

# NOTICE

## DEPARTMENT OF STATE BUREAU OF COMMISSIONS, ELECTIONS AND LEGISLATION

### Complaint Procedures Under Section 402(a) of the Help America Vote Act of 2002 and Section 1206.2 of the Pennsylvania Election Code

Effective December 9, 2003, the General Assembly has directed the Department of State (Department) to establish within its Bureau of Commissions, Elections and Legislation (Bureau) “a procedure for the review of complaints regarding the administration of Title III of the Help America Vote Act of 2002 [HAVA] (Public Law 107-252, 42 U.S.C. § 15301 *et seq.*” Pa. Election Code § 1206.2(a) (25 P.S. § 3046.2(a)), added by the act of December 9, 2002 (P.L. 1246, No. 150), § 11. This process is mandated by section 402(a) of HAVA, which requires States that receive funding under HAVA “to establish and maintain State-based administrative complaint procedures” as prescribed in that section. *See* 42 U.S.C. § 15512(a). The purpose of this notice is to announce that the Department has established within the Bureau the complaint procedure required by section 402(a) of HAVA and section 1206.2 of the Pennsylvania Election Code.

#### *Title III of HAVA*

Complaints made under these procedures must relate to the administration of Title III of HAVA, 42 U.S.C. §§ 15481-83. Before a person files a complaint under section 402(a) of HAVA and section 1206.2 of the Pennsylvania Election Code, the complainant should determine that he has a valid claim that a State or local election official or

employee has violated, is violating, or is about to violate a provision of Title III of HAVA (relating to uniform and nondiscriminatory election technology and administration requirements). Alleged violations of other Federal laws or State law that do not involve Title III of HAVA are not part of the complaint procedures described by this notice.

**Before filing a complaint under these procedures, a complainant should examine the provisions of Title III of HAVA.** By way of *summary only*, the following describe the *requirements* of Title III of HAVA:

- **By January 1, 2004**, all States must have *a system of provisional voting*. Under section 302(a) of HAVA, if an individual declares that he is registered to vote in the jurisdiction in which he desires to vote and that he is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, the individual must be permitted to cast a provisional ballot as provided by section 302(a). 42 U.S.C. § 15482(a). Section 302(a) of HAVA also prescribes procedures under which a provisional ballot is to be cast and processed. In addition, section 302(c) of HAVA provides that any voter permitted by court order or other order to vote after the polling place is required by law to close may be allowed to vote only by provisional ballot. 42 U.S.C. § 15482(c). Section 1210(a.4) of the Pennsylvania Election Code (25 P.S. § 3050(a.4)), added by Act 150 of 2002, establishes procedures for the implementation of provisional voting in Pennsylvania.
- **By January 1, 2004**, all States must publicly post at the polling places on Election Day certain *voting information* prescribed by section 302(b) of HAVA. 42 U.S.C. § 15482(b). Pennsylvania law is consistent with section 302(b) of HAVA. *See* 25 P.S. §§ 3042 & 3049(a).
- **By January 1, 2004**, section 303(b) of HAVA requires most voters who register by mail, and who are voting for the first time in the county in an election for Federal office, to present to elections officials *photo identification* or other specified *identification that shows the name and address of the voter*. 42 U.S.C. § 15483(b). A person who does not satisfy the identification requirement may cast a provisional ballot. *See* 42 U.S.C. § 15483(b)(2)(B). As permitted by HAVA (*see* 42 U.S.C. § 15484), Pennsylvania law requiring voter identification is stricter than HAVA. Sections 1210(a) and 1210(a.1) of the Pennsylvania Election Code require all electors who appear to vote in the election district, precinct or division for the first time and desire to vote first to present to an election officer a

prescribed form of photo identification or nonphoto identification that shows the name and address of the elector. *See* 25 P.S. §§ 3050(a) & 3050(a.1). Consistent with HAVA, those electors who do not comply with the voter identification requirement may cast a provisional ballot. *See* 25 P.S. § 3050(a.2).

