

# State of Wisconsin \ Government Accountability Board

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Director and General Counsel

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## MEMORANDUM

**DATE:** For the Meeting of October 2, 2013

**TO:** Members, Wisconsin Government Accountability Board

**FROM:** Kevin J. Kennedy  
Director and General Counsel  
Government Accountability Board

Prepared and Presented by:  
Michael Haas, Elections Division Administrator

**SUBJECT:** Joe Fadness Complaint against Timothy Swiggum, Independent Candidate  
for the 69<sup>th</sup> Assembly District Special Election  
Complaint EL 13-5

### Summary

This memorandum summarizes Board staff's review of the challenge that has been filed by Joe Fadness to the nomination papers of Candidate Timothy Swiggum, Independent Candidate for the 69<sup>th</sup> Assembly District Special Election.

After the initial review, Board staff determined that Candidate Swiggum's nomination papers contained 209 valid signatures. State law requires a minimum of 200 valid signatures for the office of Representative to the Assembly. The Complaint alleges that the nomination papers, due to various insufficiencies regarding individual signatures, contain only 178 signatures and are therefore insufficient to grant ballot access to Candidate Swiggum.

Candidate Swiggum's Response disputes most of the challenges raised in the Complaint and also asserts that 3 signatures are valid which were originally struck by Board staff. After reviewing the Complaint and Response, Board staff recommends striking 5 additional signatures and counting 2 signatures which were struck in the original review. These changes would result in a total of 206 valid signatures and therefore Board staff recommends that the Board grant ballot access to Candidate Swiggum.

Attached to this memorandum are the Complaint filed by Mr. Fadness and the Response filed by Mr. Swiggum. Several exhibits were filed with the Complaint which can be viewed on the G.A.B. website at [Special Teleconference G.A.B. Meeting](#). Also attached to this memorandum is an itemized summary of the staff recommendation for each petition signature that was addressed in the Complaint or the Response, as well as a copy of Chapter GAB 2, Wis. Adm. Code, which governs the review of nomination papers. The following provisions in Chapter GAB 2 establish important principles related to the review of signatures on nomination papers:

## **2.05 Treatment and sufficiency of nomination papers**

(3) . . . . Where circumstances and the time for review permit, the filing officer may consult maps, directories and other extrinsic evidence to ascertain the correctness and sufficiency of information on a nomination paper.

(4) Any information which appears on a nomination paper is entitled to a presumption of validity. . . .

(5) Where any required item of information on a nomination paper is incomplete, the filing officer shall accept the information as complete if there has been substantial compliance with the law.

## **2.07 Challenges to nomination papers**

(3)(a) The burden is on the challenger to establish any insufficiency. If the challenger establishes that the information on the nomination paper is insufficient, the burden is on the challenged candidate to establish its sufficiency. . . .

### Analysis of Challenged Signatures

#### 1. Signatures with Illegible or Incomplete Dates

The Complaint (paragraphs 1 and 2) alleges that 3 signatures are invalid because the dates are illegible or incomplete. However, G.A.B. staff concluded that the dates were legible. In addition, Section GAB 2.05(15)(a), Wis. Adm. Code, provides that an incomplete or missing date may be determined by reference to the dates of other signatures on the paper. The disputed signatures substantially comply with the necessary requirements because the date information that can be determined from other surrounding signatures on the same nomination page.

Board staff recommends counting these 3 signatures.

#### 2. Signatures with Incomplete Addresses

The Complaint (paragraphs 3 through 11), alleges that 18 signatures are invalid due to incomplete addresses because the signer did not check the box indicating whether the municipality is a town, village, or city, or in one case, checked two of the boxes. It has been the prior interpretation of the Board that the address information substantially complies with the law and should be accepted pursuant to Section GAB 2.05(5), despite the signer failing to check the box to indicate the type of municipality for the jurisdiction.

The Complaint (paragraph 12) alleges that 1 signature is invalid due to an incomplete address because the signer listed a Post Office box number rather than a street address. Past Board policy has been to accept such signatures if the entire municipality in which the P.O. Box is located is within the District. Board staff has verified that is the case with the challenged signature. The P.O. Box is listed as being in the Town of Edgar, Wisconsin. There is no Town of Edgar in the State of Wisconsin, but the Village of Edgar lies entirely within the 69<sup>th</sup> Assembly District. Also, as noted above, the Board has previously determined that address

information substantially complies with the law despite the signer's failure to check the correct box indicating the type of municipality.

