

**WEST VIRGINIA  
SECRETARY OF STATE**

**KEN HECHLER**

**ADMINISTRATIVE LAW DIVISION**

Form #5

**FILED**

JUN 30 1 09 PM '95

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

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

AGENCY: State Commission on Aging TITLE NUMBER: 76

CITE AUTHORITY: W.Va. Code §16-5L-21

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 NEW RULE BEING ADOPTED: 5

TITLE OF RULE BEING ADOPTED: West Virginia Long-Term Care

Ombudsman Program Procedural Rule

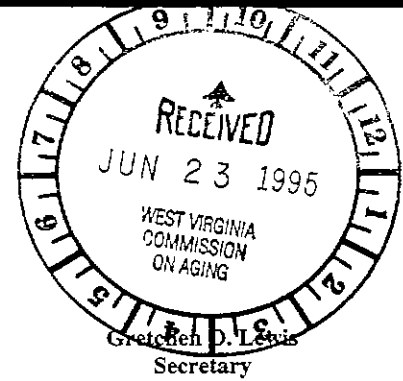
THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE  
EFFECTIVE DATE OF THIS RULE IS July 31, 1995

*William E. Goyette, Jr.*



STATE OF WEST VIRGINIA  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

Office of the Secretary  
State Capitol Complex  
Building 3, Room 206  
Charleston, West Virginia 25305  
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Gaston Caperton  
Governor

June 16, 1995

Mr. William E. Lytton, Jr.  
Interim Executive Director  
West Virginia Commission on Aging  
State Capitol Complex  
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Charleston, West Virginia 25305

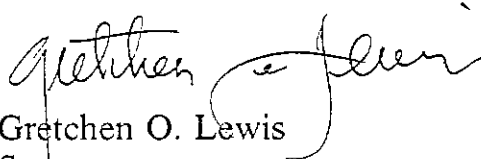
Re: Proposed Procedural Rule, Title 76,  
Series 5, West Virginia Long-Term  
Care Ombudsman Program

Dear Bill:

Pursuant to West Virginia Code 5F-2-2(a) (12), I hereby consent to the proposal of the rule specified above.

You may attach a copy of this letter to your filing with the Secretary of State as evidence of my consent.

Very truly yours,

  
Gretchen O. Lewis  
Secretary

GOL/jah

West Virginia Long-Term Care Ombudsman  
Program Procedural Rule  
Close of Public Comment Period

Summary of Comments

At the close of the comment period ending May 1, 1995 at 4:00 p.m., the State Commission on Aging did not receive any written comments.

**WEST VIRGINIA PROCEDURAL RULE  
STATE COMMISSION ON AGING  
WEST VIRGINIA LONG-TERM CARE OMBUDSMAN PROGRAM  
76 CSR 5**

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TITLE 76  
WEST VIRGINIA PROCEDURAL RULES  
STATE COMMISSION ON AGING

FILED

JUN 30 1 10 PM '95

SERIES 5  
WEST VIRGINIA LONG-TERM CARE OMBUDSMAN PROGRAM

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

**§76-5-1. General Purpose.**

1.1. Scope -- This rule establishes the policies of the office of the long-term care ombudsman program. This program was created to effectively assist residents of long-term care facilities in the assertion of their civil and human rights.

1.2. Authority -- W. Va. Code, §16-5L-21.

1.3. Filing Date -- June 29, 1995

1.4. Effective Date -- July 1, 1995

**§76-5-2. Application and Enforcement.**

2.1. Application -- This rule applies to state, regional and volunteer long-term care ombudsman programs.

2.2. Enforcement -- This rule is enforced by the State Commission on Aging.

**§76-5-3. Definitions.**

3.1. "Case Record" -- means the official files in which the ombudsman records all information relative to the investigation and resolution of the case. Case records are confidential.

3.2. "Client" -- means a resident of a long-term care facility of the applicant for long-term care services. Where appropriate, the term includes a prospective, previous, or deceased resident or recipient.

3.3. "Complainant" -- means any person who files one or more complaints with the ombudsman program. Examples of categories of complainants include residents, relatives, friends, facility staff, or other agency staff.

3.4. "Complaint" -- means a concern brought to, or initiated by, the ombudsman for investigation and action by or on behalf of one or more residents of a long-term care facility relating to health, safety, welfare or rights of a resident.

3.5. "Core Ombudsman Services" -- means investigating complaints; developing resident and family council; monitoring long-term care facilities, providing general information; providing advocacy services; providing public or community education; monitoring the implementation of laws, regulations and policy; providing professional development for representatives of the office; managing a volunteer program; program supervision; and program administration.

3.6. "Facility Monitoring" -- means the establishment of a regular presence in facilities by the ombudsman. Visits should be unannounced. Appointments may be made at the ombudsman's discretion.

3.7. "Family Council Activity" -- means provision of technical assistance, information, training, or support to residents' family members or facilities' staff in forming or maintaining a family council.

3.8. "Follow-up Activities" -- means site visits, phone calls, letters or interviews completed by an ombudsman after the complaint is resolved or referred.

3.9. "General Training" -- means presentations to community groups or to groups of residents or families on long-term care issues, long-term care issues, the long-term care ombudsman program, etc.

3.10. "Government Agency" -- means any department, division, office, bureau, board, commission, council, authority, or any other agency or instrumentality created by the State or political subdivision thereof or to which the State is a party or by any county or municipality which is responsible for the regulation, visitation, inspection, or supervision of long-term care facilities or which provides services to residents or long-term care facilities.

3.11. "Guardian" -- means the person with legal authority to manage the affairs, property and rights of another person who for some peculiarity of status or defect of age, understanding or self control is considered incapable of administering his or her own affairs.

3.12. "Identity Information" -- means information containing the identity of a complainant or resident, or which reasonably could reveal the identity of any complainant or resident.

3.13. "Immediate Family" -- means spouse, children, mother, father, brothers, or sisters.

3.14. "Information and Assistance" -- means providing assistance by telephone or in person on topics such as selecting a nursing home, resident rights, and understanding Medicaid.

3.15. "In-Service Training" -- means presentations by an ombudsman to facility staff on long-term care issues.

3.16. "Legal Representative" -- means a court appointed guardian, conservator, attorney in fact, or an executor or administrator of the estate of a deceased client who can give consent

or authorization in the matter.

3.17. "Long-Term Care Facility" -- means nursing home, personal care home, or residential board and care home as defined in W. Va. Code, §16-5C-2; nursing homes operated by the Federal government or the State government; extended care facilities operated in connection with hospitals; and any similar institution, residence or place, or any part or unit thereof, however named, in this State which is advertised, offered, maintained or operated by the ownership or management for consideration, for the express and implied purpose of providing accommodations and care or personal assistance to one or more persons who are ill or otherwise incapacitated or are dependent upon the services of others by reasons of physical or mental impairment and who are not related within the degree of consanguinity of second cousin to the owner or manager of the institution, residence or place.

3.18. "Office of the State Long-Term Care Ombudsman" -- means the Office which includes the state long-term care ombudsman, regional long-term care ombudsmen and volunteer ombudsmen all of whom are representatives of the Office.

3.19. "Official Duties" -- means the work assigned to the Office of the State Long-Term Care Ombudsman authorized by federal or state law and carried out under the auspices and general direction of the state long-term care ombudsman.

