

**WEST VIRGINIA
SECRETARY OF STATE**

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #2

Do Not Mark In this Box

FILED

May 19 10 44 AM '00

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

West Virginia Board of Examiners of
AGENCY: Psychologists TITLE NUMBER: 17

RULE TYPE: Legislative Rule; CITE AUTHORITY W. Va. Code 30-21-6 and 30-1-4

AMENDMENT TO AN EXISTING RULE: YES ___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 5

TITLE OF RULE BEING PROPOSED: Contested Case Hearing Procedure

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON July 18, 2000 AT 5:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

West Virginia Board of Examiners of Psychologists

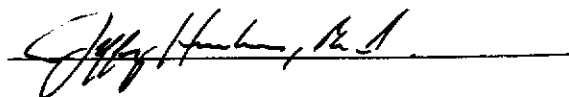
1205 Quarrier Street - Room 200

Charleston, WV 25301

Telephone: (304) 558-0604

Facsimile: (304) 558-0608

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.



ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

SUMMARY OF PROPOSAL

On March 30, 2000 the Kanawha County Circuit Court entered an order granting a writ of mandamus against the West Virginia Board of Examiners of Psychologists and its President requiring them to promulgate emergency legislative rules on or before May 22, 2000 establishing a procedure for the investigation and resolution of complaints against psychologists. A copy of the order is attached hereto and incorporated herein by reference.

The attached proposed rule, 17 CSR 5, Contested Case Hearing Procedure, is the second of two series of proposed rules designed to meet the requirements of state law as reflected in the court order referenced above.


Any questions, comments or further correspondence in regard to this proposed rule may be directed to the following:

Charlotte Thurston, Administrative Assistant
West Virginia Board of Examiners of Psychologists
1205 Quarrier Street
Charleston, WV 25301
Telephone: (304) 558-0604
Facsimile: (304) 558-0608

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

FILED
00 MAR 30 PM 3:02

DAVID A. SADE,
Petitioner,


CATHY S. D. [unclear]
KANAWHA COUNTY CIRCUIT COURT

vs.

Civil Action No. 00-Misc.-13

THE BOARD OF EXAMINERS OF
PSYCHOLOGISTS, and JEFFREY
HARLOW, Ph.D., in his official capacity
as Chairman of the Board of Examiners,

Respondents.

ORDER

On the 21st day of March 2000, the Petitioner David A. Sade, in person, and the Respondents, by Counsel Robert D. Williams, appeared before this Court pursuant to the Petition for Writ of Mandamus previously filed by the Petitioner and the Rule to Show Cause issued by the Court. Also noticed for hearing on this day were the Petitioner's Motion to Compel Discovery and Motion for Continuance. Served on Petitioner just prior to the hearing and presented to the Court were Respondents' Motion to Dismiss and Response in Opposition to Motion to Compel and Motion for Continuance.

The Court, having reviewed the pleadings and materials filed to date, including, but not limited to H.B. 4062 which amends and clarifies West Virginia Code §30-1-1 et seq, and having heard argument of Petitioner and Counsel for Respondents, has determined that Respondents have not satisfied their burden to show cause why the Petition for Mandamus should not be granted. In consideration of which, the Court hereby finds as follows:

1. Respondents have a clear non-discretionary duty to promulgate and adopt rules and regulations which specify a procedure for the investigation and resolution of all complaints against psychologists licensed under article one and twenty-one of chapter 30 of the West Virginia Code;

2. Petitioner has a clear legal right to the relief requested, as set forth in paragraph 1 above, and as provided for in articles one and twenty-one of the West Virginia Code;

3. Petitioner has no adequate remedy at law to obtain the relief requested and to which he is entitled as a matter of law;

4. Petitioner's Motion to Compel Discovery and Motion for Continuance are rendered moot by the Court's ruling in this matter;

It is therefore **ORDERED, ADJUDGED and DECREED** as follows:

1. Respondents shall promulgate a set of rules and regulations which establish a procedure for the investigation and resolution of all complaints against psychologists licensed under articles one and twenty-one of chapter 30 of the West Virginia Code no later than May 22, 2000;

