sheets, documents, general correspondence, attorney-client correspondence, attorneys' notes, memoranda, research materials, witness information, investigation materials, information compiled under the direction of the attorney, and case management records. Most of these records are paper files. However, some case management records and other records are in computer form. The files are generally maintained by division and are commonly indexed by the name of the opposing party. Some files are indexed by subject matter, witness, agency, or other category. The files contain materials which are confidential as attorney work product and attorney-client communications. Some materials are confidential under other applicable provisions of law or because of a court order. Persons wishing copies of pleadings and other documents filed in litigation should obtain these from the clerk of the appropriate court which maintains the official copy.

11.13(3) *Records.* State of Iowa files are a subpart of the complaint file system and contain general information on an individual or business including correspondence, investigative information, agency subpoenas, demands for information and responses. Work product information contained in the state of Iowa file is considered confidential. The records are subject to the same confidentiality provisions as are complaint files.

11.13(4) *Personnel files.* The Iowa civil rights commission and individual divisions maintain files containing information about employees and applicants for positions with the agency. The files contain payroll records, biographical information, medical information relating to disability, performance reviews and evaluations, disciplinary information, information required for tax withholding, information concerning employee benefits, affirmative action reports, and other information concerning the employer-employee relationship. Some of this information is confidential under Iowa Code section 22.7(11).

161—11.14(17A,22,216) Other groups of records. This rule describes groups of records maintained by the agency other than record systems as defined in rule 11.1(17A,22,216). The records listed may contain information about individuals. Unless otherwise designated, the authority for this office to maintain the record is provided by Iowa Code chapter 216, the statutes governing the subject matter of the record. Those privileges may render some or all of the following information confidential whether or not asserted in the description of the record. All records are stored both on paper and in automated data processing systems unless otherwise noted.

11.14(1) *Administrative records.* This includes documents concerning budget, property inventory, purchasing, yearly reports, office policies for employees, time sheets, printing and supply requisitions.

11.14(2) *Publications.* The office receives a number of books, periodicals, newsletters, government documents, etc. These materials would generally be open to the public but may be protected by copyright law. Most publications of general interest are available in the state law library.

11.14(3) *Office publications.* This office issues a variety of materials including press releases, statistical reports, Iowa civil rights commission case reports and annual reports.

11.14(4) *Rule-making records.* Official documents executed during the promulgation of agency rules and public comments are available for public inspection.

11.14(5) *Office manuals.* Information in office manuals such as the investigator handbook are available for public inspection.

11.14(6) *All other records.* Records are open if not exempted from disclosure by law.

161—11.15(17A,22,216) Data processing systems. The data processing systems used by the agency compare personally identifiable information in one record system with personally identifiable information in another record system.

161—11.16(17A,22,216) Applicability. This chapter does not:

1. Require the agency to index or retrieve records which contain information about individuals by that person's name or other personal identifier.

2. Make available to the general public records which would otherwise not be available under the public records law, Iowa Code chapter 22.

3. Govern the maintenance or disclosure of, notification of or access to, records in the possession of the agency which are governed by the regulations of another agency.

4. Apply to grantees, including local governments or subdivisions thereof, administering state-funded programs, unless otherwise provided by law or agreement.

5. Make available records compiled in reasonable anticipation of court litigation or formal administrative proceedings. The availability of such records to the general public or to any subject individual or party to such litigation or proceedings shall be governed by applicable constitutional principles, statutes, rules of discovery, evidentiary privileges, and applicable regulations.

6. Make available to the general public records which would otherwise not be available under Iowa Code section 216.15(4).

161—11.17(17A,22,216) Access to file information. The disclosure of information whether a change has been filed or not, or revealing the contents of any file is prohibited except in the following circumstances:

11.17(1) If a final decision per 161—subrule 2.1(10) has been reached, a party or a party's attorney may, upon showing that a petition appealing the commission action has been filed, have access to the commission's case file on that complaint.

