

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

**SERIES 5
ADJUDICATING COMPLAINTS RELATING TO
CONDUCT OF STATE ADMINISTRATIVE LAW JUDGES**

§158-5-1. General.

1.1. Scope. -- This procedural rule sets forth the practice and procedure to be followed in adjudicating or otherwise resolving complaints against state administrative law judges who are subject to the code of conduct promulgated by the West Virginia Ethics Commission in accordance with W. Va. Code § 6B-2-5a and contained in 158 CSR 13.

1.2. Authority. -- W. Va. Code §6B-2-5a.

1.3. Filing Date. -- February 16, 2005.

1.4. Effective Date. -- March 18, 2005.

1.5. Severability. -- If any section or subsection of these rules is determined to be invalid, it shall not be construed to invalidate any of the provisions not otherwise affected.

1.6. Availability of Rules. -- This rule is on file in the Office of the Secretary of State, and copies are available at the commission's office at 1207 Quarrier Street, Suite 407, Charleston, West Virginia 25301.

§158-5-2. Definitions.

2.1. "Committee" means the West Virginia Ethics Commission Committee on Standards of Conduct for Administrative Law Judges created in accordance with 158 CSR 13 § 5.1, acting in the capacity of an investigative panel.

2.2. "Complainant" means a person who files a complaint with the ethics commission.

2.3. "Respondent" means a person against whom a complaint has been filed with the ethics

commission.

2.4. "Subpoena" means an official document requiring the appearance of an individual at a given time and place.

2.5. "Subpoena duces tecum" means an official document requiring that an individual named to appear at a given time and place must bring a specific document or documents.

2.6. "Verified Complaint" means a complaint which has been reduced to writing and duly verified by oath or affirmation before a notary public.

§158-5-3. Filing Verified Complaints.

3.1. Any person may file a verified complaint with the committee regarding the conduct of a person or persons subject to the Code of Conduct for Administrative Law Judges in 158 CSR 13.

3.2. A duly verified complaint must be filed with the committee at 1207 Quarrier Street, Suite 407, Charleston, West Virginia 25301.

3.3. The executive director or his or her designee shall within three working days of receipt in the committee's office acknowledge the verified complaint by first class mail.

§158-5-4. Acceptance or Dismissal of Complaints.

4.1. In considering a complaint, the committee shall act in the capacity of an investigative panel. The investigative panel must first determine whether the allegations stated in the complaint, if taken as true, would

constitute a material violation of 158 CSR 13.

4.2. If two members of the investigative panel determine that the complaint does not contain allegations which would constitute a material violation of 158 CSR 13, then the investigative panel shall dismiss the complaint by order. A copy of the order shall be sent to the complainant by first class mail.

4.3. If the investigative panel determines that the allegations of the complaint, if taken as true, would constitute a material violation of this 158 CSR 13, then the executive director or his or her designee shall give notice of the initiation of an investigation (Notice of Investigation) by the panel to the complainant and respondent.

4.4. The Notice of Investigation, accompanied by a copy of the complaint, shall be mailed to the parties and be sent to the respondent by certified mail, return receipt requested, marked "Addressee only, personal and confidential."

4.5. The Notice of Investigation shall describe respondent's conduct which is the basis for the alleged violation of 158 CSR 13.

4.6. The Notice of Investigation shall advise the respondent that the purpose of the investigation is to determine whether probable cause exists to believe a violation of the Code of Conduct for Administrative Law Judges has occurred which may subject the respondent to sanctions by the West Virginia Ethics Commission.

4.7. The Notice of Investigation shall also inform the respondent that he or she has the right to appear and make an oral response before the investigative panel if he or she reserves the right to make an appearance in writing within fifteen (15) days of the date of notice.

4.8. The Notice of Investigation shall also inform the respondent that he or she may respond in writing to the investigative panel within thirty (30) days of receipt of the notice, which time may be extended by the chairman of

the investigative panel upon good cause shown by the respondent.

