

## 804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

### 804 CMR 1.00: RULES OF PROCEDURE

#### Section

- 1.01: Title and Applicability of 804 CMR 1.00
- 1.02: Statement of Purpose
- 1.03: Quorum of Commission
- 1.04: Public Information
- 1.05: Motions
- 1.06: Requests for Translation Services
- 1.07: Time
- 1.08: Service
- 1.09: Parties
- 1.10: Complaint
- 1.11: Proceedings on Commission- Initiated Complaints
- 1.12: Emergency Proceedings
- 1.13: Investigation by the Commission
- 1.14: Subpoenas
- 1.15: Investigative Dispositions
- 1.16: Default Procedure
- 1.17: Procedures in Housing Matters
- 1.18: Conciliation
- 1.19: Post-Determination Discovery
- 1.20: Certification to Public Hearing and Issuance of Commission Complaint
- 1.21: Public Hearings
- 1.22: Remedies
- 1.23: Full Commission Review
- 1.24: Judicial Review
- 1.25: Judicial Enforcement

#### 1.01: Title and Applicability of 804 CMR 1.00

The Massachusetts Commission Against Discrimination Rules of Procedure may be known and cited as 804 CMR 1.00.

804 CMR 1.00 govern the procedure and practice before the Massachusetts Commission Against Discrimination in all matters arising out of M.G.L. c. 151B and c. 272, § 98. They shall apply to M.G.L. c. 151C where not inconsistent with the provisions of M.G.L. c. 151C. They are intended to interpret the provisions of the Administrative Procedure Act, (M.G.L. c. 30A) and supersede all existing rules and regulations heretofore applicable to procedure and practice before the Commission. 804 CMR 1.00 shall be construed to secure the just, speedy and fair determination of every matter.

The Commission, through its individual Commissioners, in the interests of justice and after due notice to parties, may relax the application of 804 CMR 1.00 in a particular case. In any situation in which 804 CMR 1.00 do not specifically apply, the Commission or any of the individual Commissioners may exercise discretion so as to achieve a just, speedy and fair determination of the issue.

Amendment of 804 CMR 1.00 may be made at any time by the Commission; any amendment shall become effective upon filing with the Office of the Secretary of State.

#### 1.02: Statement of Purpose

The Massachusetts Commission Against Discrimination was created by act of the General Court, and upon the request of the Governor's Committee to Recommend Fair Employment Practice Legislation. The Committee, in making its report to the legislature, wrote that the existence of the Commission would "call public attention to the existence of a condition so gravely menacing that the Legislature has deemed it necessary to denounce it and to adopt a definite policy of eradication of a hideous evil which must be extirpated from our soil forever." We reaffirm our commitment to this goal.

## 804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

### 1.02: continued

The Commission's task is to work for the public good of eliminating and preventing discrimination and to educate the citizens of the Commonwealth with regard to their rights and duties under the Commonwealth's anti-discrimination statutes. It is the Commission's responsibility to enforce Massachusetts' anti-discrimination laws, in order to protect, preserve, and enhance the civil rights of its citizens. M.G.L. c. 151B preserves the civil and criminal remedies of a person who has filed a complaint under the law against discrimination, and M.G.L. c. 151B, § 9 authorizes suits in court, in order to free the Commission to work for the remedy best designed to eliminate and prevent discrimination.

The Commission further recognizes the importance to the public good of maintaining access to its proceedings for low-income complainants who cannot afford to retain private counsel. In cases where a low-income complainant is proceeding *pro se*, the Commission will ensure that the complainant has an opportunity to have his or her complaint investigated and resolved in Commission proceedings.

### 1.03: Quorum of the Commission

(1) Proceedings Under M.G.L. c. 151B, § 5. In all matters involving the administration of complaints filed pursuant to M.G.L. c. 151B, and unless otherwise specifically noted in 804 CMR 1.00 et seq., one Commissioner may act for the Massachusetts Commission Against Discrimination.

(2) Full Commission Review. For purposes of Full Commission Review pursuant to 804 CMR 1.05(a) or 804 CMR 1.23, a quorum of the Commission, consisting of two of its members, may act on its behalf, unless the Commission is comprised of less than three members, then, one Commissioner may comprise the Full Commission for purposes of 804 CMR 1.05(5)(a) or 804 CMR 1.23.

(3) Business of the Commission. For purposes of conducting all other business of the Commission, not included within 804 CMR 1.03(1), or (2), a quorum of the Commission, consisting of two of its members, may act on its behalf.

### 1.04: Public Information

(1) Request for Review. Except as otherwise provided in this Regulation, the record in every charge pending before the Commission shall be confidential and exempt from M.G.L. c. 66 and 66A pursuant to M.G.L. c. 4, § 7 (26)(f). The parties to such a charge shall be allowed access to the record upon making suitable arrangements at any time after investigative disposition pursuant to 804 CMR 1.15.

(2) Hearing Records. The official record in every complaint heard by the Commission, as defined in 804 CMR 1.21(9), except such evidence as is placed under protective order by the Commission or processed as a pseudonym complaint pursuant to 804 CMR 1.10(5)(d), shall be available for public inspection upon making appropriate arrangements with the Clerk of the Commission, at any time after Certification to Public Hearing. The parties shall have access to the entire official record, unless otherwise ordered.

(3) Privileged Information. Information protected by the attorney-work product doctrine, attorney-client privilege, and deliberative process privilege, as well as any other information exempt from the definition of public information at M.G.L. c. 4, § 7(26) shall not be released by the Commission pursuant to 804 CMR 1.00.

(4) Public Information. Except as may be placed under protective order by the Commission or processed as a pseudonym complaint pursuant to 804 CMR 1.10(5)(d), the charge of complainant and the investigative determination pursuant to 804 CMR 1.15 in any matter shall be available for public inspection upon making appropriate arrangements with the Commission.

## 804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

### 1.05: Motions

(1) Generally. Applications to the Investigating Commissioner, Hearing Commissioner or Hearing Officer for an order shall be made in writing, shall state with particularity the grounds therefor, shall set forth the relief and order sought, and shall include a proposed order.

(2) Motions at Public Hearing. Motions made during the public hearing may be stated orally on the record. The Hearing Commissioner or Hearing Officer may require oral or written supplementation as he/she deems appropriate or necessary.

(3) Submission of Motion and Opposition to Motion. The provisions of 804 CMR 1.05 shall apply to all matters where all parties are represented by counsel, including but not limited to matters where Commission Counsel is assigned to assist an otherwise pro se Complainant. The provisions of 804 CMR 1.05 shall apply to all other matters inasmuch as it is practicable.

(a) Submission of Motion. The moving party shall serve with the motion a statement of reasons, including supporting authorities, why the motion should be granted. The statement of reasons may be included in the motion itself or may be contained in a separate document. Affidavits and other documents setting forth or evidencing facts on which the motion is based shall be served with the motion. A proposed order shall be served with the motion.

(b) Submission of Opposition to Motion. A party opposing a motion may serve an opposition within 14 days, or such additional time as is allowed by the Commissioner. With the opposition, the party may serve a statement of reasons, with supporting authorities, why the motion should not be allowed. Affidavits and other documents setting forth or evidencing facts on which the opposition is based shall be served with the opposition. A proposed order may be served with the motion.

(c) Submission of Replies and Sur-replies. Following the receipt of the opposition(s) brief, if any, any party may serve a reply within seven days, following which any party may serve a sur-reply within three days.

(d) Procedure for Filing and Serving Motions. The moving party shall serve a copy of the motion and the other documents specified in 804 CMR 1.05(3)(a) and 804 CMR 1.05(3)(c) on every other party, including but not limited to Commission Counsel, where Commission Counsel has appeared on a particular matter. Every opposing party shall serve on the moving party an original and a copy, and on every other party a copy, of the opposition and other documents specified in 804 CMR 1.05(3)(b) and, if necessary, 3(c). Service shall be made within the time permitted by 804 CMR 1.05(3)(b) and 3(c). Upon receipt of the opposition and accompanying documents, if any, the moving party shall physically attach the original of the opposition and associated documents to the original motion and associated documents and shall promptly file with the Commission the combined documents and a separate document listing the title of each paper in the combined documents. If the moving party does not receive an opposition within three business days after expiration of the time permitted for service of oppositions, then the moving party shall file with the Commission the motion and other documents initially served on the other parties with an affidavit reciting compliance with 804 CMR 1.05(3) and receipt of no opposition in a timely fashion. The moving party shall give prompt notice of the filing of the motion to all other parties by serving a notice of filing accompanied by a copy of the document listing the title of each paper filed.

(e) Sanction for Noncompliance. Unless the parties have complied with the requirements of 804 CMR 1.05(3), the Commission need not act on any motion where the parties are represented by Counsel.

(f) Motion Conferences. In the event that the Commission believes that a conference is necessary or helpful to a disposition of a motion, the Commission will order the parties to attend a conference on the motion.

(g) Certificates of Service. The last page of every paper served in accordance with 804 CMR 1.05(3) shall contain a brief statement showing the date on which and the manner in which service of the paper was made on each other party. The statement may be in the following form:

*I hereby certify that a true copy of the above document was served upon (each party appearing pro se and) the attorney of record for each (other) party (and Commission Counsel) by mail (by hand) on (date). (Signature).*

## 804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

### 1.05: continued

(h) Motions on Discovery Disputes. Prior to filing any discovery motion, including any motion for sanctions or for a protective order, counsel for each of the parties shall confer in good faith to narrow the areas of disagreement to the greatest possible extent. It shall be the responsibility of the moving party to arrange for the conference. Conferences may be conducted over the telephone or other electronic device. All such motions shall contain a certificate stating that the conference required by 804 CMR 1.00 was held, together with the date and time of the conference and the names of all participating persons. Motions unaccompanied by such certificate may be denied without prejudice to renew when accompanied by the required certificate.

#### (4) Filing.

(a) Motions Prior to Investigative Disposition Pursuant to 804 CMR 1.15. Motions seeking an order from an Investigating Commissioner prior to the issuance of an investigative disposition shall be filed with the Commission investigator assigned to the matter.

(b) Motions Prior to Certification to Public Hearing and Issuance of Commission Complaint Pursuant to 804 CMR 1.20. Motions seeking an order from an Investigating Commissioner following the issuance of probable cause pursuant to 804 CMR 1.15(7)(a), and prior to the Certification Conference as defined by 804 CMR 1.20(1), shall be filed with the Clerk of the Commission, in Boston, or with the Assistant Clerk in Springfield.

(c) Motions Regarding Jurisdiction and Certification. Any motion seeking relief related to the jurisdiction of the Commission, or to the Commission Complaint and Order on Certification to Public Hearing, must be filed as described in 804 CMR 1.05(4) or (b). Unless the moving party has complied with the provisions of this paragraph, the Commission need not act on said motion, where moving party is represented by counsel.

