

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Do Not Mark In This Box

FILED

2005 AUG -9 P 3:18

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Form #5

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

AGENCY: West Virginia Ethics Commission TITLE NUMBER: 158

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

RULE TYPE: PROCEDURAL INTERPRETIVE

EXEMPT LEGISLATIVE RULE

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 17

TITLE OF RULE BEING PROPOSED: Hearings

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS Sept 9, 2005

Lewis D. Burns, Executive Director

Authorized Signature

Am Young

WEST VIRGINIA ETHICS COMMISSION
AMENDMENTS FOLLOWING PUBLIC COMMENT PERIOD
Hearings - Title 158, Series 17

No public comments were received. However various technical amendments were made. **First**, all subdivisions were given an alphabetical, as opposed to numerical, designation. **Second**, a reference to a preceding subdivision was corrected in § 158-17-6.3.a. **Third**, since the initial filing of the proposed rule the Commission moved to a new location and has a new mailing address. The new mailing address was substituted in lieu of the former address (§ 158-17-8.1).

TITLE 158
PROCEDURAL RULE
WEST VIRGINIA ETHICS COMMISSION

FILED

2005 AUG -9 P 3:18

SERIES 17
HEARINGS

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§158-17-1. General Provisions.

1.1. Scope. -- This legislative rule sets forth the practice and procedure established by the West Virginia Ethics Commission for conducting hearings pursuant to W.Va. Code §6B-2-4.

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

1.3. Filing Date. -- August 9, 2005

1.4. Effective Date. -- September 10, 2005

§158-17-2. Notice of Hearing.

2.1. If the Review Board finds probable cause to believe a violation of the Act has occurred, the Executive Director shall serve respondent by certified mail, return receipt requested, a notice of the hearing at least eighty (80) days prior to the date of the hearing.

2.2. The notice shall contain a statement of the charges, and provide the date, time, and place of the hearing.

§158-17-3. Continuances.

3.1. The scheduled hearing may be continued only upon a showing of good cause by either party prior to the hearing or at the convenience and on motion of the Commission members who will make up the hearing board.

§158-17-4. Hearing Board and Hearing Examiner.

4.1. The Commission members shall comprise a hearing board responsible for adjudicating the case. A hearing examiner may be employed by the Commission to preside at the taking of evidence at the hearing and issue a recommended decision, unless the hearing board orders that it will both preside at the taking of evidence and adjudicate the case. The hearing examiner, or the

hearing board if a hearing examiner is not employed, shall be known as the "presiding officer" at the hearing as that term is used in these rules.

4.2. Hearing examiners must be attorneys licensed to practice in West Virginia, with a minimum of three years experience in the practice of law.

4.3. The hearing examiner shall comply with the Administrative Law Judge Code of Conduct, 158 C.S.R. 13.

4.4. 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.

4.5. The hearing board or hearing examiner presiding at a hearing may:

- 4.5.a. administer oaths and affirmations;
- 4.5.b. compel the attendance of witnesses;
- 4.5.c. compel the production of documents;
- 4.5.d. examine witnesses and parties;
- 4.5.e. rule on offers of proof;
- 4.5.f. rule on evidentiary matters;
- 4.5.g. regulate the course of the hearing;
- 4.5.h. hold conferences for the settlement or simplification of issues by consent of the parties;
- 4.5.i. dispose of procedural requests or similar matters;
- 4.5.j. accept stipulated agreements;
- 4.5.k. take other action authorized by the Ethics Commission consistent with the provisions of the Act; and,
- 4.5.l. continue the hearing date upon motion of the respondent or Commission where good cause is shown.

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

5.1. A party seeking the disqualification of a hearing examiner must file a written, verified motion stating the facts and reasons for disqualification. The motion should be filed at least thirty days prior to a scheduled hearing or state, with particularity, why it is filed later.

5.2. The hearing examiner may disqualify himself or herself without a hearing or may refuse to do so and inform the parties that a hearing is necessary.

5.3. The Commission chairperson, or at his or her direction the vice chairperson, shall hear and decide a motion for disqualification. The hearing shall be held no sooner than three days and no later than seven days after the motion is filed, unless the parties agree to a shorter or longer time period.

