

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER

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ADMINISTRATIVE LAW DIVISION JAN 3 9 57 AM '01

Form #5

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: West Virginia Real Estate Appraiser Licensing & Certification TITLE NUMBER: 190

CITE AUTHORITY: W.Va. Code 37-14- et seq

RULE TYPE: PROCEDURAL X INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE _____

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES X NO _____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: Series 4

TITLE OF RULE BEING AMENDED: Investigative and Hearing Procedures

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 February 5, 2001


Authorized Signature

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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 190
PROCEDURAL RULE
WEST VIRGINIA REAL ESTATE APPRAISER LICENSING & CERTIFICATION BOARD**

**SERIES 4
INVESTIGATIVE AND HEARING PROCEDURES**

§190-4-1. General.

- 1.1. Scope. – This procedural rule establishes the investigative and hearing procedures to be followed by the Board when there is a complaint filed against an appraiser.
- 1.2. Authority. – W.Va. Code §37-14-6.
- 1.3. Filing Date. –
- 1.4. Effective Date. –

§190-4-2. Definitions.

- 2.1. "Appraisal" shall mean an analysis, opinion or conclusion prepared by a Real Estate Appraiser relating to the nature, quality, value or utility of specified interests in, or aspects of, identified real estate or identified real property.
- 2.2. "Appraisal Report" shall mean any communication, written or oral, of an appraisal.
- 2.3. "Appraiser" shall mean any person who holds a State Real Estate Appraiser license or State certification as a Real Estate Appraiser issued to him or her under W. Va. Code §37-14.1, et seq. or has submitted himself or herself to jurisdiction hereunder to applying for and exercising a Temporary Permit thereunder.
- 2.4. "Board" shall mean the Real Estate Appraiser Licensing and Certification Board established under W. Va. Code §37-14-1, et seq.
- 2.5. "Uniform Standards of Professional Appraisal Practice" means the Uniform Standards of Professional Appraisal Practice (USPAP), 2000 edition, published by the Appraisal Foundation, which are incorporated by reference and on file with the board and the office of the secretary of state for use by all appraisers in the preparation of appraisal reports. This incorporation by reference contains no future additions or amendments. A copy of the USPAP may be obtained from the Appraisal Foundation.

§190-4-3. Powers and Proceedings.

- 3.1.** Except as otherwise specifically provided herein, the enforcement proceedings under this Rule shall be conducted in accordance with the contested case hearing procedures of the West Virginia Administrative Procedure Act as adopted in this State, and the Board shall have all the powers granted therein.
- 3.2.** A complaint which alleges that the Appraiser has violated a rule of professional conduct promulgated by the Board shall be lodged with the Board. The complaint process may be instituted by any person, including members of the Board, by written complaint, or on an affidavit form prescribed by the Board, and filed with the Board. The Board may, upon its own motion, file a formal complaint against an Appraiser.
- 3.3. Investigating complaints**

 - 3.3.a.** The Board may, upon receipt of a written complaint or upon its own motion, review and investigate alleged acts or omissions which the Board reasonably believes constitute cause for disciplinary action. The Board may refer the review and investigation of the complaint to the Standards Committee referred to in paragraph (b) below. In order to determine if probable cause exists for a hearing on a complaint, the investigator(s) designated by Board staff, the Standards Committee or the chairperson of the Board shall cause an investigation to be made into the allegations of the complaint. If the Board or the Standards Committee determines that the complaint does not present facts which constitute a basis for disciplinary action, the Board or the Standards Committee shall take no further action.
 - 3.3.b.** A Standards Committee ~~may~~ shall be appointed by the chairperson. The committee will consist of at least four individuals. Two shall be Board members and at a minimum two shall be certified general appraisers. Nothing shall preclude the two Board members from also being the two required certified general appraisers. The Standards Committee will consist of at least two other individuals, who are not members of the Board, appointed by the Chairperson. The Standards Committee shall review and investigate the facts of the complaint and determine whether there is a basis for disciplinary action. The Committee may contract with an appropriate person or appoint a member of the Committee to conduct the

investigation.

3.3.c. In connection with the investigation of a complaint, the Standards Committee or the Board is authorized to subpoena witnesses, books, papers, records and any other evidence to help it determine whether a contested case proceeding should be instituted.

3.3.d. Upon completion of the investigation, the Board or the Standards Committee may:

3.3.d.1. Order the matter to be further investigated;

3.3.d.2. Allow the Appraiser, who is the subject of the complaint, an opportunity to appear before the Standards Committee for an informal discussion regarding the circumstances of the alleged violation;

3.3.d.3. Determine there is no probable cause to believe a disciplinary violation has occurred, and close the case; or

3.3.d.4. Determine there is probable cause to believe that a disciplinary violation has occurred and proceed with a contested case hearing.

