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.