

Notice
of Rulemaking Hearing

Tennessee Ethics Commission

Chapter 0580-01-03
Rules Pertaining to Complaint Proceedings

The Tennessee Ethics Commission will hold a public hearing to receive comments concerning new rules, pursuant to T.C.A. § 3-6-107(1). This hearing will be conducted as prescribed by the Uniform Administrative Procedures Act, T.C.A. § 4-5-201 et seq., and will take place in the State Library and Archives Building, Capitol Blvd., Nashville, Tennessee, at 8:30 a.m. CDT on February 26, 2008.

Written comments will be considered if received by close of business, March 14, 2008, at the office of the Tennessee Ethics Commission, 201 4th Ave. N, Suite 1820, Nashville, TN 37248; 615-253-8634.

Individuals with disabilities wishing to participate in these proceedings (or to review these filings) should contact the Tennessee Ethics Commission, 201 4th Ave. N, Suite 1820, Nashville, TN 37248, 615-253-8634, to discuss any auxiliary aids or services needed to facilitate such participation. Such contact may be in person, by writing, by telephone, or other means, and should be made no less than ten (10) days prior to February 1, 2008 or the date such party intends to review such filings, to allow time to provide such aid or service. Hearing impaired callers may use the Tennessee Relay Service (1-800-848-0298).

Complete copies of the text of the notice of rule making hearing may be downloaded from the web at <http://state.tn.us/sos/tec/index.htm>, or may be obtained by contacting Barry Woody, Tennessee Ethics Commission, 615-253-8634, 201 4th Ave. N, Suite 1820, Nashville, TN 37248.

Substance of Proposed Rules
of
The Tennessee Ethics Commission

Chapter 0580-01-03
Rules Pertaining To Complaint Proceedings

New Rules

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0580-01-03-.01 Purpose And Scope.

These rules are promulgated for the purpose of providing procedures for processing, investigating and adjudicating complaints by the Tennessee Ethics Commission pursuant to the provisions of Title 3, Chapter 6 of the Tennessee Code Annotated.

Authority: T.C.A. §§ 3-6-105 through 3-6-107, 3-6-201, et seq., 3-6-308.

0580-01-03-.02 Definitions.

(1) Commission. The Tennessee Ethics Commission.

- (2) Executive Director. The Executive Director of the Tennessee Ethics Commission.
- (3) General Counsel. The Commission's General Counsel or senior staff attorney.

Authority: T.C.A. §§ 3-6-107(1), 3-6-306(a)(3)(B).

0580-01-03-.03 Receipt And Investigation of Complaints.

