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:

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

ARTICLE 14-A

STATE EMPLOYEES EQUAL EMPLOYMENT OPPORTUNITY ACT

Section 280. Purposes of article.
280-a. Definitions.
280-b. Policies.
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§ 280. Purposes of article. It is the policy of the state of New York to provide equal opportunity in employment for all employees of the 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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sector as set forth in article fifteen of this chapter, constituting the human rights law. This act shall be known as the "state employees equal employment opportunity act."

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

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

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

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

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

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

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

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

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

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

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

(d) communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to any prohibited characteristic set forth in the human rights law, the equal pay act, and article twenty-three-A of the correction law and provide recruitment assistance on a continuing basis;

(e) review, evaluate, and control managerial and supervisory performance in such a manner as to ensure continuing affirmative application and vigorous enforcement of the policy of equal opportunity as set forth 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

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

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

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

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

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

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

(d) providing for counseling of aggrieved individuals and for the receipt and processing of individual and class complaints of discrimination; and

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

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

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

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

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

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

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

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

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

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

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

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

9. Unless the aggrieved person agrees in writing to a longer counseling period, or the aggrieved person chooses an alternative dispute resolution procedure provided by the agency, the counselor shall conduct the final interview with the aggrieved person within thirty days of the date the aggrieved person contacted the EEO office to request counseling. If the matter has not been resolved, the aggrieved person shall be informed in writing by the counselor, not later than the thirtieth day after contacting the counselor, of the right to file a discrimination complaint. The notice shall inform the complainant of the right to file a discrimination complaint within thirty days of receipt of the notice, of the appropriate official with whom to file a complaint, and of the complainant's duty to assure that the agency is informed immediately if the complainant retains counsel or a representative.

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

11. Where the aggrieved person chooses to participate in an alternative dispute resolution procedure in accordance with this section, the pre-complaint processing period shall be ninety days. If the claim has not been resolved before the ninetieth day, the notice of right to file 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;

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

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

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

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

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

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

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

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

3. An aggrieved person may request review of a determination under subdivision two of this section by an administrative judge if the complaint is dismissed in its entirety. If a portion of a complaint is dismissed, the remainder shall proceed to investigation and the dismissal of a portion of the complaint shall be reviewable by an administrative judge when a hearing is requested on the remainder of the complaint after the investigation is complete.

§ 280-h. Investigation of complaints. 1. The investigation of complaints shall be conducted by an investigator approved by the commission. Such investigator may be an employee of the agency but in no event may the agency appoint an investigator not approved by the commission.

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

appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred. Investigators may use interviews, an exchange of letters or memoranda, interrogatories, fact-finding conferences or any other fact-finding methods that efficiently and thoroughly address the matters at issue.

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

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

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

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

(b) consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

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

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

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

6. No person shall investigate any claim unless such person has appropriate qualifications meeting criteria established by the commission and is on a list of approved investigators established by the commission.

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

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

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

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

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

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

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

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

3. The administrative judge shall notify the parties of the right to seek discovery prior to the hearing and may issue such discovery orders as are appropriate. Unless the parties agree in writing concerning the methods and scope of discovery, the party seeking discovery shall request authorization from the administrative judge prior to commencing discovery on the ground that the requested information was not sufficiently developed in the investigative file or to confirm facts that were contested in the investigation. The administrative judge may limit discovery to matters not sufficiently developed in the investigative file or to facts that remain contested following the investigation. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations, or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, unduly burdensome, repetitious, or privileged. Agencies may not assert as privileged internal decision-making processes, except that consultations with counsel are privileged.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. The administrative judge shall deny class certification when the complainant does not meet the criteria established in law for acting as an agent for the class or the complainant has unduly delayed in moving for certification, such as when the class implications to the claim were reasonably apparent but no action was taken by the complainant during counseling or investigation of the matter. If, however, the class implications become apparent only during or after receipt of the investigative file, the class complaint should be referred back to the investigator for further investigation only as to the class-related issue and a determination as to probable cause or no probable cause concerning the issue involving the class.