(d) Motions After Certification to Public Hearing Pursuant to 804 CMR 1.20. Motions seeking an Order from a Hearing Commissioner or Hearing Officer following Certification to Public Hearing and issuance of Commission Complaint, and not within the provisions of 804 CMR 1.05(4)(c), shall be filed with the Hearing Commissioner or Hearing Officer, through the Clerk of the Commission, in Boston, or the Assistant Clerk, in Springfield.

#### (5) Appeal of Order Granting or Denying a Motion.

(a) Full Commission Appeal. The Full Commission will not entertain an interlocutory appeal of a ruling on a motion, except rulings made by a Hearing Officer or a Hearing Commissioner related to the jurisdiction of the Commission or to the Order on Certification to Public Hearing. Requests for relief from the Full Commission pursuant to this provision shall be filed with the Clerk of the Commission, in Boston.

(b) Request that a Commissioner Reconsider an Order. In the absence of a showing that new evidence exists, requests that an investigating Commissioner, hearing Commissioner or hearing officer reconsider his/her order on motion, will be denied. 804 CMR 1.05(5) shall not limit the parties' ability to request review by the Full Commission, pursuant to 804 CMR 1.05(5)(a) or 804 CMR 1.23(1), or the ability of the Commission to review decisions pursuant to 804 CMR 1.23(2).

### 1.06: Requests for Translation Services

(1) Appointment of Translation Services for Deaf, Hard of Hearing, Speech-Impaired or Non-English Speaking Persons. When any person who is deaf, hard-of-hearing, speech impaired, or cannot speak or understand the English language, is involved in any proceeding before the Commission, the person is entitled to have translation services present.

(a) In order to obtain the services of a Commission-appointed translator, a party may notify the Commission upon the filing of the complaint, or more than 30 days before the date the translator will be needed.

(b) If the parties are given less than 30 days notice of a proceeding, and require translation services, the party(ies) requiring translation services shall notify the Commission within three days of their receipt of notice of the proceeding.

## 804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

### 1.06: continued

(c) If the party(ies) to proceedings pursuant to 804 CMR 1.11 or 804 CMR 1.12 (Commission Initiated Proceedings and Emergency Proceedings) require translation services, the party(ies) requiring such services shall notify the Commission of the need within 48 hours of service of the Complaint.

(2) If a party requests a translator pursuant to 804 CMR 1.06(1), the Commission shall arrange for the services of such translator and shall notify the parties of the identity of the translator. The Commission may compensate the translator where necessary.

(3) The Commission may Order any party failing to appear after a request for translation services to pay the costs of unutilized translator(s).

### 1.07: Time

(1) Computation. In computing any period of time prescribed or allowed by 804 CMR 1.00 or by Order of the Commission, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs to the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation. As used in 804 CMR 1.07(1), "legal holiday" includes those days specified by M.G.L. c. 4, § 7 and any other day appointed as a holiday by the President or the Congress of the United States, or designated by the Laws of Massachusetts.

(2) Enlargement. When by 804 CMR 1.00 or by a notice given thereunder or by order or rules of the Commission, an act is required or allowed to be done at or within a specified time, the Commission for cause shown may at any time in its discretion:

- (a) With or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or,
- (b) Upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

### 1.08: Service

(1) Service of Notices of Public Hearing, and of Default Hearing, and Decisions of the Single Commissioner and of the Full Commission pursuant to 804 CMR 1.21(18), 804 CMR 1.23(1)(h), and 804 CMR 1.23(2) shall be by certified mail, return receipt requested.

(2) Service of papers pursuant to 804 CMR 1.11 and 1.12 shall, when specified therein, be via delivery in hand.

(3) Service of all other papers and motions shall be by personal service or by ordinary first class mail; provided, however, that subpoenas shall be served in the manner provided in 804 CMR 1.14(1).

### 1.09: Parties

(1) Intervention. Any person or organization not originally a party in a proceeding may intervene in the proceeding if in the judgment of the Investigating Commissioner such action will assist in the orderly disposition or presentation of the case and if such person or organization asserts a claim or defense which has common questions of law or fact with the main proceeding.

(2) Substitution of Parties. The Investigating Commissioner, upon his/her own motion or upon motion of any party, may at any time during any proceeding or investigation make such substitution, joinder, or amendment of parties as justice or convenience may require. All parties shall be notified of any amendment following 804 CMR 1.10(6)(b).

804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

1.09: continued

(3) Consolidation. The Investigating Commissioner, upon his/her own motion or upon motion of a party, may order proceedings involving a common question of law or fact to be consolidated for investigation, conciliation or hearing on any or all of the matters in issue in such proceedings.

(4) Class Action.

(a) The Investigating Commissioner may grant permission for a case to proceed as a class action before or during investigation if the following prerequisites are met:

1. The class is so numerous that joinder of all members is impracticable;
2. There are questions of law or fact common to the class;
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class;
4. The representative parties will fairly and adequately protect the interests of the class; and
5. The public interest is served by a class proceeding.

(b) A complaint may proceed as a class action after the Commission's receipt of Respondent's answer pursuant to 804 CMR 1.10(8) only upon the written Order of the Investigating Commissioner.

(c) A complaint may be maintained as a class action at a public hearing if the prerequisites of 804 CMR 1.09(4)(a) and 1.09(4)(b) have been met. Respondent may challenge the class nature of the complaint before certification of the case to public hearing through a motion submitted to the Investigating Commissioner for a hearing concerning the validity of the class; at said hearing the Respondent shall have the burden of showing a preponderance of the evidence, that the proposed class fails to satisfy the requirements of 804 CMR 1.09(4)(a).

(d) The Investigating Commissioner may require such investigation and impose such terms as shall fairly and adequately protect the interests of the class on whose behalf the complaint is brought or defended. She or he shall order that notice be given to unnamed petitioners in the most effective, practicable manner of the pendency of the complaint, of a proposed settlement, of entry of an Order, or of any other proceedings in the complaint including notice to the absent persons that they may appear and present claims and defenses if they so desire. Whenever the representative appears to the Investigating Commissioner inadequate to fairly protect the interests of absent parties who may be bound by the Order, the Commissioner may at any time prior to entry of an Order amend the complaint, eliminating therefrom all reference to representation of absent persons and the Commissioner shall enter its Order in such form as to affect only the parties to the action and those adequately represented.

(5) Representation by Counsel.

(a) The case in support of the complaint shall be presented before the Commission by one of its attorneys or agents, or, at the discretion of the Commission, by an attorney retained by the complainant.

1. An attorney may, without leave of the Commission, withdraw from a matter by filing written notice of withdrawal, together with proof of service on his client and all other parties, provided that:
  - a. such notice is accompanied by the appearance of successor counsel, or;
  - b. the matter has not yet been Certified for Public Hearing pursuant to 804 CMR 1.20.
2. Under all circumstances not within the provisions of 804 CMR 1.09(5)(a)1., leave of the General Counsel must be obtained. In making such determination, the General Counsel shall consider, among other factors, whether representation is in a pro bono capacity, or by a non-profit corporation.

(b) The determination as to whether or not to assign Commission counsel in a matter before the Commission shall be made at the discretion of the General Counsel based upon:

1. The extent of a diligent and reasonable search for private counsel conducted by the complainant, and,
2. the public interest in Commission counsel representation in a particular matter, including consideration of complainant's ability to pay for counsel.

## 804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

### 1.09: continued

Representation by counsel of the case in support of the complaint in matters before the Commission is at the discretion and authority of the General Counsel. In cases where the complainant has retained private counsel, the General Counsel may appoint Commission counsel to remain involved in the proceedings for purposes of representing the Commonwealth's interest in assuring the policies and procedures of M.G.L. c. 151B and 804 CMR 1.00 are protected, or, may allow private counsel to also act as an agent of the Commission for purposes of presentation of the complaint at public hearing. Designation of private counsel as agent of the Commission shall be made in writing by the General Counsel of the Commission.

(c) Complainant's counsel, upon motion in writing, in the sole discretion of the General Counsel and provided that the General Counsel has determined that the interests of Complainant and of the Commission are without conflict, may be designated the agent of the Commission for purposes of enforcement of a pre-determination settlement, consent order, or final order of the Commission. Designation of private counsel as agent of the Commission shall be made in writing or by the General Counsel of the Commission.

(d) Every pleading of a party represented by an attorney shall be signed in his individual name by at least one attorney of record in the attorney's name, whose address shall be stated. The signature of an attorney constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Where a party is represented by counsel, if a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of 804 CMR 1.00, the Commission, through its individual commissioners, upon motion or its own initiative, shall impose upon the person who signed it, a represented party, or both, appropriate sanction, which may include an order to pay to the other party or parties or the Commission, the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

### 1.10: Complaint

(1) Who May File. The following persons (hereinafter referred to as the Complainant(s)) may file a complaint with the Commission alleging violation(s) of M.G.L. c. 272, § 98; and/or M.G.L. c. 151B and M.G.L. c. 151C:

- (a) Any person claiming to be aggrieved by the alleged violation(s), including but not limited to, any individual;
- (b) The duly authorized representative of any person, who by virtue of infancy or incompetency, is unable to file a complaint, but who claims to be aggrieved by the alleged violation(s);
- (c) An organization, whether or not incorporated, whose purposes includes the elimination of the unlawful practice(s) which is the subject of the complaint and whose members, or some of them, claim to be aggrieved;
- (d) The Attorney General or his/her authorized representative.

In addition to the foregoing, a Commissioner may, upon the recommendation of the General Counsel initiate a complaint in the name of the Commission whenever s/he has reason to believe that any person has been or is engaged in practices which are unlawful under one or more of the provisions set forth supra.

Commission-initiated complaints shall be processed under the provisions of 804 CMR 1.11, unless, by Order of the Investigating Commissioner, such complaint is set for processing under other provisions of 804 CMR 1.00.

## 804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

1.10: continued

(2) Manner, Time and Place of Filing. The complaint may be filed by the complainant, personally or through his/her authorized representative by delivering it personally or by U.S. Mail to any of the Commission's offices at any time within 300 days after the alleged unlawful conduct; provided, however, that the 300 day requirement shall not be a bar to filing in those instances where facts are alleged which indicate that the unlawful conduct complained of is of a continuing nature, or when pursuant to an employment contract, an aggrieved person enters into grievance proceedings concerning the alleged discriminatory act(s) within 300 days of the conduct complained of and subsequently files a complaint within 300 days of the outcome of such proceeding(s).

Provided, likewise, that the 300 day requirement shall not be a bar to filing in those instances when, pursuant to 804 CMR 1.10(3)(b), an aggrieved person enters into an agreement to voluntarily mediate the alleged discriminatory acts within 300 days of the conduct complained of and subsequently files a formal complaint within 21 days of the conclusion of such proceedings.

