

CHAPTER 2 COMPLAINTS

2.1 Anonymity of complaint. For purposes of public commission meetings the complaints shall be identified only by case number so that the anonymity of the complaint 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.

2.2 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:

2.2(1). If a final decision 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. **2.2(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.

2.2(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.

2.2(4) If the commission has issued a right-to-sue letter, a party or party's attorney may have access to the commission's case file on that complaint.

2.2(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.

2.3 Timely filing of the complaint.

2.3(1) Limitation. The complaint shall be filed within 300 days after the occurrence of an alleged unlawful practice or act.

2.3(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.

2.3(3) Tolling of filing period. By law the filing period described in subrule 2.3(1) of this rule and in Title 8, Dubuque Code of Ordinances is subject to waiver, estoppel and equitable tolling. Whether the filing period should 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.

2.4 Complaints.

2.4(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 City Legal Department, 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.

2.4(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.

2.4(3) Technical defects in complaint. Notwithstanding the provisions of subrule 2.4(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.

2.5 Filing of documents with the Dubuque Human Rights Commission

2.5(1) Methods of filing. Any document, including a complaint of discrimination, may be “filed” with the commission by any one of the following methods:

- a. *In person.* By delivery in person to the offices of the commission.
- b. *By mail or regular mail.* By depositing the document in the United States mail, or sending it by courier service, postage prepaid, in an envelope addressed to the Dubuque Human Rights Commission.
- c. *By facsimile transmission (fax).* By transmitting via facsimile transmission a copy of the document. 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.
- d. *By courier service.* By delivering the document to an established courier service for immediate delivery to the Dubuque Human Rights Commission.
- e. *By certified mail.* By sending the document in the United States mail designated as certified mail.
- f. *By e-mail.* By attaching a document to or sending a document within the body of an e-mail. The commission shall have discretion over which documents may be filed by e-mail. Official signature requirements may vary from one type of document to another and shall be determined at the discretion of the commission. The commission may establish procedures to ensure the accuracy and validity of online filings and to notify parties of the receipt of electronic filings. Filings by e-mail must be delivered to a valid e-mail address of current commission staff designated to accept filed documents. The commission may require additional written verification of the veracity and accuracy of documents filed online. Senders shall include in the subject line of the e-mail the case number, if one exists, and a brief description of the submission.

2.5(2) 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, 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 or regular mail. If the document, except for a complaint of discrimination, is filed by mail or regular mail, then the date of the filing is the date of the mailing.

c. Filing by facsimile transmission. If the document, including a complaint of discrimination, is filed by facsimile transmission, 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 of the commission, 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, then the date of the filing is the date the document is delivered to the established courier service for immediate delivery to the Dubuque Human Rights Commission.

e. Filing through e-mail. If a document, including a complaint of discrimination, is filed online via e-mail, the date of the filing is the date that document is received by the commission as recorded in the e-mail inbox of the commission staff person. However, if the submission is received after office hours, the date of filing is the next day the commission offices are open for business. A submission received prior to office hours on a regular business day is deemed filed on that day.

f. 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.

2.5(3) 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 pursuant to the laws of Iowa that, on (date of mailing) I mailed copies of (describe document) addressed to the Dubuque Human Rights Commission, (address) and to the names and addresses of the person listed below by depositing a copy thereof in a United States post office mailbox with correct postage properly affixed (Date) (Signature)."

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

2.5(4) Conflicts in 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 the mailing is the date shown by the affidavit, certificate, or certificate of mailing.

2.5(5) 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 or online via e-mail and is received after office hours, the date of filing is the next day the

commission offices are open for business. Transmissions or submissions of other online filings 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.

2.6 Notice of the complaint. After jurisdictional review and within 20 days of receipt of the complaint, the commission staff shall serve respondent with a copy of the complaint by certified mail, or in person. A letter of acknowledgment shall advise the complainant of the right to withdraw the complaint and sue in the district court according to Title 8 of the Dubuque Code of Ordinances.

2.7 Preservation of records.

2.7(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 such 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 the 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.

2.7(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.

2.7(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 2.7(1) or 2.7(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 evidence.

2.8 The complaint.

2.8(1) *Amendment of complaint.*

a. A complaint or any part may be amended by the complainant or by the commission any time 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 and during the investigative stage 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 in 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.

d. 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.

