

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #2

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: WV Board of Medicine TITLE NUMBER: 11

RULE TYPE: Procedural; CITE AUTHORITY 29A-5; 6-9A

AMENDMENT TO AN EXISTING RULE: YES X NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 3

TITLE OF RULE BEING AMENDED: Board Organization and Meeting
Procedure; Contested Case Hearing Procedure

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 February 28, 1989 AT 4:30 p.m.

ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

Ronald D. Walton

WV Board of Medicine

100 Dee Drive,

Charleston, WV 25311

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

Deborah Lewis Rodecker
Counsel, WV Board of Medicine

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

These rules provide for the correct address of the West Virginia Board of Medicine, clarify those hearings to which these procedures apply, specify which party bears the burden of going forward in hearings and eliminate sexist language.

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WEST VIRGINIA PROCEDURAL RULES
WEST VIRGINIA BOARD OF MEDICINE

Chapter 6-9A & 29A-5
Series 3

Board Organization and Meeting Procedure;
Contested Case Hearing Procedure

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WEST VIRGINIA PROCEDURAL RULES
WEST VIRGINIA BOARD OF MEDICINE

1980 JAN 27 AM 9:01

Board Organization and Meeting Procedure
Contested Case Hearing Procedure

WEST VIRGINIA
SECRETARY OF STATE

Chapter 6-9A & 29A-5
Series

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WEST VIRGINIA PROCEDURAL RULES
WEST VIRGINIA BOARD OF MEDICINE

Chapter 6-9A & 29A-5
Series

Subject: Board Organization and Meeting Procedure; Contested
Case Hearing Procedure

Section 1. General

1.1. Scope - These procedural rules govern all regularly scheduled meetings and special meetings of the West Virginia Board of Medicine (the "Board") and establish procedures for the adjudication of informal and formal contested case hearings, except those hearings held under the provisions of Chapter 30, Article 3, Section 14(j) where action is taken by the Board on a temporary basis prior to a hearing.

1.2. Authority - These procedural rules are issued under the authority of and are related to Chapter 6, Article 9A, Section 3 and Chapter 29A, Article 5, Section 1 of the West Virginia Code of 1931, as amended.

1.3. Filing Date -

1.4. Effective Date -

Section 2. Application and Enforcement - These procedural rules apply to the Board and to any and all individuals desiring to

attend or to address the Board and to any person desiring a contested case proceeding as defined in Chapter 29A, Article 1, Section 2(b) of the West Virginia Code of 1931, as amended. The enforcement of these rules shall be vested in the Board.

Section 3. Regular Meetings Established; Time, Place

3.1. The Board shall meet in regular session on the second Monday of alternate months: Provided, that when such date falls upon a legal holiday, the Board may designate another date by a majority of a quorum of the Board: Provided, further, that the Board may change its regular meeting dates by resolution of a majority of its members.

3.2. The Board shall convene all regular meetings at nine o'clock, A.M., unless otherwise changed by a majority vote of a quorum of the Board.

3.3. The Board shall convene all regular meetings ~~in~~ at the ~~Conference Room~~ Offices of the West Virginia Board of Medicine, ~~3412 Chesterfield Avenue,~~ Dee Drive, Charleston, West Virginia ~~25304,~~ 25311, unless otherwise changed by a majority vote of a quorum of the Board.

3.4. The Board may, without notice, move the location of the meeting to accommodate members of the public who wish to attend such meeting, in the event the meeting room is too small to accommodate such attendance.

3.5. All regular meetings shall be general meetings for the consideration of any and all matters which may properly come before the Board.

Section 4. Special Meetings; Notice Required, Time, Place and Purpose

4.1. The Board may convene special meetings in accordance with the procedures established herein.

4.2. Special meetings of the Board may be called by the joint action of the President and Vice-President, or by any three (3) members of the Board, upon seven (7) days' prior written notice by mail, or in case of emergency, on two (2) days' notice by telephone.

