

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS

Rules of Practice and Procedure

Proposed Repeal and New Rules: N.J.A.C. 13:4

Authorized By: Division on Civil Rights, J. Frank Vespa-Papaleo, Esq., Director

Authority: N.J.S.A. 10:5-8 and 10:5-12

Calendar Reference: See Summary below for explanation of exception to calendar requirements

Proposal Number: PRN 2005-134

Submit comments by June 17, 2005 to:

Gary LoCassio, Assistant Director
Division on Civil Rights
P.O. Box 089
Trenton, New Jersey 08625-0089

The agency proposal follows:

Summary

The Division on Civil Rights (Division), pursuant to its rulemaking authority found at N.J.S.A. 10:5-8, proposes to repeal N.J.A.C. 13:4 concerning the Division's rules of practice and procedure. The Division conducted a comprehensive review of its rules of practice and procedure and determined that the existing rules in many respects were difficult to follow and not fully reflective of the current practices before the agency. Consequently, the Division has undertaken to reorganize the rules in a manner consistent with how a case is processed through the agency, to update the rules where appropriate to reflect the agency's current practices and to make the rules more clear so that parties before the agency and the public are sufficiently informed of the current procedures used by the Division in processing cases before the agency. Moreover, certain changes to the existing rules were deemed necessary to clarify misconceptions that exist among some members of the public with respect to the agency's role and the relationship between the agency and an individual who has a complaint pending before the

agency.

Further, the Division seeks certain new rules in order to conform its rules to recent changes to the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 et. seq., and to ensure that the Division's rules are consistent with the Federal Fair Housing Act (FHA), 42 U.S.C. §3601 et. seq. and regulations promulgated thereunder. These new rules are required in order for the Division to achieve certification as a substantially equivalent agency by the Department of Housing and Urban Development (HUD), which would permit the Division to enter into a work-sharing relationship with HUD. Such a work-sharing agreement would allow the Division to be eligible for funding from HUD for case processing and other initiatives related to housing discrimination.

The following chart sets forth the proposed reorganization of the subchapters of the rules.

CURRENT RULES

SUBCHAPTER 1. GENERAL
PROVISIONS

SUBCHAPTER 2. INVESTIGATIONS

SUBCHAPTER 3. COMMENCEMENT
OF ACTION

SUBCHAPTER 4. PARTIES

SUBCHAPTER 5. PLEADINGS

SUBCHAPTER 6. OTHER PLEADINGS

SUBCHAPTER 7. SERVICE OF OTHER
PLEADINGS

SUBCHAPTER 8. INVESTIGATORY
DEPOSITIONS AND
INTERROGATORIES

PROPOSED NEW RULES

SUBCHAPTER 1. GENERAL
PROVISIONS

SUBCHAPTER 2. COMMENCEMENT OF
ACTIONS

SUBCHAPTER 3. ANSWERS

SUBCHAPTER 4. INVESTIGATIONS

SUBCHAPTER 5. DEFAULTS

SUBCHAPTER 6. ADMINISTRATIVE
DISMISSALS

SUBCHAPTER 7. MOTIONS AND
OTHER CASE ACTIONS

SUBCHAPTER 8. WITHDRAWAL OF
COMPLAINTS

SUBCHAPTER 9. SUBPOENAS
SUBCHAPTER 10. CONSOLIDATION
SUBCHAPTER 11. CONCILIATION
SUBCHAPTER 12. HEARINGS
SUBCHAPTER 13. (RESERVED)
SUBCHAPTER 14. MOTIONS FOR
RECONSIDERATION AND TO
REOPEN PROCEEDINGS
SUBCHAPTER 15. ORDERS OF
DIRECTOR

SUBCHAPTER 9. CONCILIATION AND
MEDIATION
SUBCHAPTER 10. ORDERS OF
DIRECTOR
SUBCHAPTER 11. HEARINGS
SUBCHAPTER 12. PROTECTION OF
COMPLAINANTS AND
WITNESSES
SUBCHAPTER 13. ACCESS TO
DIVISION'S INVESTIGATORY
FILES

A summary of the proposed new rules follows.

Proposed new rules N.J.A.C. 13:4-1.1 and 1.2 would carry over from the existing rules, with no change in text. Proposed new rule N.J.A.C. 13:4-1.3 would carry over from the existing rules with an amendment to reflect that these rules apply to matters under the Family Leave Act as well as the LAD. The rules governing the Family Leave Act (FLA) provide, at N.J.A.C. 13:14-1.16, that complaints filed under the FLA will be processed by the Division in the same manner as LAD complaints pursuant to N.J.A.C. 13:4. This proposed new rule would codify the practice within N.J.A.C. 13:4. Similarly, the Division proposes language in new rules N.J.A.C. 13:4-1.4, 2.2, 2.3, 2.4, 2.7, 4.8, 5.2, 10.1, and 12.1 to reflect that these rules govern complaints under the FLA as well as the LAD.

Proposed new rule N.J.A.C. 13:4-1.4 would carry over from the existing rules and add a definition for “aggrieved person” to be consistent with the FHA. A definition for “investigative files” is added to clarify what documents shall be considered part of the agency’s investigative file pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq. Definitions of terms from the existing rules that are not used in the new rules have been deleted. Proposed new

rule N.J.A.C. 13:4-1.5 would be recodified from N.J.A.C. 13:4-15.4 with no change in text.

Proposed new rule N.J.A.C. 13:4-1.6 would codify the Division's practice regarding the appearance of attorneys on behalf of parties. The proposed new rule would provide that an attorney may appear on behalf of a party by completing a Division Notice of Appearance form or providing all the information requested on such form in a letter or similar document. The proposed new rule would also provide that an attorney seeking to withdraw his or her appearance must submit written Notice of the Withdrawal of Appearance to the Division and serve copies of the notice on the client and other parties.

The subchapter "Commencement of Actions" would be recodified under Subchapter 2. Proposed new rule N.J.A.C. 13:4-2.1 would be recodified from N.J.A.C. 13:4-3.1 with no change in text. Proposed new rule N.J.A.C. 13:4-2.2 would recodify and combine N.J.A.C. 13:4-4.1 and 4.2 into a single rule entitled "Who May File a Complaint." Proposed new rule N.J.A.C. 13:4-2.2, while not changing the substance of the existing rules regarding who may file a complaint with the Division, would clarify and distinguish between complaints filed by aggrieved persons themselves and those complaints filed on behalf of aggrieved persons by complainants in a representational capacity. Proposed new rule N.J.A.C. 13:4-2.3 would recodify N.J.A.C. 13:4-4.3, and incorporate the distinctions between "aggrieved persons" and "complainants" set forth in proposed N.J.A.C. 13:4-2.2. Various provisions currently contained in N.J.A.C. 13:4-3.2, 3.4 and 3.5 that relate to the preparation and contents of complaints would be combined and recodified as proposed new rule N.J.A.C. 13:4-2.4. Proposed new rule N.J.A.C. 13:4-2.5 would codify the requirement in N.J.S.A. 10:5-18 that complaints with the Division shall be filed within 180 days after the alleged act of discrimination. Proposed new rule N.J.A.C. 13:4-2.5 would also codify the Division's interpretation that complaints alleging violations of the FLA must be filed with the Division within 180 days of the alleged violation. While the FLA provides that a complaint may be filed with the Division, it does not provide an explicit limitations period for such a filing. The Division has interpreted the Legislature's reliance on the Division's enforcement mechanism for the LAD in the FLA to require application of the 180-day

limitations period for filing LAD complaints with the Division to complaints filed pursuant to the FLA. Proposed new rule N.J.A.C. 13:4-2.6 would recodify the requirements for filing complaints currently found at N.J.A.C. 13:4-3.2 and 3.3. Proposed new rule N.J.A.C. 13:4-2.7 would recodify N.J.A.C. 13:4-3.3. Requirements for the service of complaints by the Division would be moved from N.J.A.C. 13:4-3.6 to new rule N.J.A.C. 13:4-2.8, with amendments to clarify the methods by which the Division may serve complaints. Proposed new rule N.J.A.C. 13:4-2.8 would also set forth the HUD requirement that complaints in housing discrimination cases be served within 30 days of the Division's receipt of the complaint. Proposed N.J.A.C. 13:4-2.8(b) would set forth that the Division may serve a Document and Information Request with a complaint, which is currently the Division's practice. Proposed new rule N.J.A.C. 13:4-2.9 would recodify requirements for amendment of complaints currently codified at N.J.A.C. 13:4-6.3, and add a new subsection (b) which would provide that amendments that cure technical defects, clarify or amplify allegations made in the original complaint or allege additional acts that relate to or grow out of the subject matter of the original complaint will relate back to the date the complaint was first received.

