

WEST VIRGINIA
SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #2

FILED

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia Division of Labor TITLE NUMBER: 42

RULE TYPE: Legislative; CITE AUTHORITY W.Va. Code § 21-5-13

AMENDMENT TO AN EXISTING RULE: YES X NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 5

TITLE OF RULE BEING AMENDED: Wage Payment and Collection Act

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED:

TITLE OF RULE BEING PROPOSED:

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON July 31, 2003 AT 5:00 pm. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

James R. Lewis, Commissioner

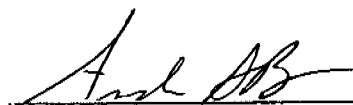
West Virginia Division of Labor

Room B-749, Building #6

State Capitol Complex

Charleston, WV 25305

THE ISSUES TO BE HEARD SHALL BE
LIMITED TO THIS PROPOSED RULE.



Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

WEST VIRGINIA DIVISION OF LABOR

749-B Building 6 , Capitol Complex • Charleston, West Virginia 25305

Phone (304) 558-7890 • Fax (304) 558-3797

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BOB WISE
Governor



JAMES R. LEWIS
Commissioner

Summary of Proposal

The purpose of this amendment is to reflect the holding of the West Virginia Supreme Court in the case of Cooper v. Glavas, 354 S.E. 2d 822 (1987) that liquidated damages under the Wage Payment and Collection Act are proportionate to the unpaid wages. The only change is reflected in subsection 13.5 of this rule.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Wage Payment and Collection Act

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

Agency West Virginia Division of Labor

Address Room B-749, Building #6
State Capitol Complex
Charleston, WV 25305

1. Effect of Proposed Rule No Fiscal Impact

	ANNUAL FISCAL YEAR				
	DECREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<u>ESTIMATED TOTAL COST</u>	\$	\$	\$	\$	\$
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERATIONS					
EQUIPMENT					
OTHER					

2. Explanation of above estimates:

-NONE-

3. Objectives of these rules:

To bring rule into compliance with a Supreme Court ruling.

Rule Title: Wage Payment and Collection Act

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

-None-

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

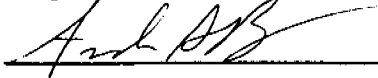
-None-

C. Economic Impact on Citizens/Public at Large.

-None-

Date: July 1, 2003

Signature of Agency Head or Authorized Representative



**TITLE 42
LEGISLATIVE RULES
DIVISION OF LABOR**

**SERIES 5
WAGE PAYMENT AND COLLECTION ACT**

§42-5-1. General.

1.1. Scope. -- The following shall govern, clarify and prescribe such actions of laying down authoritative directions to designate or order their use as a remedy to guide a firm, its officers and employees under the Wage Payment and Collection Act of the Code of West Virginia, 1931, as amended and reenacted, and further amended by adding new sections, designated sections one, six, seven, fourteen, fifteen and sixteen, passed on April 9, 1981, and in effect ninety (90) days from passage, and further amended by adding to sections one, fourteen, fifteen, sixteen and adding section seventeen, passed on April 7, 1987, and in effect ninety (90) days from passage, and further amended by adding to sections fourteen and fifteen, passed March 3, 1989, effective from passage.

1.2. Authority. -- W. Va. Code §21-5-13; §29A-1-1.

1.3. Filing Date. -- ~~March 29, 1990.~~

1.4. Effective Date. -- ~~March 29, 1990.~~

1.5. Application. -- These Regulations shall apply to employees and employers as defined by W. Va. Code §21-5-1.

1.6. Severability. -- If any provisions of these regulations or the application thereof to any employee, firm or corporation is held invalid, the invalidity shall not affect other provisions or applications of these Regulations which can be given effect without the invalid provisions or application and to this end the provisions of these Regulations are severable.

1.7. No Waiver. -- No provision of the act or regulations promulgated pursuant thereto may be waived by private agreement, and any attempted waiver is null and void.

§42-5-2. Definitions.

2.1. "Act" means the Wage Payment and Collection Act as embraced in the W. Va. Code §21-5 et seq.

