

Title ~~38~~ 37
procedural rule

1.1 Scope - same
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~~WEST VIRGINIA ADMINISTRATIVE REGULATIONS~~
~~DEPARTMENT OF MINES ENERGY~~
~~CHAPTER 22 41~~
MINE BOOK
April 15
SERIES 38 ~~16~~ 2
~~EMERGENCY PROCEDURAL REGULATIONS~~

SUBJECT: Procedures for Temporary Suspension of Certificates Issued to Persons Pursuant to Chapter 22A of the Code of West Virginia Pending Full Hearing Before the Board of Appeals

Section 1. General

1.02 Authority - These procedural rules are promulgated pursuant to Chapter 29A, Article 3, Section 3, and Chapter 29A, Article 3, Section 15 of the Code of West Virginia, 1931, as amended.

1.03 Filing Date - These ~~emergency~~ rules were filed with the Office of the Secretary of State on the 3rd day of March, 1983, and are effective upon filing.

1.04 Effective Date - Sept. 11, 1983

Aug 11, 1983

1.05 Definitions - Unless the context in which a word or term is used requires a different meaning, the definitions set out in Chapter 22, Article 1, Section 1 apply to these regulations.

Section 2. Procedures for Temporary Suspension of Certificates Issued to Persons Pursuant to Chapter 22A of the Code of West Virginia Pending Full Hearing Before the Board of Appeals

2.01 Finding of Probable Cause by the Board of Appeals. No temporary suspension of the certificate of a certified person shall be made by the Director Commissioner unless and until a finding of probable cause that such person has violated statutory duties has been made by the Board of Appeals according to the provisions of Chapter 22A, Article 1A, Section 30 29(b) of the West Virginia Code.

2.02 Temporary Suspension of Certificates. The Director Commissioner may order the temporary suspension of the certificate of any person certified pursuant to Chapter 22A of the Code of West Virginia, pending a full evidentiary hearing before the Board of Appeals if an investigation by authorized representatives of the Director Commissioner reveals that:

- (a) The certified person was active in the capacity which required or requires, the certification issued by the Director Commissioner; or
- (b) Such certified person is, or was, assigned by the operator or operator's agent to perform duties set out in the Code or regulations; and

- (c) Such certified person failed and/or neglected to perform such statutory or regulatory duties; and
- (d) Such failure and/or neglect of duty resulted in a finding by an authorized representative of the ~~Director~~ Commissioner of a violation of a health and safety standard of the Code or regulations; and
- (e) Such violation of a health and safety standard resulted in the occurrence or a high likelihood of the occurrence of the event against which the standard is directed or designed to prevent.

The temporary suspension shall be effective upon issuance by the ~~Director~~ Commissioner and shall remain effective until modified or terminated by the ~~Director~~ Commissioner or the Board of Appeals.

2.03 Notification. The ~~Director~~ Commissioner, or his authorized representative, shall notify the certified person in writing by personal service or certified mail that such person's certificate is temporarily suspended stating the reasons for such suspension.

2.04 Request for Modification. Any certified person whose certificate has been suspended pursuant to this regulation, may request in writing to the Board of Appeals, that the ~~Director's~~ Commissioner's suspension order be modified at any time after the finding of probable cause by the Board of Appeals.

2.05 Prior Proceedings. These regulations shall be applicable to all cases pending before the Board of Appeals on the date of promulgation, unless otherwise ordered by the Board of Appeals. Except when ordered by the Board of Appeals, no reissuance of any pleading, documents or request shall be required in such a proceeding.

E R R A T A

West Virginia Department of Energy
Administrative Regulation Series 81

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<u>Page</u>	<u>Section</u>	<u>Changed From</u>	<u>Changed To</u>
1	1.01(a)	Section 30, Article 1, Chapter 22	Chapter 22A, Article 1A, Section 29
1	1.05(a)	Section 1, Article 1, Chapter 22	Chapter 22A, Article 1A, Section 1
2	1.05(b)	Section 31, Article 1, Chapter 22	Chapter 22, Article 5, Section 1
2	1.05(d)	Section 30, Article 1, Chapter 22	Chapter 22A, Article 1A, Section 29
2	1.05(g)	Section 21(b), Article 1, Chapter 22	Chapter 22A, Article 1A, Section 20(b)
2	1.05(h)	Section 30, Article 1, Chapter 22	Chapter 22A, Article 1A, Section 29
2	1.05(i)	Section 30, Article 1, Chapter 22	Chapter 22A, Article 1A, Section 29
2	1.05(j)	Section 1, Article 1, Chapter 22 Section 1, Article 2, Chapter 22 Section 30(a), Article 1, Chapter 22	Chapter 22A, Article 1A, Section 1 Chapter 22A, Article 2, Section 1 Chapter 22A, Article 1A, Section 29(a)
3	1.05(l)	Section 31, Article 1, Chapter 22	Chapter 22, Article 5, Section 1
3	1.06(a)	Section 30, Article 1, Chapter 22	Chapter 22A, Article 1A, Section 29
3	1.06(a)(3)	Director Mines	Commissioner Energy
3	1.07(b)	Director	Commissioner
4	1.09(a)	25305	25311
14	2.09	Section 30, Article 1, Chapter 22 Section 21, Article 1, Chapter 22	Chapter 22, Article 5, Section 1 Chapter 22A, Article 1A, Section 20

