

WEST VIRGINIA BOARD OF OPTOMETRY

14CSR4

Disciplinary and Complaint Procedures for Optometrists

Summary

The amendment brings §14-4 into compliance with the passage of Senate Bill 230, W. Va. Code §30-8, passed during the 2010 Legislative Session.

- The amendment allows a Board member to serve as investigator of a complaint at the Board's discretion.
- The amendment allows the executive secretary or the Board's designee to issue subpoenas in compliance with Senate Bill 230.
- It includes the methods of discipline included in Senate Bill 230.
- It allows the board to stay enforcement of an adverse finding and put the licensee on probation.
- The amendment allows the Board to assess administrative costs to the licensee if the license is found to have violated the laws or rules of the Board.

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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.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Disciplinary and Complaint Procedures for Optometrists

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.

Complaints are about 7 per year or 2% of licensees and time. 2% of personal services is \$760. Average attorney cost is \$5000. 2% of current expenses is \$782. 2% of revenue is \$2340.

About 28% of all complaints go to the negotiation stage and violations. A Board member serves as our investigator on a volunteer basis. The attorney is only called in when a violation seems likely. Therefore the administrative cost provision would recapture \$5213 attorney fees and personal services costs and \$219 in current expenses.

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	6,542.00	6,542.00	1,110.00
Personal Services	5,760.00	5,213.00	547.00
Current Expenses	782.00	219.00	563.00
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	2,340.00	2,340.00	2,340.00

Rule Title: Disciplinary and Complaint Procedures for Optometrists §14-4

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Disciplinary and Complaint Procedures for Optometrists

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

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

Complaints are about 7 per year. $7/294 = .023$ or 2%. It takes about 2% of staff time and current expenses ($\$38000 \times 2\% = \760) (current expenses $\$39076 \times 2\% = 781.52$ or $\$782$). 2% of revenue is $\$2340$ ($\$117000 \times 2\% = \2340).

About 2 of 7 complaint cases go to negotiation and violation ($2/7 = 28\%$). The attorney is usually called in when violation seems likely. The administrative cost provision would recapture $\$5000$ is attorney costs, $\$213$ is personal services and $\$219$ in current expenses.

This would mean that the costs to the Board for complaints would be reduced by $\$5432$ by the administrative cost recapture. This would bring total cost of complaints to $\$1110.00$ after implementation of the amendment.

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: 6/25/10

Signature of Agency Head or Authorized Representative



FILED

2010 JUN 25 AM 11:07

TITLE 14
PROCEDURAL RULE
WEST VIRGINIA BOARD OF OPTOMETRY

OFFICE WEST VIRGINIA
SECRETARY OF STATE

SERIES 4
DISCIPLINARY AND COMPLAINT PROCEDURES FOR OPTOMETRISTS

§14-4-1. General.

1.1. Scope. -- This rule specifies a procedure for the investigation and resolution of complaints against optometrists.

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. -- .

§14-4-2. Application.

2.1 This rule applies to all licensed optometrists.

§14-4-3. Definitions.

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

3.1. "Applicant" means any person making application for an original or renewal license pursuant to W. Va. Code §§30-8-1 et seq.

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

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

3.4. "Optometrist" means a person who practices optometry as defined in W. Va. Code §30-8-23.

3.5. "Investigator" means a person who is hired by the Board for the purpose of reviewing complaints against optometrists.

§14-4-4. Causes for Denial, Probation, Limitation, Discipline, Suspension or Revocation of Licenses of Optometrists.

4.1. The Board may deny an application for license, place a licensee on probation, limit or restrict a license, suspend a license or revoke any license issued by the Board, upon satisfactory proof that a licensee has been convicted of a felony or is, in his or her professional capacity, engaged in conduct, practices or acts constituting professional negligence or a willful departure from accepted standards of professional conduct in violation of W. Va. Code §§30-8-1 et seq. or the rules of the Board.

§14-4-5. Disposition of Complaints.

