

456 CMR 13.00: CONDUCT OF HEARINGS

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13.01: Scope

(1) 456 CMR 13.00 is applicable to all hearings before the Department, except as set forth in 456 CMR 13.01(2) and except for those proceedings held pursuant to 456 CMR 20.00: *Construction of Rules and Severability* and 21.00: *Rules for Interest Mediation, Fact-finding and Interest Arbitration in Disputes Involving Public Employers and Public Employees; Private Sector Interest Mediation*.

(2) Hearings on petitions filed pursuant to 456 CMR 14.00: *Questions of Representation* shall be governed by the procedures in 456 CMR 14.08: *Investigation and Hearing*.

13.02: Expeditious Scheduling of Hearings

(1) When temporary relief or a restraining order has been procured by the Department or a party in connection with a complaint under 456 CMR 13.00, the complaint that is the basis for such temporary relief or restraining order may be heard expeditiously.

(2) For other good cause shown by a party in writing, the Department also may determine that a complaint will be heard expeditiously.

13.03: Hearings and Findings

- (1) (a) If a hearing is ordered, the Department shall set the time and place for the hearing.
- (b) Should one or more parties to the hearing petition the Board, the Board, in its discretion, and for good cause shown, may order that the hearing be conducted by the Board in the first instance. The rules and procedures of 456 CMR 12.00: *General Provisions* and 13.00 shall apply to a hearing conducted by the Board in the first instance.
- (c) Any party may file a motion to dismiss the complaint or for a summary decision prior to a hearing.
- (d) At the hearing, which shall be presided over by a hearing officer or the Board, the employer, the employee organization, or the person so complained of shall have the right to appear in person or otherwise to defend against the complaint.
- (e) The charging party shall have the burden of proving the allegations of the complaint by a preponderance of the evidence.
- (f) At the discretion of the Department, any person may be allowed to intervene in such proceeding pursuant to 456 CMR 12.03: *Intervention*.
- (g) In any hearing, the Department shall not be bound by the technical rules of evidence prevailing in the courts.

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- (h) Witness testimony may be preserved by a recording or, at the discretion of the parties who shall be responsible for the costs thereof, by stenographic transcription.
- (i) The parties shall, at the discretion and direction of the hearing officer, electronically submit documentary exhibits to the hearing.
- (j) The refusal of a witness at a hearing to answer any question that has been ruled by the Department to be proper may be grounds for striking all testimony previously given by such witness on related matters.
- (k) At the conclusion of the hearing, the hearing officer shall issue written findings of fact and shall determine whether a practice prohibited under M.G.L. c. 150E, § 10 has been committed and, if so, shall issue an order requiring the respondent to cease and desist from such prohibited practice, and shall take such further affirmative action as will comply with the provisions of M.G.L. c. 150E, § 11(d), including but not limited to the withdrawal of certification of an employee organization established, or assisted in its establishment, by any such prohibited practice.
- (l) The hearing officer shall order the reinstatement with or without back pay of an employee discharged or discriminated against in violation M.G.L. c. 150E, § 10.
- (m) If the hearing officer determines that a practice prohibited under M.G.L. c. 150E, § 10 has not been or is not being committed, the hearing officer shall state findings of fact and issue an order dismissing the complaint.

(2) A hearing officer presiding over a hearing shall have, in addition to the authority set forth in 456 CMR 13.07, the authority to make all rulings and orders necessary to decide the case based on the record of the proceedings. All decisions and orders of the hearing officer issued after the close of the hearing shall be in writing and may be appealed to the Board in accordance with 456 CMR 13.19.

13.04: Interlocutory Appeals

- (1) Prior to the close of a hearing, a party may seek relief from a ruling or order of the hearing officer in the following manner:
 - (a) The motion for relief must be in writing and addressed to the Board.
 - (b) The motion must set forth with specificity the ruling or order from which relief is sought and grounds on which the party believes that it is entitled to relief, including why review following the close of the hearing is not an adequate remedy.
- (2) Such a motion for review shall not operate to delay or interrupt the hearing. The ruling of the hearing officer shall remain in effect until and unless modified or overruled by the Board. The Board may, at its discretion, defer any ruling on such motion until the close of the hearing.