3.20. "Pecuniary Interest" -- means pecuniary interest in long-term care which includes, but is not limited to, employment by a home health company, employment by a long-term care facility, or by an association (or affiliate organization of association) for long-term care facilities, or by any organization or corporation that directly or indirectly legislates, owns or operates a long-term care facility.

3.21. "Personal Assistance" -- means any personal services, including, but not limited to: help in walking, bathing, dressing, feeding or getting in or out of bed, or supervision required because of the age or mental impairment of the resident.

3.22. "Providers" -- are the individual facilities that provide long-term care services and, where appropriate, the corporations, partnerships or persons that operate these types of entities.

3.23. "Record" -- means any medical, social, personal, administrative and financial information maintained by any long-term care facility, or by any state or local agency, pertaining to a resident of a long-term care facility or to the facility.

3.24. "Regional Long-Term Care Ombudsman or Regional Ombudsman" --- means any paid staff of a designated regional long-term care ombudsman program who has obtained appropriate certification from the State Commission on Aging and who meets the qualifications set forth in W.Va. Code §16-5L-9.

3.25. "Regional Long-Term Care Program or Regional Program" -- means an entity

designated as a regional long-term care ombudsman program by the state long-term care ombudsman.

3.26. "Representative of the Office" or "Representative of the Office of the State Long-Term Care Ombudsman" -- means one of the three categories of ombudsmen.

3.27. "Resident" -- means an individual living in a nursing home, personal care home, a residential board and care home, or any long-term care facility as defined in W. Va. Code, §16-5L-3(b) and this rule or who has lived in such a setting, or who has made application to live in such a setting.

3.28. "Resident Council Development"-- means providing technical assistance, information, training, or support to a facility's residents or staff in forming or maintaining a resident council.

3.29. "State Long-Term Care Ombudsman or State Ombudsman" -- means an individual who meets the qualifications of W. Va. Code §16-5L-5 and this rule and who is employed by the State Commission on Aging to implement the state long-term care ombudsman program.

3.30. "Volunteer Long-Term Care Ombudsman or Volunteer Ombudsman" -- means any uncompensated individual who performs the duties enumerated under W. Va. Code §16-5L-8 and this rule: Provided, that the individual has obtained appropriate certification as set forth in W. Va. Code §16-5L-9 and this rule.

3.31. "Volunteer Development -- means the implementing a program to recruit, train and supervise Certified Volunteer Ombudsman from the community.

3.32. "Withdrawn" -- means the complaint was discontinued at the option of the ombudsman or the complaint was withdrawn by the resident and not continued by the ombudsman.

#### **§76-5-4. Office of the State Long-Term Care Ombudsman.**

##### **4.1. Office Administration**

4.1.1. The Office of the State Long-Term Care Ombudsman is administered by the State Commission on Aging.

4.1.2. No individual involved in the selection of the state long-term care ombudsman may be (1) subject to a conflict of interest; (2) a member or staff personnel of an agency or organization which is (a) responsible for licensing or certifying long-term care services in West Virginia; (b) an association (or an affiliate organization of such an association) of long-term care facilities; or (c) a member or employee of an agency or organization which is designated as a regional long-term care ombudsman program.

## 4.2. Office Responsibilities

4.2.1. The responsibilities of the Office of the State Long-Term Care Ombudsman include, but are not limited to providing advocacy, responding to complaints, monitoring the long-term care system and applicable laws and regulations, expanding the ombudsman network, and representing the interests of residents.

## **§76-5-5. Designation of Regional Long-Term Care Ombudsman Programs.**

### 5.1. General Designation Requirements

5.1.1. The State Commission on Aging has the authority to designate and maintain Regional Long-Term Care Ombudsman Programs encompassing all planning and development areas of the State under the direction of the state long-term care ombudsman.

5.1.2. In order to be designated, a Regional Long-Term Care Ombudsman Program (1) cannot have a pecuniary, licensing, or organizational interest; (2) must maintain a private, nonprofit status or function as a local or regional government agency; (3) must agree to create and be capable of maintaining a regional long-term care ombudsman program; and, (4) must adhere to all requirements set forth under law and rule.

5.1.3. The program must submit a completed designation proposal and budget to the State Commission on Aging each year.

5.1.3.a. The proposal and budget are reviewed by the state long-term care ombudsman and other staff as the executive director of the State Commission on Aging deems necessary.

5.1.4. Upon approval by the State Commission on Aging, the designated Regional Long-Term Care Ombudsman Program is operated as a component of the Office of the State Long-Term Care Ombudsman.

5.1.5. No individual involved in the designation of a Regional Long-Term Care Ombudsman Program may be (1) subject to a conflict of interest; (2) a member or staff personnel of an agency or organization which is (a) responsible for licensing or certifying long-term care services in West Virginia, or (b) an association (or an affiliate organization of such an association) of long-term care facilities; or (c) a member or employee of an agency or organization which is designated as a Regional Long-Term Care Ombudsman Program.

5.1.6. A regional long-term care ombudsman program may not operate in conflict with objectives and policies of the Office of the State Long-Term Care Ombudsman.

5.1.7. Any complaints that the organization or agency designated as the Regional Long-Term Care Ombudsman Program has violated the Older Americans Act, as amended, the

Long-Term Care Ombudsman Program Act, or applicable regulations will be reported to the state long-term care ombudsman.

5.2. Initial Designation of Existing Regional Long-Term Care Ombudsman Programs:

5.2.1. No Regional Long-Term Care Ombudsman Program may operate unless it has been designated as such by the State Commission on Aging. Any program serving as a Regional Program on July 1, 1995 will be designated as a Regional Program for a period of one (1) year unless the state long-term care ombudsman determines that the agency does not meet the requirements established under law and rule.

5.2.2. Unless otherwise provided in this rule, no Regional Program may be fully designated unless it has complied with all requirements of governing the Office.

5.2.2.a. The Regional Program must ensure compliance with all program and contract requirements, all relevant federal and state statutes, regulations and policies, and ensure program integrity and stability.

5.2.2.b. No Regional Program nor any member of its staff may hold an unremedied conflict of interest.

5.2.2.c. The Regional Program must maintain an incoming toll-free telephone line to be answered during normal business hours.

5.2.3. The Regional Program's policies and procedures must address, at a minimum (1) prioritizing, screening and investigating complaints, (2) maintaining confidentiality, (3) recruiting and managing volunteers; (4) screening potential and actual employees for conflicts of interest, (5) identifying information which may be provided by an employee in different situations, (6) handling complaints about employees, (7) participating in inspections and, (8) fiscal management.

5.2.4. The Regional Program must have policies that address personnel issues, evaluations, job descriptions, and wage scales for each job classification. Personnel policies must include hours of work, benefits, promotion and evaluation criteria, personnel records for employees, and a grievance procedure.

5.2.5. The Regional Program must maintain a personnel record for each employee including written job descriptions, applications or resumes, annual performance evaluations, and documentation that the employee has received personnel policies, grievance procedures and wage information pertinent to his or her job.

5.2.6. The Regional Program must have procedures to assure that each complaint received is screened, and if appropriate, assigned to an ombudsman for investigation and back-up procedures for assigning a substitute ombudsman in the absence of the assigned ombudsman.