Proposed new rule N.J.A.C. 13:4-2.10 would apply to complaints involving minors or other confidential information. Many of the complaints received by the Division on behalf of minors involve allegations of discrimination by schools. The State Department of Education requires that in accepting complaints involving students who are minors, the minor child and the parent or legal guardian bringing the matter on behalf of the minor child shall be identified by initials. See N.J.A.C. 6A:3-1.3(a)2. Consistent with the practice of the Department of Education, the Division proposes that when it accepts a complaint on behalf of a minor, that a pseudonym complaint also be taken and that the pseudonym complaint be the only complaint available for public inspection. The proposed new rule provides a protocol to ensure that respondents can determine the identity of a complainant in order to respond to a complaint while maintaining the confidentiality of the identity of the minor. Under the proposed new rule, a similar process may be used when, in the discretion of the Director, the complaint involves

confidential information regarding the aggrieved party, such as confidential medical information, that need not be subject to public disclosure.

Subchapter 3 would be renamed “Answers ” and provide for the procedures for filing with the Division answers to complaints and responses to the Document and Information Request. Proposed new rule N.J.A.C. 13:4-3.1 would recodify from N.J.A.C. 13:4-5.1 the requirements for filings answers to complaints, with certain clarifications. Proposed N.J.A.C. 13:4-3.1(b) would provide that failure to answer a complaint or respond to the Document and Information Request would subject a party to a default. Proposed N.J.A.C. 13:4-3.1(c) would codify the Division’s current practice that requests for extensions of time to file answers and responses to Document and Information requests may be authorized by the Director for good cause shown and shall be in writing and addresses to the Director. Proposed new rule N.J.A.C. 13:4-3.2 would recodify from N.J.A.C. 13:4-5.1 the requirements for form and content of answers. The proposed rule, consistent with requirements in Rules Governing the Courts for State of New Jersey for contents of answers, would provide for respondents to make specific denials of designated allegations in a verified complaint, rather than merely a general denial. Proposed N.J.A.C. 13:4-3.2(c) would require respondents to promptly notify the Division of any change in address or other material change in the status of the respondent. Proposed new rule N.J.A.C. 13:4-3.3 would recodify the requirements of N.J.A.C. 13:4-7.1 that respondents shall serve a copy of an answer on the complainant and file a certification of service with the Division.

Subchapter 4 would be renamed “Investigations,” which is presently the heading of Subchapter 2. The proposal would attempt to place all of the Division’s rules regarding different investigative techniques under one subchapter. Proposed new rule N.J.A.C. 13:4-4.1 would address the timing of investigations, with proposed N.J.A.C. 13:4-4.1(a) being recodified from N.J.A.C. 13:4-2.1(c). Proposed N.J.A.C. 13:4-4.1(b) and (c) would codify the HUD requirements that the Division will promptly initiate an investigation upon receipt of a complaint and answer and that investigations of housing cases be completed within 100 days after the filing of the complaint. Proposed new rule N.J.A.C. 13:4-4.2 would recodify and combine N.J.A.C.

13:4-2.2 and 2.1(b) through (d), and make clear that only the Division may seek discovery from parties during a Division investigation. Also, domestic partnership status is added to the list of protected categories to make the rule consistent with recent changes to the LAD. Proposed new rule N.J.A.C. 13:4-4.3 would recodify the Division's regulations regarding interrogatories from N.J.A.C. 13:4-8.1(a). Proposed new rule N.J.A.C. 13:4-4.4 would recodify the Division's regulations regarding subpoenas from N.J.A.C. 13:4-8.1, 9.1 and 9.2, while deleting extraneous language from the existing rules. An amendment to the existing text would provide that subpoenas may be served by overnight delivery by a commercial courier. Proposed new rule N.J.A.C. 13:4-4.5 would recodify the Division's regulation regarding depositions from N.J.A.C. 13:4-8.4, with the amendment that the Director, in his or her discretion, may allow for the taking of a deposition on the motion of a party to be contingent upon the payment of the costs associated with the deposition by the party seeking such deposition. Proposed N.J.A.C. 13:4-4.5(d) would provide, consistent with the Director's authority under N.J.S.A. 10:5-8i, that the Division may take depositions of witnesses when the Director believes it will aid the investigatory process. Proposed new rule N.J.A.C. 13:4-4.6 would recodify the Division's regulations regarding enforcement of depositions, interrogatories, subpoenas and other investigative order from N.J.A.C. 13:4-9.3, while deleting extraneous language from the existing regulation that does not alter the substance of the regulation. Proposed new rule N.J.A.C. 13:4-4.7 would recodify the Division's regulations regarding fact-finding conferences from N.J.A.C. 13:4-2.3, while adding language emphasizing that the fact-finding conferences are not required in all cases and are conducted at the discretion of the Director. A further amendment would provide that at the discretion of the Director, fact-finding conferences may be recorded. Proposed new rule N.J.A.C. 13:4-4.8 would recodify from N.J.A.C. 13:4-2.1 and 2.2 the Director's authority to conduct investigations even in the absence of a complaint filed by an individual complainant.

Subchapter 5 would be renamed "Defaults." The Division's rules provide, at N.J.A.C. 13:4-8.3, for an "interrogatory default procedure" whereby if a respondent fails to respond to

interrogatories the Director may enter a default order and transmit the matter to the OAL for a hearing on a default basis. This section would be recodified and broken down into separate subsections, with proposed new rule N.J.A.C. 13:4-5.1 setting forth the rules for the applicability of the default procedure, proposed new rule N.J.A.C. 13:4-5.2 setting forth the default procedure, proposed new rule N.J.A.C. 13:4-5.3 setting forth the requirements for vacating a default and proposed new rule N.J.A.C. 13:4-5.4 setting forth the procedures for a default hearing. The language in the existing rules would be amended to clarify that the default procedure is available when a respondent who has been served with a complaint fails to respond to the complaint or to any request by the Division for information and documents in any form. The amendment was deemed appropriate since it made little sense to seek a default for failure to answer interrogatories when a respondent had failed to respond to the complaint at all. Proposed N.J.A.C. 13:4-5.3(b) provides that as a condition of vacating a default the Director may order the respondent to pay costs or reasonable expenses to the State of New Jersey and an aggrieved party or representative. Proposed N.J.A.C. 13:4-5.3(d) provides that after case has been transmitted to the OAL, a motion to vacate a default shall be directed to the administrative law judge.

Subchapter 6 would be renamed “Administrative Dismissals.” Proposed new rule N.J.A.C. 13:4-6.1 would set forth the Division’s practices with respect to administratively dismissing complaints filed with the agency. Proposed N.J.A.C. 13:4-6.1(a) lists various reasons that the Director may administratively dismiss a complaint filed with the Division without expending the resources necessary for completing a full investigation and conducting a plenary hearing. Proposed N.J.A.C. 13:4-6.1(a)7 would allow for the Director to administratively dismiss a complaint when a complainant fails to accept a reasonable offer to resolve the allegations in the complaint. Proposed N.J.A.C. 13:4-6.1(b) would outline the factors to be considered by the Director before dismissing a complaint based upon the failure of a complainant to accept a reasonable settlement offer. Proposed N.J.A.C. 13:4-6.1(c) would require the Director prior to dismissing a complaint on this basis to notify a complainant of his or her right to present the complaint by himself or herself, or through his or her own counsel, at a hearing.

The purpose of this section is to allow to Director to effectively use the investigative and litigation resources at his disposal, without having to use resources in a case where the public interest is no longer served by continuing the proceedings in light of a reasonable offer of settlement.

Subchapter 7 would be renamed “Motions and Other Case Actions.” Proposed new rule N.J.A.C. 13:4-7.1 would recodify from N.J.A.C. 13:4-6.2 the requirements for motions before the Division. Proposed new rule N.J.A.C. 13:4-7.2 would recodify from N.J.A.C. 13:4-6.5 the rules related motions to intervene. Proposed new rule N.J.A.C. 13:4-7.3 would recodify from N.J.A.C. 13:4-10.1 the rules related to motions for consolidation or severance of complaints. Proposed new rule N.J.A.C. 13:4-7.4 would combine and recodify from N.J.A.C. 13:4-14.1 and 14.2 the rules related to motions for reconsideration and to reopen the record. The rules for motions to reopen the record and for reconsideration have been combined to clear up confusion between the two different standards and time frames that applied to the motions. Under the proposed rule, a party will have 30 days to file a motion for reconsideration of any order of the Director or to reopen the agency record for further investigation of a matter. The proposed rule also states that responses to motions for reconsideration, like responses to other motions before the Division, are due ten days after service of the motion. Proposed new rule N.J.A.C. 13:4-7.5 would recodify from N.J.A.C. 13:4-7.1 the requirements for service of motions and other pleadings, with amendments to allow for service by overnight mail by commercial courier or, where in the discretion of the Director when authorized by a party, by electronic transmission.

Subchapter 8 would be renamed “Withdrawal of Complaints.” New rule N.J.A.C. 13:4-8.1 would set forth the Division’s practices regarding withdrawal of complaints. Under the proposed rule, a complainant may withdraw a complaint at any time before the issuance of a finding of no probable cause by the Division by submitting a request in writing. The proposed rule would also provide that despite the withdrawal of the individual complaint, the Director may substitute or continue as a complainant on the same facts. Such a provision would allow the Director to continue an investigation or litigation against a respondent where he or she believes

discrimination has occurred that may have affected the State's interest in eradicating discrimination beyond that of the individual complainant.

