



**WEST VIRGINIA
SECRETARY OF STATE**

NATALIE E. TENNANT

ADMINISTRATIVE LAW DIVISION

eFILED

7/11/2014 9:01:46 AM

OFFICE OF
WEST VIRGINIA SECRETARY OF STATE

**FORM 5 -- NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE OR
A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY **Education**

RULE TYPE **Legislative Exempt** AMENDMENT TO EXISTING RULE **Yes** TITLE-SERIES **126-**

RULE NAME **Rules of Procedure for Administrative Hearings and Appeals (1340)** **004**

CITE AUTHORITY **W. Va. Code §§29A-3B-1, et seq.; W. Va. Board of Education v. Hechler, 180 W. Va. 451; 376 S.E.2d 839 (1988)**

RULE IS LEGISLATIVE EXEMPT

Yes

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

W. Va. Code §§29A-3B-1, et seq.; W. Va. Board of Education v. Hechler, 180 W. Va. 451; 376 S.E.2d 839 (1988)

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS

Monday, August 11, 2014

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENTS ARE TRUE AND CORRECT.

Yes

Charles K Heinlein -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.



Title-Series: 126-004



Rule Id: 9380



Document: 25991

126CSR4

TITLE 126
PROCEDURAL RULE BOARD OF EDUCATION
SERIES 4

RULES OF PROCEDURE FOR
ADMINISTRATIVE HEARINGS AND APPEALS (1340)

§126-4-1. General.

1.1. Scope. - The "Rules of Procedure for Administrative Hearings and Appeals" are promulgated to assure procedural due process and expeditious processing of administrative proceedings before the State Superintendent of Schools. Nothing herein should be interpreted to give rise to an action on the part of any county school personnel; all remedies which are allowable by a county board of education or county school superintendent should be exhausted before appealing to the State Superintendent to hear a controversy. Employee grievances are governed by the provisions of W. Va. Code §18-29-1, *et seq.*

1.2 . Authority. - W. Va. Const., Article XII, §2; W. Va. Code §§6-9A-1 et seq., 18-2-5, 18-3-4, 18A-3-2a, 18A-3-6 and 18A-4-8e.

1.3. Filing Date. – July 11, 2014

1.4. Effective Date. – August 11, 2014

1.5. Repeal of Former Rule. This procedural rule amends W. Va. 126CSR4 West Virginia Board of Education Policy 1340 "Rules of Procedure for Administrative Hearings and Appeals" filed May 10, 2013 and effective July 1, 2013.

§126-4-2. Foreword.

2.1. This policy governs the disposition of all administrative proceedings as well as the hearing of appeals and the adjudication of controversies and disputes arising under school laws by the State Superintendent of Schools.

§126-4-3. General Rules.

3.1. Definition of "Designee." As used in these rules, "Designee" shall mean that employee of the West Virginia Department of Education (WVDE) designated by the Superintendent to hear and determine issues pursuant to the terms and conditions of this policy.

3.2. Definition of "Superintendent." As used in these rules, unless a different meaning appears from the context, "Superintendent" shall mean the State Superintendent of Schools.

3.3. Definition of "Party." "Party" shall mean petitioner, respondent, and/or intervener. "Party" shall also mean teacher or school bus operator to the extent pertinent.

3.4. All parties shall receive notice at least ten (10) days prior to the hearing. The notice of hearing shall include:

3.4.a. the date, time and place of the hearing,

3.4.b. a concise statement of the grounds for the licensure action and possible outcomes,

3.4.c. notification that either the Superintendent or a designee of the Superintendent shall conduct the hearing.

3.5. A copy of this policy shall be provided to the parties to the hearing.

3.6. Appearance Pro Se. Any person may either appear in person or be represented by a representative or an attorney at law admitted and authorized to practice in this State.

