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PART 6216

HELP AMERICA VOTE ACT ADMINISTRATIVE COMPLAINT PROCEDURE

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Section 6216.1 Purpose of administrative complaint procedure.

The purpose of this Administrative Complaint Procedure is to provide a uniform, nondiscriminatory administrative complaint procedure by which any person who believes that there is a violation (including a violation which has occurred or is occurring or is about to occur) of any provision of Title Three of the Federal Help America Vote Act of 2002 (HAVA), may file a complaint seeking redress of their grievance.

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6216.2 Procedure in administrative complaint proceedings.

(a) Initiation of Proceeding and Informal Complaints.

(1) A complaint alleging that there is a violation (including a violation which has occurred or is occurring or is about to occur) of any provision of Title Three of the Federal Help America Vote Act of 2002 (HAVA), may be made in person, by telephone, or in writing. Such complaints may be made to the appropriate local board of elections or to the State Board of Elections (The "SBOE"). A toll-free number, 1-800-458-3453, is available for telephone calls to the SBOE for making a complaint. Complaints shall be addressed by election officials expeditiously and informally whenever possible.

(b) Formal Complaints.

(1) All formal complaints shall be filed with the SBOE. All formal complaints shall be written, signed and sworn by the complainant. The complainant shall use the complaint form promulgated by, and available from, the SBOE. The SBOE or a local board of elections shall assist any person with a disability who requests assistance to file a complaint. Complaints raising similar questions of law and/or fact may be consolidated by the SBOE.

(2) All formal complaints shall contain the following information:

(i) The full name, mailing address, telephone number and email address if applicable, of the complainant;

(ii) Identification of the local or state official(s) or entity/entities (by name or by reference to the office) who is alleged to have violated Title III (the "respondent");

(iii) A description of the violation of Title III that is alleged to have occurred, is occurring, or is about to occur, sufficient to apprise the SBOE and the respondent(s) of the nature and specifics of the complaint;

(iv) An indication whether the complainant requests a hearing; and

(v) The signature of the complainant sworn to under oath or affirmation before a notary public or commissioner of deeds.

(3) A complaint shall be based upon personal knowledge and belief and be specific as to times, places and names of witnesses or parties relevant to the matters complained of. If a complaint is based upon information and belief, the complainant shall state the source of the information and belief. Copies of all documentary evidence available to the complainant shall be attached to the complaint. Evidence deemed by the complainant to be of a confidential nature shall be identified as such, and contain an explanation as to why said evidence should be so deemed.

(4) The burden of proof applied to all formal complaints shall be a preponderance of the evidence.

(5) A complaint shall be filed within sixty (60) days after the occurrence of the actions or events that form the basis for the complaint.

(6) Complaints must be filed, either in person or by mail, with the New York State Board of Elections, Office of Enforcement Counsel, 40 Steuben Street, 3rd Floor, Albany, NY 12207.

(7) A complainant may withdraw a complaint at any time by providing written notice to the SBOE. The SBOE shall send written notice of the withdrawal to respondents.

(c) Processing of Complaints.

(1) Upon receipt of a formal written complaint, the SBOE, through its Office of Enforcement Counsel, shall within two (2) business days assign a complaint number to the complaint; review the complaint for completeness, and consolidate, if it deems appropriate, any complaints that arise out of the same actions or events, raise common questions of law or fact, or involve the same respondents.

(2) If the complaint form is not properly completed or lacks the information necessary to process the complaint, the SBOE, through its Office of Enforcement Counsel, shall within three (3) business days notify the complainant that he/she must re-submit a corrected or completed complaint in order for it to be accepted for filing.

(3) Upon receipt of a completed or corrected complaint, as determined by its Office of Enforcement Counsel, the SBOE shall accept the complaint for filing, and shall issue a Notice of Acceptance of Complaint, to notify the complainant, by certified mail, return receipt requested, or by commercial courier service with proof of delivery, at the address listed on the complaint, of the tracking number assigned to the complaint, and the date upon which the complaint was accepted for filing. The time frame in which a determination must be issued by the SBOE commences on the date which the Notice of Acceptance of Complaint is issued by the Office of Enforcement Counsel.