Subchapter 9 would be renamed "Conciliation and Mediation." Proposed new rule N.J.A.C. 13:4-9.1 would provide, consistent HUD requirements, that the Division shall attempt conciliation from the time the complaint is filed through the closure of a complaint or 45 days from the date of a finding of probable cause. This proposed rule would also provide that conciliation may include non-binding mediation. Proposed new rule N.J.A.C. 13:4-9.2 would replace the Division's rules regarding confidentiality of conciliation and mediation records that are currently codified at N.J.A.C. 13:4-11.1(d) and (g), without any change in substance. Proposed new rule N.J.A.C. 13:4-9.3 would set forth rules related to mediation proceedings. Over the past few years, the Division has developed a successful mediation program. The new rule would provide that mediation proceedings may be scheduled in a matter at the discretion of the Director. The Director would designate a mediator who, if the mediation proves unsuccessful, would not participate in any way in the investigation or litigation of the matter. The proposed new rule would also provide that should a party breach a mediation agreement, the Director may reopen a complaint for investigation or seek to enforce the agreement. Proposed new rule N.J.A.C. 13:4-9.4 would recodify from N.J.A.C. 13:4-11.1 the rule for conciliation conference proceedings, with an amendment to provide that at the Director's discretion, conciliation may be conducted according to the rules for mediation.

Subchapter 10 would be renamed "Orders of the Director." Proposed new rule N.J.A.C. 13:4-10.1 would combine and recodify N.J.A.C. 13:4-6.4 and 15.1 regarding orders and findings of the Director. Proposed new rule N.J.A.C. 13:4-10.2 would recodify from N.J.A.C. 13:4-6.1(b) the rules regarding the determination of probable cause. While the LAD and the Division's regulations provide that the Director shall determine whether probable cause exists to credit the allegations of a complaint, the term "probable cause" is not defined in the LAD or the existing regulations. Courts in New Jersey have defined "probable cause" in the context of the LAD to mean "a reasonable ground of suspicion supported by facts and circumstances strong enough in

themselves to warrant a cautious [person] in the belief that the [Law Against Discrimination] has been violated.” See *Sprague v. Glassboro State College*, 161 *N.J. Super.* 218 (App. Div. 1978). Proposed new rule N.J.A.C. 13:4-10.2 would codify this definition. The proposed new rule would also clarify that if the Director determines that probable cause exists to some but not all of the allegations of the complaint, any subsequent hearing on the complaint shall be limited to those issues in which the Director has found probable cause. Proposed new N.J.A.C. 13:4-10.2(e) clarifies that findings of no probable cause are considered final agency orders, but that findings of probable cause and agency determinations are not final agency orders. Proposed new rule N.J.A.C. 13:4-10.3 would combine and recodify N.J.A.C. 13:4-6.1(c) and (d) regarding service on the parties of findings of probable cause and no probable cause as well as other orders of the Director.

Subchapter 11 would be renamed “Hearings.” Proposed new rule N.J.A.C. 13:4-11.1 would recodify from N.J.A.C. 13:4-12.1 procedures when hearings are ordered by the Director. Proposed N.J.A.C. 13:4-11.1(f) would codify the requirement in N.J.S.A. 10:5-16 that following a finding of probable cause, the case in support of the complaint shall be presented by the attorney for the Division. It would further provide that should a complainant not wish to rely on the Division’s prosecution of a complaint, he or she may exercise the right to present the case himself or herself or through his or her own attorney to the OAL. Proposed new rule N.J.A.C. 13:4-11.2 would recodify N.J.A.C. 13:4-12.4 and proposed new rule N.J.A.C. 13:4-11.3 would recodify N.J.A.C. 13:4-12.3.

Subchapter 12 would be renamed “Protection of Complainants and Witnesses.” Proposed new rule N.J.A.C. 13:4-12.1 would recodify N.J.A.C. 13:4-15.2, with the clarification that the provisions of proposed N.J.A.C. 13:4-12.1 apply to complaints pursuant to the Family Leave Act as well as the Law Against Discrimination.

Subchapter 13 would be renamed “Access to Division’s Investigatory Files.” Proposed new rule N.J.A.C. 13:4-13.1 would provide that except as otherwise set forth in these rules, that consistent with the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et. seq., the Division’s

investigatory records are confidential and exempt from public access. Proposed new rule N.J.A.C. 13:4-13.2 would recodify from N.J.A.C. 13:4-8.2 the provisions for parties to obtain discovery of the Division's investigatory files. The existing provision is amended to clarify that parties to a complaint may obtain access to the investigatory file of only that particular complaint. It would further clarify that while reports of factual statements made at a fact-finding conference are discoverable, records of settlement discussions during the conference shall not be discoverable. Proposed N.J.A.C. 13:4-13.2(b) would clarify that the Director may refuse, terminate or limit discovery, including through the issuance of protective orders, when it is determined that information sought involves confidential or privileged material or when discovery is sought to oppress any party or to delay the resolution of a case. Proposed new rule N.J.A.C. 13:4-13.3 would address discovery of the Division's investigatory file by non-parties, and provide that non-parties may only have access to those parts of the investigative file that are classified as public records, those being the verified complaint, answer, final disposition, and disposition of any motions made during the pendency of the case. Proposed new rule N.J.A.C. 13:4-13.4 would recodify from N.J.A.C. 13:4-8.2(c) the provisions regarding copying costs, and provide that parties seeking discovery of an investigatory file shall be charged the same fee for copies of records as is applicable to copies of records requested under OPRA. Currently, the costs for obtaining copies of the Division's records under OPRA are \$ 0.75/per page for pages one through 10, \$0.50/per page for pages 11 through 20, and \$0.25/per page for pages beyond page 21.

Because the Director has determined that the comment period for this proposal shall be 60 days, the proposal is exempt from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The proposed repeal and new rules will have a beneficial impact on the residents of New Jersey by conforming the Division's rules to recent amendments of the LAD. The proposed repeal and new rules will allow the Division to enter into a work-sharing agreement with HUD,

which would permit victims of housing discrimination to pursue rights under both federal and state law without having to separately pursue a complaint with HUD and the Division. Such an arrangement would also be beneficial to those entities charged with housing discrimination, as they would only be subject to a single investigative proceeding.

The Division believes that the proposed repeal and new rules will have a beneficial impact for those involved in all cases before the Division, whether as complainants or respondents, since the parties will have available to them more clearly defined and easier-to-follow rules for how the Division conducts its investigations and hearings.

Economic Impact

The proposed repeal and new rules will have a positive economic impact. The proposed rules related to housing discrimination cases will permit the Division to enter into a work-sharing agreement with HUD, allowing the Division to become eligible for federal funding for case processing and other outreach initiatives. The proposed new rules will also provide for the efficient processing of cases, which would permit the Division to best utilize its resources to combat unlawful discrimination. There would be no significant adverse economic impact on businesses or the real estate industry since all legal obligations arising under the new rules have been mandated by the existing rules of existing Federal or State law. Under the proposed new rules, there would be a slight increase in the costs for obtaining copies of Division's records. Under the current rules, the Division charges \$0.25 per page for copies of documents. Under proposed new rule N.J.A.C. 13:4-13.4, the Division would charge parties seeking discovery of its investigative file the same cost as for copies as that for documents requested pursuant to OPRA, which is \$0.75 per page for pages 1-10, \$0.50 per page for pages 11-20 and \$0.25 per page for each page more than 20.

Federal Standards Statement

A Federal standards analysis is not required because the proposed new rules relate to the rules of practice before the Division and are not intended to implement or comply with any program established under Federal law or under a State statute that incorporates or attempts to

effectuate Federal law, standards or requirements. While not imposing standards, the proposed new rules related to the procedure for investigation and hearings for complaints of housing discrimination are intended to be consistent with the rules utilized by HUD for such purposes.

Jobs Impact

The Division believes that the proposed repeal and new rules will have no impact on the number of jobs in the State.

Agriculture Industry Impact

The Division believes that the proposed repeal and new rules will have no impact on the agriculture industry.

Regulatory Flexibility Analysis

These proposed new rules describe how the Division conducts investigations and hearings of complaints filed with the agency and do not directly impose any general reporting, recordkeeping or other compliance requirements on any businesses. Small businesses, as that term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., may be affected by the proposed new rules to the extent these businesses are employers or places of public accommodation that have complaints filed against them with the Division. In other cases, small businesses could file complaints with the Division to the extent that a business has been the victim of unlawful discrimination. In either case, the Division believes that the proposed new rules will not impose any reporting, recordkeeping or other compliance requirements on small businesses beyond those in the existing rules of practice and procedure for responding to the Division's requests during an investigation. Further, while some small businesses choose to retain an attorney during an investigation by the Division, neither an attorney nor any other outside professional services are required to comply with the proposed new rules. To the extent that the proposed new rules clarify and are easier-to-follow than the existing rules, a small business may be better able to take part in an investigation by the Division without retaining counsel.