2.2. "Appeal" means an application to the Commissioner for corroboration or decision.

2.3. "Assignment or Order for Future Wages or Assignment of Wages" means all forms, assignments, transfers or sales of wages to another, either as payment or as security and whether stated to be revocable or nonrevocable except for deductions as defined herein.

2.4. "Authorized Representative" means, and includes, the director and employees of the Wage and Hour Section of the Division of Labor.

2.5. "Bond" means a legal instrument which binds the maker to pay a legal obligation for money. Types of

bonds are:

(a) "Surety Bond" means a bond whereby a third party insures or guarantees that the wages of an employer shall be paid to employees when such wages are due, and that if such employer fails or defaults in the payments of such wages when they are due, then the insuring party will pay such wages when due and shall seek redress from the defaulting employer.

(b) "Collateral Bond" means the pledge and/or deposit of cash, certificates of deposit or other such certificates or securities owned by an employer, upon approval by the Commissioner, with the State Treasurer.

The collateral of personal property may also include those specified assets set forth in W. Va. Code §21-5-14(c). Upon the pledge and deposit of collateral bonding, the employer shall execute a promissory document whereby if the employer fails or defaults in the payment of wages due to his or her employees, that the State Treasurer has the authority to convert as much of the collateral assets to cash in order to pay the wages that are due and owing, all in accordance with the W. Va. Code §21-5-14(e).

(c) "Escrow Bond" means money deposited with the State Treasurer in trust, said money shall be placed in an account in the name of the West Virginia Division of Labor and the employer. An employer who cannot provide either a surety bond or collateral bond must deposit with the West Virginia Division of Labor the amount of money set forth in W. Va Code §21-5-14(a).

(d) "Letter of Credit" means a signed agreement by a third party reputable and solvent banking or other financial institution evidencing a line of credit sufficient to cover amounts required and established by the Division of Labor to serve as a bond guarantee and to be paid to the Division of Labor upon certification of wages and benefits due as provided in §21-5-14 of the Act. All letters of credit accepted must clearly state that the credit is irrevocable. The Commissioner of Labor must determine that all letters of credit accepted are valid, stable instruments of credit that will guarantee and secure payment of wages and fringe benefits in the event of wage and fringe benefit default by an employer.

2.6. "Break Periods and/or Rest Periods" means when authorized by an employer, break periods and/or rest periods which do not exceed twenty (20) minutes duration must be counted as hours worked.

2.7. "Division" means the West Virginia Division of Labor.

2.8. "Discharge" means any involuntary termination or the cessation of performance of work by employee due to employer action.

2.9. "Employ" means to hire or permit to work.

2.10. "Lay-off" means any involuntary cessation of an employee for a reason not relating to the quality of the employee's performance or other employee-related reason. An employee who is laid off shall be paid all wages not later than the next regular payday through regular pay channels, or by mail if requested.

2.11. "Transportation" means any method of moving goods or material from one point to another.

§42-5-3. Enforcement.

3.1. Powers of the Commissioner.

(a) The Act charges the Commissioner with the administration of the West Virginia Wage Payment and Collection Act.

(b) Pursuant to the Act, the Commissioner may make and amend, alter or repeal general Rules and Regulations of procedure for carrying into effect all provisions of the Act, for obtaining statistical data respecting wages and payments, and to prescribe means, methods and practices to make effective such provisions.

(c) The Act empowers the Commissioner to make such investigations and inspections and take any action, including bringing legal action, as authorized by the Act which in his or her judgment are necessary to administer, enforce or collect claims due under the Act and these regulations.

(d) The Commissioner will ensure by periodic inspections by his or her designated representatives that a copy of any of the required bonds is posted in a place accessible to employees affected thereby, or a copy of the notification that the bonding requirements have been waived by the Commissioner. Further, the commissioner shall cause a copy of the bond to be filed in the office of the clerk of the county commission of the county wherein the person, firm or corporation is doing business to be available for public inspection.

3.2. Inspection by Division. -- The Commissioner's representative shall, during reasonable hours, make such inspections of places of employment within this State to determine compliance with the Act and these regulations.

