

## Chapter ERC 12

### MUNICIPAL SECTOR PROHIBITED PRACTICES

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**Note:** Chapter ERB 12 was renumbered chapter ERC 12 under s. 13.93 (2m) (b) 1., Stats., Register, December, 1994, No. 468. Chapter ERC 12 as it existed on June 30, 2006, was repealed and a new chapter ERC 12 was created, Register June 2006 No. 606, effective July 1, 2006.

**ERC 12.01 Scope.** This chapter governs the general procedure relating to complaints of prohibited practices as defined in s. 111.70 (3), Stats.

**History:** CR 02-037: cr. Register June 2006 No. 606, eff. 7-1-06.

**ERC 12.02 Complaint.** (1) WHO MAY FILE; FORM; NUMBER OF COPIES; FILING FEE. A complaint that any municipal employer, municipal employee, or person has engaged in a prohibited practice defined, respectively, in s. 111.70 (3) (a), (b) or (c), Stats., may be filed by any party or by a representative authorized to file on behalf of a party. The complaint shall be in writing on a form provided by the commission, or a facsimile of the commission's form, and shall include the signature or a facsimile of the signature of the party or representative filing the complaint. At the time of filing, the filing fee established by s. ERC 10.08 (1) shall be submitted to the commission. A complaint is not filed unless it contains the required signature or signature facsimile and unless and until the complaint and fee have been actually received by the commission at its Madison office during normal business hours specified in s. ERC 10.06 (1). The complaint shall be transmitted to the commission as set forth in s. ERC 10.06 (1). If the complaint is filed in paper form, a total of 3 copies of the complaint shall be included, together with 1 additional copy for each named respondent. The fee may be transmitted to the commission by physical delivery or mail. As used in this chapter, "party" has the same meaning as "party in interest."

(2) CONTENTS. The complaint shall contain all of the following:

(a) The name, address, phone number, and affiliation, if any, of each complainant, and of any representative of a complainant. Fax numbers and e-mail addresses shall be included, if available.

(b) The name, address and phone number of each respondent, and any other party named in the complaint. Fax numbers and e-mail addresses shall be included, if available.

(c) A clear and concise statement of the facts constituting the alleged prohibited practice or practices, including the time and place of occurrence of particular acts and the provisions of s. 111.70 (3), Stats., alleged to have been violated.

(d) A statement of the remedy or remedies the complainant is requesting the commission to order.

(3) SERVICE. After the filing of a complaint, the commission shall serve a copy of the complaint on each respondent named in the complaint. At the same time, the commission shall serve all parties named in the complaint with a notice that the scheduling of a hearing shall be held in abeyance pending the results of conciliation unless a party specifically requests otherwise. Service shall be by mail to the parties at their last known post-office address, except that service of a party located outside the state and who has no known post-office address within Wisconsin shall be in the manner provided in s. 111.07 (2) (a), Stats.

(4) AMENDMENT AND WITHDRAWAL. (a) *Amendment.* Any complainant may request permission to amend its complaint at any time prior to the issuance of a final order by the commission or examiner. A motion to amend a complaint shall be granted by the commission or examiner unless the amendment would unduly delay or disrupt the proceeding, or would otherwise result in an injustice to any party.

(b) *Withdrawal.* Any complaint may be withdrawn at any time prior to the issuance of a final order based on it, by motion granted by the commission or examiner. A motion to withdraw shall be granted unless withdrawal would result in an injustice to any party. The commission shall not refund fees based on a withdrawal of a complaint.

(5) CONCILIATION. The commission may cause an effort to reach informal settlement of all or part of a complaint to be undertaken by a commission designee. A conciliator so designated shall attempt through mediation to assist the parties in reaching an informal agreement resolving some or all of the issues that might otherwise require a hearing. The pendency of conciliation shall not preclude the scheduling or conduct of a hearing if scheduling is specifically requested by any party prior to the conclusion of conciliation. If the conciliator concludes that further conciliation efforts are unlikely to produce a settlement, the processing of the case shall proceed, including the scheduling of a hearing, if appropriate.

(6) NOTICE OF HEARING. (a) *When and by whom issued.* At the specific request of a party or at the unsuccessful conclusion of conciliation, the commission or examiner shall schedule a date and time for the hearing and serve all parties named in the complaint and their representatives with a notice of hearing.

(b) *Contents.* The notice of hearing shall include all of the following:

1. A statement of the time, place, and nature of the hearing, including whether the case is a class 2 or 3 proceeding as defined in s. 227.01 (3) (a) to (c), Stats. All complaint cases shall be designated as class 3 proceedings, except that cases in which a requested remedy involves a penalty, such as deprivation of a respondent's rights, immunities, privileges or remedies granted or afforded by the Municipal Employment Relations Act, shall be designated as a class 2 proceeding. Unless the parties have agreed otherwise, the hearing shall be held not less than 10 nor more than 40 days after the complaint was filed or a hearing was requested. The hearing may be rescheduled in the manner prescribed in s. ERC 12.04 (2) (e).