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14	3.02	Articles 1 or 2, Chapter 22 Insert "Commissioner" after "mine inspector" - Line (1)	Chapter 22A, Article(s) 1A or 2
15	3.04	Insert "and the Commissioner" after "Director" - Line (3)	
16	3.10 (b) (3)	Insert "and the Commissioner" after "Director"	
17	3.11 (b)	Section 30, Article 1, Chapter 22 Section 30, Article 1, Chapter 22	Chapter 22A, Article 5, Section 1 Chapter 22A, Article 5, Section 1
17	3.12	Section 30, Article 1, Chapter 22	Chapter 22A, Article 5, Section 1
17	4.01	Section 21, Article 1, Chapter 22	Chapter 22A, Article 1A, Section 20
19	4.09	Mines	Energy
21	4.14	Section 21(c), Article 1, Chapter 22	Chapter 22A, Article 1A, Section 20(c)
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Scope

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PART 1

GENERAL PROVISIONS

1.01 Scope, Construction, and Applicability

(a) The procedures and rules of practice set forth herein shall govern and apply to proceedings before the Board of Appeals generally or Hearings Examiners appointed as authorized by law, including proceedings for the withdrawal of certification pursuant to Section 30, Article 1, Chapter 22 of the Code.

(b) In any proceeding initiated prior to the effective date of these Rules, the provisions hereof shall govern and apply to all activities in such proceedings conducted after the effective date of these Rules. Except when ordered by the Board, no reissuance of any pleadings, documents, or requests shall be required in such a proceeding.

(c) These Rules shall be liberally construed to secure the just, prompt, and inexpensive conduct and determination of all proceedings before the Board consistent with adequate consideration of the issues involved.

(d) On any procedural question not regulated by these Rules, the pertinent provisions of the Administrative Procedure Act shall apply. On any matter not regulated by these Rules and for which there is no pertinent provision in the Administrative Procedure Act, the provisions of the West Virginia Rules of Civil Procedure or the rules of evidence and privilege applicable in the courts of general jurisdiction of this state, as appropriate, shall apply.

1.02 Authority

These rules are promulgated pursuant to the authority of Article 1, Chapter 22; and Article 3, Chapter 29A of the Code.

1.03 Effective Date

These rules were promulgated on the 10th day of July, 1986, and become effective on the 10th day of August, 1986.

1.04 Filing Date

These rules were filed in the Office of the Secretary of State on the 10th day of July, 1986.

1.05 Definitions

(a) All terms used in these rules, not defined herein, shall have the meanings set forth in Section 1, Article 1, Chapter 22 of the Code.

(b) Board of Appeals: The term "Board of Appeals" shall mean the board created pursuant to Section 31, Article 1, Chapter 22 of the Code.

(c) Code: The term "Code" when following a reference to a specific section, article, and chapter, shall mean the West Virginia Code of 1931, as amended.

(d) Hearing Examiner: The term "Hearing Examiner" shall mean any person authorized by the Board of Appeals pursuant to Section 30, Article 1, Chapter 22 of the Code or any other provision of the Code to conduct hearings required or authorized under the laws of this state to be conducted by the Board of Appeals.

(e) Representative of Miners: The term "representative of miners" shall mean a person or organization designated by a group of miners to act as their representative before the Board of Appeals.

(f) Preliminary Motion: The term "preliminary motion" shall mean a motion made pursuant to Section 1.11 of these rules prior to the conclusion of evidentiary hearings.

(g) Applicant: The term "applicant" shall mean a person filing a petition pursuant to Section 21(b), Article 1, Chapter 22 of the Code.

(h) Charging Party: The term "charging party" shall mean a person filing a charge of breach of duty under Section 30, Article 1, Chapter 22 of the Code.

(i) Charged Party: The term "charged party" shall mean a certified person charged with a breach of duty pursuant to Section 30, Article 1, Chapter 22 of the Code.

