

WEST VIRGINIA

SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #1

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1990 FEB -9 PM 4:07

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: West Virginia Ethics Commission TITLE NUMBER: 158

RULE TYPE: Procedural; CITE AUTHORITY West Virginia Code § 6B-2-1(e) and § 6B-2-4

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 PROPOSED: 5

TITLE OF RULE BEING PROPOSED: Procedural Rules for the West Virginia Ethics Commission HEARING PROCESS

DATE OF PUBLIC HEARING: March 21, 1990 TIME: 1:00 pm

LOCATION OF PUBLIC HEARING: West Virginia Ethics Commission Conference Room
1207 Quarrier Street, 4th Floor, Litton Bldg.
Charleston, WV 25301

COMMENTS LIMITED TO: ORAL ☐, WRITTEN ☐, BOTH ☒

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: West Virginia Ethics Commission

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

1207 Quarrier Street
Charleston, WV 25301

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Lynne Ranson
Legal Counsel
WVa. Ethics Comm.

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

SERIES 5

HEARING PROCESS

158-5-1 Order

1.1 Scope--The following procedural rules and regulations set forth the practice and procedure established by the West Virginia Ethics Commission for carrying out its responsibilities in the administration and enforcement of the West Virginia Governmental Ethics Act, (hereafter referred to as the "Act") West Virginia Code section one, article one, chapter six-B, et seq.

1.2 Authority-- W.Va. Code 6B-2-1(e)

1.3 Filing Date--

1.4 Effective Date--

1.5 If a majority of the investigative panel fails to find probable cause the proceedings shall be dismissed by order of the Commission.

1.6 The Commission order shall be signed by the majority members of the panel and copies of the order sent to complainant and respondent within three days of signature.

1.7 If a majority of the investigative panel finds probable cause to believe that a violation under the Act has occurred an order shall be signed by a majority of the panel members.

1.8 The majority members shall sign the order directing the Commission staff to:

- (a) prepare a statement of charges;
- (b) assign the matter for hearing either to the Commission panel, or a hearing examiner; and
- (c) schedule a hearing within ninety (90) days after the date of the order.

158-5-2 Notice of Hearing

2.1 The Executive Director shall within eighty (80) days prior to the date of the hearing serve respondent by "certified mail, return receipt requested a notice of the hearing.

2.2 The notice shall contain:

- (a) a statement of the charges,
- (b) hearing date,
- (c) hearing time, and
- (d) place of hearing.

158-5-3 General

3.1 The Commission members who have not served as members of the investigative panel in a particular case may act as the hearing panel to adjudicate the case.

3.2 The Commission may by a majority vote decide to assign and employ an impartial hearing examiner to preside over the case.

3.3 The scheduled hearing may be continued only upon a showing of good cause by the respondent at least five (5) days prior to the hearing or at the convenience and on motion of the Commission members who will be adjudicating.

3.4 A complainant may be assisted by a member of the Commission staff affirmed by the Commission after a determination of probable cause.

3.5 The hearing proceedings shall be electronically recorded.

3.6 The cost of preparing a transcript of the hearing shall be borne by the party requesting it.

3.7 However, upon a showing of indigency by the respondent the Commission may provide a transcript of the hearing without charge.

158-5-4 Hearing Examiners

4.1 The qualifications of the hearing examiner shall, where applicable, be guided by the Judicial Code of Ethics.

4.2 The hearing examiner shall not reside in the same county as the respondent or if applicable, the complainant.

4.3 The hearing examiner will be selected by the chairperson of the Commission, subject to approval at the next meeting by a majority vote of the Commission members present and voting.

- 4.4 The hearing examiner presiding at a hearing may:
- (a) administer oaths and affirmations
 - (b) compel the attendance of witnesses
 - (c) compel the production of documents
 - (d) examine witnesses
 - (e) rule on offers of proof
 - (f) rule on evidentiary matters
 - (g) regulate the course of the hearing
 - (h) hold conferences for the settlement or simplification of issues by consent of the parties
 - (i) dispose of procedural requests or similar matters
 - (j) accept stipulated agreements

- (k) take other action authorized by the Ethics Commission consistent with the provisions of the Act
- (l) continue the hearing date upon motion of the respondent or Commission where good cause is shown.

4.5 Where the Commission members act as the hearing panel the chairperson shall select one member to preside over the hearing and carry out the duties set forth in Rule 4.4 except that all members will vote on the final decision and sanctions to be imposed, if any.