4.3. The Secretary shall send to all members in advance of a special meeting a written notice setting forth the time and place of such special meeting and the matters to be considered at such special meeting: Provided, that such written notice is not required if the time, place and matter for consideration have been fixed in a regular meeting or if the emergency nature of a special meeting precludes other than notice by telephone or personal contact.

4.4. The Secretary shall cause the notification of the public and the news media by issuing a public notice of such special meeting as expeditiously as possible. The public notice

shall contain the time, place and matters to be considered. A copy of such public notice shall be filed with the office of the Secretary of State.

4.5. The provisions of this section shall not apply in the event of an emergency requiring immediate official action by the Board.

Section 5. Proceedings to be Open; Exceptions; Executive Session Permitted - All meetings of the Board shall be open to the public, except as otherwise provided in West Virginia Code 6-9A-4 and 30-3-6.

Section 6. Minutes - The Board shall provide for the preparation of written minutes of all of its meetings. All minutes of open meetings shall be available to the public within a reasonable time after such meetings and shall include the following information:

- a. The date, time and place of the meeting;
- b. The name of each Board member present or absent;
- c. All motions, proposals, resolutions, orders, ordinances, and measures proposed, the name of the persons proposing the same, and their disposition;
- d. The results of all votes, and upon the request of a member, the vote of each member, by name; and
- e. Minutes of executive sessions may be limited to material

which is not inconsistent with the provisions of West Virginia Code 6-9A-4.

Section 7. Quorum; Majority Vote Required; Vote by Proxy Prohibited - A majority of the members of the Board shall constitute a quorum for the transaction of business, and business shall be transacted by a majority of a quorum except that votes on disciplinary actions shall require an affirmative vote of five (5) members or a majority vote, whichever is greater. Proxy voting is prohibited.

Section 8. Records of the Board - Public Document - All records of open proceedings of the Board are public records and shall be available to the public during the usual and customary business hours of the ~~West Virginia Department of Health (the "Department")~~ Board.

Section 9. Board Membership and Organization

9.1. Members of the Board shall be appointed and serve as provided by West Virginia Code 30-3-5.

9.2. Every two (2) years, the Board shall elect from its members a President and a Vice-President. The State Director of Health shall serve as Secretary of the Board. The Board may elect such other officers as it deems necessary to perform its duties.

9.3. The President shall preserve order and conduct all proceedings according to and by parliamentary rules, and demand

conformity thereto on the part of the members. The President shall appoint all committees, unless otherwise ordered by the Board or specifically provided by law, and he or she shall sign his or her name as President to the certificates authorized to be signed by the President.

9.4. The Vice-President shall act as President in the absence of the President.

9.5. The Secretary shall keep true records of all general and special acts of the Board and all papers of value. He or she shall preserve a record of all individuals licensed, certified or disciplined by the Board. When a committee is appointed for any purpose, the Secretary shall notify each appointee of his or her appointment and furnish any essential document or information at his or her command. The Secretary shall conduct the correspondence of the Executive Committee when requested and shall, as Secretary, sign certificates authorized to be issued by the Board and shall perform all such other duties as naturally pertain to his or her office.

9.6. The Board may employ an Administrator who shall work under the immediate supervision of the President and Secretary in administering the day-to-day activities of the Board.

9.7. The Board may appoint and employ duly licensed physicians or podiatrists, as appropriate, to serve as medical

consultants to the Board on a part-time basis. A medical consultant shall be vested with the following powers and shall perform the following duties:

a. Review and select matters requiring medical expertise for decision to come to the attention of the entire Board;

b. Provide medical advice to the Secretary and the investigative staff in all matters requiring pertinent medical knowledge; and

c. Medically evaluate investigative reports, when necessary, and assist in the preparation of matters to be heard by the Board or any matter in which the Board is involved.

The authority so delegated is not intended to divest the Board of the power to elect to perform any such function at any regular or special meeting of the Board, but is a delegation to enable the performance of these Board functions at such times as the Board is not in session, and to assist the Board in the more efficient and lawful handling of its affairs.