Smart Growth Impact

The Division does not anticipate that the proposed repeal and new rules will have any impact on the achievement of smart growth and implementation of the State Development and Redevelopment Plan, otherwise known as the State Plan.

Full text of the rules proposed for repeal may be found in the New Jersey Administrative Code at N.J.A.C. 13:4.

Full text of the proposed new rules follows:

CHAPTER 4 RULES OF PRACTICE AND PROCEDURE

SUBCHAPTER 1. GENERAL PROVISIONS

13:4-1.1 Scope of rules

The following provisions shall constitute the practice and procedure and shall govern all proceedings in the Division on Civil Rights. When a case is transmitted to the Office of Administrative Law, or the Director elects to hear the contested case, the Uniform Administrative Procedure Rules, N.J.A.C. 1:1, shall govern proceedings in that case. Whenever these rules refer to procedures to be followed after transmittal to the Office of Administrative Law, such references shall also be deemed to apply to instances where the Director elects to hear a contested case pursuant to N.J.S.A. 52:14F-8.

13:4-1.2 Liberal construction of provisions

(a) These provisions shall be liberally construed by the Director to permit the Division on Civil Rights to discharge its statutory functions and to secure just and expeditious determinations of all matters before the Division on Civil Rights.

(b) The Director may, upon notice to all parties, in the interest of justice, relax the application of these rules.

13:4-1.3 Practice where rules do not govern

(a) The Director may rescind, amend or expand these rules from time to time as necessary

to comply with the Law Against Discrimination, N.J.S.A. 10:5-1 et seq. or the Family Leave Act, N.J.S.A. 34:11B-1 et seq. and such new rules shall be filed with the Office of Administrative Law.

(b) In any matter that arises not governed by these rules, the Director shall exercise his or her discretion.

13:4-1.4 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

"Administrative law judge" means any person appointed pursuant to N.J.S.A. 52:14F-5(1).

"Aggrieved person" includes any person who:

1. Claims to have been injured by a discriminatory practice; or
2. Believes that such person will be injured by a discriminatory housing practice that is about to occur.

"Attorney for the Division" means an attorney appointed or assigned by the Attorney General of New Jersey.

"Complainant" means any person filing a verified complaint alleging discrimination under the Law Against Discrimination, N.J.S.A. 10:5-1 et seq., or the Family Leave Act, N.J.S.A. 34:11B-1 et seq.

"Director" means the Director of the Division on Civil Rights who shall act for the Attorney General of New Jersey as chief executive officer of the Division in his or her place and with his or her powers.

"Division" means the State Division on Civil Rights, Department of Law and Public Safety.

"Investigator" means any employee of the Division designated under the Department of Personnel as "Investigator, Division on Civil Rights."

"Investigatory files" means all pleadings, dispositions and orders relating to the verified complaint and all materials, documents, notes, statements, communications, including electronic communications, and recorded proceedings made or received by the Division during the course

of the Division's investigation of the verified complaint.

"Office of Administrative Law" or "OAL" refers to the agency created by N.J.S.A. 52:14F-1 et seq.

"Office of the Division" means the offices located at 31 Clinton Street, Newark, New Jersey; 100 Hamilton Plaza, Paterson, New Jersey; 140 East Front Street, Trenton, New Jersey; One Port Center, 2 Riverside Drive, Camden, New Jersey; 26 South Pennsylvania Avenue, Atlantic City, New Jersey; 574 Newark Avenue, Jersey City, New Jersey; and any additional offices which may from time to time be established and listed on the Division's website.

"Respondent" means any party charged with unlawful discrimination under the Law Against Discrimination, N.J.S.A. 10:5-1 et seq., or the Family Leave Act, N.J.S.A. 34:11B-1 et seq.

13:4-1.5 Validity of rules if any portion declared invalid

If any rule, sentence, paragraph or section of these rules, or the application thereof to any persons or circumstances, shall be adjudged by a court of competent jurisdiction to be invalid, or if by legislative action any rule shall lose its force and effect, such judgment or action shall not affect, impair or void the remainder of these rules.

13:4-1.6 Attorneys; form of appearance on behalf of parties

(a) An attorney may appear on behalf of a party by completing a Division Notice of Appearance form or by providing all of the information requested on such form in a letter or similar document. The Notice of Appearance form is available from the Division's offices or its website. To constitute an appearance, a form, letter or document shall contain the names of the parties, the Division's docket number, the name of the party or parties which the attorney is representing and the attorney's address, telephone number and facsimile number. Any document constituting an appearance shall be personally signed by the attorney filing the appearance.

(b) If a party appears through an attorney, all papers subsequent to the verified complaint may be served, as provided herein, upon such attorney with the same force and effect as though served on the client, unless a specific regulation requires service on the client also.

(c) An attorney who seeks to withdraw his or her appearance shall submit a written

Notice of Withdrawal of Appearance form to the Division or provide all of the information requested on such form in a letter or similar document. Copies of this form are available from the Division's offices or its website. Upon the filing of this Notice of Withdrawal of Appearance form, the attorney shall concurrently serve copies of the Notice of Withdrawal of Appearance form upon the client and other parties. The attorney shall include a certification that a copy of the notice was mailed or delivered to all counsel and pro se parties and to the client. When an attorney seeks to withdraw after a verified complaint has been transmitted to the Office of Administrative Law, the request for withdrawal shall be addressed to the Administrative Law Judge under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1. -

SUBCHAPTER 2. COMMENCEMENT OF ACTIONS

13:4-2.1 Manner of commencing actions

Any action may be commenced by the filing of a verified complaint at the offices or with any official or field investigator of the Division.

13:4-2.2 Who may file a verified complaint

(a) Any aggrieved person, including any individual, or group of individuals, partnership, educational institution, association, labor organization, or corporation, may file, or through an attorney at law file, a verified complaint for any practice violative of the Law Against Discrimination or the Family Leave Act which affects the aggrieved person.

(b) Any legal guardian, legal representative, trustee, trustee in bankruptcy, receiver or fiduciary may file, or through an attorney at law file, a verified complaint for any practice violative of the Law Against Discrimination or the Family Leave Act which affects an aggrieved person that the individual represents.

(c) Groups and associations dedicated to the elimination of discrimination in the sale and rental of real property, in the hiring and promotional practices of employers and unions, and in the operation of public accommodations may file, or through an attorney at law file, a verified complaint for any practice violative of the Law Against Discrimination or Family Leave Act which affects the membership of the group or association or which adversely affects the mission

of the group or association.

(d) The Attorney General, the Director, the Commissioner of Labor, or the Commissioner of Education may also file a verified complaint alleging unlawful discrimination.

(e) The Director on his or her own behalf may file a verified complaint, intervene, or join as a complainant in any verified complaints filed by complainants.

13:4-2.3 Rights of parties; notification of settlement

(a) Any complainant shall be considered a party to any proceeding in the Division resulting from the filing of such verified complaint and shall have the rights of a party enumerated by these rules and by the Law Against Discrimination and the Family Leave Act.

(b) If any complainant files a verified complaint with the Division on behalf of any individual or individuals, the proceeding initiated by such verified complaint shall, if the Director finds the continuation of the proceeding is in the public interest, proceed to conclusion, including the issuance of any lawful order by the Director, even if the grievances of any individual person represented by the above complainants have been satisfactorily ameliorated.

(c) All complainants and individuals on whose behalf a verified complaint has been filed pursuant to (b) above and (d) below shall be notified of any settlement of individual grievances and of the right to file a motion urging the Director to continue the proceeding.

(d) Where the Director has filed a verified complaint which seeks relief for one or more unnamed members of a protected class, the Director shall have the discretion to settle such verified complaint on such terms as the Director deems appropriate.

(e) Complainants shall promptly notify the Division of any change in address or telephone number at all times while the verified complaint is pending.

13:4-2.4 Preparation and contents of verified complaint

(a) A verified complaint shall be filed upon a printed form approved by the Director.

(b) The Division shall aid the complainant in the completion of the verified complaint except where aid is refused by the complainant or where the complainant appears at an office of the Division or before an officer of the Division with a completed verified complaint.

(c) The verified complaint shall be entitled in the Department of Law and Public Safety, Division on Civil Rights, and shall set forth in the caption the names of the complainants and respondents.

(d) The verified complaint shall set forth in separate numbered paragraphs the following:

1. The full name and address of all complainants;
2. The full name and address of all respondents, if known;
3. A statement of the specific prohibited basis or bases set forth in the Law Against Discrimination or Family Leave Act that gave rise to the alleged discrimination;
4. A brief statement setting forth the facts deemed to constitute the alleged discrimination;
5. The section of the Law Against Discrimination or Family Leave Act allegedly violated;
6. A statement giving all pertinent facts as to whether any other action, either criminal or civil, has been instituted in the matter. A complainant shall notify the Division if at any time during the pendency of the verified complaint, he or she files a verified complaint with any other agency or court concerning the matter which is the subject of the Verified Complaint;
7. A notarized signature and verification by the person or persons filing the verified complaint; and
8. The county in which the alleged discrimination took place.