3.4. The Board or the Standards Committee, if it considers it advisable ~~or if requested by the affected Appraiser,~~ may grant the Appraiser an opportunity to appear before the Board or the Standards Committee for a voluntary informal discussion of the facts and circumstances of an alleged violation. An informal discussion shall constitute a part of the investigation of a pending disciplinary case and the facts discussed at the informal discussion may be considered by the Board or the Standards Committee in the event the matter proceeds to a contested case hearing. The Board or the Standards Committee may seek a consent order at the time of the informal discussion.

3.5. The Board or the Standards Committee may negotiate a settlement and enter into a consent order with an Appraiser. A representative of the Board or the Standards Committee, designated by the chairperson, and an Assistant Attorney General may agree to negotiate a settlement. The proposed consent order may be presented to the Board or the Standards Committee for approval and shall be binding if approved by the Board or the Standards Committee and signed by the chairperson of either the board or the standards committee and

~~Appraiser. Any Board member who participates in the negotiation of a consent order is disqualified from participating in the adjudication of the contested case.~~ Consent to negotiation by the Appraiser constitutes waiver of notice and opportunity to be heard, as set forth in the West Virginia Administrative Procedure Act, during the settlement negotiations. Thereafter, the Assistant Attorney General is authorized to discuss informal settlement with the Board chairperson or Standards Committee chairperson of either the board or the standards committee.

- 3.6.** The Board or the Standards Committee, in its discretion ~~and in lieu of prosecuting a first-time violator of the rules of professional conduct,~~ may enter into a consent agreement. A representative of the Board or Standards Committee, designated by the chairperson, and an Assistant Attorney General may agree to negotiate a consent agreement. The proposed consent agreement must be presented to the Board or Standards Committee for approval and shall be binding if approved by the Board or Standards Committee and signed by the chairperson of either the board or the standards committee and the Appraiser. Failure of the appraiser to abide by the agreement shall constitute grounds for prosecution.
- 3.7.** In the event of a contested case hearing, the Board or Standards Committee shall deliver to the parties a notice of hearing. The notice of hearing shall fix the time and place for hearing and shall contain those notice terms as required by the West Virginia Administrative Procedure Act. The notice shall also contain a statement requiring the Appraiser to submit an answer of the type specified in Section ~~3-8~~ 3.9 hereof within twenty (20) days after receipt of the notice of hearing. A written notice of hearing, together with a statement of charges, shall be personally delivered or mailed to the Appraiser by certified mail, return receipt requested, at least thirty (30) days before the hearing date. In all cases, hearings noticed to be held within no less than thirty (30) days or more than ninety (90) days from the date of service of the notice of hearing shall be deemed to comply with the provision of W.Va. Code §37-14 et seq.
- 3.8.** The statement of charges shall be prepared by the Assistant Attorney General and shall set forth the acts or omissions with which the Appraiser is charged, including standards of professional practice and professional conduct rule(s), W. Va. Code §37-14-1 et seq., or any rules of the Board alleged to have been violated, and shall be in sufficient detail to enable the preparation of the Appraiser's defense.
- 3.9.** The answer shall contain the following information:

- 3.9.a.** the name, address and telephone number of the Appraiser;
 - 3.9.b.** specific statement regarding any or all allegations in the complaint which shall be in the form of admissions or denial, and may also contain explanation, remarks or statement of mitigating circumstances; and
 - 3.9.c.** any additional facts or information the Appraiser deems relevant to the investigation and which may be of assistance in the ultimate determination of the case.
- 3.10.** Every statement of charges and notice of hearing ~~prepared~~ sought by the Board or the Standards Committee shall be prepared, reviewed and approved by the Office of the State Attorney General, which shall be responsible for the legal representation of the public interest in all proceedings. The Assistant Attorney General assigned to prosecute a contested case before the Board shall not represent the Board in that case, but shall represent the public interest. Another Assistant of the Office of the State Attorney General may be provided to represent the board in the case of a contested hearing.

§190-4-4. Contested Hearing Case.