(3) Submission to Mediation.

(a) When, within 300 days of the conduct complained of, parties represented by counsel enter into an agreement to toll the statute of limitations for purposes of mediating the dispute, such agreement shall only be honored by the Commission when the procedures of 804 CMR 1.10(3) are followed. Unless the parties fully comply with the provisions of 804 CMR 1.10(3), the Commission will not honor any private agreements that purport to have the purpose or effect of extending or tolling the statute of limitations. Arbitration shall not be available to the parties prior to the filing of a verified complaint with the Commission.

(b) Whenever the parties seek to toll the statute of limitations pursuant to 804 CMR 1.10(3), the agreement to do so must be in writing, and signed by all parties and the mediator. The mediator shall record the date any such agreement is received.

(c) When it appears that the parties are unable to mediate the dispute, the mediator shall immediately report, in writing, that proceedings pursuant to 804 CMR 1.10(3) have concluded.

(d) The date of the agreement, as referenced in 804 CMR 1.10(3)(b), shall be considered by the Commission to be the date of filing of the complaint, pursuant to M.G.L. c. 151B § 5, if the complaint, as defined in 804 CMR 1.10, is filed within 21 days of the report referenced in 804 CMR 1.10(3)(c).

(e) The Commission does not, by virtue of this procedure, waive its rights under 804 CMR 1.13(4).

(4) Form. The complaint shall be in writing, and shall be signed and verified by the Complainant. Verification for the purposes of 804 CMR 1.10(4) consists of:

(a) A signed statement, under the pains and penalties of perjury, by the Complainant that he/she has read the complaint and that the allegations contained therein are true to the best of his/her knowledge; or

(b) A jurat signed under pains and penalties of perjury by the Complainant, class representative or person authorized by an organization to file a complaint.

(5) Content. The complaint shall contain:

(a) the date(s) on which the unlawful discriminatory acts occurred; or, where the acts are of a continuing nature, the period of time during which acts occurred;

(b) a concise statement of the alleged discriminatory acts;

(c) if appropriate, a statement indicating that the complaint constitutes a class action as provided in 804 CMR 1.09(4);

(d) appropriate identification of the Complainant(s) and the person(s) alleged to have committed unlawful discriminatory acts (hereinafter referred to as the Respondent(s)), unless proceeding by use of pseudonym, pursuant to 804 CMR 1.10(5)(d);



1.10: continued

Use of pseudonym.

1. The Investigating Commissioner, upon the recommendation of the General Counsel, may determine that the public interest requires allowing one or more parties proceed before the Commission under a pseudonym. The authority to act under this provision shall not impact or impinge upon the Commission's ability to issue protective orders.

2. Upon the Commissioner's determination that a pseudonym is necessary, the Commission shall take two complaints with the same docket number. The first will include the full name and address of the complainant or reference to another individual and will not be disclosed, except in strict accordance with M.G.L. c. 66 and 66A. The second complaint will be identical to the first, except that a pseudonym will be substituted for the name of the complainant or other individual and the address, if any, will be that of the Commission's office investigating the complaint or the address of an attorney or other representative designated by the complainant or other individual. Any complaint under this provision will be drafted to avoid revealing the name or identity of the complainant or other individual to the greatest extent possible. The filing of a complaint shall not be deemed to constitute a waiver of any confidentiality rights granted by law, and the Commission shall take all reasonable steps to protect the identity of such persons from unlawful disclosure, including but not limited to prosecution pursuant to M.G.L. c. 151B, § 8.

3. The Commission shall serve a copy of the pseudonym complaint prepared under 804 CMR 1.10(5)(d)2., upon any respondent named therein. Any service of a pseudonym complaint shall be accompanied by a notice informing the respondent that, upon review of the complaint, if the respondent is unable to identify with sufficient assurance the identity of the person filing the complaint or the person on whose behalf the complaint is filed, the respondent shall notify the Commission in writing within ten days of the date the complaint is served. Such ten-day period may be extended for good cause shown. Unless the respondent provides notice in accordance with this section, the Commission shall presume that the pseudonym complaint adequately apprises the respondent of the particulars of the alleged discriminatory practice, including the identity of the person filing the complaint or on whose behalf the complaint is filed. The respondent's notice shall also designate a person upon whom the Commission shall serve a copy of the first complaint and other papers concerned with the Commission's investigation, and shall further contain an acknowledgment that any information provided by the Commission or other person will be kept strictly confidential and shall not be disclosed except in strict accordance with M.G.L. c. 66 and 66A. Thereafter, the Commission will forward the complaint identifying the complainant to the respondent.

4. The time period for answering the complaint shall begin to run from the date the respondent first receives the complaint unless, in the case of service of a pseudonym complaint, the respondent follows the procedures set forth in 804 CMR 1.10(5)(d)3. or requests an extension.

(6) Amendments.

(a) A complaint or any part thereof may be amended to cure technical defects or omissions, including failure to swear to the complaint, or to clarify and amplify allegations made therein. An amendment alleging additional acts constituting unlawful discriminatory practices related to or arising out of the subject matter of the original complaint may be made by Order of the Commissioner. Amendments shall relate back to the original filing date.

(b) Amendments may be made pursuant to 804 CMR 1.10(6) by the Investigating Commissioner at any time prior to Certification to Public Hearing and issuance of Commission Complaint pursuant to 804 CMR 1.20. In each instance a copy of the amended complaint shall be served upon each party.

(7) Service.

(a) Upon the authorization of a formal investigation pursuant to 804 CMR 1.13(1) a written notice acknowledging the filing and advising the Complainant of the time limits and choice of forums under the applicable statutes shall be served on the Complainant in the manner specified in 804 CMR 1.08(1).

## 804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

1.10: continued

(b) Upon the authorization of a formal investigation pursuant to 804 CMR 1.13(1), a copy of the complaint and a written notice advising the Respondent of his or her procedural rights and obligations shall be promptly served on each Respondent named in the Complaint in the manner provided in 804 CMR 1.08(1).

(8) Answer to Complaint.

(a) Each Respondent must file an answer in the form of a position statement to the complaint within 21 days of receipt of the notice described in 804 CMR 1.10(7)(b).

(b) Upon written request of the Respondent, and for good cause shown, the Commission may grant an extension of not more than 21 days in which to file the answer.

(c) Each Respondent must serve such answer upon the Commission and the Complainant, and where an attorney has entered an appearance on behalf of a named complainant, shall also serve a copy on the attorney.

(d) Such answer must assert all jurisdictional and other defenses which the Respondent wishes to raise and shall also contain a full and complete description of the Respondent's positions to all allegations of the complaint.

(e) The answer must be signed and affirmed by the Respondent. Signature and affirmation pursuant to 804 CMR 1.10(8) must include:

1. The signing of the answer under oath before a notary public by the Respondent, a principal of Respondent, or a person, other than counsel, authorized to act for the Respondent; or

2. A jurat signed under pains and penalties of perjury by the Respondent, a principal of Respondent, or a person, other than counsel, authorized to act for the Respondent.

3. In addition, pursuant to 804 CMR 1.09(5)(d), the position statement shall also be signed by counsel retained by the Respondent.

(f) When a complaint is amended after an answer has been filed, the Respondent may amend his/her answer within ten days after notice of an amendment, or upon the initial day of the Public Hearing whichever period may be shorter. In addition to the foregoing, the Respondent may move to have the answer amended at any time prior to Certification to Public Hearing.

1.11: Proceedings on Commission-Initiated Complaints

(1) All complaints initiated by the Commission pursuant to M.G.L. c. 151B, § 5 and 804 CMR 1.10(1) shall be processed under 804 CMR 1.11, unless otherwise ordered by the Commission.

(2) Such matters shall be investigated, heard and determined by the Commission as expeditiously as possible.

(3) Upon a Commission-initiated complaint, the Commission shall follow the procedures of M.G.L. c. 151B § 5.

(4) Upon a Commission-initiated complaint, the procedures of 804 CMR 1.00, shall be suspended, with the exception of proceedings pursuant to 804 CMR 1.11, and, 804 CMR 1.24 (Judicial Review) and 804 CMR 1.25 (Judicial Enforcement).

(5) Proceedings.

(a) The parties shall receive notice of a Commission-initiated complaint, via service of the Complaint on each of the parties, in hand;

(b) With the service described in 804 CMR 1.11(5)(a), the Commission shall serve subpoenas and subpoenas decus tecum, as it deems necessary, to investigate the matter.

(c) The Commission shall, within seven calendar days of the notice described in 804 CMR 1.11(5)(a), convene an Investigative Conference, as described in 804 CMR 1.13(5). Notice of the date, time, and place of the conference shall be served upon the parties with the service described in 804 CMR 1.11(5)(a).

## 804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

### 1.11: continued

(d) At the conclusion of the Investigative Conference, if the Investigating Commissioner determines that no probable cause exists for crediting the allegations of the complaint, he/she shall immediately notify the parties of such determination. Such determination, in a Commission-initiated complaint, shall be the final order of the investigating Commissioner, and not subject to preliminary hearing pursuant to 804 CMR 1.15(7)(d) or appeal pursuant to M.G.L. c. 30A.

(e) At the conclusion of the Investigative Conference described in 804 CMR 1.11(5)(c), if the Investigating Commissioner determines that probable cause exists for crediting the allegations of the complaint, the Investigating Commissioner may immediately endeavor to eliminate the unlawful practice complained of by conference, conciliation and persuasion. If the Commissioner's determination finds Probable Cause to credit the allegations of a housing matter, the Commissioner shall immediately serve notice upon the Respondent of its right to elect judicial determination of the complaint.

(f) The Investigating Commissioner may have the issues in the matter Certified for Public Hearing. In any matter Certified for Public Hearing pursuant to 804 CMR 1.11(5), the Commission shall seek only traditional equitable relief.

1. With such Certification the Investigating Commissioner shall serve, in hand, written notice requiring Respondent(s) answer the charges of such complaint at a hearing before the Commission, at a time and place to be specified in the notice. Requests to continue will be granted only upon a showing of good cause.

2. Such hearing should, if at all practicable, occur within 21 days of the Investigative Conference.

(g) The case in support of the complaint shall be presented before the Commission by the General Counsel his/her designee.

(h) The Respondent may file a written verified answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony.

(i) Hearings pursuant to 804 CMR 1.11(5) shall be heard by a panel of two Commissioners, neither of whom shall be the Commissioner who previously investigated the matter and issued the complaint. If the Commission is comprised of less than three Commissioners, one Commissioner may hear matters pursuant to this regulation, and the Order of the Commissioner who heard the matter shall be the Order of the Commission.

