

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #2

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2009 DEC 18 AM 11:36

OFFICE OF THE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia Bureau of Senior Services TITLE NUMBER: 76

RULE TYPE: Procedural CITE AUTHORITY: §16-5P-1, et seq. and 45CFR, et seq.

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

TITLE OF RULE BEING AMENDED: Hearing and Appeals Procedure

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

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 January 18, 2010 AT 5:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:


West Virginia Bureau of Senior Services

State Capitol

1900 Kanawha Blvd. East

Charleston, WV 25305

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



Authorized Signature
Deputy Commissioner

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL]

FISCAL NOTE FOR PROPOSED RULES

Title 76 - Procedural Rules

Rule Title: _____

Type of Rule: Legislative Interpretive Procedural

Agency: West Virginia Bureau of Senior Services

Address: State Capitol
1900 Kanawha Blvd. East
Charleston, WV 25305

Phone Number: 304 558-3317 Email: breyolds@wvseniorservices.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

This measure will have no fiscal impact on the costs and revenues of state government.

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 | | | |
| Personal Services | | | |
| Current Expenses | | | |
| Repairs & Alterations | | | |
| Assets | | | |
| Other | | | |
| 2. Estimated Total Revenues | | | |

Rule Title: _____

Rule Title:

Title 76 - Procedural Rules

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

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.

This rule change will not increase any cost to the Bureau of Senior Services, and in fact, will eliminate cost to the Bureau in the event of a hearing request from an area agency on aging. Since a hearing request will now be directed appropriately to the Assistant Secretary of Aging as outlined in the Older Americans Act, the Bureau will not be liable for any costs associated with an appeal at the state level.

Date: 12/18/09

Signature of Agency Head or Authorized Representative

Barbara Reynolds, Deputy Commissioner

Purpose

The purpose of the revisions to Title 76, Procedural Rules for the Bureau of Senior Services is to:

- (1) set forth the administrative appeal mechanism for services providers;
- (2) set forth the separate and distinct administrative appeal for area agencies on aging;
and,
- (3) to make technical changes to the format of the existing rule.

Brief Summary

The proposed rule changes to Title 76, Procedural Rules for the Bureau of Senior Services, distinguish the appeal procedure for service providers and area agencies on aging. Currently, the rule provides that both service providers and area agencies on aging shall appeal certain decisions to the Bureau of Senior Services.

This proposed modification continues the existing procedure for services providers. With regard to area agencies on aging, the modification provides that an appeal by an area agency on aging of a decision of the Bureau of Senior Services will go directly to Assistant Secretary of the Administration on Aging consistent with the dictates of the Older Americans Act. This modification allows the area agency on aging to appeal directly to the federal entity, rather than the Bureau of Senior Services which has made the adverse decision causing the appeal to occur.

Finally, this proposed rule change offers technical cleanup of the existing rule.

2009 DEC 18 AM 11:36

**TITLE 76
PROCEDURAL RULES
WEST VIRGINIA BUREAU OF SENIOR SERVICES**

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**SERIES 1
HEARING AND APPEALS PROCEDURE**

§76-1-1. General.

1.1. Scope. -- These procedural rules govern West Virginia Bureau of Senior Services hearings and appeals process.

1.2. Authority. -- W. Va. Code §16-5P-1, et seq. and 45CFR, et seq.

1.3. Filing Date. -- August 30, 2004.

1.4. Effective Date. -- September 30, 2004.

2.1. Definitions.**2.1.1. Bureau of Senior Services**

The agency created by the Legislature pursuant to West Virginia Code §16-5P-1, et seq. to promote services; enhance the health, safety and welfare of West Virginia's senior population; and serve as the primary agency within State Government to provide service to the senior population.

2.1.2. Commissioner:

The chief administrative officer appointed to administer the duties and responsibility of the Bureau of Senior Services.

2.1.3. Area Agency on Aging (AAA).

An agency designated by the Bureau of Senior Services to develop and administer the area plan for a comprehensive and coordinated system of services for older persons. The AAA serves as the advocate and focal point for older persons in the planning and service area.

2.1.4. Adverse action.

An action or decision not to act which directly affects the complainant and with which the complainant disagrees and wishes to appeal.

2.1.5. Service provider.

An entity that is awarded a grant/contract from an Area Agency to provide services. (Note: An Area Agency on Aging or the Bureau of Senior Services contract with a profit-making organization requires prior approval from the Bureau of Senior Services.)