5.2.7. The Regional Program must establish an advisory group to the program with the responsibility to render advice and support to the staff and sponsoring agency in matters pertaining to the program. The advisory group must be made up of persons concerned about the quality of life in long-term care facilities and in protecting the rights of residents of such facilities and include consumer representation.

5.2.8. The Regional Program must have access to consultants in aging, health care and legal professions to provide technical support and advice to ombudsmen.

5.2.9. The Regional Program must retain all books, records and other documents relevant to the operation of the program for three (3) full years after final payment of the grant award and all other pending matters are closed, unless transfer is authorized in writing from the State Commission on Aging. Federal and/or state auditors and any persons duly authorized by the State Commission on Aging will have full access to and the right to examine any of said material during the said period, or until resolution of all financial matters, unless prohibited by federal or state law and/or regulations.

### 5.3. Development of Ombudsman Plans by all Regional Programs.

5.3.1. The Regional Program shall develop an ombudsman plan.

5.3.2 The Ombudsman plan must include (1)investigating complaints, (2)promoting awareness of the ombudsman program, (3)educating the public, (4)monitoring laws, regulations and policies, (5)advocating, (6)providing legal counsel, (7)recruiting and managing volunteers and, (8)providing a quality assurance process.

5.3.3. The state long-term care ombudsman may consider each plan based upon (1)goals, (2)action steps, (3)objectives, (4)time lines and, (5)outcome standards.

5.3.4. The state long-term care ombudsman may utilize the following process when designating an organization or agency to serve as a Regional Long-Term Care Ombudsman Program:

5.3.4.a. The State Commission on Aging may issue a request for proposal (RFP) seeking an organization or agency to serve as the Regional Long-Term Care Ombudsman Program or take other appropriate action consistent with agency regulations.

5.3.4.b. The State Commission on Aging, or the state long-term care ombudsman may conduct an on-site visit to each of the agencies responding to the RFP to verify the facts presented in each proposal.

5.3.4.c. The State Commission on Aging will request that all of the responding agencies that meet the requirements develop an ombudsman plan. The responding agencies shall have forty (40) days to respond to this request, unless extensions are granted

consistent with agency regulations.

5.3.4.d. The state long-term care ombudsman will review the ombudsman plans and will choose the agency most appropriate to serve as the Regional Long-Term Care Ombudsman Program.

5.3.4.e. The state long-term care ombudsman notifies the responding agencies of his/her decision within forty-five (45) days.

5.3.5. The state long-term care ombudsman may provisionally designate a Regional Program for ninety (90) days if there is cause for doing so. Cause may include, but is not to be limited to, the agency's failure to comply with all of standards set forth in this rule or the existence of a conflict of interest left without remedy on the part of the agency seeking designation or any individual employee by or working for that agency.

5.3.6. A Regional Program that is provisionally designated must report progress and supply supporting program documents on required changes or required corrections in writing to the state long-term care ombudsman on a monthly basis or as otherwise required.

5.3.7. The state long-term care ombudsman may renew the provisional designation of a Regional Program for an additional ninety (90) days if the case upon which the designation is based will reasonably take more than ninety (90) days to correct and the agency is making reasonable progress toward completing that correction.

5.3.8. The state long-term care ombudsman may withdraw the designation of a provisionally Regional Program when the correction necessary to obtain full designation status is not likely to be accomplished within the time permitted.

5.3.9. Any sponsoring agency receiving full or provisional designation as a Regional Long-Term Care Ombudsman Program shall enter into a contract with the State Commission on Aging. At a minimum, the contract must specify the geographical region to be served, the ombudsman services to be provided, a requirement that the Regional Program abide by all rules, policies and laws governing the Office, payment for services, effective date, sub-contracting, termination, and renewal.

#### 5.4. Program Review for Continued Designation.

5.4.1. At least forty-five (45) days prior to the end of each Regional Program's designation year, the state long-term care ombudsman must conduct an annual review to determine whether the Regional Program may continue its designation. In addition to the annual review the state long-term care ombudsman may conduct additional program reviews at any time.

5.4.2. When conducting a program review, the state long-term care ombudsman will make an on-site visit to the Regional Program and to representatives of the Office as he or

she deems necessary. The state long-term care ombudsman may consider (1) compliance with all state and federal laws, regulations, policies, procedures and rules, (2) records and documentation, (3) ombudsman program services, (4) attainment of outcomes and objectives and, (5) plans for ensuing year.

5.4.3. During the on-site visit the state long-term care ombudsman shall have access to administrative and complaint records. Program administrative records include, but are not limited to, advisory board minutes; conflict of interest screening; quality assurance documents; client satisfaction surveys; professional development documents; documentation pertaining to the grandfathering of staff, all general information and activity logs.

5.4.4. When reviewing Regional Programs or representatives of the Office, the state long-term care ombudsman will review cases drawn from a random sampling of cases documented in the ombudsman's monthly report. The cases reviewed by the state long-term care ombudsman may include cases which were discontinued, withdrawn, unresolved, referred, unverified, open for longer than sixty (60) days, involved legal intervention or a hearing, or required a high number of hours.

5.4.5. If appropriate, upon the completion of any program review, the state long-term care ombudsman will develop a technical assistance plan for the Regional Long-Term Care Ombudsman Program.

5.4.6. Within thirty (30) days of completing any program review, the state long-term care ombudsman will provide the Regional Program with written notification of the results.

5.5. Provisional Designation of Regional Programs, Involuntary Withdrawal of a Regional Program's Designation, Voluntary Separation of Regional Programs from the Office.

5.5.1. The state long-term care ombudsman may change the designation of a fully designated Regional Program to provisional designation, or he/she may withdraw the designation of a fully or provisionally designated Regional Program for cause. Cause may include, but shall not be limited to:

5.5.1.a. The Regional Program's failure to follow policies, procedures, or state or federal laws;

5.5.1.b.. The Regional Program's failure to meet performance standards;

5.5.1.c. The Regional Program's failure to provide services in accordance with state or federal laws, office policies or procedures, the service contract, or the ombudsman plan;

5.5.1.d. The development of a conflict of interest without remedy involving

the Regional Program, its sponsoring agency, or an individual associated with either;

5.5.1.e. The misfeasance, malfeasance, or nonfeasance of a regional or volunteer ombudsman; or,

5.5.1.f. For any other reason wherein the decertifying of a Regional Program is warranted at the discretion of the state long-term care ombudsman.

5.5.2. When provisionally designating a Regional Program, the state long-term care ombudsman will provide notice of the decision. The notice must specify the changes or corrections and define the length of time the Regional Program will be given to come into compliance. Any Regional Program on provisional designation must provide the state long-term care ombudsman with a written report of their progress on a monthly basis or as otherwise required and must document that the required changes and corrections have been made.

5.5.3. The state long-term care ombudsman may withdraw the designation of a Regional Program when the scope and severity of the cause is of such a severe nature that corrections are not likely to be successfully implemented or when it appears that correction will not be implemented in appropriate time frames. The state long-term care ombudsman may presume such failure when:

5.5.3.a. The cause is found to involve a flagrant disregard of the Office's policies and procedures, standards, or federal or state law;

5.5.3.b. The pattern of problems are repeated; or,

5.5.3.c. Attempted correction of problems by the Regional Program have not been successful.

5.5.4. The state long-term care ombudsman must give the Regional Program notice of his/her decision to withdraw the Regional Program's designation. The notice must contain an explanation of the state long-term care ombudsman's reason for the withdrawal of the designation.