4.9. The Notice of Investigation shall also advise the respondent that his or her failure or refusal to respond to a fact or allegation is not taken as an admission of the truth of that fact or allegation.

§158-5-5. Investigation.

5.1. The investigative panel has forty five (45) days following the mailing of notice of investigation to consider:

5.1.a. The allegations raised in the complaint;

5.1.b. Any timely received written response of respondent;

5.1.c. Any oral response received from the respondent;

5.1.d. Other competent, relevant evidence submitted by any person to the commission; and

5.1.e. Other competent, relevant evidence gathered by the commission.

5.2. If the respondent requests an appearance before the investigative panel to present an oral response to the complaint, the investigative panel chairman will schedule a meeting to be held after the time has passed for the respondent to file a written response (within 30 days after the notice of investigation is received by the respondent). The respondent, his or her counsel, legal counsel to the commission and the commission investigator(s) may be present at the meeting.

5.3. The respondent has thirty minutes to make an oral response or statement of defense to the charges or allegation contained in the complaint. The respondent's testimony will be taken under oath or affirmation. The investigative panel, in its discretion, may allow the respondent additional time for the oral

response. The investigative panel may either record the testimony electronically or employ the services of a court reporter to record and transcribe the proceedings, as necessary.

5.4. The investigative panel may seek additional probative information from the respondent as is necessary for its investigation.

5.5. The ethics commission and the investigative panel may issue subpoenas as is necessary and any subpoena issued has the same effect as one issued by a circuit court of the state.

5.6. The commission may seek enforcement of any subpoena issued by the commission or a hearing examiner as provided under this rule by applying to the Circuit Court of Kanawha County, through the issuance of a rule or an attachment against the respondent in a contempt case.

§158-5-6. Findings of Probable Cause.

6.1. If a majority of the investigative panel fails to find probable cause the proceedings shall be dismissed by order of the commission signed by a majority of the members of the investigative panel.

6.2. The commission order shall be signed by the majority members of the panel and copies of the order shall be sent to complainant and respondent within three days of execution of the order by the panel members.

6.3. If a majority of the investigative panel finds probable cause to believe that a violation under 158 CSR 13 has occurred the majority members of the investigative panel shall sign an order directing the commission staff to prepare a statement of charges and to schedule a hearing within sixty (60) days after the date of the order.

§158-5-7. Confidentiality Requirements.

7.1. The commission shall keep all matters or information received by the commission and the investigative panel relating to a complaint, including the identity of the complainant and

respondent, confidential except as otherwise provided by this rule.

7.2. If the respondent agrees in writing to a release of information, the commission may disclose any information relating to a complaint or an investigation to the public at any time.

7.3. Upon a finding by an investigative panel that probable cause exists to believe that there has been a material violation of one of the prohibitions in 158 CSR 13, the complaint and all reports, records, non-privileged and non-deliberative material used to determine probable cause of a violation are thereafter not confidential: Provided, That confidentiality of the information remains in full force and effect until the respondent has been served by the commission with a copy of the investigative panel's order finding probable cause and with the statement of charges.

7.4. After a finding of probable cause any subsequent hearing held for the purpose of receiving evidence or the arguments of the parties or their representatives shall be open to the public and all reports, records and non-deliberative materials introduced into evidence as well as the commission's orders, are not confidential.

7.5. The complaint as well as the identity of the complainant shall be disclosed to a person named as respondent in any complaint filed with the commission immediately upon the respondent's request.

7.6. The commission may release any information relating to an investigation at any time if the release has been agreed to in writing by the respondent.

7.7. The commission may order a person filing a complaint to be bound to confidentiality if the commission makes a finding that there is a reasonable likelihood that the dissemination of information regarding a pending or imminent proceeding will interfere with a fair hearing or otherwise prejudice the due administration of justice.

§158-5-8. Notice of Hearing.

8.1. If an investigative panel finds probable cause to believe a violation of 158 CSR 13 has occurred, the executive director shall serve respondent by certified mail, return receipt requested, a notice of the hearing at least forty-five (45) days prior to the date of the hearing.