13.05: Right to Counsel and to Offer Evidence

Any party to a proceeding shall have the right to appear at such proceeding in person, by counsel or by other representative, to call, examine and cross examine witnesses and to introduce into the record documentary or other evidence.

13.06: Open to Public

Any hearing conducted pursuant to 456 CMR 13.00 shall be open to the public except in extraordinary situations or circumstances as the Department, in its discretion, may determine.

13.07: Authority of Department Agent Presiding at Hearing

The hearing officer presiding at a hearing shall have the right to inquire fully into the facts relevant to the subject matter of the hearing. The hearing officer shall have the authority to:

- (1) Administer oaths and affirmations;
- (2) Issue subpoenas;
- (3) Rule upon motions to revoke or modify subpoenas;
- (4) Rule upon offers of proof and receive relevant evidence;

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- (5) Permit depositions to be taken when appropriate;
- (6) Limit the examination and cross examination of each witness to one representative for each party;
- (7) Hold conferences for the settlement or clarification of the issues;
- (8) Dispose of procedural requests or similar matters;
- (9) Require the parties to identify prospective witnesses at least ten days prior to a scheduled hearing whenever possible;
- (10) Require the parties to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence;
- (11) Request the parties at any time during the hearing to state their respective positions concerning any issue in the case or theory in support thereof or to request that the parties submit proposed findings of fact, conclusions of law and requests for remedial relief;
- (12) Continue the hearing from day to day or to adjourn the hearing to a later date or to a different place, by announcement thereof at the hearing or by other appropriate notice;
- (13) Rule on the admissibility of evidence;
- (14) Require the parties to submit pre-filed direct testimony;
- (15) Require the parties to electronically submit documentary exhibits to the hearing; and
- (16) Take any other action authorized by 456 CMR 13.00.

13.08: Motions

- (1) All motions made prior to or subsequent to the hearing shall be filed in writing with the hearing officer in accordance with the provisions of 456 CMR 12.12: *Filing with the Department* and shall state the order or relief applied for and the grounds for the motion.
- (2) Within seven days of service of the motion, any other party to the proceeding may file a response with the hearing officer, unless directed otherwise by the hearing officer.
- (3) The hearing officer may defer ruling on any motion until the close of the hearing and may direct the parties to proceed with the hearing while the motion is pending. All motions made at the hearing shall be stated orally, unless otherwise directed by the hearing officer, and shall be included in the record of the hearing.

13.09: Objections

Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, shall be stated orally, together with a short statement of the grounds of such objection, and shall be included in the record of the hearing. No such objection shall be deemed waived by further participation in the proceedings.

13.10: Witnesses

Witnesses shall be examined orally under oath or affirmation, except if they reside outside of the Commonwealth or because of illness or other cause are unable to testify before the Department. In such situations, the Department may direct that the testimony be taken within or without this Commonwealth in such manner and in such form as is permitted by applicable law.

13.11: Stipulations of Fact

In any proceeding, stipulations of fact may be introduced in evidence with respect to any issue. At the discretion of the hearing officer, the parties may, by written stipulation filed with the hearing officer at any stage of the proceeding, or by oral stipulation made at hearing, agree as to the truth of any fact pertinent to the proceeding. The hearing officer may require parties to propose stipulations. In making findings, the hearing officer need not be bound by a stipulation which is in contravention of law or erroneous on its face.

13.12: Recording of Hearing

(1) Except for good cause shown, all hearings conducted pursuant to 456 CMR 13.00 shall be recorded by one of the following methods: audio tape, stenographic transcription, or other equivalent method approved by the Department.

(2) Copies of any official audio tape, stenographic transcription, or other equivalent record prepared by the Department shall be made available to all parties for purchase and shall be made available for the parties to review at the Department's offices.