(4) Within five (5) business days of receipt of the SBOE Notice of Acceptance of Complaint, complainant shall send a copy of a complaint, including the complaint form and copies of all documentary evidence submitted with the complaint, and a copy of the Notice of Acceptance of Complaint, to the respondent(s) named or referred to in the complaint, by certified mail, return receipt requested, or by commercial courier service with proof of delivery. Complainant shall file proof of said service on the respondent(s) with the SBOE no later than ten (10) business days of receipt of the Notice of Acceptance of Complaint. The respondent must submit a written response to the SBOE and to the complainant, to be received by said parties within ten (10) business days after receipt of both the copy of a complaint that is accepted for filing and a copy of the Notice of Acceptance of Complaint. As an option, the respondent may also include a written request for a hearing if one was not already requested by the complainant. All correspondence required to be submitted to the SBOE pursuant to this paragraph must contain the complaint number and be submitted to: The New York State Board of Elections, Office of Enforcement Counsel, 40 Steuben Street, 3rd Floor, Albany, NY 12207.

(d) Hearings on Complaints.

(1) Upon the written request of the complainant or respondent, there shall be a hearing on the record, unless prior to the hearing, the SBOE, in accordance with subdivision four of Section 3-100 of Article 3 of the Election Law, sustains the formal complaint as being uncontested. Any party to the hearing may purchase a transcript of such hearing.

(2) The complainant or respondent may withdraw his/her initial request for a hearing at any time. The parties may also agree, in the alternative, to resolve the complaint through an informal conference.

(3) The SBOE, Office of Enforcement Counsel, shall schedule a hearing if one has been requested by either the complainant or respondent, or if it is deemed by the SBOE, in accordance with subdivision four of Section 3-100 of Article 3 of the Election Law, as necessary to resolve the complaint. The SBOE shall attempt to schedule the hearing at a time convenient to all parties.

(4) The SBOE, Office of Enforcement Counsel, shall provide final written notice of the date, time and place of the hearing to the complainant and respondent, by certified mail, return receipt requested, or by commercial courier service with proof of delivery, not less than five (5) business days prior to the date of the hearing.

(5) Hearings shall be conducted by a panel of two Commissioners of the SBOE who are representatives of the two major Parties or senior staff members as selected by the Commissioners of that Party.

(6) Hearings shall be conducted at the SBOE Offices located at 40 Steuben Street, 4th Floor, Albany, NY 12207. An alternate location may

be selected when deemed necessary upon agreement of the hearing panel.

(7) The complainant shall have an opportunity to present witnesses, documents or other evidence relevant to the allegations in the complaint, and to argue his/her position. The respondent shall also be given an opportunity to present witnesses, documents or other evidence and to argue his/her position in response to the complaint. The Hearing Panel may ask questions of both parties to elicit information relevant to a determination of the complaint. Any witnesses who testify shall be under oath. The Hearing Panel can request written materials or oral presentations by persons who are not parties to the matter if the panel determines that such materials or presentations would be helpful in its review of the complaint.

(8) The following rules of evidence shall be followed in the admission of testimony and exhibits in all hearings:

(I) Any oral or documentary evidence may be received, but the hearing panel shall, as a matter of policy, exclude irrelevant, immaterial or unduly repetitious evidence. Subject to these requirements and subject to the right of any party to cross examine, any testimony may be received in written form.

(ii) Documentary evidence in the form of copies may be received at the discretion of the hearing panel, if the original is not found readily available. Upon request by any party an opportunity shall be granted to compare the copy with the original, which shall be subject to production by the person offering such copies.

(iii) Cross examination may be conducted as the hearing panel shall find to be required for a full and true disclosure of the facts.

(iv) Any exhibit admitted as evidence by the hearing panel in a prior hearing may be offered as evidence in a subsequent hearing and admitted as an exhibit in such hearing. The hearing panel shall employ its experience, technical competence, and specialized knowledge in evaluating the evidence presented at the hearing for the purpose of making its finding of facts and arriving at a final determination.

(9) The hearing may be recessed and continued to a later time or day, at the discretion of the hearing panel.

(10) All hearings shall be electronically recorded, and a record of the proceedings shall be compiled by the SBOE. The record of the proceedings shall include:

(I) The electronic recording of the hearing;

(ii) A transcript of the hearing on the record if such a hearing was so requested in writing by the complainant or respondent;

(iii) Any documents or other tangible items introduced into evidence at the hearing, and a list of same in the order in which they were introduced;

(iv) The complaint and written response;

(v) All notices and correspondence between the SBOE, the complainant and the respondent; and

(vi) The results of any investigation conducted by SBOE staff in response to the complaint.

(e) Determinations.

(1) If the hearing panel does not agree to sustain the complaint, the formal complaint shall be deemed dismissed and that shall constitute the determination of the panel.

(2) If no hearing has been requested in writing by the complainant or respondent, and if a hearing was not deemed by the SBOE, in accordance with subdivision four of Section 3-100 of Article 3 of the Election Law, as necessary to resolve the complaint, then a panel of two Commissioners

of the SBOE who are representatives of the two major Parties or senior staff members as designated by the Commissioners of that Party shall make a determination based on the written submissions of the complainant

and respondent and any other relevant information obtained by the SBOE.

