

# **WEST VIRGINIA LEGISLATURE**

## **2016 REGULAR SESSION**

### **Committee Substitute**

**for**

### **House Bill 4604**

(BY DELEGATES HOUSEHOLDER,

MR. SPEAKER (MR. ARMSTEAD), KESSINGER,

UPSON, SHOTT, FOLK AND LANE)

[Originating in the Committee on the Judiciary;

February 18, 2016.]



1 A BILL to amend and reenact §6B-2-4 of the Code of West Virginia, 1931, as amended, relating  
2 to violations of the Ethics Act; establishing a deadline of one year for the Ethics  
3 Commission to investigate and make a probable cause determination on a complaint;  
4 allowing extension past one year if consented by both respondent and complainant or  
5 unless good cause is made in writing by the Ethics Commission to both the respondent  
6 and complainant; changing the burden of proof needed to show a violation of the Ethics  
7 Act to a clear and convincing evidence standard; and extending the statute of limitations  
8 for filing complaints alleging violations of the Ethics Act from two years to five years.

*Be it enacted by the Legislature of West Virginia:*

1 That §6B-2-4 of the Code of West Virginia, 1931, as amended, be amended and reenacted  
2 to read as follows:

**ARTICLE 2. WEST VIRGINIA ETHICS COMMISSION; POWERS AND DUTIES;  
DISCLOSURE OF FINANCIAL INTEREST BY PUBLIC OFFICIALS  
AND EMPLOYEES; APPEARANCES BEFORE PUBLIC  
AGENCIES; CODE OF CONDUCT FOR ADMINISTRATIVE LAW  
JUDGES.**

**§6B-2-4. Processing complaints; dismissals; hearings; disposition; judicial review.**

1 (a) Upon the filing of a complaint, the executive director of the commission or his or her  
2 designee shall, within three working days, acknowledge the receipt of the complaint by first-class  
3 mail unless the complaint was initiated by the commission or the complainant or his or her  
4 representative personally filed the complaint with the commission and was given a receipt or other  
5 acknowledgment evidencing the filing of the complaint. No political party or officer, employee or  
6 agent of a political party acting in his or her official capacity may file a complaint for a violation of  
7 this chapter with the commission. Nothing in this section prohibits a private citizen, acting in that  
8 capacity, from filing a verified complaint with the commission under this section. Within fourteen

9 days after the receipt of a complaint, the executive director shall refer the complaint to the review  
10 board created pursuant to section two-a of this article.

11 (b) Upon the referral of a complaint by the executive director pursuant to subsection (a) of  
12 this section, the review board shall determine whether the allegations of the complaint, if taken  
13 as true, would constitute a violation of law upon which the commission could properly act under  
14 the provisions of this chapter. If the complaint is determined by a majority vote of the review board  
15 to be insufficient in this regard, the review board shall dismiss the complaint.

16 (c) Upon a finding by the review board that the complaint is sufficient, the executive  
17 director shall give notice of a pending investigation to the complainant, if any, and to the  
18 respondent. The notice of investigation shall be mailed to the parties and, in the case of the  
19 respondent, shall be mailed as certified mail, return receipt requested, marked "Addressee only,  
20 personal and confidential". The notice shall describe the conduct of the respondent which is  
21 alleged to violate the law and a copy of the complaint shall be appended to the notice mailed to  
22 the respondent. Each notice of investigation shall inform the respondent that the purpose of the  
23 investigation is to determine whether probable cause exists to believe that a violation of law has  
24 occurred which may subject the respondent to administrative sanctions by the commission,  
25 criminal prosecution by the state, or civil liability. The notice shall further inform the respondent  
26 that he or she has a right to appear before the review board and that he or she may respond in  
27 writing to the commission within thirty days after the receipt of the notice, but that no fact or  
28 allegation shall be taken as admitted by a failure or refusal to timely respond.

29 (d) Within the forty-five day period following the mailing of a notice of investigation, the  
30 review board shall proceed to consider: (1) The allegations raised in the complaint; (2) any timely  
31 received written response of the respondent; and (3) any other competent evidence gathered by  
32 or submitted to the commission which has a proper bearing on the issue of probable cause. A  
33 respondent may appear before the review board and make an oral response to the complaint.  
34 The commission shall promulgate rules prescribing the manner in which a respondent may

35 present his or her oral response. The commission may ask a respondent to disclose specific  
36 amounts received from a source and request other detailed information not otherwise required to  
37 be set forth in a statement or report filed under the provisions of this chapter if the information  
38 sought is considered to be probative as to the issues raised by a complaint or an investigation  
39 initiated by the commission. Any information thus received shall be confidential except as  
40 provided by subsection ~~(e)~~ (f) of this section. If a person asked to provide information fails or  
41 refuses to furnish the information to the commission, the commission may exercise its subpoena  
42 power as provided in this chapter and any subpoena issued by the commission shall have the  
43 same force and effect as a subpoena issued by a circuit court of this state. Enforcement of any  
44 subpoena may be had upon application to a circuit court of the county in which the review board  
45 is conducting an investigation through the issuance of a rule or an attachment against the  
46 respondent as in cases of contempt.