9.8. The order of business during any regular or special meeting of the Board shall be governed by the Sturgis Rules of Order.

9.9. Permanent committees are as follows:

a. The Executive Committee shall consist of the officers of the Board plus one (1) other member of the Board, as appointed by

the President. The President shall serve as Chairman of the Committee.

b. The Management Committee shall consist of three (3) members appointed by the President. The President shall designate one (1) member to be Chairman of the Committee. The Committee shall oversee the day-to-day operation of the Board and shall be responsible for all financial matters with the exception of the setting of fees which, where discretionary under the law, shall be the responsibility of the entire Board.

c. The Legislative Committee shall consist of three (3) or more members appointed by the President. The President shall designate one (1) member to be Chairman of the Committee. The Committee shall consider all questions bearing upon State and National legislation and shall recommend from time to time such changes in the law as it may deem advisable and, at the direction of the Board, shall take such steps as may further the desire of the Board in matters of legislation. Proposed changes in the Rules and Regulations shall be presented by the Legislative Committee, in writing, to all Board members.

d. The Complaint Committee shall consist of three (3) or more members of the Board appointed by the President. The President shall designate one (1) member to be Chairman of the Committee. Upon receipt of a complaint submitted to the Board, the

matter shall be referred to the Complaint Committee for further disposition.

e. The Board may create such additional permanent committees as it deems necessary to carry out its purposes and duties.

9.10. The President may appoint such temporary committees as are necessary to assist the Board in the performance of its duties and responsibilities and shall empower each such committee with a delegation of such Board authority as is necessary to accomplish the purpose of such temporary committees.

Section 10. Hearings

10.1. Any party who demands a hearing to have determined any constitutional rights, legal rights, duties, interests or privileges of specific parties as required by law shall specify in writing the grounds relied upon as a basis for the relief requested.

10.2. When the President or his or her authorized designee is presented with a demand for a hearing as described in subsection 10.1 of this Section, he or she shall schedule a hearing within forty-five (45) days of receipt by him or her of such written demand, unless postponed to a later date by mutual agreement. However, if the President or his or her designee shall determine that the hearing demanded would either involve an exercise of authority in excess of that available to him or her under law, or

would serve no useful purpose, ~~he~~ the President shall, within forty-five (45) days of receipt of such demand, enter an order refusing to grant the hearing as requested, incorporating therein ~~his~~ the reason(s) for such refusal. Appeal may be taken from such order as provided in West Virginia Code 29A-5-4.

10.3. Charges may be instituted against any physician or podiatrist by the Board and shall be noted in the official minutes of the Board. Charges may be based upon information indicating that there are reasonable causes for believing that said physician or podiatrist may have engaged in such conduct or be in such condition that his or her license should be placed on probation or limited or restricted or have his or her license suspended or revoked for one or more of the grounds set forth in the Medical Practice Act or these regulations.

10.4. Upon the receipt of a demand for a hearing as described in subsection 10.1 of this Section, or where a hearing is otherwise required, the President or his or her designee shall as soon thereafter as possible provide the party making such demand and the party charged with a violation of licensing provisions of the law or regulations promulgated by the Board, with a Notice of Hearing (assuming the President has not entered an order denying a hearing as provided in subsection 10.2 of this Section). Said Notice shall be served upon the Respondent at least thirty (30)

days prior to the hearing date. Said Notice shall contain the following information:

- a. The date, time and place of the hearing;
- b. A short plain statement of the matters asserted or charged, as set forth in the complaint; and
- c. A statement of intention to appoint a hearing examiner.

The complaint shall be issued in the name of the Board as an agency of the State and designate the Board as "Petitioner" and shall designate the physician being proceeded against as "Respondent." The Petitioner shall set out the substance of each offense charged with sufficient particularity to reasonably apprise the respondent of the nature, time and place of the conduct or condition complained of therein. The Board may amend the complaint as it deems proper.