2. A statement of the legal authority and jurisdiction under which the hearing is to be held, and, in the case of a class 2 proceeding, a reference to the particular statutes and rules involved.

3. A short and plain statement of the matters asserted, by reference to the pleadings on file, or otherwise.

4. A statement that each named respondent shall file an answer to the complaint, specifying the names and addresses of the persons to be served with a copy of the answer and the date by which the answer is to be served on those persons.

5. A statement that, to be timely, a motion to make the complaint more definite and certain under sub. (7) shall be received by the commission within 10 days after the earlier of the date the notice of hearing was issued or the date the commission notified the parties that the commission has received a request under sub. (5) that the hearing be scheduled prior to the conclusion of conciliation.

6. A statement that affirmative defenses not raised by a timely answer are waived.

**(7) MOTION TO MAKE MORE DEFINITE AND CERTAIN.** If a complaint is alleged to be so indefinite as to hinder a party in the preparation of its answer to the complaint, the party may, by motion, request the commission or examiner to order the complainant to file a statement supplying specified information to make the complaint more definite and certain. If the commission has notified the parties that it has received a request under sub. (5) for the hearing to be scheduled prior to the conclusion of conciliation, then a motion to make the complaint more definite and certain shall be filed no later than 10 days after the date of the commission's notice. Otherwise, the motion shall be filed no later than 10 days after the date the notice of hearing was issued. The commission or examiner may require a complainant to clarify its complaint at any time the commission or examiner finds it necessary and appropriate to do so.

**History:** CR 02-037: cr. Register June 2006 No. 606, eff. 7-1-06; CR 10-019: am. (6) (b) 4. Register June 2010 No. 654, eff. 7-1-10.

**ERC 12.03 Answer to complaint. (1) WHO SHALL FILE; FORM; NUMBER OF COPIES; FAILURE TO TIMELY FILE.** Each respondent named in the complaint shall file an answer to the complaint with the commission on or before the date designated in the notice of hearing. The answer shall be in writing and shall bear the signature or a facsimile of the signature of the party or representative filing the answer. The answer shall be transmitted to the commission as set forth in s. ERC 10.06 (1). If the answer is filed in paper form, a total of 3 copies shall be provided to the commission. Affirmative defenses not raised by a timely answer are waived.

**(2) SERVICE.** Copies of the answer shall be served by the respondent on the complainant or other persons who are designated in the notice of hearing as required to be served, on or before the date designated in the notice of hearing, by a method set forth in s. ERC 10.07.

**(3) CONTENTS.** The answer shall contain all of the following:

(a) A specific admission or denial of each allegation of the complaint or part of an allegation, or a denial based on a statement that the filing party is without knowledge about the allegation.

(b) A specific detailed statement of any affirmative defense.

**(4) AMENDMENT.** The respondent may, for good cause shown and on motion granted, amend the answer on the terms and within the period established by the commission or examiner.

**History:** CR 02-037: cr. Register June 2006 No. 606, eff. 7-1-06.

**ERC 12.04 Motions. (1) GENERALLY. (a) Presentation.** All motions shall be made in writing, except that motions made at a hearing may be stated orally on the record, and all motions shall briefly state the order, ruling, or action sought and shall state the grounds for the motion. Alternate relief may be requested. Any party may by motion request that the commission or examiner take any action which they are authorized by law to take. Any statement opposing a motion shall be promptly filed and shall conform to the same requirements as this paragraph provides for motions. Written motions, and written statements opposing them, may be transmitted to the commission as set forth in s. ERC 10.06 (1). If the motion is filed in paper form, a total of 2 copies of the motion shall be included. The party filing a written motion or written statement opposing a motion shall, at the same time, serve a copy on each of the other parties or their representatives, as set forth in s. ERC 10.07.

(b) *Disposition.* The commission or examiner shall rule on all motions. Motions made during a hearing shall be ruled on either during the hearing or when the entire record is considered. All rulings on motions shall be in writing, or if made at the hearing, may be stated orally on the record.

(c) *Rulings and orders part of record.* All motions and any related rulings or orders shall become part of the record.

**(2) PARTICULAR MOTIONS. (a) To intervene.** Any person desiring to intervene shall file a motion with the commission or examiner stating the reasons the person is claiming to have an interest in the proceeding. Intervention may be permitted upon the terms the commission or examiner finds appropriate.

(b) *To make complaint more definite and certain.* A motion to make a complaint more definite and certain shall comply with s. ERC 12.02 (7).

(c) *For pre-hearing discovery.* Except as noted in subds. 1. and 2., pre-hearing discovery is not available in prohibited practice complaint proceedings.

1. In any class 2 proceeding, each party shall have the right, prior to the date set for hearing, to take and preserve evidence as provided in ch. 804, Stats. On motion by a party or by the person from whom discovery is sought in any class 2 proceeding, and for good cause shown, the commission or examiner may make any order in accordance with s. 804.01, Stats., which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

2. In any class 1 or class 3 proceeding, each party shall have the right to take and preserve evidence with respect to a witness who is any of the following:

a. Beyond reach of the subpoena of the commission hearing examiner.

b. About to go out of the state, not intending to return in time for the hearing.

c. So sick, infirm or aged as to make it probable that the witness will not be able to attend the hearing.

d. A member of the legislature, if any committee of the same or the house of which the witness is a member is in session, provided the witness waives the privilege.

