

## Chapter Eth 3

## PRACTICE AND PROCEDURE

## GENERAL

Eth 3.01 Communications and documents addressed to board

Eth 3.02 Computation of time

Eth 3.03 Service of documents and filing of statements of economic interests

## HEARINGS AND INVESTIGATIONS

Eth 3.10 Formal investigations

Eth 3.11 Conclusion of investigation and initiation of hearing

Eth 3.12 Time and place of hearing

Eth 3.13 Conduct of hearing

Eth 3.14 Changes in time and place of hearing; continuances; adjournments

Eth 3.15 Appearances

Eth 3.16 Rules of evidence

Eth 3.17 Examination of evidence by board

Eth 3.18 Conclusion of hearing; determination

Eth 3.19 Referral of complaints and determinations

Eth 3.20 Witnesses; subpoenas; depositions

Eth 3.21 Oath

## REQUESTS FOR ADVICE

Eth 3.30 Requests for written advice

## GENERAL

**Eth 3.01 Communications and documents addressed to board.** (1) All written communications and documents intended for the board should be addressed to the State of Wisconsin, Ethics Board, 122 West Washington Avenue, Madison, Wisconsin 53703 and not to individual members of the board or its staff. All communications and documents delivered at the board's office are officially received.

**History:** Cr. Register, June, 1976, No. 246, eff. 7-1-76.

**Eth 3.02 Computation of time.** (1) The time within which an act is to be done as provided in the rule or order promulgated by the board, expressed in days, shall be computed by excluding the first day and including the last, except that if the last day be Saturday, Sunday or a legal holiday, the act may be done on the next secular day.

(2) "Legal holiday" as used in this section means any statewide legal holiday provided in section 256.17, Wis. Stats. When an act is permitted to be done by the use of the postal service, and the last day within the time prescribed by a rule or order of the board for performing such act falls on a legal public holiday under federal law, or other holiday designated by the president such that the postal service does not receive registered mail or make regular deliveries on that day, the day shall be considered a legal holiday for purposes of this section.

**History:** Cr. Register, June 1976, No. 246, eff. 7-1-76.

**Eth 3.03 Service of documents and filing of statements of economic interests.** (1) Service of documents upon the board and upon other parties in the board's proceedings and the filing of statements of economic interests may be made by deposit in the first class mail in a properly addressed envelope with sufficient postage affixed or by delivery in person.

(2) The date of service or filing shall be the day when the matter served or filed is deposited in the mail or is delivered in person, as the case may be.

**History:** Cr. Register, June, 1976, No. 246, eff. 7-1-76.

## HEARINGS AND INVESTIGATIONS

**Eth 3.10 Formal investigations.** (1) Following the board's receipt of a formal complaint or the making of a complaint on its own motion, the executive director may initiate a formal investigation with respect to alleged violations of the code.

(2) During a formal investigation, the executive director or his or her designee may:

(a) Examine any public records;

(b) Question any public official about information that has come to him or her in the course of his or her official duties or by reason of his or her public position; and

(c) Question any person or review any documents or records pertaining to the activities being investigated.

(3) The executive director or his or her designee may not proceed under this section unless the person or organization has first been notified in writing of the activities which are the subject of the investigation, of the exact nature and purpose of the investigation, the specific actions or activities to be investigated, a statement of such person's due process rights and a copy of section 19.48, Wis. Stats.

(4) The executive director shall obtain the board's approval of the investigation before expending funds from the appropriation under section 20.521 (1) (b), Wis. Stats.

**History:** Cr. Register, June, 1976, No. 246, eff. 7-1-76; am. (2) (intro.) and (b) and (3), Register, September, 1976, No. 249, eff. 10-1-76.

### **Eth 3.11 Conclusion of investigation and initiation of hearing.**

(1) At the conclusion of a formal investigation, the executive director shall provide the board with a written recommendation for further action.

(2) If, following such investigation and recommendation, the board determines that there is probable cause for believing that any person has violated the code in an instance other than specified in the original complaint:

(a) It shall, if no formal complaint has been filed alleging a violation or violations in the manner and by the person it has probable cause to believe has violated the code as determined by the investigation, on its own motion, file a verified complaint.