Upon proper motion, a more definite statement of the matters asserted or charged shall be provided to the respondent or his or her counsel, at least fifteen (15) days prior to the hearing date.

10.5. Hearings shall be conducted as follows:

- a. Any party to a hearing shall have the right to be represented by an attorney-at-law, duly qualified to practice in the State of West Virginia.

- b. The Board may be represented by the Office of the Attorney General.

c. The rules of evidence as applied in civil cases in the circuit courts of this State shall be followed.

d. Hearings conducted by the Board or by a hearing examiner appointed by the Board, upon a complaint issued by the Board, are a continuance of the investigation designed to enable the Board to properly discharge its administrative functions and authority. The purpose of such hearing is to afford the Respondent an opportunity, in person or by counsel or other representative, to respond to the complaint, to present his or her position, to present evidence in support of his or her contention, to examine and cross-examine evidence and witnesses produced in support of the complaint and to argue orally at the hearing.

e. The hearing shall be held at such time and place as is designated by the Board, but no hearing shall be conducted unless and until at least thirty (30) days' written notice thereof has been served upon the Respondent in person or by registered or certified mail.

f. The hearing shall ~~not~~ be open to the general public ~~unless the Respondent makes and files a written request therefor with the Board or with the hearing examiner.~~

g. The purpose of the hearing shall be to further inquire into the matters set forth in the complaint or any amended complaint, and to record evidence and arguments in support of same

and in opposition thereto, so that the Board may determine all issues. Members of the Board and its officers, agents and employees shall be competent to testify at the hearing, as to material and relevant matters: Provided, that no member of the Board who testifies at such hearing shall thereafter participate in the deliberations or decisions of the Board with respect to the case in which he so testified.

h. The hearing may be conducted by a Board member, or by a hearing examiner appointed by the Board.

i. A record of the hearing (including the complaints and all amended complaints, the notice of hearing, all pleadings, motions, rulings, stipulations, exhibits, documentary evidence, evidentiary depositions and the stenographic report of the hearing) shall be prepared under the supervision of the Board, if the hearing is conducted by it, or by a hearing examiner who conducts the hearing on behalf of the Board.

j. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference.

k. Initially, the Board shall be given an opportunity to present evidence, including testimony, papers, records, agency staff memoranda and documents in the possession of the Board, in support of its position, except where a hearing has been demanded under the provisions of subsection 10.1 of this section, in which

case initially the party demanding the hearing shall present his or her evidence.

l. Every party shall have the right of cross-examination of witnesses who testify, and following the conclusion of the Board's presentation, shall have the right to submit rebuttal evidence.

m. The Board shall have the right to cross-examine witnesses providing rebuttal testimony.

n. Following the presentation of all evidence, every party, including the Board, shall have the right to offer argument, not to exceed ten (10) minutes for each presentation.

o. The state or local organization which represents the profession to which the Respondent belongs may intervene in any hearing for the purpose of assisting in the prosecution of the complaint, or may, with the consent of the Respondent, intervene for the purpose of assisting the Respondent in contesting the complaint.

p. Hearing examiners are not authorized or empowered to suspend or revoke any license or to place any licensee on probation. The function of a hearing examiner is to preside at the hearing and to cause to be prepared a record of the hearing, as described above, so that the Board ~~can~~ is able to discharge its functions. The hearing examiner shall prepare recommended Findings of Fact and Conclusions of Law for submission to the Board.

q. Summons and subpoenas may be issued by the President or Secretary of the Board and by hearing examiners appointed by the Board.

r. The Board or its hearing examiner may institute proceedings in circuit courts to punish persons for contemptuous or contumacious conduct directed to the Board or to its hearing examiner in the course of hearings.

s. The Respondent shall serve his or her answer within thirty (30) days after service of the complaint upon him or her. Upon failure of the Respondent to respond to the complaint as required herein, all of the allegations set out therein as to conduct or conditions of the Respondent may be taken by the Board as confessed by the Respondent.