2.8(2) *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.

2.9 Jurisdictional review. Upon the receipt of a statement offered as a complaint, the commission staff shall review the complaint to determine whether the commission has jurisdiction over the complaint. A no jurisdiction determination shall constitute final agency action for purposes of judicial review.

2.10 Right to sue.

2.10(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 district court.

2.10(2) *Conditions precedent to right to sue.* Upon a request for a right to sue, 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.

b. The complaint has been on file with the commission for at least sixty days.*c.* The right-to-sue request has been submitted in writing with the signature of the complainant or the complainant's representative, unless otherwise prohibited by state or federal rules

or contractual agreements. Electronic signatures are permissible for right-to-sue requests.

d. The date of request is listed as well as the corresponding case number.

2.10(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 district court within 90 days of the date of mailing of the right to sue letter.

2.10(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 Title 8, Dubuque Code of Ordinances, or:

b. A conciliation or mediation agreement has been executed; or

c. The commission has served notice of hearing upon the respondent; 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 or by the administrative law judge charged with the duty of determining "probable cause;" or

f. A finding that the commission does not have jurisdiction of the complaint has been made by the commission or by the administrative law judge charged with the duty of determining "probable cause."

2.10(5) *Closure by commission.* Where 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 both parties by certified mail.

2.11 *Mediation.* Mediation shall be available at any time while a complaint is still open and the parties agree to participate. Mediation is a neutral, non-fact-finding process, at which parties attempt to negotiate a no-fault predetermination settlement for the purpose of amicably resolving the complaint. Mediation shall be available to all parties irrespective of representation by counsel. Mediation may encompass all issues in the case which could have been investigated by the commission including any claims for unlawful retaliation that may exist through the date of the mediation notice. If the parties agree to seek and obtain a global settlement not limited to resolution of the civil rights issues, the mediation may be expanded to include these collateral claims.

2.12 *Administrative review and closure.*

2.12(1) *Periodic review and administrative closure.* The commission staff shall periodically review the complaint to determine whether further processing is warranted. When the periodic review occurs prior to the determination of whether there is probable cause, then further processing is warranted when the information collected 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 will be administratively closed after notice of intended closure which shall state reasons for closure and be served upon the complainant. The complainant shall be allowed thirty (30) days to respond. Response shall be in writing and sent to the commission staff stating the reasons why the complaint should remain open. The commission staff shall review and consider the response before making a closure decision.

2.12(2) *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.

2.12(3) *Involuntary satisfactory adjustment.* A complaint may be closed as satisfactorily adjusted when the respondent has made an offer of settlement acceptable to the commission staff 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 thirty (30) days to respond in writing to the commission stating reasons why the offer is unacceptable, or to accept the offer. The commission staff shall review and consider the response before making a closure decision.

2.12(4) *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.

2.12(5) *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 periodic review 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."

2.13 Investigation. The commission staff shall make a prompt investigation of the complaint and issue a recommendation. An administrative law judge shall review the recommendation and issue a determination of probable cause or no probable cause for the commission.

2.13(1) *Cause determinations.* After a complaint has been filed, a member of the investigatory staff shall 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.

2.13(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.

2.13(3) *Notice of decision.* Both the complainant and respondent shall be notified of the decision in writing by certified mail within fifteen (15) days of the administrative law judge's decision.

2.13(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 the administrative law judge has issued a finding in the same case.

2.13(5) *Administrative closures and satisfactory adjustments.* Designated staff of the commission may rule that a case be "administratively closed" 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. Commission staff may close a case as "satisfactorily adjusted." This provision does not contemplate administrative closure where an alternative resolution, such as full investigation, is warranted.

2.13(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 and 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.

2.13(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.

2.13(8) *Minimum period for conciliation attempts.* Upon the commencement of conciliation efforts, the commission must allow at least thirty (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 begins when the complaint and the commission's offer of settlement is communicated to respondent or respondent's attorney. After the passage of thirty (30) days the executive director may order further conciliation attempts bypassed if it is determined that the procedure is unworkable. The director must have approval of a commissioner before bypassing conciliation.

2.13(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 provided to all parties.

2.13(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.

