

WEST VIRGINIA  
**SECRETARY OF STATE**

**KEN HECHLER**

**ADMINISTRATIVE LAW DIVISION**

Form #5

FILED  
DEC 11 10 30 AM '00

OFFICE OF THE SECRETARY OF STATE

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

AGENCY: WV Board of Physical Therapy TITLE NUMBER: 16

CITE AUTHORITY: WV Code §30-20-1 et seq. and WV Code §30-1-1

RULE TYPE: PROCEDURAL  INTERPRETIVE

EXEMPT LEGISLATIVE RULE

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

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 NEW RULE BEING ADOPTED: Series 2

TITLE OF RULE BEING ADOPTED: Title 16, Series 2, Contested Case

Hearing Procedure

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE  
EFFECTIVE DATE OF THIS RULE IS January 15, 2001

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(Plus all the volunteer  
help we can get)

# Memo

**Date:** November 20, 2000  
**Subject:** HB 207

HB 207, passed on November 14, 2000, during a special session of the Legislature, was signed into law on November 18, 2000 by the Governor. This bill allows all Boards that are licensed under Chapter 30 of the West Virginia Code to change to procedural and final file rules that had originally been filed as legislative. This applies to rules that relate **ONLY** to complaint procedures or contested case hearing procedures.

The Boards must final file their rules no later than January 31, 2001.

**TITLE 16  
LEGISLATIVE RULE  
BOARD OF PHYSICAL THERAPY**

FILED

Dec 11 10 30 AM '00

**SERIES 2  
CONTESTED CASE HEARING PROCEDURE**

OFFICE OF THE CLERK OF THE WEST VIRGINIA LEGISLATURE

**§16-2-1. 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 §30-20-1 et seq. and §30-1-1 et seq.

1.3. Filing Date. - June 30, 2000.

1.4. Effective Date. -

**§16-2-2. Definitions.**

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

2.1. "Board" means the West Virginia Board of Physical Therapy.

2.2. "Demanding party" means an individual who has been denied a license to practice Physical Therapy 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. "Charged party" means an individual who holds a license to practice Physical Therapy issued by the Board and who has been charged by the Board as described in Section 6.5. of these rules.

2.4. "License" means a license or temporary permit issued by the Board to practice Physical Therapy or to assist in the practice of Physical Therapy pursuant to W.Va. Code §30-20-1. et. seq.

2.5. "Licensee" means an individual who holds a license to practice Physical Therapy or to assist in the practice of Physical Therapy issued by the Board.

2.6. "Permittee" is a person who holds a temporary permit to practice Physical Therapy or to assist in the practice of Physical Therapy issued by the Board.

2.7. "Practice of Physical Therapy" means the practice of Physical Therapy as defined in W.Va. Code §30-20-2. This includes Physical Therapists, Physical Therapist Aides, and Physical Therapist Assistants.

#### **§16-2-3. Conferences; Informal Disposition of Cases.**

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

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

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

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

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

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

#### **§16-2-4. Depositions.**

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

#### **§16-2-5. Subpoenas.**

5.1. 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, its Executive Secretary/Administrator, or its Assistant Administrator.

Such subpoenas shall be issued pursuant to W.Va. Code §29A-5-1(b).

5.2. Written requests by a party for the issuance of subpoenas or subpoenas duces tecum as provided in subsection 5.1. 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 must have them properly served in accordance with W.Va. Code §29A-5-1(b).

#### **§16-2-6. Hearing Procedure.**

6.1. Any applicant denied a license or any licensee or permit holder who has had their license or temporary permit suspended by the Board who believes that such denial was in violation of W.Va. Code §30-1-1. et seq. and/or §30-20-1. et seq. will be entitled to a hearing on the action denying or suspending such license or temporary permit.

6.2. Any person who desires a hearing for the reason described in subsection 6.1. of this section must present a written demand for a hearing to the Board.

6.3. The Board may require the person demanding the hearing to give security for the costs of the hearing and if the demanding party does not substantially prevail, such costs may be assessed against them and may be collected in a civil action or by other proper remedy.

6.4. When the Chair of the Board or his/her authorized designee is presented with a demand for a hearing, he or she will schedule a hearing within sixty (60) days of receipt of the written demand. The hearing may be postponed to a later date by mutual agreement.

6.5. 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 for which his or her license should be suspended, revoked or otherwise disciplined for one or more of the grounds as set forth in W.Va. Code §30-20-10. et seq. or Title 16, Series 1, Rules of the Board. Charges may be based upon information received by way of a verified written complaint filed with the Board; and/or any information gathered by the Board in the process of investigating a complaint. Charges may also be based upon information received solely through investigative activities undertaken by the Board.

