

# **RULES OF THE LEGISLATIVE ETHICS COMMISSION**

## **CHAPTER 1:**

### **CONCURRENCE AND PENALTY ASSESSMENT PROCEEDINGS FOR DISPOSITION OF SUBSTANTIAL BASIS INVESTIGATION REPORTS RECEIVED FROM THE JOINT COMMISSION ON PUBLIC ETHICS PURSUANT TO EXECUTIVE LAW SECTION 93(14-a).**

- 1.01 Authority: These rules are promulgated pursuant to Legislative Law §§80(9)(c) and 80(10).
- 1.02 Purpose: These rules are intended to:
1. Advise respondents of the due process procedural mechanisms which have been adopted by the Legislative Ethics Commission
  2. Delineate procedures for conducting concurrence and penalty assessment proceedings regarding assessment of a civil penalty and/or referral to the appropriate prosecutor under Legislative Law §80.
- 1.03 Jurisdiction: The Legislative Ethics Commission has jurisdiction to adjudicate alleged violations of Public Officers Law §73, §73-a and §74 committed by members of the legislature, legislative employees as defined in Public Officers Law §73 and candidates for member of the legislature for violations of Public Officers Law §73-a, contained in written substantial basis investigation reports from the Joint Commission on Public Ethics, pursuant to Executive Law §94(14-a). Pursuant to Legislative Law §80(10), upon receipt of a written report from the Joint Commission on Public Ethics, within 90 calendar days of the receipt of such report, the Legislative Ethics Commission shall dispose of the matter by making one or more of the following determinations:
- a) whether the Legislative Ethics Commission concurs with the Joint Commission's conclusions of law and the reasons therefor;
  - b) whether and which penalties have been assessed pursuant to applicable law or rule and the reasons therefor; and
  - c) whether further actions have been taken by the commission to punish or deter the misconduct at issue and the reasons therefor.

2.00 Definitions:

1. Commission: “Commission” means the Legislative Ethics Commission established pursuant to L. 2007, c.14. Any action of the Commission requires a vote of the Commission, and such action must be approved by the majority of the Commission without vacancy (five members.)
2. Respondent: A member of the legislature, legislative employee or candidate for member of the legislature who is the subject of a substantial basis investigation report presented to the Legislative Ethics Commission pursuant to Executive Law §93(14-a) shall be known as the “respondent.”

3.00 Concurrence Proceedings: General Rules:

3.01 Notice of Receipt of Substantial Basis Investigation Report:

1. Within 5 calendar days after the receipt of a Substantial Basis Investigation Report from the Joint Commission on Public Ethics, the Commission shall notify the respondent of the receipt of such report and provide in such notice, a statement that the respondent is entitled, within fifteen calendar days from the receipt of such notice, to submit a written response to the findings of the Report.
2. The Commission shall provide in such notice a statement that:
  - a. The respondent is not required to submit any written response with regard to this notice, and the Commission shall not draw any adverse inference from respondent’s failure to submit any written response.
  - b. The respondent is entitled to representation by an attorney at his/her own expense.

3.02 Service on Respondent:

The Commission shall serve the Notice of Receipt of Substantial Basis Investigation Report upon the respondent by either personal delivery, or alternatively by first class mail and certified mail, return receipt requested, to the respondent’s home address or address identified in the Substantial Basis Investigation Report. The word “confidential” shall be stamped in bold letters on the outside of the envelope and on the notice. Notwithstanding such confidential marking, the respondent is not limited from disclosing the contents of such notice.

### 3.03 Disposition

The Commission shall review the written report provided by the Joint Commission on Public Ethics along with any additional materials provided pursuant to Executive Law §94(14-a) and Legislative Law §80(9) and (10).

1. Not later than forty-five calendar days after receipt from the Joint Commission on Public Ethics, the Commission may refer the matter back to JCOPE once for additional investigation.
2. Not later than ninety calendar days after receipt of such report, the Legislative Ethics Commission may disagree with some or all of the findings of JCOPE's written report; or
3. Not later than ninety calendar days after receipt of such report, the Legislative Ethics Commission may concur with some or all of the findings of JCOPE's written report and assess penalties accordingly.