(3) The Department may, in its discretion, allow a party to record the hearing by means of stenographic transcription, or through other means that will not disrupt the proceedings. Any party may request the Department to designate a written transcript of the proceeding as the official record of the proceeding subject to the following requirements:

- (a) A copy of the written transcript has been made available to all other parties to the proceeding and all have had the opportunity to specify any objections to the accuracy of the transcript to the Department;
- (b) A copy of the written transcript will be made available for purchase to all other parties for a reasonable fee reflective of the cost of the transcript;
- (c) A copy of the written transcript is provided without charge to the Department with the understanding that the Department will make the transcript available to the public pursuant to the provisions of state law.

13.13: Submission Without a Hearing

(1) The parties, with the approval of the Department, may jointly elect to waive a hearing and to submit evidence without appearing at the time and place designated for the hearing. Parties who jointly waive the hearing shall supply all documents supporting their allegations or defenses. Stipulations of fact may supplement the documentary evidence in the record.

(2) If the parties jointly seek to waive a hearing under this provision, and the Department approves the request, the Department may require the parties to enter into a written statement of Stipulated Facts and Exhibits which shall include the following:

- (a) A statement of agreement that the parties agree to waive a hearing;
- (b) A statement of the agreed contents of the entire record;
- (c) A statement of agreement that any conflict of fact between the statement of Stipulated Facts and Exhibits and the findings contained in the Complaint of Prohibited Practice or within the Respondent's Answer, shall be resolved in favor of the Statement of Stipulated Facts and Exhibits; and
- (d) A statement that the parties agree not to submit additional facts or exhibits.

13.14: Subpoenas

(1) Any party to a proceeding under 456 CMR 13.00 may request the issuance of a subpoena to compel the attendance of witnesses or the production of books, records, documents or correspondence.

(2) The party requesting a subpoena shall submit a written request to the designated hearing officer or, if no hearing officer has been assigned or is unavailable, to the Director. The request shall be submitted on a form authorized by the Department and shall include:

- (a) Department case number and caption of the proceeding;
- (b) Name, address and telephone number of the party requesting the subpoena;

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- (c) Date, time and location of the proceeding;
- (d) Name and address of the witness whose testimony is sought; and
- (e) A specific description of the books, records, correspondence or documents sought.

(3) The hearing officer or the Director shall be authorized to grant or deny requests for subpoenas and shall be authorized to affix the seal of the Department. A request for issuance of a subpoena shall be denied only if such request fails to comply with 456 CMR 13.14(2) or if the request is overbroad, oppressive or otherwise legally defective, or is submitted to the Department less than five days prior to the hearing date.

(4) The party requesting the subpoena shall be responsible for service of the subpoena and shall assume all costs of service, witness fees and mileage. Subpoenas shall be served in person by a disinterested person or by certified or registered mail. Witnesses shall be paid the same fees for attendance and travel as in civil cases in the courts of the Commonwealth and such fees shall be paid at the time of service.

(5) (a) At or prior to the time at which the subpoena compels attendance, but not later than five days after service of the subpoena, any witness under subpoena may file a motion for revocation or modification of any subpoena by submitting a written motion to the designated hearing officer, or, if no hearing officer has been designated, to the Director. The motion shall include a statement of the grounds for revocation or modification of the subpoena.

(b) Upon receipt of a motion for revocation or modification of a subpoena, the hearing officer or the Director shall rule upon the motion. Prior to such ruling, an investigation, pursuant to the provisions of M.G.L. c. 30A, § 12(4) shall be conducted. The Director may defer ruling on the motion pending designation of a hearing officer.

(6) In the event of the failure of a witness to comply with a subpoena, the Department may initiate proceedings in Superior Court to compel compliance, or may decline to initiate such proceedings. If the Department declines both to quash the subpoena and to initiate proceedings in court, nothing in 456 CMR 13.00 shall prohibit the party at whose request the subpoena was issued from seeking enforcement of the subpoena in court pursuant to M.G.L. c. 30A, § 12(5).