(j) The Commission, within 48-hours from the conclusion of a Hearing pursuant to 804 CMR 1.11(5)(i), should, if at all practicable, issue a Final Order

### 1.12: Emergency Proceedings

(1) The Investigating Commissioner may Order that any matter under his or her jurisdiction be processed under 804 CMR 1.12. Commissioners will not entertain motions of the parties that matters be processed under 804 CMR 1.12. Remedies available under this provision are limited to traditional equitable relief.

(2) Such matters shall be investigated, heard and determined by the Commission as expeditiously as possible.

(3) Upon an order that a matter be set for Emergency Proceedings under 804 CMR 1.12, the Commission shall follow the procedures of M.G.L. c. 151B § 5.

(4) Upon an order that a matter be set for Emergency Proceedings under 804 CMR 1.12, the procedures of 804 CMR 1.00 shall be suspended, with the exception of proceedings pursuant to 804 CMR 1.12, and 804 CMR 1.24 (Judicial Review) and 804 CMR 1.25 (Judicial Enforcement).

#### (5) Proceedings.

(a) The parties shall receive notice of an Order described in 804 CMR 1.12(1), via service of the Charge of Discrimination and of said Order, upon each of the parties, in hand;

(b) With the service described in 804 CMR 1.12(5)(a), the Commission shall serve subpoenas and subpoenas decus tecum, as it deems necessary, to investigate the matter.

## 804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

### 1.12: continued

(c) The Commission shall, within seven calendar days of the notice described in 804 CMR 1.12(5)(a), convene an Investigative Conference, as described in 804 CMR 1.13(5). Notice of the date, time, and place of the conference shall be served upon the parties with the service described in 804 CMR 1.12(5)(a).

(d) At the conclusion of the Investigative Conference, if the Investigating Commissioner determines that no probable cause exists for crediting the allegations of the complaint, he/she shall immediately notify the parties of such determination.

(e) At the conclusion of the Investigative Conference described in 804 CMR 1.12(5)(c), if the Investigating Commissioner determines that probable cause exists for crediting the allegations of the complaint, the Investigating Commissioner may immediately endeavor to eliminate the unlawful practice complained of by conference, conciliation and persuasion. If the Commissioner's determination finds Probable Cause to credit the allegations of a housing matter, the Commissioner shall immediately serve notice upon the Complainant and Respondent of their right to elect judicial determination of the complaint.

(f) The Investigating Commissioner may have the issues in the matter Certified for Public Hearing. In any matter Certified for Public Hearing pursuant to 804 CMR 1.12(5), the Commission shall award only traditional equitable relief.

1. With such Certification the Investigating Commissioner shall serve, in hand, written notice requiring Respondent(s) answer the charges of such complaint at a hearing before the Commission, at a time and place to be specified in the notice. Requests to continue will be granted only upon a showing of good cause.

2. Such hearing should, if at all practicable, occur within 21 days of the Investigative Conference.

(g) The case in support of the complaint shall be presented before the Commission by the General Counsel, his/her designee, or by counsel retained by Complainant as per 804 CMR 1.09(5).

(h) The Respondent may file a written verified answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony.

(i) Hearings under the Commission's Rule on Emergency Proceedings, 804 CMR 1.12, shall be heard by a panel of two Commissioners, neither of whom shall be the Commissioner who previously investigated the matter and issued the complaint. If the Commission is comprised of less than three Commissioners, one Commissioner may hear matters pursuant to 804 CMR 1.00, and the Order of the Commissioner who heard the matter shall be the Order of the Commission.

(j) The Commission, within 48-hours from the conclusion of a Hearing pursuant to 804 CMR 1.12(5)(i), should, if at all practicable issue a Final Order.

### 1.13: Investigation by the Commission

(1) Authorization of Formal Investigation. After the filing of a complaint, the Commission, through its staff, shall authorize formal investigation pursuant 804 CMR 1.13, unless:

(a) Upon review of the complaint, it is determined, for reasons of standing of the parties, timeliness of the filing, or other matters upon which jurisdiction may depend, that a formal investigation, pursuant to 804 CMR 1.13(2) would not serve the public interest. A complaint will not be investigated under 804 CMR 1.13(2) if the individual provides information which contradicts an inference of discrimination, or, if the proffered complaint is totally unbelievable on its face, or, if the Commission lacks jurisdiction. The facts alleged should be accompanied by documentation or other sufficient information, or, be capable of verification after formal investigation.

1. If the Commission, for any of the reasons articulated at 804 CMR 1.13(1), determines that formal investigation, pursuant to 804 CMR 1.13, would not serve the public interest, the Commission shall serve notice upon Complainant stating the reasons for the determination. Such notice shall act as authorization by the Commission to pursue a civil action pursuant to M.G.L. c. 151B, § 9 without awaiting the expiration of ninety days after the filing of the complaint.

2. Preliminary Hearing. The Complainant may appeal a Denial of Formal Investigation, by filing with the Clerk of the Commission a written request for a preliminary hearing within ten days after he/she has received notice of the denial. The Clerk of the Commission shall notify the Complainant of a scheduled hearing.

804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

1.13: continued

- a. The Investigating Commissioner, or designee, shall preside at the hearing and shall permit the Complainant, or his/her attorney, to present orally or in writing reasons why the Commission should formally investigate the complaint and to present such evidence in support of his or her argument as the Investigating Commissioner or designee deems appropriate.
- b. The hearing shall not be subject to the requirements of M.G.L. c. 30A.

(2) Investigatory Procedure. Investigation will be commenced within 30 days of the authorization of a formal investigation pursuant to 804 CMR 1.13(1). The Chair of the Commission shall designate one of the Commissioners as Investigating Commissioner. The Investigating Commissioner shall make, with the assistance of the Commission staff and the parties pursuant to 804 CMR 1.09, prompt investigation of the complaint. Such investigation may be made by field visit, written or oral inquiry, conference, or any other method or combination thereof deemed suitable in the discretion of the Investigating Commissioner. Whenever it shall be necessary to aid the Commission in its investigation, the Commission may interview witnesses, issue subpoenas requiring the attendance of persons or the production for examination of books, papers and other tangible things, serve interrogatories on either party and depose witnesses where necessary to preserve testimony.

(3) Prompt Investigation. The investigation of a complaint alleging discrimination in housing shall be completed in no more than 100 days after receipt of the complaint, unless it is impracticable to do so. In all other matters before the Commission, the investigation of a complaint shall be completed in no more than eighteen months following receipt of the complaint, unless it is impracticable to do so. If the Commission is unable to complete the investigation within these time periods, it shall notify the Complainant and Respondent of the reasons therefor.

(4) Commission's Right to Investigate. No waiver agreement signed by any individual shall affect the Commission's right and statutory duty to enforce M.G.L. c. 151B, c. 151C, and c. 272, § 98, or to investigate any complaint filed before it.

(5) Investigative Conference.

(a) Notice. As part of its investigation, the Commission may convene an Investigative Conference for the purpose of obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties and exploring the possibility of a negotiated settlement. Notice of the conference shall be given to all parties at least fourteen days prior thereto, and may identify the individuals requested to attend on behalf of each party. The time provisions contained in 804 CMR 1.13(5)(a) may be waived by agreement of the parties and the Commission.

(b) Attorneys, Witnesses. A party may be accompanied at an Investigative Conference by his/her attorney or other representative and by a translator if necessary. An attorney for a party not previously having entered an appearance must do so at the beginning of the conference. Parties, through counsel or otherwise, who have witnesses available to testify on their behalf, shall prepare a list of such witnesses, showing the name, daytime telephone number, and a summary of what the witness knows about the dispute. Said list shall be provided to the Commission at the Investigative Conference. Parties, through counsel or otherwise, with affidavits or written statements available from witnesses shall provide such affidavits or statements to the Commission at the Investigative Conference.

(c) Conduct. The investigator or other representative of the Commission shall conduct the conference and control the proceedings. No tape recording, stenographic report, or other verbatim record of the conference can be made. The investigator shall decide which witnesses shall be heard and the order in which they are heard. The investigator may exclude witnesses and other persons from the conference, except that each party and its representative shall be permitted to remain.

804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

1.13: continued

(d) Dismissal or Default for Non-Attendance - The failure of a party to attend the conference after due notice may result in dismissal of the charge pursuant to 804 CMR 1.15(5), in the case of a complainant, or default pursuant to 804 CMR 1.16, in the case of a respondent. A party who appears at the conference exclusively through an attorney or other representative unfamiliar with the events at issue shall be deemed to have failed to attend. The Commission may Order any party failing to attend, or requesting more than one continuance, to pay the Commission for costs incurred by such failure or request. Failure to abide by such order may result in sanctions as provided for in 804 CMR 1.16, or administrative dismissal pursuant to 804 CMR 1.15(5) for failure to cooperate with the Commission.

(6) Motion for more definite statement. If a complaint is so vague or ambiguous that the Respondent cannot reasonably be expected to take an informed legal position concerning the relevance of evidence sought, the Respondent may move that the Investigating Commissioner order a more definite statement, utilizing the provisions of 804 CMR 1.05. The motion shall point out the defects complained of and the details desired.

(7) Pre Determination Discovery.

(a) After the authorization of a formal investigation pursuant to 804 CMR 1.13(1), where the parties are represented by counsel, the Investigating Commissioner may order the parties conduct discovery into the allegations of the complaint, and the respondent's defenses, for purposes of assisting the Investigating Commissioner in the determination of whether Probable Cause exists to credit the allegations of the complaint.

(b) Such discovery, absent a specific Order of the Investigating Commissioner to the contrary, shall be limited to 15 interrogatories and/or requests for production of documents, with subparts, and six hours of deposition by each party.

(c) Failure to conduct pre-determination discovery in good faith, when ordered by the Investigating Commissioner, shall be deemed cause for:

1. Administrative closure of the matter pursuant to 804 CMR 1.15(5) for unreasonable refusal by Complainant to cooperate with the processing of the matter, and/or,
2. Investigative default, and any and all of the sanctions delineated at 804 CMR 1.16 for unreasonable refusal by Respondent to appear and cooperate with the processing of the matter.

(d) Such discovery may include interrogatories to parties, subpoenas requiring the production of documents, papers and other tangible things, and depositions. Notice of at least 14 days shall be given to a person from whom discovery is sought; notice shall also be given to every other party and to the Commission.

(e) A party desiring to take the deposition of any person upon oral examination shall include in the notice the time and place for taking the deposition, and the name and address of each person to be examined. If a subpoena duces tecum is to be served on a person to be examined, the designation of the material to be produced as set forth in the subpoena, shall be attached to the notice. The party requesting a deposition shall make all necessary arrangements for the taking of depositions, including the cost thereof. The Investigating Commissioner may order that the testimony at a deposition be recorded by other than stenographic means. The order shall designate the manner of recording, and preserving deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. All objections made at the time of the deposition shall be noted by the person taking the deposition. Evidence objected to shall be taken subject to the objection. Subject to valid objections to admissibility, depositions or any part thereof may be used for any purpose with respect to witnesses who are unavailable at the hearing or to contradict or impeach the credibility of witnesses who are available to testify at Public Hearing.

