

STATE OF NEW YORK

9604

IN ASSEMBLY

January 25, 2018

Introduced by M. of A. STECK -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the executive law, in relation to the state employees equal employment opportunity act

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The executive law is amended by adding a new article 14-A
2 to read as follows:

ARTICLE 14-A

STATE EMPLOYEES EQUAL EMPLOYMENT OPPORTUNITY ACT

Section 280. Purposes of article.

6 280-a. Definitions.

7 280-b. Policies.

8 280-c. Agency program.

9 280-d. Agency processing.

10 280-e. Pre-complaint processing.

11 280-f. Individual complaints.

12 280-g. Dismissals of complaints.

13 280-h. Investigation of complaints.

14 280-i. Hearings.

15 280-j. Class complaints.

16 280-k. Relationship to negotiated grievance procedure.

17 280-l. Appeals to the commission.

18 280-m. Decisions on appeals.

19 280-n. Remedies and relief.

20 280-o. Compliance with final decisions.

21 280-p. Enforcement of final decisions.

22 280-q. Interim relief.

23 280-r. Joint processing and consolidation of complaints.

24 280-s. Appeals of decisions of the commission.

25 280-t. EEO group statistics.

26 § 280. Purposes of article. It is the policy of the state of New York
27 to provide equal opportunity in employment for all employees of the
28 state with the same protections provided to employees in the private

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 sector as set forth in article fifteen of this chapter, constituting the
2 human rights law. This act shall be known as the "state employees equal
3 employment opportunity act."

4 § 280-a. Definitions. 1. For purposes of this article, the term
5 "discrimination" shall include sexual harassment and pregnancy discrimi-
6 nation as forms of prohibited discrimination.

7 2. The term "EEO" shall mean equal employment opportunity.

8 § 280-b. Policies. 1. No state employee or person acting in support of
9 such employee, whether pre-investigation or during the processing of a
10 complaint, shall be subject to retaliation for opposing any practice
11 made unlawful by virtue of the New York state human rights law.

12 2. Every state employee accused of discrimination covered under arti-
13 cle fifteen of this chapter may use the procedures set forth herein to
14 challenge the validity of such accusations and any adverse employment
15 action imposed as a result of such accusations. Provided, however, that
16 any relief granted herein for an employee wrongfully accused of discrim-
17 ination shall be limited to the affected employee, as no employee making
18 an accusation of discrimination shall be retaliated against in any way.

19 3. (a) This article applies to the state, all agencies, branches, or
20 departments or divisions thereof, the executive and legislative branches
21 at all levels of government, a county, city, town, village or any other
22 municipal corporation, a school district or any governmental entity
23 operating a public school, college or university, a public improvement
24 or special district, a public authority, commission, or public benefit
25 corporation, or any other public corporation, agency or instrumentality
26 or unit of government which exercises governmental powers under the laws
27 of the state. The word "agency" as used in this article shall embrace
28 all of the aforementioned governmental entities.

29 (b) This article applies to all class and individual complaints of
30 discrimination cognizable under article fifteen of this chapter, the
31 equal pay act set forth in article six of the labor law, and article
32 twenty-three-A of the correction law.

33 4. All notices required in this chapter to be given to an individual
34 employee shall be in writing and shall be signed by the aggrieved or
35 affected individual.

36 § 280-c. Agency program. 1. Every agency shall maintain a continuing
37 affirmative action program to promote equal opportunity and to identify
38 and eliminate discriminatory practices and policies. In support of such
39 program, which shall be submitted to the New York state commission on
40 human rights for review and approval, the agency shall:

41 (a) provide sufficient resources to its equal employment opportunity
42 program to ensure efficient and successful operation;

43 (b) provide for the prompt, fair and impartial processing of
44 complaints in accordance with this article;

45 (c) conduct a continuing campaign to eradicate every form of prejudice
46 or discrimination from the agency's personnel policies, practices and
47 working conditions;

48 (d) communicate the agency's equal employment opportunity policy and
49 program and its employment needs to all sources of job candidates with-
50 out regard to any prohibited characteristic set forth in the human
51 rights law, the equal pay act, and article twenty-three-A of the
52 correction law and provide recruitment assistance on a continuing basis;

53 (e) review, evaluate, and control managerial and supervisory perform-
54 ance in such a manner as to ensure continuing affirmative application
55 and vigorous enforcement of the policy of equal opportunity as set forth
56 in this article, and provide orientation, training and advice to manag-

ers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;

(f) take appropriate disciplinary action against employees who engage in discriminatory practices;

(g) make reasonable accommodation to the religious needs of applicants and employees when those accommodations can be made without undue hardship on the business of the agency;

(h) make reasonable accommodation to the known physical or mental limitations of qualified applicants and employees with disabilities unless the accommodation would impose an undue hardship on the operation of the agency's program. In this regard, an unpaid leave of absence to enable an employee to recover from an episodic manifestation of a disability shall constitute reasonable accommodation;

(i) provide recognition to employees, supervisors, managers and units demonstrating superior accomplishment in equal employment opportunity;

(j) establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort;

(k) provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs, and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;

(l) inform its employees and recognized labor organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation; and

(m) participate at the community level with other employers, with schools and universities, and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability.

2. In order to implement its program, each agency shall, subject to review and approval by the New York state commission on human rights:

(a) develop the plans, procedures and regulations necessary to carry out its program;

(b) establish or make available an alternative dispute resolution program. Such program must be available for both the pre-complaint process and the formal complaint process;

(c) appraise its personnel operations at regular intervals to assure their conformity with its program and this statute;

(d) designate: a director of EEO; EEO officer or officers; such special emphasis program managers, including, but not limited to, people with disabilities program, women's program, minority employment program; and clerical and administrative support as may be necessary to carry out the functions described in this chapter in all organizational units of the agency and at all agency installations. The EEO director shall be under the immediate supervision of the agency head, provided, however, that no agency shall be required to hire additional personnel to effectuate this mandate unless this mandate cannot be complied with unless additional personnel are hired. The functions in this paragraph may be consolidated in one existing employee for appropriate sized agencies;

(e) make written materials available to all employees and applicants informing them of the variety of equal employment opportunity programs and administrative and judicial remedial procedures available to them and prominently post such written materials in all personnel and EEO offices and throughout the workplace;

(f) ensure that full cooperation is provided by all agency employees to EEO counselors, agency EEO personnel, and EEO investigators in the processing and resolution of pre-complaint matters and complaints

1 involving the agency and that full cooperation is provided to the
2 commission in the course of appeals, including granting investigators
3 and the commission routine access to personnel, email, and other records
4 of the agency when required in connection with an investigation; and

5 (g) publicize to all employees and post at all times the names, busi-
6 ness telephone numbers and business addresses of the EEO counselors
7 (unless the counseling function is centralized, in which case only one
8 telephone number and address need be publicized and posted), a notice of
9 the time limits and the necessity of contacting a counselor before
10 filing a complaint, and the telephone numbers and addresses of the EEO
11 director, EEO officer or officers and special emphasis program managers,
12 or other person responsible for EEO matters.