(b) It shall, if a formal complaint has been filed alleging a violation or violations in the manner and by the person it has probable cause to believe has violated the code, conduct a hearing on the matter not more than 30 days after such finding of probable cause and shall, in writing, give the respondent at least 20 days' notice of the time and place of the hearing.

**History:** Cr. Register, June, 1976, No. 246, eff. 7-1-76.  
Register, September, 1976, No. 249

**Eth 3.12 Time and place of hearing.** (1) A hearing on the matter shall not be held less than 20 days after the board's determination of probable cause unless the respondent petitions the board for an earlier date and the board grants the petition.

**Note:** Section 19.48 (3) (c) requires the board to give the accused at least 20 days' notice of the hearing date. Once the board has given the accused the required notice, there is no prohibition to establishing an earlier hearing date if that is the accused's desire.

**History:** Cr. Register, June, 1976, No. 246, eff. 7-1-76.

**Eth 3.13 Conduct of hearing.** (1) A hearing shall be conducted by one or more members of the board or by such other person as the chair shall designate.

(2) The presiding officer shall open the hearing and ask that appearances be entered on the record.

(3) The presiding officer shall exclude from the hearing all persons not required to attend unless the respondent petitions for a public hearing.

(4) The presiding officer shall then make a concise statement of the scope and purposes of the hearing. Thereafter parties may make motions or opening statements.

(5) When opening statements are made they shall be confined to a brief summary, in clear and concise form, of the evidence to be offered and a statement of ultimate points relied upon. There shall be no argument on either the facts or legal theories.

(6) During the hearing the presiding officer may exclude witnesses until they are called to testify, may direct that persons who are expected to testify be kept separate until called and may prevent them from communicating with anyone until they have been examined.

(7) Parties may be off the record only when the presiding officer permits. If a discussion off the record is pertinent to the proceedings, the presiding officer will summarize it on the record.

(8) No smoking is permitted during a hearing. A ten-minute recess may be taken at approximately the end of each hour of proceeding.

**History:** Cr. Register, June, 1976, No. 246, eff. 7-1-76; am. (1), Register, September, 1976, No. 249, eff. 10-1-76.

**Eth 3.14 Changes in time and place of hearing; continuances; adjournments.** (1) Changes in the time and place of the first session of a hearing in any proceeding may be granted only by the chair, or presiding officer designated by the chair, for good cause shown by a written request made to the chair reasonably in advance of the time set, showing when and how copies of such requests were served upon each member of the board, the board's executive director, the complainant, and the respondent.

(2) After a hearing has commenced, continuances and adjournment may be ordered by the presiding officer.

**Note:** This section is created to clearly establish that after the commencement of a hearing the presiding officer may order a recess or adjournment.

After a hearing date has been established, it is unlikely that the board will meet again prior to the hearing. Therefore, the power to change the time and place of the first session of a hearing

is vested solely in the chair. The person petitioning for a change of time or place for the first hearing session must notify other parties to the proceeding of the request so that they may have time to notify the chair of their objections, if any, to the proposed modification.

**History:** Cr. Register, June, 1976, No. 246, eff. 7-1-76; am. (1), Register, September, 1976, No. 249, eff. 10-1-76.

**Eth 3.15 Appearances.** (1) Parties to a proceeding that is the subject of a hearing may be the board's designee and respondents.

(2) A person or organization, other than the board, who files a formal complaint is the complainant, a party complained against is a respondent.

(3) Employees of the board may appear neither in support for nor in opposition to any cause, but may appear for the sole purpose of discovering and, if necessary, presenting facts pertinent to the issues. The executive director shall notify the respondent of any exculpatory evidence of which he or she has knowledge.

**History:** Cr. Register, June, 1976, No. 246, eff. 7-1-76; am. (3), Register, September, 1976, No. 249, eff. 10-1-76.

**Eth 3.16 Rules of evidence.** (1) Any party dissatisfied with a ruling by the presiding officer during a hearing may have such a ruling reviewed by the board by:

- (a) Noting an exception in the record.
- (b) Submitting to the board within 7 days of the date of mailing of the transcript containing such ruling a statement in writing showing the nature of the ruling and a brief summary of the reasons why such ruling is claimed to be erroneous, and
- (c) Simultaneously serving copies of such statement upon all parties to the proceeding. Other parties may reply thereto in writing within 7 days after such service. Failure of a party noting an exception in the record to perfect the exception as above provided shall constitute waiver of the noted exception. The board shall not rule upon exceptions to rulings of a presiding officer unless the foregoing requirements are met.