13.15: Oral Argument or Briefs

(1) The parties shall be entitled to oral arguments at the close of the hearing or may be given permission by the hearing officer to file briefs or written statements. The time for oral argument shall be fixed by the hearing officer.

(2) Any party permitted to file a brief shall do so within ten days after the close of the hearing, unless otherwise directed by the hearing officer. Any filing must be in compliance with 456 CMR 12.12: *Filing with the Department*.

(3) Requests for additional time in which to file a brief shall be made in writing to the hearing officer and shall be filed with the Department no later than three days before the date such briefs are due.

(4) No reply briefs may be filed except by permission of the hearing officer.

13.16: Reopening of Hearings

The hearing officer may reopen the hearing and receive further evidence or otherwise dispose of the matter prior to the issuance of a final decision. The hearing officer shall notify the parties of the time and place of hearings reopened under 456 CMR 13.16.

13.17: Record

(1) The record in a hearing under this chapter shall consist of the charge, the complaint, answer, motions, rulings, orders, audio recording or stenographic transcription, stipulations, exhibits, documentary evidence, deposition and amendments to any of the foregoing.

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(2) Whenever a hearing concerns, in whole or in part, facts or issues which were or could have been litigated in a related representation proceeding, the Department or hearing officer may incorporate in the record such parts of the record of the representation proceeding as may be appropriate.

(3) The record before the Board on review of a hearing officer decision shall be as set forth in 456 CMR 13.19(3).

13.18: Waiver of Hearing

(1) If the respondent desires to waive a hearing on the allegations set forth in the complaint or the amended complaint and not contest the proceeding, the answer to the complaint may consist of a statement that respondent refrains from contesting the proceedings or that respondent consents that the Department may make, enter and serve upon respondent an order to cease and desist from violations of M.G.L. c. 150E alleged in the complaint or that respondent admits all the allegations of the complaint. Either of the first two such answers shall have the same force and effect as if all the allegations of the complaint were admitted and, as in that case, shall be deemed by the Department to waive a hearing thereon and to authorize the Department, without a hearing, without evidence and without findings as to facts or other intervening procedure, to make, enter, issue and serve upon respondent an order to cease and desist from the violation of M.G.L. c. 150E charged in the complaint or to take such other action as provided in M.G.L. c. 150E.

(2) If the respondent does not file an answer, the Department may proceed in a like manner.

13.19: Appeal of Hearing Officer Decisions

(1) The decision of the hearing officer shall become final and binding on the parties unless, within ten days after notice thereof, any party requests a review by the Board. This procedure is the exclusive method by which the parties may request review by the Board of the decision of the hearing officer.

(2) Any party seeking review of a decision of a hearing officer must file a notice of appeal with the Department, together with a supplementary statement, not later than ten days after receiving notice of the decision of the hearing officer. Within ten days of service thereof, any other party to the proceeding may file a supplementary statement responding to matters raised by the appealing party. The notice of appeal shall be in writing and contain the case name and number, the date of the decision of the hearing officer and a statement that the party requests review by the Board.

(3) Supplementary statements shall state with specificity the basis of the appeal.

(a) A party claiming that the hearing officer has made erroneous findings of fact shall identify the specific findings challenged and clearly identify all record evidence supporting the party's proposed findings of fact, including specific references to page and line numbers of the transcript when one is available.

(b) The findings of fact made by the hearing officer may be adopted summarily by the Board unless specifically objected to by a timely filed supplementary statement. Only disputes as to material issues of fact need be resolved by the Board on appeal.

(c) When a party claims that the hearing officer has made errors of law, the supplementary statement shall identify the challenged conclusions and must explain the basis upon which the party believes the conclusions to be erroneous. Failure to provide the above described information may result in summary dismissal of the appeal.

(3) The record on review before the Board shall consist of the hearing officer's decision, the supplementary statements of the parties, if any, such portions of the record before the hearing officer as are necessary to resolve factual disputes and such other evidence as the Board may require.

REGULATORY AUTHORITY