13 3. Under each agency program, the EEO director shall be responsible
14 for:

15 (a) advising the head of the agency with respect to the preparation of
16 equal employment opportunity plans, procedures, regulations, reports and
17 other matters pertaining to the policy set forth in section two hundred
18 eighty of this article and the agency program;

19 (b) evaluating from time to time the sufficiency of the total agency
20 program for EEO and reporting to the head of the agency with recommenda-
21 tions as to any improvement or correction needed, including remedial or
22 disciplinary action with respect to managerial, supervisory or other
23 employees who have failed in their responsibilities;

24 (c) when authorized by the head of the agency, making changes in
25 programs and procedures designed to eliminate discriminatory practices
26 and to improve the agency's program for equal employment opportunity;

27 (d) providing for counseling of aggrieved individuals and for the
28 receipt and processing of individual and class complaints of discrimi-
29 nation; and

30 (e) assuring that individual complaints are fairly and thoroughly
31 investigated and that the agency cooperates with the investigation in a
32 timely manner in accordance with this article.

33 4. The commission shall provide directives, instructions, forms and
34 other materials as needed to carry out the commands and objectives of
35 this article.

36 § 280-d. Agency processing. 1. Each agency shall adopt procedures for
37 processing individual and class complaints of discrimination that are
38 consistent with the requirements of this article and with the
39 instructions for complaint processing as set forth in directives of the
40 New York state commission on human rights.

41 2. The commission shall periodically review agency resources and
42 procedures to ensure compliance with this article.

43 § 280-e. Pre-complaint processing. 1. Aggrieved persons who believe
44 they have suffered discrimination or retaliation prohibited in the New
45 York state human rights law must consult an EEO counselor prior to
46 filing a complaint in order to try to informally resolve the matter.

47 2. Each agency shall make such a counselor available to such person,
48 provided, however, that such EEO counselor must notify such person in a
49 writing signed by that person or his or her representative the right to
50 utilize as an alternative an EEO counselor provided by the New York
51 state commission on human rights.

52 3. An aggrieved person must initiate contact with a counselor within
53 ninety days of the date of the matter alleged to be discriminatory. The
54 ninety days shall run from the time when the aggrieved person knew or
55 should have known through information readily available to him or her
56 that the discriminatory act or challenged personnel action had occurred.

1 4. The agency or the commission shall extend the ninety day time limit
2 in subdivision three of this section when the individual shows that he
3 or she was not notified of the time limits, that despite due diligence
4 he or she was prevented by circumstances beyond his or her control from
5 contacting the counselor within the time limits, or for other reasons
6 considered sufficient by the agency or the commission.

7 5. At the initial counseling session, counselors must advise individ-
8 uals in writing of their rights and responsibilities, including the
9 right to request an investigation, the right to request a hearing, the
10 duty to mitigate damages, administrative and court time frames, and that
11 only the claims raised in pre-complaint counseling, or issues or claims
12 like, or related to, issues or claims raised in pre-complaint coun-
13 seling, may be alleged in a subsequent complaint filed with the agency,
14 except as provided herein. Counselors must advise individuals of their
15 duty to keep the agency and commission informed of their current address
16 and, where applicable, to serve copies of relevant papers on the agency.
17 The notice shall include a notice of the right to file a class
18 complaint. If the aggrieved person informs the counselor that he or she
19 wishes to file a class complaint, the counselor shall explain the class
20 complaint procedures and the responsibilities of a class agent.

21 6. Counselors shall advise aggrieved persons that, where the agency
22 agrees to offer alternative dispute resolution in the particular case,
23 they may choose between participation in the alternative dispute resolu-
24 tion program and the counseling activities provided for herein.

25 7. Counselors shall conduct counseling activities in accordance with
26 the directives of the commission.

27 8. When advised that a complaint has been filed by an aggrieved
28 person, the counselor shall submit a written report within fifteen days
29 to the agency office that has been designated to accept complaints and
30 the aggrieved person concerning the issues discussed and actions taken
31 during counseling. The aggrieved person may respond with any objections
32 that the counselor's report does not fairly express the issues discussed
33 and the actions taken during counseling.

34 9. Unless the aggrieved person agrees in writing to a longer coun-
35 seling period, or the aggrieved person chooses an alternative dispute
36 resolution procedure provided by the agency, the counselor shall conduct
37 the final interview with the aggrieved person within thirty days of the
38 date the aggrieved person contacted the EEO office to request coun-
39 seling. If the matter has not been resolved, the aggrieved person shall
40 be informed in writing by the counselor, not later than the thirtieth
41 day after contacting the counselor, of the right to file a discrimi-
42 nation complaint. The notice shall inform the complainant of the right
43 to file a discrimination complaint within thirty days of receipt of the
44 notice, of the appropriate official with whom to file a complaint, and
45 of the complainant's duty to assure that the agency is informed imme-
46 diately if the complainant retains counsel or a representative.

47 10. Prior to the end of the thirty day counseling period, the
48 aggrieved person may agree in writing with the agency to postpone the
49 final interview and extend the counseling period for an additional peri-
50 od of no more than sixty days, which shall extend the time by like
51 amount for any other notices called for in this section.

52 11. Where the aggrieved person chooses to participate in an alterna-
53 tive dispute resolution procedure in accordance with this section, the
54 pre-complaint processing period shall be ninety days. If the claim has
55 not been resolved before the ninetieth day, the notice of right to file
56 a complaint shall be issued.

12. The counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The counselor shall not reveal the identity of an aggrieved person who consulted the counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint under this section from that person involving that same matter.

§ 280-f. Individual complaints. 1. A complaint must be filed with the agency that allegedly discriminated against the complainant. Such agency shall file a copy of the complaint with the commission with notice to the complainant. Should the agency fail to file a copy of the complaint to the commission, all deadlines set forth herein shall be extended until the time of such transmission. An individual complainant may also file a copy of the complaint with the commission.

2. A complaint must be filed within thirty days of receipt of the notice required by subdivision nine of section two hundred eighty-e of this article.

3. A complaint must contain a signed statement from the person claiming to be aggrieved or of an attorney representing that he or she is the attorney for the aggrieved person. This statement must be sufficiently precise to identify the aggrieved individual and the agency and to describe generally the action or actions or practice or practices that form the basis of the complaint. The complaint must also contain a telephone number and address where the complainant or the representative can be contacted. The complaint should also include a list of witnesses to be contacted during the investigation and a brief description of the relevant information known to each.

4. A complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint. After requesting a hearing, a complainant may file a motion with the administrative judge to amend a complaint to include issues or claims like or related to those raised in the complaint.