6. Filing and presentation of a class complaint:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13. On expiration of the period allowed for preparation of the case, the administrative judge shall set a date for hearing. The hearing may 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

election for purposes of this section. An aggrieved employee who files a complaint under this part may not thereafter file a grievance on the same matter. An election to proceed under a negotiated grievance procedure is indicated by the filing of a timely written grievance, the denial of such grievance by the agency, and the pursuit of such grievance to the next stage of the grievance process. An aggrieved employee who files a grievance with an agency whose negotiated agreement permits the acceptance of grievances which allege discrimination may not thereafter file a complaint on the same matter under this chapter irrespective of whether the agency has informed the individual of the need to elect. Any such complaint filed after a grievance has been filed on the same matter shall be dismissed without prejudice to the complainant's right to proceed through the negotiated grievance procedure. Upon such dismissal, which shall include notice of the right to seek a hearing before an administrative judge, the complainant may seek a hearing on the dismissal before an administrative law judge in the same manner as in any individual complaint, including the ultimate right to appeal to the commission.

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

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

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

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

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

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

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

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

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

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

§ 280-m. Decisions on appeals. 1. The decision shall be based on the preponderance of the evidence. The decision on an appeal from the decision of the administrative judge shall be de novo, except that the findings of the administrative judge as to the credibility of witnesses shall be based on a substantial evidence standard of review.

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

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

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

(b) the decision will have a substantial impact on the policies, practices or operations of the agency in which case the commission shall consider only the question of how to mitigate the impact on the policies, procedures or operations of the agency.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. (a) Notwithstanding any provision of law to the contrary, the provisions of this subdivision relating to the award of attorney's fees or costs shall apply to all allegations of discrimination covered under this article and to all allegations of discrimination covered with respect to private employees under article fifteen of this chapter, constituting the human rights law. In a decision of an administrative judge, or the commission, or of a court in a case involving a private employee covered under the human rights law, or a public employee covered under this chapter, the administrative judge, the commission, or the court, as applicable, shall award the applicant or employee reasonable attorney's fees (including expert witness and paralegal fees) and other costs and disbursements incurred in the investigation and processing of the complaint, from the first involvement of counsel through all appeals. Any award of attorney's fees or costs shall be paid by the agency.

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

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

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

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

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

2. Notwithstanding subdivision one of this section, when the agency requests reconsideration or appeals and the case involves removal, separation, or suspension continuing beyond the date of the request for reconsideration, and when the decision orders retroactive restoration, the agency shall comply with the decision to the extent of the temporary or conditional restoration of the employee to duty status in the position specified by the administrative judge of the commission, pending the outcome of the agency request for reconsideration.

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

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

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

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

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

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

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

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

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

§ 280-r. Joint processing and consolidation of complaints. Complaints of discrimination filed by two or more complainants consisting of substantially similar allegations of discrimination or relating to the same matter may be consolidated by the agency, the administrative judge, or the commission for joint processing after appropriate notification to the parties. Two or more complaints of discrimination filed by the same complainant shall be consolidated by the agency, by the administrative judge, or by the commission for joint processing after appropriate notification to the complainant. When a complaint has been consolidated with one or more earlier filed complaints, the agency shall complete its investigation within one hundred eighty days after the filing of the last complaint or three hundred sixty days after the filing of the original complaint, 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. An aggrieved individual shall retain the right to bring a civil action in New York state supreme court concerning the subject matter of the consolidated complaints if the investigation of the consolidated complaints is not completed within one hundred eighty days of consolidation or three hundred sixty days after the filing of the first complaint, whichever is earlier, or a hearing has not been commenced within one hundred eighty days of the request for same.

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

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

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

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

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

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

3. Data on race, national origin, and sex shall be collected by voluntary self-identification. If an employee does not voluntarily provide the requested information, the agency shall advise the employee of the importance of the data and of the agency's obligation to report it. If the employee still refuses to provide the information, the agency must make visual identification and inform the employee of the data it will be reporting. If an agency believes that information provided by an employee is inaccurate, the agency shall advise the employee about the solely statistical purpose for which the data is being collected, the need for accuracy, the agency's recognition of the sensitivity of the information, and the existence of procedures to prevent its unauthorized disclosure. If, thereafter, the employee declines to change the apparently inaccurate self-identification, the agency must accept it.

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

5. Each system is subject to the following controls:

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

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

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

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

(e) data on disabilities shall also be collected by voluntary self-identification. If an employee does not voluntarily provide the requested information, the agency shall advise the employee of the importance of the data and of the agency's obligation to report it. If an employee who has been appointed pursuant to special appointment authority for hiring individuals with disabilities, or who has requested reasonable accommodation for a disability, still refuses to provide the requested information, the agency must identify the employee's disability based upon the records supporting the appointment or the request for reasonable accom-

modation. If any other employee still refuses to provide the requested information or provides information that the agency believes to be inaccurate, the agency should report the employee's disability status as unknown;

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

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

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

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

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

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

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

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