47 (e) Unless consented to by both the respondent and complainant, or unless good cause  
48 be made in writing to both the respondent and complainant, the investigation and a determination  
49 as to probable cause shall not exceed one year.

50 ~~(e)~~ (f) All investigations, complaints, reports, records, proceedings and other information  
51 received by the commission and related to complaints made to the commission or investigations  
52 conducted by the commission pursuant to this section, including the identity of the complainant  
53 or respondent, are confidential and may not be knowingly and improperly disclosed by any current  
54 or former member or employee of the commission or the review board except as follows:

55 (A) Once there has been a finding that probable cause exists to believe that a respondent  
56 has violated the provisions of this chapter and the respondent has been served by the commission  
57 with a copy of the review board's order and the statement of charges prepared pursuant to the  
58 provisions of subsection ~~(g)~~ (h) of this section, the complaint and all reports, records,  
59 nonprivileged and nondeliberative material introduced at any probable cause hearing held  
60 pursuant to the complaint cease to be confidential.

61 (B) After a finding of probable cause, any subsequent hearing held in the matter for the  
62 purpose of receiving evidence or the arguments of the parties or their representatives shall be  
63 open to the public and all reports, records and nondeliberative materials introduced into evidence  
64 at the hearing, as well as the commission's orders, are not confidential.

65 (C) The commission may release any information relating to an investigation at any time  
66 if the release has been agreed to in writing by the respondent.

67 (D) The complaint and the identity of the complainant shall be disclosed to a person named  
68 as respondent immediately upon the respondent's request.

69 (E) Where the commission is otherwise required by the provisions of this chapter to  
70 disclose information or to proceed in such a manner that disclosure is necessary and required to  
71 fulfill those requirements.

72 (1) If, in a specific case, the commission finds that there is a reasonable likelihood that the  
73 dissemination of information or opinion in connection with a pending or imminent proceeding will  
74 interfere with a fair hearing or otherwise prejudice the due administration of justice, the  
75 commission shall order that all or a portion of the information communicated to the commission  
76 to cause an investigation and all allegations of ethical misconduct or criminal acts contained in a  
77 complaint shall be confidential and the person providing the information or filing a complaint shall  
78 be bound to confidentiality until further order of the commission.

79 ~~(f)~~ (g) If the members of the review board fail to find probable cause, the proceedings shall  
80 be dismissed by the commission in an order signed by the members of the review board. Copies  
81 of the order of dismissal shall be sent to the complainant and served upon the respondent  
82 forthwith. If the review board decides by a unanimous vote that there is probable cause to believe  
83 that a violation under this chapter has occurred, the members of the review board shall sign an  
84 order directing the commission staff to prepare a statement of charges and assign the matter for  
85 hearing to the commission or a hearing examiner as the commission may subsequently direct.  
86 The commission shall then schedule a hearing, to be held within ninety days after the date of the

87 order, to determine the truth or falsity of the charges. The commission's review of the evidence  
88 presented shall be de novo. For the purpose of this section, service of process upon the  
89 respondent is obtained at the time the respondent or the respondent's agent physically receives  
90 the process, regardless of whether the service of process is in person or by certified mail.

91 ~~(g)~~ (h) At least eighty days prior to the date of the hearing, the commission shall serve the  
92 respondent by certified mail, return receipt requested, with the statement of charges and a notice  
93 of hearing setting forth the date, time and place for the hearing. The scheduled hearing may be  
94 continued only upon a showing of good cause by the respondent or under other circumstances  
95 as the commission, by legislative rule, directs.

96 ~~(h)~~ (i) The commission may sit as a hearing board to adjudicate the case or may permit  
97 an assigned hearing examiner employed by the commission to preside at the taking of evidence.  
98 The commission shall, by legislative rule, establish the general qualifications for hearing  
99 examiners. The legislative rule shall also contain provisions which ensure that the functions of a  
100 hearing examiner will be conducted in an impartial manner and describe the circumstances and  
101 procedures for disqualification of hearing examiners.