5. The agency shall acknowledge receipt of a complaint or an amendment to a complaint in writing and inform the complainant of the date on which the complaint or amendment was filed. The agency shall advise the complainant in the acknowledgment of his or her right to a hearing and the commission's address where a request for a hearing shall be sent. Such acknowledgment shall also advise the complainant that:

(a) The complainant has the right to appeal the final action on or dismissal of a complaint to the commission; and

(b) The agency is required to initiate an impartial and appropriate investigation of the complaint within one hundred eighty days of the filing of the complaint unless the parties agree in writing to extend the time period. When a complaint has been amended, the investigator shall complete his or her investigation within one hundred eighty days after the last amendment to the complaint or three hundred sixty days after the filing of the original complaint, whichever is earlier, except that the complainant may request a hearing from an administrative judge on the consolidated complaints any time after one hundred eighty days from the date of the first filed complaint.

§ 280-g. Dismissals of complaints. 1. Prior to a request for a hearing in a case, the agency shall dismiss an entire complaint that:

(a) fails to allege facts asserting a claim of discrimination that is cognizable under the human rights law, the equal pay act, or article twenty-three-A of the correction law, or states the same claim that is pending before or has already been decided by the agency or commission;

1 (b) fails to comply with applicable time limits, as extended, or that
2 raises a matter that has not been brought to the attention of a counse-
3 lor and is not like or related to a matter that has been brought to the
4 attention of a counselor;

5 (c) is the basis of a pending civil action in the New York state
6 supreme court in which the complainant is a party, or that was the basis
7 of a prior civil action decided by the New York state supreme court in
8 which the complainant was a party. An aggrieved individual shall retain
9 the right to bring a civil action in New York state supreme court
10 concerning the subject matter of the complaint if the investigation of
11 the complaint is not completed within one hundred eighty days of the
12 complaint, if the complaint is not amended, or, if the complaint is
13 amended, within the earlier of one hundred eighty days after the last
14 amendment to the complaint or three hundred sixty days after the filing
15 of the original complaint, or a hearing has not been commenced within
16 one hundred eighty days of the request for same;

17 (d) raises the matter in a negotiated grievance procedure that permits
18 allegations of discrimination as described in this article;

19 (e) is moot on the ground that the remedy requested by the complainant
20 has already been adopted by the agency;

21 (f) cannot be pursued because the complainant cannot be located,
22 provided that reasonable efforts have been made to locate the complain-
23 ant and the complainant has not responded within thirty days to a notice
24 of proposed dismissal sent to his or her last known address;

25 (g) the agency has provided the complainant with a written request to
26 provide relevant information or otherwise proceed with the complaint,
27 and the complainant has failed to respond within thirty days of its
28 receipt. A complaint may be dismissed for failure to cooperate, but must
29 be adjudicated if sufficient information for that purpose is already
30 available notwithstanding the complainant's failure to respond to
31 further requests for information; or

32 (h) alleges dissatisfaction with the processing of a previously filed
33 complaint to which the procedures of this article are applicable.

34 2. Where the agency believes that some but not all of the claims in a
35 complaint should be dismissed for the reasons contained in paragraph (a)
36 of subdivision one of this section, the agency shall notify the
37 complainant in writing of its determination, the rationale for that
38 determination, and that those claims will not be investigated, and shall
39 place a copy of the notice in the investigative file.

40 3. An aggrieved person may request review of a determination under
41 subdivision two of this section by an administrative judge if the
42 complaint is dismissed in its entirety. If a portion of a complaint is
43 dismissed, the remainder shall proceed to investigation and the dismiss-
44 al of a portion of the complaint shall be reviewable by an administra-
45 tive judge when a hearing is requested on the remainder of the complaint
46 after the investigation is complete.

47 § 280-h. Investigation of complaints. 1. The investigation of
48 complaints shall be conducted by an investigator approved by the commis-
49 sion. Such investigator may be an employee of the agency but in no
50 event may the agency appoint an investigator not approved by the commis-
51 sion.

52 2. The commission shall promulgate regulations to assure that the
53 investigation is conducted in an independent manner not subject to
54 influence by the agency. In accordance with such regulations, the inves-
55 tigator shall develop an impartial and appropriate factual record upon
56 which to make findings on the claims raised by the written complaint. An

1 appropriate factual record is one that allows a reasonable fact finder
2 to draw conclusions as to whether discrimination occurred. Investi-
3 gators may use interviews, an exchange of letters or memoranda, interro-
4 gatories, fact-finding conferences or any other fact-finding methods
5 that efficiently and thoroughly address the matters at issue.

6 3. Investigators may not rely on statements from witnesses without
7 obtaining the witness's signature on the statement under oath from a
8 notary public. Any such statement must include an acknowledgement by
9 the witness that the statement is the witness's own words, that the
10 witness has not been threatened or coerced into making the statement,
11 and that the witness has been advised that a witness cannot be retali-
12 ated against for participating in an EEO investigation.

13 4. When the complainant, or the agency against which a complaint is
14 filed, or its employees fail without good cause shown to respond fully
15 and in timely fashion to requests by the investigator for documents,
16 records, comparative data, statistics, affidavits, or the attendance of
17 witness or witnesses, the investigator must note that fact.

18 5. The investigator, the administrative judge, or the commission shall
19 on appeal, in appropriate circumstances:

20 (a) draw an adverse inference that the requested information, or the
21 testimony of the requested witness, would have reflected unfavorably on
22 the party refusing to provide the requested information;

23 (b) consider the matters to which the requested information or testi-
24 mony pertains to be established in favor of the opposing party;

25 (c) exclude other evidence offered by the party failing to produce the
26 requested information or witness;

27 (d) issue a decision fully or partially in favor of the opposing
28 party, or;

29 (e) take such other actions as it deems appropriate.

30 6. No person shall investigate any claim unless such person has appro-
31 priate qualifications meeting criteria established by the commission and
32 is on a list of approved investigators established by the commission.

33 7. The investigator shall complete his or her investigation within one
34 hundred eighty days of the date of filing of an individual complaint. By
35 written agreement within such time period, the complainant and the
36 respondent agency may voluntarily extend the time period for not more
37 than an additional ninety days.

38 8. Within one hundred eighty days from the filing of the complaint, or
39 where a complaint was amended, within the earlier of one hundred eighty
40 days after the last amendment to the complaint or three hundred sixty
41 days after the filing of the original complaint, the investigator shall
42 provide the complainant and the agency with a copy of his or her deci-
43 sion and a complete unsanitized copy of the investigative file, and
44 shall notify the complainant that, within thirty days of receipt of the
45 investigative file, the complainant has the right to request a hearing
46 and decision from an administrative judge of the commission who shall
47 consider the matter de novo on the record compiled by the investigator
48 together with all evidence offered by the parties at the hearing.

49 9. The investigator shall state whether or not there is probable cause
50 to believe discrimination or retaliation occurred.

51 10. Either the agency or the complainant may request an administrative
52 hearing concerning the matter. If there is a finding of no probable
53 cause, and the complainant does not request a hearing, then the
54 complaint shall be dismissed, and such dismissal shall not be appeal-
55 able. If there is a finding of probable cause, and the agency chooses to
56 adopt that finding as final agency action, then the agency must provide

1 a remedy to the complainant. If the complainant is dissatisfied with the
2 remedy, the complainant may request a hearing at which only the remedy
3 will be at issue.