Board staff recommends counting the 19 signatures challenged as listing incomplete addresses.

### 3. Signatures of Individuals Alleged to be Disqualified Based Upon Felony Convictions

The Complaint (paragraphs 13, 14, and 17) alleges that 3 signatures are invalid because they contain the names of individuals who are not qualified electors due to felony convictions. In the first two instances the supporting documentation included with the Complaint was inconclusive to establish that the signers were disqualified due to felony convictions and current incarceration or supervision. In addition, G.A.B. staff received confirmation from the Department of Corrections that one individual had no record of a felony conviction and the other is currently under Department supervision but for a misdemeanor, not a felony.

The supporting documentation regarding the third signature alleged to be invalid due to a felony conviction also fails to meet the challenger's burden of proof. It is unclear whether the name on the signature is the same as the one cited in the court case documentation. Even assuming it is the same name, there is a lack of evidence to establish that the individual who signed the document is the same person noted in the court record listing the felony conviction. According to the Department of Corrections, the individual listed in the court record included with the Complaint is currently living in Minnesota and has never listed his address as being in the Town of Stratford, which is the address on the nomination paper. Absent sufficient evidence to prove that the individual who signed the petition is the same person who is under felony supervision, such as an identical date of birth, Board staff concludes that the statement on the petition indicating that each signer is eligible to vote should be presumed to be valid, and that the challenger has not met the burden to refute that presumption.

Board staff recommends counting the 3 signatures challenged as being disqualified electors due to felony convictions.

### 4. Signatures with Addresses of Business Locations

The Complaint (paragraphs 15) alleges that 2 signatures contain an address which is a business location, and that the location is outside of the 69<sup>th</sup> Assembly District. The location is the Woodland Hotel. Candidate Swiggum's Response argues that the business includes several apartments, which G.A.B. staff confirmed by consulting the website of the hotel, and that the two signers reside at the location. The allegation in the Complaint, therefore, does not overcome the principle that information on the nomination paper is presumed to be valid. In addition, by consulting the Statewide Voter Registration System, G.A.B. staff has determined that the address is located in the 69<sup>th</sup> Assembly District.

The Complaint (paragraph 18) also alleges that another signature contains a business address, and provides a copy of a listing in the White Pages indicating that the signer resides at a different location. Board staff concluded that this evidence shifts the burden of proof to Candidate Swiggum, and that the Response does not adequately establish that the address listed with the signature is the residential address of the signer.

Board staff recommends counting the 2 signatures described above as residing at the Woodland Hotel, but striking the signature that is related to the address documented in the White Pages listing.

#### 5. Signatures with Addresses Outside of the Jurisdiction

The Complaint (paragraph 16) alleges that 2 signatures should be struck because the same address listed for both signatures is outside of the 69<sup>th</sup> Assembly District. By consulting the Statewide Voter Registration System, G.A.B. staff has determined that the address is located in the 86<sup>th</sup> Assembly District.

Board staff recommends striking these 2 signatures because the individuals reside outside of the 69<sup>th</sup> Assembly District.

#### 6. Signatures Alleged to be in the Same Handwriting

The Complaint (paragraph 19) alleges that 2 signatures are written in the same handwriting. The Complaint provides an assertion but no direct evidence that the signatures were written by the same person. Candidate Swiggum's Response indicates that both individuals were present at the location when he circulated the petition, but he also states that the petition was signed inside the residence while he waited outside, and he cannot verify whether one individual wrote both signatures. Prior Board policy has been to accept signatures with similar handwriting, absent direct evidence that an individual did not make their own signature, because Board staff is not qualified to analyze handwriting. However, Mr. Swiggum's Response contradicts the circulator's certification which states that "I know that each person signed the paper with full knowledge of its content on the date indicated opposite his or her name." Without actually observing the signatures, Mr. Swiggum could not know that either individual signed the nomination paper opposite his or her name.

Board staff recommends striking both of these challenged signatures.

#### Analysis of Three Signatures Originally Struck

Candidate Swiggum's Response asserts that G.A.B. staff struck 3 signatures which should be counted. In one instance (page 12, line 3 of the nomination papers), staff agrees that the date is legible. In addition, the complete date may be determined by reference to the dates of other signatures on the same page.