3.7. Authority of Superintendent. The Superintendent shall have authority to administer oaths and affirmations; examine witnesses and receive evidence; rule upon offers of proof; issue subpoenas; take or cause depositions to be taken whenever the ends of justice would, in the Superintendent's opinion, be served thereby; regulate the course of the hearing; and dispose of procedural requests or similar matters. The authority of the Superintendent shall extend to his/her designee in all cases arising under this policy when the matter is heard by the designee at the request of the Superintendent.

3.7.a. The Superintendent may also call witnesses and question them. The Superintendent may limit the number of witnesses who will be called, within reason, and may also limit the length of oral argument.

3.7.b. A hearing may be adjourned from one day to another or to another place either by announcement by the Superintendent at the hearing or by appropriate notice.

3.7.c. The Superintendent may grant a continuance for good cause shown by the requesting party or upon his/her own motion.

3.8. Evidence. The formal rules of evidence shall be relaxed. Evidence will be admissible if it is material and relevant to the matter; however, irrelevant, immaterial or unduly repetitious evidence shall be excluded. All evidence, including any records, investigations, reports and documents which the Superintendent desires to consider as evidence in making a decision, shall be offered and made a part of the record in the proceeding. The Superintendent may take official notice of any fact which may be judicially noticed by a Court and, in addition, may take official notice of general, technical or scientific facts within the Superintendent's knowledge. Parties may be given a fair opportunity to refute the facts so noticed. The requirements of this rule shall not apply to cases in which the truth of the particular fact or matter is admitted or to a determination of appropriate relief.

3.9. Stenographic Transcript. Where there is available a stenographic transcript of proceedings before a county board of education, or before any court of record or other official or body whose action is called into question before the Superintendent, either party may, if at least ten (10) days' notice of intention to do so has been given to opposing parties or counsel, offer the transcript of testimony of any witness or witnesses named in said notice in lieu of producing said witness or witnesses at the hearing.

3.10. Briefs and Oral Argument. All parties shall have the opportunity to submit briefs on the matter, and to present oral argument if requested. Oral argument shall be limited to thirty (30) minutes for each party, unless the Superintendent shall otherwise order. Briefs, if any, shall be submitted within the time fixed by the Superintendent.

3.11. Failure to Cooperate. The Superintendent, on his or her own initiative or at the request of the designee, may institute judicial proceedings for punishment of persons for contemptuous conduct directed to the Superintendent or the designee, in the course of a proceeding.

3.12. **Written Decision.** Every determination shall be embodied in a written decision which shall contain both findings of fact and conclusions of law and an appropriate recommended disposition. Such decisions shall be issued by the Superintendent's designee. Upon receipt of the recommended order with findings and conclusions from such designee, the Superintendent shall review the same along with the record and issue an order adopting the findings, conclusions, and/or recommendations of the designee; rejecting the findings, conclusions and/or recommendations of the designee; or remanding the matter back to the designee with instructions for further evidence or findings, conclusions and/or recommendations. When the case is heard directly by the Superintendent, the Superintendent shall issue both a written decision, which shall set forth findings of fact and conclusions of law, and an appropriate order. Said orders shall be filed in the office of the Superintendent and copies thereof shall be served or mailed to the parties of record affected thereby or their attorneys of record within thirty (30) days following the Superintendent's receipt of any recommendation from his or her designee or within thirty (30) days following the hearing when heard directly by the Superintendent.

3.13. **Waiving of Rules.** Any of the provisions of these rules relating to the presentation of his/her case or argument may be waived by any party or his/her attorney.

3.14. Hearings shall be recorded by electronic means or by a court reporter.

§126-4-4. Rules for Hearings on Teacher and School Bus Operator Certification Suspension/Revocation/Recall/Denial for Cause.

4.1. Definitions of terms used in this section.

4.1.a. "Hearing Officer." As used in these rules, unless a different meaning appears from the context, "Hearing Officer" shall mean the State Superintendent of Schools, the Professional Practice Panel, the Licensure Appeal Panel, or a WVDE employee designated by the Superintendent to hear and determine issues of suspension, revocation, permanent revocation and/or denial for cause or it shall mean the School Bus Operator Review Panel, which hears and makes recommended decisions regarding school bus operator certificate suspension, revocation, recall or denial for cause.