4 11. Where the complainant has received the notice required in subdivi-
5 sion eight of this section or at any time after one hundred eighty days
6 have elapsed from the filing of the complaint, or, if an amended
7 complaint has been filed, within the earlier of one hundred eighty days
8 after the last amendment to the complaint or three hundred sixty days
9 after the filing of the original complaint, the complainant may request
10 a hearing by submitting a written request for a hearing directly to the
11 commission's office indicated in the investigator's decision. The
12 commission shall notify the agency that a hearing has been requested.
13 Within fifteen days of receipt of a copy of the request for a hearing,
14 the agency shall provide a copy of the complaint file to the commission.

15 § 280-i. Hearings. 1. When a complainant or the agency requests a
16 hearing, the commission shall appoint an administrative judge to conduct
17 a hearing in accordance with this section. Upon appointment, the admin-
18 istrative judge shall assume full responsibility for the adjudication of
19 the complaint, including overseeing the development of the record. The
20 administrative judge shall decide the matters raised in the complaint de
21 novo without regard to any findings of the investigator, provided,
22 however, that all materials in the investigative file shall be consid-
23 ered to determine whether such materials constitute admissible evidence.

24 2. When a party is represented by counsel, the agency may make an
25 offer of resolution to a complainant and such offer may be accepted
26 without involvement of the administrative judge. When a party is not
27 represented by counsel, the agency may make an offer of resolution to a
28 complainant, but the administrative judge must review and approve the
29 offer for fairness under all the circumstances including the estimated
30 likelihood that the complainant or the agency may or may not prevail at
31 a hearing. Any resultant settlement may be confidential if the complain-
32 ant and the agency agree and the administrative judge, on application by
33 the parties, finds that confidentiality is in the reasonable interest of
34 the complainant.

35 3. The administrative judge shall notify the parties of the right to
36 seek discovery prior to the hearing and may issue such discovery orders
37 as are appropriate. Unless the parties agree in writing concerning the
38 methods and scope of discovery, the party seeking discovery shall
39 request authorization from the administrative judge prior to commencing
40 discovery on the ground that the requested information was not suffi-
41 ciently developed in the investigative file or to confirm facts that
42 were contested in the investigation. The administrative judge may limit
43 discovery to matters not sufficiently developed in the investigative
44 file or to facts that remain contested following the investigation.
45 Evidence may be developed through interrogatories, depositions, and
46 requests for admissions, stipulations, or production of documents. It
47 shall be grounds for objection to producing evidence that the informa-
48 tion sought by either party is irrelevant, unduly burdensome, repeti-
49 tious, or privileged. Agencies may not assert as privileged internal
50 decision-making processes, except that consultations with counsel are
51 privileged.

52 4. Agencies shall provide for the attendance at a hearing of all
53 employees approved as witnesses by an administrative judge. Attendance
54 at hearings will be limited to persons determined by the administrative
55 judge to have direct, personal knowledge relating to the complaint. The
56 administrative judge shall have the power to regulate the conduct of a

1 hearing, limit the number of witnesses where testimony would be repeti-
2 tious, and exclude any person from the hearing for contumacious conduct
3 or misbehavior that obstructs the hearing. The administrative judge
4 shall receive into evidence information or documents relevant to the
5 complaint. Rules of evidence shall not be applied strictly, and hearsay
6 shall be permitted as to background and incidental matters but not to
7 avoid the testimony of witnesses having a central or important role in
8 the matter. An agency witness shall not be permitted to testify as to
9 complaints about an employee unless such complaints were put in writing
10 contemporaneously with the alleged complaint. The administrative judge
11 shall exclude irrelevant or repetitious evidence.

12 5. The complainant, an agency, and any employee of an agency shall
13 produce such documentary and testimonial evidence as the administrative
14 judge deems necessary. The administrative judge shall serve all orders
15 to produce evidence on both parties.

16 6. Administrative judges are authorized to administer oaths. Testimony
17 of witnesses shall be made under oath or affirmation or, alternatively,
18 by written statement under penalty of perjury if the parties agree to
19 accept such witness's testimony in that manner or if the administrative
20 judge determines that the witness is unavailable and his or her testimo-
21 ny could not be taken by deposition.

22 7. If a party believes that some or all material facts are not in
23 genuine dispute and there is no genuine issue as to credibility, the
24 party may, at least fifteen days prior to the date of the hearing or at
25 such earlier time as required by the administrative judge, file a state-
26 ment with the administrative judge prior to the hearing setting forth
27 the fact or facts and referring to the parts of the record relied on to
28 support the statement. The statement must demonstrate that there is no
29 genuine issue as to any such material fact. The party shall serve the
30 statement on the opposing party.

31 8. The opposing party may file an opposition within fifteen days of
32 receipt of the statement in subdivision seven of this section. The oppo-
33 sition may refer to the record in the case to rebut the statement that a
34 fact is not in dispute or may file an affidavit stating that the party
35 cannot, for reasons stated, present facts to oppose the request. After
36 considering the submissions, the administrative judge may order that
37 discovery be permitted on the fact or facts involved, limit the hearing
38 to the issues remaining in dispute, issue a decision without a hearing,
39 or make such other ruling as is appropriate.

40 9. The hearing shall be recorded and the agency shall arrange and pay
41 for verbatim transcripts. All documents submitted to, and accepted by,
42 the administrative judge at the hearing shall be made part of the record
43 of the hearing. The administrative judge shall provide the parties with
44 a list of all documents he or she has admitted into evidence at the
45 hearing and a list of all documents that were proposed for admission but
46 not accepted into evidence. Such lists shall form part of the record of
47 the case. Either party may request reproduction of a document it does
48 not have in its possession.

49 10. Unless the administrative judge makes a written determination that
50 necessary cause exists for extending the time for issuing a decision, an
51 administrative judge shall issue a decision on the complaint, and shall
52 order appropriate remedies and relief where discrimination is found,
53 within ninety days of receipt by the administrative judge of the record
54 of the hearing. The administrative judge shall send copies of the hear-
55 ing record, including the transcript, and ultimately the decision, to
56 the parties. The parties shall be permitted to submit briefs on the

1 matter within thirty days of receipt by the administrative judge of the
2 record of the hearing.

3 11. Any party advancing a proposition shall bear the burden of proof
4 by a preponderance of the evidence. If the discipline or discharge of an
5 employee is at issue, and the employee has proven that discrimination
6 was a substantial factor in the adverse employment action, then such
7 discipline or discharge shall be set aside and appropriate remedies
8 provided as set forth in this article.

9 12. Any decision must contain notice of both parties' right to appeal
10 to the commission.

11 § 280-j. Class complaints. 1. A complainant may file with the agency a
12 class complaint at any reasonable point in the process when it becomes
13 apparent that there are class implications to the claim raised in an
14 individual complaint.