3.3. Penalty for violation. -- Any employer violating any provisions of these Rules and Regulations shall be subject to the penalties prescribed by W. Va. Code §21-5-4, 5, 11, 12, 15 and 17.

§42-5-4. Form Or Records; Scope Of Records.

4.1. Form of records. -- No particular order or form of records is prescribed. However, every employer who is subject to any of the provisions of the Act is required to maintain payroll and employment records for a period of not less than five (5) years.

4.2. Content of records. -- The written record or records with respect to each and every employee shall contain:

(a) Name in full, identifying symbol or number if such is used in place of name on any time, work or payroll record. This shall be the same name as that used for Social Security record purposes;

(b) Social Security number;

(c) Home address;

(d) Date of birth, if under eighteen (18);

(e) Occupation or job classification;

(f) Rate of regular pay and rate of overtime pay;

(g) Hours worked each workday and total hours worked each workweek;

(h) Method of calculating the percent of fringe benefits owed to an employee at any given time.

§42-5-5. Records Of Retroactive Payments Of Wages.

5.1. The following procedure is to be used in recording retroactive wage payments:

(a) Record and preserve, as an entry on his or her payroll or other pay records, the amount of such payment to each employee, the period covered by such payment to each employee and date of payment.

(b) Prepare a report of such payment, (i) Preserve a copy for his or her records, (ii) file the original, which shall evidence payment by the employer and receipt by the employee, with the Commissioner of Labor within ten (10) days after payment is made.

§42-5-6. Petition For Special Agreement - Records.

6.1. Written petition. -- Any firm, which due to peculiar conditions under which it must operate, desires authority to maintain records in a manner other than required in Section 4, et. seq., or to be relieved of preserving certain records for the period specified herein, may submit a written petition to the Commissioner setting forth the authority desired and reason thereof.

6.2. Commissioner determines relief sought. -- The Commissioner may grant the authority prayed for if it does not hamper or interfere with the enforcement of the provisions of the Act; such authority, however, may be limited as the Commissioner determines as requisite, and subject, also, to subsequent revocation.

6.3. Employer must comply with regulations during adjudication period. -- The submission of a petition or the delay of the Commissioner in acting upon such petition shall not relieve any firm from any obligations to comply with regulations of this Act. However, the Commissioner shall give notice of the petition with due promptness.

§42-5-7. Place For Keeping Records.

7.1. Records to be kept. -- Each employer so required shall keep the records required by these regulations safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records shall be made available within seventy-two (72) hours following written notice from the Commissioner.

7.2. Records to be open to the Division for inspection. -- All records of the employer shall be open to the Division for inspection, examination, copying, photographing or otherwise reproducing, in order to insure compliance with the Act.

§42-5-8. When Wages Are Payable.

8.1. Wage payments by railroad companies. -- Every railroad company authorized to do business by the laws of this State shall, on or before the first day of each month, pay its employees the wages earned by them during the first half of the preceding month, ending with the fifteenth day thereof; and on or before the fifteenth day of each month, pay the employees thereof the wages earned by them during the last half of the preceding calendar month.

8.2. Wage payments by employers not railroads. -- With the exception of railroad companies, every employer shall, at least once in every two (2) weeks, pay at least all wages earned.

Such wages shall be paid in lawful money of the United States or checks or money orders on banks convenient

to the place of employment where suitable arrangements have been made for the cashing of such checks by employees for the full amount of wages, or by any method of depositing immediately available funds in an employee's demand or time account in any bank, credit union or savings and loan institution that may be agreed upon in writing between the employee and such person, firm or corporation, which agreement shall specifically identify the employee, the financial institution, the type of account and the account number.

§42-5-9. Employee Absent On A Payday.

9.1. If at the time of payment, any employee shall be absent from his or her regular place of labor, and shall not receive his wages through a duly authorized representative, he or she shall be entitled to such payment at any time thereafter upon the proper paymaster at the place where such wages are usually paid and where the next pay is due, and the proper mailing in the United States post office of such payment in time to reach the usual post office of the employee by the time aforesaid, in the usual course of mails, shall be in compliance with this regulation.