4.1.b. "Teacher." As used in these rules, the word "Teacher" (and its derivatives) shall mean any person certified or otherwise professionally licensed by the Superintendent pursuant to policy, rule, or regulation of the West Virginia Board of Education or pursuant to statute, including but not limited to administrators, professionals, paraprofessionals, coaches and holders of service certificates.

4.1.c. "Teacher Applicant." As used in these rules, the term "Teacher Applicant" (and its derivatives) shall mean any person applying for a teacher license issued by the Superintendent pursuant to policy, rule or regulation of the West Virginia Board of Education or pursuant to statute.

4.1.d. "School Bus Operator Applicant." As used in these rules, the term "School Bus Operator Applicant" (and its derivatives) shall mean any person on whose behalf a county board of education or other public institution has submitted a request for certification to operate a school bus to the Superintendent pursuant to policy, rule or regulation of the West Virginia Board of Education or pursuant to statute.

4.1.e. "Party." "Party" shall mean petitioner, respondent, and/or intervener. "Party" shall also mean teacher or school bus operator to the extent pertinent.

4.1.f. "Suspension." "Suspension", as used in these rules, shall mean a temporary revocation imposed for a fixed and definite period of time. After a period of suspension has expired, the affected individual must reapply for licensure or certification unless automatic reinstatement was recommended by the Professional Practice Panel and/or ordered by the Superintendent.

4.1.g. "Professional Practice Panel." "Professional Practice Panel" shall mean the seven (7) individuals selected to hear and make recommendations to the Superintendent regarding the permanent revocation, revocation, suspension, recall, imposition of conditions for reinstatement of a teacher's license and the reinstatement of a teacher's license pursuant to W. Va. Code §18A-3-6, 126CSR154 West Virginia Board of Education Policy 5050, West Virginia Commission for Professional Teaching Standards (Policy 5050) and 126CSR136 West Virginia Board of Education Policy 5202, Minimum Requirements for the Licensure of Professional/Paraprofessional Personnel and Advanced Salary Classifications (Policy 5202).

4.1.h. "Licensure Appeal Panel." "Licensure Appeal Panel" shall mean the seven (7) individuals selected to hear and make recommendations to the Superintendent regarding permanent denial for cause and denial for cause of a teacher's license, pursuant to W. Va. Code §§18A-3-1(i), 18A-3-2a and 18A-3-6, and Policy 5050.

4.1.i. "School Bus Operator Review Panel." "School Bus Operator Review Panel" shall mean the seven (7) individuals selected to hear and make recommendations to the Superintendent regarding denial for cause, suspension, revocation or recall of a school bus operator certificate, pursuant to W. Va. Code §18A-4-8e and 126CSR92 West Virginia Board of Education Policy 4336, West Virginia School Bus Transportation Policy and Procedures Manual (Policy 4336).

4.2. Grounds for Permanent Revocation, Revocation, or Suspension and Imposition of Reinstatement Conditions on ~~of~~ Teaching Certificates. The Superintendent may, after ten (10) days' notice and upon proper evidence, permanently revoke, revoke, suspend or impose other conditions on the active or expired certificate(s) of any teacher for intemperance, untruthfulness, cruelty or immorality, the conviction, guilty plea or plea of no contest to any charge involving sexual misconduct with a minor or a student, or for using fraudulent, unapproved or insufficient credit to obtain the certificates. (W. Va. Code §§18A-3-6; 18A-4-8e(4)).

4.3. Grounds for Denial of Teaching Licensure for Cause. A teaching certificate shall not be issued to any person who is not of good moral character and physically, mentally and emotionally qualified to perform the duties for which the certification would be granted or for any other cause which would justify the permanent revocation, revocation or suspension of certification. If the cause would justify the permanent revocation of certification, a denial of teaching licensure for cause may be designated as permanent. (W. Va. Code §§18A-3-1(i), 18A-3-2a, 18A-3-6).