### 4.00 Penalty Assessment Proceedings: General Rules

#### 4.01 Notice of Penalty Assessment Proceeding:

If the Commission determines that it concurs with some or all of the findings of the Joint Commission on Public Ethics' substantial basis investigation report, the Commission shall send a Notice of Penalty Assessment Proceedings to the respondent by either personal delivery, or alternatively by first class mail and certified mail, return receipt requested. The date fixed for the proceeding shall be at least ten (10) calendar days after the Notice of Penalty Assessment Proceeding is sent to respondent.

#### 4.02 Content of Notice:

In substantial conformity of §301 of the State Administrative Procedure Act, the Notice of Penalty Assessment Proceeding shall contain the following information:

1. A statement of the time, place and nature of the proceeding.
2. A statement that the proceeding is being conducted pursuant to Legislative Law §§80(9) and (10).
3. A statement that respondent is subject to the jurisdiction of the Commission for the purpose of imposing penalties.

4. A dated copy of the Joint Commission on Public Ethics' substantial basis investigation report.
  5. A statement notifying the respondent of his or her right to be represented by counsel at the proceeding, to present evidence in the manner provided by rule 5.0 of these rules.
  6. A statement that the Commission has the power to assess civil penalties and refer violations to the appropriate prosecutor.
  7. A statement that interpreter services shall be made available to deaf persons without charge.
- 4.03 Non-Public Proceeding: No meeting or proceeding of the Commission shall be open to the public, except if expressly provided otherwise by the Commission.
- 4.04 Public Disclosure of Rules: These rules shall be available to the public.
- 4.05 Presiding Officer: The Commission shall designate a member of the Commission to serve as the presiding officer for the purpose of supervising the conduct of the penalty assessment proceeding.
- 4.06 Oaths and Affirmations: The presiding officer shall have the power to administer oaths and affirmations.
- 4.07 Discovery Procedure:
- a. Demand for Documents: The respondent may demand documents and materials from the Commission relevant to the matter under review only insofar as allowed under these rules and only to the extent that such material is in the possession of the Commission. However, the Commission must provide the respondent with any exculpatory material within its possession.
  - b. Discovery when Available: The respondent may seek disclosure of materials allowed under this section only after a Notice of Penalty Assessment Proceeding is sent. Whenever the Commission is obligated to provide information to the respondent under these rules, it shall endeavor to do so within a reasonable time after a request
  - c. Discoverable Materials:
    1. Materials provided to the Legislative Ethics Commission by the Joint Commission on Public Ethics pursuant to Executive Law §14-a (b), subject to Rule 4.07(d)(3) of these rules.

2. Statement of allegations: A statement of allegations based upon the Substantial Basis Investigation Report received from the Joint Commission on Public Ethics shall be made available to the respondent in the Notice of Penalty Assessment Proceeding. Respondent will be furnished with a copy of such report by the Joint Commission on Public Ethics pursuant to Executive Law §14-a. Upon written request from the respondent an additional copy of the report will be provided by the Legislative Ethics Commission.

3. Exhibits: The respondent shall provide the Legislative Ethics Commission a list of exhibits along with a summary of exhibit contents intended to be introduced into evidence at the penalty assessment proceeding.

d. Non- Discoverable Material

1. Privileged Material: Material which is ordinarily exempt from disclosure on the grounds of privilege shall not be discoverable.

2. Attorney Work Product: The work product of the Legislative Ethics Commission staff counsel or conference counsel assigned to the Legislative Ethics Commission shall not be discoverable.

3. Confidential Material – material deemed confidential by the Legislative Ethics Commission, including but not limited to names, identifying information and sensitive witness information.

e. Cost of Discovery: The Respondent shall pay for the reasonable cost of copying any discoverable materials requested under this rule.

4.08 Subpoena Power of Commission: Pursuant to §80 (9) of the Legislative Law which deems the Commission to be an agency within the meaning of article three of the State Administrative Procedure Act, the presiding officer in consultation with the co-chairs, may sign and issue subpoenas.

4.09 Any person who appears in any proceeding herein described shall be accorded the right to be accompanied, represented and advised by counsel.

4.10 Adjournment: Upon good cause shown or on its own motion, the Commission may grant an adjournment of a scheduled proceeding or extend the time available to comply with a requirement of these rules.

5.0 Rules of Evidence: The following rules of evidence shall apply to the conduct of the penalty assessment proceeding:

1. The Commission generally will not be bound by the formal rules of evidence although the rules relating to privileged communications recognized by the law shall be given effect.

