

Protests and Protest Hearings

HANDOUTS:

Presented by the
Union County Board of Elections

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Suggested Agenda for a Preliminary Meeting before Holding a Protest Hearing

Purpose of Preliminary Meeting:

- A) Discuss the procedure that will be followed at protest hearing.
- B) Set a hearing date for the protest.

Procedure:

1. State that the party who filed the protest will be known as the “Protester.” The party that the protest is filed against will be known as the as the “Respondent.”
2. State that the candidate or issue that has been certified to the ballot for _____ election will remain on the ballot unless the Protester can show a reason, under the law, to remove it.
3. State that the Protester has the burden of proof. The burden of proof is by a preponderance of the evidence that the candidate or issue should not appear on the ballot.
4. Tell the parties that the hearing will not be as formal as a court, but that the rules of the hearing are being explained to them now so they will know what to expect. Also tell them that the court rules of evidence will not be used, but that the Board will decide what witnesses and evidence they will consider in order to make a decision on the protest.
5. Tell the parties that the Protester will present witnesses and evidence first. The Respondent and the Board Members can ask questions of the witnesses after each testifies and the Respondent can object to evidence offered by the Protester to the Board. After the Protester is finished, then the Respondent will present witnesses and evidence. The Protester and the Board can ask questions of the Respondent’s witnesses or the Protester can object to evidence. Once the Respondent is done with witnesses and evidence, the Protester will then have a short opportunity to present rebuttal witnesses or evidence, which will be subject to questions by the Respondent and the Board.
6. Inform the parties that the hearing will be transcribed by a stenographer and that all witnesses will be sworn before giving testimony.
7. Instruct the parties that at end of hearing, the parties will be allowed to make summary arguments. These will be oral unless one of the parties asks to submit written summary arguments. The Protester will go first, then the Respondent. The Protester will be allowed a short rebuttal statement if desired since the Protester has the burden of proof.

8. Let the parties know that after oral summary arguments, the board will deliberate and either make a decision at that time or may decide to consider the matter and issue a decision later.

9. Tell the parties that if any party wishes to subpoena witnesses, the request must be filed more than 3 business days before the hearing. Explain that the Board of Elections has no bailiff like a court, so the parties will have to serve the subpoenas themselves.

10. Instruct the parties that if they wish to submit any briefs, cases, law or other documents to the board before hearing, that must be done more than 3 business days before the hearing. Also, tell the parties that the Board will have copies of whatever is filed, such as the petitions, protest and briefs.

11. Explain that any party may have an attorney. Tell the parties that the board will be represented by the Prosecuting Attorney. Make sure that parties understand that the Prosecuting Attorney will have no part in the decision on the protest. Instead, the sole function of the Prosecutor will be to answer any questions the board may have on the correct procedure for handling the protest and to answer any questions the board may have about any statute or case law.

12. Ask if any of the Board or Staff have additional comments or instructions about the hearing. Ask the parties if they have any additional matters or questions.

13. Lastly, set the hearing date. Tell the parties that the statutes requires that the hearing be set promptly and that the Board desires to make a decision timely so all parties know what will or will not be on the ballot and are able to begin their campaigning. Ask the parties how many witnesses they intend to call and their expectation of the amount of time it will take for the hearing. Ask the Respondent how much time is needed in order to give the Respondent adequate time to defend against the protest. Select a date (and maybe an alternate date) that is available for the Board, Staff, stenographer, Prosecuting Attorney, parties and the attorneys for the parties.

14. Follow-up the Preliminary Meeting with a letter outlining the issues discussed in the Preliminary Meeting and that date, place and time for the Protest Hearing. This must be sent by mail. Certified mail may be best although not required.

15. Advertise the Protest Hearing just as you would any Special Meeting of the Board of Elections.

Suggested Follow-up Letter after the Preliminary Meeting for a Protest Hearing

**RE: Protest Against the Declaration of Candidacy and Petition for
Candidate _____(Name) for Nomination to the Office of
_____(or issue) for the _____ Election.**

To All Parties:

Thank you for meeting with our Board on _____(date) to discuss the procedure that will be followed in the above caption Protest Hearing and to set a date to hold the Protest Hearing.