**History:** Cr. Register, June, 1976, No. 246, eff. 7-1-76.

**Eth 3.17 Examination of evidence by board.** Whenever in a hearing it is impracticable for the members of the board who participate in the decision to hear or read all the evidence, the final decision shall not be made until a summary of the evidence prepared by the person conducting the hearing, together with recommendations as to the findings of fact and the decision in the proceeding has been prepared and furnished to each party, and a reasonable opportunity has been afforded to each party to file written exceptions to such summary and proposed findings and decision and to argue with respect to them orally and in writing before all the members who are to participate in the decision. The board's findings of fact may be made upon the basis of such summary and the filed exceptions thereto. Whenever the board's ultimate decision is contrary to the recommendations of the person conducting the hearing, the decision shall include a statement of facts and ultimate conclusions relied upon

in rejecting the recommendations of the hearing officer. The parties may by written stipulation waive compliance with this section.

**History:** Cr. Register, June, 1976, No. 246, eff. 7-1-76; am. Register, September, 1976, No. 249, eff. 10-1-76.

**Eth 3.18 Conclusion of hearing; determination.** (1) After the hearing, the board shall, in written findings of fact and conclusions based thereon, make a determination whether or not probable cause exists concerning any misconduct by the respondent constituting a violation of the code. The written determination shall be open to public inspection.

(2) If the board determines that no probable cause exists, it shall immediately send written notice of such determination to the respondent and to the complainant, if any.

(3) If the board determines that probable cause for misconduct exists:

(a) It shall refer the matter for appropriate prosecution to the district attorney in whose jurisdiction the alleged violation occurred and shall supply him or her with a written statement of its determination.

(b) It shall give written notice of its action to the respondent and shall notify the respondent that unless within 10 days the respondent requests the board to withhold from the district attorney any information, records, documents, reports or transcripts that were placed before the board on behalf of the respondent or as part of his or her defense, the board will refer such documents to the district attorney.

**Note:** Section 19.48 (1) (a) provides that: \* \* \* "Except for the determination provided in sub. (6), all records, transcripts of any investigations or inquiries of the board under this section shall be confidential and shall not be open to public inspection by any person other than a member or employe of the board, or state employe designated to assist the board."

This rule clearly establishes that the board's written finding of probable cause or lack thereof is open to public inspection.

Section 19.48 (1) (b) provides: \* \* \* "The accused state public official or state public employe cited by the declaration of probable cause may request the board to withhold any information, records, documents, reports and transcripts that were placed before the board on behalf of the accused or as a part of his defense. The board shall grant such a request."

This rule takes notice of this statutory provision and provides that the respondent who has not made a request within 10 days of notification of the board's determination, waives this right.

**History:** Cr. Register, June, 1976, No. 246, eff. 7-1-76; am. (3) (a) and (b), Register, September, 1976, No. 249, eff. 10-1-76.

**Eth 3.19 Referral of complaints and determinations.** (1) Following its receipt or adoption, on its own motion, of a formal complaint alleging a violation of the code by a public official liable to impeachment the board shall refer the complaint to the assembly.

(2) If, after a hearing, the board determines that probable cause exists for believing that the respondent has violated the code, the board shall, in addition to the referral in section Eth 3.18(3) (a), submit its written findings of fact and conclusions based thereon and copies of any records, reports and transcripts in its possession, together with other relevant evidence:

(a) In the case of a legislator, to the appropriate house.

(b) In the case of a state public official or state public employe in the unclassified service in the executive branch of state government, to the appointing authority who may censure, suspend or remove the state public official or state public employe from office or employment.

(c) In the case of an employe in the unclassified service in the legislative branch of state government, to the appointing authority which may censure, suspend or remove the employe from office or employment.

