

Amended by R.2008 d.302, effective October 6, 2008.
See: 40 N.J.R. 2409(a), 40 N.J.R. 5816(a).

In the address in (a), inserted "and Workforce Development" twice; and in (d), inserted "and Workforce Development" and updated the website address.

12:110-6.7 Modification or revocation of orders

(a) An affected employer or an affected employee, group of employees, or employee representative, may apply in writing to the Commissioner for a modification or revocation of an order for a permanent variance any time after six months from its issuance. The application shall contain:

1. The name and address of the applicant;
2. Identification of the order from which relief is sought;
3. A description of the relief which is sought;
4. A statement setting forth with particularity the grounds for relief;
5. If the applicant is an employer, a certification that the applicant has informed his affected employees of the application by:
 - i. Giving a copy thereof to their employee representative where one exists;
 - ii. Posting at the place where notices to employees are normally posted, a statement giving a summary of the application and specifying where a copy of the full application may be examined (or, in lieu of the summary, posting the application itself).
6. If the applicant is an affected employee, a certification that a copy of the application has been furnished to the employer.

(b) The Commissioner may, on his or her own motion, proceed to modify or revoke an order for a permanent variance at any time after six months from its issuance. In such event, the Commissioner shall cause to be published a notice of his or her intention, affording interested persons an opportunity to submit written data, views, or arguments regarding the proposal and informing the affected employer and employees of their right to request a hearing, and shall take such other action as may be appropriate to give actual notice to affected employees. The request for a hearing shall include a short statement of:

1. How the proposed modification or revocation would affect the requesting party; and
2. What the requesting party would seek to show on the subjects or issues involved.

(c) Any final order issued under N.J.S.A. 34:6A-39 may be renewed or extended as permitted by the applicable section and in the manner prescribed for its issuance.

Amended by R.1998 d.33, effective January 5, 1998.
See: 29 N.J.R. 4440(a), 30 N.J.R. 80(a).

12:110-6.8 Action on application

(a) If an application filed pursuant to N.J.A.C. 12:110-6.5, 6.6 or 6.7 does not conform to the provisions required in the applicable section, the Commissioner may deny the application.

(b) Prompt notice of the denial of an application shall be given to the applicant.

1. A notice of denial shall include, or be accompanied by, a brief statement of the grounds for the denial.
2. A denial of an application pursuant to this section shall be without prejudice to the filing of another application.

(c) If an application has not been denied pursuant to (a) above, the Commissioner shall cause to be published a notice of the filing of the application.

(d) A notice of the filing of an application shall include:

1. The terms or an accurate summary of the application;
2. A reference to the Act under which the application has been filed;
3. An invitation to interested persons to submit, within a stated period of time, written data, views, or arguments regarding the application; and
4. Information to affected employers and employees that the matter will be transmitted to the Office of Administrative Law for a hearing.

Amended by R.1998 d.33, effective January 5, 1998.
See: 29 N.J.R. 4440(a), 30 N.J.R. 80(a).

12:110-6.9 Hearing processes

(a) Any application for a temporary variance, renewal of a temporary variance, permanent variance or revocation or modification of a permanent variance shall be transmitted by the Commissioner to the Office of Administrative Law for hearing before an administrative law judge upon his or her determination that:

1. An application conforms to the applicable provisions of N.J.A.C. 12:110-6.5, 6.6 or 6.7; and
2. Any period for the submission of written argument or comment has closed.

(b) Hearings on any application shall be pursuant to N.J.S.A. 52:14B-1 et seq., 52:14F-1 et seq. and N.J.A.C. 1:1.

(c) The Commissioner, on his or her own motion or that of any party, may consolidate or simultaneously consider two or more proceedings which involve the same or closely related issues.

(d) The Commissioner may adopt, reject or modify the recommended report and decision of the administrative law judge and shall issue his or her final order not more than 45 days after the hearing report is issued.