The Protest Hearing will be held on the ____ day of _____, at _____ a.m./p.m. at the office of the County Board of Elections located at _____.

At our preliminary meeting we discussed the following issues:

1. The party who filed the protest will be known as the “Protester.” The party that the protest is filed against will be known as the as the “Respondent.”
2. The candidate or issue that has been certified to the ballot for _____ election will remain on the ballot unless the Protester can show a reason, under the law, to remove it.
3. The Protester has the burden of proof. The burden of proof is by a preponderance of the evidence that the candidate or issue should not appear on the ballot.
4. The hearing will not be as formal as a court, but the rules of the hearing were explained at the preliminary meeting so you would know what to expect. Also, the court rules of evidence will not be used, but the Board will decide what witnesses and evidence we will consider in order to make a decision on the protest.
5. The Protester will present witnesses and evidence first. The Respondent and Board can ask questions of the witnesses after each testifies and the Respondent can object to evidence offered by the Protester to the Board. After the Protester is finished, then the Respondent will present witnesses and evidence. The Protester and Board can ask questions of the Respondent’s witnesses and the Respondent can object to evidence. Once the Respondent is done with witnesses and evidence, the Protester will then have a short opportunity to present rebuttal witnesses or evidence, which will be subject to questions by the Respondent and Board.

6. The hearing will be transcribed by a stenographer and all witnesses will be sworn before giving testimony.

7. At end of the hearing, the parties will be allowed to make summary arguments. These will be oral unless one of the parties asks to submit written summary arguments. The Protester will go first, then the Respondent. The Protester will be allowed a short rebuttal statement if desired since the Protester has the burden of proof.

8. After oral summary arguments, the board will deliberate and either make a decision at that time or may decide to consider the matter and issue a decision later.

9. If any party wishes to subpoena witnesses, the request must be filed **more than 3 business days before the hearing**. The parties will have to serve the subpoenas themselves.

10. If any party wishes to submit any briefs, cases, law or other documents to the board before hearing, that must be done **more than 3 business days before the hearing**. Also, the Board will have copies of whatever is filed, such as the petitions, protest and briefs.

11. Any party may have an attorney. The board will be represented by the Prosecuting Attorney. The Prosecuting Attorney will have no part in the decision on the protest. Instead, the sole function of the Prosecutor will be to answer any questions the board may have on the correct procedure for handling the protest and to answer any questions the board may have about any statute or case law.

This hearing notice is sent to you to comply with the Ohio Revised Code.

Sincerely yours,

Board of Elections

Example of Subpoena for Witness to Testify At Protest Hearing

(Note: A Party to the Protest will file a Praecipe for Service of Subpoena. The Board will then issue the subpoena like the example shown below. This will be served on the party subpoenaed and a copy showing that service was made on that person will be filed in the Board office. As with all legal matters, consult your Prosecutor.)

SUBPOENA ORC 3519.18 Civil Case

The State of Ohio, _____ County _____ County Board of Elections

To: (Name and Address)

You are hereby required to be and appear before the _____ County Board of Elections at the Board Office, _____ (address), on the _____ day of _____, at _____ a.m/p.m., to testify as a witness in a certain Protest pending before the Board of Elections entitled Protest Filed by _____;

and you are not to depart the Board of Elections without leave. Herein fail not, under penalty of law. And have you then and there this writ.

Said Board of Elections requires your said attendance on behalf of the (name of person requesting the subpoena)

Witness my hand this ____ day of _____, ____.

Chairman
_____ County Board of Elections

By _____

_____, Director

Certificate of Service

I, _____, certify that I served the above Subpoena
upon _____ on the _____ day of _____, _____,
by personal service.

(Name)

Witness my hand this ____ day of _____, ____.

Chairman
_____ County Board of Elections

By _____
_____, Director

Certificate of Service

I, _____, certify that I served the above Subpoena Duces
Tecum upon _____ on the ____ day of _____, _____,
by personal service.

