

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #2

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2007 MAY -2 AM 10: 32

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Board of Acupuncture TITLE NUMBER: 32

RULE TYPE: Procedural CITE AUTHORITY: 30-36-1 et seq.,30-1-1 et seq.,29A-5-1 et seq.

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 32CRS8

TITLE OF RULE BEING PROPOSED: Contested Case Hearing Procedure

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 June 12, 2007 AT 12:00 (noon) ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Dr. Darrell E. Samples, Secretary

Board of Acupuncture

P O Box 252

Huntington, WV 25707-0252

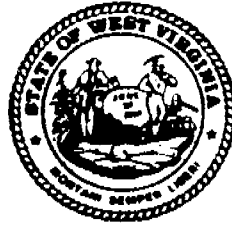
THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.


Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

**Joe Manchin III,
Governor**

Michelle DeStefano, LAc
Shepherdstown
Marian Hollinger
Morgantown
Brian Stephen Love, MD
Morgantown



P O Box 252
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C. P. Negri, OMD, NMD
Fairmont
Darrell E. Samples, ND, OMD
Huntington

~State of West Virginia~
Board of Acupuncture

April 30, 2007

Title 32
Procedural Rule
Series 8

Contested Case Hearing Procedure Summary

The purpose of this rule is to comply with W. Va. Code §§ 30-36-1 et seq., 30-1-1 et seq. and 29A5-1 et seq. This rule provides the outline of Board procedures which will be followed in contested cases of Board rulings.

The proposed procedural rule provides licensees who disagree with Board findings of fact or restrictions, revocations or suspensions against a licensee the method for contesting such order.

The proposed procedural rule provides applicants who have been denied licensure the method for contesting such denial.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Contested Case Hearing Procedure (32CRS8)

Type of Rule: Legislative Interpretive Procedural

Agency: Board of Acupuncture

Address: P O Box 252
Huntington, WV 25707
Attn: Dr. Darrell E. Samples, Secretary

Phone Number: 304 529-9355 Email: docsamples@verizon.net

Fiscal Note Summary

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

None

Fiscal Note Detail

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

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: _____

Rule Title: Contested Case Hearing Procedure (32CRS8)

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

There are no costs associated with this rule.

MEMORANDUM

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

Date: April 30, 2007

Signature of Agency Head or Authorized Representative

Mr. Daniel J. Sauter

FILED

2007 MAY -2 AM 10: 32

**TITLE 32
PROCEDURAL RULE
BOARD OF ACUPUNCTURE**

**SERIES 8
CONTESTED CASE HEARING PROCEDURE**

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§32-3-1. General.

1.1. Scope. -- This rule establishes procedures for the adjudication of contested case hearings before the Board.

1.2. Authority. -- W. Va. Code §§30-36-1 et seq., 30-1-1 et seq. and 29A-5-1 et seq.

1.3. Filing Date. --

1.4. Effective Date. --

§32-3-2. Definitions.

The following words and phrases as used in these rules shall have the following meanings, unless the context otherwise requires:

2.1. "Board" means the West Virginia Board of Acupuncture.

2.2. The term "demanding party" means an individual who has been denied a license to practice acupuncture and oriental medicine by the Board and who, as a result, demands that a hearing be held before the Board on the issue of such denial.

2.3. The term "charged party" means an individual who holds a license to practice acupuncture and oriental medicine issued by the Board and who has been charged by the Board as described in subsection 3.4 of this rule.

2.4. The term "licensee" means an acupuncturist who holds a license issued by the Board to practice acupuncture and oriental medicine or a "trainee" who holds an educational training permit.

2.5. The term "license" means a license issued by the Board pursuant to W. Va. Code §30-36-1 et seq.

2.6. "Practice of acupuncture and oriental medicine" means the practice of acupuncture and oriental medicine as defined in W. Va. Code §30-36-1 et seq. and includes licensed acupuncturists, student acupuncturists and acupuncture trainees.

§32-3-3. Hearing Procedures.

3.1. Any person denied a license or who has had their license/training permit suspended, restricted, or revoked by order of the Board and who believes such order was in violation of W. Va. Code §§30-1-1 et seq. and/or 30-36-1 et seq. shall be entitled to a hearing on the action.

3.2. Any person who desires a hearing for the reason described in subsection 3.1 of this section must present a written demand for such to the Board.

3.3. When the president of the Board or his or her authorized designee is presented with such a demand for a hearing, 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.

3.4. Charges may be instituted against any licensed acupuncturist, student acupuncturist and acupuncture trainee by the Board when reasonable cause exists for believing that he or she may have engaged in conduct or be in such condition that his or her license should be suspended, revoked or otherwise disciplined for one or more of the grounds set forth in W. Va. Code §30-36-1 et seq. or the Board's legislative rules. Charges may be based upon information received by way of a verified written complaint filed with the Board and further information gathered by the Board in the process of investigating such complaint. Charges may also be based upon information received solely through investigative activities undertaken by the Board.

