



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE EXEMPT, INTERPRETIVE OR PROCEDURAL
RULE**

AGENCY: Ethics Commission

TITLE-SERIES: 158-17

RULE TYPE: Procedural Amendment to Existing Rule: Yes Repeal of existing rule: No

RULE NAME: Hearings

CITE STATUTORY AUTHORITY: W. Va. Code §§ 6B-2-2 and 6B-2-4.

This rule is filed with the Secretary of State. This rule becomes effective on the following date:

May 25, 2018

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Theresa M Kirk -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

**TITLE 158
PROCEDURAL RULE
WEST VIRGINIA ETHICS COMMISSION**

**SERIES 17
HEARINGS**

§ 158-17-1. General Provisions.

1.1. Scope. -- This Procedural Rule establishes the practice and procedure for conducting hearings pursuant to W. Va. Code § 6B-2-4.

1.2. Authority. -- W. Va. Code §§ 6B-2-2 and 6B-2-4.

1.3. Filing Date. -- April 24, 2018

1.4. Effective Date. -- May 25, 2018

§ 158-17-2. Notice of Hearing.

2.1. If the Review Board finds probable cause to believe a violation of the Act has occurred, the Executive Director shall serve Respondent by certified mail, return receipt requested, with a Statement of Charges and a Notice of Hearing setting forth the date, time, and place of the hearing,

2.2. The Statement of Charges and Notice of Hearing shall be served at least eighty days prior to the date of the hearing.

§ 158-17-3. Continuances.

3.1. The Hearing Examiner may only continue the hearing for good cause.

§ 158-17-4. Hearing Examiner.

4.1. The Commission may employ a Hearing Examiner to preside at the hearing and to issue a recommended decision containing proposed findings of facts and conclusions of law.

4.2. Hearing Examiners must be attorneys licensed to practice law in West Virginia with a minimum of five years' experience in the practice of law.

4.3. The Hearing Examiner shall comply with the Administrative Law Judge Code of Conduct, W. Va. Code § 6B-2-5a and W. Va. Code R. §§ 158-13-1 through 11.

4.4. The Hearing Examiner shall be selected by the Executive Director.

§ 158-17-5. Disqualification of Hearing Examiners.

5.1. A party may seek to disqualify the Hearing Examiner by filing a written motion asserting the grounds for disqualification. The motion must be filed at least thirty days prior to the scheduled hearing.

5.2. The Hearing Examiner may hold a hearing on the Motion for Disqualification. If the Hearing Examiner denies the Motion for Disqualification, he or she shall set forth the grounds for denial in writing. If a moving party's Motion for Disqualification is denied, he or she may request a hearing before the Commission Chairperson or his or her designee who shall review the Motion for Disqualification de novo and decide the Motion.

5.3. The party seeking to disqualify the Hearing Examiner may request that a full record be made. The costs thereof, including the cost of court reporter services, witness fees and expenses shall be borne by the moving party unless the moving party prevails on the motion. This subsection does not, however, bar the Commission from ordering the Respondent to pay this cost in accordance with W. Va. Code § 6B-2-4(s).

5.4. The Chairperson or his or her designee shall issue a written decision on the Motion for Disqualification as soon as practicable. If a motion is granted, the Executive Director shall appoint a new Hearing Examiner. If the motion is denied, the Hearing Examiner shall proceed to hear the case within the time frame set forth in the Notice of Hearing or may for good cause reschedule the hearing to a later date.

5.5. The decision on the merits of a motion to disqualify a Hearing Examiner is interlocutory and is not subject to direct or immediate appeal.

§ 158-17-6. Prehearing Discovery.

6.1. Information which is exempt from discovery includes, but is not limited to, the following:

6.1.1. Any record, report, memorandum or communication dealing with the internal practice, policy or procedure of the Commission;

6.1.2. Any record, report, memorandum, or communication of Commission staff or members regarding the institution, progress or result of an investigation of a Complaint or made in anticipation of or in preparation for a hearing;

6.1.3. The work product of an attorney, investigator or other staff member made in the course of an investigation of a Complaint or in anticipation of or in preparation for a hearing on the Complaint, or any report, record, memorandum, or communication made by Commission staff, the Commission, or Review Board, during the investigation of a complaint or in anticipation of or in preparation for a hearing on the Complaint which is otherwise privileged;

6.1.4 Any memorandum, statement or mental impression prepared or obtained by the Commission's attorney or staff;

6.1.5. Any documents protected by the attorney-client privilege; and

6.1.6. The identity of confidential informants and sources, unless they are to be used as witnesses.

6.2. The parties shall exchange within sixty days of the Respondent's receipt of the Notice of the Hearing:

6.2.1. reports of experts to be used at the hearing;

6.2.2. the names of any witnesses the party expects to call at the hearing, including their addresses and telephone numbers;

6.2.3. copies of documents to be used at the hearing; and

6.2.4. results of any inspection of tangible objects to be used at the hearing.

