

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #5

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JAN 12 9 57 AM '01

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS TITLE NUMBER: 7

CITE AUTHORITY: Chapter 30 Article 13

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: 2

TITLE OF RULE BEING ADOPTED: Administrative Hearing Procedures

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS March 1, 2001

Anna Hicks

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Board Administrator

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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.

ADMINISTRATIVE HEARING PROCEDURES

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§7-2-1. General.

1.1. Scope. This rule specifies the procedures for Resolution of complaints relating to the practice of engineering in this State pursuant to the authority granted to the West Virginia State Board of Registration for Professional Engineers by West Virginia Code §30-13-1 et seq.

1.2. Authority. W. Va. Code §30-13-1 et seq. And 30-1-1 et seq.

1.3. Filing Date. January 12, 2001

1.4. Effective Date. March 1, 2001

§7-2-2. Complaints.

2.1. Form and Who may file.

2.1.a. Form. The form of complaints shall be determined by the Board. All complaints shall be in writing and verified by the complainant before a notary public.

2.1.b. Who may file. A complaint may be filed by any natural person or legal entity, any registered engineer, or any firm holding a certificate of authorization. A complaint may be filed by a member of the Board staff, with or without direction from the Board, or a member of the Board. Charges may be based upon information received solely through investigative activities undertaken by the Board.

2.2. Filing.

2.2.a The applicable statute provides for disposition of a complaint if trivial, unfounded, or settled informally. Unless in the opinion of at least one member of the Board the alleged situation which is the subject of a complaint presents an imminent danger to health or safety, a complaint will be deemed received and filed only upon the majority vote of the Board members present and meeting in general session. Until such action, the complaint will be on the agenda for each meeting until resolved informally or filed. During the period before a complaint is deemed filed, the Board will take appropriate action, upon motion and consistent with the applicable statutes, to investigate and settle the complaint informally.

2.2.b. A complaint will not be considered by the Board until an original is delivered to and logged in and numbered by the Board Administrator at Charleston during normal business hours. Facsimile and other electronic transmission of complaints will be accepted for filing, provided originals are delivered to the Board Administrator within fourteen (14) days thereafter.

2.3. Notice to Respondent. The Board Administrator shall give notice of the filing of a complaint to any and all respondents named in the complaint. Such notice shall be by certified mail, return receipt requested, to the respondent at his, her, or its last known address or in a manner consistent with the rules for service of process under the West Virginia Rules of Civil Procedure. A return of service shall be completed by the person effecting service and filed with the Board.

2.4. Response to Complaints. The respondent may file, within thirty days after service of the complaint, a responsive pleading which shall state with particularity every defense in law or fact to the allegations in the complaint. Every responsive pleading shall be verified by the respondent.

2.5. Failure to File Response. The failure to file a response to the complaint shall be deemed an admission of the factual allegations contained therein. The failure to file a response shall not be grounds for delaying hearing or other action upon the complaint.

2.6. More Definite Statement. The Board or a respondent may request a clarification or more definite statement of the allegations in the complaint. A respondent's request for a more definite statement shall be filed with the Board not less than fifteen days before the hearing date. The Board's request may be issued to a complainant at any time, and the complainant shall respond within seven days of service of the request by the Board. Failure of a complainant to respond timely to such request may be grounds for dismissal of the complaint.

§ 7-2-3. Hearing Panel.

3.1. Hearing Panel.

3.1.a. Complaints regarding persons licensed by the Board and complaints regarding unlawful practice of engineering in this State or a request for hearing regarding licensure or issuance of a certificate of authorization shall be heard and decided by the Board as a whole sitting as a Hearing Panel,

except that any member of the Board who has a conflict of interest with regard to a particular complaint may decline to participate in such proceedings. Recusal is mandatory in any proceeding in which a judge, similarly situated, would be required to exercise recusal. The filing of a complaint by a Board member will not automatically be grounds for recusal. Recusal shall not prevent a Board member from testifying as a witness.

3.1.b. If recusals result in there being less than a quorum, the remaining unrecused members of the Board shall appoint a registered professional engineer who is not a member of the Board for each recused member to serve solely for the purposes of hearing and deciding such complaint.

3.1.c. The Hearing Panel shall conduct hearings, make findings of fact and conclusions of law, and issue administrative decisions and orders to enforce the provisions of Chapter 30, Article 13 of the West Virginia Code.

3.2. Location of Hearing Proceedings. Unless otherwise ordered by a majority vote of the Board, all hearings shall be heard at Charleston.