(j) Charge: The term "charge" shall mean a petition, complaint or any written document which plainly states a neglect or failure to perform any duty mandated by Section 1, Article 1, Chapter 22 of the Code, et seq., or Section 1, Article 2, Chapter 22 of the Code, et seq., and complies with the requirements of Section 30(a), Article 1, Chapter 22 of the Code.

(k) Any Interested Person of Record: The term "any interested person of record" shall mean any person in attendance at any hearing who has: (1) an interest in the outcome of the proceeding before the Board or Hearing Examiner, and (2) information or evidence which can be presented that could assist the Board or Hearing Examiner in performing its fact finding function, or if no hearing is held any person who meets the

requirements of (1) and (2), and who may submit documents or materials to the Board for its consideration in the matter before it, or a person of record with the Board who meets above.

(1) Chairman: The term "chairman" shall mean that person selected by the members of the Board of Appeals according to requirements of Section 31, Article 1, Chapter 22 of the Code.

1.06 Parties

(a) In a proceeding for withdrawal of certification under Section 30, Article 1, Chapter 22 of the Code, the parties shall be:

- (1) the charging party;
- (2) the charged party;
- (3) the Director of the Department of Mines; and
- (4) any interested person of record allowed to intervene under Section 1.07 of these Rules or any other person so allowed to intervene.

1.07 Intervention

(a) Any person claiming a right of participation in a proceeding on the basis that the person has an interest in the outcome of the proceeding or any person otherwise seeking to intervene in a proceeding may become a party to a proceeding upon the Board's granting of such person's petition to intervene.

(b) A petition seeking intervention must be written, setting forth the interest of the petitioner in the proceedings, containing a showing that petitioner's participation will assist in the determination of the issues in question, and such petition must be served, contemporaneously with the filing, on the Director who shall serve such petition on all other parties to the proceeding.

(c) Any party may file objections to a petition for intervention within fifteen (15) days after service of the petition on the party.

(d) A petition for leave to intervene may be filed at any stage of a proceeding before the commencement of a

hearing. After the commencement of a hearing, a petition for leave to intervene may be filed only with the waiver by all parties or upon a showing by the petitioner of good cause for the delay in seeking intervention.

(e) The Board may grant or deny petitions for intervention or may permit intervention limited to a particular state of the proceeding.

1.08 Form of Documents

(a) Caption. The documents filed in any proceeding conducted under these rules shall be captioned in the name of the person or persons charged with a violation or seeking relief from the Board and may contain or include other information appropriate for the identification of the proceeding, including any docket number assigned to the case.

(b) Title. After the caption, each such document shall contain a title which shall be descriptive of the document and which shall identify the party by whom the document is submitted.

(c) Signature. The original of each document, filed shall be signed at the end by the party submitting the document, or, if the party is represented by an attorney, by such attorney. The address and telephone number of the party or the attorney shall appear beneath the signature.

1.09 Filing and Service of Pleadings and Other Documents

(a) Where to file. All pleadings, forms, and documents in a proceeding described in these rules shall be filed with the Chairman, Board of Appeals, 1615 Washington Street, East, Charleston, West Virginia 25305.

(b) Number of Copies. Except as otherwise provided in these rules or by the Chairman, a party shall furnish an original and three (3) copies of all pleadings and other documents required or permitted to be filed with the Board.

(c) How to file. All filing may be accomplished by personal delivery or first class mail.

(d) When filing effected. In the case of mailing by first class mail, filing is effective upon mailing. In the case of personal delivery, filing is effective upon delivery.

(e) Copies to be served. Copies of all pleadings and other documents filed in any proceeding described in these e

1.17 Discovery

(a) Discovery shall be completed within thirty (30) days after commencement of a proceeding. For good cause shown, the Board may permit the time for discovery to be extended.

(b) Parties may obtain discovery of any relevant matter, not privileged, that is admissible evidence or appears reasonably calculated to lead to the discovery of admissible evidence.

(c) Upon application by a party or by the person from whom discovery is sought or upon its own motion, the Board may, for good cause shown, make any order limiting discovery to prevent undue delay or to protect a party or person from annoyance, oppression, or undue burden or expense.

(d) Upon application to the Board, any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories. The time, place, and manner of taking depositions shall be governed by the order of the Board.

(e) Upon receiving approval by the Board, any party may serve written interrogatories or requests for admission upon another party. A party served with written interrogatories or a request for admission shall answer such interrogatories or requests within fifteen (15) days of service unless the proponent of the interrogatories or request agrees to a longer time, or unless the Board by order specifies a different time or excuses the party from answering on good cause shown. Interrogatories shall be answered under oath. For good cause shown, the Board may order a party to produce and permit inspection, copying, or photographing of designated documents or objects.