6.3. Witness Statements -- At least seven days prior to the hearing, the parties shall exchange written and signed statements, tape-recorded statements, and statements adopted by individuals who will be witnesses at the hearing which are within the Respondent's or Commission's possession. If a party fails to produce witness statements in a timely manner, the Hearing Examiner may bar that witness' testimony at the hearing unless good cause is shown for allowing the testimony.

6.4. Subpoenas and subpoenas duces tecum

6.4.1. The Commission may issue subpoenas and subpoenas duces tecum either at its own instance or upon written application of a party to the Executive Director whenever necessary to compel the attendance of witnesses and the introduction of books, records, correspondence, documents, papers or any other evidence which is relevant to the Complaint or Statement of Charges.

6.4.2. When a subpoena is issued at the request of a party to the hearing, the cost of service, witness and mileage fees shall be borne by the party at whose request the subpoena is issued. When the subpoena is issued at the instance of the Commission, the cost of service shall be borne by the Commission. This subdivision does not, however, bar the Commission from ordering the Respondent to pay the cost in accordance with W. Va. Code § 6B-2-4(s).

6.4.3. Witness and mileage fees shall be the same as are paid witnesses in the circuit courts of this state.

6.4.4. It is the responsibility of a party requesting the issuance of a subpoena or subpoena duces tecum to serve it by personal service, registered or certified mail, return receipt requested, or registered or certified mail, return receipt requested with delivery restricted to the person to whom the subpoena or subpoena duces tecum is directed. A party required to prove service by registered or certified mail must prove service by producing or filing with the Ethics Commission a return receipt or acknowledgement signed by the person to whom the subpoena or subpoena duces tecum is directed.

6.5. Depositions

6.5.1. Depositions may be obtained by either party and used for evidentiary or discovery purposes.

6.5.2. Evidentiary objections may be made on the record during any deposition or at the time the deposition is offered into evidence.

6.5.3. There is no requirement that the Hearing Examiner attend a deposition.

6.5.4. A party may be permitted to take a deposition of a witness, within or without the State of West Virginia, upon written request to and approval by the Hearing Examiner. A request for deposition shall contain:

- 6.5.4.a. the name and address of the person whose deposition is requested;
- 6.5.4.b. a brief statement of the matters on which the person is to be examined; and
- 6.5.4.c. a brief statement of the reasons for taking the deposition.

6.5.6. If the Hearing Examiner grants the request to take the deposition, the party taking the deposition shall provide reasonable notice of the deposition to the person deposed, all parties, and their counsel of record.

6.5.7. The notice shall be in writing and contain the date, time and place of the deposition, as well as the name and address of each person to be deposed.

6.5.8. The cost of court reporter services, witness fees and expenses shall be borne by the party taking the deposition. This subdivision does not, however, bar the Commission from ordering the Respondent to pay the cost in accordance with W. Va. Code § 6B-2-4(s).

6.5.9. The deposition shall be taken in the manner proscribed by the laws of West Virginia for taking depositions in civil cases in courts of record except as set forth in this Rule.

§ 158-17-7. Hearing Procedure.

7.1. The West Virginia Rules of Evidence shall apply during the hearing.

7.2. The hearing proceedings shall be electronically recorded. The Commission may employ the services of a court reporter to record and transcribe the proceedings by any means permitted in the circuit courts of this state.

7.3. The cost of preparing a transcript of the hearing shall be borne by the party requesting it. This subdivision does not, however, bar the Commission from ordering the Respondent to pay the cost in accordance with W. Va. Code § 6B-2-4(s).

7.4. Any party to a hearing has the right to be represented by an attorney duly qualified to practice in the State of West Virginia. A Respondent may not be represented at a hearing by a spokesperson, lay representative or anyone else not authorized to practice law in the State of West Virginia.

7.5. The Respondent may appear without counsel and represent himself or herself at the hearing. At the beginning of the hearing, the Hearing Examiner shall ensure that the Respondent does not desire to obtain counsel and is thoroughly advised of the sanctions which may be imposed in the event the Commission finds that the Respondent committed a material violation of W. Va. Code §§ 6B-1-1 through 6B-3-11.

7.6. All persons at the hearing shall conduct themselves in a respectful manner. Demonstrations of any kind at hearings shall not be permitted. The Hearing Examiner may, in his or her discretion, recess or continue any hearing at which any person conducts themselves in any manner which interferes with

or prevents the proper conduct of the hearing.

7.7. All testimony to be considered by the Hearing Examiner at the hearing shall be by sworn or affirmed testimony.

7.8. The purpose of the hearing is to further inquire into the matters set forth in the Statement of Charges and to record evidence and arguments in support of and in opposition to the charges so that the Commission may determine all issues.