5.1. Any person, firm, corporation, member of the Board, or public officer may make a complaint to the Board which charges an optometrist or unlicensed individual or entity engaged in the practice of optometry with a violation of W. Va. Code §§30-8-1 et seq. or of conduct which would be a violation of the rules of the Board. The Board may provide a form for that purpose, but a complaint may be filed in any written form. In addition to describing the alleged violation which prompted the complaint, the complaint should contain the following:

5.1.1. The name and address of the optometrist or unlicensed individual or entity engaged in the practice of optometry against whom the complaint is lodged;

5.1.2. The date of care;

5.1.3. The name of any person who may have treated the patient after the alleged incident; and,

5.1.4. The name of any health care institution in which the patient was an inpatient or outpatient after or during the alleged incident.

5.2. A complaint against an optometrist or unlicensed individual or entity engaged in the practice of optometry shall allege that such person has been convicted of a felony or is, in his or her professional capacity, engaging in conduct, practices or acts constituting professional negligence or a willful departure from accepted standards of professional conduct in violation of W. Va. Code §§30-8-1 et seq. or the rules of the Board.

5.3. Complainants are immune from liability for the allegations contained in their complaints filed with the Board unless the complaint is filed in bad faith or for a malicious purpose.

5.4. The Board shall maintain a complaint log which records the receipt of each complaint, its nature and its disposition.

5.5. The Board shall maintain a separate file on each complaint received, and each file shall have a number assigned to it.

5.6. Upon receipt of a complaint, the Board shall issue one of the following acknowledgments to the complainant:

5.6.1. That the matter will be reviewed by the Board;

5.6.2. That the complaint is outside the jurisdiction of the Board, with suggestions as to how the complainant might best obtain a resolution of his or her problem; or,

5.6.3. That more information will be required in order to adequately review the individual complaint.

5.7. The Board shall send a copy of the complaint, including any supporting documentation, by certified mail to the licensee, or unlicensed individual or entity engaged in the practice of optometry in question for his or her written comment, and he or she shall submit a written response to the Board within thirty (30)

days of the date of such correspondence, or waive the right to do so.

5.8. Requests for comment on complaints sent to licensees or unlicensed individuals or entities engaged in the practice of optometry shall be considered properly served when sent to their last known address. It is the responsibility of the licensee or unlicensed individual or entity engaged in the practice of optometry to keep the Board informed of his or her current address.

5.9. Upon receipt of a licensee's or unlicensed individual or entity engaged in the practice of optometry's comments in response to a complaint, the Board shall promptly send a copy of the same, including any supporting documentation, to the complainant.

5.10. After receipt and review of a complaint, unless the complaint is determined to fall within the provisions of subdivision 5.6.2 of this rule, the Board shall cause to be conducted any reasonable inquiry or investigation it considers necessary to determine the truth and the validity of the allegations set forth in the complaint. The review of complaints and any view or investigation thereof may, at the discretion of the Board, be assigned to a committee of the Board.

5.11. At any point in its investigation of a complaint the Board may, at its discretion, assign the matter to a Board member or an investigator for review and investigation.

5.12. Upon receipt of a complaint the investigator shall, within sixty (60) days, review and investigate the same and provide the Board with a report. The report shall contain a statement of the allegations, a statement of facts, and an analysis of the complaint including a description of the care provided, the records reviewed and a statement of the investigator's findings and recommendations. The investigator shall, upon request, be afforded an opportunity to have an investigation interview with the licensee, or unlicensed individual or entity engaged in the practice of optometry in question or other involved parties, a report of which shall be placed in the investigation file.

5.13. To facilitate the disposition of a complaint, the Board or the committee may request any person to attend an informal conference, or to appear at a regular meeting of the Board, at any time prior to the Board entering any order with respect to the complaint. The Board or the committee shall give notice of the conference, which notice shall include a statement of issues to be informally discussed. Statements made at a conference may not be introduced at any subsequent hearing on the merits without the consent of all parties to the hearing. No prejudice shall attach for failure to attend a conference pursuant to a request.

5.14. The Board, its president, the investigating committee, or chairperson, executive secretary or the Board's designee may issue subpoenas and subpoenas duces tecum to complete the Board's investigation and to determine the truth or validity of complaints. The investigator may request the Board, ~~or~~ its president, investigating committee or chairperson, ~~or executive secretary or the Board's designee~~ to issue a subpoena or subpoena duces tecum. Any such request shall be accompanied by a brief statement specifying the necessity for the same.

