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Formstack Submission for form A Clearer Code: Regulatory Reform

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CMR Number (If known): :	
General Regulatory Themes::	Other
Please list the Agency or Agencies affiliated with this regulation::	MCAD, DLR

Describe the regulatory issue or observation::

The revisions recommended below are consistent with basic fairness and due process. They will assist the DLR and MCAD in screening out meritless claims at the probable cause stage, increase the overall efficiency of the public agencies, and reduce the amount of public resources spent on adjudicating claims.

First, the DLR should require heightened filing requirements. Currently, the DLR regulations state that the contents of a charge of prohibited practice need only contain "a concise statement of all relevant facts." See 456 CMR 15.02. The DLR discontinued its prior practice of requiring the charging party to support its claim with a position statement (formerly referred to as the charging party's "written submission") containing evidence supporting the charging party's factual claims and citation to appropriate legal authority. The DLR currently does not require any written submission in support of the charge and regularly allows a charging party to submit a charge that is entirely bereft of detail. Accordingly, the DLR's pleading requirements do not give the respondent meaningful notice of the claims prior to the investigative conference, resulting in a gross inefficiency of time for both the respondent and the DLR hearing officer and an unfair investigatory process.

Second, the DLR permits the charging party to make "oral amendments" to the charge at the investigative conference while simultaneously prohibiting the

respondent from filing any evidence or statement of its position after the investigative conference has concluded. Thus, in conjunction with the lack of heightened pleading requirement discussed above, the DLR's current operating practices (a) do not put the opposing party on notice of the facts concerning the case, (b) allow a charging party to instigate proceedings without committing to a position or ensuring the substance of their allegations, (c) permit the charging party to add additional facts and legal theories during the course of litigation without notice, (d) ensure that the DLR is not given an outline of all facts and evidence prior to determining probable cause, and (e) do not assist the DLR in efficiently screening baseless claims.

Third, some of the DLR's deadlines for filing important documents should be extended. The current time constraints – allowing the responding party only five (5) days to respond to a charge and seven (7) days to respond to a motion – do not allow for meaningful investigation or response. In contrast, the DLR's former regulations required (a) that the charging party must file a "written submission" in support of the charge within 20 days after filing the charge, (b) that the charging party must serve its written submission on the respondent, and (c) that the respondent was obligated to file a written submission in response to the charge/charging party's written submission within 20 days after receiving it. In addition to permitting the respondent the opportunity to properly respond to a complaint, the former process allowed the DLR to efficiently screen out charges that were not supported by probable cause, avoid issuing complaints on charges not supported by any evidence, and conserve the agency's scarce hearing resources.

Fourth, all parties should be held to the same standard concerning notice requirements in MCAD cases. The rules currently require a certificate of service for all papers filed in a case. See 804 CMR 1.05(3). However, the rules also seem to allow a pro se plaintiff to escape from the rules concerning affecting service on all parties. See 804 CMR 1.05(3)(g) Motions ("The provisions shall apply to all matters where all parties are represented by counsel"). Fairness dictates that the rules should be amended to ensure that the opposing party receives notice of all motions and actions taken in a case, whether or not that party is represented by counsel. The MCAD has, at times, cited the need to "level the playing field" between pro se complainants and respondents represented by counsel as justification for 804 CMR 1.05(3)(g), and noted that the regulation protects pro se complainants against disclosing information to respondents that is harmful to their claims. However, the MCAD's primary role when it adjudicates claims is to reach the truth, and this rule (a) impairs the ability of the investigatory process to reach the truth, (b) may create the appearance that the MCAD is not impartial, and (c) conflicts with basic tenets of fairness and due process.

Fifth, when issuing a complaint that finds probable cause for discrimination, the MCAD currently does not issue numbered findings setting forth each alleged unlawful act and containing a concise summary of factual findings. Obviously, the MCAD receives numerous complaints that are multi-faceted and expansive. However, by issuing findings that do not specify the exact theories/claims it has endorsed, the MCAD does not narrow the litigation to the claims that are actually supported by probable cause. Limiting the issues through a more precise finding of probable cause will facilitate settlement between the parties and generally reduce the resources and time spent by the MCAD and the parties when the claims must actually be adjudicated at a hearing.

Suggestions for

First, the DLR regulations should be amended to compel a charging party to

improvements to the regulation::	provide a more definite statement of its claim so that the opposing party has notice of the allegations and the ability to meaningfully defend itself. This amendment to the rules will result in proper due process being afforded to the responding party, a more efficient hearing process for the agency, and additional settlement between the parties as all parties will be forced to thoroughly evaluate their evidence prior to the investigatory conference. Second, there should be specific, detailed guidelines concerning the DLR's investigatory conference procedure. There are few, if any, rules regulating this important event, which may determine whether there is probable cause to send a case to hearing. See 456 CMR 15.04. Revised regulations should be adopted that prohibit the DLR from making "oral amendments" to the charge at the investigative conference. Instead, the DLR's regulations should require a charging party to file a motion to amend the charge and give the respondent fair notice and opportunity to respond in accordance with the same basic due process found in court. A revision of the DLR regulations concerning the investigatory conference procedure will ensure fairness for all parties that appear before the DLR. Third, a party responding to a DLR complaint or charge of prohibited practice should be allotted at least ten (10) days to respond to the charge, rather than the five (5) days currently stipulated by the regulations, and a party should be allowed to have more than seven (7) days to respond to a motion. See 456 CMR 15.02(4); 456 CMR 15.06(1); 456 CMR 13.07. A party should be permitted enough time to investigation the allegations against them and prepare a meaningful response. Fourth, the regulations should generally require both parties to copy the other side on any document or evidence filed with the MCAD, absent a protective order from the agency. This ensures basic fairness and ensures that there is no appearance that any party is given favorable treatment due to its ex parte communications with hearing officer. Fifth, when MCAD finds probable cause to issue a complaint, the agency should issue a set of numbered findings that sets forth each alleged unlawful act and a concise statement of the claim. This will streamline the hearing process and focus all parties – and the agency itself – on the pertinent issues.

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