(f) Upon motion by a party or by a person from whom discovery is sought, and for good cause shown, the Investigating Commissioner may make a protective Order limiting discovery. If the motion for a protective Order is denied, the Investigating Commissioner may order that any party permit discovery.

(g) If a party or person fails to comply with an Order for discovery of the Commission, the Investigating Commissioner may make such Orders in regard to the failure of discovery as are just, and among others the following:

## 804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

1.13: continued

1. An order that the matters regarding which discovery was granted by the Commission or any other designated facts shall be taken to be established for the purpose of the case in accordance with the claim of the party seeking discovery;

2. An Order refusing to allow the non-complying party to support or oppose disputed claims or defenses, or prohibiting him from introducing designated matters in evidence.

In lieu of any of the foregoing Orders or in addition thereto, the Commission may require the party failing to submit to discovery or the attorney advising him or both to pay the reasonable expenses, including attorney fees, and the Commission's costs caused by the failure.

### 1.14: Subpoenas

(1) General Provisions. Subpoenas shall be issued in the name of the Commission, in accordance with the provisions of M.G.L. c. 30, § 12, by the General Counsel of the Commission or any lawyer of the Commission's legal staff or any other person or persons who may be designated from time to time by the Commission, including counsel for the parties. Service may be made by constables, sheriffs, clerks, Justices of the Peace, and other persons authorized by law to serve subpoenas, which shall include any person who is not a party and is not less than 18 years of age. Service shall be perfected upon exhibiting and reading the subpoena to the witness, or by giving him a copy thereof or by leaving a copy at his place of abode. When a subpoena is issued at the request of a party other than the Commission, the cost of the service, witness and mileage fees, shall be borne by the moving party. Witness and mileage fees shall be the same as are paid to witnesses in the district courts of the Commonwealth. Upon a showing of economic hardship and in the interest of justice the Commission may at its discretion waive fees and/or costs in connection with the subpoena.

Any motion for subpoena pursuant to 804 CMR 1.14(2), or any subpoena issued pursuant to 804 CMR 1.14(3) shall be served on counsel for all other parties to the proceeding before the Commission, including but not limited to Commission Counsel, utilizing the procedures at 804 CMR 1.05.

(2) Prior to Certification to Public Hearing. The Investigating Commissioner, or his/her authorized representative, shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production, copying, and photographing of any evidence, including, but not limited to, books, records, correspondence or documents relating to any matter under investigation or in question before him/her, not subject to 804 CMR 1.13(6)(e) and 804 CMR 1.19(3). Any party may move for the issuance of a subpoena from the Investigating Commissioner, by serving notice upon all other parties and endeavoring to schedule, with the Commission, a conference on the motion. The Commission may, through specific reference by Discovery Order pursuant to 804 CMR 1.13(6) or 804 CMR 1.19, delegate the authority to issue subpoenas to counsel for the parties.

(3) Following Certification to Public Hearing. Following Certification to Public hearing pursuant to 804 CMR 1.20, counsel for any party may issue subpoenas pursuant to M. G. L. c. 30A, § 12. Issuance of subpoenas will be governed by 804 CMR 1.09(5)(d). The subpoena shall show on its face the name and address of the party at whose request the subpoena was issued.

(4) Vacation or Modification of Subpoenas. Any witness subpoenaed under this Rule, counsel for any party to the proceeding, or Commission Counsel, may upon written motion request the Commissioner assigned to vacate or modify the subpoena. Such motion shall set forth the reasons therefor and be served upon counsel for all other parties, and Commission Counsel. The moving party shall endeavor to schedule, with the Commission, a conference on the motion. The Commissioner assigned to the case shall review the subpoena to determine whether in the interests of fairness and justice it should be vacated or otherwise modified, and issue a decision forthwith.

## 804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

1.14: continued

(5) Enforcement of Subpoenas. Upon the failure of any person to comply with a subpoena issued pursuant to 804 CMR 1.14, and not subsequently vacated or modified by the Commission, the General Counsel may, in the name of the Commission, apply to the Superior Court for an Order requiring compliance with the subpoena. The Commission may seek an Order for costs and fees from the Superior Court when enforcing subpoenas pursuant to this provision, as well as appropriate sanctions under M.G.L. c. 151B, § 8.

### 1.15: Investigative Dispositions

(1) Substantial Weight and Delay of Process. Whenever the Commission has reason to believe that another forum, having jurisdiction over the parties and subject matter contained in a complaint filed with the Commission, is conducting a prompt and thorough investigation of such complaint in a manner consistent with the requirements and standards of the Commission, the Commission may defer its investigation of the complaint until such other forum has completed its investigation and/or resolution of the complaint. If it appears from a review of the forum's investigative report(s) and/or resolution of the complaint that the Commission's requirements and standards have been met, the Commission may accord such findings substantial weight and may deem the complaint closed. Notwithstanding the foregoing provision, the parties' rights to appeal any determination by the Commission as provided for under 804 CMR 1.00 shall not be affected.

The Commission shall notify the parties in writing of any decision to defer investigation of a complaint until after investigation and/or resolution of such complaint by another forum.

(2) Filing of a Civil Action Under M.G.L. c. 151B, § 9.

(a) Within the first 90 days after the filing of a complaint, the Commission will not allow removal, so that it may be filed pursuant to M.G.L. c. 151B, § 9, of any complaint before it except on motion of the Complainant for good cause shown.

(b) After a complaint has been pending before the Commission for 90 days Complainant may file, with the Commissioner having charge of the matter, notice of Complainant's intent to file a complaint pursuant to M.G.L. c. 151B, § 9, along with a request that the Commission not initiate a complaint pursuant to 804 CMR 1.10(1) and 804 CMR 1.11, upon withdrawal, upon the same subject matter, against Respondent. The Commission retains discretion to grant or deny such a request, as the interests of justice demand.

(c) M.G.L. c. 151B, § 9 makes available to the Complainant trial in state court as an alternative to public hearing before the Commission. Accordingly, the Hearing Commissioner shall require the Complainant or his/her counsel waive the right to removal of the complaint to state court within 30 days after Certification to Public Hearing.

(d) Any person who files an action in any court of the Commonwealth or in any federal court, which includes a claim under M.G.L. chs. 151B, 151C, or c. 272, §§ 92A, 98, or 98A, shall promptly notify the Commission of the filing of the action by serving the General Counsel of the Commission with a copy of such complaint.

(e) In any matter originally filed with this Commission, or any other matter under M.G.L. chs. 151B, 151C, or c. 272, §§ 92A, 98, or 98A, where a final order issues of a Justice of the Superior Court, or any other court of competent jurisdiction, the prevailing party or parties shall serve a copy of such final order on the General Counsel of the Commission

(f) In any appeal to the Court of Appeals or Supreme Judicial Court, of a matter originally filed with this Commission, in which an issue is raised under M.G.L. c. 151B, c. 151C or c. 272, §§ 92A, 98, or 98A, the party raising the issue shall serve a copy of the notice of appeal on the General Counsel. At the time of filing a notice of appeal or other papers, documents, or briefs in the case, a party shall file proof of service of the papers, documents, or briefs upon the General Counsel.

(3) Withdrawal. The Complainant may at any time request withdrawal of his/her complaint. Such request shall be in writing and shall set forth the reasons therefor. The Commissioner assigned to the case may grant or deny such request as the interests of justice require. If the Complainant's request is granted the parties shall be notified in writing. Notwithstanding, withdrawal of a complaint shall not affect the Commission's right to initiate a complaint based upon the same facts; such Commission-initiated complaint shall relate back to the date of filing of the individual complaint.



## 804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

1.15: continued

(4) Lack of Jurisdiction. Whenever it appears upon investigation of a complaint that the Commission lacks jurisdiction over the parties or subject matter of the complaint, the Commissioner having responsibility for the case shall dismiss the complaint and shall so notify the parties in writing, including the reasons therefor. The complainant shall have the same right of appeal from dismissal of a case for lack of jurisdiction as provided for in 804 CMR 1.15(7)(d).

(5) Administrative Closure. If the public interest so requires, the Commissioner assigned to the case may administratively close the case for reasons including but not limited to the following:

(a) Bankruptcy of the Respondent, the death of a party, or inability to locate a party. Before closing a matter because of inability to locate a party, the Commission shall send to that party two copies of a letter stating that the matter will be closed if a response is not received within 30 days. The first copy of the letter shall be sent to the most recent address on file with the Commission, and the second copy shall be forwarded through the Social Security Administration's letter forwarding service. The Commission shall allow 30 days for response before administratively closing the matter.

(b) Unreasonable refusal by Complainant to cooperate with processing of the case. Such unreasonable refusal may include failure to provide information, materials or responses to the Respondent's submissions which are necessary for investigation of the case, failure to comply with an order pursuant to 804 CMR 1.13(6), and unreasonable refusal to accept a proposed pre-determination agreement, pursuant to 804 CMR 1.15(6) or 804 CMR 1.18.

In any case closed administratively, the reasons therefore shall be clearly noted; provided, however, that an administrative closure pursuant to 804 CMR 1.15(5) shall not constitute a final order for purposes of exercising rights provided under M.G.L. c. 151B, § 6 or M.G.L. c. 30A. The Commissioner may, in his or her discretion, reopen a case which has been closed pursuant to 804 CMR 1.15(5) for good cause shown.

(6) Pre-Determination Settlement. The Commission encourages the parties to resolve complaints through voluntary settlement prior to investigative determination.

(a) The parties may submit to the Investigating Commissioner the terms of such settlement in writing. Said terms may be unavailable to the public at the discretion of the Commission. If it appears from the facts of the complaint and the terms of settlement that the public interest has been served, the Investigating Commissioner shall dismiss the complaint without a finding, and shall so notify the parties in writing. Such Pre-Determination Settlement shall have the effect of an Order of the Commission for the purpose of enforcement pursuant to M.G.L. c. 151B, § 6 and 804 CMR 1.25.

(b) When a formal offer of settlement by a respondent is acceptable to the Commission but not to the complainant, the Commission may close the matter pursuant to 804 CMR 1.02 and 804 CMR 1.15(5), and the complainant may proceed in the appropriate court of competent jurisdiction under M.G.L. c. 151B, § 9. In making this determination, offers of settlement by a respondent shall be reviewed by the General Counsel or designee, to determine whether such settlement offer is substantial enough to require a determination, in the public interest, to terminate the proceeding, on notice to complainant, if the complainant unreasonably refuses to accept the offer of settlement. The following criteria are among those that should be considered in making this determination:

1. probability of success after full investigation;
2. reasonableness of offer;
3. reasonableness of complainant's refusal, if any;
4. the amount of the complainant's economic loss, and respondent's degree of responsibility therefor;
5. the amount of complainant's costs, including attorneys fees, if any;
6. in appropriate cases, evidence of the amount of complainant's mental pain and suffering;
7. the egregiousness of the discrimination charged;
8. whether complainant is represented by counsel;
9. and, whether the public interest is served by the continuation of the proceedings.