(d) *To correct transcript.* A motion to correct transcript shall comply with s. ERC 18.08 (5).

(e) *To reschedule hearing.* A motion to reschedule hearing shall set forth the reasons for the request, alternate dates for rescheduling, and the positions of all other parties regarding the request.

(f) *To dismiss.* A motion to dismiss shall state the basis for the requested dismissal. A motion to dismiss shall not be granted before an evidentiary hearing has been conducted except where the pleadings, viewed in the light most favorable to the complainant, permit no interpretation of the facts alleged that would make dismissal inappropriate.

**History:** CR 02-037: cr. Register June 2006 No. 606, eff. 7-1-06.

**ERC 12.05 Hearings.** Practice and procedure for hearings in prohibited practice complaint proceedings shall be as set forth in s. ERC 18.08, except that the rule reference in s. ERC 18.08 (6) (b) shall be to s. ERC 12.04 (2) (c).

**History:** CR 02-037: cr. Register June 2006 No. 606, eff. 7-1-06; CR 10-019: am. Register June 2010 No. 654, eff. 7-1-10.

**ERC 12.06 Findings of fact, conclusions of law and order. (1) ISSUANCE.** After the close of the evidence and the submission of closing arguments, or on granting a motion for dismissal of a complaint, the commission or examiner shall issue written findings of fact, conclusions of law and order to the parties. Copies of decisions may be purchased by the public from the commission's Madison office and may also be available on the commission website or in other commission publications.

(2) **CONTENTS.** The findings of fact and conclusions of law shall be made regarding all material issues of fact and law presented on the record. The order, which shall state the determination as to the rights of the parties, may dismiss or may sustain the complaint in whole or in part or require the respondent to cease and desist from the prohibited practices found and take affirmative action that shall effectuate the policies of the Municipal Employment Relations Act.

**History:** CR 02-037: cr. Register June 2006 No. 606, eff. 7-1-06.

**ERC 12.07 Interlocutory findings of fact, conclusions of law and order.** The commission may, after the close of the hearing and pending the final determination by it of any controversy, make and issue interlocutory findings of fact, conclusions of law and order when doing so shall effectuate the policies of the Municipal Employment Relations Act, which may be enforced in the same manner as final orders.

**History:** CR 02-037: cr. Register June 2006 No. 606, eff. 7-1-06.

**ERC 12.08 Setting aside, modifying, changing or reversing findings of fact, conclusions of law and order.** Within 20 days from the date findings of fact, conclusions of law and order are issued, they may be set aside, modified, changed or reversed by the commission or examiner if any mistake is discovered in the decision or on grounds of newly discovered evidence, provided that no petition for review of an examiner's findings, conclusions and order has been filed with the commission. If within that 20 day period no order is issued setting aside, modifying, changing or reversing the findings of fact, conclusions of law and order and no petition for review of an examiner's findings, conclusions and order has been filed, then the examiner's findings, conclusions and order shall become the commission's by operation of law under s. 111.07 (5), Stats.

**History:** CR 02-037: cr. Register June 2006 No. 606, eff. 7-1-06.

#### **ERC 12.09 Review of findings of fact, conclusions of law and order issued by examiner.**

(1) **RIGHT TO FILE PETITION, TIME TO FILE PETITION.** Within 20 days from the date a copy of the findings of fact, conclusions of law and order of an examiner was mailed to the last known address of the parties, any party dissatisfied with the findings of fact, conclusions of law and order may file a written petition with the commission as set forth in s. ERC 10.06 (1), and shall, at the same time, serve copies of the petition on the other parties as set forth in s. ERC 10.07, to review the findings of fact, conclusions of law and order. If the commission is satisfied that a party has been prejudiced because of exceptional delay in the receipt of a copy of any findings of fact, conclusions of law and order, it may extend the time another 20 days for filing the petition for review.

(2) **DISPOSITION.** If a petition for commission review is timely filed, the commission shall promptly establish a schedule for the submission of written arguments by the parties beginning with the party that filed the petition for commission review. The commission shall then review the record and issue to the parties its own findings of fact, conclusions of law and order in the matter. Copies of decisions may be purchased by the public from the commission's Madison office and may also be available on the commission website or in other commission publications.

**History:** CR 02-037: cr. Register June 2006 No. 606, eff. 7-1-06.

**ERC 12.10 Petition for rehearing.** Any person aggrieved by a final order of the commission may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. Practice and procedure regarding the filing and processing of a petition for rehearing in a prohibited practice complaint case shall be as set forth in s. ERC 18.11.

**History:** CR 02-037: cr. Register June 2006 No. 606, eff. 7-1-06; CR 10-019: am. Register June 2010 No. 654, eff. 7-1-10.