

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #3

Do Not Mark In This Box

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2010 JUL 30 PM 5:01

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: WV Board of Optometry TITLE NUMBER: 14CSR3

CITE AUTHORITY: §30-8-1, et. seq.

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 14CSR3

TITLE OF RULE BEING AMENDED: Contested Case Hearing Procedure

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.


Authorized Signature

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: July 30, 2010

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) WV Board of Optometry, 179 Summers Street, Charleston, WV 25301, 304-558-5901

LEGISLATIVE RULE TITLE: ~~14CSR3 Contested Case Hearing Procedure~~

1. Authorizing statute(s) citation §30-8-1, et seq

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
June 25, 2010

b. What other notice, including advertising, did you give of the hearing?
A memo was mailed to all licensees directing them to our web site, www.wvbo.org, where the proposed rules were posted. Notice was given by phone and hand delivery of the rules to the West Virginia Optometric Association, and notice was given by phone contact and an e-mail was sent to the West Virginia Academy of Ophthalmologists informing them of the posting on the web site.

c. Date of Public Hearing(s) *or* Public Comment Period ended:
July 26, 2010 at noon

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached xx No comments received _____

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 30, 2010 at 2:00 p.m.

- f. Name, title, address and **phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Pamela Carper, 179 Summers Street, Suite 231, Charleston, WV 25301, 304-558-5901 The cell phone number is 304-546-2907.

- g. **IF DIFFERENT FROM ITEM 'f'**, please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

Gregory Moore, O.D., President, WV Board of Optometry, 179 Summers Street, Suite 231, Charleston, WV 25301, 304-558-5901 or 304-768-7902 or contact Pam Carper listed above.

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

-n/a

b. Date of hearing or comment period:

n/a

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

n/a

d. Attach findings and determinations and reasons:

Attached n/a

WEST VIRGINIA BOARD OF OPTOMETRY

14CSR3

Amendment to Contested Case Hearing Procedure

Summary

The amendment brings §14-3 into compliance with the passage of Senate Bill 230, W. Va. Code §30-8, passed during the 2010 Legislative Session.

- The amendment adds permission for the Board to hire a hearing examiner as listed in Senate Bill 230.
- It also allows the Board to assess administrative costs to the licensee if the licensee is found to have violated the provisions of W. Va. Code §30-8-1 et. seq. or the Board's rules 14CSR.

WEST VIRGINIA BOARD OF OPTOMETRY

14CSR3

Contested Case Hearing Procedure

Circumstances

The amendment is written in order to comply with the requirements of Senate Bill 230 passed during the 2010 Legislative Session rewriting the Board's enabling statute, W. Va. Code §30-8.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Contested Case Hearing Procedure

Type of Rule: Legislative Interpretive Procedural

Agency: West Virginia Board of Optometry

Address: 179 Summers Street, Suite 231
Charleston, WV 25301

Phone Number: 304-558-5901 Email: wvbdopt@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.

The Board has had no contested case hearings in 7 years. Therefore one hearing is used as an example. The amendment adds the use of a hearing examiner as an option for the board. It also allows the board to charge administrative costs to a licensee who has been found to be guilty of violating W. Va. Code §30-8 or the Board's rules 14CSR.

The cost of the hearing would be recaptured if the licensee is found in violation through the assessment of administrative costs. If the cost was absorbed it would have a total of \$6372 per hearing.

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	6,372.00	6,372.00	0.00
Personal Services	6,172.00	6,172.00	0.00
Current Expenses	200.00	200.00	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	6,372.00	0.00

Rule Title: Contested Case Hearing Procedure §14-3

Rule Title:

Contested Case Hearing Procedure

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

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

The Board has not had a contested case hearing in the last seven years. I have used one case as an estimate. A hearing examiner costs \$100 per hour x 24 hours = \$2400. Our attorney costs would amount to about the same as negotiating a consent agreement which is \$3000. Court reporting and staff time would add an additional \$772 (reporter \$30/hr x 16 = \$480. Staff time \$18.72/hr x 16 = \$292.) Current expenses are estimated at \$200. This would total \$6372 per hearing.

If the licensee is found in violation, the Board would capture the cost in assessment of administrative costs. If the licensee was found to not be in violation, the cost would be \$6372 per hearing.

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: 7/30/10

Signature of Agency Head or Authorized Representative



TITLE 14
PROCEDURAL RULE
WEST VIRGINIA BOARD OF OPTOMETRY
SERIES 3
CONTESTED CASE HEARING PROCEDURE

§14-3-1. General.