- 4.1.** A hearing may be conducted before a majority of the Board members. ~~If a hearing is conducted before a majority of the Board members, those Board members who serve on the Standards Committee shall be disqualified from hearing the case.~~ If the Board so elects, an Administrative Law Judge or Hearing Examiner may act, in lieu of the Board, and present Findings of Fact and Conclusions of Law to the Board, and the Board can accept or reject such findings. The Administrative Law Judge or Hearing Examiner shall be an attorney licensed to practice law in the State of West Virginia. The Administrative Law Judge or Hearing Examiner shall be in control of the proceedings and shall have the authority to administer oaths, to admit or exclude testimony or other evidence, and to rule on all motions and objections.
- 4.1.a.** The presiding officer and/or other Board members shall have the right to conduct direct examination of the witnesses at any stage of each witness' testimony.
 - 4.1.b.** The hearing shall be open to the public.
 - 4.1.c.** Contested proceedings shall be recorded either by mechanical or electrical means or by certified shorthand reporters. Contested proceedings or any part thereof shall be transcribed

at the request of any party, with the expense of the transcription to be charged to the requesting party. The recording, stenographic notes, or transcription or oral proceedings shall be filed with and maintained by the Board for at least five (5) years from the date of the decision.

4.1.d. Subpoena Powers.

4.1.d.1. Board subpoenas for books, papers, records, and other evidence will be issued to a party upon request. Subpoenas for witnesses may also be obtained. The Executive Director of the Board shall issue all subpoenas for both parties upon reasonable cause shown. The request, which may be verbal or written, must specify the documents sought to be obtained and the full names and addresses of the witnesses whose testimony is sought.

4.1.d.2. Discovery procedures shall consist of those procedures authorized under the State Administrative Procedure Act found in W. Va. Code §29A-5-1 et seq.

4.1.d.3. In the event of a refusal to obey a subpoena, either party or the Board may petition the circuit court for its enforcement. If a proper showing is made, the circuit court shall order the person to obey the subpoena; if the person fails to obey the order of the court, the person may be found guilty of contempt of court.

4.1.e. If an Appraiser, upon who a proper notice of hearing has been served, fails to appear in person at the hearing, the Board and presiding officer may proceed to conduct the hearing (or may enter such other order or judgement as the Board deems appropriate) and the Appraiser shall be bound by the results of such hearing to the same extent as if the Appraiser were present.

4.1.f. Before testimony is presented, the record shall show the identity of any Board members present, of the presiding officer, and of the primary parties and their representatives, and shall reflect that all testimony is being recorded. The Appraiser may challenge any member of the Board for cause prior to the commencement of the hearing; the members of the Board (with the challenged member abstaining) shall decide by the majority vote whether cause exists and whether the challenged member shall participate in the hearing. The Board shall set dates, times

and rules for hearings and shall rule on all issues. Hearings before the Board shall generally be conducted in the following order, subject to modification at the discretion of the Board:

- 4.1.f.1.** The Presiding Officer, Administrative Law Judge or Hearing Examiner may read a summary of the charges and answers thereto, and other responsible pleadings filed by the Appraiser prior to the hearing.
- 4.1.f.2.** The Assistant Attorney General representing the State's interest before the Board may make a brief opening statement, which shall include a summary of charges and the witnesses and documents to support such.
- 4.1.f.3.** The Appraiser shall be offered the opportunity to make an opening statement, which shall include the names of any witnesses the Appraiser desires to call in defense.
- 4.1.f.4.** The presentation of evidence on behalf of the State, including a summary at the close of the evidence on behalf of the State.
- 4.1.f.5.** The presentation of evidence on behalf of the Appraiser.
- 4.1.f.6.** Rebuttal evidence on behalf of the State, if any.
- 4.1.f.7.** Rebuttal evidence on behalf of the Appraiser, if any.
- 4.1.f.8.** Closing arguments, first on behalf of the State, then on behalf of the Appraiser, and then on behalf of the State, if any.
- 4.1.g.** The presiding officer, or if appointed, the hearing examiner, shall have authority to grant immunity from disciplinary action before the Board to a witness, but only upon the unanimous vote of all members of the Board hearing the case. The official record of the hearing shall include the reasons for granting the immunity.
- 4.1.h.** Admissibility of evidence at the hearing shall be governed by the terms of the West Virginia Administrative Procedure Act. Copies of documents offered as evidence at the hearing shall be provided to opposing parties. Copies must also be furnished

to members of the Board. Notwithstanding the foregoing, to the extent the Appraiser believes he/she is being asked to reply to accusations, charges, innuendoes, or facts for the first time in the hearing, the Appraiser shall be afforded the opportunity to respond to any such evidence to the Board either in writing or at a subsequent scheduled meeting of the Board; the Assistant Attorney General assigned to prosecute the case before the Board shall, however, be allowed to continue to present evidence during the hearing.

4.1.i. When a majority of the Board presides over the reception of evidence at the hearing, the decision is a final decision.

4.2. 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.