1.13 Ex Parte Communications

(a) No individual, partnership, corporation, association, or other entity outside of this Board, its staff, or its agents shall make or knowingly cause to be made any prohibited ex parte communication to the Board, its staff, or its agents as to the merits of any proceeding before the Board which has not been concluded.

(b) No member of the Board, its staff, or its agents shall request any prohibited ex parte communications or make or knowingly cause to be made any prohibited ex parte communications to any individual, partnership, corporation, association, or other entity outside of this Board, its staff, or its agents as to the merits of any proceeding before the Board which has not been concluded.

rules and copies of all notices pertinent to such proceedings shall be served upon all other parties to the proceeding as described in Section 1.06 of these rules and companion sections.

(f) Method of service. Documents by which any proceeding is initiated shall be served on each individual party personally or by registered or certified mail, return receipt requested. All subsequent documents may be served personally or by first class mail. Service by mail is complete upon mailing.

(g) Once the Board of Appeals has agreed to hear the petition or claim, all pleadings and other documents filed in any proceeding described in these Rules shall contain a written certification of the date and manner of service. Such certification shall be in the form of an affidavit of the person making the service or of the written representation of the person's attorney. No pleading or document shall be considered filed for any purpose in the absence of such written certification.

(h) Service of Attorney. Whenever a party is represented by an attorney who has signed any document filed on behalf of such party or otherwise entered an appearance on behalf of such party service thereafter may be made upon the attorney without additionally serving the individual party or parties. In any event once an attorney is of record in a proceeding under the rules, service shall be made on the attorney before service is complete.

1.10 Amendments

(a) The strict formal requirements in pleadings are not required to be observed in documents, answers, or any other papers filed with the Board; and amendments or supplemental statements may be made and filed at any time prior to a scheduled hearing as long as the documents are filed and served as called for under these rules at least ten (10) days prior to the scheduled hearing date. If a party desires to file amended or supplemental statements less than 10 days before the scheduled hearing of the matter, the party or his representative shall make a written request to the Chairman of the Board to file those amendments along with the amendments. Said request will set forth with particularity the reason for the need to file such documents at the late date. The Chairman of the Board will then allow or disallow the filing based solely in his discretion as justice might require.

(b) A further and better statement of any cause or ground of complaint or defense, a further and better particulars

of any matter stated, in any document, may in any case be ordered at the discretion of the Chairman or Hearing Examiner.

1.11 Motions

(a) Unless made during a hearing, all motions shall be in writing, contain a short and plain statement of the grounds on which it is based, and set forth the relief sought. Motions may be accompanied by appropriate supporting material or discussion of the reasons for granting the motion.

(b) A statement in opposition to a motion may be filed by any party within ten (10) days after the date of service.

(c) Any motion, including motions made during the hearing and except for motions related to jurisdiction or directed verdict or for a motion for reconsideration of the final decision of the Board, made less than ten (10) days before the commencement of an evidentiary hearing shall contain a showing of good cause for the motion not having been filed prior to the ten (10) day period.

(d) Unless ordered by the Board, oral argument on motions will not be heard.

1.12 Consolidation of Proceedings

The Chairman of the Board may at any time order a proceeding described in these rules consolidated with any other such proceeding then pending before the Board, if such a consolidation is, in the opinion of the Board, a more efficient and expeditious manner of taking evidence, as long as all parties to the proceeding are afforded due process of law and a fair opportunity to present and make a record of evidence.

1.13 Hearings

All hearings shall be conducted by the Board itself, with the Chairman having the primary responsibility for conducting the hearing, or by a Hearing Examiner, pursuant to the direction of the Board, in those cases as authorized by the Code and consistent with the requirements of these Rules. All hearings shall be conducted in a fair and impartial manner, be conducted in accordance with the provisions of Part 2 of these Rules, and be open to the public.

1.14 Public Access to Board Records

(a) Subject to reasonable regulation by the Board, all Board records relating to reviewing charges to withdraw certification

cation, and review of alleged discharges, discrimination or failure to compensate shall be open for public inspection.

(b) The Board shall make available for public inspection all final orders, decisions and opinions in the adjudication of cases under the provisions of these rules.

1.15 Time

(a) In computing any period of time prescribed or allowed by these Rules, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday when the offices of the government of this State are closed, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday when the offices of the government of this State are closed.

(b) When by these Rules or by a notice given thereunder, an act is required or allowed to be done at or within a specified time, the Board may extend such time for good cause shown. If the motion for extension is made after the expiration of the prescribed time or any earlier granted extension, the extension shall be granted only upon the further showing that the failure to act was the result of excusable neglect.