2. Said rules and regulations shall comply with the terms of West Virginia Code §30-1-8 as amended by H.B. 4062;

2. Said rules and regulations shall be filed by May 22, 2000 as emergency legislative rules under the terms of West Virginia Code §29A-3-15;

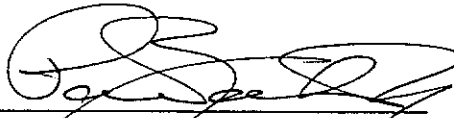
3. Respondents' Motion to Dismiss is denied;

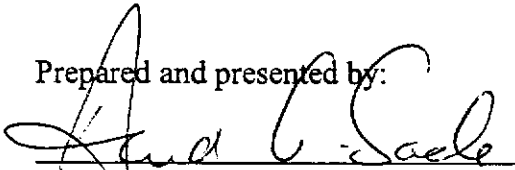
4. The Court shall retain jurisdiction of this matter until an Order of Dismissal is entered.

Still outstanding in this matter is Petitioner's request for attorney's fees. The Court will address this issue at a later date either upon submission of an Agreed Order Awarding Attorney's Fees, or upon Petitioner's Motion for an Award of Attorney's Fees and any response filed by Respondents.

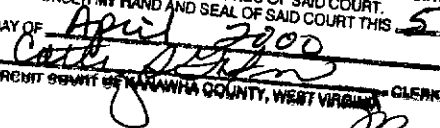
The Circuit Clerk is directed to send a certified copy of this Order to the Petitioner and Counsel for the Respondents at their addresses of record.

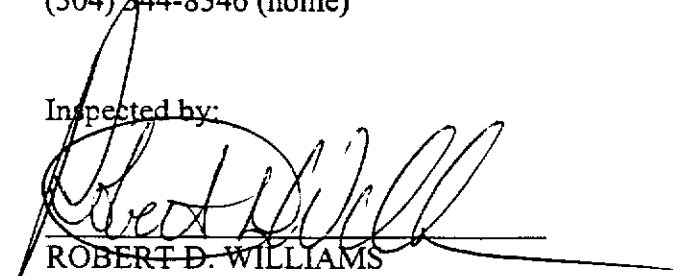
ENTERED this 30th day of March 2000.


PAUL ZAKAIB, JUDGE

Prepared and presented by:


DAVID A. SADE
Petitioner
Attorney at Law
WV State Bar No. 3229
1003 Circle Rd.
Charleston, WV 25314
(304) 558-0526 (office)
(304) 244-8346 (home)

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT,
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 5th
DAY OF April 2000

CATHY S. GATSON, CLERK

Inspected by:


ROBERT D. WILLIAMS
Counsel for Respondents
WV State Bar No. 6146
Assistant Attorney General
Office of the Attorney General
State Capitol
Room 26, East Wing
Charleston, WV 25305
(304) 558-2021

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 17 CSR5 Contested Case Hearing Procedures

Type of Rule: Legislative Interpretive Procedural

Agency: W Board of Examiners of Psychologists

Address: 1205 Quarrier Street, Room 200
Charleston, WV 25301

1. Effect of Proposed Rule

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	HEREAFTER
ESTIMATED TOTAL COST	\$ 0	\$ 0	\$ 0	\$ 0	\$ 0
PERSONAL SERVICES	0	0	0	0	0
CURRENT EXPENSE	0	0	0	0	0
REPAIRS & ALTERATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER	0	0	0	0	0

2. Explanation of above estimates:

There is no fiscal effect because the filing of the rule has no impact on the cost of implementing current rules.

3. Objectives of these rules:

To comply with state law as it relates to the investigation and resolution of complaints against psychologists.

Rule Title: 17 CSR5 Contested Case Hearing Procedures

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None. The Board does not use state funds.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.


None.

C. Economic Impact on Citizens/Public at Large.

None.

Date: 5/18/00

Signature of Agency Head or Authorized Representative



**TITLE 17
LEGISLATIVE RULE
PSYCHOLOGISTS**

**SERIES 5
CONTESTED CASE HEARING PROCEDURE**

FILED

MAY 19 10 44 AM '00

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

§17-5-1. 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 § 30-21- 6 and § 30-1-4
- 1.3. Filing Date. -- May 19, 2000
- 1.4. Effective Date. --

§17-5-2. Definitions.