15 2. Within thirty days of an agency's receipt of a class complaint, the
16 agency shall forward the complaint, along with a copy of the counselor's
17 report and any other information pertaining to timeliness or other rele-
18 vant circumstances related to the complaint, to the commission. The
19 complainant shall be sent notification of filing with the commission.

20 3. Within forty-five days after filing such complaint, a complainant
21 shall move before the commission for class certification, which shall
22 appoint an administrative judge to hear the motion, unless an adminis-
23 trative judge had already been appointed.

24 4. If a complainant moves for class certification after completing the
25 counseling process contained in section two hundred eighty-e of this
26 article, no additional counseling is required.

27 5. The administrative judge shall deny class certification when the
28 complainant does not meet the criteria established in law for acting as
29 an agent for the class or the complainant has unduly delayed in moving
30 for certification, such as when the class implications to the claim were
31 reasonably apparent but no action was taken by the complainant during
32 counseling or investigation of the matter. If, however, the class impli-
33 cations become apparent only during or after receipt of the investi-
34 gative file, the class complaint should be referred back to the investi-
35 gator for further investigation only as to the class-related issue and a
36 determination as to probable cause or no probable cause concerning the
37 issue involving the class.

38 6. Filing and presentation of a class complaint:

39 (a) A class complaint must be signed by the agent or representative
40 and must identify the policy or practice adversely affecting the class
41 as well as the specific action or matter affecting the class agent and
42 why the agent qualifies under law to represent the class as agent for
43 the class.

44 (b) The complaint shall be investigated in the same manner as provided
45 with respect to individual complaints, except as provided in subdivision
46 five of this section.

47 (c) The administrative judge may dismiss the complaint, or any
48 portion, for any of the reasons listed in section two hundred eighty-g
49 of this article or because it does not meet the prerequisites of a class
50 complaint as described herein.

51 7. When appropriate, the administrative judge may decide that a class
52 be divided into subclasses and that each subclass be treated as a class,
53 and the provisions of this section then shall be construed and applied
54 accordingly.

55 8. The administrative judge shall transmit his or her decision to
56 accept or dismiss a class complaint to the agency and the agent. The

1 decision shall inform the agency or the agent of the right to appeal the
2 decision to the commission in the same manner as any other appeal. Proc-
3 essing of the individual complaint shall continue while the appeal is
4 pending. Should the commission reverse a decision not to certify a
5 class, a hearing on class-related issues may be held separately.

6 9. Within fifteen days of receiving notice that the administrative
7 judge has accepted a class complaint or a reasonable time frame speci-
8 fied by the administrative judge, the agency shall use reasonable means,
9 such as mailing to last known address or distribution, to notify all
10 class members of the acceptance of the class complaint. Such notices
11 shall contain:

12 (a) the name of the agency or organizational segment, its location,
13 and the date of certification of the class complaint;

14 (b) a description of the issues accepted as part of the class
15 complaint;

16 (c) an explanation of the binding nature of the final decision or
17 resolution of the complaint on class members; and

18 (d) the name, address and telephone number of the attorney for the
19 class representative, if any, and of the class representative.

20 10. The administrative judge shall notify the agent and the agency
21 representative of the time period that will be allowed both parties to
22 prepare their cases as to the class-related issues but in no case less
23 than ninety days. Reasonable extensions of time should be granted.

24 11. Both parties are entitled to reasonable development of evidence on
25 matters relevant to the issues raised in the complaint. The same rules
26 relating to discovery and to evidence in individual complaints shall
27 apply. Provided, however, that the administrative judge shall take into
28 account the class nature of the complaint in granting a request for
29 additional discovery.

30 12. The process for voluntary resolution of a class complaint shall be
31 the same as for an individual complaint. Provided, however, that notice
32 of a resolution agreed upon by the parties shall be given to all class
33 members in the same manner as notification of the acceptance of the
34 class complaint and to the administrative judge. It shall state the
35 relief, if any, to be granted by the agency and the name and address of
36 the administrative judge assigned to the case. It shall state that with-
37 in thirty days of the date of the notice of resolution, any member of
38 the class may petition the administrative judge to vacate the resolution
39 because it benefits only the class agent, or is otherwise not fair,
40 adequate and reasonable to the class as a whole. The administrative
41 judge shall review the notice of resolution and consider any petitions
42 to vacate filed. If the administrative judge finds that the proposed
43 resolution is not fair, adequate and reasonable to the class as a whole,
44 the administrative judge shall issue a decision vacating the agreement
45 and may, but is not required to, replace the original class agent with a
46 different petitioner or some other class member who is eligible to be
47 the class agent during further processing of the class complaint. The
48 decision shall inform the agency, the class agent, former class agent,
49 or the petitioner of the right to appeal the decision to the commission.
50 If the administrative judge finds that the resolution is fair, adequate
51 and reasonable to the class as a whole, the administrative judge shall
52 so order and the resolution shall bind all members of the class.

53 13. On expiration of the period allowed for preparation of the case,
54 the administrative judge shall set a date for hearing. The hearing may
55 be set for the same date as on the individual complaint or on a differ-

ent date as appropriate. The hearing shall be conducted in the same manner as a hearing on an individual complaint.

14. (a) The administrative judge shall decide whether systemic relief for the class is appropriate with regard to the personnel action or matter that gave rise to the complaint, and the relevant time period in which such personnel action or matter adversely affected the class.

(b) If the administrative judge finds no class relief appropriate, he or she shall determine if a finding of individual discrimination is warranted and, if so, shall determine appropriate relief.

(c) The administrative judge shall notify the agency and the complainant and/or agent of the decision and of the right to appeal to the commission.

(d) The agency shall, within thirty days of the decision, notify class members of the final decision and relief awarded, if any, through the same media employed to give notice of the existence of the class complaint. The notice, where appropriate, shall include information concerning the rights of class members to seek individual relief, and of the procedures to be followed, and of the right to appeal to the commission.

(e) When discrimination is found, an agency must eliminate or modify the employment policy or practice out of which the complaint arose and provide individual relief for class members, including an award of attorney's fees and costs, to the agent.

(f) When class-wide discrimination is not found, but it is found that the class agent is a victim of discrimination against him or her as an individual, the administrative judge shall award all appropriate relief to the individual complainant.

(g) When class discrimination is found in the final decision and a class member believes that he or she is entitled to individual relief, the class member may file a written claim with the head of the agency or its EEO director within thirty days of receipt of notification by the agency of its final decision. Administrative judges shall retain jurisdiction over the complaint in order to resolve any disputed claims made by class members that they are entitled to individual relief. To be entitled to individual relief, the claim must include a specific, detailed showing that the claimant is a class member who was affected by the discriminatory policy or practice, and that this discriminatory action took place within the period of time for which the administrative judge found class-wide discrimination in his or her final decision. Where a finding of discrimination against a class has been made, there shall be a presumption of discrimination as to each member of the class. The agency must show by clear and convincing evidence that any class member is not entitled to relief. The administrative judge may hold a hearing or otherwise supplement the record on a claim filed by a class member. Any decision by the administrative judge shall be appealable under the same procedures applicable to any individual complaint.