3.5. Charges instituted against a licensee or trainee as described in subsection 3.4 of this section shall be set forth in a Complaint and Notice of Hearing issued in the name of the Board as the agency of the State regulating the practice of acupuncture and oriental medicine. Such Complaint and Notice of Hearing shall designate the Board as the "Complainant," and shall designate the licensed acupuncturist, student acupuncturist and acupuncture trainee involved in the proceeding as the "Respondent"; 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; shall state the date, time and place for the hearing; and, shall contain a statement of intention by the Board to appoint a hearing examiner.

3.6. Upon receipt of a demand for a hearing described in subsection 3.1 and 3.2 of this section, the president or his or her designee shall provide the demanding party with a Complaint and Notice of Hearing issued in the name of the Board as the agency of the State regulating the practice of acupuncture and oriental medicine. Such Complaint and Notice of Hearing shall designate the demanding party as the "Complainant" and shall designate the Board as the "Respondent"; shall set out the substance of each and every reason that the Board has denied the demanding party a license with sufficient particularity to reasonably apprise the demanding party of the nature, time and place of the conduct or condition at issue therein; shall state the date, time and place for the hearing; and shall contain a statement of intention by the Board to appoint a hearing examiner.

3.7. The Board may amend the charges set forth in a Complaint and Notice of Hearing as it deems proper.

3.8. A Complaint and Notice of Hearing shall be served upon the demanding or charged party at least thirty (30) days prior to the date of hearing.

3.9. Upon written motion received by the Board no later than twenty (20) days prior to the date of hearing, a more definite statement of the matters charged or the reasons stated for denial of licensure shall be provided to the demanding or charged party or his or her counsel, at least fifteen (15) days prior to the hearing date.

3.10. Hearings shall be conducted as follows:

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

3.10.2. The Board may be represented by the West Virginia Attorney General's Office.

3.10.3. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded from the hearing. Furthermore, the rules of evidence as applied in civil cases in the circuit courts of this State shall be followed. However, when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.

3.10.4. The rules of privilege recognized by the law of this State shall be followed.

3.10.5. Objections to evidentiary offers shall be noted in the record. Any party to the hearing may vouch the record as to any excluded testimony or other evidence.

3.10.6. Any party to a hearing may appear with witnesses to testify on his or her behalf; may be heard in person, by counsel or both; may present such other evidence in support of his or her position as deemed appropriate by the Board or its designated hearing examiner; and, when appropriate, may cross-examine witnesses called by the Board in support of the charges or in defense of its decision to deny licensure or educational training permit.

3.10.7. 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 charged or demanding party and/or his or her attorney in person; or if he or she cannot be found, by delivering such notice at his or her usual place of abode, and giving information of its purport, to his wife or her husband, or to any other person found there who is a member of his or her family and above the age of sixteen (16) years; or if neither his wife or her husband nor any such person can be found there, and he or she cannot be found, by leaving such notice posted at the front door of such place of abode; or if he or she does not reside in this State, such notice may be served by the publication thereof once a week for three (3) successive weeks in a newspaper published in this State; or such notice may be served by registered or certified mail.

3.10.8. The hearing shall be open to the general public.

3.10.9. 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 or she so testified.

3.10.10. The hearing may be conducted by one or more Board members or by a hearing examiner appointed by the Board.

3.10.11. A record of the hearing, including the complaint(s), if applicable, the notice of hearing, all pleadings, motions, rulings, stipulations, exhibits, documentary evidence, evidentiary depositions and the stenographic report of the hearing, shall be made and a transcript

thereof maintained in the Board's files. Upon request, a copy of the transcript shall be furnished to any party at his or her expense.

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

3.10.13. Where a hearing is held upon the instance of the Board after charges have been brought against a licensee pursuant to subsections 3.4 and 3.5 of this section, the Board shall have the burden of proof and shall present its evidence and/or testimony in support of the charges first.

3.10.14. Where a hearing is held upon demand under the provisions of subsections 3.1, 3.2, 3.3, and 3.6 of this section, the demanding party shall have the burden of proof and shall therefore be required to present his or her evidence first. The Board may require the person demanding the hearing to give security for the costs thereof and if the demanding party does not substantially prevail, such facts may be assessed against them and may be collected in a civil action by other proper remedy.

3.10.15. Following the conclusion of the Board's presentation of evidence in accordance with subsection 3.10.13 of this section, the Respondent or charged party shall have the right to submit his or her evidence in defense.

3.10.16. Following the conclusion of the demanding party's presentation of evidence in accordance with subsection 3.10.14 of this section, the Board shall have the right to submit its evidence in defense.

3.10.17. The Board may call witnesses to testify in support of its decision to deny licensure or in support of the charges instituted against a licensee; may present such other evidence to support its position; and, may cross-examine witnesses called by the demanding party or charged party in support of his or her position.