4.4. Grounds for Revocation or Suspension and Imposition of Reinstatement Conditions on School Bus Operator's Certificate. The Superintendent may, after ten (10) days' notice and upon proper evidence, suspend, revoke or refuse to renew the certification for cause or impose any conditions upon the certification of any school bus operator for intemperance, untruthfulness, cruelty, immorality, conviction of a felony charge, conviction of any charge involving sexual misconduct with a minor or a student, or just and sufficient cause for revocation specified in Section 19.1 of Policy 4336.

4.5. Grounds for Denial of School Bus Operators Licensure for Cause. The Superintendent may refuse to certify a candidate for school bus operator who is not of good moral character and is not physically, mentally and emotionally qualified to perform the duties of school bus operator safely and efficiently, including just and sufficient cause specified in Section 15.3 of Policy 4336.

4.6. Application for Reinstatement of Suspended or Revoked Teaching Certificates.

4.6.a. A teacher whose certificate has been suspended may apply for reinstatement once conditions for reinstatement imposed by the Superintendent have been satisfied. The application for reinstatement shall be considered an application for initial license under W. Va. Code § 18A-3-10, and the applicant must therefore be fingerprinted for a criminal background check. The WVDE shall conduct an investigation to determine whether the teacher has satisfied all requirements for reinstatement and demonstrated a record of rehabilitation, i.e., presently possessing the integrity, moral character and competence to resume teaching. If, during the period of revocation, the requirements for the teacher's certification changed, the teacher must satisfy those requirements before reinstatement. If the WVDE determines that all reinstatement requirements, including rehabilitation, have been met, the Superintendent may reinstate a teacher's certificate without a hearing. If the WVDE determines that a question exists as to a teacher's fulfillment of all requirements, and therefore, a hearing is necessary, it shall submit a written report to the Professional Practice Panel, which shall conduct a hearing and make a recommendation to the Superintendent whether the teacher's certificate should be reinstated and whether any conditions or restrictions should be placed upon the reinstated certificate.

4.6.b. A teacher whose certificate has been permanently revoked may not apply for reinstatement.

4.6.c. Except in the case of a permanent revocation, a teacher whose certificate has been revoked may apply for reinstatement after the expiration of five years from the effective date of revocation. The application for reinstatement shall be considered an application for initial license under W. Va. Code § 18A-3-10, and the applicant must therefore be fingerprinted for a criminal background check. The WVDE shall conduct an investigation to determine whether the teacher has satisfied any requirements for reinstatement imposed by the Superintendent and demonstrated a record of rehabilitation, i.e., presently possessing the integrity, moral character and competence to resume teaching. If, during the period of revocation, the requirements for the teacher's certification changed, the teacher must satisfy those requirements before reinstatement. At the conclusion of its investigation, the WVDE shall submit a written report to the Professional Practice Panel, which shall conduct a hearing and make a recommendation to the Superintendent on whether the teacher should be reinstated and, if so, whether conditions or restrictions should be placed upon the reinstated license. In determining rehabilitation, the Professional Practice Panel should consider the seriousness of the conduct that formed the basis of the revocation.

4.67. Duty of County Superintendent. It shall be the duty of any county superintendent who knows of any conduct on the part of any teacher, including student teachers, or school bus operators for which a certificate may be denied, permanently denied, revoked, permanently revoked, suspended or recalled, to report the same, together with all the facts and evidence, to the Superintendent for such action as may be proper. In the case of a student teacher, the county superintendent must also send the report to the appropriate teacher preparation institution. Failure to report such information, if willful, may be grounds for revocation of the certificate of the county superintendent.

4.78. Recalling Certificates for Correction. If a teaching or school bus operator certificate has been granted through an error, oversight or misinformation, the Superintendent shall have authority to recall the certificate and make such corrections as will conform to the requirements of law and West Virginia Board of Education policy.