158-5-5 Prehearing Discovery

5.1 Exemptions from Discovery--Information which is exempt from discovery includes, but is not limited to the following:

(a) any record, report, memorandum, or communication dealing with the internal practice, policy and procedure of the Commission.

(b) any record, report, memorandum, or communication of the staff or member regarding the institution, progress or result of an investigation of either a verified or unverified complaint.

(c) the work product of an investigator or other staff member made in the course of an investigation of a verified or unverified complaint, or in preparation for an investigative panel, or in anticipation of or in preparation for a hearing on the complaint.

(d) any memorandum, statement or mental impression prepared or directed to be prepared by legal counsel to the Commission.

(e) the identity of a confidential informant unless he is the complainant or will be a witness for the Commission at the hearing.

5.2 Prehearing Discovery--The following evidence shall be exchanged within sixty (60) days of the mailing and receipt of notice of the hearing to the respondent:

(a) reports of experts to be used at the hearing;

(b) list of witness names and addresses as available to be used at the hearing;

(c) copies of documents to be used at the hearing; and

(d) inspection of tangible objects to be used at the hearing.

5.3 Witness Statements--At least seven (7) 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.

5.4 Failure to comply with Rule 5.3 and produce such statements in a timely manner will result in the bar of that witness' testimony unless good cause can be shown and the hearing examiner or Commission panel allows the witness' testimony.

5.5 Production of Witnesses--Each party is entitled to compel through subpoena the attendance of any witness whose testimony may be relevant and material, except that a party is not entitled to the presence of a witness who is deemed unavailable. A witness shall be deemed unavailable in, but not limited to the following situations:

(a) The witness is not subject to compulsory process in West Virginia by reason of non-residence within, or prolonged absence from the State of West Virginia;

(b) The witness refuses to testify despite an order to do so;

(c) The witness claims by sworn affidavit a lack of memory of the subject matter;

(d) The witness is unable to be present or to testify at the hearing because of an existing physical or mental illness or infirmity;

(e) The witness is absent from the hearing and the requesting party is not at fault, could not have prevented the unavailability, and demonstrates that all reasonable measures to secure the presence of the witness have been taken, including the timely request for and service of a subpoena as required by these rules and regulations as set forth below.

5.6 Witness fees--Where a subpoena is issued at the instance of a party to the hearing, the cost of service, witness and mileage fee shall be borne by the party at whose request the subpoena is issued, at the same rate as are paid witnesses in state circuit court proceedings.

5.7 Expert Witness fees--The party who uses an expert witness at the hearing shall be responsible for payment of the appearance fee, of such witness.

5.8 The presence of a witness may be obtained by the issuance of a subpoena requiring the attendance of such witness at the designated place, time and hearing date.

5.9 A subpoena for a witness may be issued by the Executive Director upon the written application of any party.

5.10 It shall be the responsibility of the party requesting the issuance of a subpoena to serve the subpoena on a witness by personal service or certified mail.

5.11 Production of Documents--Each party is entitled to compel through a subpoena duces tecum the production of documents which are relevant and material to the hearing.

5.12 A subpoena duces tecum may be issued by the Executive Director upon written application of any party.

5.13 It shall be the responsibility of the party requesting the issuance of a subpoena duces tecum to serve the subpoena on the authorized records custodian by certified mail or personal service.

5.14 Depositions--Although the hearing process is for the purpose of the development of evidence and should be used to the maximum extent possible, depositions may be obtained and used for evidentiary purposes.

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

5.16 It is not necessary that a hearing examiner or Commission panel be present at the deposition.

5.17 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 or Commission panel. A request for deposition shall contain:

(a) the name and address of the person whose deposition is requested;

(b) a brief statement of the matters on which the person is to be examined; and

(c) a brief statement of the reasons for taking the deposition in lieu of eliciting testimony at a hearing.

5.18 If approval is granted for the deposition by the hearing examiner or Commission panel, reasonable notice shall be given to the person deposed, all parties and their counsel of record.

5.19 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.

5.20 The cost of court reporter services, witness fees and expenses shall be borne by the party taking the deposition.

5.21 Such deposition shall be taken in the manner proscribed by laws of West Virginia for taking deposition in civil cases in courts of record except as set forth in these regulations.

158-5-6 Hearing Procedure

6.1 Evidence--The West Virginia Rules of Evidence shall be used in the hearing.

6.2 Representation--Any party to a hearing shall have the right to be represented by an attorney duly qualified to practice in the State of West Virginia.