3.10.18. All parties shall have the right to offer opening and closing arguments, not to exceed ten (10) minutes for each presentation.

3.10.19. Hearings held by the Board as a result of charges instituted against a licensee may be continued or adjourned to a later date or a different place by the Board or its designee by appropriate notice to all parties.

3.10.20. Motions for a continuance of a hearing may be granted upon a showing of good cause. Motions for continuance must be in writing and received in the office of the Board no later than seven (7) days prior to the hearing date. In determining whether good cause exists, consideration will be given to the ability of the party requesting the continuance to proceed effectively without a continuance. A motion for a continuance filed less than seven (7) days from the date of hearing shall be denied unless the reason for the motion could not have been ascertained earlier. Motions for continuance filed prior to the date of hearing may be ruled on by the Executive Secretary or Assistant Executive Secretary of the Board or designated hearing examiner. All other motions for continuance shall be ruled on by the Board member(s) or the hearing examiner presiding over the hearing.

3.10.21. All motions related to a case set for hearing before the Board, except motions for continuance and those made during the hearing, shall be in writing and shall be

received in the office of the Board at least ten (10) days before the hearing. Prehearing motions shall be heard at a prehearing conference or at the hearing prior to the commencement of testimony. The Board member(s) or the hearing examiner presiding at the hearing shall hear the motions and the response for the non-moving party and shall rule on such motions accordingly.

§32-3-4. Transcription of Testimony and Evidence.

4.1. All testimony, evidence, arguments and rulings on the admissibility of testimony and evidence shall be recorded by stenographic notes and characters or by mechanical means.

4.2. All recorded materials shall be transcribed. The Board shall have the responsibility to make arrangements for the transcription of the recorded testimony and evidence.

4.3. Upon the motion of the Board or any party assigning error or omission in any part of any transcript, the Board or its 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/or revised as appropriate so as to make it conform to the truth.

4.4. A transcript of the hearing shall be provided to all members of the Board for review at least ten (10) days before the vote is taken on its decision in any licensure or licensure disciplinary matter.

§32-3-5. Submission of Proposed Findings of Fact and Conclusions of Law.

5.1. Any party may submit proposed findings of fact and conclusions of law at a time and manner designated by the Board or its duly appointed hearing examiner.

§32-3-6. Hearing Examiner.

6.1. 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 matters, hold conferences for the settlement or simplification of issues by consent of the parties, cause to be prepared a record of the hearing so that the Board is able to discharge its functions and otherwise conduct hearings as provided in §24-3-3.10 herein.

6.2. Hearing examiners appointed by the Board are not authorized or empowered to grant, suspend, revoke or otherwise discipline any license.

6.3. The hearing examiner shall prepare recommended findings of fact and conclusions of law for submission to the Board. The Board may adopt, modify or reject such findings of fact and conclusions of law.

§32-3-7. Conferences; Informal Disposition of Cases.

7.1. At any time prior to the hearing or thereafter, the Board, its designee or its duly appointed hearing examiner may hold conferences for the following purposes:

7.1.1. To dispose of procedural requests, prehearing motions or similar matters;

7.1.2. To simplify or settle issues by consent of the parties; or

7.1.3. To provide for the informal disposition of cases by stipulation or agreement.

7.2. The Board or its appointed hearing examiner may cause such conferences to be held on its own motion or by the request of a party.

7.3. The Board may also initiate or consider stipulation or agreement proposals with regard to the informal disposition of cases and may enter into such stipulations and/or agreements without conference.

§32-3-8. Depositions.

8.1. Evidentiary depositions may be taken and read or otherwise included into evidence as in civil actions in the circuit courts of this State.

§32-3-9. Subpoenas.

9.1. Subpoenas to compel the attendance of witnesses and subpoenas duces tecum to compel the production of documents may be issued by the Board or its Executive Secretary, and by the hearing examiner appointed by the Board. Such subpoenas shall be issued pursuant to W. Va. Code 29A-5-1(b).

9.2. Written requests by a party for the issuance of subpoenas or subpoenas duces tecum as provided in subsection 9.1 of this section must be received by the Board no later than ten (10) days before a scheduled hearing. Any party requesting the issuance of subpoenas or subpoenas duces tecum shall see that they are properly served in accordance with W. Va. Code §29A-5-1(b).

§32-3-10. Orders.

10.1. Any final order entered by the Board following a hearing conducted pursuant to these rules shall be made pursuant to the provisions of W. Va. Code §§29A-5-3 and 30-1-8(d). 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.

10.2. 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 demanding or charged party and/or his attorney of record, if any, within five (5) days after entry by the Board by personal service or by registered or certified mail.

§32-3-11. Appeal.

11.1. An appeal from any final order entered in accordance with these rules shall comply with the provisions of W. Va. Code §30-1-9.

§32-3-12. Severability.

12.1. If any provision of this rule or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect the provisions or application of this

rule which can be given effect without the invalid provisions or application and to this end the provisions of this rule are declared to be severable.