CHAPTER 3
CONTESTED CASES

3.1 General Provisions

3.1(1) *Scope and applicability.* This chapter applies to contested case proceedings conducted by the Dubuque Human Rights Commission**.**

3.1(2) *Prosecutory representative of the commission.* The commission's case in support of the complaint shall be presented by an attorney or agent of the commission.

3.1(3) *Extension of time for service by mail.* Whenever a party has the right or is required by this chapter to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon that party and the notice or paper is served upon that party by mail, three days shall be added to the prescribed period. Such additional time shall not be applicable where the hearing officer has prescribed the method of service of notice and the number of days to be given. This rule has no effect on actions which must be taken within a prescribed period after the issuance of a proposed decision or final order.

3.2 Notice of Hearing and Answer

3.2(1) *Statement of charges.*

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

b. The statement of charges shall contain:

(1) An allegation that the respondent is a proper respondent within the meaning of and subject to provisions of the Dubuque Code of Ordinances.

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

(*c)* A statement of charges is sufficient if it:

(1) Names the respondents and complainants;

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

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

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

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

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

(e) None of the allegations identified pursuant to paragraph 3.2(1)"d" shall be considered as a claim of discrimination in the contested case proceeding, but evidence on such allegations may be considered when relevant to other allegations of discrimination or as background evidence.

3.2(2) *Scheduling conference.*

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

conference. The scheduling conference may be conducted in whole or in part by telephone.

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

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

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

3.2(3) *Notice of hearing* Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. Delivery shall be executed by any of the following means: certified mail with return receipt requested, personal service as provided in the Iowa Rules of Civil Procedure, first-class mail, or publication as provided by the Iowa Rules of Civil Procedure to all interested parties or their attorneys at least 30 days before the date of the hearing. Certified mail return receipts, returns of service, or similar evidence of service shall be filed with the hearing officer. The notice shall include:

*a.*The time and place of hearing;

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

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

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

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

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

g. Identification of the hearing officer, if known.

3.2(4) *Answer to notice of hearing.* The respondent is encouraged to file an answer to the allegations contained within the notice of hearing within 20 days of service of the notice of hearing. Answers are encouraged as a means of sharpening the issues and preserving claimed error.

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

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

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

3.2(5 *Hearing officers*. The chairperson of the commission shall designate three members of the commission, an administrative hearing officer, or two commissioners and

an administrative hearing officer to conduct the hearing. The absence or disqualification of one or more members of a hearing panel appointed to hear a particular case shall not prevent the remaining panel members from hearing the case as independent hearing commissioners, unless other good cause can be shown that would prevent the individual commissioner(s) from acting as independent hearing commissioner(s).

3.2(6) *Disqualification.* Persons who have any interest in the case at issue, shall disqualify themselves to serve on the hearing panel. An investigating commissioner in the case at issue shall not be appointed to serve as a hearing commissioner.

3.3 Amendment

3.3(1). Any notice of hearing, petition, statement of charges, or other charging document may be amended before a responsive pleading has been filed. Amendments to pleadings after a responsive pleading has been filed and to an answer may be allowed with the consent of the other parties or in the discretion of the hearing officer who may impose terms or grant a continuance. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

3.3(2) Amendment to conform to proof. When issues not raised by the notice of hearing or the answer are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after the final decision; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the hearing on the ground that it is not within the issues made by the pleadings, the hearing officer may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the hearing officer that the admission of such evidence would prejudice that party in maintaining the action or defense upon the merits. The hearing officer may grant a continuance to enable the objecting party to meet such evidence.

3.4 Default

3.4(1) If a party failes to appear or participate in a contested case proceeding after proper service of notice, the hearing officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

3.4(2) Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

3.4(3) Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final agency action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated. A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

3.4(4) The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

3.4(5) Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

3.4(6) "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under the Iowa Rules of Civil Procedure.

3.4(7) A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party.

3.4(8) If a motion to vacate is granted and no timely interlocutory appeal has been taken, the hearing officer shall issue another notice of hearing and the contested case shall proceed accordingly.

3.4(9) A default decision may award any relief consistent with the notice of hearing and the commission's remedial authority under the Dubuque Code of Ordinances.

3.4(10) A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately.

