

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #5

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2009 AUG 17 PM 3:45

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: Secretary of State TITLE NUMBER: 153

CITE AUTHORITY: W.Va. Code Sections 3-1-50 & 3-1A-6(b)

RULE TYPE: PROCEDURAL INTERPRETIVE

EXEMPT LEGISLATIVE RULE

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

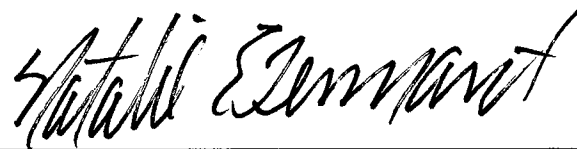
TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 21

TITLE OF RULE BEING PROPOSED: Procedural Rule for Election Violations Complaint Process

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE

EFFECTIVE DATE OF THIS RULE IS September 16, 2009



Authorized Signature

MEMORANDUM

Date: 8/14/09

Subject: Public Comment to Proposed Procedural Rule 153-21

No comments were received during the comment period.

The proposed rule was technically amended because a former provision, sections 6.1.3 and 6.1.4, improperly provided a right to request hearing to the complainant but the authorizing provisions of WV Code §3-1-50 permits only the complainant to request a hearing. The two sections were deleted from the final version.

**TITLE 153
LEGISLATIVE RULE
SECRETARY OF STATE**

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**SERIES 21
PROCEDURAL RULE FOR
ELECTION VIOLATIONS COMPLAINT PROCESS**

OFFICE WEST VIRGINIA
SECRETARY OF STATE

153-21-1. General.

1.1. Scope. -- These rules establish the procedure for filing, investigation, and resolution of election violation complaints. These provisions do not apply to election recounts or contesting an election outcome and are not a substitute for the provisions provided by West Virginia Code for those processes.

1.2. Authority. -- W. Va. Code §§3-1-50 and 3-1A-6(b)

1.3. Filing Date. -- August 17, 2009

1.4. Effective Date. -- September 16, 2009

153-21-2. Definitions.

2.1. "Alternate dispute resolution" means the procedure for resolving any complaint which has not been resolved by the secretary within ninety days of receipt of the complaint.

2.2. "Complaint" means any notarized report, on forms provided by the secretary of state, sworn to and signed by an individual, alleging a violation of the provisions of West Virginia Code, Chapter Three, which has occurred, is occurring, or is about to occur.

2.3. "Complaint procedure" means the state-based administrative complaint filing and resolution process required by W.Va. Code §3-1-50. This process does not apply to election recounts or election result contests. A complainant who wishes to challenge the validity of a primary, general, or special election, or to determine the validity of a ballot or vote must seek relief as otherwise provided by law.

2.4. "Complainant" means the person who has filed the formal complaint.

2.5. "Final determination" means the decision of the secretary or commission regarding the validity, timeliness, and appropriateness of the complaint and, if found to be valid, timely and appropriate, regarding whether a report should be filed with the prosecuting attorney with jurisdiction over the criminal violations suggested by the investigation of the complaint.

2.6. "Hearing" means an administrative process before a hearing officer selected by the secretary of state conducted to permit the presentation of evidence regarding the

alleged violation.

2.7. "Hearing Officer" means the person designated by the secretary of state to conduct the hearing, administer oaths, receive testimony, documentary and other evidence, and issue a proposed finding to the secretary.

2.8. "Publish the results" means a written notice by the secretary provided to the complainant and respondent that there has been no violation and the complaint has been dismissed.

2.9. "Receipt of complaint" means the day on which the secretary of state actually receives the fully completed complaint form regardless of how submitted.

2.10. "Receive" means the date actually received by the party but is presumed to have been received no later than four (4) working days after mailing by the secretary.

2.11. "Respondent" means the person accused of wrongdoing, or some other violation, in the complaint.

2.12. "Working day" means a day when the secretary of state's office is open to the public.

153-21-3. Complaint Filing.

3.1. Prescribed forms.

3.1.1. Any complaint filed with the secretary of state must be in writing and on a prescribed form provided by the secretary;

3.1.2. The prescribed form is available on the website of the secretary and may also be obtained by calling or writing the offices of the secretary of state and requesting a form.

3.2. Information Required:

3.2.1. The form must contain the following:

3.2.1.a. The form must be signed by the complainant;

3.2.1.b. The complainant must have sworn to the accuracy and truthfulness of all information on the form;

3.2.1.c. The signature and affirmation of the complainant must be notarized by a notary public;

3.2.1.d. The complainant must describe the nature of the alleged violation;

3.2.1.e. The complainant must provide the name of the person alleged to have

committed the violation;

3.2.1.f. The complainant must provide the title of the election office held, if any, by the person alleged to have committed the violation;

3.2.1.g. The complainant must provide his or her address and phone number;

3.2.1.h. The claimant must provide the nature of the relief or remedy requested of the secretary; and

3.2.1.i. The violation described by the complaint must, on its face, identify an election or voting violation, error, or other irregularity over which the secretary has jurisdiction.