- (1) Complaints shall be received by the Commission if filed by a citizen of Tennessee under T.C.A. § 3-6-201(a), or initiated by the Commission in accordance with the provisions of T.C.A. § 3-6-201(d).
- (2) Complaint proceedings and records relating to a preliminary investigation shall be kept confidential by Commission staff and Commission members in accordance with the requirements contained in T.C.A. § 3-6-202.
- (3) Upon receipt of a complaint filed by a citizen of Tennessee under T.C.A. § 3-6-201(a), the Commission's General Counsel or designee shall determine, in accordance with the provisions of T.C.A. § 3-6-203, whether the complaint meets the threshold statutory requirements to be treated as a cognizable complaint, including whether it alleges violations of laws which are within the jurisdiction of the Commission to enforce; provided, however, complaints against a candidate in any election shall be processed in accordance with the procedures set forth in T.C.A. § 3-6-201(e).
 - (a) If the complaint alleges violations of the laws that are within the jurisdiction of the Registry of Election Finance, the Commission's General Counsel or designee shall refer the complaint to the Registry of Election Finance and provide notice of such referral to the alleged violator and to the complainant in accordance with the requirements of T.C.A. §§ 3-6-201(e), 3-6-201(f) and 3-6-203(a).
 - (b) If the Commission's General Counsel or designee determines that the complaint is not covered by subsection (a) above and either:
 - (i) does not meet the threshold statutory requirements to be treated as a cognizable complaint, or
 - (ii) does not allege violations of laws that are within the jurisdiction of the Commission, the Executive Director shall dismiss the complaint and provide notice thereof to the alleged violator and to the complainant, in accordance with the requirements of T.C.A. §§ 3-6-201(f) and 3-6-203(a).
 - (c) If the Commission's General Counsel or designee determines that the complaint meets the threshold statutory requirements to be treated as a cognizable complaint and that it alleges violations of laws that are within the Commission's jurisdiction, the Executive Director shall provide notice thereof to the alleged violator and to the complainant, in accordance with the requirements of T.C.A. §§ 3-6-201(f), and shall refer the complaint to the Office of the Attorney General and Reporter for investigation, in accordance with the requirements of T.C.A. § 3-6-203(b).
- (4) If a complaint is initiated by the Commission pursuant to T.C.A. § 3-6-201(d), the Executive Director shall provide notice thereof to the alleged violator and to the complainant, in accordance with the requirements of T.C.A. §§ 3-6-201(f), and shall refer the complaint to the Office of the Attorney General and Reporter for investigation, in accordance with the requirements of T.C.A. § 3-6-203(b).
- (5) After serving any notice, order or other document required in this Rule 0580-01-03, the person

making such service shall file a certificate of service in the record of the proceeding and, if the notice or order was served by mail, shall also file the official proof of delivery.

Authority: T.C.A. §§ 3-6-201 through 3-6-203.

0580-01-03-.04 Probable Cause Hearings.

- (1) Upon receipt of the report of the investigation by the Office of the Attorney General and Reporter, the Executive Director shall schedule a probable cause hearing, in consultation with the Commission, for a date at least 45 days after the complainant and alleged violator have received notice of the probable cause hearing pursuant to paragraph (2) below. The Executive Director shall coordinate with the complainant and alleged violator in an effort to avoid a scheduling conflict, but the Commission shall have final authority to set the date, time and place of the hearing.
 - (a) The complainant or alleged violator may move for a continuance of the probable cause hearing, which the Commission may, in its discretion, grant for good cause shown after taking into consideration relevant factors including the timeliness and the reason for the request, in addition to any prejudicial effect on other parties. The Commission may delegate to the Chair, the Executive Director or the General Counsel the authority to grant or deny continuances. The Commission may also, on its own motion, continue a hearing.
 - (b) The probable cause hearing shall not be a meeting under the provisions of the Tennessee Open Meetings Act, but shall be closed to the public as provided in T.C.A. § 3-6-202, unless the alleged violator requests in writing that the investigation and associated records and meetings be made public as provided in T.C.A. § 3-6-202(a)(1)(A). The Commission will not give public notice of the date, time and place of the probable cause hearing.
 - (c) The probable cause hearing shall not be required to be held pursuant to the contested case provisions of the Uniform Administrative Procedures Act, T.C.A. § 4-5-301, et seq.
- (2) Upon scheduling the probable cause hearing, the Executive Director or designee shall provide to both the complainant and the alleged violator, via certified mail, return receipt requested, by other mail service which provides verification of service, or by personal service, notice that includes the following:
 - (a) A copy of the report of the Office of the Attorney General and Reporter;
 - (b) The date, time and location of the probable cause hearing;
 - (c) The opportunity to choose, in writing filed with the Commission (on a form provided by the Commission) at least thirty (30) days before the scheduled hearing, one (1) of the following options:
 1. To appear personally or through an attorney to present oral testimony and any documents that the party wishes the Commission to consider; or
 2. To appear by sworn, notarized statement, including any pertinent exhibits which the party wishes the Commission to consider.
 - (d) The information that if a party does not timely choose one of the foregoing, the party shall be deemed to have waived the right to present oral or written testimony and exhibits; and that a party's waiver of the right to present oral or written testimony and exhibits at the probable cause hearing does not waive the party's right to present oral or written testimony and exhibits at the public complaint hearing referenced in section 0580-01-03-.05 of these rules.