(Name)

Suggested Agenda for a Protest Hearing

Before the hearing:

1. Set up room for hearing.
2. Have a sign in sheet to record who attended the hearing.

At the hearing:

1. Chairperson calls the Board into session for a special meeting. Chairperson either runs the hearing or turns the hearing over to the Board Member designated to preside over the Protest Hearing.

2. State the purpose of the special meeting – to hold a hearing on the protest filed by _____ (name) against _____ (give details of the protest for the record).

3. Presiding Board Member should then outline for the record what has taken place that led up to the Protest Hearing

Example:

On ____ date, Candidate X filed 10 Nominating Petitions and Statement of Candidacy for the office of _____ for the _____ election.

On ____ date, the Board of Elections approved the petitions and certified the name of Candidate X to the _____ election as a candidate for _____ office.

On ____ date, Y filed a protest pursuant to Ohio Revised Code Section _____ objecting to the name of Candidate X appearing on the ballot for the _____ election on the following grounds _____.

On _____, a meeting was scheduled with Candidate X and with Y to set a date for the protest hearing and to discuss the procedure that would be followed at the protest hearing. The protest hearing was scheduled for today.

All parties were notified by telephone and by certified letter. Notice of the hearing was also published in the local newspaper.

4. Introduce the Board Members and Staff.

5. Introduce the Prosecuting Attorney and state on the record that the Prosecuting Attorney will have no part in the decision on the protest. Instead, the sole function of the Prosecutor will be to answer any questions the board may have on the correct procedure for handling the protest and to answer any questions the board may have about any statute or case law.

6. Introduce the stenographer and explain for the record that everything will be taken down by the stenographer.

7. Have the Attorneys and Parties introduce themselves.
8. State on the record what the Board has reviewed prior to the hearing, such as the petitions, the protest, statutes, case law, directives or advisories and any briefs or documents submitted prior to the hearing by the parties.
9. State if the Board has any exhibits they wish to have available for use by the parties such as copies of the original petitions that were filed and the protest. These might be pre-marked Board's Exhibit 1 and 2.
10. Remind all present that the Protester has the burden of proof and must show by a preponderance of the evidence that the candidate or issue should not appear on the ballot. If the Protester fails to meet that burden, the candidate or issue will appear on the ballot.
11. Ask the Board Members and Staff if there is anything else that should be mentioned before the hearing begins.
12. Ask the parties or their attorneys if they have any further questions before the hearing begins.
13. Swear-in the witnesses. This might be done as follows:

Ask that anyone who intends to give testimony in the protest hearing should stand and raise their right hand. Once that is done, the witnesses are sworn: "Do you solemnly swear or affirm that the testimony you are about to give is the truth, the whole truth and nothing but the truth and this you do under penalty of perjury." Witnesses respond, "I do."
14. Ask the parties if they want the witnesses separated. If so, have the witnesses wait in another room where they can not hear the testimony of the others. Tell them a staff member will get them when the Board is ready to have them testify and not to discuss their testimony, before or after, they have been called as a witness.
15. Remind the parties that the court rules of evidence will not be used, but that the Board will decide what witnesses and evidence they will allow in order to make a decision on the protest.
16. Remind the parties that the Protester will present witnesses and evidence first. The Respondent and the Board can ask questions of the witnesses after each testifies and the Respondent can object to evidence offered by the Protester to the Board. After the Protester is finished, then the Respondent will present witnesses and evidence. The Protester and Board can ask questions of the Respondent's witnesses or the Protester can object to evidence. Once the Respondent is done with witnesses and evidence, the Protester will then have a short opportunity to present rebuttal witnesses or evidence, which will be subject to questions by the Respondent and Board.
17. Ask the Protester to call their first witness or present any evidence. Continue until both sides have presented their witnesses and evidence to the Board.

18. After all testimony has been presented, allow the parties to make summary arguments. These will be oral unless one of the parties asks to submit written summary arguments. The Protester will go first, then the Respondent. The Protester will be allowed a short rebuttal statement if the Protester wishes since the Protester has the burden of proof.

19. After summary arguments, the board deliberates and either makes a decision at that time or may decide to consider the matter and issue a decision later. The Prosecutor is present but only to answer any questions concerning the law.