(3) The referrals under subsections (1) and (2) of this section shall be made no later than:

(a) Six months following the date of the receipt or adoption of the complaint if no action is taken on the complaint;

(b) Ten days following the board's determination under section 19.48(3)(c), Wis. Stats., or section 19.48(6), Wis. Stats., that there is not probable cause to believe that the respondent has violated the code;

(c) Ninety days after the board has notified the attorney general of a district attorney's failure to commence prosecution and the attorney general has taken no action on the complaint;

(d) Ten days after the expiration of the time in which a notice of appeal or motion for a new trial may be timely made if the matter has been the subject of a court proceeding and no appeal is taken or motion for a new trial made.

(e) Ten days after the entry of a nonappealable order or decision disposing of the matter.

**Note:** Sections 19.48(8) and (9) require the board to refer certain complaints and determinations to other governmental bodies. This rule establishes times by which these referrals must be accomplished.

**History:** Cr. Register, June, 1976, No. 246, eff. 7-1-76; am. (2) (b) and (c), Register, September, 1976, No. 249, eff. 10-1-76.

**Eth 3.20 Witnesses; subpoenas; depositions.** (1) Pursuant to chapter 885, Wis. Stats., subpoenas may be signed and issued by any member of the board. Witness fees and mileage of witnesses subpoenaed on behalf of the board shall be paid at the rate prescribed for witnesses in a circuit court upon filing with the board their affidavits of attendance and travel and shall be charged to the appropriation for investigations authorized by section 20.521(1)(b), Wis. Stats.

(2) The board's designee or the accused may, during an investigation or hearing, cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for the taking of depositions in civil actions in circuit court.

(3) Upon request, any member of the board will issue subpoenas to compel the attendance of necessary witnesses. A subpoena duces tecum will not be issued unless the person requesting such subpoena furnishes the board with the specific identity of the document to be produced by the subpoenaed witness.

**Note:** Section 19.48(4) provides: "The board shall have the same power to compel the attendance of witnesses and to issue subpoenas and summary process as is granted to legislative committees under ss. 13.31 and 13.32. Upon request of the accused, the board shall Register, September, 1976, No. 249

subpoena named individuals to appear as witnesses at the hearing, if such action is necessary to compel their attendance."

Section 13.31 provides, in part: "The attendance of witnesses before any committee of the legislature, or of either house thereof, appointed to investigate any subject matter, may be procured by subpoenas signed by the presiding officer and chief clerk of the senate or assembly."

Section 19.48 (4) notwithstanding, section 885.01 (4) provides that a subpoena may be issued by any board or by any member of a board authorized to take testimony.

This rule provides that the board may issue subpoenas in accordance with that general authority to compel the attendance of witnesses under section 885.01.

Section 19.48 (5) provides that " \* \* \* Prior to any hearing . . . , the accused . . . shall be afforded full discovery rights, including adverse examination of witnesses who will testify at the hearing. \* \* \* "

Although the law expressly grants discovery rights to the accused, it is silent with respect to the board's investigatory powers. This rule interprets the law to mean that the board's designee may also take the deposition of a potential witness.

**History:** Cr. Register, June, 1976, No. 246, eff. 7-1-76.

**Eth 3.21 Oath.** Before testifying, every witness shall be required to declare that he or she will testify truthfully, by oath or affirmation administered by the presiding officer or any member of the board.

**Note:** This section repeats the statutory requirement that witnesses be under oath and establishes by whom the oath may be administered.

**History:** Cr. Register, June, 1976, No. 246, eff. 7-1-76; am. Register, September, 1976, No. 249, eff. 10-1-76.

## REQUESTS FOR ADVICE

**Eth 3.30 Requests for written advice.** In instances where delay is of substantial inconvenience or detriment to a party requesting the board's written advice regarding the propriety of any matter to which he or she is or may become a party, the board's executive director may, with the advice and consent of the chair, or if he or she is unavailable with the advice and consent of the next ranking officer of the board, or if he or she is unavailable, with the advice and consent of the secretary or other member of the board, advise the state public official. Written advice prepared by the executive director pursuant to this rule shall have the full force and effect of written advice given by the board.

**History:** Cr. Register, June, 1976, No. 246, eff. 7-1-76; am. Register, September, 1976, No. 249, eff. 10-1-76; am. Register, October, 1976, No. 250, eff. 11-1-76.