- **By January 1, 2004**, section 303(b)(4) of HAVA requires *mail voter registration forms* to include certain information. *See* 42 U.C. § 15483(b)(4). Pennsylvania law requires that the information required by section 303(b)(4) be included on its Voter Registration Mail Application form. *See* 4 Pa. Code § 183.1.
- **By January 1, 2006**, each *voting system* used in an election for Federal office must meet standards specified by section 301 of HAVA (42 U.S.C. § 15481), including accessibility for individuals with disabilities as described by section 301(a)(3) of HAVA (42 U.S.C. § 15481(a)(3)) and alternative language accessibility as provided by section 301(a)(4) of HAVA (42 U.S.C. § 15481(a)(4)).
- **By January 1, 2006**, all States must establish and maintain a *computerized Statewide voter registration list* as prescribed by section 303(a) of HAVA, 42 U.S.C. § 15483(a), including a system of computerized voter list maintenance, technological security, and minimum standards for accuracy of State voter registration records. *See* 42 U.S.C. §§ 15483(a)(2)-(4). Pennsylvania law requires Pennsylvania to have a Statewide computerized voter registration system, known as the Statewide Uniform Registry of Electors (SURE), in place and fully connected by January 1, 2005. *See* 25 Pa. C.S. § 1222.
- For *applications for voter registration* received **on and after January 1, 2006**, section 303(a)(5) of HAVA will prohibit the acceptance or processing of the application unless (i) the application includes the driver's license number of an applicant who has been issued a current and valid driver's license, or if the applicant does not have a current and valid driver's license, the last four digits of the applicant's social security number (except for an applicant who declares in his application that he has neither a current and valid driver's license nor a social security number); and (ii) elections officials determine that the number provided by the applicant is valid. 42 U.S.C. 15483(a)(5).
- HAVA provides that the requirements established by Title III are "*minimum requirements*" and that States may establish election technology and administration requirements "that are more strict than the requirements established under [Title III]," so long as the State requirements are not inconsistent with any Federal requirements. 42 U.S.C. § 15484. In addition, HAVA leaves "[t]he specific choices on the methods of complying with the requirements of [Title III] to the discretion of the State." 42 U.S.C. § 15485.

HAVA Section 402(a)

Section 402(a)(2) of HAVA requires a State to establish and maintain a State-based administrative complaint procedure that meets the following requirements:

- (A) The procedure shall be uniform and nondiscriminatory.
- (B) Under the procedures, any person who believes that there is a violation of any provision of [T]itle III [of HAVA] (including a violation which has occurred, is occurring, or is about to occur) may file a complaint.
- (C) Any complaint filed under the procedures shall be in writing and notarized, and signed and sworn by the person filing the complaint.
- (D) The State may consolidate complaints filed under [§ 402(a)(2)](B).
- (E) At the request of the complainant, there shall be a hearing on the record.
- (F) If, under the procedures, the State determines that there is a violation of any provision of [T]itle III, the State shall provide the appropriate remedy.
- (G) If, under the procedures, the State determines that there is no violation, the State shall dismiss the complaint and publish the results of the procedures.
- (H) The State shall make a final determination with respect to a complaint prior to the expiration of the 90-day period which begins on the date the complaint is filed, unless the complainant consents to a longer period for making such a determination.
- (I) If the State fails to meet the deadline applicable under [§ 402(a)(2)](H), the complaint shall be resolved within 60 days under alternative dispute resolution procedures established for purposes of ... section [402]. The record and other materials from any proceedings conducted under the complaint procedures established under ... section [402] shall be made available for use under the alternative dispute resolution procedures.

42 U.S.C. § 15512(a)(2).

To receive requirements payments under Title II of HAVA, the Governor or his designee, in consultation and coordination with the Secretary of the Commonwealth, must file with the federal Election Assistance Commission (Commission) “a statement

certifying that the State is in compliance with the requirements” prescribed by section 253(b) of HAVA. *See* 42 U.S.C. § 15403(a). Among the requirements imposed by section 253(b) is filing with the Commission of “a plan for the implementation of the uniform, nondiscriminatory administrative complaint procedures required under section 402” (or inclusion in the State plan filed under section 253(b)(1)), and having in place “procedures ... for purposes of meeting the requirements” of section 402. 42 U.S.C. § 15403(b)(2). The Commonwealth has included in its HAVA State Plan a plan for the implementation of section 402 of HAVA.

*PA Election Code § 1206.2*

To implement section 402 of HAVA, the Legislature in December 2002 added section 1206.2 to the Pennsylvania Election Code. As noted, section 1206.2(a) requires the Department, by December 9, 2003, to establish within the Bureau “a procedure for the review of complaints regarding the administration of Title III of the Help America Vote Act of 2002.” 25 P.S. § 3046.2(a). The Department of State must provide a complaint form that requires “the signature of the complainant, an affidavit and notarization and the attachment of any supporting documentation.” *Id.*

In subsection (b) of section 1206.2, the Legislature has prescribed the following additional rules and procedures governing complaints made against a local or county employee or official:

- (1) The Department of State shall provide the county board of elections with a copy of the complaint within three business days of receipt.
- (2) The county board of elections shall have twenty days to either reach an agreement with the complainant or file a written response to the complaint.

(3) The Department of State shall provide the complainant with a copy of the response and an opportunity for an informal hearing.

(4) Where an informal hearing is requested, the county board of elections shall be given notice and the opportunity to participate.

(5) The Department of State shall issue a final determination and remedial plan if necessary no later than ninety days after the filing of the complaint. If the Department of State fails to issue the determination within ninety days, it shall provide alternative dispute resolution for the disposition of the complaint. The alternative process shall be completed within sixty days of its commencement.