6.3 Conduct at Hearings--All parties to hearings, their counsel, and spectators shall conduct themselves in a respectful manner. Demonstrations of any kind at hearings shall not be permitted. The hearing officer or hearing Commission panel representative may, in his discretion, recess or continue any hearing in which the parties, attorneys, witnesses or spectators, conduct themselves in a disrespectful, disorderly or contemptuous manner which interferes with or prevents the proper conduct of such hearing.

6.4 Testimony Under Oath--All testimony to be considered by the hearing examiner or the Commission panel at the hearing shall be by sworn or affirmed testimony.

6.5 The purpose of the hearing shall be to further inquire into the matters set forth in the statement of charges, and to record evidence and arguments in support of same and in opposition thereto, so that the commission may determine all issues.

6.6 Members of the Commission and its officers, agents and employees shall be competent to testify at the hearing as to material and relevant matters: Provided, That no member of the Commission who testifies at such hearing shall thereafter participate in the deliberations or decisions of the Commission with respect to the case in which he or she so testified.

6.7 Each party shall have the opportunity to make a brief opening statement setting forth the evidence it intends to prove.

6.8 Initially the Commission or complainant shall present competent and relevant evidence, including testimony, documents or otherwise in proof of the statement of charges.

6.9 The respondent may present competent and relevant evidence following the conclusion of the Commission or complainant's case.

6.10 Each party shall have the right to cross-examine any witness who testifies.

6.11 Following the presentation of respondent's evidence the Commission or complainant shall have the right to submit rebuttal evidence.

6.12 Following the presentation of all evidence both parties shall have the right to offer oral argument to summarize the evidence presented, not to exceed ten (10) minutes for each presentation.

6.13 Marking of Exhibits--All exhibits offered into evidence shall be labeled and marked as either "Complainant Exhibit," or "Respondent Exhibit".

6.14 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 either a photograph, facsimile, or description of such exhibit may be substituted.

6.15 The hearing Examiner or Commission panel may order witnesses sequestered upon its own motion or of the parties.

6.16 The respondent may appear without counsel and represent himself at the hearing. The hearing Examiner or Commission panel shall insure the respondent does not desire to obtain counsel and understands that he is representing himself in a serious matter which could result in his being sanctioned or fined.

6.17 Lay Representative--A respondent may not be represented at a hearing by a spokesperson, lay representative or anyone else not licensed or authorized to practice law in the State of West Virginia.

6.18 Presence of respondent--Respondent is entitled to be present and to present evidence at the hearing; however, the taking of evidence and a final determination of the issues by the hearing examiner or Commission panel shall not be prevented, and the respondent shall be considered to have waived the right to be present if:

(a) after being notified of the date, time and place of hearing he does not appear, absent a showing of good cause, or

(b) after being advised by the hearing examiner or Commission panel that disruptive conduct will cause removal from the hearing he persists in conduct which is such as to justify his exclusion from the hearing.

158-5-7 Findings of Fact; Briefs

7.1 Either party within fifteen (15) days from the conclusion of the hearing may submit proposed findings of fact or a brief containing argument and conclusion of law.

7.2 If the Commission members acted as a hearing panel then each party shall supply each member with a copy of the proposed findings of fact and any brief submitted.

7.3 The original proposed findings of fact and brief shall be filed with the West Virginia Ethics Commission at 1207 Quarrier Street, Charleston, West Virginia 25301.

7.4 Findings of fact shall be limited to the facts admitted into evidence at the hearing or made part of the record.

158-5-8 Record

8.1 The exclusive record for decision by the hearing examiner or hearing panel shall be:

- (a) the transcript or recording of testimony at the hearing;
- (b) exhibits introduced into evidence at the hearing;
- (c) all documents filed in the proceeding, and
- (d) the proposed findings of fact submitted by the parties.

8.2 A party permitted by the Commission to take and file an evidentiary deposition, or otherwise exercise discovery may make that part of the record.

158-5-9 Final Decision

9.1 If the hearing was held before a hearing examiner the Commission shall have forty-five days (45) within receipt of the entire record to make a final decision.

9.2 If the hearing was held before the Commission hearing panel they have shall twenty one (21) days following receipt of the entire record to make a final decision.