3.5 Consolidation and severance.

3.5(1) *Grounds for consolidation.* The hearing officer may, upon motion, consolidate any or all matters at issue in two or more contested case proceedings where:

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

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

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

3.5(2) *Effect of consolidation*. Where consolidated hearings are held, a single record of the proceedings may be made and the evidence introduced in one matter may be considered as introduced in the other, and a separate or joint decision shall be made at the discretion of the hearing officer.

3.5(3) *Severance.* The hearing officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

3.6 Filing and service of documents.

3.6(1) *When service required.* Except when otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every other paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the commission, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing , the party filing a document is responsible for service on all parties.

3.6(2) *Service – how made.* Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivering, mailing, or transmitting by fax (facsimile) a copy to the attorney or to the party at the attorney's or party's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule or order.

3.6(3) *Filing – when required.* After the notice of hearing, all pleadings, motions, documents or other papers shall be filed with the hearing officer at the office of the

Human Rights Commission. Except as provided by these rules, the Iowa Rules of Civil Procedure pertaining to discovery, or other law, all pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the hearing officer.

3.6(4) *Filing – how and when made.* In a contested case before the commission, a document is filed by any of the methods described in rule 2.5. The date a document is deemed to be filed in a contested case before the commission is determined according to rule 2.5

3.6(5) *Proof of mailing*.

a. In a contested case before the commission, proof of mailing is made according to rule 2.5.

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

3.7 Discovery

3.7(1) *Civil procedure rules govern discovery*. Discovery procedures applicable in civil actions, as set forth in the Iowa Rules of Civil Procedure, are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the hearing officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

3.7(2) *Motions relating to discovery.* Any motion relating to discovery shall allege that the moving party has made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the hearing officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 3.7(1). The hearing officer may rule on the basis of the written motion and any response, or may order argument on the motion.

3.7(3) *Use at hearing.* Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

3.7(4) *Sanctions available.* The Iowa Rules of Civil Procedure govern what sanctions may be imposed by the hearing officer for the failure to comply with a discovery order, the failure to respond to discovery, or failing to otherwise comply with the rules of discovery.

3.7(5) *Discovery on commission and complainant.* When discovery of information from complainant is sought, discovery should be made upon the complainant with a copy thereof provided to the commission's representative. When discovery of information from the commission is sought, discovery should be made upon the commission with a copy thereof provided to the complainant or the complainant's representative.

3.7(6) *Discovery materials not filed.* Unless otherwise ordered by the hearing officer, no deposition, notice of deposition, interrogatory, request for production of documents, request for admission, or response, document, or thing produced, or objection thereto shall be filed. Any motion attacking the sufficiency of a response to a discovery request must have a copy of the request and response attached or the motion may be denied. This rule does not apply to depositions to perpetuate testimony.

3.7(7) *Discovery conference.* A discovery conference may be ordered, requested, and held in the same manner and upon the same terms as provided for in the Iowa Rules of Civil Procedure.

3.7(8) *Duplication of civil procedure rules.* The duplication in these rules of provisions contained within the Iowa Rules of Civil Procedure relating to discovery does not imply that other portions of the civil procedures rules do not govern discovery in contested cases before the commission.

3.8 Contested Case Subpoenas.

3.8(1) *Issuance of subpoenas*

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

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

3.8(2) *Motion to quash or modify.* The hearing officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

3.9 Contested case motions.

3.9(1) *Form.* No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought. Any motion for summary judgment shall comply with the Iowa Rules of Civil Procedure. Motions made during hearing may be stated orally upon the record.

3.9(2) *Response.* Any party may file a written response to a motion within 14 days after the motion is serviced, unless the time period is extended or shortened by the rules of the commission or the hearing officer. The hearing officer may consider a failure to respond within the required time period in ruling on a motion.

3.9(3) *Oral argument.*

a. The hearing officer may schedule an oral argument on any motion.

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

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

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

3.9(4) *Motions regarding hearing.*

a. Motions pertaining to the hearing, except motions for summary judgment, must be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the agency or an order of the hearing officer.

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

3.9(5) *Motions for summary judgment*. Motions for summary judgment shall comply with the requirements of the Iowa Rules of Civil Procedure and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.