13:4-2.5 Time period for filing verified complaints

Verified complaints shall be filed within 180 days after the alleged act of discrimination or alleged violation of the Family Leave Act.

13:4-2.6 How to file verified complaints

(a) Any person filing a verified complaint with the Division may file by submitting a single copy to any office of the Division or any official or field investigator of the Division. A verified complaint shall be deemed filed on the date it is received in any office of the Division,

or on the date it is received by any official or field investigator of the Division.

(b) The filing of a verified complaint or any other pleading shall be proven by the official stamp of the Division or by the signature of any official, employee or field investigator and his or her written notation indicating the date of receipt.

13:4-2.7 Notification of filing

Upon receipt of the verified complaint, the Division shall provide the complainant with a form adopted by the Director, which notifies the complainant of his or her rights under the Law Against Discrimination or Family Leave Act, including the right to file a verified complaint in the Superior Court of New Jersey and be heard before a jury; the jurisdictional limitations of the Division; and any other provisions of the Law Against Discrimination or Family Leave Act that may apply to the verified complaint. The jurisdictional limitations of the Division include the limitation of the Division on Civil Rights to only administer claims under the Law Against Discrimination or Family Leave Act, and the inability of the Division on Civil Rights to afford parties the opportunity of a jury trial in claims heard before the Office of Administrative Law.

13:4-2.8 Service of verified complaints

(a) Upon receipt of a verified complaint, the Division shall promptly serve a copy on all respondents by certified mail or overnight delivery by commercial courier, or at the discretion of the Director, by personal delivery by an agent of the Division. In cases involving alleged violations of N.J.S.A. 10:5-12g, h, i, k, and o, service of the verified complaint shall take place no later than 30 days following the Division's receipt of the verified complaint.

(b) In its discretion, the Division may serve a Document and Information Request with the copy of the verified complaint.

13:4-2.9 Amendment of verified complaints

(a) Prior to transmittal of a case to the Office of Administrative Law, the complainant with the approval of the Director may file an amended verified complaint with the Division.

(b) Amendments that cure technical defects, clarify or amplify allegations made in the original verified complaint, or allege additional acts which constitute unlawful practices related

to or growing out of the subject matter of the original verified complaint, will relate back to the date the verified complaint was first received.

(c) Following transmittal of a case to the Office of Administrative Law, any motion to amend a verified complaint shall be initially presented to the administrative law judge hearing the matter.

(d) Using the standards set forth in the Uniform Administrative Procedure Rules, any pleading may be amended during or after hearing with leave of the administrative law judge to conform to the evidence presented.

13:4-2.10 Verified complaints involving minors or other confidential information; use of pseudonym

(a) The Division shall take two verified complaints with the same docket number when the verified complaint involves an aggrieved party who is a minor or when the Director determines, in his or her sole discretion, that the verified complaint involves confidential information regarding an aggrieved party. The first verified complaint shall include the full name and address of the aggrieved party and shall not be disclosed except as required by law. The second verified complaint shall be identical to the first, except that a pseudonym shall be substituted for the name of the aggrieved party and the address, if any, shall be that of the Division's office investigating the verified complaint or the address of an attorney or other representative designated by the complainant or aggrieved party.

(b) The Division shall serve a copy of the pseudonym verified complaint prepared under this section upon any respondent named therein. Any service of a pseudonym verified complaint shall be accompanied by a notice informing the respondent that, upon review of the verified complaint, if the respondent is unable to identify with sufficient assurance the identity of the person filing the verified complaint or the aggrieved party, the respondent shall notify the Division in writing not later than ten days after the date the verified complaint is served. The respondent's notice shall also designate a person upon whom the Division shall serve a copy of the first verified complaint and other papers concerning the Division's investigation, and shall

further contain an acknowledgment that any information provided by the Division or other person will be kept strictly confidential. Thereafter, upon receipt of a release from the complainant, the Division shall forward the verified complaint identifying the complainant to the respondent along with a protective order prohibiting the respondent from disclosing the identity of the complainant. Any violation of such a protective order will subject the violator to penalties pursuant to N.J.S.A. 10:5-14.1a.

SUBCHAPTER 3. ANSWERS

13:4-3.1 Time for filing answers

(a) Respondents shall file an answer and response to the Document and Information request with the Division within 20 days after service of the verified complaint and Document and Information Request.

(b) Respondents that fail to file an answer and/or response to the Document and Information Request within the time period provided by these rules shall be subject to the default procedure set forth at N.J.A.C. 13:4-5.

(c) Extensions of time for filing an answer and/or responding to the Document and Information Request may be authorized by the Director upon good cause shown. Requests for extensions of time shall be in writing and addressed to the Director.

13:4-3.2 Form and contents of answers

(a) The answer to the verified complaint shall fully and completely advise the parties and the Division as to the nature of the respondent's defenses to each claim asserted, and shall admit or deny the allegations set forth in the verified complaint. Denials shall fairly meet the substance of the allegations denied. A respondent who intends in good faith to deny only part or a qualification of an allegation shall specify so much of it as true and material and deny only the remainder. The respondent may not generally deny all the allegations but shall make the denials as specific denials of designated allegations.

(b) Allegations in any answer setting forth an affirmative defense shall be taken as denied.

(c) Respondents shall promptly notify the Division of any change in address or other material change in the status of the respondent (such as a bankruptcy filing or ceasing to operate as an ongoing concern) at all times while the verified complaint is pending.

13:4-3.3 Service of answers

(a) Respondents shall serve a copy of their answer on the complainant(s) pursuant to the procedure set forth at N.J.A.C. 13:4-7.5 within three days of the filing of the answer.

(b) Respondents shall within five days of serving an answer file a certification with the Division attesting that such service has been completed.

SUBCHAPTER 4. INVESTIGATIONS

13:4-4.1 Timing of investigations

(a) An investigation by the Division may be conducted either prior to or subsequent to the filing of a verified complaint.

(b) Upon receipt of a verified complaint and answer, the Division shall promptly initiate an investigation into the allegations of discrimination.

(c) In cases involving alleged violations of N.J.S.A. 10:5-12 g, h, i, k and o, the Division shall complete its investigation within 100 days after the filing of the verified complaint. If the Division is unable to complete the investigation within that time period, it must notify the complainant(s) and respondent(s) in writing of the reasons for its failure to do so.

13:4-4.2 Investigatory procedures

(a) In the conduct of investigations, all investigatory powers granted by N.J.S.A. 10:5-8h through j shall be available to the Division. In its discretion, the Division may conduct investigations using, among other things, interrogatories, fact finding conferences, subpoenas, field visits, interviews, and depositions as provided in these rules.

(b) During the pendency of the Division's investigation, only the Division may seek discovery from the parties.

(c) In connection with an investigation of the operation of any real property, as defined by N.J.S.A. 10:5-5n, the Division may require the submission of information concerning the

race, creed, color, national origin, ancestry, marital status, domestic partnership status, sex, affectional or sexual orientation, familial status, disability, nationality or source of lawful income to be used for rental or mortgage payments of the occupants of such real property, the terms and conditions on which the sale or lease of said real property is to be made to the general public, the vacancy rate of such real property subject to rent, the plans for advertising or notifying the public of the availability of said real property for rental or sale, the standard form documents used in the rental or sale of such real property, and such other information as may be reasonably necessary to carry out the provisions of the Law Against Discrimination.

(d) In connection with an investigation of any employer, as defined by N.J.S.A. 10:5-5e, the Division may require the submission of information concerning:

1. The race, creed, color, national origin, ancestry, age, marital status, domestic partnership status, affectional or sexual orientation, genetic information, sex, disability, atypical hereditary cellular or blood trait, military status or nationality of employees;
2. The employment records of employees;
3. The procedures for advertising or notifying the public of the availability of jobs;
4. The procedures for hiring or selecting employees;
5. The testing, seniority, promotion and discharge procedures; and
6. Such other information as may be reasonably necessary to carry out the provisions of the Law Against Discrimination or Family Leave Act.

13:4-4.3 Interrogatories

The Director may cause interrogatories to be served to aid the Division in its investigation. Unless otherwise specified in the interrogatories, responses shall be filed with the Division within 20 days following service of the interrogatories.

13:4-4.4 Subpoenas

(a) The Director may issue such subpoenas as he or she deems necessary to aid the investigatory process. The Director shall issue subpoenas in the name of the Division, and the

subpoenas shall direct the person designated to attend personally and, if necessary, to attend with any books, records, documents and any other evidence which relates to any matter under investigation.

(b) A subpoena shall state the time and place where the person designated is directed to attend.

(c) A subpoena may be issued by the Director upon the application of any party if that party can demonstrate to the Director that the subpoena is reasonable, and that the matters sought therein are relevant and material to the investigation.

(d) Where a respondent is a corporation and is represented by an attorney who has filed a notice of appearance with the Division, the Director may issue a notice in lieu of subpoena requiring respondent to produce documents or to produce its employees to attend any investigatory proceeding. Said notice in lieu of subpoena shall be served upon respondent's attorney in the manner set forth in (f) and (g) below.