§42-5-10. Petition For Special Agreement - Paydays.

10.1. Written petition. -- Any firm, who due to peculiar conditions under which it must operate and upon a compelling showing desires authority to establish regular paydays less frequently than once in every two (2) weeks as required in Section 8.2 of these regulations, may submit a written petition to the Commissioner setting forth the authority desired and reason thereof: Provided, That in no event shall the employee be paid in full less frequently than once each calendar month on a regularly established schedule. At the time of the filing of the petition, the employer shall include with the application a postage paid envelope addressed to each of the employees.

10.2. Hearing; notification of employees. -- The Commissioner shall hold a hearing upon any request for special agreement. The employees of the employer shall be given at least twenty (20) days notice of the time and place of hearing.

10.3. Commissioner determines relief sought. -- The Commissioner may grant the authority for less frequent paydays upon a compelling showing of cause; such authority, however, may be limited as the Commissioner determines as requisite, and subject, also, to subsequent revocation.

10.4. Firm must comply with regulations during adjudication period. -- The submission of a petition or the delay of the Commissioner in acting upon petition shall not relieve any employer from any obligations to comply with regulations of this Act. However, the Commissioner shall give notice of the petition with due promptness.

§42-5-11. Assignment Of Wages.

11.1. Documents of assignment. -- Except as provided in this regulation, or otherwise provided by law, nothing will affect the right of an employee to assign part of his or her claim against his or her employer for wages. The employer must have an assigned authorization prior to deducting or withholding shortages from an employee's wages.

11.2. Example of wage assignment. -- The following wage assignment form shall be considered in presumptive compliance by the Division:

STATE OF WEST VIRGINIA
COUNTY OF _____

I, (employee), hereby assign to (creditor) future wages due me from (employer) in the amount of \$_____ which amount due to (creditor) together with the amounts previously assigned totals \$_____ the total amount due to said creditor by this and previous assignments. Three fourths of my earnings for each pay period less deductions shall be exempt from all wage assignments. All my wages assignments shall be paid in the order of the date I signed them. This assignment shall be effective for a period of one (1) year.

(Employee)

Taken, sworn to and subscribed before me on this the _____ day of _____, 19____.

Notary Public

My commission expires _____, 19____.

Accepted by (endorsement by employer) on this the _____ day of _____, 19____.

By (employer of employee), (title)

_____ County

11.3. Authorized deductions not requiring wage assignment form.

(a) Authorized deductions for amounts required or allowed by law to be withheld, union or club dues, pension plans, payroll savings plans, credit unions, charities or hospitalization or medical insurance shall not be required to be in any prescribed form.

(b) Any employer who fails to pay portions of wages in accordance with properly executed assignment shall be liable for an amount equal to the amount such employer failed to pay. The employee shall not be subject to a suit for reimbursement from a party to whom the employer improperly paid the employee's wages.

§42-5-12. Agreements Contra To This Regulation Void.

12.1. It shall be unlawful for any employer or railroad company to enter into or make any agreement with any employee for the payment of any such employee otherwise than as provided in this regulation, except to pay such wages at shorter intervals than herein provided. Every agreement made in violation of this regulation shall be deemed to be null and void.

§42-5-13. Employee Separated From Payroll Before Payday.

13.1. Discharge. -- An employee who is discharged shall be paid all wages including fringe benefits within seventy-two (72) hours of the employee's final hour of employment.

13.2. Resignation. -- An employee who quits or resigns shall be paid all wages, including fringe benefits, no later than the next regular payday, either through the regular pay channels or by mail if requested by the

employee. If the employee gives at least one (1) pay period's notice of intention to quit computed from the last moment of employment, the employer shall at the time of quitting pay all wages, including fringe benefits due the employee.

13.3. Lay-off. -- An employee who is laid off shall be paid all wages not later than the next regular payday through regular pay channels or by mail if requested.