5.4. The party seeking disqualification of the hearing examiner may make a full record. The costs thereof, including the cost of court reporter services, witness fees and expenses shall be borne by the moving party unless the moving party prevails on the motion or makes a showing of indigence.

5.5. The chairperson or vice-chairperson shall issue a written decision on the motion as soon as practicable, but no later than seven days after the motion was heard. If a motion is granted the Commission chairperson or vice-chairperson shall appoint a new hearing examiner no later than seven days after the decision on the motion is received. If the motion is denied the hearing examiner shall proceed to hear the case within the time frame set forth in the notice of hearing or, if necessary and upon a showing of good cause, shall reschedule the hearing to a later date.

5.6. The decision on the merits of a motion to disqualify a hearing examiner shall be considered interlocutory in nature and not subject to direct or immediate appeal, except that this rule shall not prohibit any party from seeking redress by appropriate extraordinary remedy.

§158-17-6. Prehearing Discovery.

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

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

6.1.b. any record, report, memorandum, or communication of the staff or Commission member regarding the institution, progress or result of an investigation of a complaint.

6.1.c. the work product of an investigator or other staff member made in the course of an investigation of a complaint, or in preparation for the Review Board or in anticipation of or in preparation for a hearing on the complaint.

6.1.d. any memorandum, statement or opinion prepared or directed to be prepared by legal counsel to the Commission.

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

6.2. The parties shall exchange within sixty (60) days of the mailing and receipt of notice of the hearing to the respondent:

6.2.a. reports of experts to be used at the hearing;

6.2.b. a list of witness names, addresses, and telephone numbers as available to be used at the hearing;

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

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

6.3.a. 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.

6.3.b. If a party fails to comply with subdivision 6.3.a of this rule to produce witness statements in a timely manner the hearing examiner or hearing board shall bar that witness' testimony at the hearing unless good cause can be shown and the hearing examiner or hearing board allows the witness' testimony.

6.4. Production of Witnesses

6.4.a. 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 determined unavailable. A witness

is unavailable in, but not limited to, the following situations:

6.4.a.1. 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;

6.4.a.2. The witness is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity;

6.4.a.3. The witness is exempted from testifying by ruling of a circuit court on the ground of privilege from testifying.

6.4.b. Where a subpoena is issued at the instance of a party to the hearing, the cost of service, and the witness and mileage fee shall be borne by the party at whose request the subpoena is issued, at the same rate as paid to witnesses in state circuit court proceedings. The party who uses an expert witness at the hearing is responsible for payment of the appearance fee of the witness.

6.4.c. The presence of a witness may be obtained by the issuance of a subpoena requiring the attendance of the witness at the designated place, time and hearing date. A subpoena for a witness may be issued by the Executive Director upon the written application of any party. It is the responsibility of the party requesting the issuance of a subpoena to serve the subpoena on a witness by personal service or certified mail, return receipt requested.

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

6.6. Depositions

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

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

6.6.c. It is not necessary that a hearing examiner or the hearing board be present at the deposition.

6.6.d. 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 hearing board. A request for deposition shall contain:

1. the name and address of the person whose deposition is requested;

2. a brief statement of the matters on which the person is to be examined; and

3. a brief statement of the reasons for taking the deposition.

6.6.e. If approval is granted for the deposition, the party taking the deposition shall provide reasonable notice of the deposition to the person deposed, all parties, and their counsel of record.

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

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

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

§158-17-7. Hearing Procedure.

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

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

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

7.4. Any party to a hearing has the right to be represented

by an attorney duly qualified to practice in the State of West Virginia. A respondent may not be represented at a hearing by a spokesperson, lay representative or anyone else not licensed or authorized to practice law in the State of West Virginia.

7.5. The respondent may appear without counsel and represent himself or herself at the hearing. At the beginning of the hearing the presiding officer shall insure the respondent does not desire to obtain counsel and is thoroughly advised of the sanctions which may be imposed in the event of a finding that the respondent committed a material violation of chapter six-B of the West Virginia Code.

7.6. 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 presiding officer may, in his or her 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 the hearing.