(e) Following transmittal of a case to OAL for hearing, the procedures set forth at N.J.A.C. 1:1, shall govern the issuance of subpoenas.

(f) The subpoena shall be served either by personal service by any person 18 or more years of age by delivery of a copy thereof to the person named therein, by overnight delivery by commercial courier, or by registered or certified mail, return receipt requested.

(g) Accompanying all subpoenas shall be a check in an amount sufficient to cover the costs for one day's attendance and such mileage as may be allowed by law in civil matters in the courts of the State of New Jersey; but no fee shall be allowed where a subpoena requires only the production of documents which may be produced by mailing copies of said documents to the Division.

13:4-4.5 Depositions by Division and parties

(a) On written motion of any party prior to transmittal of a case to OAL, the Director may order that the testimony of any material witness residing within or without the State be taken by deposition in the manner prescribed by law for depositions in civil actions. Such motion may be

granted only if it sets forth:

1. The name and address of the witness to be deposed;
2. A showing of the materiality of that witness' testimony; and
3. A showing that the witness will be unable to attend, or cannot be compelled to attend, the hearing. Said motion shall request an order requiring the witness to appear and testify before an officer, representative, or agent of the Division.

(b) In his or her discretion, the Director may allow the taking of a deposition to be contingent upon the payment of all costs associated therewith by the moving party.

(c) No depositions shall be taken by parties for any reasons or by any manner other than that contained in (a) above, except in exceptional circumstances, prior to transmittal of a case to OAL.

(d) The Division may take depositions of witnesses as part of any investigation when, in the discretion of the Director, such depositions will aid the investigatory process.

13:4-4.6 Enforcement of depositions, interrogatories, subpoenas, other investigatory orders

If any person shall fail to appear at the time designated in a subpoena, or shall fail to comply with an order of the Director for the taking of depositions, interrogatories, or other investigatory procedures, or shall fail to provide information as requested pursuant to a lawful investigation, he or she shall be subject to the appropriate enforcement provisions of N.J.S.A. 10:5-8i, 10:5-19 and 10:5-26, as well as the provisions of N.J.A.C. 13:4-5.

13:4-4.7 Fact finding conferences

(a) Fact-finding, as part of an investigation in a discrimination complaint, is subject to the following:

1. As part of its investigation and at the discretion of the Director, the Division may convene a fact-finding conference for the purpose of obtaining evidence, identifying the issues in dispute, ascertaining the positions of the parties and exploring the possibility of settlement. The fact-finding conference is not an adjudication of the merits of the verified complaint.

2. The Division shall provide the parties with written notice of the conference. Said notice shall identify the individuals requested to attend on behalf of each party, and any documents which any party is requested to provide within the specified time frame.

(b) The conference shall be conducted as follows:

1. The Division employee acting as fact-finder shall conduct and control the proceedings.

2. Upon prior notice to the Division, the parties may bring witnesses to the conference in addition to those whose attendance may be specifically requested by the Division, but the fact-finder shall have discretion over which witnesses shall be heard and the order in which they are heard. The fact-finder may exclude any witness or other person from the conference, except that one representative of each party or counsel shall be permitted to remain throughout. In the case of parties that are not individuals, the fact-finder may limit attendance at the conference to one representative of each party and counsel.

3. The Division may request the parties to provide affidavits from witnesses who appear at the fact-finding conference.

4. A party may be accompanied at a fact-finding conference by his or her attorney or another representative, and by a translator, if necessary.

5. An attorney for a party who has not previously entered his or her appearance shall do so at the outset of the conference.

6. Because the fact-finding conference is a means of investigation and not a hearing on the merits of a case, the parties shall not be entitled to cross-examine witnesses. All questioning shall be conducted by the fact-finder, unless in his or her discretion the fact-finder permits questions to be asked by other persons present at the conference.

7. At the discretion of the Director, a fact-finding conference may be recorded. The tape shall become part of the Division's investigative file and discovery of the tape

will be governed by N.J.A.C. 13:13.

8. During the conference, the fact-finder may allow a recess to permit the parties to discuss settlement.

(c) Postponements of a fact-finding conference shall be subject to the following:

1. Postponements of a scheduled fact-finding conference will be granted only for good cause shown. Parties are discouraged from requesting adjournment from fact-finding conferences. Requests for adjournments should be directed to the regional manager. Except in extraordinary circumstances, requests for adjournments must be made upon notice to all parties at least 10 working days prior to the conference.

2. If a party does not appear at a fact-finding conference without obtaining a postponement, the Division may proceed with the conference without the party.

(d) If the respondent or the complainant refuses or fails to attend a scheduled fact-finding conference, the Division may schedule an alternate conference date. The Division may subpoena any party or witness who has failed to attend the initially scheduled fact-finding conference. The Division may also subpoena any documents which either party was requested to bring, and fails to bring, to the fact-finding conference.

13:4-4.8 Director's investigations

(a) The Director, pursuant to N.J.S.A. 10:5-6, 10:5-8c, g, h, i and j; and 10:5-9.1, may conduct investigations to determine the extent to which industries, groups of industries, business persons, or groups of business persons, or other persons or groups of persons are complying with the Law Against Discrimination or Family Leave Act.

(b) All investigatory and discovery powers which the Division may otherwise utilize in the investigation of verified complaints as set forth in the Law Against Discrimination, the Family Leave Act and in these rules of practice and procedure, including, but not limited to, the power to issue subpoenas, take depositions and serve interrogatories, may be utilized in the discretion of the Director during a Director's investigation.

SUBCHAPTER 5. DEFAULTS

13:4-5.1 Applicability of default procedure

(a) If a respondent has been served with a verified complaint and/or the Director has issued a request for information or documents in any form pursuant to N.J.S.A. 10:5-8i, and notice of the consequences of the failure to answer the verified complaint and/or request for information or documents has been given to respondent, and respondent fails either to answer the interrogatories, the verified complaint and/or the request for information or documents or to file a motion to strike the request for information or documents within the time specified therein, the Director may initiate the default procedure set forth in this subchapter.

(b) In the event the respondent files a motion to strike the request for information or documents within the time set to answer the request for information or documents, said motion shall be supported by affidavit and/or brief and shall be ruled upon by the Director on the motion papers without oral argument; if said motion is granted the request for information or documents shall be stricken and if said motion is denied the Director shall then follow the procedure set forth below or enter any other appropriate order. The filing of a motion to strike a request for information or documents shall toll the time for filing a response to such a request with the Division.

13:4-5.2 Default procedure

(a) The Director shall initiate the Default Procedure by serving the following notice and order:

"NOTICE is hereby given that a verified complaint has been served upon you charging you with a violation of the Law Against Discrimination (and/or Family Leave Act as is applicable). Pursuant to this Division's authority under N.J.S.A. 10:5-8(i), a verified complaint and/or request for information or documents (as is applicable) has/have been served upon you. Said the verified complaint and/or request for information or documents has/have not been answered and filed within the time as therein

prescribed. Should you fail to fully answer and file the answers to verified complaint and request for information or documents within ten days, a default shall be entered in this case. Said default shall constitute:

(a) An admission that the verified complaint and/or request for information or documents, if answered, would have established facts in accordance with the claim of the complainant;

(b) A waiver of your right to have this Division conduct further investigation, find whether or not there is probable cause, make conciliation efforts or hold a public hearing;

(c) A waiver of your right to present any and all defenses.

THEREFORE it is on this _____ day of _____, _____,

ORDERED:

1. Respondent(s) shall fully answer and file answers to the verified complaint and/or request for information or documents previously served.

2. Respondent(s) shall file said answers on or within the tenth day following the date of this order."

(b) If, after the expiration date of the Director's order extending time to answer the verified complaint and/or request for information or documents, the respondent has failed to file an answer to the verified complaint and/or to fully answer and file the request for information or documents with the Director:

1. Said failure shall constitute a waiver of the respondent's right to an investigation, finding of probable cause, conciliation efforts or public hearing;

2. Said failure shall result in the suppression of any and all defenses of the respondent;

3. Said failure shall result, with respect to request for information or documents, in the matters regarding which questions were asked being taken as established for the

purposes of the case in accordance with the claim of the complainant; and

4. The Director shall order the entry of a default on the docket of the Division.

(c) Any order for entry of default must be supported by an affidavit of a field investigator or other Division employee authorized by the Director. The affidavit shall recite:

1. The date of service of the verified complaint and/or request for information or documents on respondent and the date of the service of any order requiring answers to the verified complaint and/or request for information or documents and extending the time in which to answer them;

2. That the respondent has failed to file an answer to the verified complaint and/or to reply to the request for information or documents within the time required by the Director's order as it may have been extended, or respondent has made a motion to strike the request for information or documents and following denial thereafter by the Director has failed to answer within the time required by the Director's order;

3. That respondent has been given notice of the consequences of failure to answer the verified complaint and/or to respond to request for information or documents; and

4. That the complainant had filed his/her allegation of discrimination within the time prescribed by law.

(d) Within 10 days after the entry of default, the Director shall serve notice of the entry of default and supporting affidavit upon the respondent. The notice shall inform respondent that the case will be transmitted to the OAL for hearing on a default basis and that transmittal will occur twenty days after receipt by respondent of the notice of entry of default. The notice shall also inform respondent of the opportunity provided by N.J.A.C. 13:4-5.3 for petitioning the Director to vacate the entry of default.

