

# Memo

Date: May 4, 2009

To: Patricia E. Ryan, Executive Director

From: John P. Gause, Commission Counsel

Re: E08-0598, [REDACTED]

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Complainant has asked that we reconsider the dismissal of his complaint, which was administratively dismissed for failure to cooperate with the investigation pursuant to our Procedural Rule § 2.02(H). I think that you do have the discretion to reconsider your dismissal decision.

There is nothing in our Procedural Rule or in the Maine Human Rights Act that directly addresses the issue of reconsideration. A state agency has the inherent authority to reconsider its decisions, even in the absence of standing rules on the subject. *See Jackson v. Town of Kennebunk*, 530 A.2d 717, 718 (Me. 1987). Accordingly, I believe that you do have the authority to reconsider a dismissal decision.

The question remains, however, of what standard you should apply in handling a request for reconsideration. "To satisfy due process requirements, laws and regulations must provide specific standards which avoid arbitrary and discriminatory enforcement. 16B Am.Jur. 2D Constitutional Law § 916." *Lane v. Town of Millinocket*, 2002 WL 2014977, \*6 (Me.Super. 2002) (Mead, J.) (finding that the lack of a standard for reconsideration of decisions by a Personnel Board violated Due Process). Although, in light of *Tomer v. Maine Human Rights Commission*, 2008 ME 190, which held that your dismissal decisions are not "final agency actions" for purposes of the Maine Administrative Procedures Act, you may similarly not be required to adhere to Due Process requirements in your dismissal decisions, I think the best practice is to provide the parties with notice of the reconsideration standard you will apply and give the opposing party an opportunity to respond.

The Equal Employment Opportunity Commission's Compliance Manual § 4.6 has a provision that permits its directors to, on their own initiative, reconsider their dismissal decisions, thereby reactivating dismissed complaints. Section 4.6 provides as follows:

An office Director who issues a no cause LOD or a dismissal for reasons other than no cause may, on his/her own motion, reconsider the LOD/dismissal. The Title VII/ADA reconsideration procedure in § 1601.21(d) is applicable to dismissals for reasons other than no cause (see

29 CFR § 1601.18(f). A like procedure also applies to no cause LODs (see § 1601.19(b)). The LOD/dismissal is vacated immediately upon issuance of the notice of intent to reconsider sent to the parties. If the old LOD/dismissal is vacated under this procedure before the original 90 day right to sue period expires, the right to sue period is revoked and a new 90 day period begins upon receipt of the new LOD.

Section 4.6 points to the procedure in the EEOC's procedural regulations for Director "no cause LOD's," found at 29 C.F.R. § 1601.21(d), but that regulation does not provide further guidance that is helpful to us. See 29 C.F.R. § 1601(21)(d) (providing, in relevant part, that a director "may on his or her own initiative reconsider such determinations"). I could not find any EEOC decisions that have interpreted the EEOC Compliance Manual § 4.6 or the regulation. At least one court has questioned the applicability of the EEOC reconsideration regulation beyond Title VII and held that a withdrawn charge cannot be reopened even if the regulation did apply. See *Lewis v. Norfolk Southern Corp.*, 271 F.Supp.2d 807, 815 (E.D.Va. 2003) (ADEA case). We do not need to decide whether withdrawn complaints can be reopened here.

Because we do not have a defined procedure for reconsideration, and because I could not find additional guidance interpreting the EEOC standard, I think the best approach is for you to follow the standard applicable to requests for reconsideration of orders on motions under Maine Rules of Civil Procedure 7(b)(5). Rule 7(b)(5) states that "motions for reconsideration of an order shall not be filed unless required to bring to the court's attention an error, omission or new material that could not previously have been presented."

Here, Complainant has made a persuasive argument that he could not have made previously because he did not receive our notification that his case was going to be dismissed (the certified letter was returned to us as unclaimed). Nevertheless, I would send a letter to Respondent outlining Complainant's request, providing the standard you will use in responding to the request, and giving Respondent an opportunity to submit anything they would like on point. I have attached a draft letter.