5.5.5. A Regional Program may voluntarily withdraw its designation as a Regional Long-Term Care Ombudsman Program by providing the state long-term care ombudsman with a written notice of its intent ninety (90) days prior to the date upon which the program expects the withdrawal of designation to take place.

## 5.6. Notice Rights and Hearing Requirements.

5.6.1. Whenever a party requests a hearing in accordance with this rule, the state long-term care ombudsman sets the date, time, and place for the hearing, and notifies the party thereof within thirty (30) working days of receiving the request for a hearing, unless the parties

agree otherwise.

5.6.2. The director of the State Commission of Aging has the authority to designate a hearing officer. Upon completion of the hearing, the hearing officer makes a recommendation and forwards it to the Director of the Commission on Aging. The Director makes the final decision within thirty (30) days after the hearing was held. The Director's decision will be the final administrative form of appeal.

## **§76-5-6. Certification and Continuing Education.**

### **6.1. General Requirements**

6.1.1. The state long-term care ombudsman develops and implements procedures for training and certification of regional and volunteer long-term care ombudsmen.

6.1.1.a. Regional and volunteer long-term care ombudsmen who satisfactorily complete the training requirements may be certified by the State Commission on Aging.

6.1.1.b. Regional and volunteer ombudsman are given identification cards which are presented to the administrator or his or her designee when entering a long-term care facility and to employees, residents and others thereafter.

6.1.1.c. Consistent with the provisions of this rule, certified regional and volunteer long-term ombudsmen are to be representatives of the Office of the State Long-Term Care Ombudsman.

6.1.2. No regional or volunteer ombudsman may perform his or her official duties prior to the completion of certification training except as a supervised portion of that training program.

6.1.3. An individual must attend, at a minimum, twenty-five (25) hours of training to be initially certified as a regional or volunteer ombudsman.

6.1.4. Regional and volunteer long-term care ombudsmen who have completed the minimum training requirements specified in this section of the rule may be given identification cards by the State Commission on Aging valid for one (1) year.

6.1.5. For each year after initial certification, a regional long-term care ombudsman must attend twenty-five (25) hours of documented continuing education on long-term care, federal, state, and local laws, regulations, and policies or subjects related to his or her duties or responsibilities annually in order to obtain a new identification card.

6.1.5.a. The Regional Program will submit requests for staff to the state ombudsman in accordance with section 6.6.

6.1.6.. For each year after initial certification, a volunteer long-term care ombudsman must attend at least seven (6) hours of documented continuing education, on subjects related to long-term care, annually in order to obtain a new identification card.

## 6.2. Approval of Certification and Continuing Education.

6.2.1. All certification training conducted under this rule must be based upon a curriculum approved by the state long-term care ombudsman.

6.2.2. The state long-term care ombudsman may give at his/her discretion full or partial credit of training.

6.2.3. All requests for credit must come from the Regional Program. All requests for credit must include documentation of the training or experience described in the application.

6.2.4. In all cases where the state long-term care ombudsman seeks to decertify a regional or volunteer ombudsman, or to remove a candidate for failure to complete certification training or continuing education in a timely manner, the state long-term care ombudsman will give notice to the Regional Program. Upon receipt of the notice, the Regional Program must ensure that the individual is relieved of all complaint-handling duties that require contact with consumers or providers until such time as all appeals have been exhausted and a final determination has been made. Notice will include reasons for the proposed action, law or rule involved, an explanation or extenuating circumstances may be provided in writing, date for which his or her identification care must be returned, and a statement regarding entitlement to an appeal.

## 6.3. Certification Training Deadlines.

6.3.1. Candidates must complete certification training within six (6) months, if a volunteer ombudsman or two (2) months if a regional ombudsman.

6.3.2. The state long-term care ombudsman may approve an application where the applicant demonstrates an acceptable reason for extending the time for certification training and the candidate shows probable success for becoming certified. Acceptable reasons may include, but are not limited to, illness in the immediate family, unexpected changes in living circumstances, employment conflicting with the scheduled training and time constraints.

## 6.4. Failure of a candidate to complete certification training or continuing education.

6.4.1. Failure of a candidate to complete the certification training or continuing education is cause for removal as a regional or volunteer ombudsman.

6.4.2. A candidate may demonstrate extenuating circumstances or give an explanation to the regional ombudsman, for volunteer ombudsman of that program; or to the state long-term care ombudsman, for regional ombudsman. If the explanation or extenuating

circumstances are not acceptable to the regional ombudsman or the state long-term care ombudsman, he or she must notify the candidate.

6.4.3. An individual who has been removed as a candidate may be reinstated if the candidate is likely to successfully complete certificate training.

## 6.5 Central Registry.

6.5.1. The Regional Program must maintain a central registry of regional and volunteer ombudsmen. The registry must include name, address and telephone number; qualifications; classifications; counties the regional ombudsman is assigned; facility the volunteer ombudsman is assigned; position description which contains any prohibitions.

6.5.1.a. Prohibitions may include limitations on duties, limitations on complaint activity investigation, and any limitations due to a conflict of interest.

## 6.6. Separation of Representatives from the Office.

6.6.1. The separation of a representative from the office may occur through decertification, voluntary resignation, termination, or reduction in force.

6.6.2. No regional or volunteer ombudsman may be recommended for decertification without cause. Cause includes, but is not limited to:

6.6.2.a. Failing to follow policies and procedures that conform to the statute and regulations;

6.6.2.b. Failing to provide services in accordance with the statute, regulations, and policies of the Office, the service contract, and approved ombudsman plan;

6.6.2.c. Performing a function not recognized or sanctioned by the Office;

6.6.2.d. Failing to meet the required qualifications;

6.6.2.e. Failing to complete certification training;

6.6.2.f. Failing to meet the continuing education requirements; or,

6.6.2.g. Intentionally failing to reveal a conflict of interest.

6.6.3. When the state long-term care ombudsman initiates a decertification action, he or she will provide written notification to the Regional Program.

6.6.4. An ombudsman who voluntarily separates from the Office may apply to have

his/her certification reinstated when he/she becomes reemployed by or accepted as a volunteer of the Office. Any person seeking recertification must apply in writing to the state long-term care ombudsman. The application must provide the date of separation and a summary of any professional development in or experience with ombudsman skills, long-term care services, problem resolution skills or related skills the applicant may have received since his/her separation from the Office.

6.6.5. The state long-term care ombudsman will review the application of an individual seeking reinstatement and may require the applicant to receive additional professional development, based upon the length of time the applicant has been away from the field, and the experience or professional development the applicant has accumulated in the interim.

#### 6.7. Continuing Education Requirements.

6.7.1. The required hours of continuing education may be prorated for a regional or volunteer ombudsman who has been certified for less than twelve (12) months.

6.7.2. No session will be approved as a source for continuing education credits unless:

6.7.2.a. The individual(s) presenting the session has a recognized expertise in the content area;

6.7.2.b. The session transmits knowledge relevant to the duties of a long-term care ombudsman; and,

6.7.2.c. The session has not been held for the purpose of individual or group supervision.

6.7.3. The Regional Program must submit all requests for credit toward their continuing education requirements to the state long-term care ombudsman. All requests for credit must contain the name of the session, a brief summary of the session's content, and the length of the session.