102 ~~(i)~~ (j) A member of the commission or a hearing examiner presiding at a hearing may:

103 (1) Administer oaths and affirmations, compel the attendance of witnesses and the  
104 production of documents, examine witnesses and parties and otherwise take testimony and  
105 establish a record;

106 (2) Rule on offers of proof and receive relevant evidence;

107 (3) Take depositions or have depositions taken when the ends of justice will be served;

108 (4) Regulate the course of the hearing;

109 (5) Hold conferences for the settlement or simplification of issues by consent of the parties;

110 (6) Dispose of procedural requests or similar matters;

111 (7) Accept stipulated agreements;

112 (8) Take other action authorized by the ethics commission consistent with the provisions  
113 of this chapter.

114           ~~(j)~~ (k) With respect to allegations of a violation under this chapter, the complainant has the  
115 burden of proof. The West Virginia Rules of Evidence governing proceedings in the courts of this  
116 state shall be given like effect in hearings held before the commission or a hearing examiner. The  
117 commission shall, by rule, regulate the conduct of hearings so as to provide full procedural due  
118 process to a respondent. Hearings before a hearing examiner shall be recorded electronically.  
119 When requested by either of the parties, the presiding officer shall order a transcript, verified by  
120 oath or affirmation, of each hearing held and so recorded. In the discretion of the commission, a  
121 record of the proceedings may be made by a certified court reporter. Unless otherwise ordered  
122 by the commission, the cost of preparing a transcript shall be paid by the party requesting the  
123 transcript. Upon a showing of indigency, the commission may provide a transcript without charge.  
124 Within fifteen days following the hearing, either party may submit to the hearing examiner that  
125 party's proposed findings of fact. The hearing examiner shall thereafter prepare his or her own  
126 proposed findings of fact and make copies of the findings available to the parties. The hearing  
127 examiner shall then submit the entire record to the commission for final decision.

128           ~~(k)~~ (l) The recording of the hearing or the transcript of testimony, as the case may be, and  
129 the exhibits, together with all papers and requests filed in the proceeding, and the proposed  
130 findings of fact of the hearing examiner and the parties, constitute the exclusive record for decision  
131 by the commission, unless by leave of the commission a party is permitted to submit additional  
132 documentary evidence or take and file depositions or otherwise exercise discovery.

133           ~~(l)~~ (m) The commission shall set a time and place for the hearing of arguments by the  
134 complainant and respondent, or their respective representatives, and shall notify the parties  
135 thereof. Briefs may be filed by the parties in accordance with procedural rules promulgated by the  
136 commission. The commission shall issue a final decision in writing within forty-five days of the  
137 receipt of the entire record of a hearing held before a hearing examiner or, in the case of an  
138 evidentiary hearing held by the commission acting as a hearing board in lieu of a hearing  
139 examiner, within twenty-one days following the close of the evidence.



140           ~~(m)~~ (n) A decision on the truth or falsity of the charges against the respondent and a  
141 decision to impose sanctions must be approved by at least seven members of the commission.

142           ~~(n)~~ (o) Members of the commission shall recuse themselves from a particular case upon  
143 their own motion with the approval of the commission or for good cause shown upon motion of a  
144 party. The remaining members of the commission may, by majority vote, select a temporary  
145 member to replace a recused member: *Provided*, That the temporary member selected to replace  
146 a recused member shall be a person of the same status or category, provided by subsection (b),  
147 section one of this article, as the recused member.

148           ~~(o)~~ (p) Except for statements made in the course of official duties to explain commission  
149 procedures, no member or employee or former member or employee of the commission may  
150 make any public or nonpublic comment about any proceeding previously or currently before the  
151 commission. Any member or employee or former member or employee of the commission who  
152 violates this subsection is subject to the penalties contained in subsection (e), section ten of this  
153 article. In addition, violation of this subsection by a current member or employee of the  
154 commission is grounds for immediate removal from office or termination of employment.

155           ~~(p)~~ (q) A complainant may be assisted by a member of the commission staff assigned by  
156 the commission after a determination of probable cause.

157           ~~(q)~~ (r) No employee of the commission assigned to prosecute a complaint may participate  
158 in the commission deliberations or communicate with commission members or the public  
159 concerning the merits of a complaint.

160           ~~(r)~~ (s) (1) If the commission finds by clear and convincing evidence ~~beyond a reasonable~~  
161 ~~doubt~~ that the facts alleged in the complaint are true and constitute a material violation of this  
162 article, it may impose one or more of the following sanctions:

- 163           (A) Public reprimand;  
164           (B) Cease and desist orders;

165 (C) Orders of restitution for money, things of value, or services taken or received in  
166 violation of this chapter;

167 (D) Fines not to exceed \$5,000 per violation; or

168 (E) Reimbursement to the commission for the actual costs of investigating and prosecuting  
169 a violation. Any reimbursement ordered by the commission for its costs under this paragraph shall  
170 be collected by the commission and deposited into the special revenue account created pursuant  
171 to section six, article one of this chapter.