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

8.3. Copies of the panel's order finding probable cause and the statement of charges shall be forwarded to the government agency where the respondent is or was employed or was under contract at the time of the events alleged as a violation of 158 CSR 13.

§158-5-9. Continuances.

9.1. The scheduled hearing may be continued only upon a showing of good cause by either party prior to the hearing.

§158-5-10. Hearing Board and Hearing Examiner.

10.1. The commission members who have not served as members of the investigative panel in a particular case shall comprise a hearing board responsible for adjudicating the case. A hearing examiner shall be employed by the commission to preside at the taking of evidence at the hearing and issue a recommended decision. The hearing examiner shall be known as the "presiding officer" at the hearing as that term is used in these rules.

10.2. The qualifications of the hearing examiner shall conform to the requirements of 158 CSR 13. Hearing examiners must be attorneys licensed to practice in West Virginia, with a minimum of three years experience in the practice of law.

10.3. 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.

10.4. The hearing examiner presiding at a hearing may:

10.4.a. administer oaths and affirmations;

10.4.b. compel the attendance of witnesses and issue subpoenas for witnesses as provided in this rule;

10.4.c. compel the production of documents and issue subpoenas duces tecum as provided in this rule;

10.4.d. examine witnesses and parties;

10.4.e. rule on offers of proof;

10.4.f. rule on evidentiary matters;

10.4.g. regulate the course of the hearing;

10.4.h. hold conferences for the settlement or simplification of issues by consent of the parties;

10.4.i. dispose of procedural requests or similar matters;

10.4.j. accept stipulated agreements;

10.4.k. take other action authorized by the ethics commission consistent with the provisions of 158 CSR 13 and this rule; and,

10.4.l. continue the hearing date upon motion of the respondent or commission where good cause is shown.

§158-5-11. Disqualification of Hearing Examiners.

11.1. 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 fifteen (15) days prior to a scheduled

hearing or state, with particularity, why it is filed later.

11.2. 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.

11.3. A member of the investigative panel assigned to the case shall be appointed by the commission chairman to 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.

11.4. 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.

11.5. The investigative panel member assigned to hear the motion for disqualification 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 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.

11.6. 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.

§158-5-12. Prehearing Discovery.

12.1. Information which is exempt from discovery includes, but is not limited to the

following:

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

12.1.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.

12.1.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 an investigative panel, or in anticipation of or in preparation for a hearing on the complaint.

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

12.2. The parties shall exchange within twenty-five (25) days of the mailing and receipt of notice of the hearing to the respondent:

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

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

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

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

12.3. 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.

12.3.a. If a party fails to comply with

section 12.3. of this rule to produce witness statements in a timely manner the hearing examiner shall bar that witness' testimony at the hearing unless good cause can be shown and the hearing examiner allows the witness' testimony.

12.4. 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 determined unavailable. A witness is unavailable in, but not limited to, the following situations:

12.4.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;

12.4.b. 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;

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

12.5. 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.

12.5.a. 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 hearing examiner 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.

12.6. 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 hearing examiner 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.

12.7. Depositions -- Depositions may be obtained by any party and used for evidentiary purposes.

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

12.7.b. It is not necessary that a hearing examiner be present at the deposition.

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

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

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

12.7.c.3. a brief statement of the reasons for taking the deposition in lieu of eliciting testimony at a hearing.

12.7.d. 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.

12.7.e. 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.

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

12.7.g. 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.

§158-5-13. Hearing Procedure.

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

13.2. The complaint will be prosecuted by a member of the commission staff.

13.3. The hearing proceedings shall be electronically recorded or, 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.

13.4. Any party to a hearing has the right to be represented by an attorney duly qualified to practice in the State of West Virginia. No party may 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.

13.5. 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 158 CSR 13.

13.6. 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.

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

13.8. 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.

13.9. 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.

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

13.11. 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.

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

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

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

13.15. Following the presentation of all evidence all 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.

13.16. All exhibits offered into evidence shall be labeled and marked as exhibits of the

respective parties, such as "Complainant Exhibit," or "Respondent Exhibit".