- (3) If the complainant or alleged violator intends to appear and present oral testimony at the probable cause hearing (with or without counsel), the documents that the party intends to submit for introduction into evidence must be filed with the Commission office, marked as the party's exhibits, at least twenty (20) days before the probable cause hearing.
- (4) A complainant or alleged violator wishing to appear by sworn notarized statement must submit the statement and any accompanying documentation to the Commission office at least twenty (20) days before the probable cause hearing.
- (5) The Commission shall provide for a court reporter to transcribe the hearing.
 - (a) Such hearing record shall be maintained in accordance with the confidentiality provisions contained in T.C.A. §§ 3-6-202 through 203.
 - (b) Notwithstanding any provisions to the contrary contained in the Rules of the Tennessee Ethics Commission, Chapter 0580-1-2, Access to Public Records of the Tennessee Ethics Commission, any party to the proceeding or the party's legal counsel, as authorized under the confidentiality provisions contained in T.C.A. §§ 3-6-202 through 203, may obtain a written transcript of the proceeding directly from the court reporter at the party's own expense.
- (6) At the probable cause hearing, if a party has chosen to appear personally (with or without counsel), any Commission member and/or the Commission's General Counsel or designee may question the individual presenting oral testimony or written evidence, whether such individual is a party or another witness.
- (7) The Commission may limit the presentation of the oral testimony or the admission of exhibits if the Commission determines such evidence to be duplicative of evidence already submitted, irrelevant to the factual or legal questions pending before the Commission, or that the Commission otherwise determines should not be admitted into evidence. In determining whether or not to bar testimony or exhibits, or to otherwise exclude evidence, the Commission may, but is not required to, rely upon the Tennessee Rules of Civil Procedure or the Tennessee Rules of Evidence.
- (8) If the Commission determines that no probable cause exists to believe that a violation of any law or rule administered and enforced by the Commission has occurred, the Commission shall dismiss the complaint by entering a written report in the form of an order, copies of which shall be provided to the complainant and the alleged violator by personal service, certified mail, return receipt requested, or by other mail service which provides verification of delivery. Such order shall:
 - (a) State with particularity the Commission's legal and factual reasons for dismissal of the complaint;
 - (b) Inform the complainant of the right to request a reconsideration, pursuant to T.C.A. § 3-6-203(b)(1), by filing with the Commission no later than fifteen (15) business days after the date of entry of the order, a written motion, stating with specificity the legal and factual reasons why the complainant contends that the Commission's finding of no probable cause was erroneous; and that the Complainant must simultaneously serve a copy of such motion on the alleged violator, by personal service, certified mail, return receipt requested, or by other mail service which provides verification of delivery.
- (9) If a complainant timely files and serves a request for reconsideration in compliance with subsection (8) above, the Executive Director shall schedule a Commission meeting, at which the Commission shall consider the complainant's reasons for contending that the original finding of no probable cause was erroneous. The Commission shall determine whether or not to grant the request for a reconsideration. Unless the alleged violator requests in writing that the investigation and associated records and meetings be made public as provided in T.C.A. § 3-6-202(a)(1)(A), the Commission's

meeting to consider the request shall not be a public meeting, shall be closed to the public as provided in T.C.A. § 3-6-202, and no public notice of such meeting shall be given.