7.7. All testimony to be considered by the presiding officer at the hearing shall be by sworn or affirmed testimony.

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

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

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

7.11. Initially the complainant or the commission's counsel shall present competent and relevant evidence, including testimony or documents, in proof of the statement of charges.

7.12. The respondent or his or her counsel may present competent and relevant evidence following the conclusion of the complainant's case.

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

7.14. Following the presentation of the respondent's evidence the complainant has the right to submit rebuttal evidence.

7.15. Following the presentation of all evidence both parties have the right to offer oral argument to summarize the evidence presented, not to exceed ten (10) minutes for each presentation, unless for good cause the period is extended by the presiding officer.

7.16. All exhibits offered into evidence shall be labeled and marked as either "Complainant Exhibit," or "Respondent Exhibit".

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

7.18. The presiding officer may order witnesses sequestered upon his or her own motion or on the motion of a party.

7.19. The 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 shall not be prevented, and the respondent shall be considered to have waived the right to be present if:

7.19.a. after being notified of the date, time and place of hearing he or she does not appear, absent a prior showing of good cause, or

7.19.b. after being advised by the presiding officer that disruptive conduct will cause removal from the hearing, he or she persists in conduct which justifies his or her exclusion from the hearing.

7.20. The cost of preparing a transcript of the hearing shall be borne by the party requesting it. Upon a showing of indigence by the respondent, however, the Commission may provide a transcript of the hearing without charge.

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

8.1. Either party, within fifteen (15) days from the conclusion of the hearing, or during a time period established by the Commission, may submit proposed findings of fact, conclusions of law and a brief containing argument. All proposed findings of fact, conclusions of law and briefs shall be filed with the West Virginia Ethics Commission at 210 Brookes Street, Suite 300, Charleston, West Virginia 25301-1804. If the hearing board presided at the hearing, it is the duty of the executive director of the commission to provide each hearing board member with a copy of any party's proposed findings of fact, conclusions of law, and brief within one day of receipt.

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

§158-17-9. Decision if Hearing Examiner is Presiding Officer.

9.1. The hearing examiner has forty five (45) days from receipt of the proposed findings and conclusions from the parties to issue his or her recommended decision.

9.2. The hearing examiner shall make copies of this recommended decision available to the parties, and submit the recommended decision along with the entire record to the Commission for final decision by the hearing board.

9.3. The parties may submit briefs to the Commission's hearing board in support of or in opposition to the hearing examiner's recommended decision within fourteen (14) days of receipt of the recommended decision.

9.4. The Commission's hearing board shall then have forty-five days (45) within receipt of the entire record to make a final decision on behalf of the Commission.

9.5. Either party may request an opportunity to make an oral argument to the hearing board members prior to their deliberations on the hearing examiner's recommended decision and the imposition of appropriate sanctions, if applicable. The request must be made in writing and submitted with the party's brief regarding the hearing examiner's recommended decision filed pursuant to section 11.2 of this rule.

§158-17-10. Decision When Hearing Board is the Presiding Officer.

10.1. If the Commission chose not to employ a hearing

examiner to hear the evidence and prepare a recommended decision and the presiding officer was the hearing board, no additional oral argument beyond what is allowed pursuant to section 15 of this rule shall be necessary.

10.2. The hearing board shall have twenty one (21) days following receipt of the entire record to make a final decision on behalf of the Commission.

§158-17-11. Administrative Record.

11.1. The exclusive record for decision is:

11.1.a. the transcript or recording of testimony at the hearing;

11.1.b. exhibits introduced into evidence at the hearing;

11.1.c. all documents filed in the proceeding, and

11.1.d. the proposed decisions and any briefs submitted by the parties.

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

§158-17-12. Final Decision.

12.1. All final decisions of the Commission must be in writing and copies mailed within three days of the final decision by certified mail, return receipt requested.

12.1.a. the respondent or respondent's counsel, if any, and

12.1.b. complainant.

12.2. A final decision must be approved by at least seven members of the Commission's hearing board.

§158-10-13. Sanctions.

13.1. In its final decision the Commission may impose sanctions in accordance with W.Va. Code § 6B-2-4(r) if it finds, by evidence beyond a reasonable doubt, that the charges are true and constitute a material violation of the Act.

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