13.17. 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.

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

13.19. 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:

13.19.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

13.19.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.

13.20. 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.

§158-5-14. Findings of Fact, Conclusions of Law, and Briefs.

14.1. Any party, within fifteen (15) days from the conclusion of the hearing, 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 1207 Quarrier Street, Charleston, West Virginia 25301.

14.2. 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.

§158-5-15. Decision by Hearing Examiner.

15.1. The hearing examiner shall prepare a recommended decision following the fifteen (15) day period after the hearing reserved to the parties to submit proposed findings of fact, conclusions of law and any briefs containing argument.

15.2. 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.

15.3. The hearing examiner shall serve copies of this recommended decision on the parties by certified mail, return receipt requested, and submit the recommended decision, along with the entire record, to the commission for final decision by the hearing board.

15.4. The commission members who have not served as members of the investigative panel in a particular case shall comprise the hearing board responsible for making the commission's final determination on a complaint.

15.5. 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.

15.6. 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.

15.7. Any 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 15.1 of this rule. Oral argument shall not exceed ten (10) minutes for each presentation, unless for good cause the period is extended by the chairperson of the hearing board.

§158-5-16. Hearing Board Record.

16.1. The exclusive record for decision is:

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

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

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

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

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

§158-5-17. Final Decision.

17.1. 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, to all parties.

17.2. A final decision must be approved by at least six members of the commission's hearing board.

§158-5-18. Recusal of Ethics Commissioners.

18.1. 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 to serve in the place of a recused member.

18.2. The temporary replacement for a recused commission member shall be a person of the same status or category provided in W. Va. Code §6B-2-1(b) as the recused member.

§158-5-19. Sanctions.

19.1. In its final decision the commission may impose one or more of the following sanctions upon the respondent if it finds, by clear and convincing evidence, that one or more charges are true and constitute a material violation of 158 CSR 13:

19.1.a. a written admonishment;

19.1.b. a cease and desist order;

19.1.c. an order of restitution of money, thing of value, or services taken or received in violation of 158 CSR 13; and,

19.1.d. fines not to exceed one thousand dollars for each violation.

19.2. 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.

19.3. In addition to the foregoing sanctions, the commission may recommend to the appropriate governmental body that the respondent be suspended or terminated from employment, removed from office, or disqualified from serving in the capacity of an administrative law judge either permanently or until such time as the respondent has completed an approved course of remedial training.

§158-5-20. Conciliation Agreements.

20.1. At any stage of the proceedings, the commission may enter into a conciliation agreement with a respondent if such agreement is deemed by a majority of the members of the commission to be in the best interest of the state and the respondent.

20.2. Any conciliation agreement must be

disclosed to the public.

20.3. Upon acceptance of a conciliation agreement, a majority of the members of the commission may elect to impose one or more of the sanctions provided in the preceding section.

§ 158-5-21. Appeal.

21.1. The respondent may appeal final decisions of the commission involving the issuance of sanctions to the circuit court of Kanawha County, West Virginia, only upon grounds set forth in W.Va. Code § 29-5-4.

§ 158-5-22. Immunity Absent Malicious or Fraudulent Complaints.

22.1. Any person, official, or agency who in good faith files a verified complaint pursuant to 158 CSR 13 shall be immune from any civil liability that otherwise might result by reason of such actions.

22.1.a. In the event a person files a verified complaint which is determined by the committee to have been made maliciously or fraudulently, either knowing that the statements contained therein were not true, or in reckless disregard to the truth or falsity of material allegations contained in the complaint, the committee may impose one or more of the following sanctions on the complainant:

22.1.a.1. Make reimbursement to the respondent for reasonable actual costs incurred by the respondent;

22.1.a.2. Pay reasonable attorney fees incurred by the respondent;

22.1.a.3. Make reimbursement to the commission for the reasonable actual costs of investigation;

22.1.a.4. Decline to process any further complaints from the same individual until all monetary sanctions have been satisfied.