New Rule, R.1998 d.33, effective January 5, 1998.

See: 29 N.J.R. 4440(a), 30 N.J.R. 80(a).

Former section, "Requests for hearing on application," repealed.

12:110-6.10 (Reserved)

Repealed by R.1998 d.33, effective January 5, 1998.

See: 29 N.J.R. 4440(a), 30 N.J.R. 80(a).

Section was "Consolidation of proceedings".

12:110-6.11 (Reserved)

Repealed by R.1998 d.33, effective January 5, 1998.

See: 29 N.J.R. 4440(a), 30 N.J.R. 80(a).

Section was "Hearings".

SUBCHAPTER 7. DISCRIMINATION AGAINST EMPLOYEES

12:110-7.1 Scope of subchapter

This subchapter establishes the procedural rules governing a public employee's allegations of discrimination by a public employer or person.

12:110-7.2 Employer responsibility and employee rights

(a) No employer or person shall discharge or in any manner discriminate against any employee because the employee has directly or indirectly:

1. Filed any complaint under or related to the Act with the employer, the Commissioner of Labor and Workforce Development or the Commissioner of Health and Senior Services or any other State or local agency. Such complaints shall relate to conditions at the workplace as distinguished from complaints touching upon general public safety and health issues;

2. Requested an inspection;

3. Instituted or caused to be instituted any proceeding under or related to the Act including, but not limited to, petitioning for promulgation of an occupational safety or health standard, applying for modification or revocation of a variance, appealing to the Commissioner of Labor and Workforce Development from an element of an Order to Comply or filing a judicial challenge to any standard or Order.

4. Testified or is about to testify in any proceeding under or related to the Act;

5. Made or provided any statement related to safety or health conditions at the workplace in the course of judicial or quasi-judicial, legislative, rulemaking or adjudicative

proceedings or during an inspection or investigation of workplace safety or health issues by any public or private body;

6. Participated as a party in enforcement proceeding under the Act;

7. Requested information or advice from the Department of Labor and Workforce Development or the Department of Health and Senior Services;

8. Exercised on his or her own behalf or on behalf of others any right afforded by the Act.

(b) Any employee who believes that he or she has been discharged, disciplined or otherwise discriminated against by any person in violation of this section may, within 180 days after the employee first had knowledge or should reasonably have known that such violation did occur, file a complaint with the Commissioner alleging that discrimination.

Amended by R.1998 d.33, effective January 5, 1998.

See: 29 N.J.R. 4440(a), 30 N.J.R. 80(a).

Amended by R.2008 d.302, effective October 6, 2008.

See: 40 N.J.R. 2409(a), 40 N.J.R. 5816(a).

In (a)1, (a)3 and (a)7, inserted "and Workforce Development".

12:110-7.3 Unprotected activities

(a) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The proscriptions of the Act apply when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in activities protected by the Act does not automatically render him immune from discharge or other adverse action for legitimate reasons, or from adverse action dictated by non-prohibited considerations.

(b) To establish a violation of the Act, the employee's engagement in protected activity need not be the sole consideration behind the discharge or other adverse action. If protected activity was the substantial reason for the action, or if the discharge or other adverse action would not have taken place but for engagement in protected activity, the Act has been violated. Ultimately, the issue as to whether a discharge or other adverse action was because of protected activity shall be determined on the basis of the facts in the particular case.

Recodified from N.J.A.C. 12:110-7.4 and amended by R.1998 d.33, effective January 5, 1998.

See: 29 N.J.R. 29 N.J.R. 4440(a), 30 N.J.R. 80(a).

Former section, "Persons prohibited from discriminating", was repealed.

12:110-7.4 Filing of complaints

(a) All complaints to the Commissioner shall be in writing, signed by the person complaining (complainant) or his or her representative and shall include the reason for the complaint and the specific relief requested.

