

**220-RICR-80-05-2**

## **TITLE 220 – DEPARTMENT OF ADMINISTRATION**

### **CHAPTER 80 – DIVERSITY, EQUITY AND OPPORTUNITY**

#### **SUBCHAPTER 05 – EQUAL OPPORTUNITY**

PART 2 – Rules of Practice and Procedure for Hearings on Complaints Issued by the State Equal Opportunity Administrator

#### **2.1 Authority**

These Rules and Regulations are promulgated pursuant to R.I. Gen. Laws § 42-11-2.7(d) and R.I. Gen. Laws § 28-5.1-3.2(b).

#### **2.2 Scope**

These Rules shall govern hearings on complaints initiated by the State Equal Opportunity Office pursuant to R.I. Gen. Laws § 28-5.1-3.2(a).

#### **2.3 Definitions**

A. Wherever used in these Rules and Regulations, the following terms shall be construed as follows unless the context in which they are used clearly requires a different meaning:

1. “Administrator” means the State Equal Opportunity Administrator as established by R.I. Gen. Laws § 28-5.1-3(e).
2. “Agency” means any agency of any department or division within State government excluding the legislative branch.
3. “Associate director” means the Associate Director of the Office of Diversity, Equity and Opportunity as established by R.I. Gen. Laws § 42-11-2.7(b).
4. “Contested case” means a matter for which the Office has initiated a complaint pursuant to R.I. Gen. Laws § 28-5.1-3.2(a).
5. “Director” means the Director of the Department of Administration as established by R.I. Gen. Laws § 42-11-1.
6. “Employee” means any individual who is a State employee or was a State employee or was an applicant for State employment.

7. "Hearing officer" means the Administrator of Adjudication as defined by R.I. Gen. Laws § 36-4-40.1, or another Hearing Officer designated by the Director.
8. "Office" means the State Equal Opportunity Office as established by R.I. Gen. Laws § 28-5.1-2(a).
9. "Order" means an Order made pursuant to R.I. Gen. Laws § 28-5.1-3.2(c) requiring a respondent to a complaint to cease and desist from any unlawful discriminatory practice and/or to take any affirmative action, including, but not limited to, hiring, reinstatement, transfer, or upgrading employees, with or without back pay, or dismissal, that may be necessary to secure compliance with any applicable affirmative action plan or with State or Federal law. The Office shall not issue an Order without the approval of the Associate Director.
10. "Party" means the Administrator, in his or her official capacity, the Agency named in the complaint, and any Employee deemed by the Hearing Officer to have standing.

## **2.4 Complaints**

- A. The Administrator, with the approval of the Associate Director, may initiate a complaint in accordance with R.I. Gen. Laws § 28-5.1-3.2(a).
- B. No complaint shall be issued unless the Office has reason to believe that the Agency willfully failed to comply with the requirements of any applicable affirmative action plan or of R.I. Gen. Laws § 28-5.1-1 *et seq.*, or the Agency failed to meet the standards of good faith effort, reasonable basis, or reasonable action, as defined in guidelines promulgated by the Federal Equal Employment Opportunity Commission as set forth in 29 C.F.R. Part 1607.
- C. All complaints issued by the Administrator shall name the Agency as the respondent. No Employee shall be named by the Office as a respondent to the complaint.
- D. Any Employee may make motion to the Hearing Officer to become a Party.
- E. The Administrator shall serve the complaint upon the Agency's head in accordance with R.I. Gen. Laws § 28-5.1-3.2(b). A copy of the complaint shall be sent to the Director.
- F. The Agency shall respond to the complaint and appear at the hearing in accordance with R.I. Gen. Laws § 28-5.1-3.2(b).

## **2.5 Standard**

The Hearing Officer shall determine whether the Agency willfully failed to comply with the requirements of any applicable affirmative action plan or of R.I. Gen. Laws § 28-5.1-1 *et seq.*, or the Agency failed to meet the standards of good faith effort, reasonable basis, or reasonable action, as defined in guidelines promulgated by the Federal Equal Employment Opportunity Commission as set forth in 29 C.F.R. Part 1607. The Hearing Officer shall issue a written decision in accordance with their determination.