20. Announce the decision of the Board either granting the protest or denying the protest.

21. Board or staff prepares summary minutes of the protest hearing showing the board's decision. Copies of the minutes are sent to all parties.

Suggested Minutes for a Protest Hearing

A special meeting of the _____ County Board of Elections was held on the ___ day of _____.

Those present were _____ (list board, staff, parties and their attorneys, prosecutor, stenographer, witnesses and members of the public).

The Chairperson called the Board into session for the special meeting. The Chairperson stated that the purpose of the special meeting was to hold a hearing on the protest filed by _____ (name) against _____ (give details of the protest for the record).

The Chairperson then stated what had taken place that led up to the Protest Hearing. (List the background)

Example:

On ___ date, Candidate X filed 10 Nominating Petitions and Statement of Candidacy for the office of _____ for the _____ election.

On ___ date, the Board of Elections approved the petitions and certified the name of Candidate X to the _____ election as a candidate for _____ office.

On ___ date, Y filed a protest pursuant to Ohio Revised Code Section _____ objecting to the name of Candidate X appearing on the ballot for the _____ election on the following grounds _____.

On _____, a meeting was scheduled with Candidate X and with Y to set a date for the protest hearing and to discuss the procedure that would be followed at the protest hearing.

The Chairperson said that all parties were notified of the hearing by telephone and by certified letter. Notice of the hearing was also published in the local newspaper.

The Chairperson introduced the Board Members, Staff, Stenographer and Prosecuting Attorney. The Chairperson stated that the Prosecuting Attorney would have no part in the decision on the protest. Instead, the sole function of the Prosecutor would be to answer any questions the board may have on the correct procedure for handling the protest and to answer any questions the board may have about any statute or case law.

The Chairperson then asked the Attorneys and Parties to introduce themselves for the record.

The Board said they had reviewed the following prior to the hearing _____ (such as the petitions, the protest, statutes, case law, directives or advisories and any briefs or documents submitted prior to the hearing by the parties).

The Board introduced the following Exhibits which were made available for use by the parties at the hearing:_____ (such as Board’s Exhibit 1 – Petitions of the Candidate X and Board’s Exhibit 2 – Protest filed by Y.)

The Chairperson said the Protester has the burden of proof and must show by a preponderance of the evidence that the candidate or issue should not appear on the ballot. If the Protester failed to meet that burden, the candidate or issue will appear on the ballot.

The Chairperson asked if there were any other issues to discuss before the hearing began.

The witnesses were then sworn in. The Chairperson asked if any party wished to have the witnesses separated. Upon request, the witnesses were removed and instructed not to discuss their testimony with each other.

The Board told the parties that the court rules of evidence will not be used, but that the Board will decide what witnesses and evidence they will allow in order to make a decision on the protest.

The Protester called the following witnesses and presented the following evidence_____. The Respondent next called the following witnesses and presented the following evidence_____. After, the Protester was given the opportunity to present rebuttal witnesses or evidence. The Protester presented the following rebuttal witnesses and evidence_____.

After all testimony was presented, the Board allowed the parties to make summary arguments. Both the Protester and the Respondent presented arguments to the Board. The Protester was then given an opportunity to give a rebuttal statement.

After summary arguments, the board deliberated and made the following decision on the Protest: _____.

There being no further business to come before the Board, the meeting was adjourned.

QUICK REFERENCE GUIDE

REFERENCE MATERIALS:

- Election Officials Manual *for County Board of Elections*
Chapter 7: Petitions, Write-Ins and Protests

ADVISORIES:

- Advisory No. 2008-10
Reporting Facts of Investigations under R.C. 3501.11(J)
Issuing and Serving Subpoenas

STATUTES RELATING TO PROTESTS AND PROTEST HEARINGS:

- 3501.11(J) Board Duties
- 3519.18 Power of Board in hearing protests
- 3501.39 Grounds for rejection of petition or declaration of candidacy
- 3513.041 Protests against write-in candidates
- 3513.05 Protests against the candidacy of any person filing a declaration of candidacy
- 3513.262 Written Protests and Hearings; Filing deadline for nominating petitions
- 3513.262 Written Protests and Hearings; Processing nominating petitions