

## Form #2

FILED

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**ATTACH A BRIEF SUMMARY OF YOUR PROPOSAL**

## **FISCAL NOTE FOR PROPOSED RULES**

Rule Title: **64CSR01 Rules of Procedure for Contested Case Hearings and Declaratory Rulings**

Type of Rule: \_\_\_\_\_ Legislative \_\_\_\_\_ Interpretive **X** \_\_\_\_\_ Procedural

Agency: **Health and Human Resources**

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### **Fiscal Note Summary**

Summarize in a clear and concise manner what effect this measure will have on costs and revenues of state government.

This rule will have no fiscal impact on the State. It is an update and modernization of the existing procedural rule for conducting contested case hearings and rendering declaratory rulings. Many terms or titles have been changed in law since this rule was last amended in 1981.

### **Fiscal Note Detail**

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

Effect of Proposal	Fiscal Year		
	2010 Increase/Decrease (use "-")	2011 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
<b>1. Estimated Total Cost</b>	0	0	0
<b>Personal Services</b>			
<b>Current Expenses</b>			
<b>Repairs and Alterations</b>			
<b>Equipment</b>			
<b>Other</b>			
<b>2. Estimated Total Revenues</b>	0	0	0

**3. Explanation of above estimates (including long-range effect):**

Please include any increase or decrease in fees in your estimated total revenues.

**Memorandum**

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

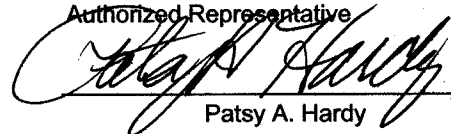
Date

6/24/10

Agency

Department of Health and Human Resources

Authorized Representative



Patsy A. Hardy  
Cabinet Secretary

Procedural Rule, 64CSR01  
Rules of Procedure for Contested Case  
Hearings and Declaratory Rulings  
Department of Health and Human Resources  
Bureau for Public Health

### **BRIEF SUMMARY**

The proposed rule updates the procedural rule for the Bureau for Public Health as to how the agency conducts contested case hearings and is authorized to provide declaratory rulings. The rule has not been amended since 1981. In the intervening years several of the terms and titles have changed. It is also being revised to set a limit to the time an aggrieved party has to request a hearing.

### **STATEMENT OF CIRCUMSTANCES**

The Bureau for Public Health seeks to update and modernize the rule for procedures in contested case hearings and declaratory rulings. The rule is outdated and inaccurate in its references to titles of the leadership of the agency it governs.

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## TITLE 64

**PROCEDURAL RULE**  
**BUREAU FOR PUBLIC HEALTH**  
**DEPARTMENT OF HEALTH AND HUMAN RESOURCES**

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

## SERIES 1

**RULES OF PROCEDURE FOR CONTESTED CASE**  
**HEARINGS AND DECLARATORY RULINGS**

**§64-1-1. General.**

1.1. Scope. -- These procedural rules establish the general procedures for conducting contested case hearings and the issuance of declaratory rulings. The purpose of these rules is to facilitate the resolution of contested cases in a just, speedy, and inexpensive manner and to provide for declaratory rulings in accordance with ~~Chapter 29A, Article 4, Section 1 of the West Virginia Code of 1931, as amended~~ WV Code §29A-4-1

1.2. Authority. -- ~~W-Va. Code §§16-1-7 16-1-4, §29A-5-1(a) and 29A-4-1.~~

1.3. Filing Date. -- ~~October 9, 1981.~~

1.4. Effective Date. ~~November 10, 1981.~~

**§64-1-2. Application.**

2.1. These procedural rules shall apply to every person, partnership, association, corporation or public corporation affected by any rules, regulations or statutes enforceable by the ~~department of bureau for public health~~. These rules of procedure shall not apply to contested case hearings arising under the authority of ~~Chapter 16, Article 2D, Section 1, et seq. of the West Virginia Code of 1931, as amended~~ WV Code §16-2D-1, et seq.

**§64-1-3. Definitions.**

3.1. ~~Director shall mean the director of the West Virginia department of health~~ Bureau – The Bureau for Public Health in the Department of Health and Human Resources.

3.2. ~~Agency shall mean the West Virginia department of health~~ Commissioner – The Commissioner of the Bureau for Public Health or his or her designee.

**§64-1-4. Hearings.**

4.1. ~~Demand~~ Request for Hearing; Form Required - Any party who ~~demands~~ requests a hearing

to ~~have determined~~ determine any constitutional rights, legal rights, duties, interests or privileges of specific parties as required by law shall specify in writing the relief requested and the grounds relied upon as a basis for the relief requested.

4.2. Hearing on Written ~~Demand Request~~ - When the ~~director~~ Commissioner is presented with a ~~demand request~~ for a hearing as described in subsection 4.1 of this section he or she shall conduct a hearing within forty-five (45) days of receipt ~~by him~~ of such written ~~demand request~~, unless postponed to a later date by mutual agreement.