11.17(2) If a case has been approved for public hearing and the notice of hearing has been issued, any party or party's attorney may have access to file information through prehearing discovery measures provided in 161—4.6(216). In addition, file information may be sought pursuant to Iowa Code subsection 17A.13(2).

11.17(3) If a decision rendered by the commission in a contested case has been appealed, any party or party's attorney may, upon showing that the decision has been appealed, have access to the commission's case file on that complaint.

The fact that copies of documents related or gathered during an investigation of a complaint are introduced as evidence during the course of a contested case proceeding does not affect the confidential status of all other documents within the file which are not introduced as evidence.

11.17(4) If the commission has issued a right-to-sue letter per 161—subrule 3.10(3), a party or party's attorney may have access to the commission's case file on that complaint.

11.17(5) Only upon written notification, from an attorney or a party, that the attorney represents that party may the attorney then obtain access to the commission case file on the same terms as that party.

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[1] Effective date of 161—11.17(2), 11.17(4) and 11.17(5) delayed 70 days by the Administrative Rules Review Committee at its meeting held March 9, 1993; delayed until adjournment of the 1994 Session of the General Assembly by this Committee May 11, 1993.

CHAPTERS 12 to 14
Reserved

CHAPTER 15
MISCELLANEOUS PROVISIONS
[Prior to 1/13/88, see Civil Rights 240—Ch 11]

161—15.1(216) Partial invalidity. If any provision of commission rules shall be held invalid, the remainder of the rules shall not be affected thereby. The invalidity of any of the rules with respect to a particular person or under particular circumstances shall not affect their application to other persons or different circumstances.

161—15.2(216) Availability of rules. Copies of commission rules shall be available to the public on request.

161—15.3(17A,ExecOrd11) Waiver of requirements imposed by commission rule.

15.3(1) *Filing of a request for waiver or variance.* Any person may file a request for waiver or variance of an administrative rule of the civil rights commission by writing a proper request which is received by Executive Director, Civil Rights Commission, Second Floor, 211 East Maple Street, Des Moines, Iowa 50309-1858. All requests for waiver or variance of an administrative rule must be in writing and meet all requirements set out in paragraph 15.3(2)*"a."* A request for a waiver is filed by any of the methods listed in rule 161—3.5(216). The date a request for waiver is filed is governed by rule 161—subrule 3.5(7). The commission shall provide the requester with a file-stamped copy of the request if the requester provides an extra copy for this purpose.

15.3(2) *Form of request.*

a. Required contents. A request for waiver or variance of a rule must:

(1) Prominently state on its face that it is a request for a waiver or variance of an administrative rule; and

(2) State the name and address of the entity or person for whom a waiver or variance is requested; and

(3) Describe or give the citation of the specific rule for which a waiver or variance is requested; and

(4) State the specific waiver or variance requested.

The commission shall not process a filing as a request for a waiver or variance if that filing does not conform to the requirements of this paragraph.

b. Suggested contents. In addition, a request for waiver or variance of a rule should also:

(1) State all relevant facts that the requester believes would justify a waiver or variance.

(2) State the reasons the requester believes will justify a waiver or variance.

(3) State the history of the commission's action relative to the requester. If the request is in connection with a complaint of discrimination on file with the commission, the requester should identify the complaint at issue including, if possible, the complaint number.

(4) State any information regarding the commission's treatment of similar cases, if known.

(5) State the name, address and telephone number of any person inside or outside state government who would be adversely affected by the grant of the request or who otherwise possesses knowledge of the matter with respect to the waiver or variance request.