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

- 2.1 "Applicant" means any person making application for an original or renewal license or a temporary permit pursuant to West Virginia Code § 30-21-1 *et seq.*
- 2.2. "Board" means the West Virginia Board of Examiners of Psychologists.
- 2.3. "Demanding party" means an applicant who has been denied a license to practice psychology by the Board and who, as a result, demands that a hearing be held before the Board on the issue of such denial.
- 2.4. "Charged party" means a psychologist or supervised psychologist who has been charged by the Board with a violation of W.Va. Code § 30-21-1 *et seq.* and the rules of the Board.
- 2.5. "License" means a license or temporary permit issued by the Board pursuant to W. Va. Code § 30-21-1 *et seq.*

2.6. "Licensee" means an individual who holds a license to practice psychology issued by the Board.

2.7. "Practice of psychology" means the practice of psychology and the practice of school psychology as defined in W. Va. Code § 30-21-2.

2.8. "Psychologist" means licensed psychologist, school psychologist, school psychologist independent practitioner and applicant.

2.9. "Supervised psychologist" means supervised psychologist, supervised school psychologist, and supervised school psychologist independent practitioner.

§17-6-3. Hearing Procedure.

3.1. Any applicant denied a license by order of the Board who believes such denial was in violation of W. Va. Code §§ 30-1-1 *et seq.* or 30-21-1 *et seq.* or the rules of the Board shall be entitled to a hearing on the action denying such license. Any applicant who desires a hearing for this reason must present a written demand for such to the Board. Provided, That requests for hearings 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.

3.2. When the president 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.

3.3. Any psychologist who has had his or her license suspended and any supervised psychologist who has had their approval to progress through the licensure application process

suspended by the Board prior to a hearing on the basis that the psychologist's or supervised psychologist's continuation in practice constitutes an immediate danger to the public shall be considered a charged party within the meaning of this rule, and shall be entitled to a hearing on the action as set forth herein.

3.4. Charges may be instituted against any psychologist or supervised psychologist by the Board when reasonable cause exists for believing that the psychologist or supervised psychologist may have engaged in conduct, practices or acts such that his or her license or approval to progress through the licensing process should be suspended, revoked or otherwise disciplined for one or more of the grounds set forth in W. Va. Code § 30-21-1 *et seq.* or rules of the Board. Charges may be based upon information received by way of a 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 psychologist or supervised psychologist as described in subsection 3.4 of this rule shall be set forth in a Complaint and Notice of Hearing issued in the name of the Board. Such Complaint and Notice of Hearing shall designate the Board as the "Complainant", and shall designate the psychologist or supervised psychologist 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, practices or acts complained of therein; shall state the date, time and place for the hearing; and, shall contain a statement of intention by the Board to appoint a hearing examiner.

3.6. Upon receipt of a demand for a hearing described in subsections 3.1 and 3.2 of this section, the president 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 with sufficient particularity to reasonably apprise the demanding party of the nature, time and place of the conduct or condition at issue therein; shall state the date, time and place for the hearing; and, shall contain a statement of intention by the Board to appoint a hearing examiner.

3.7. The Respondent, whether a charged party or a demanding party, shall, within thirty (30) days of the date of the issuance of the Complaint and Notice of Hearing, serve an answer, in writing, on the Board. The Respondent may respond personally or through his or her attorney, but the answer shall address the substantive allegations set forth in the Board's complaint or order.

3.8. The Board may amend the charges set forth in a Complaint and Notice of Hearing as it deems proper.

3.9. 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.

3.10. 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.

3.11. Hearings shall be conducted as follows:

- 3.11.1. 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.
- 3.11.2. The Board may be represented by the West Virginia Attorney General's Office.
- 3.11.3. 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
- 3.11.4. The rules of privilege recognized by the law of this state shall be followed.
- 3.11.5. 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.
- 3.11.6. 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 its designated 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.

3.11.7. 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 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.