6.7.4. No regional or volunteer ombudsman may be precluded from meeting continuing education requirements with credits that were also counted toward the continuing education requirements of other professional organizations or boards, as long as content is related to his or her job description.

6.7.5. Each regional and volunteer ombudsman of a Regional Program must apply to his/her Regional Program for review of the continuing education hours he or she has earned. By May first of every year, he or she must produce documentation to substantiate attendance at approved sessions. By June first of every year, the Regional Program must certify to the state long-term care ombudsman that each regional and volunteer ombudsman has fulfilled his or her

continuing education requirements.

6.7.6. If a regional or volunteer ombudsman has not fulfilled his/her continuing education requirements by the first day of June then the Regional Program, must certify to the state long-term care ombudsman the number of hours not yet completed, and the probability of completion of the necessary hours by the thirtieth (30) day of June. By July tenth (10) of every year, the Regional Program must submit any remaining information needed to complete the continuing education certification process.

6.7.7. A regional or volunteer ombudsman may demonstrate extenuating circumstances or give an explanation to the Regional Program. If the explanation or extenuating circumstances are not acceptable to the state long-term care ombudsman, the state long-term care ombudsman, will notify the Regional Program.

6.7.8. A regional or volunteer ombudsman not meeting the continuing education requirement will not be certified or if certified may be decertified.

#### 6.8. Training Content.

6.8.1. The training content for all candidates seeking certification for volunteer or regional ombudsman must include instruction in (1)the ombudsman program authority and responsibility, (2)resident rights, (3)an overview of long-term care facilities, (4)review of medical records, (5)applicable laws and regulations, (6)Medicare and Medicaid, (7)confidentiality, (8)aging process, (9)community agencies, (10)effects of institutionalization, (11)ethics, and, (12)any additional topic deemed appropriate by the state ombudsman.

6.8.2. Ombudsman skills will include training in (1)observing and communicating with residents, (2)building relationships with providers, (3)investigating complaints, and, (4)complaint resolution techniques.

6.8.3. The training content for all candidates seeking certification as a regional ombudsman includes the professional development required under section 6 of this rule, and additional in depth professional development, regional ombudsman training will include (1)development of an action plan, (2)legal, administrative, and other remedies, (3)disclosure of information, (4)advance directives, (5)service management, (6)advocacy skills, (7)documentation, (8)mediation and negotiation, (9)reporting system, and, (10)any additional topics deemed appropriate by the state ombudsman.

#### **§76-5-7. Conflict of Interest.**

##### 7.1. General

7.1.1. A conflict of interest, as used in this rule, occurs when:

7.1.1.a. A state, regional or volunteer ombudsman or any member of his or her immediate family has a pecuniary interest in long-term care facilities within the state or an association thereof within the last two (2) years.

7.1.1.b. A state, regional or volunteer ombudsman or any member of his or her immediate family has a pecuniary interest adverse to long-term care facilities or an association thereof.

7.1.1.c. A state, regional or volunteer ombudsman solicits contributions or seeks employment from a long-term care facility which he or she monitors.

## 7.2. Disclosure and Review

7.2.1. Potential and existing state, regional or volunteer long-term care ombudsmen are to disclose information regarding himself/herself and his or her immediate family in order to assess a conflict of interest at the time of employment and at least annually.

7.2.1.a. Regional and volunteer long-term care ombudsman information is reviewed by the state long-term care ombudsman at the time of certification and during the annual program review. When completed, the person who conducted the screen and the person screened must acknowledge the completion of the screen in writing. The completed screening instrument must be made a record of the program and must be subject to program review.

7.2.1.b. The state long-term care ombudsman will report potential or apparent conflicts of interest from the review to the executive director of the State Commission on Aging.

7.2.1.c. The executive director of the State Commission on Aging reviews potential or apparent conflicts of interest of the state long-term care ombudsman.

7.2.1.d. The residence of a member of a state, regional or volunteer long-term care ombudsman's immediate family in a long-term care facility is not, in and of itself, construed as a conflict of interest. However, a state, regional or volunteer long-term care ombudsman may not be assigned to a long-term care facility in which an immediate family member is a resident.

7.2.2. No long-term care ombudsman volunteer may perform his or her duties in any specific facility at which, within the proceeding two (2) years, an immediate family member of the volunteer is or has been a resident or an applicant for resident. Placing a name of a family member on a waiting list is not a formal application.

7.2.3. Upon allegation, discovery or disclosure of a conflict of interest the executive director of the State Commission on Aging is required to identify and to remedy a conflict of interest. Failure to abide by the remedy defined by the Director is grounds for

termination of certification of a state, regional or volunteer ombudsman and is grounds for termination as a designated Regional Long-Term Care Ombudsman Program.

7.2.4. A report of a potential or actual conflict of interest must be submitted in writing to the Director and reveal the nature, extent and potential impact of the conflict of interest, and will propose a remedy which will neutralize the conflict of interest. Examples of remedies which may be approved include remedies that assure:

7.2.4.a. The independence of the ombudsman to provide unbiased investigations, successful problem resolution, advocacy services, and other ombudsman services;

7.2.4.b. That no employee having a conflict of interest is involved with or influences the operation of the program; and,

7.2.4.c. That no employee having a conflict of interest is involved with or influences any decision to hire or appoint a state, regional or volunteer ombudsman.

7.2.5. Within thirty (30) days of receiving a report, the Director must review the nature, scope and extent of the conflict of interest and determine whether or not to approve the report. While the decision is pending, the Regional Program responsible must assign an individual with a conflict of interest to duties that do not pose a conflict.

7.2.5.a. The Director may grant a waiver of the conflict, approve a remedy or take an action deemed necessary.

7.2.5.b. Any waiver granted will remain in effect for as long as the conflict continues to exist to the same extent as reported and for as long as the remedy continues to work.

7.2.6. Actions prohibited by someone holding a conflict of interest may include, but are not be limited to, actions taken to influence any decision or action which could be characterized as interference with or reprisals against an ombudsman.

7.2.7. A state or regional ombudsman assigned to investigate a complaint must reveal any relationship with the provider, public agency or person involved that may call into question his or her objectivity or effectiveness in investigating the complaint. These types of relationships may include, but are not limited to, having previously worked for or with a current employee of the provider, having a relative, significant other, who works for the provider, or having worked for the public agency involved in the complaint.

7.2.8. No regional ombudsman may investigate a complaint involving a service directly delivered by a sponsoring agency. The resident must be informed of any decision to refer the complaint to the state long-term care ombudsman and must be informed of the reasons for the referral.

7.2.9. A Regional Program which receives a complaint about a service which the sponsoring agency does not directly provide, but for which the sponsoring agency contracts, set standards, reimburses, or brokers, must reveal the relationship and offer options to the resident. The ombudsman must adhere strictly to the resident's confidentiality and proceed in accordance with the resident's directions and consistent with this rule.

7.2.10. Any conflict of interest not waived or remedied, and any prohibition resulting therefrom, must be recorded in the regional or volunteer's position description which is placed on file in the central registry.

## **§76-5-8. Investigation of Complaints.**

### 8.1. Consent

8.1.1. A state or regional ombudsman may investigate a complaint, reveal the identity of a resident, or resolve a complaint when authorized. Authorization is given by consent. Consent may be given in writing by the resident or orally, when written consent is not practicable. Oral consent must be documented in the case record.