1.1. Scope. -- This rule specifies the procedure for the adjudication of contested case hearings before the Board.

1.2. Authority. -- W. Va. Code §§30-8-1 et seq. and 30-1-1 et seq.

1.3. Filing Date. -- .

1.4. Effective Date. -- .

§14-3-2. Definitions.

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

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

2.2. "Demanding party" means an individual who has been denied a license to practice optometry 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 optometry or permit issued by the Board and who has been charged by the Board as described in Section 3.4 of these rules.

2.4. "License" means a license or permit issued by the Board pursuant to W. Va. Code §30-8-1 et seq.

2.5. The term "Licensee" means an individual who holds a license to practice optometry issued by the Board.

2.6. "Permittee" means a person who holds a temporary optometry permit.

2.7. "Practice of optometry" means the practice of optometry" as defined in W. Va. Code §30-8-3.

§14-3-3. Hearing Procedure.

3.1. Any applicant denied a license or permit or any licensee or permit holder who has had their license or permit suspended by the Board who believes such denial was in violation of W. Va. Code §§30-1-1 et seq. and/or 30-8-1 et seq. shall be entitled to a hearing on the action denying or suspending such license or permit.

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 Chair 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 licensee or permittee by the Board when probable cause exists for believing that the licensee or permittee may have engaged in conduct, practices or acts in such condition that his or her license or permit should be suspended, revoked or otherwise disciplined for one or more of the grounds set forth in W. Va. Code §30-8-18, 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

permittee 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 ~~licensed—optometrists~~ optometry. Such Complaint and Notice of Hearing shall designate the Board as the “Complainant”, and shall designate the licensee or permittee 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; and shall state the date, time and place for the hearing.

3.6. Upon receipt of a demand for a hearing described in subsections 3.1 and 3.2 of this section, the chair or his or her designee shall provide the demanding party, with a Complaint and Notice of Hearing issued in the name of the Board. 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 or permit with sufficient particularity to reasonably apprise the demanding party of the nature, time and place of the conduct or condition at issue therein; and shall state the date, time and place for the hearing.

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 shall 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 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 a 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 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 testified.

3.10.10. The hearing shall be conducted by a quorum of the Board: or, if the Board so chooses, a hearing examiner chosen 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 subsection 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 action, 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 or 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 offer its evidence in rebuttal.

3.10.17. The Board may call witnesses to testify in support of its decision to deny licensure, to deny a permit or in support of the charges instituted against a licensee or permittee; 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 or hearing examiner as a result of charges instituted against a licensee or permittee may be continued or adjourned to a later date or 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 before 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 hearing date may be denied unless the reason

for the motion could not have been ascertained earlier. Motions for continuance filed prior to the date of hearing shall be ruled on by the chair or executive secretary of the Board. All other motions for continuance shall be ruled on by the Board member(s), ~~or~~ the member presiding over the hearing or hearing examiner.

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. Pre-hearing motions shall be heard at a pre-hearing conference or at the hearing prior to the commencement of testimony. The Board member(s) presiding at the hearing or the hearing examiner shall hear the motions and the response from the non-moving party and shall rule on such motions accordingly.

§14-3-4. Transcription of Testimony and Evidence.

4.1. 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.

4.2. All reported materials shall be transcribed. The Board shall have the responsibility to make arrangements for the transcription of the reported 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 chair, ~~or~~ presiding member or the 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 permit disciplinary matter.

§14-3-5. 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.

§14-3-6. Conferences; Informal Disposition of Cases.

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

6.1.1. To dispose of procedural requests, pre-hearing motions or similar matters;

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

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

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

6.3. 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.

§14-3-7. Depositions.

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

§14-3-8. Subpoenas.

8.1. Subpoenas to compel the attendance of witnesses and subpoenas duces tecum to compel the production of documents may be issued by any member of the Board, ~~or~~ its Executive Secretary or its Assistant Executive Secretary. Such subpoenas shall be issued pursuant to W. Va. Code §29A-5-1(b).

8.2. Written requests by a party for the issuance of subpoenas or subpoenas duces tecum as provided in subsection 8.1 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 duces tecum shall see that they are properly served in accordance with W. Va. Code §29A-5-1(b)

§14-3-9. Orders.

9.1. 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

9.2. 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. The Board may assess administrative costs to the licensee if the licensee is found to have violated the provisions of W. Va. Code §§30-8-1 et. seq. or the Board's rules, 14CSR. Any costs which are assessed shall be placed into the special account of the Board. 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 or her attorney of record, if any, within ten (10) days after entry by the Board by personal service or by registered or certified mail.

§14-3-10. Appeal.

10.1. An appeal from any final order entered in accordance with these rules shall comply with the provisions of W. Va. Code §§30-1-9 and W. Va. Code 29A-6-1 et seq.