3.3. Quorum. A quorum shall consist of not less than three members of the Hearing Panel.

3.4. Presiding at Hearings.

3.4.a. The President of the Board shall serve as the presiding officer at hearings. In the event of the President's recusal, the Hearing Panel shall elect a presiding officer from among themselves who will preside for hearings on that complaint.

3.4.b. The presiding officer shall have the power to (1) administer oaths and affirmations, (2) rule upon offers of proof and receive relevant evidence, (3) regulate the course of the hearing, (4) hold conferences for the settlement or simplification of the issues by consent of the parties, and (5) dispose of procedural requests or similar matters.

3.5. Privilege and Immunity. All information provided, including documents and testimony given with respect to any complaint, investigation or proceeding under these rules shall be privileged in any action for defamation or the like. All members of the Board, its counsel, and their employees shall be absolutely immune from civil suit in the same manner as members of the judiciary in the State for any conduct in the course of their official duties.

§7-2-4. Procedural Rules for Hearings

4.1. Notice of Hearings.

4.1.a. Within sixty(60)days of filing complaint, the presiding officer shall set a hearing date and time. Notice of the hearing date and time shall be served on respondent and counsel for respondent, if any, by first class mail addressed to the last known mailing address of such person. Such notices shall be mailed not less than thirty (30) days before the hearing date. All complaints, unless dismissed by the Board as unfounded, trivial or settled informally, shall be heard within six months after the date each complaint was filed.

4.1.b Hearings may be rescheduled by the presiding officer and, once begun, continued from time to time, for cause shown as the interests of justice may require.

4.2. Prehearing Matters. The presiding officer, with or without the request of a party, may schedule a prehearing conference to narrow the issues to be heard, to estimate the time which will be required for the hearing, rule upon prehearing motions, and, when appropriate, negotiate informal disposition of the complaint.

4.3.a. Conduct of Hearing--Order of Hearing.

4.3.a.1. Upon calling on for hearing any complaint, the presiding officer shall cause the complaint to be read and offer the respondent the opportunity to reply. The Hearing Panel may receive evidence from its investigator or staff. Respondent, directly or by counsel, may present evidence in defense against the complaint. All testimony given shall be subject to cross-examination by the opposing party. The Board may receive rebuttal evidence after respondent's presentation. Any member of the Hearing Panel may inquire to any witness at any time.

4.3.a.2 After the receipt of all evidence, respondent and Board staff, directly or by counsel, may be allowed to make closing arguments.

4.3.a.3 If the respondent is not a natural person, the respondent shall be represented by counsel. The Board or its staff may be represented by counsel.

4.3.a.4 Failure of the respondent to appear, without

cause, shall not result in delay or postponement of the hearing.

4.3.b. The Record. The record of a hearing shall consist of the testimony and documentary and physical evidence admitted into evidence by the Hearing Panel, all agency memoranda, data, and other documents considered by the Hearing Panel in making its determination, and the administrative decision or order ruling upon the complaint. All hearing proceedings on the record shall be recorded by stenographic means. Any party may obtain a transcript of the proceedings at the party's expense.

4.3.c. Testimony. Witnesses shall testify under oath or affirmation.

4.3.d. Evidence. The West Virginia Rules of Evidence shall apply. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. 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 men in the conduct of their affairs. The Hearing Panel shall be bound by the rules of privilege recognized by law. Objections to evidentiary offers and the ruling thereupon shall be noted in the record. Any party to any such hearing may vouch the record as to any excluded testimony or other evidence.

4.3.d.2. Only the evidence admitted into the record and judicially cognizable facts so noticed shall be considered in the determination of the complaint.

4.3.d.3. Depositions may be taken and read or otherwise received as evidence in accordance with Rules 30 and 32 of the West Virginia Rules of Civil Procedure.

4.3.e. Conformance. Upon motion of any member of the Hearing Panel or any party assigning error or omission in any part of any transcript, the presiding officer 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 as appropriate so as to make it conform to the truth.

4.3.f. Deliberations. Hearing Panels may deliberate and issue decisions in person, by telephone conference, or by written correspondence.

4.3.g. Open Meetings and Executive Sessions. Pursuant to Chapter 6, Article 9A of the West Virginia Code, the Board may by majority vote hold hearings under these rules in executive session

unless the respondent requests an open meeting. In any event, the vote upon the final decision of the Hearing Panel shall be in open session.

4.4. Standard of Proof. To impose any sanction or penalty, the findings of the Hearing Panel in support hereof must be proved by clear and convincing evidence.