8.1.2. When the resident is unable to give consent due to diminished capacity or death, consent may be given in writing by the legal representative or guardian; or, orally, when written consent from the legal representative is not practicable. Oral consent must be documented in the case record.

8.1.2.a. When there is no legal representative, the legal representative is unknown to the ombudsman or the provider, the legal representative cannot be reached within five (5) days of the date upon which a complaint was received, or when the estate of a deceased client has no executor, the ombudsman may proceed with the investigation.

8.1.2.b. In the event that the legal representative or guardian refuses to authorize an investigation or the ombudsman has reasonable cause to believe the legal representative or guardian is not acting in the best interest of the client, the ombudsman may proceed with the investigation if approved by the state long-term care ombudsman.

### 8.2. Investigation response time.

8.2.1. In responding to or investigating a complaint, the ombudsman must consider the urgency of the complaint as seen by both the program and the resident. If there is probable physical harm to the resident, the ombudsman must respond appropriately by the end of the next working day after receiving the complaint. In all other cases, the ombudsman must respond as appropriate to the complaint.

### 8.3. General Investigative Procedures.

8.3.1. The ombudsman initiates the investigation by:

8.3.1.a. Establishing contact with the resident, legal representative or other relevant person;

8.3.1.b. Visiting the site;

8.3.1.c. Obtaining a clear statement of the clients problems and goals;

8.3.1.d. Informing the resident of his or her rights and the ombudsman process;

8.3.1.e. Revealing known conflicts of interest, if any; and,

8.3.1.f. Identifying the participants.

8.3.2. After initiating the investigation, the ombudsman must proceed with the complaint and implement a strategy to resolve the concern until the case is closed. This process may include:

8.3.2.a. Identifying the relevant agencies;

8.3.2.b. Identifying any steps already taken to handle the complaint;

8.3.2.c. Gathering factual information through interviews with persons with potential knowledge;

8.3.2.d. Observing in the facility;

8.3.2.e. Researching regulations and laws;

8.3.2.f. Reviewing relevant resident, provider, or government records;

8.3.2.g. Taking appropriate action pertaining to complaints regarding any government agency; and,

8.3.2.h. Documenting all activities.

8.3.3. The ombudsman may (1) bring issues to the attention of the facility before referring a complaint, (2) immediately refer a complaint to the appropriate regulatory, social service or other agency. Referrals must include pertinent facts and are subject to confidentiality and consent requirements. Confidential information will be documented as confidential when transmitted. The ombudsman may report violations of:

8.3.3.a. Licensing and certification regulations to the Office of Health Facility Licensure and Certification;

8.3.3.b. Professional licensing laws or standard to the appropriate professional board;

8.3.3.c. Suspected abuse and neglect to adult protective services; and,

8.3.3.d. Suspected criminal activity to the appropriate law enforcement agency.

8.3.4. The state or regional long-term care ombudsman need not investigate any complaint if:

8.3.4.a. The complaint is trivial, frivolous, vexatious or not made in good faith;

8.3.4.b. The complaint has been too long delayed to justify present investigation;

8.3.4.c. The resources available, considering the established priorities, are insufficient for an adequate investigation;

8.3.4.d. The matter complained of is not within the investigatory authority of the long-term care ombudsman program; or,

8.3.5. If a determination is made by a regional long-term care ombudsman not to investigate any complaint, then the complaint is to be referred to the state long-term care ombudsman who will make a final decision as to whether the matter warrants further investigation.

8.3.6. A state or regional ombudsman must open a case on those complaints which they intend to pursue, as authorized by the resident or deemed necessary by the ombudsman. All other activities taken on behalf of residents must be recorded as either information and assistance or advocacy activities.

8.3.7. The Ombudsman need not exhaust one principal step before starting another; he/she need use only those necessary principal steps, and need not follow them in the order given in this section.

8.3.8. The resident, if competent, or their legal representative must have the right to participate in planning any course of action to be taken on his/her behalf by the ombudsman and the resident or their legal representative must have the right to approve or disapprove any proposed action to be taken on his/her behalf by such ombudsman.

#### 8.4. Confidentiality of Information.

8.4.1. Identity information obtained or maintained by a state, regional or volunteer ombudsman in the course of carrying out their official duties pursuant to the long-term care ombudsman program must remain confidential except as provided in this rule.

8.4.1.a. Representatives of the Office must not reveal identifying information about individuals providing information about a complaint without their consent unless ordered to do so by a court.

8.4.1.b. A representative of the Office who receives a subpoena for ombudsman records, to attend a deposition, or to give testimony in court must notify the state long-term care ombudsman immediately.

8.4.2. Complainants can remain anonymous or have their identity remain confidential. When these situations occur, the Regional Program is to advise the complainant about possible limitations in the ability of the program to investigate and resolve the complaint; however, in many instances the program can proceed without disclosing the complainant's or resident's identity, and must do whatever is possible under these circumstances.

8.4.3. Representatives of the Office must maintain records in a confidential manner and address the storage, maintenance, and physical access to all written and electronic complaint records and assure that complaint records are in a secure location so that access to the files is limited to the State Long-Term Care Ombudsman, Director of Commission on Aging or designee.

8.4.4. At the request of the provider, person or parties against whom the complaint has been filed, and subject to restrictions under this section, a state or regional ombudsman may state the verification status of the complaint in question and whether or not the case had been opened or closed.

8.4.5. All other information and files maintained by the ombudsman program are to be disclosed only at the discretion of the regional ombudsman program having authority over the disclosure of such files. Prior to any destruction of the files, the state long-term care ombudsman must receive notice; this notice must be in writing and 30 days prior to the actual destruction of the files.

8.4.6. Except as otherwise provided by the law and rule, persons authorized to review records include the state ombudsman.

#### 8.5. Complaint Intake and Screen.

8.5.1. A representative of the Office may receive a complaint over the telephone, in person or through the mail. A complaint identified or generated by the office itself shall be considered a complaint received.

8.5.2. The Regional Program must assure that all complaints are screened prior to assignment for investigation to identify those complaints which they will decline to investigate, consistent with this rule.

8.5.3. A representative of the Office must gather basic information in response to a complaint received including:

8.5.3.a. The full name, address and telephone number of the person(s) making the complaint, except in those instances when a complainant requests anonymity;

8.5.3.b. The full name, address and telephone number of the resident involved, when necessary;

8.5.3.c. The full name, address and telephone number of the resident's legal representative, if applicable, as well as a brief review of the legal representative's scope of authority;

8.5.3.d. The provider(s), agency(ies), parties or persons involved, if applicable; and,

8.5.3.e. A statement of facts about the complaint, including the date(s) of any alleged occurrence(s), the sequence of events as known to the complainant, and any steps previously taken by the complainant to resolve the complaint.

#### 8.6. Access to Residents.

8.6.1. An Ombudsman is entitled under both federal and state law to have immediate access to a resident to seek consent from that resident or to communicate further. When exercising this right, the ombudsman must:

8.6.1.a. Respect the privacy and convenience of the resident. The ombudsman should, whenever possible, seek to communicate to residents, at convenient times to the resident;

8.6.1.b. Inform the appropriate staff member of his/her presence upon entering the facility;

8.6.1.c. Announce and identify themselves to the resident; and,

8.6.1.d. Never seek to intimidate, coerce, or deceive the resident into a communication or interview.