9.3 All final decisions must be in writing and copies mailed within three days of the final decision by certified mail, return receipt requested, marked "Addressee only, personal and confidential" to:

- (a) the respondent, and
- (b) complainant, if any.

9.4 The final decision will be signed by at least a majority of the Commission hearing panel.

9.5 The Executive Director of the Commission shall file the original final decision with the Secretary of State within three days of receipt from the hearing examiner or hearing panel.

158-5-10 Sanctions

10.1 A decision to impose sanctions must be approved by at least six members of the Commission.

10.2 Members of the Commission shall recuse themselves from a particular case upon their own motion with the approval of the Commission or for good cause shown upon motion of a party. The remaining members of the Commission shall by majority vote, select a temporary member of the Commission to replace a recused member.

10.3 The temporary replacement for a recused Commission member shall be selected from the public at large, without regard to any requirement of prior governmental experience, political affiliation or residence in a particular congressional district.

10.4 The Commission may impose one or more of the following sanctions:

- (a) public reprimand;
- (b) cease and desist order;
- (c) order restitution for money, thing of value, or services taken or received in violation of the Act;
- (d) fines not to exceed one thousand dollars per violation; and
- (e) recommend to the appropriate governmental body that respondent be terminated from employment or be removed from office.

10.5 The Commission may institute civil proceedings in the circuit court of the county wherein a violation occurred for the enforcement of sanctions.

10.6 Respondent and complainant may submit a memorandum regarding proposed appropriate sanctions to be placed upon respondent within 15 days of the date of the final decision.

10.7 Twelve copies of the memorandum must be filed with the Executive Director of the Commission who will distribute it to Commission members for their review before imposing sanctions.

10.8 The Commission members shall sign and issue in writing the sanctions imposed upon respondent within thirty days of the date of the final decision and file with the Executive Director of Commission.

10.9 The Executive Director or his designee will mail by certified mail, return receipt requested a copy of the written sanctions to respondent and complainant.

158-5-11 Appeal

Decisions of the Commission involving the issuance of sanctions may be appealed to the circuit court of Kanawha County, West Virginia, or to the circuit court of the county where the violation is alleged to have occurred, only by respondent and only upon grounds set forth in section four, article five, chapter twenty-nine of the West Virginia Code.

158-5-12 Costs Assessed Against Complainant

12.1 If the hearing examiner or Commission hearing panel finds in favor of respondent and that the complaint was brought or made in bad faith the Commission shall order complainant to:

- (a) reimburse reasonable actual costs incurred by respondent; and/or
- (b) pay reasonable attorney fees incurred by respondent.

12.2 Respondent shall also have a cause of action and be entitled to compensatory damages, punitive damages, costs, and attorney fees for a complaint made or brought in bad faith.

158-5-13 Criminal Referral

13.1 A hearing examiner, investigative panel, or Commission member or Commission employee may bring before the full Commission a factual situation where it appears that a criminal violation may have been committed.

13.2 If after a discussion of the facts eight (8) members of the Commission vote that probable cause exists to believe a criminal violation has occurred, the matter shall be referred to the appropriate county prosecutor with a recommendation to initiate a criminal investigation.

13.3 The appropriate county prosecutor shall be Kanawha County if the referral involves a legislator and the alleged violation occurred in Kanawha County.

13.4 If the criminal referral does not pertain to a legislator and did not occur in Kanawha County the appropriate county prosecutor shall be where the alleged violation occurred.

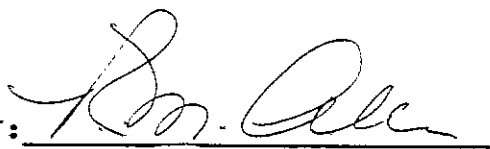
13.5 The county prosecutor's office shall have sixty (60) days after receiving a referral letter from the Commission's legal counsel to advise the Commission in writing whether:

- (a) it believes a criminal violation has been committed by this or other individuals, and
- (b) if it would be able and willing to prosecute this matter.

13.6 The ethics proceedings or investigation by the Commission shall be held in abeyance until the conclusion of the referral proceedings.

13.7 It shall remain confidential and not be disclosed that the Commission has referred this matter for criminal investigation.

13.8 If eight (8) of the Commission members do not vote to refer such matter for criminal investigation and find that a criminal violation has not occurred, the Commission shall remand the matter to the investigating panel, hearing examiner, or Commission hearing panel for further proceedings.

SUBMITTED BY: 

DATE FILED: February 9, 1990