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

3.10 Prehearing conferences.

3.10(1) *Subject matter of conference.* Upon the hearing officer's own motion or the motion of the parties, the hearing officer may direct the parties or their counsel to meet with the hearing officer for a conference to consider:

a. Simplification of the issues;

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

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

d. Limitation of number of witnesses;

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

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

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

3.10(2) Prehearing conferences shall be conducted by telephone unless otherwise ordered. A record of the conference will not be kept unless requested by either party. The record may be by tape recording or by certified shorthand reporter, at the discretion of the hearing officer. A party may request a copy of the tape recording or transcript of the conference, if it was recorded; or a transcript of the conference, if it was reported, and the requesting party will bear the cost of the recording or transcription.

3.10(3) *Effect of conference*. The record shall show the matters disposed of by order and by agreement in such pretrial conferences. The subsequent course of the proceeding shall be controlled by such action.

3.11Continuances Unless otherwise provided, applications for continuances shall be made to the hearing officer. **3.11(1)** *Written or oral motions for continuance.* A written motion for continuance shall:

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

b. State the specific reasons for the request; and

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

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

3.11(2) *Factors to consider.* In determining whether to grant a continuance, the hearing officer may consider:

a. Prior continuances;

b. The interests of all parties;

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

3.11(3) The hearing officer may require documentation of any grounds for continuances.

3.11(4) Failure of a party to timely obtain counsel, after clear and adequate notice of the right to be represented by an attorney, will not be considered grounds for a continuance in order to allow time to obtain counsel.

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

3.13 Disqualification.

3.13(1) A hearing officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

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

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

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

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

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

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

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

3.13(2) The term “personally investigated” means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term “personally investigated” does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person’s investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other agency functions, including fact gathering or exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as hearing officer in that case shall be disclosed if required by 1998 Iowa Acts, chapter 1202, section 19(3), and subrules 4.13(3) and 4.14(8).

3.13(3) In a situation where a hearing officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides

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

3.13(4) If a party asserts disqualification on any appropriate ground, including those listed in subrule 3.13(1), the party shall file a motion supported by an affidavit. The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party. If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the hearing officer determines that disqualification is appropriate, the hearing officer shall withdraw. If the hearing officer determines that withdrawal is not required, the hearing officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal.

3.13(5) *Remittal of disqualification*. A hearing officer disqualified by the terms of 3.13(1) “e” or “f” may, instead of withdrawing from the proceeding, disclose, either in writing or orally, on the record the basis for the disqualification. If, based on such disclosure, the parties and lawyers, independently of the administrative adjudicator’s participation, all agree in writing that the adjudicator’s relationship is immaterial or that the adjudicator’s financial interest is insubstantial, the adjudicator is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

3.13(6) *Partial disqualification of commission*. The disqualification of one or more members of the commission who are considering adoption of a proposed decision of the hearing officer shall not prevent the remaining commissioners from considering the proposed decision.

3.14 Ex parte communication.

3.14(1) *Prohibited communications.* Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the hearing officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned to render a proposed or final decision or to make findings of fact or conclusions of law in the contested case from communicating with each other. Nothing in this provision is intended to preclude the hearing officer from communicating with members of the commission staff or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in rule 3.13(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the hearing officer any ex parte communications they have received of a type that the hearing officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence of record.

3.14(2) Prohibitions of ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

3.14(3) Written, oral or other forms of communication are “ex parte” if made without notice and opportunity for all parties to participate.

3.14(4) To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with these rules and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

3.14(5) Persons who jointly act as hearing officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

3.14(6) Communications with the hearing officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the hearing officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines.

3.14(7) *Disclosure of prohibited communications*. A hearing officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the hearing officer should be disqualified. If the hearing officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the hearing officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order. If the hearing officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

3.14(8) Promptly after being assigned to serve as hearing officer at any stage in a contested case proceeding, a hearing officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the hearing officer as long as such documents have been or will shortly be provided to the parties.

3.14(9) The hearing officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the agency. Violation of ex parte communication prohibitions by agency personnel shall be reported to the executive director for possible sanctions including censure, suspension, dismissal , or other disciplinary action.

3.15 Powers of hearing officer. The hearing officer who presides at the hearing shall have all powers necessary to the conduct of a fair and impartial hearing including, but not limited to, the power to:

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

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

3.16 Hearing procedures.

3.16(1) Objections. All objections shall be timely made and stated in the record. Any objection not duly made before the hearing officer shall be deemed waived.

3.16(2) Representation of parties. Parties have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Partnerships, corporations, or associations may be represented by any member, officer, director or duly authorized agent. Any party may be represented by an attorney or another person authorized by law.