Board staff recommends reversing its initial determination counting this signature as valid.

In the second instance, Candidate Swiggum asserts that a signature with an address that is missing the street number (page 15, line 5) should be counted because the signature of the individual's ward (who is also his mother) is directly below and contains a complete address. During the recall elections of 2011 and 2012, Board staff applied a policy of rejecting signatures that did not contain the street number, absent a written statement from the signers or other direct evidence that the two individuals resided together. In this instance, the Board may consider Candidate Swiggum's assertion of the relationship between the two signers and that he witnessed the signatures. In addition, Board staff has confirmed through the Statewide Voter Registration

System that the signer listing the incomplete address is a registered voter who resides at the same address listed for his ward on the following signature line.

The Board may consider whether to overrule or modify its prior practice, but based upon the policy established and applied during the recent recall petition reviews, Board staff recommends striking the signature because it lacks a street number, consistent with the determination during the initial review.

In the third instance, Candidate Swiggum asserts that a signature with a date that lacks the year (page 20, line 1) should be counted because the remaining signatures on the page indicate the year as 2013. In the past, the Board policy has required that signatures on the first and last line of a nomination paper contain the complete date information, and not allowed missing date information on those lines to be determined by reference to the dates of other signatures on the page. However, in the context of a court case challenging the Board's application of Section GAB 2.05(15)(a), Wis. Adm. Code, the Department of Justice has advised that the Board's interpretation of that rule was too restrictive in that it required incomplete dates to be "bracketed" by complete dates. The DOJ recommended that the Board equally apply the principle of determining missing date information by reference to other information on the page, even if the incomplete date appeared on the first or last signature line.

Based upon the legal guidance of the DOJ, Board staff recommends counting this signature.

#### Conclusion and Recommended Motion

Based upon the above analysis, Board staff recommends that 3 challenged signatures should be struck, that 2 additional signatures be struck due to statements in the Response, and that 2 signatures which were struck upon initial review should be counted, for a net reduction of 3 signatures from the original count of 209 valid signatures. Board staff recommends the following motion:

**The Board incorporates the staff above as its findings of fact and conclusions of law. The Board approves the challenge to Candidate Swiggum's nomination papers as to 3 signatures, strikes 2 additional signatures, and adds one signature that was originally struck. The Board therefore verifies 206 valid signatures, and grants ballot access to Candidate Swiggum.**

**Review of challenged signatures - Timothy Swiggum - Fadness Complaint**

<b>Challenge</b>	<b>Staff Decision</b>	<b>Change</b>
1	Challenge not valid. Staff can read date for signature 6, page 5. It is a valid date. Challenge not valid. Staff can read date for signature 7, page 5. Both signatures would also count because dates around them are valid.	0
2	Challenge not valid. Substantial compliance.	0
3-11	Challenges not valid. Substantial compliance.	0
12	Challenge not valid. Substantial compliance. While there is no Town of Edgar, the entire Village of Edgar lies within AD 69.	0
13	Challenge not valid. Evidence provided is inconclusive.	0
14	Challenge not valid. Evidence provided is inconclusive.	0
15	Challenge not valid. A review of the website provided shows apartments available to rent at this address. Also, Facebook page may not have the most up-to-date information.	0
16	Challenge valid. An address search on myvote.wi.gov shows this address is located in AD 86 not AD 69.	-2
17	Challenge not valid. It is not clear if the signer is the same person listed in the evidence provided.	0
18	Challenge valid. Paperwork submitted shows the signer listed a business address as his residence.	-1
19	Challenge not valid. Evidence provided is inconclusive. There are similarities, but G.A.B. staff is not handwriting experts.	0
	TOTAL	3 (Struck)
	209-3 = 206	