- (10) If the Commission grants the complainant's request for reconsideration, the Commission shall hold a hearing, at which both parties shall be permitted to be heard. No additional documents or information shall be introduced unless the documents and information were unknown and unavailable at the time of the original probable cause hearing. Unless there are such newly discovered documents or information, the reconsideration shall be limited to alleged errors in the Commission's original dismissal on a finding of no probable cause. Unless the alleged violator requests in writing that the investigation and associated records and meetings be made public as provided in T.C.A. § 3-6-202(a)(1)(A), the Commission's meeting to consider the request shall not be a public meeting, shall be closed to the public as provided in T.C.A. § 3-6-202, and no public notice of such meeting shall be given.
- (11) If, after reconsideration, the Commission determines that there is no probable cause, the Commission shall enter an order that there is no probable cause and that the complaint is dismissed with prejudice; and the Commission may order the complainant to reimburse the alleged violator for any reasonable costs and reasonable attorney fees that the alleged violator has incurred in connection with such request for reconsideration, as substantiated in an affidavit filed by the alleged violator. Likewise, if the Commission finds that the complainant engaged in any of the conduct described in T.C.A. § 3-6-208(a), the Commission shall have the discretion to impose the sanctions described in that section, incorporating T.C.A. § 3-6-205(a)(2), which shall constitute a judgment against the complainant under T.C.A. § 3-6-206(c). The alleged violator shall have the rights described in T.C.A. § 3-6-208(b).
 - (a) The Commission's order shall set forth a time by which the complainant must pay any fees and costs assessed by the Commission.
 - (b) Any costs or fees that are not paid in accordance with the order shall be referred to the General Counsel or to the office of the Attorney General and Reporter for enforcement, pursuant to T.C.A. § 3-6-110.
- (12) Upon a determination of no probable cause, if the alleged violator has not previously requested that the matter be made public, the Commission shall make public the records and proceedings in the matter sixty (60) days after the latest of: (1) the date the Commission enters its report of no probable cause, if the complainant does not request a reconsideration, or (2) the date the Commission enters its Order denying the complainant's request for a reconsideration, or (3) the date the Commission enters its Order of no probable cause after reconsideration.
- (13) Upon a determination of probable cause, if the alleged violator has not previously requested that the matter be made public, the Commission shall make public the records and proceedings in the matter on (1) the date the public hearing to determine whether a violation has occurred commences; or (2) the date the Commission refers to the appropriate house of the general assembly a finding that probable cause exists to believe that a member of the general assembly has committed an act constituting misuse of office for personal financial gain.
- (14) After serving any notice, order or other document required in this Rule 0580-01-03-.04, the person making such service shall file a certificate of service in the record of the proceeding and, if the notice or order was served by mail, shall also file the official proof of delivery.

Authority: T.C.A. §§ 3-6-201 through 3-6-203, 3-6-207 through 3-6-208.

