

HAVA Complaint Procedures

9. § 254(a)(9) State-Based Administrative Complaint Procedures

A description of the uniform, nondiscriminatory State-based administrative complaint procedures in effect under section 402. -- HAVA §254 (a)(9)

Deadline for Compliance: Prior to certification of State Plan, but no later than January 1, 2004; no waiver permitted.

The State Board has developed and adopted the following procedure for complaints that meets HAVA requirements.

HAVA Administrative Complaint Procedure

Under the provisions of Section 17(a) of House Bill 842, a new statute, §163-91, was created that authorized the State Board of Elections to adopt a uniform, nondiscriminatory procedure, as required under § 402 of Title IV of HAVA for the resolution of any complaint alleging a violation of any provision of Title III of HAVA, including a violation that has occurred, is occurring, or is about to occur. Among other things, §163-91 provides that no provision of Chapter 150B of the North Carolina General Statutes shall apply to allegations, complaints, hearings, or appeals as to an alleged violation of HAVA by the Board or a local board of elections. The procedure is set out as follows:

Definitions

(a) In this subtitle, the following terms have the meanings indicated:

- (1) "Board" shall mean the North Carolina State Board of Elections.
- (2) "Complainant" means the person who files a complaint with the State Board under this subtitle.
- (3) "Designee(s)" means one or more Board members or others assigned by the Board to perform any or all functions of the full board under this procedure.
- (4) "HAVA" shall mean the Help America Vote Act of 2002, Public Law 107-252, 116 Stat. 1666 (2002), codified at 42 United States Code §§15481-15485.
- (5) "Respondent" means any State or local election official whose actions are asserted, in a complaint under this subtitle, to be in violation of Title III.
- (6) "Title III" means Title III of the Help America Vote Act of 2002, Public Law 107-252, 116 Stat. 1666 (2002), codified at 42 United States Code §§15481-15485.

Complaint

(a) Any person who believes that there is a violation of any provision of Title III may file a complaint. A complaint shall be in writing and notarized, signed and sworn by the Complainant. The Complainant may use:

(1) The form prescribed by the Board, which is available from the Board or from any local board of elections, or which may be downloaded from the Board website; or

(2) Any other document providing the same information required in the Board-prescribed form.

(b) A complaint shall be filed within 30 days after the occurrence of the actions or events that form the basis for the complaint, including the actions or events that form the basis for the Complainant's belief that a violation is about to occur, or, if later, within 30 days after the Complainant knew or, with the exercise of reasonable diligence, should have known of those actions or events. The Complainant shall mail, fax, e-mail or otherwise deliver a copy of the complaint to each Respondent.

(c) The Board may consolidate complaints if they relate to the same actions or events, or if they raise common questions of law or fact.

Hearing

(a) At the request of the Complainant or upon the Board's own motion, the Board shall conduct a hearing on the record. The hearing shall be conducted no sooner than 10 days and no later than 20 days after the Board receives the complaint. The Board shall give at least 5 business days' advance notice of the date, time, and place of the hearing by mail, fax, e-mail, or any other means of delivery, to the Complainant, and each named Respondent.

(b) The Board or the Board's designee(s) shall act as hearing officer(s). The designee(s) may be authorized by the Board to perform any or all duties the Board might have as to a complaint filed under this article.

(c) The Complainant, any Respondent, or any other interested member of the public may appear at the hearing and testify or present tangible evidence in connection with the complaint. The North Carolina Rules of Evidence, §8C-1, shall not apply to the hearing. Subpoenas for witnesses shall not be issued at the request of a party; each party shall be responsible for providing their own witnesses. However, the Board may subpoena any person to testify in a hearing when the Board determines it will serve the public interest. Each witness testifying shall be sworn. The hearing officer may limit the testimony, if necessary, to ensure that all interested participants are able to present their views. The

hearing officer may recess the hearing and reconvene at a later date, time, and place announced publicly at the hearing. There shall be no right of cross-examination, but a person may testify or present evidence to contradict any other testimony or evidence. At the discretion of the Board, hearings may be transcribed or otherwise recorded and made available to the public.

Final Determination

(a) If there has been no hearing requested, the Board or the Board's designee(s) shall review the record and determine whether, under a preponderance of the evidence standard, a violation of Title III has been established.

(b) At the conclusion of any hearing under this Article, the Board or its designee(s) shall determine, under a preponderance of the evidence standard, whether a violation of Title III has been established.

(c) If the Board or the Board's designee(s) determines that a violation has occurred, the Board, acting through the Board or designee, shall provide the appropriate remedy. The remedy so provided may include an order to any Respondent, commanding the Respondent to take specified action, or prohibiting the Respondent from taking specified action, with respect to a past or future election. However, the remedy may not include an award of money damages or attorney's fees.

(d) If the complaint is not timely or not in proper form, or if the Board or the Board's designee, whether acting as hearing officer or otherwise, determines that a violation has not occurred or that there is insufficient evidence to establish a violation, the Board or designee(s), shall dismiss the complaint.

(e) The final determination of the Board shall be issued within 90 days after the complaint was filed, unless the Complainant consents in writing to an extension. The final determination shall be mailed, faxed, e-mailed, or otherwise delivered to the Complainant, and each Respondent.

Alternate Dispute Resolution

(a) If the State Board cannot make a final determination within 90 days after the complaint was filed, or within any extension to which the Complainant consents, the complaint shall be referred for final resolution, using alternate dispute resolution. Any record or materials compiled, as a result of a complaint proceeding shall be made available for use under alternate dispute resolution.

(b) On or before the 5th business day after a final Board determination was due, the Board shall designate in writing to the Complainant the name of a proposed arbitrator, knowledgeable in

election matters, to resolve the complaint. Within 3 business days after the Complainant receives this proposal, the Complainant shall either agree to the proposed arbitrator or counter with the name of a different proposed arbitrator, also knowledgeable in election matters. Within three days the Board shall indicate if the proposed arbitrator of the Complainant is acceptable. If it is not, then the names of both proposed arbitrators shall be placed in a container and the arbitrator shall be determined by lot drawn by the Complainant. The Board shall be responsible for any reasonable costs (not to exceed the rate of \$75 per hour) and expenses generated by the arbitrator in determining the complaint.

(c) The arbitrator may review the record compiled in connection with the complaint and any briefs or memoranda previously filed in the action, but shall not receive additional testimony or evidence.

(d) The arbitrator must issue a written resolution within 60 days after the final Board determination was due. This 60-day period may not be extended. The final resolution of the arbitrator shall be transmitted to the Board and shall be the final resolution of the complaint. Under no circumstances may the final determination of an arbitrator order action to be performed except in the complaint at hand or order a change in state law, federal law or Board policies, procedures, or rules.

No Appeal

The final determination of the Board, or the final resolution of an arbitrator, shall not be subject to appeal in any State court, State administrative hearing or panel, or federal court. If the alleged Title III HAVA violation supports a legal cause of action independent of Title III of HAVA, the Complainant shall not be precluded from filing such legal action as a result of making a complaint under this procedure.

Record of all Proceedings

At the discretion of the Board hearings within the requirements of §254(a)(9) shall be transcribed.