3.16(3) Rights of parties. Subject to terms and conditions prescribed by the hearing officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

3.16(4) Sequestration of witnesses. At the request of a party, a hearing officer may order witnesses sequestered so they cannot hear the testimony of other witnesses, and the judge may make the order sua sponte. This rule does not authorize sequestration of (a) a party who is a natural person, or (b) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (c) a person whose presence is shown by a party to be essential to the presentation of the case.

3.16(5) The hearing officer shall conduct the hearing in the following manner:

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

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

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

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

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

3.16(6) Marking of exhibits. Exhibits entered into evidence which are offered by the commission or the complainant shall be numbered serially, i.e., 1, 2, 3, etc.; whereas those offered by the respondent shall be lettered serially, i.e., A, B, C, ...AA, BB, etc.; and those offered jointly shall be designated by "joint exhibit" and numbered serially.

3.16(7) Contents of record. The record in a contested case before the hearing officer shall include:

a. All pleadings, motions, and rulings;

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

c. A statement of matters officially noticed;

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

e. All proposed findings and exceptions;

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

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

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

3.16(8) Standards of conduct.

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

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

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

3.17 Evidence.

3.17(1) The hearing officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

3.17(2) Stipulation of facts is encouraged. The hearing officer may make a decision

based on stipulated facts. Stipulated facts are binding on the hearing officer and the commission when it has not been proven that the stipulation was the result of fraud, wrongdoing, misrepresentation, or was not in accord with the intent of the parties.

3.17(3) Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice by express or implied waiver, or the hearing officer determines that good cause justifies their expansion. If the hearing officer decides to admit evidence on issues outside the scope of notice over the objection of a party who did not have actual notice of those issues, that party, upon timely motion, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue. The scope of the issues at public hearing may include the facts as uncovered in the investigation and need not be limited to the allegations as stated in the original complaint.

3.17(4) The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties. All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

3.17(5) Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The hearing officer may rule on the objection at the time it is made or may reserve ruling until the written decision. Evidentiary objections, other than those based on relevancy, materiality, unduly repetitious evidence, privilege, discovery rules, or scope of examination, or any ground for which a ruling is compulsory as a matter of law, shall be simply noted in the record by the hearing officer.

3.17(6) Whenever evidence is ruled inadmissible, the party offering that exhibit may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the hearing officer, present the testimony. If the excluded evidence consists of a document of exhibit, it shall be marked as part of an offer of proof and inserted in the record.

3.17(7) Although the rules of evidence do not apply in a contested case hearing, a finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The commission shall give effect to the rules of privilege recognized by law.

3.17(8) The authenticity of all documents submitted as proposed exhibits at the prehearing conference shall be deemed admitted unless objection is made at the prehearing conference or a written objection to authenticity of a document is filed at least ten days prior to the hearing. A party will be permitted to challenge authenticity at a later time upon a clear showing of good cause for failure to have made the objection earlier. A party's objection to authenticity is that party's refusal to admit the fact of authenticity and need not be ruled upon to be effective. If authenticity is not admitted under this rule it may be proved at hearing by any means permitted by law.

3.17(9) No evidence shall be received at any hearing concerning offers or counter-offers of adjustment during efforts to conciliate or settle an alleged unfair or

discriminatory practice.

3.18 Evidence of past sexual practices.

3.18(1) Discovery regarding past sexual practices. In a contested case alleging conduct which constitutes sexual harassment, a party seeking discovery of information concerning the complainant's sexual conduct with persons other than the person who committed the alleged act of sexual harassment, must establish specific facts showing good cause for that discovery, and that the information sought is relevant to the subject matter of the action, and reasonably calculated to lead to the discovery of admissible evidence.

3.18(2) Evidence of past sexual practices inadmissible. In a contested case against a respondent who is accused of sexual harassment, or whose agent or employee is accused of sexual harassment, evidence concerning the past sexual behavior of the alleged victim is not admissible.

3.19 Cost of copies of record. Upon request the commission shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record shall be paid by the requesting party.

3.20 Posthearing briefs.

3.20(1) In general. The hearing officer may fix times for submission of posthearing briefs. Unless otherwise ordered by the hearing officer, such briefs shall be filed simultaneously by all parties and there shall be no page limit nor any other formal requirements.

3.20(2) Reply briefs. If simultaneous briefs are filed then any party may file a reply brief within 10 days after service of the brief to which the reply is made.