(3) The determination of a panel will be final unless changed by the SBOE pursuant to subdivision four of section 3-100 of Article 3 of the Election Law, within ninety (90) days of the Notice of Acceptance of Complaint being issued by the Office of Enforcement Counsel. A final determination shall be filed and published by the SBOE within ninety (90) days of the Notice of Acceptance of Complaint being issued by the Office of Enforcement Counsel, unless the complainant agrees to a longer period of time. When a violation has been found, the final determination shall include an appropriate remedy for any violation of Title III of the Help America Vote Act of 2002 (HAVA) found by the SBOE. A final determination dismissing a formal complaint may be filed by any one member of the panel. Filing and Publication shall occur upon posting of the final determination on the SBOE web site - www.elections.state.ny.us. The SBOE shall mail a copy of the final determination to the complainant and respondent.

(4) The final determination shall include findings of fact regarding the alleged violations, based on a preponderance of the evidence standard, and shall specify an appropriate remedy if a Title III violation is found. If no violation is found, then the final determination shall dismiss the complaint. Any complaint that is not timely filed or does not allege a violation of Title III of HAVA that has occurred, is occurring or is about to occur with regard to a federal election may be dismissed by the SBOE in a written determination.

(5) The SBOE, Office of Enforcement Counsel shall provide copies of the final determination to the complainant and respondent.

(f) Remedies.

(1) Remedies available under this procedure shall be directed to the improvement or correction of election procedures governed by Title III and must be consistent with state law. Remedies may consist of a directive to the local or state official(s) or entity/entities to undertake or to refrain from certain actions or to alter certain procedures pertaining to federal elections.

(2) A remedy provided for under this rule may not include any award of damages or payment of costs, penalties or attorneys fees, and may not include the invalidation of any election or a determination of the validity of any ballot or vote.

(3) No provision of this section shall be construed to impair or supersede the right of an aggrieved party to seek a judicial remedy including a judicial remedy concerning any final determination made pursuant to the Alternative Dispute Resolution procedure as outlined in 6216.3 below. The SBOE shall provide notice to all complainants of the provisions of this subdivision.

(g) Costs of conducting hearings.

(1) The SBOE shall be responsible for the costs of administering hearings. This shall not include any expenses of any complainant or respondent to the hearing.

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6216.3 Alternative dispute resolution.

(a) Purpose and Overview.

(1) Whenever a final determination of a formal complaint is not made within ninety (90) days of the date of acceptance as established in 6216.2(c)(3) above, or any other longer agreed upon time period, the SBOE shall refer the formal complaint to an independent, alternative dispute resolution (ADR) agency. Such hearings and determinations shall be conducted by the alternative dispute resolution agency pursuant to regulations as outlined below. Such agency shall have sixty (60) days, from the expiration of the original ninety (90) day time period, or any other longer agreed upon time period, to make a final determination. The SBOE shall contract, pursuant to subdivision four of section 3-100 of Article 3 of the Election Law with one or more such alternative dispute resolution entities for this specific purpose.

(b) Referral to ADR Agency.

(1) As soon as the SBOE has exceeded the ninety (90) calendar day period as established in 6216.2(c)(3) above, or any other longer agreed upon time period, the complaint will be forwarded immediately to the administrative office of the ADR agency selected by the SBOE from those agencies under contract with the SBOE to provide such services.

(2) The materials forwarded shall include :

(i) The electronic recording of the hearing;

(ii) A transcript of the hearing on the record if such a hearing was so requested in writing by the complainant or respondent;

(iii) Any documents or other tangible items introduced into evidence at the hearing;

(iv) The complaint and written response;

(v) All notices and correspondence between the SBOE, the complainant and the respondent; and

(vi) The results of any investigation conducted by SBOE staff in response to the complaint.

(vii) Contact information for each party which will include addresses, phone numbers, fax numbers and email, if available;

(viii) Any other information relevant to the complaint, including any specific requirements for arbitration.

(c) Selection of Arbitrators for Inclusion on Panel.

(1) The ADR agency selected by the SBOE shall select arbitrators who shall be evaluated for inclusion onto a panel from which they may be selected for each case submitted under this program.

(2) The ADR agency will approve an arbitrator for inclusion to the panel, based upon background, training and requisite experience. The arbitrator must have significant arbitration experience dealing with matters of legislation and law. A current resume will be kept on file by the ADR agency for all arbitrators included on the panel. Each arbitrator must have professional liability insurance coverage.