4.9. Denial for Cause Proceedings. Upon receipt of a notice of recommendation of denial for cause of a teaching application from the WVDE Office of Professional Preparation or of a school bus operator application from the WVDE Office of Transportation, the applicant may submit a written request for an

appeal hearing within thirty (30) days of receipt. If no such hearing request is timely received, the application may be denied for cause by the Superintendent. If an appeal hearing request is received from a teaching applicant, the matter will be scheduled for a hearing before the Licensure Appeal Panel. If an appeal hearing request is received from a school bus operator applicant, the matter will be scheduled for a hearing before the School Bus Operator Review Panel.

4.10. Notice of Teaching and School Bus Operator Certificate Denial, Revocation, Suspension and Recall Proceedings. Teaching and school bus operator certificate denial, revocation, suspension or recall proceedings shall be conducted before the appropriate Hearing Officer as set forth in Section 4.1.a. The teacher or school bus operator shall receive notice ten (10) days prior to the hearing.

4.10.a. The notice shall include:

4.10.a.1. the date, time and place of the hearing,

4.10.a.2. a concise statement of the charges or reasons for denial,

4.10.a.3. identification of the Hearing Officer conducting the hearing, and

4.10.a.4. the possible actions to be taken against the certificate, when applicable.

4.10.b. Upon timely request by the teacher or school bus operator, a more definite statement of the charges shall be provided to the teacher or school bus operator.

4.10.c. Appearance Pro Se. Any person may either appear in person with or without a representative or an attorney at law admitted and authorized to practice in this State.

4.10.d. A quorum shall be required, which is a majority of the Panel hearing the matter.

4.11. General Hearing Procedures.

4.11.a. The hearing shall be open to the public, unless the teacher, school bus operator or applicant requests that it be closed. The Hearing Office may close portions of the hearing to the public when evidence protected under the Family Education Rights and Privacy Act, 12 U.S.C. §1332g, is presented. Students shall be referred to by their initials whenever possible.

4.11.b. The WVDE bears the burden of proof and shall present its evidence first in permanent revocation, revocation, suspension and denial for cause proceedings. The burden of proof level, i.e., preponderance of evidence or clear and convincing is set forth in W. Va. Code §18A-3-6 and §18A-4-8e(4)(C). The teacher, school bus operator or applicant may present his or her position through introduction of evidence, examination and cross-examination of witnesses, and oral argument. A teacher applying for reinstatement of a suspended or revoked license bears the burden of proof and shall present his or her evidence first.

4.11.c. The Hearing Officer may also call witnesses and question them, as well as those called by the parties. The Hearing Officer may limit the number of witnesses who will be called, within reason, and may also limit the length of oral argument when heard.

4.11.d. A hearing may be adjourned from one day to another or to another place either by announcement by the Hearing Officer at the hearing or by appropriate notice.

4.11.e. The Superintendent, a designee or the Chair of the appropriate Panel may grant a continuance for good cause shown by the requesting party or upon his/her own motion.

4.11.f. Authority of Hearing Officer. The Hearing Officer shall have authority to administer oaths and affirmations; examine witnesses and receive evidence; rule upon offers of proof; issue subpoenas; take or cause depositions to be taken whenever the ends of justice would, in the Hearing Officer's opinion, be served thereby; regulate the course of the hearing; and dispose of procedural requests or similar matters.

4.11.g. The Hearing Officer shall have authority to recommend that a teacher's or school bus operator's certificate be revoked, suspended, denied for cause by the Superintendent, ~~and~~ to recommend conditions upon which a certificate may be restored and to recommend whether a teacher's certificate should be reinstated.

4.11.h. Hearings shall be recorded by electronic means or by a court reporter.