13.4. Strike or labor dispute. -- An employee who is on strike or otherwise suspended as a result of a labor dispute shall be paid all wages not later than the next regular payday through regular pay channels. If the employee so requests at least twenty-four (24) hours before the last hour of employment before an impending strike or labor dispute, all accrued benefits shall accompany the payment of wages and fringe benefits, and shall be mailed or otherwise delivered to the employee.

13.5. Recovery of employee. -- An employee may recover, in addition to the regular wages and fringe benefits, an amount equal to his wages without rendering any service therefore, for each day the employer is in default, up to thirty days. In accordance with the case of *Cooper v. Glavas*, 354 S.E.2d (W.Va. 1987), in the event that an employer timely delivered a final paycheck after termination of an employee, but made a partial underpayment or improper deduction from wages at any time during employment up to and including the final paycheck, liquidated damages shall be proportionate to the unpaid wages, and the employee may recover an amount of up to thirty days wages at the regular rate multiplied by the percentage of the employee's total wages that were not paid or improperly deducted. The payment of wages improperly withheld does not cure the default for that period the employer was in default.

§42-5-14. Notification To Employees, Records Maintained By Employers And Posting Of Notices Required.

14.1. Notification of employers' pay. -- All employers shall at the time of hire notify their employees in terms of hour, day, month or year, including the term of employment, in writing of the rate of pay, overtime rate, fringe benefits amount and method of computing fringe benefits and of the day, hour and place of payment. Any changes in such rate, time, term or place shall be furnished to employees in writing or by posted notice in a place or places where all employees would observe it on a daily basis at least one (1) full pay period prior to the effective date of such change.

14.2. Records of deductions. -- The employer shall furnish to each employee an itemized statement of wages to include hourly rate, overtime rate, bonus and incentive pay, plus the amount deducted from the employee's pay, including the amount and authority for which monies were deducted (e.g., withholding tax, state taxes, FICA, union dues, wage assignment, etc.).

14.3. Abstract of Wage Act. -- The following abstract of the Act shall be posted in a place accessible to all employees:

This employer is required to:

1. Have a payday at least once every two (2) weeks (except railroad companies - semimonthly).
2. Pay in money, or in check or money orders on banks convenient to the place of work where arrangements have been made for cashing.
3. On discharge, pay all wages, including fringe benefits, within seventy-two (72) hours of the last hour of employment.

4. On quitting, pay all wages, including fringe benefits, at the regular payday (except if one pay period's notice is given by the employee, all wages including fringe benefits must be paid at the time of quitting).

5. On lay-off or strike, pay all wages, including fringe benefits, at the next regular payday (except if requested by the employee, all wages including fringe benefits must be paid by mail).

6. Notify his or her employees in writing at the time of hiring of the rate of pay and of the day, hour and place of payment and thereafter of any changes.

7. Make known to all his or her employees in writing or by accessible posted notice all employment practices, and policies with regard to vacation pay, sick pay and other fringe benefits.

8. Furnish each employee with an itemized statement of deductions made from his or her wages for each pay period.

Employers engaged in construction work, or the severance, production or transportation (excluding railroads and water transporters) of minerals, must have demonstrated the ability to pay all wages and fringe benefits due employees, or must have posted a bond securing payment.

This employer may not:

1. Sell to any employee goods or supplies at prices higher than the current market value.
2. Deduct more than twenty-five percent (25%) of an employee's earnings under a wage assignment (excluding amounts required by law to be withheld, union dues, club dues, pension plans, payroll savings plans, credit unions, charities and hospitalization and medical insurance).
3. Take a wage assignment unless it is notarized, specifies the total amount due, states that three fourths (3/4) of the wages are exempt, and contains the written acceptance of the employee.
4. Refuse to pay a deceased employee's relatives, wages owing up to eight hundred dollars (\$800).
5. Refuse to pay the wages of the employees of his or her subcontractor who has failed to pay his or her employees.
6. May not coerce or compel, or attempt to coerce or compel an employee to purchase goods or services in payment of wages due him or her or to become due him or her.

§42-5-15. Collection Of Wages Due Through Action By The Commissioner.