(c) Whenever any party has the right or is required to do some act or undertake some proceedings within a prescribed period after service of a notice or other document upon him and the notice or document is served upon the party by mail, three (3) days shall be added to the prescribed period.

1.16 Action by the Board

A vacancy in the Board shall not impair the right of the remaining two (2) members to exercise all of the powers of the Board. Two members of the Board, at all times, shall constitute a quorum of the Board. Only those members of the Board attending a hearing held in a proceeding shall participate in the decision in a proceeding arising out of such hearing. In any matter where only two (2) members of the Board attend the hearing held therein, action by the Board to grant the relief requested by the person initiating the proceeding shall require the concurrence of both of those members of the Board.

(c) The term "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice is not given to all parties as provided for in this Rule.

(d) The ex parte communications prohibited by this Rule include:

- (1) such communications, when written, if copies thereof are not contemporaneously served by the communicator on all parties to the proceeding; and
- (2) such communications, when oral, unless advance notice thereof is given by the communicator to all parties to the proceeding and adequate opportunity afforded to them to be present.

(e) The ex parte communications prohibited by this Rule shall not include:

- (1) oral or written requests for information solely with respect to the status of a proceeding; and
- (2) oral or written communications which all the parties to the proceeding agree, or which the Board formally rules, may be made on an ex parte basis.

(f) All ex parte communications made in violation of this Rule shall be placed on the public record of the proceeding to which it relates.

(g) In the event an ex parte communication in violation of this Rule occurs, the Board may make such orders or take such action as to the interests of justice require. Upon notice and hearing, the Board may determine that the interests of justice require that the claim or interest in the proceeding involving a party who knowingly makes a prohibited ex parte communication or knowingly causes a prohibited ex parte communication to be made be dismissed, denied, or otherwise disregarded on account of such violation. Upon notice and hearing, the Board may censure, suspend, otherwise discipline, or revoke the privilege of practice before the Board of any person who knowingly makes or causes the making of a prohibited ex parte communication.

(e) The Hearing Examiner shall prepare a report upon the matters submitted to him by the order of reference and shall set forth his findings of fact and conclusions of law in the report. He shall file the report with the Board and shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The Board shall forthwith mail to all parties notice of the filing.

(f) The Board shall accept the Hearing Examiner's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report, any party may file with the Board and serve written objections thereto upon the other parties. Application to the Board for action upon the report and upon objections thereto shall be by motion and upon notice to the other parties. The Board, after hearing, may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(g) Before filing his report, a Hearing Examiner may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

PART 2

HEARINGS

2.01 Scope

Unless otherwise specified in these or other rules and regulations, the rules in this Part shall govern and apply to hearings conducted by the Chairman or a Hearing Examiner pursuant to the authority provided in the laws of this State or rules and regulations promulgated pursuant thereto.

2.02 Conduct of Hearings

The Chairman or a Hearing Examiner appointed by the Board in those proceedings, as authorized by the Code, shall conduct every hearing.

2.03 Powers of the Board and Hearing Examiners

(a) In all proceedings before the Board or during the time of reference of a proceeding to a Hearing Examiner in matters authorized by the Code, the Board or the Hearing Examiner in such respective matters shall have the authority and power to:

- (1) administer oaths and affirmations;

Hearing Examiners

(a) In matters where authorized by the Code, the Board may appoint a Hearing Examiner. Anyone appointed to act as a Hearing Examiner must not have had any connection at any time with the coal industry or an organization representing miners, unless all parties to the proceeding consent to such a person's appointment. A reference to a Hearing Examiner shall be the exception and not the rule.

(b) The order of reference to the Hearing Examiner may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the Hearing Examiner's report. Subject to the specifications and limitations stated in the order, the Hearing Examiner has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference through subpoenas issued by the Board. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. The Hearing Examiner shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided for hearings before the Board.

(c) When a reference is made, the clerk of the Board shall forthwith furnish the Hearing Examiner with a copy of the order of reference. It is the duty of the Hearing Examiner to proceed with all reasonable diligence. Either party, on notice to the parties and Hearing Examiner, may apply to the Board for an order requiring the Hearing Examiner to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the Hearing Examiner may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(d) The parties may procure the attendance of witnesses before the Hearing Examiner by the issuance and service of subpoenas through the Board. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies as if the witness failed to appear or give evidence before the Board.

- (2) rule upon offers of proof and receive relevant evidence;
- (3) take such action regarding discovery as required in any proceedings and as specified in these Rules;
- (4) regulate the course of the hearing;
- (5) dispose of procedural requests or similar matters;
- (5) hold conferences for the settlement or simplification of the issues with the consent of the affected parties;
- (7) deny any continuance except for good cause shown;
- (8) request the Director to investigate the charge filed in a decertification proceeding and report the results of the investigation within ten (10) days of his receipt of the request;
- (9) adopt any other method for the gathering of sworn evidence which affords the Director and all parties due process of law and fair opportunity to present and make a record of evidence; and
- (10) take any other action in connection with proceedings as authorized by law.