3.11.8. The hearing shall be open to the general public.

3.11.9. 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 or she testified.

3.11.10. The hearing may be conducted by one or more Board members or by a hearing examiner appointed by the Board.

3.11.11. 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.

3.11.12. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference.

3.11.13. Where a hearing is held upon the instance of the Board after charges have been brought against a psychologist or supervised psychologist 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.

3.11.14. 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.

- 3.11.15. Following the conclusion of the Board's presentation of evidence in accordance with subsection 3.11.13 of this section the Respondent or charged party shall have the right to submit his or her evidence in defense.
- 3.11.16. Following the conclusion of the demanding party's presentation of evidence in accordance with subsection 3.11.14 of this section, the Board shall have the right to submit its evidence in defense.
- 3.11.17. The Board may call witnesses to testify in support of its decision to deny licensure or in support of the charges instituted against a licensee; 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.
- 3.11.18. All parties shall have the right to offer opening and closing arguments, not to exceed ten (10) minutes for each presentation.
- 3.11.19. Hearings held by the Board as a result of charges instituted against a psychologist or supervised psychologist may be continued or adjourned to a later date or a different place by the Board or its designee by appropriate notice to all parties.
- 3.11.20. 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 date of hearing shall 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 Executive Secretary of the Board. All other motions for continuance shall be ruled on by the Board member(s) or the hearing examiner presiding over the hearing.

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

§ 17-5-4. 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 or its appointed 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 disciplinary matter.

§ 17-5-5. 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 or its duly appointed hearing examiner.

§ 17-5-6. Hearing Examiner.

6.1. The Board may appoint a hearing examiner who shall be empowered to subpoena witnesses and documents, administer oaths and affirmations, examine witnesses under oath, rule on evidentiary matters, hold conferences for the settlement or simplification of issues by consent of the parties, cause to be prepared a record of the hearing so that the Board is able to discharge its functions and otherwise conduct hearings as provided in section 3.11 of this rule.

6.2. Hearing examiners appointed by the Board are not authorized or empowered to grant, suspend, revoke or otherwise discipline any psychologist or supervised psychologist.

6.3. The hearing examiner shall prepare recommended findings of fact and conclusions of law for submission to the Board. The Board may adopt, modify or reject such findings of fact and conclusions of law.

§17-5-7. Conferences; Informal Disposition of Cases.

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

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

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

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

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

7.3. 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.

§ 17-6-8. Depositions.

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

§ 17-5-9. Subpoenas.

9.1. Subpoenas to compel the attendance of witnesses and subpoenas duces tecum to compel the production of documents may be issued by the Board, its President, and by the hearing examiner appointed by the Board. Such subpoenas shall be issued pursuant to W. Va. Code §29A-5-1(b).

9.2. Written requests by a party for the issuance of subpoenas or subpoenas duces tecum as provided in subsection 9.1 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).

§ 17-5-10. Orders.

10.1. 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 30-21-11. 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

10.2. 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 shall be served upon the demanding or charged party or his or her attorney of record, if any, within five (5) days after entry by the Board by personal service or by registered or certified mail.

§ 17-5-11. Penalties.

11.1. In connection with its review and investigation of a complaint against a psychologist or supervised psychologist, the Board is authorized to enter into consent decrees, to reprimand, to enter into probation orders and to levy fines not to exceed one thousand dollars per day per violation, or any of these, singly or in combination.

11.2. The Board is further authorized to place a supervised psychologist on probation, to require additional years of supervision for supervised psychologists, to limit, restrict, suspend or revoke the approval of any supervised psychologist to progress through the licensure application process, to place a licensee on probation or to limit, restrict, suspend or revoke any license issued by the Board.

11.3. Probation, limitations and restrictions on psychologists and supervised psychologists may involve the imposition of any lawful conditions and requirements for a period of time, which the Board in its discretion deems just and proper, including, but not necessarily limited to, counseling or psychotherapy, special supervision, limitations on the types of patients which can be treated and additional training or education.

§ 17-5-12. Appeal.

An appeal from any final order entered in accordance with these rules shall comply with the provisions of W. Va. Code §§29A-5-4 and 30-21-12.