3.20(3) Supplemental briefs. Posthearing briefs in addition to those ordered by the hearing officer under subrule 3,20(1) or those allowed by subrule 3.20(2) may be filed only upon application to the hearing officer.

3.20(4) Extensions. A motion for an extension of the time to file a brief shall be made no later than the day before the brief is due. A motion for an extension to file a brief may be oral and may be granted ex parte where the movant represents either (*a*) that the other parties who are filing briefs have been notified and that the motion is unopposed or (*b*) that there is an emergency which justifies such a request. An order granting an extension shall be in writing.

3.20(5) Late filing. Upon motion and within the discretion of the hearing officer a brief which is filed late may be struck.

3.20(6) Failure in a party's briefs to state, to argue, or to cite authority in support of an issue may be deemed waiver of that issue by that party before the hearing officer.

3.21 Requests to present additional evidence.

3.21(1) *In general.* A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence.

3.21(2) *After proposed decision issued.* If a request to present additional evidence is made after the issuance of the proposed decision by the hearing officer then the request

must be filed with the appeal or, by a nonappealing party, within 14 days after the service of the appeal. If the commission grants the motion to present additional evidence, the commission shall remand the case to the hearing officer for the taking of the additional evidence and any appropriate modification of the proposed order.

3.22 Proposed decision.

3.22(1) *Written decision.* After a review of the transcript, the evidence, and the briefs, the hearing officer shall set forth, in writing, findings of fact, conclusions of law, and a proposed decision and order. The proposed decision becomes the final decision of the commission without further proceedings unless there is an appeal to, or review on motion of, the Dubuque human rights commission within the time provided in rule 3.23

3.22(2) *Notification.* Upon receipt of the hearing officer's proposed decision, the commission shall forward a copy of the proposed decision to each of the parties by certified mail. A copy shall also be sent to counsel and to each commissioner.

3.23 Review of proposed decision on appeal to the commission.

3.23(1) Appeal by party. Any adversely affected party may appeal a proposed decision to the commission within 30 days after issuance of the proposed decision.

3.23(2) Review. The commission may initiate review of a proposed decision on its own motion at any time within 60 days following the issuance of such a decision.

3.23(3) Notice of appeal. An appeal of a proposed decision is initiated by filing a timely notice of appeal with the Dubuque human rights commission. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

a. The parties initiating the appeal;

b. The proposed decision or order appealed from;

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

d. The relief sought;

e. The grounds for relief.

3.23(4) If an appeal or motion for review is filed, the executive director shall set a review date. The parties shall be notified of this date by certified mail. Copies of this notification shall also be sent to counsel and the commissioners.

3.23(5) An appeal is filed with the commission by delivering the notice of appeal to the commission at its offices. All appeals and briefs shall be sent to the staff of the Dubuque human rights commission. An appeal may be filed by any of the methods described in subrules 3.6(1) to 3.6(4). Regardless of the method used to file an appeal, the date an appeal is filed is the date it is actually received by the commission.

3.23(6) Oral argument. All parties or their attorneys may request to present oral argument to the commission whenever the commission reviews a proposed decision pursuant to this rule. The commission may, in its discretion, allow oral argument for ten minutes or longer.

3.23(7) Briefs and arguments. Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter, any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. The commission may shorten or extend the briefing period as appropriate. When filing a

brief the party shall file an original and nine copies.

3.24 Scope of review by commission.

3.24(1) *In general.* Whenever the commission reviews a proposed decision, it has all the power it would have in initially making the final decision. The commission may adopt, modify or reject the hearing officer's proposed decision or it may remand the case to the hearing officer for the taking of additional evidence and the making of any further proposed findings of fact, conclusions of law, or decision and order the commission deems necessary.

3.24(2) *Limitation of issues.* Whenever the commission reviews a proposed decision it shall consider only those issues actually presented to the hearing officer unless the issue was one which either:

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

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

This rule does not affect a party's right to seek disqualification of a commissioner under rule 3.13 or 3.14

3.25 Interlocutory appeals. Upon written request of a party or on its own motion, the commission may review an interlocutory order of the hearing officer. In determining whether to do so, the commission shall weigh the extent to which its granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the agency at the time it reviews the proposed decision of the hearing officer would provide an adequate remedy. Any request or motion for interlocutory review must be filed within seven days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

3.26 Intervention.

3.26(1) *Motion.* A motion for leave to intervene in a contested case proceeding shall state the grounds for the proposed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the hearing officer.