4.3. It is desirable, but not always necessary, that 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 licensure disciplinary matter and by a majority vote of those present of the board the necessity of a transcript may be waived.

§190-4-5. Disposition.

5.1. By a majority vote of the members hearing the contested matter, the Board shall make Findings of Fact and Conclusions of Law and may take one (1) or more of the following actions:

5.1.a. Dismiss the charges. In the event the charges are dismissed, and before a decision by the Board is reported, the file shall be confidential.

5.1.b. Suspend or revoke the Appraiser's license or certification.

5.1.c. Impose a period of probation, either with or without conditions.

5.1.d. Require reexamination for State licensing or certification as an Appraiser.

5.1.e. Require additional professional education or continuing education.

5.1.f. Issue a public or private censure, warning or formal reprimand.

5.1.g. Issue a consent order.

5.1.h. Impose a fine not to exceed \$500.00.

~~§190-4-6. Motion for Rehearing.~~

~~6.1. Within twenty (20) days after issuance of a final decision, any party may file an application with the Board for a rehearing. The application shall state the specific grounds for rehearing and the relief sought. The application shall be deemed denied if not granted within twenty (20) days after service on the Executive Director of the Board.~~

~~6.1.a. Upon a rehearing, the Board shall consider facts not presented in the original proceeding if:~~

~~6.1.a.1. Such facts arose after the original proceeding was concluded;~~

~~6.1.a.2. The party offering such evidence could not reasonably have provided such evidence at the original proceedings; or~~

~~6.1.a.3. The party offering the additional evidence was misled by any party as to the necessity for offering such evidence at the original proceeding.~~

~~6.1.b. The decision made upon the conclusion of the original proceedings shall not be reversed or changed for procedural, evidentiary, or other error that does not cause substantial injustice to the parties.~~

~~6.1.c. The decision made upon a rehearing may incorporate by reference any and all parts of the decision made upon the conclusion of the original proceeding.~~

~~§190-4-7 6. Final Decision.~~

~~7.1.6.1. The final decision of the Board shall be filed with the Executive Director. A copy of the decision and order shall immediately be sent by certified mail, return receipt requested, to the Appraiser's last known post office address or may be served in the manner of original notices upon the Appraiser.~~

§190-4-8 7. Ex Parte Communications.

8-1 7.1. Ex parte communications and other matters tending to prejudice a contested case hearing are prohibited by the West Virginia Administrative Procedure Act. In keeping with this provision, the following minimal requirements are applicable:

8.7.1.a. Neither the Assistant Attorney General nor the Appraiser may communicate ex parte with the Board members concerning an issue under consideration in the hearing.

8.7.1.b. Individuals assigned to render a proposed or final decision or to make Findings of Fact or Conclusions of Law shall not communicate, directly or indirectly, in connection with any issue of fact or law, with any person or party, except upon notice and opportunity for all parties to participate. Such individuals may, however, communicate with members of the Board and its Executive Director and may have the aid and advice of persons other than those with a personal interest in, or those engaged in prosecuting or advocating in, either the case under consideration or a pending, factually-related case involving the same parties.

8.7.1.c. In any case, where it becomes necessary to communicate with a party on matters noted above, notice shall be given to all parties and a date, time, and place set for a discussion of the matter.

§190-4-98. Judicial Review.

9 8.1 Judicial review of the Board's decision may be sought in accordance with the terms of the West Virginia Administrative Procedure Act.

§190-4-10 9. Application for Reinstatement.

10-9.1. Any person whose license or certification has been revoked or suspended by the Board may apply to the Board for reinstatement in accordance with the terms of the order of revocation or suspension. If the order of revocation or suspension does not establish terms upon which reinstatement might occur, an initial application for reinstatement may not be made until one (1) year has elapsed from the date the order becomes effective, and successive applications shall be made no more often than once every two (2) years.

§190-4-11 10. Public Records and Publication of Decisions.

~~11.1.~~ **10.1.** The board shall maintain and keep open for public inspection during office hours a complete and properly indexed record of all applications for license or certification received, licenses and certificates issued, licenses and certificates renewed, and licenses and certificates revoked, canceled or suspended under the provisions of this act. A copy of any such record shall be made available to the public, upon application to the board, at such reasonable price per copy as may be fixed by the board.

~~11.2.~~ **10.2.** Final decisions of the Board relating to disciplinary actions, including consent agreements and consent orders, may be transmitted to the appropriate professional association(s), other states, and news media.

§190-4-12.11. Quasi-Judicial Immunity.

~~12.1.~~ **11.1.** Members of the Board shall be entitled to quasi-judicial immunity from suit for their actions as such members of the Board.