1.15: continued

(7) Causal Determinations.

(a) Probable Cause. A finding of Probable Cause shall be made when, after appropriate investigation, the Investigating Commissioner concludes that there is sufficient evidence upon which a fact-finder could form a reasonable belief that it is more probable than not that the respondent committed an unlawful practice. In making this determination, the investigating commissioner or designee thereof shall not resolve disputes involving genuine issues of material fact.

(b) Probable Cause Procedure. If, after appropriate investigation, the Investigating Commissioner determines that there is sufficient evidence to support a finding of Probable Cause to credit the allegations of the complaint, he/she shall issue a Probable Cause Finding.

If, after appropriate investigation, the Investigating Commissioner determines that there is insufficient evidence to support a finding of Probable Cause to credit the allegations of the complaint, he/she shall dismiss the complaint and shall issue a Lack of Probable Cause Finding. The determination of a lack of probable cause shall be issued within ten days from such determination.

Where the complaint contains allegations of more than one unlawful practice, the Investigating Commissioner shall make a determination of Probable Cause or Lack of Probable Cause with respect to each allegation. Said determination(s) shall be issued and served on all the parties.

(c) Reconsideration of Probable Cause.

1. Motion for Reconsideration.

a. A respondent may move for reconsideration of the probable cause finding within 30 days of the probable cause finding.

b. Such motions should be filed upon all parties and the General Counsel, utilizing the procedures and time frames set forth in 804 CMR 1.05.

c. The Investigating Commissioner shall render her or his decision within 20 days of receipt of the motion, opposition, and supporting papers, except that in the case of a claim alleging discrimination based upon housing the decision shall be rendered in ten days following the receipt of the motion.

d. In the event that an Investigating Commissioner does not render a decision on a Motion to Reconsider a Probable Cause finding within the time period specified in 804 CMR 1.15(7)(c), the motion shall be deemed denied.

e. Following review under 804 CMR 1.15(7)(c), the Investigating Commissioner may issue an Order reversing the Probable Cause determination, reopening the matter for further investigation, modifying the Probable Cause finding, or taking such other action as is deemed necessary in the interests of justice, under this provision.

2. Reversal or modification of a Probable Cause determination shall be considered to have satisfied any requirement for a Preliminary Hearing of Lack of Probable Cause, pursuant to 804 CMR 1.15(7)(d).

(d) Preliminary Hearing of Lack of Probable Cause. The Complainant may appeal a determination of Lack of Probable Cause, unless such determination of Lack of Probable Cause was entered upon the Reconsideration of a determination of Probable Cause, pursuant to 804 CMR 1.15(7)(c) or 804 CMR 1.20, by filing with the Clerk of the Commission a written request for a preliminary hearing within ten days after he/she has received notice of the determination. The Clerk of the Commission shall notify all other parties of the appeal and shall schedule a hearing.

The Investigating Commissioner who made the initial determination, or his/her designee, shall preside at the hearing and shall permit the Complainant, or his/her attorney, to present orally or in writing reasons why the Lack of Probable Cause determination is in error and to present such evidence in support of their argument as the Investigating Commissioner or his/her designee deems appropriate. The Investigating Commissioner may allow the Respondent, or his/her attorney, to present orally or in writing reasons why the Lack of Probable Cause determination should be sustained, and to present such evidence in support of their argument as the Investigating Commissioner or his/her designee deems appropriate. The hearing shall not be subject to the requirements of M.G.L. c. 30A.

## 804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

### 1.15: continued

The Investigating Commissioner may, upon review of evidence presented at the Preliminary Hearing, the written statement, and any other materials submitted:

1. Reverse the Lack of Probable Cause Finding and serve upon the parties a Finding of Probable Cause;
2. Reopen the case for further investigation;
3. Affirm the Lack of Probable Cause Finding;
4. Modify the Lack of Probable Cause Finding; or
5. Take such other action as he/she deems necessary in the interest of justice.

He/she shall notify the parties of his decision in writing and, except where he/she affirms the prior determination, shall state the reasons for his/her decision.

### 1.16: Default Procedure

(1) If a Respondent has been served with a verified complaint and notice of the consequences of the failure to answer, and Respondent fails either to answer or to file a Motion for a More Definite Statement pursuant to 804 CMR 1.13(6), or otherwise acts in violation of the provisions of 804 CMR 1.10(8), 804 CMR 1.13(5), or 804 CMR 1.13(7), the Investigating Commissioner may impose upon the Respondent appropriate sanctions following Rule 37(b) of the Massachusetts Rules of Civil Procedure including but not limited to the sanctions that:

- (a) Said failure shall result in the matters regarding the complaint being taken as established for the purposes of the case in accordance with the claims of the Complainant;
- (b) Said failure shall constitute a waiver of Respondent's right to have the Commission conduct further investigation, determine whether there is probable cause and/or make conciliation efforts;
- (c) Said failure shall bar the Respondent from introducing any and all evidence at the public hearing;
- (d) Said failure shall bar the Respondent from introducing designated matters into evidence at the public hearing;
- (e) Said failure shall bar the Respondent from presenting any and all defenses at the public hearing; and,
- (f) Said failure shall bar the Respondent from opposing designated claims or supporting designated defenses at the public hearing.

(2) If sanctions are imposed pursuant to 804 CMR 1.16 the Investigating Commissioner shall order the entry of a default on the docket of the Commission. Notice of the entry of default and of the sanctions imposed shall be served upon the Respondent.

(3) If sanctions are imposed pursuant to 804 CMR 1.16, the Investigating Commissioner may order the imposition of costs and fees to be paid by the defaulting party to the Commission and all other parties.

(4) Within 14 days after entry of default, the Respondent may petition the Investigating Commissioner who may vacate the entry of default and reopen the case for good cause shown. The Respondent's assertion of good cause shall be in affidavit form and shall include the full and complete answers to all interrogatories. The Investigating Commissioner may order the imposition of costs pursuant to 804 CMR 1.16(3), when a default is vacated pursuant to 804 CMR 1.16.

(5) After the entry of a default, the Investigating Commissioner shall take whatever steps (s)he deems necessary to complete the investigation and issue a causal determination, and, the Investigating Commissioner may take any or all of the following additional actions:

- (a) Order that a matter be processed pursuant to 804 CMR 1.12(5) (Emergency Proceedings); or,
- (b) Seek relief in the Superior Court for a violation of M.G.L. c. 151B § 8, pursuant to M.G.L. c. 214 § 3 (12) or (13); or,
- (c) Any other relief against the parties or counsel as is necessary and appropriate to enforce the provisions of M.G.L. c. 151B § 5.

1.17: Procedures in Housing Matters

The Commission shall make final disposition of a complaint alleging discrimination in housing within one year of the date of receipt of the complaint, unless it is impracticable to do so. If the Commission is unable to make final disposition of such a complaint within this time period, it shall notify the Complainant and Respondent in writing of the reasons therefor.

1.18: Conciliation

(1) Upon a finding of Probable Cause, the Investigating Commissioner, or his/her designee, shall endeavor to eliminate the unlawful practice complained of through conference, conciliation and persuasion.

(a) In conciliating a complaint, the Commission will attempt to achieve a just resolution of the complaint and to obtain assurances that the Respondent will satisfactorily remedy any violations of the rights of the aggrieved person, and take such action as will assure the elimination of discriminatory practices, or the prevention of their occurrence, in the future.

(b) Relief Sought for Aggrieved Persons. The following types of relief may be sought for aggrieved persons in conciliation:

1. Monetary relief in the form of damages, including damages caused by humiliation or embarrassment, and attorney fees;
2. Other equitable relief including, but not limited to reinstatement to employment with or without back pay, promotion with or without back pay, letters of recommendation or reference, access to the dwelling at issue (or to a comparable dwelling), the provision of services or facilities, an apology and a promise to refrain from engaging in the same or similar discriminatory conduct, or other specific relief; and/or,
3. Injunctive relief appropriate to the elimination of discriminatory practices effecting the aggrieved person or persons.

(c) Provisions Sought for the Public Interest. The following types of provisions may be sought for the vindication of the public interest:

1. Elimination of the discriminatory practice;
2. Prevention of future discriminatory practices;
3. Remedial affirmative activities to overcome discriminatory practices;
4. Apologies;
5. Reporting requirements;
6. Monitoring and enforcement activities, and,
7. Educational and training efforts.

(d) Termination of Conciliation Efforts. The Commission may terminate its efforts to conciliate a complaint if the respondent fails or refuses to confer with the Commission; the complainant or the respondent fail to make a good faith effort to resolve any dispute; or the Commission finds, for any reason, that voluntary agreement is not likely to result.

## 804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

### 1.18: continued

(e) Prohibitions and Requirements with Respect to Disclosure of Information Obtained During Conciliation. Except as provided in 804 CMR 1.18(2), nothing that is said or done in the course of conciliation may be made public or used as evidence in a subsequent Public Hearing under 804 CMR 1.21 or in civil actions under M.G.L. c. 151B, § 9. Conciliation agreements shall be made public, unless the complainant and respondent request nondisclosure and the Investigating Commissioner determines that disclosure is not required to further the interests of M.G.L. c. 151B. Notwithstanding a determination that disclosure of a conciliation agreement is not required, the Commission may publish tabulated descriptions of the results of all conciliation efforts.

(f) Review of Compliance with Conciliation Agreements. The Commission, through its individual Commissioners, from time to time, may review compliance with the terms of any conciliation agreement. Whenever the Commission has reasonable cause to believe that a respondent has breached a conciliation agreement, the General Counsel may take appropriate action, including re-opening of the matter before the Commission, and the filing of a civil action for enforcement of the terms of the conciliation agreement and seeking appropriate sanction under M.G.L. c. 151B, § 8.

(2) A Consent Order or conciliation agreement shall be an agreement between the Respondent and the Complainant and shall be subject to the approval of the Commission. It may include any or all remedies available under 804 CMR 1.02, 804 CMR 1.21 and 804 CMR 1.22. Such Consent Order or conciliation agreement shall be in writing, shall set forth the terms of the agreement, and shall be signed by the parties and counsel of record. If the Commission determines that disclosure is not necessary to further the purposes of the nondiscrimination laws, it may, upon the request of the parties, determine that a Consent Order or conciliation agreement is partially or wholly confidential in nature and therefore unavailable for public inspection.

(3) A Consent Order shall constitute a Final Order of the Commission for the purpose of judicial enforcement pursuant to M.G.L. c. 151B and 804 CMR 1.25.