**Review of challenged signatures - Timothy Swiggum - Swiggum Response**

<b>Challenge</b>	<b>Staff Decision</b>	<b>Change</b>
1	Staff can read date for signature 6, page 5. It is a valid date. Staff can date read signature 7, page 5. Both signatures would also count because dates around them are valid.	0
2	Substantial compliance	0
3-11	Substantial compliance	0
12	Substantial compliance	0
13	Swiggum does not dispute, staff decision stands	0
14	Swiggum does not dispute, staff decision stands	0
15	Swiggum argument supports staff decision on Fadness complaint.	0
16	Swiggum does not dispute Fadness complaint, staff decision stands	-2
17	Swiggum does not dispute, staff decision stands	0
18	Swiggum states signer lives at the address. Staff found a Google Maps street view photo, which shows the business may have apartments above it. The photograph is not conclusive. Swiggum provides no other evidence to support his claim. Signature struck based on evidence provided in Fadness complaint.	-1
19	Swiggum states both individuals were present when he offered the nomination paper. However, he did not see them each sign the page. Both signatures will now be struck because the circulator did not witness them sign.	-2
	TOTAL	5 (Struck)
	209-5 = 204	

**Swiggum contends G.A.B. staff incorrectly struck the following signatures:**

Page 12, Line 3 -	Upon review of Swiggum's statement, staff will count the signature. It does appear there is a "1" hidden by the slash mark. Additionally, based on dates surrounding this signature, it could be assumed that this date should be 9/21/13	+ 1
Page 15, Line 5 -	Staff struck this signature because there was no house number with the street name. Swiggum's statement does not rehabilitate this signature. This signature will not be counted.	0
Page 20, Line 1 -	Signature was struck consistent with current agency nomination paper review guidelines. However, the "Scott Gordon Case" allowed for incomplete dates for first or last signer, so long as the year can be reasonably determined from other dates on the page. Staff will count this signature.	+ 1
	TOTAL	2 (Added)

**FINAL TOTAL: 209 (original count) - 5 (3 struck from challenge and 2 struck as result of candidate response) = 204 + 2 (added based on candidate response) = 206**

## Chapter GAB 2

### ELECTION RELATED PETITIONS

GAB 2.05 Treatment and sufficiency of nomination papers.  
GAB 2.07 Challenges to nomination papers.

GAB 2.09 Treatment and sufficiency of election petitions.  
GAB 2.11 Challenges to election petitions.

**Note:** Chapter EIBd 2 was renumbered chapter GAB 2 under s. 13.92 (4) (b) 1., Stats., and corrections made under s. 13.92 (4) (b) 2. and 7., Stats., [Register April 2008 No. 628](#).

**GAB 2.05 Treatment and sufficiency of nomination papers. (1)** Each candidate for public office has the responsibility to assure that his or her nomination papers are prepared, circulated, signed, and filed in compliance with statutory and other legal requirements.

**(2)** In order to be timely filed, all nomination papers shall be in the physical possession of the filing officer by the statutory deadline. Each of the nomination papers shall be numbered, before they are filed, and the numbers shall be assigned sequentially, beginning with the number "1". Notwithstanding any other provision of this chapter, the absence of a page number will not invalidate the signatures on that page.

**(3)** The filing officer shall review all nomination papers filed with it, up to the maximum number permitted, to determine the facial sufficiency of the papers filed. Where circumstances and the time for review permit, the filing officer may consult maps, directories and other extrinsic evidence to ascertain the correctness and sufficiency of information on a nomination paper.

**(4)** Any information which appears on a nomination paper is entitled to a presumption of validity. Notwithstanding any other provision of this chapter, errors in information contained in a nomination paper, committed by either a signer or a circulator, may be corrected by an affidavit of the circulator, an affidavit of the candidate, or an affidavit of a person who signed the nomination paper. The person giving the correcting affidavit shall have personal knowledge of the correct information and the correcting affidavit shall be filed with the filing officer not later than three calendar days after the applicable statutory due date for the nomination papers.

**(5)** Where any required item of information on a nomination paper is incomplete, the filing officer shall accept the information as complete if there has been substantial compliance with the law.

**(6)** Nomination papers shall contain at least the minimum required number of signatures from the circuit, county, district or jurisdiction which the candidate seeks to represent.

**(7)** The filing officer shall accept nomination papers which contain biographical data or campaign advertising. The disclaimer specified in s. 11.30 (2), Stats., is not required on any nomination paper.

**(8)** An elector shall sign his or her own name unless unable to do so because of physical disability. An elector unable to sign because of physical disability shall be present when another person signs on behalf of the disabled elector and shall specifically authorize the signing.

**(9)** A person may not sign for his or her spouse, or for any other person, even when they have been given a power of attorney by that person, unless sub. (8) applies.