4.5. Subpoena and Contempt Power. The Hearing Panel shall have power to issue subpoenae or any other lawful process through the presiding officer at the request of any party. Subpoenae may be issued for attendance of witnesses or the production of documentary evidence. Subpoenae and other process may be served in accordance with the West Virginia Rules of Civil Procedure. All witnesses shall be entitled to such witness fees and expenses as in any civil proceeding in this State. The Hearing Panel may apply to any circuit court for an order requiring any person to comply with the presiding officer's directions in maintaining order at a hearing or to compel compliance with subpoenae.

4.6. Hearing Procedures Relating to Conviction of a Crime that Reflects Adversely on an Engineer's Honesty or any Felony.

4.6.a. An engineer who has been convicted of a crime that reflects adversely on the engineer's honesty, trustworthiness or fitness as an engineer, or of any felony, shall, within thirty days of entry of the order or judgment of conviction, forward a copy of the order or judgment to the Board's Administrator. A plea or verdict of guilty or a conviction after a plea of nolo contendere shall be deemed to be a conviction within the meaning of this rule. Any other person may file a copy of the order or judgment with the Board.

4.6.b. Upon receipt of the order or judgment, which shall be conclusive evidence of the guilt of the crime or crimes of which the engineer has been convicted, the Board Administrator shall treat the order or judgment as a complaint for misconduct and violation of professional responsibility.

4.6.c. A respondent may present evidence and argument in support of mitigation based on, but not limited to, the nature of respondent's misconduct, surrounding facts and circumstances, previous ethical violations, the willfulness of the conduct, and the adequacy of respondent's previous opportunity to present evidence.

4.7. Reciprocal Discipline.

4.7.a. A final adjudication in another jurisdiction, whether state or federal, of misconduct constituting grounds for discipline of a registered professional engineer in that jurisdiction or a voluntary surrender of a license to practice engineering in connection with a disciplinary proceeding in that jurisdiction shall, for the purposes of proceedings under these rules, conclusively establish such conduct.

4.7.b. A registrant in this State against whom any form of public discipline has been imposed by the authorities of another jurisdiction, whether state or federal, or who voluntarily surrenders his or her license to practice engineering in connection with such disciplinary proceedings shall notify the Board of such action in writing within ten days thereof. Failure to notify the Board shall constitute an aggravating factor in any subsequent disciplinary proceeding. Any other person may notify the Board of such action by filing a complaint.

4.7.c. If the registrant intends to challenge the validity of the disciplinary order entered in the foreign jurisdiction or the voluntary surrender of his or her license to practice engineering in connection with a disciplinary proceeding, the registrant must request a formal hearing and file with the Board a full copy of the record of the disciplinary proceedings which resulted in imposition of the disciplinary order or the voluntary surrender of a license to practice engineering.

§7-2-5. Disposition of Complaints

5.1. Administrative Decisions and Orders.

5.1.a. Any party may submit proposed findings of fact and conclusions of law as permitted in the discretion of the presiding officer.

5.1.b. After a hearing upon a complaint is completed, including an instance in which the respondent defaults, the Hearing Panel shall make findings of fact and conclusions of law and issue the appropriate administrative decision or order.

5.1.c. The Hearing Panel may make findings of fact and conclusions of law in connection with the hearing and in conformity with applicable law notwithstanding the failure of the complaint to allege the grounds therefor.

5.1.d. Informal disposition may also be made of any complaint by stipulation, agreed settlement, or consent order provided, however, that a hearing upon any pending complaint set pursuant to Rule 4.0 shall not be cancelled other than by a respondent's acceptance of such proposed informal disposition.

5.1.e. All dispositions of complaints shall be signed by the presiding officer. A copy shall be maintained in the permanent records of the Board.

5.1.f. The official determination of the Hearing Board shall be made by majority vote of the Hearing Panel. The presiding officer shall vote in every matter but shall reserve his vote to the last. Any minority of the Hearing Panel may preserve its opinion in written form submitted at or not less than ten days after the conclusion of the hearing.

5.1.g. A copy of the administrative decision or order shall be served upon each party and his counsel in person or by registered or certified mail within five days after entry by the presiding officer.

5.2. Unlawful Practice. If the administrative decision or order finds that the respondent is engaging in the practice of engineering in this state without being registered, the Board may request the prosecutor of any county to prosecute the respondent pursuant to West Virginia Code § 31-13-23 or the Board may file a complaint seeking an injunction to enforce the provisions of Chapter 31, Article 13 of the West Virginia Code. Nothing in these rules shall prohibit the Board from requesting prosecution or seeking an injunction without prior notice and opportunity for hearing to the person who is believed to be in violation.