(4) When a formal offer of settlement by a respondent is acceptable to the Commission but not to the complainant, the Commission may close the matter pursuant to 804 CMR 1.02 and 804 CMR 1.15(5), and the complainant may proceed in the appropriate court of competent jurisdiction under M.G.L. c. 151B, § 9. In making this determination, offers of settlement by a respondent shall be reviewed by the General Counsel or designee, to determine whether such settlement offer is substantial enough to require a determination, in the public interest, to terminate the proceeding, on notice to complainant, if the complainant unreasonably refuses to accept the offer of settlement.

The following criteria are among those that should be considered in making this determination:

- (a) probability of success after full hearing;
- (b) reasonableness of offer;
- (c) reasonableness of complainant's refusal, if any;
- (d) the amount of the complainant's economic loss, and respondent's degree of responsibility therefor;
- (e) the amount of complainant's costs, including attorneys fees, if any;
- (f) in appropriate cases, evidence of the amount of complainant's mental pain and suffering;
- (g) the egregiousness of the discrimination charged;
- (h) whether the complainant is represented by counsel;
- (i) whether the time for filing a civil action, under M.G.L. c. 151B, § 9, has elapsed;
- (j) and, whether the public interest is served by the continuation of the proceedings.

### 1.19: Post-Determination Discovery

(1) After a Probable Cause determination, any party or Commission Counsel may file a motion with the Investigating Commissioner for discovery to be completed prior to the Certification Conference, pursuant to 804 CMR 1.20, including interrogatories to parties, subpoenas requiring the production of documents, papers and other tangible things, and depositions. Ruling on the motion for discovery shall be in writing by the Investigating Commissioner.

## 804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

### 1.19: continued

(2) If discovery is granted, the moving party shall serve a written demand for the form of discovery granted by the Commission upon the person named in the motion to the Commission. Notice of at least 14 days shall be given to a person from whom discovery is sought; notice shall also be given to every other party.

(3) A party desiring to take the deposition of any person upon oral examination shall include in the notice the time and place for taking the deposition, and the name and address of each person to be examined. If a subpoena duces tecum is to be served on a person to be examined, the designation of the material to be produced as set forth in the subpoena, shall be attached to the notice. The party requesting a deposition shall make all necessary arrangements for the taking of depositions, including the cost thereof. The Investigating Commissioner may order that the testimony at a deposition be recorded by other than stenographic means. The order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. All objections made at the time of the deposition shall be noted by the person taking the deposition. Evidence objected to shall be taken subject to the objection. Subject to valid objections to admissibility, depositions or any part thereof may be used for any purpose with respect to witnesses who are unavailable at the hearing or to contradict or impeach the credibility of witnesses who are available to testify at Public Hearing.

(4) Upon motion by a party or by a person from whom discovery is sought, and for good cause shown, the Investigating Commissioner may make a protective Order limiting discovery. If the motion for a protective Order is denied, the Investigating Commissioner may order that any party permit discovery.

(5) If a party or person from whom discovery is sought fails to comply with an Order for discovery of the Investigating Commissioner, a party or Commission Counsel seeking discovery may apply to the Commission to make such Orders in regard to the failure of discovery as are just, and among others the following:

- (a) An order that the matters regarding which discovery was granted by the Commission or any other designated facts shall be taken to be established for the purpose of the case in accordance with the claim of the party seeking discovery;
- (b) An Order refusing to allow the non-complying party to support or oppose disputed claims or defenses, or prohibiting him from introducing designated matters in evidence: In lieu of any of the foregoing Orders or in addition thereto, the Commission may require the party failing to submit to discovery or the attorney advising him or both to pay the reasonable expenses, including attorney fees, and Commission expenses caused by the failure.

### 1.20: Certification to Public Hearing and Issuance of Commission Complaint

(1) Certification Conference. The Investigating Commissioner, upon his/her own motion if the circumstances so warrant or upon notification by the parties that discovery pursuant to 804 CMR 1.19 is complete or unnecessary, shall schedule a conference to determine Certification of Issues to Public Hearing. The Investigating Commissioner may issue an Order pursuant to 804 CMR 1.20(2). The Investigating Commissioner shall serve notice of the Certification Conference upon all parties and counsel of record, and the General Counsel.

(2) Written Submissions Regarding Certification to Public Hearing. The Investigating Commissioner may order the parties provide, prior to the Certification Conference a written submission concerning the following. Failure to provide all written submissions as Ordered by the Investigating Commissioner will be cause for any and all sanctions delineated at 804 CMR 1.16(1):

- (a) Stipulations
- (b) Discovery
- (c) Definition of classes
- (d) Motions
- (e) List of witnesses
- (f) Identification of facts and issues in dispute
- (g) Submission of legal memoranda in support of a party's position

804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

1.20: continued

- (h) List of proposed Issues to be Certified to Public Hearing
- (i) Any other matter which, in the judgment of the Investigating Commissioner, is likely to expedite the preparation and presentation of the case.

(3) Commission Complaint and Order of Certification to Public Hearing. When the Investigating Commissioner believes that the public interest requires a certification of issues to public hearing, she or he shall issue a complaint in the name of the Commission, pursuant to M.G.L. c. 151B, § 5. Following the Certification Conference pursuant to 804 CMR 1.20(1), and based upon the submissions of the parties at the Conference, and the record, the Investigating Commissioner shall issue an Order, constituting the Complaint of the Commission pursuant to M.G.L. c. 151B, § 5. The Order shall be in writing, served upon all parties and counsel of record, in hand or by certified mail, which:

(a) Certifies, to a Public Hearing before a Hearing Officer, Hearing Commissioner, or the Full Commission, each and every issue to be considered at Public Hearing, including:

1. Subject matter jurisdiction;
2. Complainant's allegations of discrimination;
3. Respondent's affirmative defenses;
4. Respondent's articulated legitimate nondiscriminatory reasons;
5. Complainant's allegations of pretext;
6. Relief sought, and,
7. Any other factual and legal issues.
8. And, sets a date, place, and time for the Public Hearing; or,

(b) Certifies one or more questions of law to the full Commission; or,

(c) Any other Order the Commissioner deems appropriate in the public interest, as well as fair and equitable to the parties.

(4) Intervention in the Complaint of the Commission. Any complainant may file a request for intervention under 804 CMR 1.20(3)(a). Intervention shall be permitted if the request is filed with the written submissions pursuant to 804 CMR 1.20(2) and the intervenor is the aggrieved person on whose behalf the charge is issued.

## 804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

### 1.21: Public Hearings

(1) Hearing Commissioner. The Public Hearing shall be conducted by a Commissioner, other than the Investigating Commissioner, designated by the Chair, or by a person found to be qualified by the Commission as a Hearing Officer, or by the Full Commission. The proceedings shall be governed by M.G.L. 151B, § 5, and 804 CMR 1.00.

(2) Substitution of Hearing Commissioner or Hearing Officer. In the event of the unavailability of the Hearing Commissioner or Hearing Officer to issue a written decision pursuant to 804 CMR 1.21(18); the Chair shall assign another Commissioner or Hearing Officer to hear any remaining evidence and to review the record. If a Commissioner or Hearing Officer is assigned to issue a written decision after the termination of the hearing, that Commissioner or Hearing Officer shall review the hearing transcript and record. Prior to the issuance of a final decision such Commissioner or Hearing Officer shall cause to be served upon the parties Proposed Findings of Fact, Conclusions of Law and Order, and shall afford the parties a reasonable opportunity to file objections thereto.

(3) Conduct. All parties, witnesses, counsel and others present at a hearing shall conduct themselves in a manner consistent with the standards of decorum commonly observed in the courts of the state. Where such standards are not observed, the Commission, through a Hearing Commissioner or Hearing Officer, may take such action as it deems appropriate.

(4) Request for Clarification. The Commission, the Hearing Commissioner or Hearing Officer, upon request of a party or sua sponte may, by written request to the General Counsel, seek clarification of the Complaint and Order of the Investigating Commissioner Certifying the Matter for Public Hearing, pursuant to 804 CMR 1.20(3)(a).

(5) Continuance. Any party requesting a continuance shall make such request in writing to the Commission, the Hearing Commissioner, or the Hearing Officer, and shall provide the other party(s) with a copy of the request. Continuances will be granted only upon a showing of changed circumstances or good cause. In any instance in which a party's failure to timely request a continuance results in fees or costs to the Commission, the party responsible shall incur such cost.

(6) Settlement After Commencement of Public Hearing. If, after the commencement of a Public Hearing, the matter in dispute before the Commission is settled between the parties and the settlement is acceptable to the Commission, the Commission, the Hearing Commissioner, or the Hearing Officer, in his or her discretion may assess costs including but not limited to sheriff's fees and stenographic services to any or all parties.

(7) Ex Parte Communications. In any proceeding pursuant to 804 CMR 1.21 or in any appeal therefrom, neither a party nor his/her authorized representative nor any Commission staff member who have participated in the processing of the case shall communicate ex parte for information with respect to the status of the proceeding.

#### (8) Public Hearing Default Rules.

(a) Entry of Default. Whenever any party properly served with a Certification to Public Hearing and notice of Public Hearing fails to appear at the Hearing by Him/herself or by counsel, the Commission, the Hearing Commissioner, or the Hearing Commissioner shall enter his/her default on the record. Written notice of the entry of default and of the consequences thereof pursuant to 804 CMR 1.21(7)(a) shall be served upon the Complainant and the Respondent within ten days of the entry of the default. The order of entry of default shall be interlocutory in nature and shall not constitute a final order of the Commission, unless issued by the Full Commission.

(b) Consequences of Default. If the party in default is the Complainant, the Commission, the Hearing Commissioner, or the Hearing Officer shall dismiss the complaint. If the party in default is the Respondent, the Commission, the Hearing Commissioner, or the Hearing Officer shall conduct a default hearing in lieu of and on the date scheduled for the public hearing.



804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

1.21: continued

(c) Default Hearing. At a default hearing, the Commission, the Hearing Commissioner, or the Hearing Officer shall receive any evidence proffered by the Complainant and shall determine the amount of any damages or other relief to be ordered. After the default hearing, the Commission, the Hearing Commissioner, or the Hearing Officer shall enter a Final Decision and Order pursuant to M.G.L. c. 151B, § 5 and 804 CMR 1.21(18).

(d) Removal of Default. Within ten days of receipt of the notice of entry of the default, the party in default may petition the Commission, the Hearing Commissioner, or the Hearing Officer, who may vacate the entry of default, remove the consequences of the default and reopen the case for good cause shown. The assertion of good cause of the party in default shall be in affidavit form. In any instance in which a case is reopened after entry of default, the party in default shall bear the cost of stenographer's fees incurred by the Commission on the date of entry of default.