6.6. Allegations instituted against a Licensee or Permittee as described in subsection 6.4. of this section must be set forth in a Complaint and Notice of Hearing by the Board as the Agency of the State regulating the practice of Physical Therapy. The Complaint and Notice of Hearing must designate the Board as the "Complainant", and will designate the Licensee or Permittee involved in the proceeding as the "Respondent". The Complaint and Hearing Notice must state the substance of each offense with sufficient details in order to reasonably apprise the Respondent of the nature, date and place of the conduct or condition complained of therein. It must also state the date, time and place for the hearing.

6.7. Upon receipt of a demand for a hearing described in subsections 6.1. and 6.2. of this section, the Chair or his or her designee will 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 Physical Therapy. Such Complaint and Notice of Hearing shall designate the demanding party as the "Complainant" and will designate the Board as the "Respondent"; will set out the substance of each and every reason that the Board has denied the demanding party a license or temporary permit with sufficient particularity to reasonably apprise the demanding party of the nature, date and place of the conduct or condition at issue therein. It must also state the date, time and place for the hearing.

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

6.9. Hearings shall be conducted as follows:

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

6.9.2. The Board will be represented by the West Virginia Attorney General's Office.

6.9.3. Irrelevant, immaterial, or unduly repetitious evidence will 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.

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

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

6.9.6. 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 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 temporary permit.

6.9.7. The hearing will be held at such time and place designated by the Board, but no hearing will be conducted unless at least thirty (30) days written notice of the hearing 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 to 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 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.

6.9.8. Members of the Board and its officers, agents and employees are 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.

6.9.9. The hearing will be conducted by a quorum of the Board.

6.9.10. A record of the hearing, including the complaint(s), and if applicable, the notice of hearing, all pleadings, motions, rulings, stipulations, exhibits, documentary evidence, evidentiary depositions and the stenographic report of the hearing, will be made and a transcript thereof maintained in the Board's files. Upon request, a copy of the transcript will be furnished to any party at his or her expense.

6.9.11. Any documentary evidence resulting from an investigation or sworn statements may be received in the form of copies or excerpts of by incorporation by reference.

6.9.12. Where a hearing is held upon the instance of the Board after charges have been brought against a Licensee or Permittee pursuant to subsections 6.5. and 6.6. of this section, the Board has the burden of proof in substantiating the charges and must present its evidence and/or

testimony in support of the charges first.

6.9.13. Where a hearing is held upon demand under the provisions of subsections 6.1., 6.2., 6.3., and 6.7. of this action, the demanding party has the burden of proof and will, therefore, be required to present his or her evidence first.

6.9.14. Following the conclusion of the Board's presentation of evidence in accordance with subsection 6.9.12. of this section, the Respondent or charged party has the right to submit his or her evidence in defense.

6.9.15. Following the conclusion of the demanding party's presentation of evidence in accordance with subsection 6.9.13. of this section, the Board has the right to offer its evidence in rebuttal.

6.9.16. The Board may call witnesses to testify in support of its decision to deny licensure, to deny a temporary 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.

6.9.17. All parties have the right to offer opening and closing arguments, not to exceed ten (10) minutes for each presentation, unless otherwise lengthened by the Board.

6.9.18. Hearings held by the Board 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.

6.9.19. 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 or 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 the the date of the hearing will be ruled on by the Chair or Executive Secretary/Administrator of the Board. All other motions for continuance will be ruled on by the Board member(s) or the member presiding over the hearing.

6.9.20. All motions related to a case set for hearing before the Board, except motions for continuance and those made during the hearing, must be in writing and received in the office of the Board at least ten (10) days before the hearing. Prehearing motions will 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 will hear the motions and responses from the non-moving party and rule on the motions.

#### **§16-2-7. Transcription of Testimony and Evidence.**

7.1. All testimony, evidence, arguments and rulings on the admissibility of testimony and evidence will be reported by stenographic notes and characters or by mechanical means.

7.2. All reported materials will be transcribed. The Board has the responsibility to make arrangements for the transcription of the reported testimony and evidence.

7.3. 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 will settle all differences arising as to whether the transcript truly discloses what occurred at the hearing and will require that the transcript be corrected and/or revised as appropriate so as to make it conform to the truth.

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

**§16-2-8. Submission of Proposed Findings of fact and Conclusions of Law.**

8.1. Any party may submit proposed findings of fact and conclusions of law at a time and manner designated by the Board.

**§16-2-9. Orders.**

9.1. Any final order entered by the Board following a hearing conducted pursuant to this rule will be made pursuant to the provisions of W.Va. Code §29A-5-3 and §30-1-8(d). All final orders must be entered within sixty (60) days following the submission of all documents and materials necessary for the proper disposition of the case, including transcripts, and must 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. A copy of the final order approved by a majority of the Board must 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.

**§16-2-10. Appeal.**

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