(b) In all proceedings, whether before the Board or a Hearing Examiner, the Board shall be responsible to subpoena witnesses and require the production of any books, papers, records, or other documents relevant or material to the proceedings.

2.04 Notice of Hearing: Contents of Notice

(a) Unless otherwise specified in the Rules, no hearing shall be conducted under the Rules or otherwise unless the parties to the proceeding shall have received at least ten (10) days written notice.

(b) Each written notice of the hearing, or notice of denial of the hearing for failure to state a charge, shall contain

3.04 Notice of Charge and Time to Answer

The Board upon receipt of a charge shall immediately give notice of the charge accompanied by the charge, to the charged party, the Director if he is not the charging party, and the representative of the miner or miners at the mine where the violation is alleged to have occurred, giving ten (10) days from the date of the notice in which to answer.

3.05 Contents of Charge

(a) A charge shall comply with applicable general requirements and shall contain:

- (1) the name of the person charged;
- (2) the duty or duties the person charged is alleged to have violated;
- (3) the approximate date and place so far as is known of the violation of duty; and
- (4) the capacity of the person making the charge.

(b) A charge shall be verified upon oath or affirmation on the basis of information and belief or personal knowledge by the charging party.

3.06 Contents of Answer

An answer shall comply with applicable general requirements and shall contain any documents and materials which could aid the Board in its determination of the possible substance of the charge.

3.07 Who May File an Answer

Any party may file an answer. The failure of a party to file an answer in the prescribed time shall not operate to bar that party's further participation in the proceeding.

3.08 Investigation of Charge

(a) If the Board is unable to determine the substance of the charge, it may request the Director to investigate the charge.

(b) Upon request by the Board, the Director shall investigate the charge and report the results of the investi-

the date, time and place of the hearing; notice of the hearing and a copy of the charge shall be mailed by certified mail, return receipt requested, to the charging party, the charged party, the Director, the representative of the miner or miners affected and to any interested person of record, and, such notice shall contain the date, time and place of the hearing; and a short and plain statement of matters which are to be the subject of or asserted at the hearing. Such notice shall be provided in accordance with the provisions of Section 2, Article 7, Chapter 29A of the Code.

2.05 Data, Time and Place of Hearing

The date, time, and place of each hearing shall be determined by the Board or the Hearing Examiner who is to conduct the hearing. In assigning a hearing site, due regard shall be given to the convenience and necessity of the parties or their representatives and witnesses, the availability of suitable hearing facilities, and other relevant factors.

2.06 Representation at Hearings

At hearings held pursuant to these rules, any party may represent himself or be represented by an attorney at law admitted to practice before the courts of any state or the District of Columbia. In addition, any party who is also an operator may be represented by a full-time employee, and any miner may be represented by the representative of miners.

2.07 Burden of Proof

In all proceedings before the Board the party initiating the proceeding shall have the burden of proving his case by a preponderance of the evidence.

2.08 Proposed Findings, Conclusions, and Orders; Briefs

The Board or the Hearing Examiner to whom a matter is referred may request the parties to file proposed findings of fact, conclusions of law, and orders, together with a supporting brief. Such proposals and briefs also shall be allowed to be filed at the request of a party. At the request of a party, the Board or the Hearing Examiner to whom a matter is referred shall allow reply briefs to be submitted within ten (10) days after the date of filing of an opposing party's proposals and briefs.

All such proposals and briefs shall be served upon all parties and shall contain references to the record and authorities relied upon.

2.09 Hearings To Be Public

All hearings conducted under these rules shall be open to the public; and hearings conducted to hear charges concerning withdrawal or suspension of certification pursuant to Section 30, Article 1, Chapter 22 of the Code shall have a transcript made of all evidence presented in any such hearing. A transcript shall not be made of a hearing conducted to hear charges concerning discrimination or miner's entitlements pursuant to Section 21, Article 1, Chapter 22 of the Code, unless (1) a party to such proceedings requests that a transcript be made within thirty (30) days from the date of the receipt of a final order or decision by the Board or (2) the Board orders a transcript prepared on its own motion; or (3) a Court of record or other judicial body exercising jurisdiction over this proceeding or appeal orders that a transcript be prepared.