(b) The complaint shall be filed with the Commissioner within 180 days after the employee first had knowledge or should reasonably have known of the alleged discriminatory action.

(c) Upon receipt of the complaint, a designee of the Commissioner shall cause an investigation to be made which initially will consist of a review of the written record.

(d) A party in a complaint may be represented by an attorney or an authorized employee representative.

New Rule, R.1998 d.33, effective January 5, 1998.

See: 29 N.J.R. 4440(a), 30 N.J.R. 80(a).

Former section recodified to N.J.A.C. 12:110-7.3.

12:110-7.5 Burden of proof

(a) The burden of proof in any proceeding under this section shall rest with the employee.

(b) In the absence of any direct evidence of retaliation by the employer for the employee's exercise of protected rights under this Act, a prima facie case must be established by the employee showing that he or she engaged in protected activity, that the employer knew of this activity, that the employer was hostile to the protected conduct and that the employer took the alleged action in retaliation for the exercise of the protected rights.

(c) When dual motives, both retaliation for the exercise of a protected activity and legitimate business motives are asserted for the employer's action, the employee shall first establish that the protected activity was a substantial factor in the employer's disputed action. If this is accomplished, the burden shifts to the employer to establish by a preponderance of evidence that the action occurred for legitimate business reasons and not in retaliation for the protected activity.

Repeal and New Rule, R.1998 d.33, effective January 5, 1998.

See: 29 N.J.R. 4440(a), 30 N.J.R. 80(a).

Section was "Complaints under the Act".

12:110-7.6 Remedies

(a) Warnings, reprimands, or derogatory references resulting from the protected activity which may have been placed in the complainant's personnel file shall be expunged.

(b) Reinstatement of the employee, back pay, benefits, seniority and reasonable legal costs may be awarded in any successful appeal.

(c) Back pay shall include unpaid salary, including regular wages, increments and across the board adjustments. Benefits shall include vacation and sick leave credits and additional amounts expended by the employee to maintain his or her health insurance coverage during the period of improper suspension or removal.

1. The award of back pay shall be reduced by the amount of taxes, social security payments, dues, pension payments and any other sums normally withheld.

2. The award of back pay shall be reduced by the amount of money actually earned during the separation. If an employee also held other employment at the time of the adverse action, the earnings from such other employment shall not be deducted from the back pay. However, if the employee increased his or her work hours at the other employment during the back pay period, earnings from such additional hours shall be subtracted from the back pay award.

3. Funds that must be repaid by the employee shall not be considered when calculating back pay.

4. Back pay shall include items such as overtime pay and holiday premium pay.

(d) When back pay and benefits are awarded, determination of the actual amounts shall be settled by the parties whenever possible.

(e) If settlement on an amount cannot be reached, either party may request, in writing, Commissioner review.

1. The parties shall submit all information and/or documentation requested by the Commissioner or his or her designee.

2. The Commissioner or his or her designee shall decide the matter in any manner or format which he deems appropriate.

(f) The Commissioner or his or her designee shall order an employer to post an Order to Comply or such other notice deemed appropriate at any or all of the employer's establishments for at least 15 days upon a determination that the employer committed a discriminatory act or some other violation of the Act.

Repeal and New Rule, R.1998 d.33, effective January 5, 1998.

See: 29 N.J.R. 4440(a), 30 N.J.R. 80(a).

Section was "Proceedings under the Act".

Amended by R.2003 d.189, effective May 5, 2003.

See: 35 N.J.R. 335(a), 35 N.J.R. 1920(a).

Rewrote the section.

12:110-7.7 Processing of complaint

(a) Within 10 days of receipt of the complaint, the Commissioner, or his or her designee, shall make an initial determination based on the information contained therein and upon any personal contact with the complainant, if such had been deemed necessary, to determine whether an adverse action had taken place while the complainant was engaged in a protected activity. Upon the Commissioner's, or his or her designee's, determination that the adverse action appears to have occurred because the complainant engaged in a protected activity, he or she shall provide the complainant and his or her employer with a 20-day period within which to

submit written arguments and documentation in support of their position.