WEST VIRGINIA BOARD OF OPTOMETRY

179 Summers Street, Suite 231

Charleston, WV 25301

Phone: (304) 558-5901

Fax: (304) 558-5908

e-mail: wvbdopt@verizon.net

MEMORANDUM

TO: All Licensees

FROM: Gregory Moore, O.D., President

DATE: June 28, 2010

RE: Board Rules Filed For Comment Last Week

The Board has been working on rule amendments and two new rules to comply with Senate Bill 230 which passed during the 2010 Legislative Session. The bill completely re-wrote the Board's enabling statute, W. Va. Code, §30-8.

New provisions needed to be written to implement the privileges gained. We have made amendments to the Board's existing rules, §14-1 through §14-8. The Board is also proposing three new rules, §14-9, §14-10 and §14-11. These rules outline the certificate procedure to prescribe contact lenses that contain and deliver pharmaceutical agents required by SB 230, separate the continuing education provisions currently listed in §14-1 with some modernization of the rule and a new specific procedure for course pre-approval, and a rule outlining the procedures required to obtain the privilege to use injections for substances other than epinephrine as required by SB 230. These provisions are listed in §30-8-15 of SB 230.

The proposed rules are posted on our web site, www.wvbo.org in two places. The first is just under the Board's mission statement beside the Annual Report and Education and Training of Optometrists. The second posting is under "Laws and Regulations Governing Optometry" under proposed rules. We have also posted the full text of SB 230 so you may refer to the requirements listed requiring the changes to the rules. The language to be eliminated is struck through and the new language is underlined. There are no underlines or strike throughs in §14-9 through §14-11 because they are new rules.

The Board welcomes and values your opinion. Please review the proposed rules and let us know of your recommendations or concerns. Please send your written comments to the Board by e-mail to wvbdopt@verizon.net, by postal mail at 179 Summers Street, Suite 231, Charleston, WV 25301, or by fax at 304-558-5908. The Board office phone number is 304-558-5901 if you have any questions.

Once again, we value your opinion. Please review these proposals and give us your input. **The last date we can receive your comments for §14-11, Injection Certificate, is Friday, July 23, at 5:00 p.m. The last day we may receive comments for the rest of the rules is noon on Monday, July 26.** Thank you for your time and attention.

MISSION STATEMENT

To ensure that all applicants for licensure and all Doctors of Optometry currently licensed, practice their profession in a manner that benefits and protects the public, and to ensure that the highest quality optometric eye and vision care is provided in a professional, competent, and ethical manner.

Laws

- Senate Bill 230 Chapter 30-8
- Chapter 30 - Article 8 Optometrists
- 14-1 Rules Of The West Virginia Board of Optometry
- 14-2 Expanded Prescriptive Authority Procedures for Optometrists
- 14-3 Contested Case Hearing Procedure
- 14-4 Disciplinary and Complaint Procedures for Optometrists
- 14-5 Schedule of Fees
- 14-6 Examination and Scoring Policy
- 14-7 Administration and Board Meeting
- 14-8 Licensure by Endorsement

Proposed Rules

- Senate Bill 230 Chapter 30-8
- 14-1 Rules of the West Virginia Board of Optometry
- 14-2 Oral Pharmaceuticals
- 14.3 Contested Case Hearing Procedures
- 14.4 Disciplinary and Complaint Procedures
- 14.5 Schedule of Fees
- 14.6 Examination and Scoring Policy
- 14.7 Administration and Board Meetings
- 14.8 Licensure by Endorsement
- 14.9 Contact Lenses that Contain and Deliver Pharmaceutical Agents Certificate
- 14.10 Continuing Education
- 14.11 Injectable Pharmaceutical Agents Certificate

Optometrist List
Click here to start, or call the
board office for more information

West Virginia Board of Optometry
179 Summers Street, Suite 231
Charleston, WV 25301
Phone: (304) 558-5901
Fax: (304) 558-5908
Email: wvbdopt@frontier.com

Click here to log in to the
Member Account Manager

Website design by Dream Catcher, LLC

To view PDF's you will need the free Adobe Acrobat Reader



Adobe Reader

download

West Virginia Board of Optometry

From: West Virginia Board of Optometry [wvbdopt@verizon.net]
Sent: Thursday, June 24, 2010 6:12 PM
To: Nancy Tonkin (nancy.tonkin@wvmtmg.com)
Subject: Rules

Attachments: 14-11 Proposed Rule Injections 062410.doc

The injection rule was filed today. All of the rules were sent to our web master to be posted on our web site. Guess which one has a broken link? I have sent an email to Dream Catcher to correct it. They are usually pretty fast. It should be up by tomorrow. Here is a copy until then.

Have a good evening,

Pamela Carper

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