**(10)** The signature of a married woman shall be counted when she uses her husband's first name instead of her own.

**(11)** Only one signature per person for the same office is valid. Where an elector is entitled to vote for more than one candidate for the same office, a person may sign the nomination papers of as many candidates for the same office as the person is entitled to vote for at the election.

**(12)** A complete address, including municipality of residence for voting purposes, and the street and number, if any, of the residence, (or a postal address if it is located in the jurisdiction that the candidate seeks to represent), shall be listed for each signature on a nomination paper.

**(13)** A signature shall be counted when identical residential information or dates for different electors are indicated by ditto marks.

**(14)** No signature on a nomination paper shall be counted unless the elector who circulated the nomination paper completes and signs the certificate of circulator and does so after, not before, the paper is circulated. No signature may be counted when the residency of the circulator cannot be determined by the information given on the nomination paper.

**(15)** An individual signature on a nomination paper may not be counted when any of the following occur:

(a) The date of the signature is missing, unless the date can be determined by reference to the dates of other signatures on the paper.

(b) The signature is dated after the date of certification contained in the certificate of circulator.

(c) The address of the signer is missing or incomplete, unless residency can be determined by the information provided on the nomination paper.

(d) The signature is that of an individual who is not 18 years of age at the time the paper is signed. An individual who will not be 18 years of age until the subject election is not eligible to sign a nomination paper for that election.

(e) The signature is that of an individual who has been adjudicated not to be a qualified elector on the grounds of incompetency or limited competency as provided in s. 6.03 (3), Stats., or is that of an individual who was not, for any other reason, a qualified elector at the time of signing the nomination paper.

**(16)** After a nomination paper has been filed, no signature may be added or removed. After a nomination paper has been signed, but before it has been filed, a signature may be removed by the circulator. The death of a signer after a nomination paper has been signed does not invalidate the signature.

**(17)** This section is promulgated pursuant to the direction of s. 8.07, Stats., and is to be used by election officials in determining the validity of all nomination papers and the signatures on those papers.

**History:** Emerg. cr. 8-9-74; cr. [Register, November, 1974, No. 227](#), eff. 12-1-74; emerg. r. and recr. eff. 12-16-81; emerg. r. and recr. eff. 6-1-84; cr. [Register, November, 1984, No. 347](#), eff. 12-1-84; r. and recr. [Register, January, 1994, No. 457](#), eff. 2-1-94; [CR 00-153](#): am. (2), (4), and (14), r. (15), renum. (16), (17), and (18) to be (15), (16) and (17), and am. (15) (b) as renum., [Register September 2001 No. 549](#), eff. 10-1-01.

**GAB 2.07 Challenges to nomination papers. (1)** The board shall review any verified complaint concerning the sufficiency of nomination papers of a candidate for state office that is filed with the board under ss. 5.05 and 5.06, Stats.; and the local filing officer shall review any verified complaint concerning the sufficiency of nomination papers of a candidate for local office that is filed with the local filing officer under s. 8.07, Stats. The filing officer shall apply the standards in s. GAB 2.05 to determine the sufficiency of nomination papers, including consulting extrinsic sources of evidence under s. GAB 2.05 (3).

(2) (a) Any challenge to the sufficiency of a nomination paper shall be made by verified complaint, filed with the appropriate filing officer. The complainant shall file both an original and a copy of the challenge at the time of filing the complaint. Notwithstanding any other provision of this chapter, the failure of the complainant to provide the filing officer with a copy of the challenge complaint will not invalidate the challenge complaint. The filing officer shall make arrangements to have a copy of the challenge delivered to the challenged candidate within 24 hours of the filing of the challenge complaint. The filing officer may impose a fee for the cost of photocopying the challenge and for the cost of delivery of the challenge to the respondent. The form of the complaint and its filing shall comply with the requirements of ch. GAB 20. Any challenge to the sufficiency of a nomination paper shall be filed within 3 calendar days after the filing deadline for the challenged nomination papers. The challenge shall be established by affidavit, or other supporting evidence, demonstrating a failure to comply with statutory or other legal requirements.

(b) The response to a challenge to nomination papers shall be filed, by the candidate challenged, within 3 calendar days of the filing of the challenge and shall be verified. After the deadline for filing a response to a challenge, but not later than the date for certifying candidates to the ballot, the board or the local filing officer shall decide the challenge with or without a hearing.