(e) Twenty days after respondent receives notice of the entry of default the Director shall transmit the case to OAL for the purpose of a hearing on the complainant's proofs of the allegation of discrimination on a default basis in accordance with N.J.A.C. 13:4-5.4.

13:4-5.3 Vacation of default

(a) At any time after entry of default and before transmittal of the case to OAL, the respondent may petition the Director who may vacate the entry of default and reopen the case for good cause shown. The respondent's assertion of good cause shall be in affidavit form and shall include the full and complete answers to the verified complaint and all request for information or documents.

(b) As a condition of vacating the default, the Director may order the respondent to pay costs or reasonable expenses, including attorney's fees, to the State of New Jersey or an aggrieved representative or party.

(c) If the Director vacates the entry of default at any time prior to the date of transmittal of the case to the OAL, the verified complaint shall instead proceed to an investigation finding as to probable cause, and where appropriate, conciliation or public hearing as provided by these rules.

(d) After transmittal of the case to OAL, a motion to vacate a default shall be directed to the Administrative Law Judge pursuant to N.J.A.C.1:1.

13:4-5.4 Default hearing and final order

(a) At a default hearing the proofs shall consist of the order of entry of default, the supporting affidavit and any other evidence proffered by the complainant, and the only cognizable issues shall be whether the facts established by the complainant and admitted by respondent constitute an act of discrimination, and if so, the amount of damages or other recommended relief. No evidence proffered by the respondent shall be admitted at a default hearing.

(b) After receiving the initial decision of the administrative law judge, the Director shall enter a final order pursuant to N.J.S.A. 10:5-17.

(c) If discrimination is found by the Director, the final order shall require the respondent to take any affirmative action which in the judgment of the Director is necessary to both eliminate any discrimination and make the complainant whole.

(d) The order described in (c) above shall be the only final order provided for by this rule;

all other orders provided by this rule shall be interlocutory in nature.

SUBCHAPTER 6. ADMINISTRATIVE DISMISSALS

13:4-6.1 Administrative dismissals

(a) The Director may, in his or her discretion administratively dismiss verified complaints for reasons including, but not limited to, the following:

1. Lack of jurisdiction;
2. The complainant is unavailable or unwilling to participate in conciliation or investigation, or to attend a hearing;
3. Relief is precluded by the respondent's absence or other special circumstances;
4. The complainant has initiated an action in Superior Court pursuant to N.J.S.A. 10:5-13;
5. The verified complaint was not timely filed pursuant to N.J.S.A. 10:5-13;
6. The verified complaint, on its face, fails to state a claim for relief under the New Jersey Law Against Discrimination or Family Leave Act, N.J.S.A. 10:5-1 et seq.; or
7. The failure by the complainant to accept reasonable offers to resolve the allegations in the verified complaint.

(b) In determining whether to administratively dismiss a verified complaint pursuant to (a)7 above, the Director will take the following factors into account:

1. Probability of success after full investigation and hearing;
2. Reasonableness of offer;
3. Reasonableness of complainant's refusal, if any;
4. The amount of complainant's economic loss, and respondent's degree of responsibility therefor;
5. The evidence of the amount of complainant's mental pain and suffering;
6. The egregiousness of the discrimination charged; and
7. Whether the public interest is best served by the continuation of the proceedings.

(c) Prior to administratively dismissing a case pursuant to N.J.A.C. 13:4-6.1(a)7 above, the Director shall notify the complainant of the reason for the dismissal, and shall offer the complainant the opportunity, pursuant to N.J.S.A.10:5-13, to transmit the action to the Office of Administrative Law and to present the action by himself or herself, or through his or her own counsel at the hearing. If the complainant does not request such transmittal of the case within 30 days of the notice by the Division, the matter will be administratively dismissed. When a complainant files a request with the Division for transmittal pursuant to this section, the complainant thereby waives any right to have an attorney for the Division prosecute the verified complaint, and the other procedures and requirements set forth at N.J.A.C. 13:4-11.1 apply.

SUBCHAPTER 7. MOTIONS AND OTHER CASE ACTIONS

13:4-7.1 Motions

(a) The procedure governing all motions made prior to transmittal of a case to the Office of Administrative Law shall be in accordance with the rules governing the New Jersey courts, except where otherwise provided under these rules. After transmittal, the procedure shall be in accordance with N.J.A.C. 1:1.

(b) All complainants and respondents, as well as the Division, may file motions.

(c) Unless otherwise provided in this chapter, opposing parties to a motion shall file and serve responsive papers no later than 10 days following receipt of the motion. The moving party may file and serve further papers responding to any matter raised by the opposing party no later than five days after receipt of the responsive papers.

13:4-7.2 Motions to intervene

(a) Prior to transmittal of a case to the Office of Administrative Law, any person interested in or associated with the matters alleged in a verified complaint may file an original and two copies of a motion to intervene and shall serve an additional copy on each respondent and complainant by registered or certified mail, return receipt requested.

(b) Copies of said motion shall be filed and served together with supporting affidavits and briefs.

(c) Following transmittal of a case to the Office of Administrative Law, motions to intervene shall be made pursuant to N.J.A.C. 1:1-12.

13:4-7.3 Motions for consolidation or severance of verified complaint

(a) Whenever the Director deems it necessary, he or she may order that any verified complaint filed with the Division and any proceedings which may have been initiated with respect thereto be consolidated with or severed from any other verified complaint which may have been instituted with the Division.

(b) Following transmittal of a case to the Office of Administrative Law, all motions to sever or consolidate shall be initially presented to the OAL, pursuant to N.J.A.C. 1:1. Subject to the requirements of N.J.S.A. 10:5-13, requests for consolidation of cases pending before the Division with cases pending before OAL but involving the jurisdiction of other agencies shall be handled in accordance with N.J.A.C. 1:1.

13:4-7.4 Motions for reconsideration

(a) Any party may, within 30 days after the service of a finding of probable cause or no probable cause or other final order of the Director, file a motion for reconsideration seeking review of the agency's decision and/or the reopening of the record for further investigation. The motion shall be in writing and state the grounds upon which relief is sought. The motion shall be served upon all opposing parties in accordance with N.J.A.C. 13:4-7.5, following which each opposing party may, within 10 days following service of the motion, file a response to the motion. The Director may grant such motion and vacate or modify the order, and/or reopen the record upon showing of the following:

1. Mistake, inadvertence, surprise, or excusable neglect;
2. Fraud, misrepresentation or other misconduct of an adverse party;
3. Newly discovered evidence, which the moving party can demonstrate is reasonably likely to change the final decision of the Director and which by due diligence could not have been discovered in time to be presented at the hearing or during the investigation of the matter; or

4. Any other reason consistent with the public policy of the Law Against Discrimination or Family Leave Act and in the interest of justice.

(b) No motion filed pursuant to this section, and no order granting such motion, shall suspend the operation of any final Director's order unless otherwise specified by order of the Director.

13:4-7.5 Service of motions and other pleadings

(a) Prior to transmittal to OAL, unless otherwise instructed by the Director, every motion and every written notice, brief or memorandum of law shall be served by the filing party by mailing copies to all parties, by registered or certified mail, return receipt requested or by overnight mail by commercial courier, within three days of said filing.

(b) Such documents shall not be deemed served until an affidavit of mailing to all other parties is filed with the Division at the time of or subsequent to filing the pleading.

(c) When any party has appeared through or is represented by an attorney, service upon such attorney shall be deemed valid service upon the party in all cases unless timely written notice of withdrawal or substitution of such attorney is served upon the Director and all other parties.

(d) The Division may, in the discretion of the Director, serve pleadings and other papers on behalf of a party appearing pro se.

(e) The Division may, in the discretion of the Director, serve any paper or disposition upon a party by electronic transmission if that party has previously advised the Division that it is willing to accept service in such a manner.

SUBCHAPTER 8. WITHDRAWAL OF COMPLAINTS

13:4-8.1 Withdrawals

(a) A pending verified complaint, or any part thereof, may be withdrawn by the complainant at any time before issuance of a finding of no probable cause by the Division.

(b) A withdrawal shall be in writing, on a form provided by the Division, and shall be signed by the complainant or the complainant's attorney.

(c) Withdrawal of an individual verified complaint shall not preclude the Director from substituting himself or herself as, or continuing as, a complainant based on the same facts.

SUBCHAPTER 9. CONCILIATION AND MEDIATION

13:4-9.1 Timing of conciliation proceedings

At any time beginning with the filing of the verified complaint and ending with the closure of the case or 45 days from the date of a finding of probable cause, the Division shall, to the extent feasible, commence conciliation proceedings, which may, in the discretion of the Director, include mediation conducted by a mediator designated by the Director with respect to the verified complaint.