4.11.i. Evidence. The formal rules of evidence shall be relaxed. Evidence will be admissible if it is material and relevant to the matter; however, irrelevant, immaterial or unduly repetitious evidence shall be excluded. All evidence, including any records, investigations, reports and documents which the Hearing Officer desires to consider as evidence in making a decision, shall be offered and made a part of the record in the proceeding. The Superintendent may take official notice of any fact which may be judicially noticed by a Court and, in addition, may take official notice of general, technical or scientific facts within the Hearing Officer's knowledge. Parties may be given a fair opportunity to refute the facts so noticed. The requirements of this rule shall not apply to cases in which the truth of the particular fact or matter is admitted or to a determination of appropriate relief. Revocation, suspension, or other action against the certificate of a teacher or school bus operator in another jurisdiction or refusal by another jurisdiction to issue a teacher or school bus operator certificate shall be *prima facie* evidence of grounds for revocation, suspension, denial for cause or other action against the certificate in West Virginia.

4.11.j. Stenographic Transcript. Where there is available a stenographic transcript of proceedings before a county board of education, or before any court of record or other official or body concerning issues which form or support the basis for the hearing before the Hearing Officer, either party may provide to the Hearing Officer and the other party copies of said transcripts to be used as substantive evidence in the proceedings. The transcript of testimony of any witness or witnesses may be used in lieu of producing said witness or witnesses at the hearing. The use of transcripts may also be directed by the Hearing Officer in the interest of time.

4.11.k. Findings and Oral Argument. At the discretion of the Hearing Officer, the parties may submit proposed findings on the matter, or, in the alternative, present oral argument at the conclusion of the hearing. Oral argument shall be limited to thirty (30) minutes for each party, unless the Hearing Officer shall otherwise order. Proposed findings, if any, shall be submitted within the time fixed by the Hearing Officer.

4.12. Failure to Participate. Upon failure of a teacher, school bus operator or applicant to contest the asserted causes for revocation of a certificate or lesser license or for the denial for cause of a certificate or lesser license, or upon failure of a party respondent to appear and defend against the petitioner's claims, all of the allegations/claims duly made may be accepted by the Hearing Officer as confessed.

4.13. Failure to Cooperate. The Hearing Officer may request that the Superintendent institute judicial proceedings to sanction persons for contemptuous conduct directed to the Hearing Officer in the course of a proceeding.

4.14. **Written Decision.** If the parties are not submitting written proposed findings, the Panels may deliberate at the conclusion of the hearing and announce their decision to the parties orally, which will then be reduced to a written decision. Every decision of the Hearing Officer shall be embodied in a written recommendation which shall contain both findings of fact and conclusions of law and an appropriate resolution. Such written decisions shall be issued by the Hearing Officer to the Superintendent. An appropriate Order setting forth a decision regarding suspension, permanent revocation, revocation or recall of certification, ~~or~~ permanent denial for cause, denial for cause, reinstatement application or other action shall then be issued by the Superintendent within sixty (60) days of receipt of the Hearing Officer's written decision. The Order shall either adopt the recommendations of the Hearing Officer or contain a factual or legal basis for varying from the recommendations of the Hearing Officer. The Order and the Hearing Officer's written decision shall be mailed to the parties. When the case is heard directly by the Superintendent, the Superintendent shall issue a written decision which shall set forth the findings of fact and conclusions of law and an appropriate Order within sixty (60) days of the hearing or receipt of any proposed findings. Said Orders shall be mailed to the parties of record affected thereby or their attorneys of record.

4.14.a. The Licensure Appeal Panel may recommend that a denial for cause be permanent, it may recommend that an applicant fulfill certain conditions before being eligible to apply again or it may recommend that a specified period of time elapse before an applicant may apply again.

4.15. **Waiving of Rules.** Any of the provisions of these rules relating to the presentation of a party's case or argument may be waived by the party or his/her representative or attorney.

§126-4-5. Appeal to Circuit Court.

5.1. Any party other than the WVDE dissatisfied with the decision rendered by the Superintendent may appeal the same to the Circuit Court within 30 days of receipt of the Order.

5.2. Upon the WVDE's receipt of notice of an appeal, a transcript of the proceedings held in accordance with the provisions of this policy shall be made and forwarded to all named parties at the expense of the WVDE.

§126-4-6. Severability.

6.1. If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this rule.