2. Official Notice: The Commission may take official notice of any facts or law that could be judicially noted.
3. The presiding officer may exclude irrelevant or unduly repetitious evidence.
4. All testimony taken before the Commission shall be under oath or by affirmation.

#### 6.0 Conduct of Penalty Assessment Proceeding:

In accordance with Legislative Law §80(9)(a) the following rules shall govern the conduct of the penalty assessment hearing:

1. No proceeding shall be convened or reconvened pursuant to adjournment unless at least five members are present. Members may appear via telephone or teleconference but at least two members must be physically present.
2. The designated presiding officer shall commence the proceeding with a statement of findings against the respondent as stated in the substantial basis investigation report.
3. An oral summary of the substantial basis investigation report shall be presented first by the Legislative Ethics Commission staff counsel.
4. Respondent, who shall have the right to appear *pro se* or through counsel, shall then have an opportunity to present an opening statement but need not do so.
5. Respondent shall only have the right to proffer evidence that is relevant and material to the assessment of penalty.

In assessing the amount of civil penalties to be imposed, the Commission shall consider:

- (1) the seriousness of the violation;
- (2) the amount of gain to the individual;
- (3) whether the individual previously had any civil or criminal penalties imposed;
- (4) any other factors the Commission deems relevant.

6. The designated presiding officer shall rule on objections and questions relating to the admissibility of evidence and other procedural matters.
  7. Respondent shall have the right to present a closing statement.
  8. Staff counsel shall then present a closing statement.
  9. The penalty assessment proceeding shall be stenographically recorded. Any stenographer employed by the Commission shall treat the record of the proceeding with the same level of confidentiality afforded to transcripts of grand jury proceedings and shall take an oath to that effect.
- 6.01 Consent Agreement Procedure: The Commission shall have the option to enter into a consent agreement in lieu of the penalty assessment proceeding or in addition thereto. Pursuant to statute, a vote of at least five members of the commission is required to approve the consent agreement.
- 6.02 Proceeding Record: At the request of the respondent, a copy of the transcript of the penalty assessment proceeding shall be provided upon payment of the required cost.
- 6.03 Content of Penalty Assessment Proceeding Record: In substantial compliance with State Administrative Procedure Act § 302 (1), the record of the penalty assessment proceeding shall include the following:
1. Substantial Basis Investigation Report transmitted by the Joint Commission on Public Ethics;
  2. Notice of receipt of report by respondent pursuant to rule 3.01;
  3. Respondent's response, if any;
  4. Notice of Penalty Assessment Hearing;
  5. Evidence received into the record;
  6. A statement of matters officially noticed except matters so obvious that a statement of them would serve no useful purpose;
  7. Disposition of the Commission.
- 6.04 Record Confidentiality: The complete record of a penalty assessment proceeding shall remain confidential pursuant to Legislative Law § 80 (12) (a) with the exception that the terms of any settlement or compromise of a complaint or referral or report which includes a fine, penalty or other remedy reached after the Commission has received a report from the Joint Commission on Public Ethics pursuant to subdivision 14-a of section 94 of the Executive Law shall be available for public inspection as provided

for by Legislative Law § 80 (12) (a) (1).

- 7.00 Vote to Assess Civil Penalty or Make Referral: The Commission is authorized to assess a civil penalty and/or to make a referral to the appropriate prosecutor.
- 7.01 Publication of Disposition: Pursuant to Legislative Law §80(10)(c), the disposition of the Commission shall be in writing and published on its website no later than ten calendar days after such disposition, unless requested by a law enforcement agency to suspend the Commission's action because of an ongoing criminal investigation.
- 7.02 Notice of Disposition: Notice of the Commission's disposition shall be mailed to respondent by first class mail and certified mail, return receipt requested.
- 7.03 Demand for Civil Penalty: Within 14 of the Disposition and Notice of Civil Penalty, the Commission shall send respondent a Demand for Civil Penalty. The Demand shall be sent by first class and certified mail, return receipt requested.
- 7.04 Referral to the Attorney General for Collection: If respondent does not pay the penalty in full or enter into an agreement to make scheduled payments on the penalty within 90 days of the Demand for Civil Penalty, the Commission shall refer the matter to the Civil Recoveries Bureau of the New York State Office of the Attorney General. The Commission shall send the referral within 10 days after the 90-day period has expired.

Approved July 25, 2019