PART 3 RULES APPLICABLE TO PROCEEDINGS INITIATED TO WITHDRAW CERTIFICATION

3.01 Scope

The rules in this Part govern and are applicable to proceedings initiated pursuant to Section 30, Article 1, Chapter 22 of the Code by a mine inspector or the Director to charge a mine foreman, assistant mine foreman, fire boss or any other certified person with neglect or failure to perform any duty mandated pursuant to Articles One or Two of Chapter 22 of the Code. In addition to the rules contained in this Part, the general rules of practice before the Board contained in Part 1 and the rules relating to hearings held by the Board contained in Part 2 are also applicable to such proceedings.

3.02 By Whom and Against Whom a Charge May be Initiated

A mine inspector or the Director may charge a mine foreman, assistant mine foreman, fire boss or any other certified person with neglect or failure to perform any duty mandated pursuant to Article 1 or 2, Chapter 22 of the Code.

3.03 Initiation of Proceedings

The charge is initiated by filing it with the Director or with the Board. If a charge is filed with the Director, the Director, within ten (10) days, shall forward notice of the charge with a copy of the charge to the Board.

gation to the Board within ten (10) days of his receipt of the charge.

3.09 Probable Cause Determination

(a) Within twenty (20) days after receipt of the charge the Board shall evaluate the charge and determine whether or not a violation of duty has been stated.

(b) In making a probable cause determination, the Board shall evaluate all documents and materials of record, including the charge and any answer filed, in order to determine as nearly as possible the substance of the charge.

3.10 Notice of Probable Cause Determination, and Hearing or Denial of Hearing

(a) If the Board determines that probable cause exists to support the allegation that the person charged has violated his duty, the Board by the end of the twenty (20) day period shall set a date for hearing which date shall be within eighty days of the filing of the charge.

(b) If probable cause is determined, notice of the hearing, a copy of the charge and the probable cause determination shall be mailed by certified mail, return receipt requested to:

- (1) the charging party;
- (2) the charged party;
- (3) the Director, if he is not the charging party;
- (4) the representative of the miner or miners at the mine where the violation is alleged to have occurred; and
- (5) to any interested person of record.

(c) If the Board determines that no probable cause exists, notice of denial of the hearing, a copy of the charge and the reasons for the failure to state a charge shall be mailed by certified mail, return receipt requested to:

- (1) the charging party;
- (2) the charged party;
- (3) the Director, if he is not the charging party;

- (4) the representative of the miner or miners at the mine where the violation is alleged to have occurred; and
- (5) to any interested person of record.

3.11 Board Findings

(a) At the conclusion of the hearing the Board shall proceed to determine the case upon consideration of all the evidence offered and shall render a decision in writing containing its findings and conclusions of law.

(b) If the Board finds by a preponderance of the evidence that the certificate or certificates of the charged person should be suspended or revoked pursuant to Section 30, Article 1, Chapter 22 of the Code, it shall enter an order to that effect. No renewal of the certificate shall be granted except as provided in Section 30, Article 1, Chapter 22 of the Code.

3.12 Judicial Review

Any party adversely affected by a final order or decision issued by the Board under these rules pursuant to Section 30, Article 1, Chapter 22 of the Code shall be entitled to judicial review thereof pursuant to Section 4, Article 5, Chapter 29A of the Code.

PART 4 RULES APPLICABLE TO PROCEEDINGS INITIATED ALLEGING DISCRIMINATION OR FOR COMPENSATION OWED TO MINERS AS A RESULT OF A WITHDRAWAL ORDER

4.01 Scope

The rules of this Part govern and are applicable to proceedings initiated pursuant to Section 21, Article 1, Chapter 22 of the Code by any miner or a representative of miners who believes that he has been discharged or in any other way discriminated against because he, (1) has notified the Director, his authorized representative, or an operator, directly or indirectly, of any alleged violation or danger, (2) has filed, instituted or caused to be filed or instituted any proceeding under this law, (3) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of the state mining laws; or any miner who has not been compensated by an operator for lost time due to the posting of a withdrawal order. In addition to the rules contained in this Part, the general rules of practice before the

Board contained in Part 1 and the rules relating to hearings held by the Board contained in Part 2 are also applicable to such proceedings.

4.02 When and by Whom Applications May be Made to Board

Any miner or a representative of miners who believes that he has been discharged or otherwise discriminated against as set out in (1), (2) or (3) of Section 4.01 of these rules, or any miner who has not been compensated by an operator for lost time due to the posting of a withdrawal order, may, within thirty (30) days after such violation occurs, make application to the Board for a review of such alleged discharge, discrimination, or failure to compensate.

4.03 Initiation of Proceedings

The proceeding is initiated by filing the application with the Board.