§ 280-k. Relationship to negotiated grievance procedure. 1. When a person is employed by an agency and is a member of a bargaining unit covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect to raise the matter under this chapter or in the negotiated grievance procedure, but not both. An election to proceed under this part is indicated only by the filing of a written complaint; use of the pre-complaint process as described in section two hundred eighty-e of this article does not constitute an

1 election for purposes of this section. An aggrieved employee who files a
2 complaint under this part may not thereafter file a grievance on the
3 same matter. An election to proceed under a negotiated grievance proce-
4 dure is indicated by the filing of a timely written grievance, the
5 denial of such grievance by the agency, and the pursuit of such griev-
6 ance to the next stage of the grievance process. An aggrieved employee
7 who files a grievance with an agency whose negotiated agreement permits
8 the acceptance of grievances which allege discrimination may not there-
9 after file a complaint on the same matter under this chapter irrespec-
10 tive of whether the agency has informed the individual of the need to
11 elect. Any such complaint filed after a grievance has been filed on the
12 same matter shall be dismissed without prejudice to the complainant's
13 right to proceed through the negotiated grievance procedure. Upon such
14 dismissal, which shall include notice of the right to seek a hearing
15 before an administrative judge, the complainant may seek a hearing on
16 the dismissal before an administrative law judge in the same manner as
17 in any individual complaint, including the ultimate right to appeal to
18 the commission.

19 2. When a person is not covered by a collective bargaining agreement
20 that permits allegations of discrimination to be raised in a negotiated
21 grievance procedure, allegations of discrimination shall be processed as
22 complaints under this chapter. The erroneous filing of a grievance under
23 a collective bargaining agreement that does not permit allegations of
24 discrimination to be raised in the course of the negotiated grievance
25 procedure shall not prejudice a person from filing a complaint under
26 this chapter.

27 3. If an administrative judge determines that the filing of a griev-
28 ance resulted in noncompliance with the time limits set forth in this
29 article, that the agency had notice of the allegations of discrimination
30 through the grievance process, and that the complainant has some basis
31 for failing to timely file under this article, including that the indi-
32 vidual was operating under erroneous advice provided by someone with
33 management authority at the agency, or an EEO counselor, or did not have
34 the benefit of counsel, then the administrative judge shall grant relief
35 from the time limits set forth in this article.

36 § 280-l. Appeals to the commission. 1. All appeals to the commission
37 referred to in this article must be filed within thirty days of receipt
38 of the dismissal, final action, or decision. An appeal is taken by
39 filing a notice of appeal with the commission.

40 2. The appellant shall furnish a copy of the notice of appeal to the
41 opposing party at the same time it is filed with the commission. In or
42 attached to the appeal to the commission, the appellant must certify the
43 date and method by which service was made on the opposing party.

44 3. If an appellant does not file an appeal within the time limits of
45 this subpart, the appeal shall be dismissed by the commission as untime-
46 ly, though the commission, upon application, may extend the time for
47 good cause shown.

48 4. The commission shall set a schedule for the briefing of an appeal.

49 5. The parties shall not be responsible for preparation of the record
50 on appeal, though the commission may require a party to provide an
51 appendix containing the most pertinent portions of the record.

52 6. The record shall consist of the file of the administrative law
53 judge, any matters admitted into evidence, or offered as evidence,
54 before the administrative judge, and the transcript of the hearing. Any
55 party may examine the record at his or her request for purposes of
56 preparing a brief on the appeal.

1 7. The commission shall hear arguments on an appeal in the same manner
2 as an appellate court.

3 8. The commission may hear appeals in a panel consisting of three
4 commissioners designated in random fashion.

5 § 280-m. Decisions on appeals. 1. The decision shall be based on the
6 preponderance of the evidence. The decision on an appeal from the deci-
7 sion of the administrative judge shall be de novo, except that the find-
8 ings of the administrative judge as to the credibility of witnesses
9 shall be based on a substantial evidence standard of review.

10 2. The decision shall advise the parties of their right to appeal to
11 the appellate division.

12 3. A party may request reconsideration within thirty days of receipt
13 of a decision of the commission, which the commission in its discretion
14 may grant, if the party demonstrates that:

15 (a) the appellate decision involved a clearly erroneous interpretation
16 of material fact or law; or

17 (b) the decision will have a substantial impact on the policies, prac-
18 tices or operations of the agency in which case the commission shall
19 consider only the question of how to mitigate the impact on the poli-
20 cies, procedures or operations of the agency.

21 § 280-n. Remedies and relief. 1. When an administrative judge, or the
22 commission, in an individual case of discrimination, finds that an
23 applicant or an employee has been discriminated against, the administra-
24 tive judge shall provide full relief which shall include the following
25 elements in appropriate circumstances:

26 (a) notification to all employees of the agency in the affected facil-
27 ity of their right to be free of unlawful discrimination and assurance
28 that the particular types of discrimination found will not recur;

29 (b) commitment that corrective, curative, or preventive action will be
30 taken, or measures adopted, to ensure that violations of the law similar
31 to those found will not recur;

32 (c) an unconditional offer to each identified victim of discrimination
33 of placement in the position the person would have occupied but for the
34 discrimination suffered by that person, or a substantially equivalent
35 position;

36 (d) payment to each identified victim of discrimination on a make
37 whole basis for any loss of earnings the person may have suffered as a
38 result of the discrimination together with interest on such lost earn-
39 ings; and

40 (e) commitment that the agency shall cease from engaging in the
41 specific unlawful employment practice found in the case.

42 2. (a) When an agency, or the commission, finds that an applicant for
43 employment has been discriminated against, the agency shall offer the
44 applicant the position that the applicant would have occupied absent
45 discrimination or, if justified by the circumstances, a substantially
46 equivalent position. The offer shall be made in writing. The individual
47 shall have thirty days from receipt of the offer within which to accept
48 or decline the offer. Failure to accept the offer within the thirty day
49 period will be considered a declination of the offer, unless the indi-
50 vidual can show that circumstances beyond his or her control prevented a
51 response within the time limit.

52 (b) If the offer is accepted, appointment shall be retroactive to the
53 date the applicant would have been hired. Back pay with interest shall
54 be awarded from the date the individual would have entered on duty until
55 the date the individual actually enters on duty. The individual shall be
56 deemed to have performed service for the agency during this period for

1 all purposes except for meeting service requirements for completion of a
2 required probationary or trial period.

3 (c) If the offer of employment is declined, the agency shall award the
4 individual a sum equal to the back pay he or she would have received
5 from the date he or she would have been hired until the date the offer
6 was declined. Interest on back pay shall be included in the back pay
7 computation. The agency shall inform the applicant, in its offer of
8 employment, of the right to this award in the event the offer is
9 declined.