0580-01-03-.05 Public Complaint Hearings

- (1) If the Commission determines that probable cause exists to believe that a violation of a law or rule administered and enforced by the Commission has occurred, the Commission shall hold a public hearing; provided, however, if the Commission determines that probable cause exists to believe that a member of the general assembly has committed a violation which constitutes misuse of office for personal gain, the Commission shall not hold a public hearing but shall instead report its determination and findings to the appropriate house of the general assembly pursuant to T.C.A. § 3-6-207 .
- (2) The Executive Director or designee shall provide to the alleged violator and the complainant, by personal service, by certified mail, return receipt requested, or by other mail service which provides verification of delivery, notice of the time, date, and location of the hearing. If the alleged violator is a member of the general assembly, the Executive Director shall additionally provide such notice to the ethics committee of the appropriate house pursuant to T.C.A. § 3-6-203(b)(2).
- (3) The Executive Director shall publish public notice of such hearing in the same manner as public notices of regularly scheduled Commission hearings are posted.
- (4) The public complaint hearing shall not be held pursuant to the contested case provisions of the Uniform Administrative Procedures Act, T.C.A. § 4-5-301, et seq.; provided, however, that if a lobbyist, employer of lobbyist, or an official listed in T.C.A. § 8-50-501 who is subject to the provisions of Title 3, Chapter 6, Part 3 of the Tennessee Code Annotated, is accused of a violation of such part, the Commission shall adopt procedures utilized under the Uniform Administrative Procedures Act.
 - (a) The Commission shall provide for a court reporter to transcribe the hearing, and, if the hearing is held as a contested case hearing under the Uniform Administrative Procedures Act, Commission staff shall otherwise provide for a record of the proceedings to be maintained as required by T.C.A. § 4-5-319.
 - (b) Notwithstanding any provisions to the contrary contained in the Rules of the Tennessee Ethics Commission, Chapter 0580-1-2, Access to Public Records of the Tennessee Ethics Commission, any party may obtain a written transcript of the proceeding directly from the court reporter at the party's own expense.
- (5) A party may be represented by counsel. The Commission shall be represented by its General Counsel or designee.
- (6) The Commission may, on its own motion, as requested by the complainant, or at the request of the alleged violator, issue subpoenas and assess fees related thereto in accordance with the provisions of T.C.A. §§ 3-6-204(a) and 3-6-107(2). Such subpoenas shall be issued through the Executive Director or designee in the form and manner in which subpoenas are issued by clerks of court under the Tennessee Rules of Civil Procedure. Service may be by certified mail, in addition to the means of service provided by the Tennessee Rules of Civil Procedure. Witnesses under subpoena shall be entitled to the same fees as are now or may hereafter be provided by law or by action of the Commission. The party requesting the subpoenas shall bear the cost of paying the fees to the witnesses subpoenaed.
- (7) After the Commission has concluded the public complaint hearing, it shall determine, based upon a preponderance of the evidence, whether a violation of any law or rule within the jurisdiction of the Commission has occurred and, if so, the appropriate civil penalty or administrative sanction to be imposed.
 - (a) A vote of not less than four (4) Commissioners shall be required to find a violation and to impose a civil penalty or other administrative sanction.

- (b) The Commission may, if it deems appropriate to do so, set a separate hearing for the consideration of appropriate civil penalties or other administrative sanctions. At such a hearing, no further testimony or evidence shall be admitted.
- (8) In assessing civil penalties or other administrative sanction, the following factors, along with any other factors that the Commission deems pertinent in the particular case, may be considered, and the factors considered may be given whatever relative weight the Commission deems appropriate in the particular case:
- (a) Whether the amount imposed will be a substantial economic deterrent to the violator.
 - (b) Whether the violator has previously committed violations.
 - (c) The circumstances leading to the violation.
 - (d) The severity of the violation and the risk of harm to the integrity of the processes of government.
 - (e) The economic benefits gained by the violator as a result of non-compliance.
 - (f) The interest of the public.
- (9) Upon the conclusion of all proceedings, the Commission shall enter a ruling in the form of an order of the Commission, which shall take effect upon entry and shall become final fifteen (15) business days thereafter, which shall include:
- (a) Findings of fact and conclusions of law for all aspects of the order, and reference to any testimony and exhibits admitted into evidence at the hearing, on which the respective findings and conclusions are based; and
 - (b) Notice of the date upon which the order becomes final and the time limits for seeking judicial review of the final order pursuant to T.C.A. § 3-6-204(b).
- (10) The Commission members present at any hearing shall designate a Commissioner to conduct the hearing, and orders shall be signed by the designated Commission member. Each Commissioner shall indicate by mark whether or not the Commissioner voted with the majority. Commission staff shall provide copies of the signed order to all parties.
- (11) After serving any notice, order or other document required in this Rule 0580-01-03-.05, the person making such service shall file a certificate of service in the record of the proceeding and, if the notice or order was served by mail, shall also file the official proof of delivery.

Authority: T.C.A. §§ 4-5-301 et seq.; T.C.A. §§ 3-6-107; 3-6-203 through 3-6-204; 3-6-207.

The notice of rulemaking set out herein was properly filed in the Department of state on the 11th day of December, 2007, (FS 12-10-07; DBID 787)