4.04 Contents of Application

An application shall comply with applicable general requirements and shall contain:

- (1) the name of the respondent,
- (2) a description of the act and detailed circumstances surrounding the alleged discharge, discrimination, or failure to compensate, accompanied by any supporting documents that may be available,
- (3) copies of any contract arbitration decision involving the applicant and the same set of facts alleged in the application,
- (4) a statement as to whether a similar complaint has been filed with the Secretary of the United States Department of Labor pursuant to 30 U.S.C. § 815(c) of the Federal Mine Safety and Health Act.

4.05 Contents of Answer

An answer shall comply with applicable general requirements and shall contain any documents and materials which could aid the Board in its determination of the possible substance of the charge.

4.06 Who May File an Answer; Time for Answer

Any party may file an answer within fifteen (15) days of the date of service of the application on the party. The failure of a party to file an answer shall not foreclose the party's further participation in the proceeding.

4.07 Investigation of Application

Upon receipt of the application, the Board shall cause such investigation to be made as it deems appropriate. Such investigation shall provide an opportunity for a public hearing as provided in Part 2 of these rules at the request of any party to enable the parties to present information relating to the alleged violation.

4.08 Notice of Application

A copy of the application along with any other materials filed with the Board shall be served on the respondent by the applicant as set forth in Section 1.09(f) of these rules.

4.09 Notice of Hearing

Mailing of the notice of hearing to the respondent at his last address of record as reflected in the records of the Department of Mines shall be deemed adequate notice to the respondent.

4.10 To Whom Notice is to be Given and Contents of Notice

(a) Notice of any hearing in the matter shall be mailed by certified mail, return receipt requested to:

- (1) the applicant;
- (2) the respondent; and
- (3) to any interested person of record.

(b) Each written notice of the hearing shall contain the date, time and place of the hearing; and a short and plain statement of matters which are to be the subject of or asserted at the hearing. Such notice shall be provided in accordance with the provisions of Section 2, Article 7, Chapter 29A of the Code.

4.11 Public Hearing

A public hearing shall be held only at the request of any party to enable the parties to present information relating to such violation or by order of the Board. A request for such hearing by any party must be filed with the Board and served on all other parties within twenty (20) days of the date of service of the application on the requesting party.

4.12 Final Decisions of the Board

(a) Finding of Violation

If the Board finds that a violation did occur, it shall issue a decision within forty-five days of the conclusion of the investigation, making findings of facts and conclusions of law, incorporating therein, requiring the person committing such violation to take such affirmative action to abate the violation as the Board deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner or representative of miners to his former position with back pay, and also pay compensation for the idle time as a result of a withdrawal order.

(b) Finding of No Violation

If the Board finds that no violation occurred, it shall issue an order denying the application, such order shall incorporate the Board's findings therein.

4.13 Proceedings Relative to Discharge; 45 Day Limitation

(a) If the proceedings under Part 4 of these rules relative to discharge are not completed within forty-five (45) days of the date of discharge due to delay caused by the operator, the miner shall be automatically reinstated until the final determination.

(b) If the proceedings under Part 4 of these rules relative to discharge are not completed within forty-five (45) days of the date of discharge due to delay caused by the Board, then the Board may, at its option, reinstate the miner until the final determination.

(c) If the proceedings under Part 4 of these rules relative to discharge are not completed within forty-five (45) days of the date of discharge due to delay caused by the miner, the Board shall not reinstate the miner until the final determination.

(d) Prior to any order of reinstatement under sections (a) or (b) of this Rule; if no hearing has been previously

held on the discharge by either the Board or a Hearing Examiner, the Board shall hold a hearing to determine the cause of any delay and the matters specified herein. Temporary reinstatement until the final determination of the proceedings shall be granted once the Board first determines that it has jurisdiction of the application, unless the respondent shows that there is a substantial unlikelihood that the application will succeed on the merits, and that the granting of the order of temporary reinstatement will adversely affect the safety or health of the miners at the mine where the applicant is to be reinstated.

4.14 Request by Applicant for Costs

Whenever an order is issued under Part 4 of these rules pursuant to Section 21(c), Article 1, Chapter 22 of the Code, at the request of the applicant, a sum equal to the aggregate amount of all costs and expenses including the reasonable attorney's fees as determined by the Board to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation.

4.15 Judicial Review

Any party adversely affected by a final order or decision issued by the Board under these rules pursuant to Section 21, Article 1, Chapter 22 of the Code shall be entitled to judicial review thereof pursuant to Section 4, Article 5, Chapter 29A of the Code.

4.16 Deferral

In any proceeding instituted under the Code and to which this Part applies and upon motion by any party to the proceeding, the Board may dismiss an application and defer to the processing of the same claim by the United States Department of Labor if the Board finds that the same claim was first presented to the United States Department of Labor and is being or has been processed by that agency.