8.6.2. An ombudsman must terminate an interview or visit with a resident who has expressly declined services or withdrawn consent for services.

8.6.3. Should an ombudsman be denied immediate access to a resident, the ombudsman is to inquire as to the nature of the denial and determine an appropriate action according to the response.

8.6.3.a. If the explanation appears reasonable to the ombudsman (e.g. the resident is being bathed), the ombudsman should accept the explanation and seek the earliest opportunity to interview the resident.

8.6.3.b. If the explanation does not appear reasonable to the ombudsman, or if access is being denied arbitrarily, the ombudsman should inform the administrator of the facility of their legal right to communicate with the resident.

8.6.4. When a denial of access continues, the ombudsman must notify the state long-term care ombudsman so that appropriate action may be discussed.

#### 8.7. Access to Records.

8.7.1. A state or regional ombudsman must be allowed access to any resident's records, including medical records, reasonably necessary to any investigation, however:

8.7.1.a. If the resident is competent and has the ability to write, access may only be obtained by the written consent of the resident;

8.7.1.b. If the resident is competent but unable to write, oral consent may be given in the presence of a third party who must witness the resident's consent in writing;

8.7.1.c. If the resident is under a guardianship or has granted a medical power of attorney, or granted any other power of attorney which is in effect, access may only be obtained by the written consent of the guardian or attorney in fact, unless the existence of guardianship, medical power of attorney or attorney in fact is unknown to the long-term care ombudsman upon investigation and to the long-term care facility, or unless the guardian or attorney in fact cannot be reached through normal communications channels within five (5) working days;

8.7.1.d. If the resident is unable to express written or oral consent and there is no guardian or attorney in fact or the notification of the guardian or attorney in fact is not achieved for the reasons set forth in subsection (c) of this section, or if the resident is deceased, inspection of records may be made;

8.7.1.e. If access to records is necessary to investigate a complaint and (1)the legal representative or guardian refuses to give permission or (2)the ombudsman has reasonable cause to believe the legal representative or guardian is not acting in the best interest of the resident, access may be obtained with approval of the state ombudsman.

8.7.2. The state or regional long-term care ombudsman is allowed access to all

records of any long-term care facility that are reasonably necessary for the investigation of a complaint, including, but not limited to, facility incident reports, dietary records, policies and procedures of the facility that the facility is required to maintain under federal or state law, admission agreements, staffing schedules, and any document depicting the actual staffing pattern of the facility and resident council and grievance committee minutes.

#### 8.8. Verification of Complaints.

8.8.1. The validity of each complaint investigated is to be determined according to the classifications listed below and documented by the ombudsman based on the evidence or information obtained during the investigation.

8.8.2. Verified. A complaint shall be considered verified if:

8.8.2.a. Observed by an Ombudsman;

8.8.2.b. Substantiated through interviews, records, inspections, and/or observation;

8.8.2.c. Reported in licensing or survey reports; or,

8.8.2.d. Acknowledged by facility.

8.8.3. Partially Verified. A complaint shall be considered partially verified if a portion of the complaint is verified and/or the complaint is supported by evidence which is contradictory but tends to corroborate the complaint.

8.8.4. Not Verified. The complaint shall be considered not verified if the interviews, records, or observations fail to corroborate the substance of the complaint.

8.8.5. Undetermined. A complaint shall be considered as undetermined when there is not enough information to classify the complaint as either verified, partially verified, or not verified.

#### 8.9. Complaint resolution.

8.9.1. Except as otherwise provided in this section, the ombudsman must attempt to resolve all verified or partially verified complaints.

8.9.2. The ombudsman must advise the resident or legal representative of the options for resolving the complaint and the various strategies that could be used. Where appropriate, the ombudsman will encourage and empower the resident to handle the complaint directly with the agency, provider, or person with whom the resident has the problem.

8.9.3. If a complaint is verified, partially verified, or undetermined, the ombudsman

has the responsibility to inform the resident of the legal, administrative, and other remedies available to resolve the complaint. The ombudsman will assist the resident in seeking appropriate remedies in order to resolve the complaint, subject to confidentiality provisions. The ombudsman will attempt, whenever possible, to resolve complaints on an in-house basis (i.e. within the facility or agency where the problem exists).

8.9.4. The resolution status of each complaint must be documented according to the classifications listed below:

8.9.4.a. Resolved or Partially resolved. A complaint will be classified as resolved or partially resolved when the problem reported was corrected or partially corrected to the satisfaction of the complainant and/or the ombudsman, and a satisfactory change occurred; or, the problem reported was referred on to another agency and was corrected or partially corrected to the satisfaction of the resident and/or the ombudsman, and a satisfactory change occurred.

8.9.4.b. Not resolved. A complaint will be classified as not resolved when the ombudsman took steps to correct the problem; however, for whatever reason, the problem was not corrected to the satisfaction of the resident and/or the ombudsman, and no satisfactory change occurred.

8.9.4.c. Withdrawn. A complaint will be classified as withdrawn when the ombudsman, because of lack of cooperation or information, discontinues the investigation or resolution efforts or the complaint was withdrawn by the resident.

#### 8.10. Notice of Complaint Disposition.

##### 8.10.1. During the course of an investigation and resolution process:

8.10.1.a. The ombudsman must inform the resident of actions taken in the course of the investigation and resolution process, upon request.

8.10.1.b. If a complaint has been referred to another investigative agency, the ombudsman will follow-up with the investigating agency at least once every thirty (30) days until the investigation is completed and must immediately report the status of the investigation to the resident.

8.10.1.c. If the complaint has been referred to the Office of Health Facility Licensure and Certification for investigation, the regional ombudsman will request a copy of the investigative report.

8.10.1.d. The Regional Program must notify the Office, whether in writing or by telephone, prior to initiating any legal action in circuit court or pursuing an appeal of an administrative hearing. If the Regional Program's attempt to notify the Office is unsuccessful, the Regional Program may contact the Office within two (2) working days.

8.10.2. Once the resolution of a complaint has been determined to be resolved or partially resolved, not resolved, or referred the ombudsman must, within thirty (30) days, inform the resident as to the outcome of the complaint and the activities undertaken by the Regional Program to resolve the complaint unless the complainant or the resident requested not to be recontacted or their identities are anonymous.

8.11. Closing a case.

8.11.1. A state or regional ombudsman may close a case if:

8.11.1.a. The complaint has been resolved or explained to the resident's satisfaction;

8.11.1.b. The complaint has not been verified upon investigation;

8.11.1.c. The ombudsman is satisfied with the resolution and no further activity will produce further satisfaction for the resident;

8.11.1.d. The complaint is not a complaint the ombudsman should be investigating;

8.11.1.e. The resident has requested that the ombudsman cease his/her activity;

8.11.1.f. It has become apparent that the complaint is frivolous, vexatious or was not made in good faith; or,

8.11.1.g. It is determined that an adequate investigation cannot be conducted because of insufficient funds, insufficient staff, lack of staff expertise, or any other reasonable factor that would result in an inadequate investigation despite a good faith report.