3.2.2. Any complaint form which does not provide all of the required information required by subsections 3.2.1.a through 3.2.1.h, will be returned to the person making the complaint without further processing by the secretary of state.

3.2.3. A complainant may withdraw his or her complaint at any time prior to a final determination by the secretary or the commission. The withdrawal notice must be in writing. The secretary shall notify the respondents of the withdrawal of the complaint.

3.3. Time limits for filing.

3.3.1. WV Code §3-9-24 and other statutory references to limitations on prosecutions of crimes notwithstanding, a complaint form meeting all requirements of subsections 3.2.1.a through 3.2.1.i of this rule must be received by the secretary within thirty (30) days of the occurrence of the event that forms the basis for the complaint, or within thirty (30) days after the complainant knew, or reasonably should have known, of the occurrence of the event, whichever is later.

3.3.2. Any complaint form received after the time permitted for filing shall be dismissed by the secretary. An otherwise timely complaint form, but one which does not meet all requirements of subsections 3.2.1.a through 3.2.1h, will be returned to the complainant. The complainant will be allowed ten (10) working days to file a corrected form providing all required information or the complaint will be dismissed.

153-21-4. Complaint Where Secretary is Respondent or Has Conflict of Interest

4.1. If the complaint alleges that the secretary, either personally or in his or her official capacity, is a named respondent or is otherwise conflicted, then the secretary may refer the complaint to the Attorney General for resolution. The Attorney General shall follow the procedures set forth in sections 5 and 6 of this rule.

153-21-5. Complaint Investigation Process

5.1. Within ten (10) working days of receipt of the complaint the secretary shall have reviewed the nature of the complaint and shall have determined whether the complaint has met the jurisdictional requirements of subsection 3.2.1.i.

5.1.1. If the secretary determines that no jurisdiction exists, the secretary shall dismiss the complaint and notify the complainant of the action.

5.1.2. If the secretary determines that jurisdiction over the complaint may exist, the secretary shall provide notice describing the allegations in the complaint, but not the identity of the complainant, to any respondent.

5.1.3. If the secretary determines that the complaint involves an investigation contemplated by W.Va. Code §§3-8-8(e) or 3-1B-4, the secretary will notify the requesting party that the complaint has been referred to the State Election Commission.

5.2. Respondent may file any written reply within ten (10) days working days from receipt of notice of the complaint.

5.2.1. The response of the responding party shall be signed and must include a verification or affirmation that the information contained is true and correct.

5.3. Investigations shall be conducted by qualified persons employed by the secretary under the provisions of W.Va. Code §3-1A-8.

5.4. Within ninety days of receipt of the complaint form the secretary shall make a final determination of the complaint in one of the following manners:

5.4.1. Dismissal of the complaint after determination that the alleged violation is not subject to this process per subsection 3.2.1.i.

5.4.2. Dismissal of the complaint after determination that there has been no violation;

5.4.3. Dismissal of the complaint if it alleges a claim for which relief cannot be granted or for which a remedy is not available;

5.4.4. Dismissal of the complaint when a complainant who has requested a hearing fails to appear at the hearing when scheduled;

5.4.5. Completion of investigation and report to local prosecuting attorney concerning possible violations of election laws; or

5.4.6. Completion of investigation and, if mistake or misconduct which does not involve possible violations of election laws is found, inform the responding party of the nature of error committed and take appropriate administrative steps to address any misconduct.

5.4.7. Final determinations and remedies shall not include an award of monetary

damages or attorney fees.

5.4.8. A final determination may not invalidate any vote or ballot, or cancel or delay any election. Parties seeking to invalidate or change an election outcome must pursue legal remedies and procedures provided by statute.

5.4.9. A final determination may not be used as evidence, or cited as controlling, in the prosecution or defense of any proceeding arising from the events alleged to have been a violation.

5.5. The complainant may agree to an extension of the ninety day deadline requested by the secretary.

5.6. The secretary may consolidate complaints involving the same actions or events or that raise common questions of law or fact.

5.7. Except as otherwise provided by Code or this regulation, all details of any investigation, including the existence of any investigation, are confidential and may not be released to any person. Confidentiality may not be waived by any party.

153-21-6. Complaint Hearing Procedures.

6.1. Except for those investigations contemplated by W.Va. Code §§3-8-8(e) and 3-1B-4, a person may request a hearing.

6.1.1. A request by the complainant for a hearing may be submitted with the complaint form filed with the secretary.

6.1.2. A request for hearing by the complainant must be filed no later than ten (10) working days after the filing of the complaint.