(3) (a) The burden is on the challenger to establish any insufficiency. If the challenger establishes that the information on the nomination paper is insufficient, the burden is on the challenged candidate to establish its sufficiency. The invalidity or disqualification of one or more signatures on a nomination paper shall not affect the validity of any other signatures on that paper.

(b) If a challenger establishes that an elector signed the nomination papers of a candidate more than once or signed the nomination papers of more than one candidate for the same office, the 2nd and subsequent signatures may not be counted. The burden of proving that the second and subsequent signatures are that of the same person and are invalid is on the challenger.

(c) If a challenger establishes that the date of a signature, or the address of the signer, is not valid, the signature may not be counted.

(d) Challengers are not limited to the categories set forth in pars. (a) and (b).

(4) The filing officer shall examine any evidence offered by the parties when reviewing a complaint challenging the sufficiency of the nomination papers of a candidate for state or local office. The burden of proof applicable to establishing or rebutting a challenge is clear and convincing evidence.

(5) Where it is alleged that the signer or circulator of a nomination paper does not reside in the district in which the candidate being nominated seeks office, the challenger may attempt to establish the geographical location of an address indicated on a nomination paper, by providing district maps, or by providing a statement from a postmaster or other public official.

**History:** Emerg. cr. 8-9-74; cr. Register, November, 1974, No. 227, eff. 12-1-74; emerg. r. and recr. eff. 12-16-81; emerg. r. and recr. eff. 6-1-84; cr. Register, Novem-

ber, 1984, No. 347, eff. 12-1-84; emerg. am. (1), (4) to (6), eff. 6-1-86; am. (1), (4) to (6), Register, November, 1986, No. 371, eff. 12-1-86; r. and recr. Register, January, 1994, No. 457, eff. 2-1-94; CR 00-153: am. (2) (a) and (b), Register September 2001 No. 549, eff. 10-1-01; reprinted to restore dropped copy in (2) (b), Register December 2001 No. 552; correction in (1) made under s. 13.92 (4) (b) 7., Stats., Register April 2008 No. 628.

**GAB 2.09 Treatment and sufficiency of election petitions.** (1) Except as expressly provided herein, the standards established in s. GAB 2.05 for determining the treatment and sufficiency of nomination papers are incorporated by reference into, and are made a part of, this section.

(2) In order to be timely filed, all petitions required to comply with s. 8.40, Stats., and required by statute or other law to be filed by a time certain, shall be in the physical possession of the filing officer not later than the time set by that statute or other law.

(3) All petitions shall contain at least the number of signatures, from the election district in which the petition was circulated, equal to the minimum required by the statute or other law establishing the right to petition.

(4) Only one signature per person for the same petition, is valid.

(5) This section applies to all petitions which are required to comply with s. 8.40, Stats., including recall petitions, and to any other petition whose filing would require a governing body to call a referendum election.

**History:** Cr. Register, January, 1994, No. 457, eff. 2-1-94.

**GAB 2.11 Challenges to election petitions.** (1) Except as expressly provided herein, the standards established in s. GAB 2.07 for determining challenges to the sufficiency of nomination papers apply equally to determining challenges to the sufficiency of petitions required to comply with s. 8.40, Stats., including recall petitions, and to any other petition whose filing requires a governing body to call a referendum election.

(2) (a) Any challenge to the sufficiency of a petition required to comply with s. 8.40, Stats., shall be made by verified complaint filed with the appropriate filing officer. The form of the complaint, the filing of the complaint and the legal sufficiency of the complaint shall comply with the requirements of ch. GAB 20; the procedure for resolving the complaint, including filing deadlines, shall be governed by this section and not by ch. GAB 20.

(b) The complaint challenging a petition shall be in the physical possession of the filing officer within the time set by the statute or other law governing the petition being challenged or, if no time limit is specifically provided by statute or other law, within 10 days after the day that the petition is filed.

(3) The response to a challenge to a petition shall be filed within the time set by the statute or other law governing that petition or, if no time limit is specifically provided by statute or other law, within 5 days of the filing of the challenge to that petition. After the deadline for filing a response to a challenge, the filing officer shall decide the challenge with or without a hearing.

**History:** Cr. Register, January, 1994, No. 457, eff. 2-1-94.