8.12. Referral of Complaints to the State Long-Term Care Ombudsman.

8.12.1. A regional ombudsman must refer to the state long-term care ombudsman any complaints:

8.12.1.a. That pose a conflict of interest to the ombudsman or the Regional Program that cannot be remedied by reassigning the complaint;

8.12.1.b. That the resident has requested the complaint be handled by the state long-term care ombudsman;

8.12.1.c. That are trivial, frivolous, vexatious, or not made in good faith;

8.12.1.d. That were made so long after the actual occurrence that it is no

longer reasonable to conduct an investigation; or,

8.12.1.e. For which an adequate investigation cannot be conducted because of insufficient funds, staff, experts, or other factor that could result in an inadequate investigation despite a good faith effort.

### 8.13. Case Records.

8.13.1. The complaint case record must include only objective observations of items such as the resident's physical condition, behavior, conversations, and other facts that are revealed during the course of the investigation. In addition, all complaint case records must contain:

8.13.1.a. Data required by the statewide uniform reporting system;

8.13.1.b. Resident data: name; address/location; telephone number; sex; age; minority status; source of payment; name of any legal representative (if applicable); scope of authority of legal representative; address and telephone number of any legal representative;

8.13.1.c. Complainant data: name; address; telephone number and, relationship to the resident;

8.13.1.d. Pertinent provider information;

8.13.1.e. A clear, concise statement of the complaint, from both the complainant and resident, if different;

8.13.1.f. Documentation of the resident's consent to handle a complaint;

8.13.1.g. A statement as to the resident's desired outcome;

8.13.1.h. The action plan;

8.13.1.i. A running chronology of the contacts made to gather information regarding the complaint and to effect resolution of the problem, including the type of contact, the date, and who made the contact;

8.13.1.j. Documentation of any deviations from case handling protocol, practice, or policy;

8.13.1.k. Documentation of referrals to other agencies and the state long-term care ombudsman;

8.13.1.l. Copies of all correspondence sent or received regarding the complaint;

8.13.1.m. Copies of all documents gathered as a part of the complaint handling process;

8.13.1.n. Copies of release of information forms used to obtain documents or documentation of how consent was obtained;

8.13.1.o. Documentation of consent to reveal identities of the resident or other individuals involved in the complaint; and,

8.13.1.p. A summary statement of the closed complaint that demonstrates the extent to which the resident's desired outcome was achieved and the reason the case is being closed.

8.13.2. Complaint case records must be retained by the state long-term care ombudsman and Regional Programs for three (3) years.

8.13.3. Complaints must be documented on the statewide reporting system.

#### **§76-5-9. Ombudsman Program Services.**

##### **9.1. Facility Monitoring.**

9.1.1. The Regional Program will visit long-term care facilities unannounced within its geographic jurisdiction. The Regional Program must develop and implement a written visitation plan which assures that the program has personal contact with residents and employees of facilities within the service area.

9.1.2. Personal contact means visiting residents, consulting with the administrator of the facility, or, if unavailable, another supervisory facility staff person, and the president of the resident's council, or, if unavailable, another member of the resident's council.

9.1.3. The Regional Program will prioritize visits, as defined in this section, to a facility where persons over the age of sixty (60) reside where:

9.1.3.a. Three (3) or more verified or partially verified complaint reports are received by the Regional Program within each calendar quarter. If a complaint report has been received where the nature of the complaint or complaints are not against the facility, the complaint report may not be counted when determining the need for more frequent visits;

9.1.3.b. The Regional Program has been informed that ownership of the facility has changed;

9.1.3.c. The Regional Program has received notice that incidents have occurred in a facility which result in an action or determination by the Office of Health Facility Licensure and Certification such as penalty assessment, admission ban, license revocation,

provisional license, inspection monitor, receiver, or decertification proceeding.

## 9.2. Public Information and Education.

9.2.1. The Regional Program will accept referrals and inquire and provide information to assist residents, or individuals requesting the information on behalf of a resident, concerning the long-term care system, the rights and benefits of residents of long-term care facilities, services available to residents including the activities of the ombudsman program, and concerns of residents of long-term care services to the public.

9.2.1.a. The ombudsman may not reveal confidential information when responding to information requests.

9.2.1.b. Inquires regarding specific facility complaints will include number of complaints, general complaint types, verification and resolution.

9.2.1.c. Complaint data will not be given unless verification and resolution status is also included.

9.2.2. The Regional Program will conduct public education activities including providing public speaking engagements, sponsoring or conducting workshops, promoting the development of community organizations to participate in the ombudsman program, developing and distributing written materials, and participating in media coverage concerning long-term care issues.

## 9.3. Issue Advocacy.

9.3.1. The Regional Program will assist the Office in monitoring the development and implementation of federal, state, and local laws, regulations and policies that relate to long-term care facilities. This service component includes participation in any Long-Term Care Ombudsman Program advocacy activities concerning legislative and regulatory issues.

## **§76-5-10. Legal Issues**

### 10.1. Legal Advice and Consultation to Regional Ombudsmen.

10.1.1. Regional Program staff may contact either the Regional Program's legal counsel or the Office to seek advice or consultation regarding a specific legal issue related to a complaint. The request may be made by telephone, or submitted in writing. The Office or Regional Program's legal counsel may request a brief, concise description of the complaint, the specific legal issue for which legal expertise is sought, and any relevant documentation.

10.1.2. A response will be in writing or telephone within five (5) working days by:

10.1.2.a. Providing the requested legal advice or consultation;

10.1.2.b. Requesting additional information;

10.1.2.c. Providing an update on the progress in obtaining the necessary information and an anticipated time frame; or

10.1.2.d. Indicating that the request is inappropriate and can not be answered.

10.1.3. The Office may follow up in writing to any final responses made by telephone to the Regional Program to assure consistency and accuracy in the information conveyed.

## 10.2. Notifying the Office.

10.2.1. A Regional Program must notify the Office upon receipt of any complaint, summons, subpoena, lawsuit, injunction, or notice of any other legal action taken against the Regional Program or any Representative of the Office. Such notice must be provided within twenty-four (24) hours, in writing, and is to include a copy of any legal document.

## **§76-5-11. Willful Interference.**

### 11.1. General Guidelines

11.1.1. Any individual who attempts to intentionally prevent, interfere with, or attempt to impede in any way with an ombudsman in the performance of his or her official duties under either state or federal law relating to the activities of the Office of the State Long-Term Care Ombudsman is in violation of W. Va. Code §16-5L-18.

11.1.2. When an ombudsman believes that willful interference is being attempted or has occurred, the ombudsman should take such steps as are necessary to prevent the interference by warning the perpetrator of the sanctions provided by law, and, if possible, advising the appropriate supervisor or the administrator of the facility of the situation and the sanctions provided by law. All attempts to prevent interference will be recorded in the case record. If the interference continues, the ombudsman must:

11.2.1.a. Attempt to corroborate his or her account of the situation with documentation, witness, photographs, tape recordings, or physical evidence. The prosecution of any willful interference may involve a criminal trial, and, accordingly, any corroborating evidence should be carefully collected, preserved, and safeguarded for delivery to the appropriate law enforcement office.

11.2.1.b. Immediately inform the legal counsel to the ombudsman program that an apparent violation of W. Va. Code §16-5L-18 has occurred.

11.1.2.c. Immediately inform the Office of the State Long-Term Care Ombudsman about the interference and provide supporting documentation concerning the interference for appropriate action.

**§76-5-12. Severability.**

12.1. The provisions of this rule are declared to be severable. If any provision of this rule is held invalid, the remaining provisions will remain in effect.