10 3. When an administrative judge, or the commission, finds that an
11 employee of the agency was discriminated against, the agency shall
12 provide relief, which shall include, but need not be limited to, one or
13 more of the following actions:

14 (a) nondiscriminatory placement, with back pay and interest;

15 (b) cancellation of an unwarranted personnel action and restoration of
16 the employee to his or her former position or a substantially equivalent
17 position;

18 (c) expunction from the agency's records of any adverse materials
19 relating to the discriminatory employment practice; and

20 (d) full opportunity to participate in the employee benefit denied,
21 including, but not limited to, training, preferential work assignments,
22 and overtime scheduling.

23 4. The agency has the burden of proving by a preponderance of the
24 evidence that the complainant has failed to mitigate his or her damages.
25 Failure to mitigate must be raised at the hearing before the administra-
26 tive judge or is waived.

27 5. (a) Notwithstanding any provision of law to the contrary, the
28 provisions of this subdivision relating to the award of attorney's fees
29 or costs shall apply to all allegations of discrimination covered under
30 this article and to all allegations of discrimination covered with
31 respect to private employees under article fifteen of this chapter,
32 constituting the human rights law. In a decision of an administrative
33 judge, or the commission, or of a court in a case involving a private
34 employee covered under the human rights law, or a public employee
35 covered under this chapter, the administrative judge, the commission, or
36 the court, as applicable, shall award the applicant or employee reason-
37 able attorney's fees (including expert witness and paralegal fees) and
38 other costs and disbursements incurred in the investigation and process-
39 ing of the complaint, from the first involvement of counsel through all
40 appeals. Any award of attorney's fees or costs shall be paid by the
41 agency.

42 (b) When the administrative judge, the commission, or a court, as
43 appropriate, determines an entitlement to attorney's fees or costs, the
44 complainant's attorney shall submit a verified statement of attorney's
45 fees, including but not limited to, expert witness fees and paralegal
46 fees, and other costs and disbursements, as appropriate, to the adminis-
47 trative judge, the commission, or the court within thirty days of
48 receipt of the decision and shall submit a copy of the statement to the
49 agency. A statement of attorney's fees and costs shall be accompanied by
50 an affidavit executed by the attorney of record itemizing the attorney's
51 charges for legal services using the attorney's ordinary and customary
52 recordkeeping process for accounting for his or her time. The agency may
53 object in whole or in part to a statement of attorney's fees and costs
54 within thirty days of its receipt.

55 (c) The administrative judge, the commission, or the court shall issue
56 a decision determining the amount of attorney's fees or costs due within

1 sixty days of receipt of the statement and affidavit. The decision shall
2 include the specific reasons for determining the amount of the award.

3 (d) The amount of attorney's fees shall be calculated using the
4 following standards: the starting point shall be the number of hours
5 reasonably expended multiplied by a reasonable hourly rate. The reason-
6 able hourly rate shall be the same as the lodestar rate then prevailing
7 in federal court for attorneys of like experience in the particular part
8 of the state where the case arose. There is a strong presumption that
9 this amount represents the reasonable fee.

10 § 280-o. Compliance with final decisions. 1. Relief ordered in a
11 final decision of an administrative judge, if not appealed, or of the
12 commission, is mandatory and binding on the agency except as otherwise
13 provided in this section. Failure to implement ordered relief shall be
14 subject to judicial enforcement as set forth in this chapter.

15 2. Notwithstanding subdivision one of this section, when the agency
16 requests reconsideration or appeals and the case involves removal, sepa-
17 ration, or suspension continuing beyond the date of the request for
18 reconsideration, and when the decision orders retroactive restoration,
19 the agency shall comply with the decision to the extent of the temporary
20 or conditional restoration of the employee to duty status in the posi-
21 tion specified by the administrative judge of the commission, pending
22 the outcome of the agency request for reconsideration.

23 3. Service under the temporary or conditional restoration provisions
24 of subdivision two of this section shall be credited toward the
25 completion of a probationary or trial period, or shall count for
26 promotion as appropriate.

27 4. When the agency requests reconsideration, or appeals it may delay
28 the payment of any amounts ordered to be paid to the complainant until
29 after the request for reconsideration or the appeal is resolved. If the
30 agency delays payment of any amount pending the outcome of the request
31 to reconsider or the appeal, and the resolution of the request or appeal
32 requires the agency to make the payment, then the agency shall pay
33 interest from the date of the original decision it had appealed or asked
34 to be reconsidered until payment is made, as well as all interest
35 required prior to the request for reconsideration or appeal.

36 5. The agency shall notify the administrative judge or the commission,
37 as appropriate, and the employee in writing at the same time it requests
38 reconsideration or appeals that the relief it provides is temporary or
39 conditional and, if applicable, that it will delay the payment of any
40 amounts owed but will pay interest as set forth above in the event its
41 application or appeal is unsuccessful. Failure of the agency to provide
42 notification will result in the dismissal of the agency's request or
43 appeal.

44 6. When no appeal is taken, or no request for reconsideration is filed
45 or when a request for reconsideration is denied, the agency shall
46 provide the relief ordered and there is no further right to delay imple-
47 mentation of the ordered relief. The relief shall be provided in full
48 not later than sixty days after receipt of the final decision unless
49 otherwise ordered in the decision.

50 § 280-p. Enforcement of final decisions. A complainant may petition
51 the supreme court of the state of New York pursuant to article seventy-
52 eight of the civil practice law and rules for enforcement of a decision
53 issued by an administrative judge that is not appealed to the commis-
54 sion, that is issued under the commission's appellate jurisdiction, or
55 of any settlement agreement executed in the course of the administrative
56 process. A settlement agreement is binding even if not executed by all

1 parties if the essential terms were clearly entered into the record or
2 if the exchange of correspondence clearly indicates agreement on the
3 essential terms. The court may supply any additional non-essential terms
4 based on the submissions of the parties.

5 § 280-q. Interim relief. 1. When the agency appeals and the case
6 involves removal, separation, or suspension continuing beyond the date
7 of the appeal, and when the administrative judge's decision orders
8 retroactive restoration, the agency shall comply with the decision to
9 the extent of the temporary or conditional restoration of the employee
10 to duty status in the position specified in the decision, pending the
11 outcome of the agency appeal.

12 2. Service under the temporary or conditional restoration provisions
13 of subdivision one of this section shall be credited toward the
14 completion of a probationary or trial period, or eligibility for
15 promotion, if the commission upholds the decision on appeal. Such
16 service shall not be credited toward the completion of any applicable
17 probationary or trial period or toward promotion if the commission
18 reverses the decision on appeal.

19 3. When the agency appeals, it may delay the payment of any amount,
20 other than pay and benefits accruing under temporary or conditional
21 restoration, which had been ordered to be paid to the complainant until
22 after the appeal is resolved. Such delay shall be administered in
23 accordance with section two hundred eighty-o of this article.