6.2. If a hearing has been requested and is permitted by law, the secretary shall designate a hearing officer to conduct the hearing.

6.3. The hearing officer will schedule the hearing at a date which will reasonably permit the delivery to the secretary of proposed findings, as required by subsection 6.10 of this rule, no later than the eightieth (80th) day after receipt of the complaint.

6.4. Parties shall be given at least ten days notice of the hearing date and time.

6.5. The hearing will be conducted at the offices of the secretary in Charleston.

6.6. At the discretion of the hearing officer, hearings may take place telephonically.

6.7. The hearing officer may issue a scheduling order setting time limits for filing of documentary evidence, depositions, or statements, and require briefing of the issues if necessary.

6.8. The hearing shall be closed to the public. Only the complainant and respondent, their attorneys and witnesses, and employees of the secretary may attend.

6.9. The hearing officer shall limit the scope of any evidence and inquiries at the hearing to that which is relevant to the original complaint. A party may not raise new issues or complaints at the hearing.

6.10. Conduct of hearing

6.10.1. The hearing will be adjourned, or continued for good cause only, at the discretion of the hearing officer after determining whether all parties have been permitted sufficient opportunity to present their case or defense;

6.10.2. The hearing officer must begin the proceedings with an admonishment to the parties and all present of the requirement to maintain confidentiality and the criminal penalty for failing to do so;

6.10.3. The hearing officer will conduct a hearing in a fair and impartial manner to both the complainant, and his or her witnesses, and the responding party, and his or her witnesses;

6.10.4. The hearing officer need not strictly apply the Rules of Evidence;

6.10.5. All witnesses shall be sworn;

6.10.6. Witnesses other than complainant, respondent and employees of the secretary shall be sequestered;

6.10.7. The hearing officer may, in his or her discretion, admit credible hearsay evidence;

6.10.8. The hearing officer may, in his or her discretion, permit cross-examination of witnesses by a party;

6.10.9. The hearing officer may, in the interest of ensuring that all interested participants are able to present their views, limit the content and time of testimony;

6.10.10. If the hearing is on consolidated complaints, then the complainants may be allowed or required to designate a single representative party to advocate for the consolidated class;

6.10.11. If a person has already testified and wishes to contradict testimony or evidence subsequently presented, the rebuttal must be only in written form submitted to the hearing officer as provided in subsection 6.11 or this rule;

6.10.12. Employees of the secretary may appear and testify or give evidence in other manner; and

6.10.13. The hearing officer will make his or her decision based on the preponderance of evidence presented at the hearing.

6.10.14. The hearing will be recorded but transcripts will only be prepared at the request and at the expense of a party.

6.11. The hearing officer may allow five (5) days for the parties to file written statements or briefs following the adjournment of the hearing.

6.12. Within ten (10) days of the adjournment of the hearing, the hearing officer shall submit to the secretary findings of facts and conclusions of law addressing the issue(s) raised by the complaint.

6.12.1. These findings shall be proposed findings subject to adoption, rejection, or amendment by the secretary.

6.12.2. Release of copies of the proposed findings shall be at the discretion of the secretary.

6.13. Within ten (10) days of receipt of the proposed findings, the secretary shall resolve the complaint in one of the ways provided by section 5.4. of this regulation.

6.14. The decision of the secretary is final and is not subject to appeal.

153-21-7. Alternate Dispute Resolution Procedures.

7.1. If the secretary cannot resolve the complaint within ninety (90) days of filing, or at the conclusion of any additional time agreed to by the complainant, the secretary shall provide an alternate means for resolving the complaint.

7.2. The alternate dispute resolution shall resolve the complaint within sixty (60) days of the end of the original ninety (90) day deadline.

7.3. No later than five (5) days after the end of the ninetieth (90th) day following receipt of the complaint, if additional time has not been agreed to by the complaining party, the secretary shall schedule a meeting of the State Election Commission to address the complaint.

7.4. If the secretary has been unable to conduct a requested hearing within ninety (90) days, the commission may conduct a hearing in executive session pursuant to the procedures of 146 CSR 2 §5. The commission may request memoranda or briefs, but no additional evidence may be received by the commission.

7.5. The commission shall be provided with copies of all documentary information, the complaint form, any other non-privileged materials, and the hearing transcript (if a hearing had been conducted) obtained as a result of the investigation to that point.

7.6. By majority vote, the commission shall resolve, in one of the ways provided by section 5.4 of this regulation, the complaint within the sixty (60) day resolution requirement.

7.7. The decision of the commission is final and is not subject to appeal.