## **2.6 Hearings In General**

- A. All Parties should be afforded an opportunity to respond and present evidence and argument on all issues involved.
- B. Agencies must appear at hearings by appearance of legal counsel. Individual Employees, once named as Parties by the Hearing Officer, may represent themselves or be represented by legal counsel at their own expense. Consistent with R.I. Gen. Laws § 11-27-2, "Practice of Law," any person accompanying a Party who is not a lawyer (certified member of the bar of the State of Rhode Island) cannot represent the Party in the hearing.
- C. Continuances and postponements may be granted by the Hearing Officer in his or her discretion.
- D. Disposition may be made of any Contested Case by stipulation, agreed settlement, consent order or default.
- E. Should the Hearing Officer determine that written memoranda are required, the Parties will be notified by the Hearing Officer of the need to file a written document which discusses the issues of the case. Memoranda of Law may always be offered in support of arguments offered by the Parties.
- F. The Administrator may, when he or she deems appropriate, retain independent legal counsel to prosecute any Contested Case.
- G. A record of each hearing shall be made. Any Party may request a transcript at its own expense. If a transcript is requested by any Party, a copy of the transcript shall be provided, at no cost, to the Hearing Officer.

## **2.7 Conduct of Hearings**

- A. Hearings shall be conducted by the Hearing Officer who shall have authority to examine witnesses, to rule on motions, and to rule upon the admissibility of evidence.
- B. The hearing shall be convened by the Hearing Officer. Appearances shall be noted and any motions or preliminary matters shall be taken up. Each Party shall

have the opportunity to present its case generally on an issue by issue basis, by calling and examining witnesses and introducing written evidence.

- C. The Administrator shall first present his or her case followed by presentation of the Agency and any other Parties.
- D. The Hearing Officer shall have the authority to continue or recess any hearing and to keep the record open for the submission of additional evidence.
- E. If for any reason a Hearing Officer cannot continue on a case, another Hearing Officer will be appointed who will become familiar with the record and perform any function remaining to be performed without the necessity of repeating any previous proceedings in the case.
- F. Each Party shall have the opportunity to examine witnesses and cross-examine opposing witnesses on any matter relevant to the issues in the case.
- G. Any objections to testimony or evidence and the basis for the objection shall be made at the time the testimony or evidence is offered.
- H. The Hearing Officer may question any Party or any witness for the purpose of clarifying his or her understanding or to clarify the record.
- I. The scope of the hearing shall be limited to those matters specifically outlined in the complaint.
- J. Written evidence will be marked for identification. If the original is not readily available, written evidence may be received in the form of copies or excerpts. Upon request, Parties shall be given an opportunity to compare the copy with the original.
- K. Findings of fact shall be based solely on the evidence and matters officially noticed.
- L. If a Party fails to attend or participate in the hearing as requested, the Hearing Officer may issue a default ruling against such Party.

## **2.8 Records of Proceedings**

- A. The record in a Contested Case shall include:
  - 1. All pleadings, motions, intermediate rulings;
  - 2. Evidence received or considered;
  - 3. A statement of matters officially noticed;
  - 4. Questions and offers of proof and rulings thereon;

5. Proposed findings and exceptions;
6. Any decision, opinion, or report by the Hearing Officer at or after the hearing; and
7. All memoranda or data submitted to the Hearing Officer in connection with the Hearing Officer's consideration of the case.

## **2.9 Ex Parte Communications**

There shall be no communications between the Hearing Officer and a Party or any of their representatives regarding any issue of fact or law in a case, without notice and opportunity for all Parties to participate.

## **2.10 Rules of Evidence**

- A. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The Rules of Evidence as applied in civil cases in the Superior Courts of this State shall be followed; but, when necessary to ascertain facts not reasonably susceptible of proof under the rules, evidence not admissible under those rules may be submitted if it is of a type commonly relied upon by reasonably prudent men and women in the conduct of their affairs. The Hearing Officer shall give effect to the Rules of Privilege recognized by law. Objections to evidence may be made and shall be noted in the record.
- B. A copy the Hearing Officer's decision shall be served upon the Associate Director and all Parties to the proceeding.
- C. In the event a decision is found in favor of the Administrator, and after approval by the Associate Director, the Office may issue an Order.
- D. Any Order issued by the Office shall be considered a Final Order and may be appealed in accordance with the Administrative Procedures Act, R.I. Gen. Laws § 42-35-1 *et seq.*

## **2.11 Severability**

If any provision of this Regulation or the application thereof to any person or circumstances is held invalid or unconstitutional, the invalidity or unconstitutionality shall not affect other provisions or applications of this Regulation which can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this Regulation are severable.