24 § 280-r. Joint processing and consolidation of complaints. Complaints
25 of discrimination filed by two or more complainants consisting of
26 substantially similar allegations of discrimination or relating to the
27 same matter may be consolidated by the agency, the administrative judge,
28 or the commission for joint processing after appropriate notification to
29 the parties. Two or more complaints of discrimination filed by the same
30 complainant shall be consolidated by the agency, by the administrative
31 judge, or by the commission for joint processing after appropriate
32 notification to the complainant. When a complaint has been consolidated
33 with one or more earlier filed complaints, the agency shall complete its
34 investigation within one hundred eighty days after the filing of the
35 last complaint or three hundred sixty days after the filing of the
36 original complaint, except that the complainant may request a hearing
37 from an administrative judge on the consolidated complaints any time
38 after one hundred eighty days from the date of the first filed
39 complaint. An aggrieved individual shall retain the right to bring a
40 civil action in New York state supreme court concerning the subject
41 matter of the consolidated complaints if the investigation of the
42 consolidated complaints is not completed within one hundred eighty days
43 of consolidation or three hundred sixty days after the filing of the
44 first complaint, whichever is earlier, or a hearing has not been
45 commenced within one hundred eighty days of the request for same.

46 § 280-s. Appeals of decisions of the commission. Decisions of the
47 commission shall be appealable to the appellate division of the supreme
48 court in the particular department where the employee acting in his or
49 her individual capacity or acting as the agent of a class was employed
50 at the time he or she filed the complaint. Decisions of the commission
51 shall notify the complainant or class agent and the agency of their
52 right to appeal to the appellate division. Notice of appeal shall be
53 filed with the commission, which shall then notify the appropriate
54 appellate division of the pendency of an appeal. The time to file a
55 notice of appeal shall be thirty days from the date of the commission's

1 issuance of its decision and mailing of that decision by the commission
2 to both parties.

3 § 280-t. EEO group statistics. 1. Each agency, subject to review and
4 approval by the commission, under a timeline set by the commission,
5 shall establish:

6 (a) a system to collect and maintain accurate employment information
7 on the race, national origin, sex and disabilities of its employees; and

8 (b) a system for reporting the number of EEO complaints filed under
9 this article, and the disposition of such complaints.

10 2. The data gathered shall be reported in pdf format on an EEO section
11 of such agency's website and shall be collected statewide and reported
12 in pdf format on the commission's website.

13 3. Data on race, national origin, and sex shall be collected by volun-
14 tary self-identification. If an employee does not voluntarily provide
15 the requested information, the agency shall advise the employee of the
16 importance of the data and of the agency's obligation to report it. If
17 the employee still refuses to provide the information, the agency must
18 make visual identification and inform the employee of the data it will
19 be reporting. If an agency believes that information provided by an
20 employee is inaccurate, the agency shall advise the employee about the
21 solely statistical purpose for which the data is being collected, the
22 need for accuracy, the agency's recognition of the sensitivity of the
23 information, and the existence of procedures to prevent its unauthorized
24 disclosure. If, thereafter, the employee declines to change the appar-
25 ently inaccurate self-identification, the agency must accept it.

26 4. The information collected under subdivision two of this section
27 shall be disclosed only in the form of gross statistics. An agency shall
28 not collect or maintain any information on the race, national origin or
29 sex of individual employees except when an automated data processing
30 system is used in accordance with standards and requirements prescribed
31 by the commission to insure individual privacy and the separation of
32 that information from the employee's personnel record.

33 5. Each system is subject to the following controls:

34 (a) only those categories of race and national origin prescribed by
35 the commission, or categories concerning the processing of EEO
36 complaints, may be used;

37 (b) only the specific procedures for the collection and maintenance of
38 data that are prescribed or approved by the commission may be used;

39 (c) the commission shall review the operation of the agency system to
40 insure adherence to commission procedures and requirements. An agency
41 may make an exception to the prescribed procedures and requirements only
42 with the advance written approval of the commission;

43 (d) the agency may use the data only in studies and analyses which
44 contribute affirmatively to achieving the objectives of the equal
45 employment opportunity program. An agency shall not establish a quota
46 for the employment of persons on the basis of race, color, religion,
47 sex, or national origin;

48 (e) data on disabilities shall also be collected by voluntary self-i-
49 dentification. If an employee does not voluntarily provide the requested
50 information, the agency shall advise the employee of the importance of
51 the data and of the agency's obligation to report it. If an employee who
52 has been appointed pursuant to special appointment authority for hiring
53 individuals with disabilities, or who has requested reasonable accommo-
54 modation for a disability, still refuses to provide the requested informa-
55 tion, the agency must identify the employee's disability based upon the
56 records supporting the appointment or the request for reasonable accom-

1 modation. If any other employee still refuses to provide the requested
2 information or provides information that the agency believes to be inac-
3 curate, the agency should report the employee's disability status as
4 unknown;

5 (f) an agency shall report to the commission on employment by race,
6 national origin, sex and disability in the form and at such times as the
7 commission may require.

8 § 2. Section 293 of the executive law, as amended by chapter 958 of
9 the laws of 1968, subdivisions 1 and 2 as amended by chapter 166 of the
10 laws of 2000, is amended to read as follows:

11 § 293. ~~[Division of]~~ New York state commission on human rights. 1.
12 There is hereby created in the executive department a ~~[division of]~~ New
13 York state commission on human rights hereinafter in this article called
14 the ~~[division]~~ commission. The commission shall consist of five members
15 with four year terms. The governor shall appoint each of the five
16 members. The initial term of each member shall be one year, two years,
17 three years, four years, and five years, so that the terms are staggered
18 to guarantee the independence of the commission. The head of such ~~[divi-~~
19 ~~sion]~~ commission shall be ~~[a commissioner hereinafter in this article~~
20 ~~called the commissioner]~~ an executive director, who shall be ~~[appointed]~~
21 elected by the ~~[governor, by and with the advice and consent of the~~
22 ~~senate and shall hold office at the pleasure of the governor]~~ members of
23 the commission. The commissioner shall be entitled to his or her
24 expenses actually and necessarily incurred by him or her in the perform-
25 ance of his or her duties.

26 2. The commissioner may establish, consolidate, reorganize or abolish
27 such bureaus and other organizational units within the division as he or
28 she determines to be necessary for efficient operation.

29 § 3. (a) Wherever the term "state division of human rights" appears in
30 the consolidated or unconsolidated laws of this state, such term is
31 hereby changed to the "New York state commission on human rights".

32 (b) Wherever the term "commissioner of the division of human rights"
33 appears in the consolidated or unconsolidated laws of this state, such
34 term is hereby changed to the "executive director of the New York state
35 commission on human rights".

36 (c) The legislative bill drafting commission is hereby directed to
37 effectuate this provision, and shall be guided by a memorandum of
38 instruction setting forth the specific provisions of law to be amended.
39 Such memorandum shall be transmitted to the legislative bill drafting
40 commission within sixty days of enactment of this provision. Such memo-
41 randum shall be issued jointly by the governor, the temporary president
42 of the senate and the speaker of the assembly, or by the delegate of
43 each.

44 § 4. This act shall take effect on January 1, 2019.