10.6. Hearings may be continued from one day to another, or adjourned to a later date or a different place, by announcement thereof or by appropriate notice to all parties.

A continuance may be granted by the President or his or her designee for good cause shown. A written notice of a continuance shall be filed at least five (5) days prior to the hearing date.

Section 11. Transcription of Reported Testimony and Evidence

11.1. 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.

11.2. Upon the request to the Board by any party to the hearing, all reported materials shall be transcribed and a copy thereof furnished to such party at his or her expense.

11.3. In all cases where a hearing examiner is appointed, all reported materials shall be transcribed and forwarded to the President. A party who requests a copy of a transcript prepared pursuant to this subsection shall be furnished a copy at his or her expense.

11.4. The Board shall have the responsibility to make arrangements for the transcription of the reported testimony and evidence. In the event transcription is required pursuant to this Section, it shall be accomplished within a reasonable time.

11.5. Upon the motion of the Board or any party assigning error or omission in any part of any transcript, the Board, through the President or its 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.

Section 12. Submission of Proposed Findings of Fact and Conclusions of Law

12.1. Any party may submit Proposed Findings of Fact and Conclusions of Law within thirty (30) days of the conclusion of a

hearing, or in the event the proceedings of a hearing are transcribed, within twenty (20) days from the date the final transcript is available to all parties and to all members of the Board. Transcripts of the hearing shall be provided to all members of the Board for review at least ten (10) days before the vote on the Proposed Findings of Fact and Conclusions of Law is called.

Section 13. Hearing Examiner

13.1. The President, with the approval of a majority of the Board, may appoint a hearing examiner who shall be empowered to subpoena witnesses and documents, administer oaths and affirmations, examine witnesses under oath, rule on evidentiary questions, hold conferences for the settlement or simplification of issues by consent of the parties and otherwise conduct hearings as provided in Section 10.5 herein. If a hearing examiner is appointed under this Section, he or she shall make proposed Findings of Fact and Conclusions of Law.

13.2. The President, with the approval of a majority of the Board, may appoint one (1) or more members of the Board to serve as hearing examiner(s) for the purpose of conducting any hearing on behalf of the Board. The hearing examiner shall submit written Findings of Fact and Conclusions of Law to the Board pursuant to West Virginia Code 29A-5-3, and the Board may adopt, modify or reject such Findings of Fact and Conclusions of Law.

Section 14. Conferences; Informal Disposition of Cases

14.1. At any time prior to the hearing or thereafter, the President, his or her designee, or his or her duly appointed hearing examiner may hold conferences for the following purposes:

- a. To dispose of procedural requests or similar matters;
- b. To simplify or settle issues by consent of the parties;

or

c. To provide for the informal disposition of cases by stipulation, agreed settlement, or consent order.

14.2. The President, his or her designee, or a duly appointed hearing examiner may cause such conferences to be held on his or her own motion or by the request of a party.

Section 15. Depositions - Evidentiary depositions may be taken and read into evidence as in civil actions in the circuit courts of this State.

Section 16. Subpoenas

16.1. The President or his or her designee shall have the power to issue subpoenas or subpoenas duces tecum pursuant to the provisions set forth in West Virginia Code 29A-5-1(b).

16.2. Written requests for the issuance of subpoenas or subpoenas duces tecum as provided in subsection 16.1 shall be made no later than ten (10) days before a scheduled hearing.

Section 17. Orders

17.1. Any final order entered by the President or his or her designee following a hearing conducted pursuant to these rules, shall be made pursuant to the provisions of West Virginia 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 shall contain Findings of Fact and Conclusions of Law.

17.2. The Findings of Fact and Conclusions of Law must be approved by a majority of the Board either by a poll or vote at a regular meeting, before a final order is entered. A copy of the final order approved by a majority of the Board shall be served upon the Respondent within five (5) days after entry by the Board, by means of registered or certified mail sent to the party or his counsel.

Section 18. Appeal - An appeal from any final order entered in accordance with these regulations shall comply with the provisions of West Virginia Code 29A-5-4.