(3) The ADR agency panel recommendations will be sent to the State Board of Elections which may challenge inclusion based upon just cause.

(4) The panel shall include at least two (2) arbitrators able to perform hearings within each of the six regions currently established in New York State by the Election's Commissioners' Association of New York State.

(5) Arbitrators approved for inclusion on the panel will be required to attend an orientation for this program and issues relative to HAVA, conducted by the ADR agency and the SBOE.

(6) There will be periodic roster review by the applicable ADR agency and the SBOE, to occur at least every two (2) years, for continuation of an arbitrator to remain on panel.

(7) A training component may be added by the ADR agency and the SBOE if sufficient qualified arbitrators fulfilling the geographic representation cannot be obtained after an adequate search.

(d) Assignment of arbitrators to specific cases.

(1) An arbitrator will be selected by the ADR agency for each case submitted under this program.

(2) Selection of an arbitrator shall be done geographically based upon the origin of the complaint from those panel members able to perform hearings within the specific region. Selection will be determined on a rotating basis, constrained by arbitrator availability to provide services within the legislatively mandated sixty (60) calendar day period from the expiration of the original hearing request. First preference will be given to a local arbitrator in a region. To accommodate schedules and keep within the legislative mandate, an arbitrator from an outside region may be utilized.

(3) An arbitrator may be removed from serving on a particular case for bias or any financial or personal interest, or prior relationship to one or both parties or their representatives, and if their serving is objected to by one or both parties, based upon that prior relationship. An arbitrator shall disclose in writing any such bias, financial or personal interest or relationship immediately to all parties upon gaining knowledge of same. An arbitrator may also be recused if he/she cannot/refuses to abide by guidelines (i.e. ethics/standards) of either the SBOE or the ADR agency. An arbitrator may also be recused for another reason, if deemed valid by the SBOE.

(e) Case processing.

(1) The ADR agency will conduct an expedited cost-effective process where complaints are decided in a timely manner, but not at expense of a full and complete investigation.

(2) The ADR agency will review the materials submitted by the SBOE, and forward a copy of the materials to the appointed arbitrator. Within a period of fifteen (15) to twenty (20) calendar days after receipt of the complaint and supporting documentation, the ADR agency and the arbitrator will schedule the hearing in a neutral, convenient, and accessible location to the complainant.

(3) The ADR agency will forward the following information to the parties:

(I) Date of arbitration;

(ii) Location of arbitration;

(iii) Appointed arbitrator, and summary of arbitrator vitae when requested;

(iv) Any disclosure statement the arbitrator may deem relevant;

(4) The parties will have seven (7) calendar days to object to the arbitrator on the grounds of a prior relationship or due to another reason deemed sufficient by the ADR agency and the SBOE. The parties will also have seven (7) calendar days to make a request for the arbitrator to subpoena another party/parties to attend the arbitration.

(5) An arbitration will be held, giving the parties full opportunity to present evidence and testimony.

(6) The arbitrator will then analyze all materials relevant to the complaint, and develop a written statement clearly explaining his/her decision and a remedy to the complaint, if applicable.

(7) The arbitrator's decision will be advisory in nature, not constituting a final and binding award. The arbitrator will forward his/her written arbitration decision to the ADR agency, which will forward a copy to both parties, as well as the State Board.

(8) The entire process from complaint forwarding to the ADR agency, to dissemination of the decision to the parties will take no more than

sixty (60) calendar days, with the exception of an adjournment of the

case beyond the sixty (60) day time frame as agreed to by the parties. Adjournments will be determined by the arbitrator.

(9) The procedures and relative elements of the Arbitration Program will be subject to review, at least annually.

(f) Arbitration remedies.

(1) Recommended remedies available pursuant to arbitration shall be directed to the improvement or correction of election procedures governed by Title III and must be consistent with state law. Remedies may consist of a recommendation directing the local or state official(s) or entity/entities to undertake or to refrain from certain actions or to alter certain procedures pertaining to federal elections.

(2) A recommended remedy provided for under this rule may not include any award of damages or payment of costs, penalties or attorneys fees, and may not include the invalidation of any election or a determination of the validity of any ballot or vote.

(3) No decision of the arbitrator shall be construed to impair or supersede the right of an aggrieved party to seek a judicial remedy. The decision of the arbitrator must provide notice to all parties of the provisions of this subdivision.

(g) Costs of conducting arbitration.

(1) The SBOE shall be responsible for the costs of administering arbitrations as the same are established in the agreement between the SBOE and the ADR agency entered into pursuant to subdivision four of section 3-100 of Article 3 of the Election Law. This shall not include any expenses of any complainant or respondent to the arbitration.