4.3. ~~However,~~ A request for a hearing may be denied if the ~~director~~ Commissioner ~~shall~~ determines that the hearing ~~demanded~~:

(a) ~~4.3.a. would involve an~~ Involves an exercise of authority in excess of that available to ~~him~~ under law; ~~or~~

(b) ~~4.3.b. would~~ Would serve no useful purpose; ~~or~~

4.3.c. Arises out of an event or occurrence that happened more than ninety (90) days prior to the request for a hearing.

4.4. If the Commissioner determines that the request for a hearing should be denied under section 4.3. of this rule, then the Commissioner ~~he~~ shall, within twenty (20) days of the receipt of such ~~demand request~~, enter an Order ~~refusing to grant the hearing as requested~~ denying the request for hearing, incorporating therein his including the reason for such refusal denial. Appeal may be taken from such Order as provided in ~~Chapter 29A, Article 5, Section 4 of the West Virginia Code of 1931, as amended~~ W V Code §29A-5-4.

~~4.3.~~ 4.5. Notice of Hearing - Upon the receipt of a ~~demand request~~ for a hearing as described in Subsection 4.1 of this Section, the ~~director~~ Commissioner shall within twenty (20) days provide the party making such ~~demand request~~ with a notice of hearing providing the ~~director~~ has not entered an Order denying a hearing as provided in subsections 4.3. and 4.4. 4.2 of this Section. Such notice shall contain:

(a) 4.5.a. The date, time and place of the hearing;

(b) 4.5.b. A short plain statement of the matters asserted; and

(c) 4.5.c. A statement of intention to appoint a hearing examiner if one is to be appointed pursuant to Section 8 herein; such notice shall be given at least 10 days in advance of the date of the hearing.

4.4. 4.6. How Hearings Conducted - Hearings shall be conducted as follows:

(a) 4.6.a. any Any party shall have the right to be represented by an attorney ~~at law, duly~~

qualified to practice in the state of West Virginia;

(b) ~~4.6.b. the~~ The agency bureau may be represented by the office of the attorney general;

(c) ~~4.6.c. the~~ The rules of evidence as applied in civil cases in the circuit courts of this state shall be followed;

(d) ~~4.6.d. when~~ When necessary to ascertain facts not reasonably susceptible to proof under said rules of evidence, evidence not admissible thereunder shall be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent ~~men~~ people in the conduct of their affairs;

(e) ~~4.6.e. the~~ The agency bureau shall be bound by the rules of privilege recognized by law;

(f) ~~4.6.f. documentary~~ Documentary evidence may be received in the form of copies or excerpts or by incorporation of reference;

(g) ~~4.6.g. initially~~ Initially the agency bureau shall be given an opportunity to present evidence, including testimony, papers, records, agency bureau staff memoranda and documents in the possession of the agency bureau which it selects and determines to be in support of its position;

(h) ~~4.6.h. every~~ Every party shall have the right of cross-examination of witnesses who testify, and following the conclusion of the agency's bureau's presentation, shall have the right to present evidence including testimony, papers and records and to submit rebuttal evidence;

(i) ~~4.6.i. the~~ The agency bureau shall have the right to cross-examine witnesses providing rebuttal testimony; and

(j) ~~4.6.j following~~ Following the presentation of all the evidence, every party, including the agency bureau, shall have the right to offer closing argument, not to exceed a reasonable time limit as determined by the ~~director~~ Commissioner or the hearing examiner.

#### **§64-1-5. Continuation and Adjournment.**

5.1. Hearings may be continued from one day to another or adjourned to a later date or a different place by announcement thereof by the hearing examiner at the hearing or by appropriate notice to all parties. A written motion for a continuance shall be filed and received by the bureau and the hearing examiner at least five (5) days prior to the hearing date.

#### **§64-1-6. Transcription of Reported Testimony and Evidence.**

6.1. What Reported - All testimony, evidence, arguments, and rulings on the admissibility of testimony and evidence shall be reported by stenographic notes and characters or by mechanical means.

6.2. Request from any Party - Upon the request to the agency bureau from any party to the hearing, all reported materials shall be transcribed and a copy thereof furnished to such party at his or her expense.

6.3. Transcription in the Event a Hearing Examiner is Appointed - In all cases where a hearing examiner is appointed, all reported material shall be transcribed and forwarded to the ~~director~~ Commissioner. Any parties requesting a copy of a transcript prepared pursuant to this subsection shall be furnished a copy at their expense.

6.4. Responsibility for Transcript - The agency bureau shall have the responsibility for making arrangements for the transcription of the reported testimony and evidence. In the event transcription is required pursuant to this section it shall be accomplished with all dispatch.

6.5. Correction of Error in Transcript - Upon the motion of the agency bureau or any party assigning error or omission in any part of any transcript, the agency bureau through the ~~director~~ Commissioner or duly appointed hearing examiner shall settle all differences arising as to whether such transcript truly discloses what occurred at the hearing and shall direct that the transcript be corrected and revised in the respects designated, so as to make it conform to the whole truth.