15.3(3) *Procedure for evaluating requests for waiver.*

a. Service of request. Within 30 days after the receipt of a request for waiver or variance of an administrative rule, the commission shall provide a copy to all persons who are required to receive one by a provision of law. The commission may also provide a copy of the request to those individuals whom the requester has identified as being adversely affected by a grant of the request. In the case of a request made in connection with a complaint of discrimination on file with the commission, the commission shall provide a copy of the request to all other parties in the case. Service may occur by regular mail. If necessary for maintenance of the confidentiality of a commission investigation, information may be redacted from a request for variance before the request is provided to persons other than the requester.

b. Decision maker for request. The decision whether to grant a request for waiver or variance shall be made either by the executive director or upon a vote of the commissioners. If the request is

made in connection with a complaint of discrimination on file with the commission, any discussion by the commissioners of the request for waiver may be in closed session.

c. Investigation of allegations. The decision maker or a designated member of the commission staff may conduct an investigation into any factual issue which is relevant to the request for a waiver or variance. A refusal by the requester to cooperate in this investigation may be grounds to deny the request for waiver or variance. In the case of a request made in connection with a complaint of discrimination, if any party to the complaint refuses to cooperate in the investigation, the decision maker may infer that the requested information would be adverse to the uncooperative party.

d. Time frame for decision on request. The commission shall render a decision on a request for waiver or variance of a rule within 120 days of receipt of the request. During this period the commission may extend the time for rendering a decision by notifying all persons who were notified of the request pursuant to paragraph 15.3(3)*"a"* that the time for rendering a decision has been extended. This notice shall include a new time frame for rendering the decision. Failure to render a decision or extend the time for rendering a decision within the required period shall be deemed a denial of the request.

e. Notification of decision. The commission shall send any decision rendered concerning the request for waiver or variance to all persons who were notified of the request pursuant to paragraph 15.3(3)*"a."*

f. Form of grant of request. Any waiver or variance shall be the narrowest exception possible to the provisions of the rule. A waiver or variance shall not be permanent unless the requester has shown that a temporary waiver or variance is impracticable. The commission may renew a temporary waiver or variance without a request if the commission finds that the factors of paragraph 15.3(4)*"b"* remain valid.

15.3(4) *Standard for evaluating request for waiver.*

a. Burden of persuasion. The burden of persuasion rests with the person who requests from the commission a waiver or variance of a rule.

b. Standard. A request for a waiver or variance shall be evaluated based on the unique, individual circumstances set out in the request. A waiver or variance may be granted only if the decision maker finds clear and convincing evidence that:

(1) The application of the rule would pose an undue hardship on the person for whom the waiver or variance is requested; and

(2) The waiver or variance from the requirements of a rule in the specific case would not prejudice the substantial legal rights of any person; and

(3) The provisions of a rule subject to a request for a waiver or variance are not specifically mandated by statute or another provision of law; and

(4) Substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver or variance is requested; and

(5) Granting the request would not waive or vary any requirement created or duty imposed by statute.

15.3(5) *Exceptions to waiver.*

a. Waiver in contested cases. This rule does not apply to any request for a waiver or variance of a rule which is made in connection with a contested case before the commission. Waiver or variance requests made in connection with a contested case are governed by rule 161—4.29(17A).

b. Not applicable to this rule. No person may request a waiver or variance from the requirements of this rule.

c. Requests by commission officials. No commissioner, commission staff member or other commission official may file a request for a waiver of a requirement placed upon that individual as part of that individual's official duties.

d. Time requirements. This rule does not authorize the commission to waive or vary any time requirement of an administrative rule.

e. No effect on case status. In the case of a request made in connection with a complaint of discrimination on file with the commission, the commission may not grant a request for waiver or variance if this would either close a case which was open at the time of the request or reopen a case

which was closed at the time of the request. The reopening provisions of rule 161—3.16(216), however, shall apply.

15.3(6) *Public inspection of waiver requests.* All waiver or variance requests and responses shall be indexed by administrative rule number and available to members of the public for inspection at the offices of the Civil Rights Commission, Second Floor, 211 East Maple Street, Des Moines, Iowa. Identifying information concerning any person, including parties to complaints on file, may be withheld by the commission in order to protect the confidentiality of case-related information as required by Iowa Code section 216.15(4).

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