2.14 Injunctions. If the commission staff determines that a complainant may be irreparably injured before a public hearing can be called to determine the merits of the complaint, commission staff may request an attorney for the commission to seek injunctive relief as may be appropriate to preserve the rights of the complainant and the public interest.

2.15 Investigative subpoenas.

2.15(1) *Prior to notice of hearing.* The commission staff may issue subpoenas prior to the issuance of a notice of hearing. Neither the complainant, except when the commission is acting as complainant, nor the respondent shall have the right to demand that a subpoena be issued.

2.15(2) *Initial information request.* Before a subpoena is issued, the commission staff shall make a request of the person having possession, custody, or control of the requested material or real evidence. 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.

2.15(3) *Form of subpoena.* Every subpoena shall state the name of the commission

and the purpose for which the subpoena is issued.

2.15(4) *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 appear personally and/or produce designated books, papers, or other real evidence in the possession, custody, or control of that person's control at a specified time and place. The subpoena also may command the person to whom it is directed to attend and give testimony as part of an investigation or public hearing.

2.15(5) *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 or by certified mail 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.

2.15(6) *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.

2.15(7) *Objections to subpoena.*

a. Any person who intends not to comply with all or part of a subpoena issued by the commission shall promptly after the date of service of the subpoena upon that person, petition the commission staff 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 commission staff may as soon as practicable make a final determination of the petition via certified 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; and
- (4) The subpoena is not reasonably relevant to matters under investigation.

c. To assure 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.

2.15(8) *Failure to comply.* Where a person fails to comply with a subpoena, the commission staff may authorize the filing of a petition for enforcement in the district court.

2.16 Procedure to reopen.

2.16(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 3.2.

2.16(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 staff 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.

2.16(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 staff 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 shall be provided to all respondents. The parties shall be afforded no less than 14 or more than 30 days to submit their positions, in writing, on the motion for reopening in writing.

The commission may summarily deny an application for reopening without seeking additional information and without following any of the procedures set forth in paragraph 2.16(3). 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, or commission staff may grant or deny the application for reopening. If the application is granted, the matter shall be referred back to the investigating staff, if further investigation is required. 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 sent by regular or certified mail to the last known mailing address.

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.

2.16(4) *No probable cause determination reopening.* In addition to the reopening provisions of subrule 2.16(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 thirty (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.

2.16(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 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. A party is barred from applying for reopening of a case on the ground that the agreement was involuntary if the party has voluntarily accepted all benefits of an agreement.

2.16(6) Probable cause determination. The provisions of subrule 2.16(3) notwithstanding, a respondent may not apply for reconsideration of a finding of probable cause.

2.16(7) Decision to proceed to hearing. The provisions of rule 2.16(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.

2.16(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 of issuance of the administrative release are satisfied, and none of the exceptions set forth in rule 2.10(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.

2.16(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. If 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. **2.16(10) Notice of reopening.** Whenever the commission reopens or reconsiders a decision, case closure, or other action of the commission under any provision of this rule, the commission shall inform each of the parties of the reopening in writing sent by regular or certified mail to the last known mailing address.

2.16(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.

2.17 Right of Representation. Although not required, all witnesses have a right to be represented by counsel during any investigation.

2.17(1) In all cases where management or supervisory personnel employed by the respondent are requested for an interview, the witness shall be entitled, although not required, to have respondent's attorney present during any questioning, provided that the attorney has filed a written appearance with the commission. The above, notwithstanding, should credibility be of concern, neither the respondent nor its counsel shall be privy to the questioning of the management or supervisory witness. Except for management and supervisory personnel, respondent's attorney shall not be permitted to be present during any interviews or investigations.

In all cases where interviews are scheduled with management or supervisory personnel employed by the respondent, the interviews should be scheduled through the respondent. In all cases where interviews are scheduled with non-management or non-supervisory personnel employed by the respondent, interviews should be scheduled through direct contact with the witness.

For purposes of this section management or supervisory personnel shall be limited to the persons described as follows:

- a. owner of the respondent's business; or
- b. ability to hire and fire employees; or
- c. supervises two or more employees and has the ability to take disciplinary actions

against those employees.

2.17(2) All investigative interviews of witnesses shall be conducted at the offices of the commission staff unless the commission staff approves an exception to this rule.