(9) Transcript and Record. Testimony offered at a public hearing shall be either transcribed by stenographer retained by the Commission or recorded by electronic recording equipment (tape recorder). A party may arrange to have a stenographer present at any hearing at which the Commission employs electronic equipment; provided, however, that if an unofficial transcript is prepared by a stenographer employed by a party, that party must furnish the Commission with a copy of the transcript within 20 days of the receipt of said transcript from the stenographer. In the case of a tape recorded hearing, a party desiring a copy of the tape shall so request in writing, and a copy shall be made at the expense of the requesting party.

Any objections to the accuracy of a stenographically transcribed hearing are waived if not made within 20 days after the parties receive notice from the Commission of the availability of the transcript at the Boston office of the Commission.

In addition to the tapes or written transcript of the Public Hearing, the record shall consist of the exhibits in evidence including, if so submitted, the Certification to Public Hearing, complaint, answer, stipulations, motions and the dispositions thereof.

(10) Stipulations. Written stipulations may be introduced in evidence, if signed by the persons sought to be bound thereby, or by their authorized representatives. Oral stipulations may be made on the record during the course of a Public Hearing.

(11) Evidence. The Commission shall not be bound by the rules of evidence observed by courts except for the rules of privilege (see M.G.L. c. 30A, § 11(2)). So far as practicable, however the Commission shall follow the rules of evidence then prevailing in the courts of the Commonwealth.

The Commission adopts Rule 803(8) of the Federal Rules of Evidence which permits the admission, as an exception to the hearsay rule, of records, reports, statements or data compilations of public agencies setting forth factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information indicate lack of trustworthiness.

Evidence unrelated to the issues Certified pursuant to 804 CMR 1.20 shall be deemed irrelevant and, therefore, inadmissible.

(12) Administrative Notice. The Commission, the Hearing Commissioner, or the Hearing Officer may take administrative notice of matters as might be judicially noticed by the courts of the United States or of the Commonwealth, and of technical or general facts within its specialized areas of knowledge.

(13) Preservation of Objections to Rulings of the Investigating Commissioner. A party may, in order to preserve a defense or an argument, make an offer of proof to the Commission, the Hearing Commissioner or Hearing Officer consisting of an Order of the Investigating Commissioner. Such Offer shall be taken into the record. Any Order of the Investigating Commissioner so offered may be the basis of further review or appeal.

(14) Oral Argument. The Commission, the Hearing Commissioner, or the Hearing Officer, may, in his or her discretion, allow a reasonable time to the parties for oral argument.

## 804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

### 1.21: continued

(15) Briefs and/or Proposed Findings of Fact. Briefs and/or proposed Findings of Fact may be filed by parties or by any interested person before or during the course of a hearing, or within such time thereafter as the Commission, the Hearing Commissioner, or the Hearing Officer may designate.

Any brief or proposed findings of fact, submitted pursuant to this regulation must be submitted on paper, and on 3.5" floppy disk readable in IBM format, ASCII only, unless granted a waiver from this requirement by the Commission, the Hearing Commissioner or the Hearing Officer.

(16) Other Submissions. The Commission may allow the parties, after a showing of good cause, to file evidentiary documents or exhibits within a reasonable time subsequent to the completion of the hearing. If a request for such subsequent filing is granted, on or before the date set for filing, the requesting party shall send copies of all documents of exhibits which are the subject of the request to all other parties. If such requirement for copies is impracticable, the Commission may in the alternative allow reasonable inspection of the original by all parties. The Commission may also require on its own motion that the parties file evidentiary documents or exhibits subsequent to the completion of the hearing.

(17) Assessment of Costs When Imposed by the Commission. Costs may be assessed by the Commission following 804 CMR 1.16, (Default); 804 CMR 1.14 (Issuance and Service of Subpoenas), 804 CMR 1.19(3) (Discovery - Depositions), 804 CMR 1.21(5) (Continuances), 804 CMR 1.21(6) (Settlement After Commencement of Public Hearing), and 804 CMR 1.21(8) (Public Hearing Default).

(18) Finding and Order. The Commission, the Hearing Commissioner, or the Hearing Officer shall issue a decision in writing which shall contain all Findings of Fact and Conclusions of Law necessary to address each and every issue Certified pursuant to 804 CMR 1.20, and to support the decision, and any and all Orders provided under 804 CMR 1.21(18) which are consistent with such Findings of Fact and Conclusions of Law. The Commission, the Hearing Commissioner or the Hearing Officer may not consider issues not Certified pursuant to 804 CMR 1.20. The parties shall be notified in writing of their rights to appeal such decision. A copy of the decision shall be served upon each party, his or her attorney of record, and the Attorney General.

### 1.22: Remedies

(1) Scope. The Commission shall issue such Orders and fashion such relief as will effectuate the purposes of the statutes enforced by the Commission.

(2) In any case brought as a class action, the Commission may, when appropriate, order that all remedies shall apply to member(s) of the class.

### 1.23: Full Commission Review

#### (1) Request for Review of Decision of a Hearing Commissioner or Hearing Officer.

(a) Any party aggrieved by a final decision of a Hearing Commissioner or Hearing Officer may, within ten days of receipt of the decision, file a notice of requested review with the Commission. Within 30 days of receipt of the decision, the appellant shall file with the Commission a petition setting forth:

1. facts showing the appellant to be aggrieved,
2. all matters alleged to have been erroneously decided,
3. all other matters on which the appellant relies; and
4. the relief to which the appellant believes he/she is entitled, which relief may be requested in the alternative.

(b) Stay of Order. The filing of a request for review of the decision of the Hearing Commissioner shall not operate as a stay of execution of the Order of the Hearing Commissioner or Hearing Officer, unless specifically ordered by the Commission.

(c) Commissioners. The Investigating Commissioner shall not participate in the deliberations of the Commission except when, necessary to create a quorum of the Commission. The Hearing Commissioner shall participate in the review of his/her decision unless such participation is impracticable.

804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

1.23: continued

(d) Oral Argument. The Commission may, in its discretion, order oral argument on an appeal petition.

(e) Intervention in the Review.

1. The party filing a petition for review of the decision of the Hearing Commissioner or Hearing Officer shall serve a copy of the petition upon all parties to the proceeding in which the decision sought to be reviewed was made.

2. Any party to the proceeding before the Hearing Commissioner or Hearing Officer shall have the right to intervene in the review proceeding by filing a notice of intervention stating his/her interest and the position he/she takes with respect to the decision under appeal.

3. The notice of intervention shall be filed within ten days of receipt of the review petition and shall be served on all parties by the intervenor.

4. The Commission may in its discretion permit other interested persons to intervene in the review proceeding, if such person(s) are substantially and specifically affected by the proceedings.

(f) Record of Review. The review petition shall be confined to the record.

(g) Additional Evidence. If application is made to the Commission for leave to present additional evidence, and it is shown to the satisfaction of the Commission that the additional evidence is material to the issues in the case, and that there was good reason for failure to present it in the proceeding before the Hearing Commissioner or Hearing Officer, the Commission may order that the additional evidence be taken before the Hearing Commissioner or Hearing Officer upon such conditions as the Commissioner deems proper.

(h) Commission Decision. After review of the decision of the Hearing Commissioner or Hearing Officer, the Commission may affirm the decision, or remand the matter for further proceedings before the Hearing Commissioner or Hearing Officer; or set aside or modify the decision, if it determines that the substantial rights of any party may have been prejudiced because the decision is:

1. In violation of constitutional provisions; or
2. In excess of the statutory authority or jurisdiction of the Commission; or
3. Based on an error of law; or
4. Made on unlawful procedure; or
5. Unsupported by substantial evidence; or
6. Arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law, and/or the Order of the Investigating Commissioner, certifying the issues to public hearing.

(2) Review of Decisions of Hearing Officers. The Full Commission may review the final decision of a Hearing Officer sua sponte. In addition, the Investigating Commissioner, on the advice of the General Counsel, may request the Full Commission review the decision of a Hearing Officer.

(a) The Commission may order oral argument, and/or order the parties or the General Counsel submit memoranda of law or fact. The Commission shall, under such circumstances, take action as delineated at 804 CMR 1.23(1), or any other order it deems necessary in the interests of justice.

1.24: Judicial Review

(1) Definition of Final Commission Order. For the purpose of judicial review pursuant to M.G.L. c. 151B, § 6, the Decision of the Full Commission on appeal from the Decision of the Hearing Commissioner pursuant to 804 CMR 1.23(1)(h), or issued by the Commission pursuant to 804 CMR 1.23(2), shall constitute the Final Order of the Commission.

(2) Who May Obtain Judicial Review of a Final Commission Order. Judicial review of a Final Order of the Commission may be obtained by the Complainant, Respondent or other person aggrieved by such Order pursuant to M.G.L. c. 151B, § 6. The Commission may designate counsel of the party who prevailed in Commission proceedings as agent of the Commission for the purpose of defending the Decision during judicial review. Designation of outside counsel as agent of the Commission under 804 CMR 1.24(2) and 804 CMR 1.25(2) shall be made in a writing signed by the General Counsel of the Commission.

## 804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

### 1.25: Judicial Enforcement

(1) Definition of Final Commission Order. Where no party files a timely appeal to the Full Commission of a final decision of a Hearing Commissioner, that decision shall constitute the Final Order of the Commission for the purposes of judicial enforcement. If an appeal to the Full Commission is timely filed, or the decision is subject to automatic review pursuant to 804 CMR 1.23(2), the Commission decision of the Full Commission shall constitute the Final Order of the Commission for the purposes of judicial enforcement. Predetermination settlements approved by the Commission following 804 CMR 1.15(6)(b) and Consent Orders entered into by the Commission pursuant to 804 CMR 1.18 may constitute Final Orders of the Commission for the purposes of judicial enforcement.

(2) Who May Obtain Judicial Enforcement of a Final Commission Order. A party to a Consent Order, pre-determination settlement, or a person affected by a final decision and Order of the Commission may file a complaint with the Commission alleging violation(s) of said Consent Order, pre-determination settlement, or final decision and Order. The Commission shall proceed to obtain enforcement by filing a petition in the appropriate state court pursuant to M.G.L. c. 151B, § 6; the Commission may appear in court at enforcement proceedings by one of its attorneys, or it may designate counsel for the party aggrieved by the alleged violation as agent of the Commission for the purpose of obtaining enforcement, through the General Counsel.

(3) The Commission may seek to enforce the provisions of M.G.L. c. 151B, c. 151C, or c. 272, §§ 92A, 98, or 98A, or 804 CMR 1.00 et seq. by utilization of the procedures set forth in M.G.L. c. 151B, §§ 5, 8, M.G.L. c. 214 § 3 (12) or (13) or any other lawful means as the interest of justice demand.

### REGULATORY AUTHORITY

804 CMR 1.00: M.G.L. c. 151B, c. 151C and c.272, § 98.