

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

Form #5

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SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: West Virginia Board of Optometry TITLE NUMBER: 14-3

CITE AUTHORITY: 30-8-1, et. al.

RULE TYPE: PROCEDURAL INTERPRETIVE

EXEMPT LEGISLATIVE RULE

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

LRMRC counsel found the rule to be procedural and asked to have it filed as procedural.

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 3

TITLE OF RULE BEING AMENDED: Contested Case Hearing Procedure

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS Feb. January 5, 2011

Natalie E. Tennant
Authorized Signature

\$3.00

**TITLE 14
PROCEDURAL RULE
WEST VIRGINIA BOARD OF OPTOMETRY**

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**SERIES 3
CONTESTED CASE HEARING PROCEDURE**

CLARENCE M. HARRIS
SECRETARY OF STATE

§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 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 director 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, 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 Director or its Assistant Executive Director. 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.