(b) Failure by the complainant to provide additional information requested may result in dismissal of the appeal.

(c) Upon closure of the 20 day period, the Commissioner or his or her designee may provide one additional five working day extension of the comment period upon request, with substantial justification, by any one of the parties.

(d) Upon receipt of the written argument and documentation, the Commissioner or his or her designee may, at his discretion, seek additional information or clarification through:

1. A written list of questions to any or all of the parties. The questions and responses will be made available to all parties; and/or

2. On-site interviews, separately or jointly, with any or all of the parties and/or witnesses. Interviews with employees shall be conducted during their regular work hours and they shall receive payment of normal wages for the time spent during the interviews.

(e) At any time during the processing of the complaint, an affected employer, employee or employee representative may request that the Commissioner or his or her designee hold an informal conference for the purpose of discussing any or all issues raised by the complaint.

1. If a party requests a settlement conference, or the Commissioner or his or her designee determines that an informal settlement conference would be useful, a conference shall be scheduled and conducted by the designee within 30 days of receipt of the request.

2. If the conference is requested by the employer, the employee and/or his or her employee representative shall be afforded an opportunity to participate.

3. If the conference is requested by the employee or his or her employee representative, the employer shall be afforded an opportunity to participate.

4. No conference or request for such conference shall operate as a stay of any time period established for the filing or processing of the complaint.

(f) If the parties reach a settlement through the informal conference process in (f) above, or some other mechanism, the settlement shall be incorporated into the Commissioner's final determination.

(g) Not more than 90 days after the receipt of the complaint, the Commissioner or his or her designee shall notify the employee and the employer of his or her determination. The notice shall become the Commissioner's final determination unless, within 15 days of receipt of the notice, the employer or the employee requests a hearing.

Repeal and New Rule, R.1998 d.33, effective January 5, 1998.

See: 29 N.J.R. 4440(a), 30 N.J.R. 80(a).

Section was "Testimony".

Amended by R.2003 d.189, effective May 5, 2003.

See: 35 N.J.R. 335(a), 35 N.J.R. 1920(a).

Rewrote the section.

12:110-7.8 Hearing processes

(a) If the Commissioner determines that the request for a hearing was timely filed, he or she shall transmit the matter to the Office of Administrative Law for hearing before an administrative law judge. See N.J.A.C. 1:1 for Office of Administrative Law hearing procedures.

(b) At the request of the employer, employee or employee representative, or on his own motion, the Commissioner may hold an informal conference for the purpose of attempting to effectuate a settlement of any or all of the issues. All parties shall be afforded an opportunity to participate in any such conference.

(c) The Commissioner may adopt, reject or modify the recommended report and decision of the administrative law judge and shall issue his or her final determination not more than 45 days after the hearing report is issued.

New Rule, R.1998 d.33, effective January 5, 1998.

See: 29 N.J.R. 4440(a), 30 N.J.R. 80(a).

Former section was recodified to N.J.A.C. 12:110-7.9.

12:110-7.9 Refusal to work

(a) The Act does not afford employees the right to walk off the job because of potential unsafe conditions at the workplace.

(b) If hazardous conditions which may be violative of the Act are not corrected by the employer once brought to his attention or if there is dispute about the existence of a hazard, the employee shall have the opportunity to request inspection of the workplace, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. The employer shall permit the employee to contact the Department of Labor, the Department of Health and Senior Services or other appropriate public agency during regular work hours with no loss in wages to report such conditions.

(c) An employer would not ordinarily be in violation of the Act by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety and health hazards. However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself or herself to an imminent danger of serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself or herself to the imminent danger, and he or she believes that a subsequent discharge, discipline or other employer discrimination activity results from this refusal, he or she may file a discrimination complaint with the Com-