7.9. Members of the Commission and its officers, agents and employees are competent to testify at the hearing as to material and relevant matters but no member of the Commission who testifies at the hearing may thereafter participate in the deliberations or decisions of the Commission with respect to the case in which he or she testified.

7.10. Each party may make a brief opening statement setting forth the evidence he or she intends to prove.

7.11. The Complainant or the Commission's counsel shall first present competent and relevant evidence, including testimony and/or documents, in support of the Statement of Charges.

7.12. The Respondent or his or her counsel may present competent and relevant evidence following the conclusion of the Complainant's presentation of evidence.

7.13. Each party has the right to cross-examine any witness who testifies.

7.14. Following the presentation of the Respondent's evidence, the Complainant has the right to submit rebuttal evidence.

7.15. Following the presentation of all evidence, both parties have the right to make a closing argument, not to exceed ten minutes. The Hearing Examiner may extend the time period upon a showing of good cause.

7.16. All exhibits offered into evidence shall be labeled and marked.

7.17. All exhibits offered into evidence, or copies thereof, shall be appended to the record of proceedings, and if any exhibit is not susceptible to attachment or copying the Hearing Examiner may authorize the substitution of either a photograph, facsimile, or description of the exhibit.

7.18. The Hearing Examiner may order that witnesses be sequestered.

7.19. The Respondent is entitled to be present and to present evidence at the hearing; however, the Respondent shall be considered to have waived the right to be present if:

7.19.1. after being notified of the date, time and place of hearing he or she does not appear and fails to show good cause for his or her absence, or

7.19.2. after being advised by the Hearing Examiner that disruptive conduct will cause removal from the hearing, he or she persists in conduct which justifies his or her exclusion from the hearing.

§ 158-17-8. Findings of Fact, Conclusions of Law, and Briefs.

8.1. Either party may, within fifteen business days from the conclusion of the hearing, file with the Commission proposed Findings of Fact, Conclusions of Law and a brief containing argument.

8.2. Findings of fact shall be limited to the facts admitted into evidence at the hearing or made part of the record and any facts found through judicial notice.

§ 158-17-9. Decision of Hearing Examiner.

9.1. The Hearing Examiner must issue proposed Findings of Facts and Conclusions of Law (hereinafter "Recommended Decision") within forty-five days from receipt of the parties' proposed Findings of Fact, Conclusions of Law and briefs.

9.2. The Hearing Examiner shall provide a copy of the recommended decision to the Executive Director who shall provide a copy of it to the parties and the Commission.

9.3. The parties may submit briefs to the Commission in support of or in opposition to the Hearing Examiner's recommended decision within fourteen days of receipt of the recommended decision.

9.4. The Commission shall then have forty-five days within receipt of the entire record to make a final decision on behalf of the Commission.

9.5. Either party may request an opportunity to make an oral argument to the Commission prior to their deliberations on the Hearing Examiner's recommended decision and the imposition of appropriate sanctions, if applicable. The request must be made in writing and submitted within fifteen business days from the conclusion of the hearing.

§ 158-17-10. Commission as a Hearing Board.

10.1. In lieu of employing a Hearing Examiner, the Commission may sit as a hearing board to preside at the hearing.

10.2. The Chairperson or his or her designee may serve as the Presiding Officer of the Hearing Board and may exercise all powers of the Hearing Examiner for purposes of handling prehearing matters and conducting the hearing.

10.3. If the Commission sits as a Hearing Board, it shall issue a final decision in writing within twenty-one days following the close of evidence, including receipt of the proposed Findings of Fact and Conclusions of Law of the parties.

§ 158-17-11. Administrative Record.

11.1. The exclusive record for decision is:

11.1.1. the transcript or recording of testimony at the hearing;

11.1.2. exhibits introduced into evidence at the hearing;

11.1.3. all documents or evidentiary depositions filed in the proceeding, and

11.1.4. any proposed Findings of Facts and Conclusions of Law and briefs submitted by the parties, including briefs submitted in support of or in opposition to the Hearing Examiner's recommended decision.

§ 158-17-12. Final Decision.

12.1. The Commission's final decision must be in writing. Within three business days of issuing a final decision, the Commission must mail a copy of it to the Respondent or Respondent's counsel by certified mail, return receipt requested. A copy must also be provided to the Complainant.

12.2. A final decision must be approved by at least six members of the Commission.

§ 158-17-13. Sanctions.

13.1. The Commission may impose sanctions in accordance with W. Va. Code § 6B-2-4(s) if it finds by clear and convincing evidence that the facts alleged in the Complaint are true and constitute a material violation of the Act.

13.2. The Commission may institute civil proceedings in the circuit court of the county in which a violation occurred for the enforcement of sanctions imposed in its final decision.