3.26(2) *When filed.* Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

3.26(3) *Grounds for intervention.* The movant shall demonstrate that: (*a*) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (*b*) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (*c*) the interests of the movant are not adequately represented by

existing parties.

3.26(4) *Effect of intervention.* If appropriate, the hearing officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

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

3.28 Awards of attorney's fees.

3.28(1) *Retention of jurisdiction.* In any final decision in which it is determined that the complainant is entitled to an award of attorney's fees, but the actual amount has not yet been determined, there is, by operation of this rule, an express retention of jurisdiction of the case by the commission in order to determine the actual amount of attorney's fees to which the party is entitled and to enter a subsequent order awarding those fees. The commission shall take this action regardless of whether or not such retention of jurisdiction is expressed in the final decision. In such case, the decision is final in all other respects except the determination of the amount of the attorney's fees.

3.28(2) *Stipulation.* A final decision, in which it is determined that the complainant is entitled to an award of attorney's fees, may provide for an opportunity for the parties to file a written stipulation concerning the amount of the fees to be awarded. Any such stipulation entered into by the complainant(s) and respondent(s) is binding on the commission in the absence of evidence of fraud, wrongdoing, misrepresentation, or evidence that the stipulation is not in accord with the intent of the parties.

3.28(3) *Hearing.* If the amount of attorney's fees is not stipulated to by the parties, the hearing officer shall schedule a hearing on the issue of the amount of the attorney's fees. The hearing shall be governed by the same procedures as a hearing on the merits of a complaint except where otherwise ordered by the hearing officer. The parties may elect, by written stipulation, to utilize some method, such as stipulation of facts or submission of a documentary record, other than or complementary to a hearing, in order to make a record on attorney's fees which may then be reviewed by the hearing officer. By operation of this rule, the commission expresses its consent to such stipulations if agreed to by the parties seeking and contesting attorney's fees. The record of the original hearing is part of the record on the attorney's fee issue. Regardless of the method by which the record is made, the complainant has the burden of persuasion in proving attorney's fees.

3.29 Waiver, modification of rules.

3.29(1) *By hearing officer.* Upon notice to all parties, the hearing officer may, with respect to matters pending before the hearing officer, modify or waive any rule herein upon a determination that no party will be prejudiced and that the ends of justice will be served.

3.29(2) *By parties.* Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the hearing officer, in the discretion of the hearing officer, may refuse to give effect to such a waiver when the hearing officer deems the waiver to be inconsistent with the public interest.

3.30 Application for rehearing.

3.30(1) *By whom filed.* Any party to a contested case proceeding may file an application for rehearing from a final order.

3.30(2) *Content of application.* The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the agency decision on the existing record and whether, on the basis of the grounds enumerated in rule 3.21, the applicant requests an opportunity to submit additional evidence.

3.30(3) *Time of filing.* The application shall be filed with the commission at its offices in within 20 days after the issuance of the final decision.

3.30(4) *Notice to other parties.* A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the commission shall serve copies on all parties.

3.30(5) *Disposition.* Any application for a rehearing shall be deemed denied unless the agency grants the application within 20 days after its filing.

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

3.32 Assessment of costs of hearing.

3.32(1) *General rule.* If the complainant or the commission prevails in the hearing, the respondent shall pay the “contested case costs” incurred by the commission. If the respondent prevails in the hearing, the commission shall itself bear the “contested case costs” incurred by the commission.

3.32(2) *Mixed results.* Where the complainant or commission is successful as to part of the remedies sought at the hearing and unsuccessful as to part of the remedies, the hearing officer may recommend an equitable apportionment of “contested case costs” between the commission and the respondent.

3.32(3) *Costs allowable.* The following “contested case costs” and no others will be assessed or apportioned as provided in subrule 3.32(1) or 3.32(2):

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

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

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

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

e. Postage incurred by the hearing officer in sending by mail (regular or certified) any papers which are made part of the record;

f. Costs for hiring the hearing officer.

3.32(4) *Remedial orders.* This rule does not affect those costs which may be recoverable under Title 8 of the Dubuque Code of Ordinances.

3.33 Appeals to the district court. Appeals to the district courts from the decision of the commission shall be perfected pursuant to the provisions of Title 8 of the Dubuque Code of Ordinances.