5.15. At any point in the course of an investigation or inquiry into a complaint, the Board may determine that there is not and will not be sufficient evidence to warrant further proceedings, or that the complaint fails to allege misconduct for which an optometrist or unlicensed individual or entity engaged in the practice of optometry may be sanctioned by the Board: Provided, that in the event the review and investigation of a complaint is assigned to the committee or an investigator, the committee or investigator shall make their respective findings and recommendations to the Board prior to the Board dismissing the complaint.

§14-4-6. Methods of Discipline.

6.1.. When the Board finds that any applicant is unqualified to be granted a license or finds that any licensee or permittee should be disciplined pursuant to W. Va. Code §30-8-1 et. seq. or rules of the Board, the Board may take

any of the actions listed in W. Va. Code §30-8-18.

6.2. In addition to and in conjunction with the foregoing actions, the Board may make a finding adverse to the licensee or applicant, but withhold imposition of judgment and penalty, or it may impose the judgment and penalty but suspend or otherwise stay enforcement thereof and place the applicant, licensee or permittee on probation, which probation may be vacated upon noncompliance with such reasonable terms as the Board may impose. In its discretion, the Board may restore and reissue a license to practice optometry issued under W. Va. Code §30-8-1 et seq., or any antecedent law, and as a condition of reinstatement, it may impose any disciplinary or corrective measure(s) provided for in this rule or in the W. Va. Code §30-8-1 et. seq. The provisions of §14-4-6.2 shall not apply to revoked licenses.

6.3. 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 in the special account of the Board.

§14-4-6 7. Contested Case Hearings.

67.1. The Board may refuse to renew a license, suspend or revoke a license or bring an action in a court of competent jurisdiction to enforce the provisions of W. Va. Code §30-8 against an unlicensed individual or entity engaged in the practice of optometry if it determines there is probable cause to believe that the optometrist's or unlicensed individual or entity engaged in the practice of optometry's conduct, practices or acts constitute an immediate danger to the public.

§14-4-7 8. Appeals.

78.1. Any applicant or unlicensed individual or entity engaged in the practice of optometry who has had his or her application for a license denied or had court action taken against him or her by order of the Board may appeal the order within thirty (30) days of that

action in accordance with the contested case hearing procedures set forth in W. Va. Code §§29A-6-1 et seq. and the rules of the Board: Provided, That the appeal shall not include cases in which the Board denies a license or certificate after an examination to test the knowledge or the ability of the applicant where the controversy concerns whether the examination was fair or whether the applicant passed the examination.

§14-4-89. Court Action and the Unlicensed Practice Of Optometry.

89.1. The Board may institute, in its own name, proceedings to temporarily or permanently restrain and enjoin the practice of optometry by the following:

89.1.1. An individual who is not licensed to practice optometry pursuant to Chapter 30-8, or who is involved in conduct not specifically exempted from the requirement of Chapter 30-8; or

89.1.2. An individual who was previously licensed by the Board to practice optometry but is currently practicing optometry in violation of Chapter 30-8, regardless of whether the respondent has been convicted of violating the penal provisions thereof.

89.2. Petition for injunction filed under subsection (1) of this section may be filed in Kanawha Circuit Court or the circuit court of the county in which said violation occurred, and the Board shall not be required to pay any costs or filing fees or furnish any bond in connection therewith.

89.2.1. In the petition, it shall be sufficient to charge that the respondent on a day certain in a named county engaged in the practice of optometry in violation of Chapter 30-8. No showing of damage or injury shall be required.

89.2.2. Issuance of an injunction shall enjoin any act specified under Chapter 30-8 and shall remain in place as long as necessary to prevent the unlawful practice of optometry.

89.2.3. Issuance of an injunction shall not relieve the respondent from being subject to any other proceeding under law provided by Chapter 30-8 or otherwise.

89.2.4. Violation of an injunction or restraining order shall be punished as a contempt without the intervention of a jury.

89.3. Any person who violates any of the provisions of Chapter 30-8 or the rules of the board shall be guilty of a Class A misdemeanor and shall pay a fine not to exceed five thousand dollars (\$5,000) per violation.