13:4-9.2 Confidentiality of conciliation and mediation records

Settlement proposals or other information exchanged during a conciliation conference or mediation proceedings shall be kept confidential by all persons involved in the conciliation conference or mediation proceedings and shall not be admissible as evidence unless obtained from a source independent of the conciliation or mediation. Conciliation and mediation agreements shall be available to the public unless the complainant and respondent otherwise agree and the Attorney General determines that disclosure is not required to further the purposes of the law.

13:4-9.3 Mediation proceedings

(a) At any time following the filing of a verified complaint, mediation proceedings may be scheduled at the discretion of the Director.

(b) The Director may designate a mediator employed by the Division or otherwise appointed by the Director to conduct the mediation proceedings. In the event the mediation is unsuccessful, the mediator shall not participate in any way in the investigation, motions or hearing of the case.

(c) If mediation is unsuccessful and the respondent has not yet filed an answer to the verified complaint, such answer and the responses to the Division's Document and Information Request must be filed within 20 days of the respondent's receipt of notification that the matter is

being transferred to the Bureau of Enforcement for further investigation.

(d) If the Director finds that there has been a breach of the mediation agreement, the Director may, in his or her discretion, reopen the verified complaint for investigation or seek to enforce the agreement.

13:4-9.4 Conciliation conference proceedings

(a) After a finding of probable cause, the Director or his or her representative shall, to the extent feasible, schedule a conciliation conference and engage in conciliation with respect to the verified complaint.

(b) The respondent shall have at least five days notice of the time and place of the conciliation conference.

(c) This notice shall contain a provision advising the respondent that in the event conciliation is unsuccessful, a public hearing will be held.

(d) Failure to attend the conciliation conference may be deemed to be an unsuccessful attempt at conciliation.

(e) Any conciliation agreement arising out of conciliation efforts by the Division shall be an agreement between the respondent and the complainant, and shall be subject to the approval of the Division.

(f) At the Director's discretion, conciliation may be conducted according to the rules applicable for mediation set forth in this subchapter.

SUBCHAPTER 10. ORDERS OF THE DIRECTOR

13:4-10.1 Orders and findings of Director

At any time during the course of the proceedings, the Director may enter such orders, including protective orders and orders of dismissal, as may be necessary to effectuate the processing and determination of a case or as he or she may deem appropriate to further the intent and purposes of the Law Against Discrimination or Family Leave Act. When a case is pending before the OAL, the procedures set forth at N.J.A.C. 1:1 shall apply.

13:4-10.2 Findings of probable cause

(a) Following the completion of an investigation of a verified complaint filed with the Division, the Director shall determine whether or not probable cause exists to credit the allegations of the verified complaint.

(b) If the Director determines based upon a review of the investigative findings that there is a reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the Law Against Discrimination or Family Leave Act has been violated, he or she shall issue a finding of probable cause.

(c) If the Director determines based upon a review of the investigative findings that there is not a reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the Law Against Discrimination or Family Leave Act has been violated, he or she shall issue a finding of no probable cause.

(d) If the Director determines based upon a review of the investigative findings that probable cause exists as to some but not all of the allegations of the verified complaint, he or she shall issue an agency determination setting forth those issues to which the Director finds that probable cause exists and those issues to which the Director finds that no probable cause exists. Any subsequent hearing on the verified complaint shall be limited to those issues in which the Director determines that probable cause exists.

(e) A finding of no probable cause pursuant to (c) above shall be considered a final order. Findings of probable cause pursuant to (b) above, and agency determinations pursuant to (d) above, shall not be considered final orders.

13:4-10.3 Service of Director's orders

All orders of the Director, including findings of probable cause and no probable cause, shall be promptly served on all parties.

SUBCHAPTER 11. HEARINGS

13:4-11.1 When hearings ordered

(a) The Director shall determine when a hearing shall be necessary in any matter.

(b) When the Director has determined pursuant to N.J.A.C. 13:4-10.2(b) that probable

cause exists to credit the allegations of a verified complaint and conciliation has failed to eliminate the alleged practices of discrimination or when, in the judgment of the Director, conciliation would not be feasible, the Director shall order a hearing.

(c) At any time after 180 days from the filing of a verified complaint with the Division, a complainant may file a request with the Division to present the action by himself or herself or through his or her own attorney to the Office of Administrative Law. Such request shall be in writing and signed by the complainant or his or her attorney.

(d) Upon receipt of a request made pursuant to (c) above, the Division shall file the action with the Office of Administrative Law, unless at the time of receipt of the request the Division has found No Probable Cause or otherwise dismissed the verified complaint.

(e) The complainant or his or her attorney may be required to complete any forms which may be necessary to permit the Division to transmit the case to the Office of Administrative Law.

(f) When the Director orders a hearing pursuant to (b) above, the attorney for the Division shall present the case in support of the verified complaint to the Office of Administrative Law. If the complainant does not wish to rely on the Division's prosecution of the verified complaint, he or she may request to present the case by himself or herself or through his or her own attorney to the Office of Administrative Law pursuant to (c) above.

(g) When a complainant files a request with the Division pursuant to (c) above, complainant thereby waives any right to have an attorney for the Division prosecute the verified complaint. The parties shall, however, send copies of all pleadings, briefs and memoranda to the Division's attorney at the same time as filing such papers with OAL. The Division's attorney may attend preliminary proceedings such as pre-hearing conferences in order to determine the appropriateness of intervention, and may intervene on behalf of the Division in any case pursuant to N.J.S.A. 10:5-13.

13:4-11.2 Conduct of hearings

The procedure for conducting hearings, issuing initial decisions and issuing final orders

shall be governed by the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

13:4-11.3 Temporary injunction

If the Director determines that the interests of the complainant may be irreparably damaged by the lapse of time before a hearing could be scheduled or between the scheduling of a hearing and the ultimate disposition of the matter in the Division, he or she shall instruct the attorney for the Division to seek such temporary injunctive relief in the Superior Court of New Jersey, pursuant to N.J.S.A. 10:5-14.1, as may be appropriate to preserve the rights of the complainant. Where a complainant is proceeding pro se or through a private attorney, pursuant to N.J.S.A. 10:5-13, the complainant may apply to the Court for temporary injunctive relief.

SUBCHAPTER 12. PROTECTION OF COMPLAINANTS AND WITNESSES

13:4-12.1 Protection of witnesses; preventing reprisals

(a) No person shall discharge, evict, expel or otherwise discriminate or take reprisals against any person because he or she has opposed any practices or acts forbidden under the Law Against Discrimination or Family Leave Act or because he or she has filed a complaint, testified or assisted in any proceeding under the Law Against Discrimination or Family Leave Act.

(b) For the purposes of this section, all persons who have been, are or will be respondents in proceedings before the Division shall be considered to be within the continuing jurisdiction of the Division and shall be subject to appropriate order of the Director of the Division as in the case of an unlawful reprisal, including such interim orders as may be deemed necessary to preserve the status quo and to protect the best interests of the parties.

SUBCHAPTER 13. ACCESS TO DIVISION'S INVESTIGATORY FILES

13:4-13.1 Confidentiality of Division's investigatory files

Except as otherwise set forth in this subchapter, the Division's investigatory records shall be considered confidential and exempt from public access under N.J.S.A.47:1A-1 et seq.

13:4-13.2 Discovery of Division's investigatory files by parties to the verified complaint

(a) After a Finding of Probable Cause has been issued by the Director, after transmittal to OAL pursuant to N.J.S.A. 10:5-13, after any final determination has been issued, or after any

other agency closure, a party to a verified complaint may, upon written request and notice to all other parties, receive discovery of the following information in the Division's investigatory file of that verified complaint:

1. Statements made by any person during the course of the Division's investigation, other than work product of Division employees, intra-agency communications and attorney-client communications;
2. All factual written reports, or sound recordings, made by the field investigator or other employee or agent of the Division;
3. All factual written data, factual written reports or documentary information; and
4. Reports of factual statements made at a fact-finding conference, except that records of settlement discussions during the conference shall not be discoverable.

(b) When an objection is made to a discovery request on the grounds that it seeks confidential or privileged material, or that the purpose of the request is to oppress any party or to delay the resolution of the case, the Director may refuse, terminate, or limit discovery as the circumstances warrant, including issuance of protective orders.

13:4-13.3 Discovery of Division's investigatory files by non-parties

Non-parties to a verified complaint shall not have access to the material in the Division's investigatory file of that verified complaint, except that non-parties may inspect and receive a copy of the verified complaint, the answer, the final disposition, and the dispositions of any motions made during the pendency of the case. When a verified complaint is taken pursuant to N.J.A.C. 13:4-2.10, non-parties may only inspect the pseudonym verified complaint.

13:4-13.4 Copying costs

The Division's fee for copying documents requested pursuant to this section shall be the same fee as is applicable to requests granted pursuant to N.J.S.A. 47:1A-1 et seq. The Director may waive or modify this fee in the case of an indigent party or in other extraordinary situations for good cause.