#### **§64-1-7. Submission of Proposed Findings of Fact and Conclusions of Law; Time for Submission.**

7.1. Any party, including the agency bureau, may submit to the ~~director~~ hearing examiner or administrative law judge proposed findings of fact and conclusions of law within thirty (30) days of the conclusion of a hearing or, on a time frame to be agreed upon by the parties and by the hearing examiner. ~~in~~ In the event the proceedings of a hearing are transcribed, then the parties may submit proposed findings of fact and conclusions of law within twenty (20) days from the date the final transcript is available.

#### **§64-1-8. Appointment of Hearing Examiner; Function of Hearing Examiner.**

8.1. The ~~director~~ Commissioner may, in his or her discretion, appoint a hearing examiner who shall be empowered to subpoena witnesses and documents, administer oaths and affirmations, to examine witnesses under oath, to rule on evidentiary questions, to hold conferences for the settlement or simplification of issues by consent of the parties and to ~~otherwise~~ conduct hearings as provided in Section 4 herein.

#### **§64-1-9. Conferences; Informal Disposition of Cases.**

9.1. At any time prior to the hearing or thereafter but prior to the issuance of a final decision, the ~~director~~ Commissioner, or his or her duly appointed hearing examiner may hold conferences:

- (a) 9.1.a. to To dispose of procedural request or similar matters;



~~(b) 9.1.b. to~~ To simplify or settle issues by consent of the parties; or

~~(e) 9.1.c. to~~ To provide for the informal disposition of cases by stipulation, agreed settlement, or consent order.

9.2. The ~~director~~ Commissioner, or his or her duly appointed hearing examiner may cause such conferences to be held on his or her own motion or ~~by~~ at the request of a party.

#### **§64-1-10. Dispositions Permitted.**

10.1. Evidentiary depositions may be taken and read into evidence only as allowed in the rules of civil procedure as in civil actions in the circuit courts of this state.

#### **§64-1-11. Subpoenas.**

11.1. Where Permitted by Chapter 16 - In accordance with any provision contained in Chapter 16 of the West Virginia Code of 1931, as amended, authorizing the ~~director~~ Commissioner to issue subpoenas or subpoenas duces tecum, the ~~director~~ Commissioner or his or her duly appointed hearing examiner shall have the power to issue subpoenas or subpoenas duces tecum pursuant to the provisions set forth in ~~Chapter 29A, Article 5, Section 1(b) of the West Virginia Code of 1931, as amended~~ WV Code §29A5-1(b).

11.2. Time for Requesting the Issuance of Subpoenas - Written requests for the issuance of subpoenas or subpoenas duces tecum as provided in subsection 11.1 of this section shall be made no later than 10 days prior to a scheduled hearing.

#### **§64-1-12. Orders; Content.**

12.1. Every final order entered by the ~~director~~ hearing examiner or administrative law judge, following a hearing conducted pursuant to these rules, shall be made pursuant to the provisions of ~~Chapter 29A, Article 5, Section 3 of the West Virginia Code of 1931, as amended~~ WV Code §29A-5-3. Such orders shall be entered within forty-five (45) days following the submission of all documents and materials necessary for the proper disposition of the case, including transcripts and proposed findings of fact and conclusions of law.

#### **§64-1-13. Declaratory Ruling - Procedures.**

13.1. On petition of any interested person, the ~~director~~ Commissioner may issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule, regulation or statute enforceable by the ~~department of health~~ bureau.

13.2. Any interested person shall petition the ~~director~~ Commissioner in writing, succinctly stating the issues upon which the declaratory ruling is requested.

13.3. Upon receipt of such petition, the ~~director~~ Commissioner may cause a hearing to be held for the presentation of arguments and evidence within thirty (30) days of receipt of such petition. The ~~director~~ Commissioner shall notify the parties thereto and set a time, a place, and a date for such hearing.

13.4 A declaratory ruling issued after argument and stated to be binding shall be binding between the bureau for public health ~~department~~ and the petitioner on the state of facts alleged, unless altered or set aside by a court in accordance with ~~Chapter 29A, Article 4, Section 2 of the West Virginia Code of 1931, as amended~~ WV Code §29A-1-2. Furthermore, such declaratory ruling shall not be binding on any other person.

13.5 A declaratory ruling issued upon petition, proper notice and argument shall not preclude the petitioner from seeking a contested case hearing in accordance with the provisions of these Rules of Procedure for Contested Case Hearings and Declaratory Rulings. Such declaratory ruling shall serve only to explain or to elucidate the applicability to any person, property, or state of facts or any rule or statute enforceable by the ~~department of~~ bureau for public health.

#### **§64-1-14. Appeal.**

14.1. Appeal - an appeal from any final order or ruling entered in accordance with these regulations this rule shall be in accordance with the provisions of ~~Chapter 29A, Article 5, Section 4 of the West Virginia Code of 1931, as amended~~ WV Code §29A-5-4.

#### **§64-1-15. Severability.**

15.1. ~~If any provision of these rules or the application thereof to any person or circumstance shall be held invalid, such invalidity thereof shall not affect the provision or application of these regulations which can be given effect without the invalid provision or application and to this end the provisions of these regulations are declared to be severable.~~