172 (2) In addition to imposing the above-specified sanctions, the commission may  
173 recommend to the appropriate governmental body that a respondent be terminated from  
174 employment or removed from office.

175 (3) The commission may institute civil proceedings in the circuit court of the county in  
176 which a violation occurred for the enforcement of sanctions.

177 ~~(s)~~ (t) At any stage of the proceedings under this section, the commission may enter into  
178 a conciliation agreement with a respondent if the agreement is deemed by a majority of the  
179 members of the commission to be in the best interest of the state and the respondent. Any  
180 conciliation agreement must be disclosed to the public: *Provided*, That negotiations leading to a  
181 conciliation agreement, as well as information obtained by the commission during the  
182 negotiations, shall remain confidential except as may be otherwise set forth in the agreement.

183 ~~(t)~~ (u) Decisions of the commission involving the issuance of sanctions may be appealed  
184 to the circuit court of Kanawha County, only by the respondent and only upon the grounds set  
185 forth in section four, article five, chapter twenty- nine-a of this code.

186 ~~(u)~~ (v) (1) Any person who in good faith files a verified complaint or any person, official or  
187 agency who gives credible information resulting in a formal complaint filed by commission staff is  
188 immune from any civil liability that otherwise might result by reason of such actions.

189 (2) If the commission determines, by clear and convincing evidence, that a person filed a  
190 complaint or provided information which resulted in an investigation knowing that the material

191 statements in the complaint or the investigation request or the information provided were not true;  
192 filed an unsubstantiated complaint or request for an investigation in reckless disregard of the truth  
193 or falsity of the statements contained therein; or filed one or more unsubstantiated complaints  
194 which constituted abuse of process, the commission shall:

195 (A) Order the complainant or informant to reimburse the respondent for his or her  
196 reasonable costs;

197 (B) Order the complainant or informant to reimburse the respondent for his or her  
198 reasonable attorney fees; and

199 (C) Order the complainant or informant to reimburse the commission for the actual costs  
200 of its investigation. In addition, the commission may decline to process any further complaints  
201 brought by the complainant, the initiator of the investigation or the informant.

202 (3) The sanctions authorized in this subsection are not exclusive and do not preclude any  
203 other remedies or rights of action the respondent may have against the complainant or informant  
204 under the law.

205 ~~(v)~~ (w) (1) If at any stage in the proceedings under this section it appears to a Review  
206 board, a hearing examiner or the commission that there is credible information or evidence that  
207 the respondent may have committed a criminal violation, the matter shall be referred to the full  
208 commission for its consideration. If, by a vote of two-thirds of the members of the full commission,  
209 it is determined that probable cause exists to believe a criminal violation has occurred, the  
210 commission shall refer the matter to the appropriate county prosecuting attorney having  
211 jurisdiction for a criminal investigation and possible prosecution. Deliberations of the commission  
212 with regard to referring a matter for criminal investigation by a prosecuting attorney shall be private  
213 and confidential. Notwithstanding any other provision of this article, once a referral for criminal  
214 investigation is made under the provisions of this subsection, the ethics proceedings shall be held  
215 in abeyance until action on the referred matter is concluded. If the referral of the matter to the  
216 prosecuting attorney results in a criminal conviction of the respondent, the commission may

217 resume its investigation or prosecution of the ethics violation, but may not impose a fine as a  
218 sanction if a violation is found to have occurred.

219 (2) If fewer than two-thirds of the full commission determine that a criminal violation has  
220 occurred, the commission shall remand the matter to the review board, the hearing examiner or  
221 the commission itself as a hearing board, as the case may be, for further proceedings under this  
222 article.

223 ~~(w)~~ (x) The provisions of this section shall apply to violations of this chapter occurring after  
224 September 30, 1989, and within one year before the filing of a complaint: *Provided*, That the  
225 applicable statute of limitations for violations which occur on or after July 1, 2005, is two years  
226 after the date on which the alleged violation occurred: *Provided, however, That the applicable*  
227 *statute of limitations for violations which occur on or after July 1, 2016, is five years after the date*  
228 *on which the alleged violation occurred.*

NOTE: The purpose of this bill is to lessen the burden of proof from a “beyond a reasonable doubt” standard to a “clear and convincing” standard as the needed proof to sustain an allegation of a violation of the Ethics Act. The bill also would lengthen the statute of limitations in which to bring a complaint under the Ethics Act from the current two years, to five years. The bill also establishes a deadline on of one year for the Ethics Commission to investigate and make a determination as to probable cause of a violation of the Ethics Act.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.