25 P.S. § 3046.2(b).

For complaints made against the Department, the following procedures apply:

(1) The Department of State shall forward the complaint to the Office of General Counsel within three business days of receipt.

(2) The Department of State shall have twenty days to either reach an agreement with the complainant or file a written response to the complaint.

(3) The Office of General Counsel shall provide the complainant with a copy of the response and an opportunity for an informal hearing.

(4) Where an informal hearing is requested, the Department of State shall be given notice and an opportunity to participate.

(5) The Office of General Counsel shall issue a final determination and remedial plan if necessary no later than ninety days after the filing of the complaint. If the Office of General Counsel fails to issue the determination within ninety days, it shall provide alternative dispute resolution for the disposition of the complaint. The alternative process shall be completed within sixty days of its commencement.

25 P.S. § 3046.2(c).

Determinations made under section 1206.2 are not administrative adjudications under the Administrative Agency Law, 2 Pa. C.S. Ch. 5, subch. A, and Ch. 7, subch. A, *see* 25 P.S. § 3046.2(d); and determinations made by the Department under section 1206.2(b) are not subject to appellate review under 42 Pa. C.S. § 763 (relating to direct appeals from government agencies). *See* 25 P.S. § 3046.2(e). Rather, either party may

initiate in the court of common pleas of the county where the election board is located a *de novo* appeal from a final order of the Department disposing of a complaint made against a local or county official or employee under section 1206.2. *Id.*

By contrast, determinations made by the Office of General Counsel (Office) under subsection (c) – though not adjudications under the Administrative Agency Law – *are* agency determinations subject to appellate review in Commonwealth Court under 42 Pa.C.S. § 763. *See* 25 P.S. § 3046.2(f).

### Complaint form

The complaint form prescribed by the Department appears as Appendix A to this notice. Copies of the complaint forms are available at the Bureau's offices at 210 North Office Building, Harrisburg, PA 17120; by calling the Bureau at (717) 787-5280; or through e-mail request made to the Bureau at RA-BCEL@state.pa.us. The complaint form is also available through the Department's web site at [www.dos.state.pa.us](http://www.dos.state.pa.us).

### Filing and processing

The original and two copies of a complaint should be filed with the Bureau at its Harrisburg office. Upon receipt, Bureau staff will review the complaint to assure that it includes the signature of the complainant, the required affidavit with notarization, and the documentation that the complainant claims supports his complaint. If the complaint is in proper form, the Bureau will accept and log the complaint. If the complaint is deficient, the Bureau will afford the complainant the opportunity to cure the deficiency.

Within three business days of the receipt of a complaint against a local or county official or employee, the Bureau will forward a copy of the complaint to the appropriate county board of elections for appropriate action or response. If the complaint has been made against the Department, the Bureau will forward the complaint to the Office of General Counsel within three business days of receipt.

*Response and Opportunity for Informal Hearing*

Within 20 days upon receipt of the complaint, the complainant and the respondent county board of elections must notify the Bureau that they have reached an agreement; or the board of elections must file a response to the complaint, providing to the Bureau an original and two copies of the response. In the case of a complaint made against the Department, the complainant and the Department within 20 days must notify the Office that they have reached an agreement; or the Department must file a response with the Office, providing to the Office an original and two copies of the response.

Upon receipt of a response from a board of elections, the Bureau will provide a copy of the board's response and invite the complainant to request an informal hearing as provided by section 1206.2(b) of the Election Code. Upon the receipt of a response by the Department to a complaint made against it, the Office will provide a copy of the Department's response and invite the complainant to request an informal hearing as provided by section 1206.2(c) of the Election Code.

Informal hearing

In the event that a complainant should request an informal hearing under section 1206.2(b) of the Election Code, the Department will notify the board of elections and invite it to participate. The Department will thereafter assign a hearing officer and proceed as provided by section 402(a)(2) of HAVA, section 1206.2(b)(5) of the Election Code, and applicable provisions of the General Rules of Administrative Practice and Procedure, 1 Pa. Code Part II.

In the event that a complainant should request an informal hearing under section 1206.2(c) of the Election Code, the Office will notify the Department and invite it to participate. The Office will thereafter assign a hearing officer and proceed as provided by section 402(a)(2) of HAVA, section 1206.2(c)(5) of the Election Code, and applicable provisions of the General Rules of Administrative Practice and Procedure, 1 Pa. Code Part II.

Disposition

The assigned hearing officer will make a final determination in the manner and in the time prescribed by sections 402(a)(2)(F)-(H) of HAVA and section 1206.2(b)(5) or section 1206.2(c)(5) of the Election Code.

Alternative Dispute Resolution

In the event that the Department or the Office should fail to issue a final determination within the time prescribed by section 1206.2(b)(5) or section 1206.2(c)(5)

of the Election Code, respectively, a process of alternative dispute resolution will be afforded as directed by the General Counsel of the Commonwealth.

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Secretary of the Commonwealth