15.1. Action by the Commissioner. -- Pursuant to the Act, the Commissioner or his or her designated representative, upon the request of any person whose wages have not been paid in accordance with the law, may bring any legal action necessary to collect such claim.

15.2. Request by claimant to be in writing. -- Request for the assistance of the Commissioner shall be made upon the forms as provided by the Commissioner.

§42-5-16. Bonding Procedures.

16.1. General. -- Surety, collateral, escrow bonds, and irrevocable letters of credit as defined in Section 2.5 of

these regulations, are the only type bonding documents authorized by the Code.

16.2. Correspondence relating to bonds. -- Certified mail, return receipt requested, will be utilized for all correspondence pertaining to bonds or requested actions pertaining to bonds including applications for waivers.

16.3. Procedures for bonds.

(a) The Commissioner will forward to the employer evidence and/or receipt of the bonding document and cause to be filed such evidence and/or receipt with the clerk of the county commission in the county in which the employer operates said business.

(b) After receipt of the bond by the employer, the employer will comply with requirements of W. Va. Code 21-5-14(f). The number of additional copies of bonding evidence may be reproduced by the employer to meet the prescribed posting requirements of the Code.

16.4. Waiver of bonding requirements.

(a) The Commissioner shall waive the bonding requirements of this section upon his or her determination that an employer is of sufficient financial responsibility to pay wages and fringe benefits. In no event will the Commissioner be compelled to issue a waiver. Applications from firms requesting a waiver will be accepted only if accompanied by notarized financial documentation in the form of financial statements presented in accordance with generally accepted account principles and will include: (1) A balance sheet (statement of financial position), (2) state of revenues/expenses and (3) statement of change in financial position, and (4) related notes of financial disclosure. All such financial statements must cover two (2) operating years. All joint venture operations shall be subject to the bonding provisions, if not in business for five years, unless waiver is achieved by the principal parties of the joint venture through waiver application approval by the Commissioner of Labor.

(b) The Commissioner may waive the bonding requirements for the wages and fringe benefits of owners, partners or corporate officers upon receipt of such waiver application. The application must be evidenced by notarized affidavit indicating that the individual(s) covered by the waiver are bona fide owners, partners or corporate officers holding 20 percent (20%) or more of the total company or corporation ownership.

(c) Waivers will be granted for a period of six (6) consecutive months. Inspections will be conducted by the Commissioner and where found that a firm is failing to maintain a sound financial responsibility, the waiver will be withdrawn and the firm must furnish bond for wages and benefits pursuant to W. Va. Code §21-5-14(a).

16.5. Claim for wages against a bond. -- When a claim for wages against an employer who has posted a bond is made, the Commissioner will cause an investigation of the employer's payroll records and have them submitted for his or her review and determination of wages. He or she will then have certification of the wages prepared and present same to the bonding company or the State Treasurer for payment of said wages.

16.6. Termination of bond. -- As prescribed by W. Va. Code 21-5-14(g), and utilizing the procedures of Section 16.2 above, bonds may be terminated only when all requirements cited in the Code are met by the firms.

16.7. Contractors and subcontractors to notify commissioner. -- It shall be the duty of a prime contractor to notify the commissioner in writing by certified mail within ten (10) days next following of all contract or subcontract agreements entered into with an employer and such contract or subcontract contemplates the

performance of construction work or the severance, production or transportation of minerals as provided in W. Va. Code §21-5-16.

The notification shall include: (1) Employee's name, (2) location of job site, and (3) employer's principal business location. Said prime contractor shall continue to identify specific contracts and subcontracts at each jobsite in behalf of said principal contractor.

§42-5-17. Amendments To Regulations.

17.1. Written petition to Commissioner. -- Any person wishing a revision of any of these regulations may submit to the Commissioner a written petition setting forth the changes desired and the reasons for proposing them.

17.2. Hearing on petition. -- The Commissioner, upon inspection of the petition, and believing that the grounds are reasonable, may schedule a hearing with due notice to interested persons, or make other provisions for affording interested persons an opportunity to present data, views and arguments relating to any proposed changes.