2.1.6. Hearing.

A proceeding where the relevant facts and applicable law will be addressed and considered.

2.1.7. Complainant.

A party who makes the complaint in a formal action or proceeding.

2.1.8. Respondent.

The party against whom the appeal or complaint is brought.

2.1.9. Hearing Examiner.

A person designated by the Bureau of Senior Services to preside at hearings, take evidence and make factual and legal findings.

2.1.10. Parties.

The complainant and respondent.

§76-1-2-3. Hearings and Appeals - Procedure for Service Providers

~~2.1.~~ 3.1. The Area Agency on Aging shall provide an opportunity for a hearing to any service provider whose contract/grant is suspended, terminated or non-renewed.

~~2.2.~~ 3.2. The Bureau of Senior Services shall provide an opportunity for a hearing where a service contract/grant between a service provider and the Bureau of Senior Services has been suspended, terminated, or non-renewed. Any hearing on this issue shall be conducted pursuant to Section ~~3.1~~ 4.1 of this Rule and shall not involve the area agency. Provided that where an area agency on aging holds a service contract/grant with Bureau of Senior Services any hearing thereon will be conducted pursuant to Section 5.1, et seq. of this Rule.

~~2.3.~~ 3.3. Continuity of Services.

~~2.3.1.~~ 3.3.1. During the hearing and appeal process, any service provider specified in ~~2.1.~~ 3.1 and ~~2.2.~~ 3.2 whose contract/grant is suspended, terminated, or non-renewed shall:

(a) Continue operating until this hearing and appeal process is final and a decision rendered; provided, however, should the Commissioner of the Bureau of Senior Services determine that termination of the contract should occur immediately, the Commissioner may order that the parties cease performance under the contract immediately.

(b) During unusual circumstances the Bureau of Senior Services shall determine if alternative contractual arrangements are necessary to assure that services continue. Should the Commissioner, in his or her discretion, determine that alternative contractual arrangements are necessary, the Commissioner shall take any and all appropriate action to ensure the continuation of necessary and appropriate services as required by West Virginia Code §16-5P-1 and §16-5P-6.

~~2.4.~~ 3.4. Request for Area Agency on Aging hearing.

~~2.4.1.~~ 3.4.1. If an entity wishes to appeal the decision of the Area Agency on Aging, it must file a written request for an informal hearing

to the Area Agency on Aging within ten (10) working days after receipt of the adverse action.

~~2.4.2.~~ 3.4.2. A written request for a hearing shall contain the following information:

(a) The name, address and telephone number of the complainant.

(b) A concise statement of the complaint.

(c) A statement of all relevant facts and the grounds on which the complaint is based.

(d) The relief being sought.

~~2.4.3.~~ 3.4.3. Within five (5) working days of the request, the Area Agency on Aging shall schedule a hearing date. The hearing before the Area Agency on Aging shall be completed within thirty (30) days following receipt of the request.

~~2.4.4.~~ 3.4.4. The Area Agency on Aging shall notify the complainant, in writing, of the date, time and location of the hearing, allowing for at least ten (10) working days' notice.

~~3.4.5.~~ 3.4.5. The hearing shall be informal and shall provide for participation by the complainant and the Area Agency on Aging.

~~2.5.~~ 3.5. The Area Agency on Aging decision.

~~2.5.1.~~ 3.5.1. Within five (5) working days following the hearing, the Area Agency on Aging shall issue a written decision notifying the complainant of its decision.

~~2.5.2.~~ 3.5.2. The decision shall include:

(a) A statement setting forth the reason(s) for and the evidence on which the decision was based;

(b) Any instructions necessary to facilitate implementation of the decision; and

(c) Instructions on how to appeal the decision.

§76-1-3-4. Request for Bureau of Senior Service Hearing/Appeal.

~~3-1:~~ 4.1. The Bureau of Senior Services shall provide an opportunity for a hearing to:

~~3-1.1.~~ An Area Agency on Aging when the Bureau of Senior Services proposes to:

~~_____ (a) Disapprove the area plan or plan amendment submitted by the Area Agency on Aging as specified in 45 C.F.R. §1321.39(b); or~~

~~_____ (b) Withdraw the Area Agency on Aging designation as a planning and service area as provided in 45 C.F.R. §1321.43.~~

~~_____ (c) Suspend, terminate or non-renew the Area Agency on Aging grant/contract.~~

~~3-1.2:~~ 4.1.1. Any applicant for designation as a planning and service area under 45 C.F.R. §1321.39 whose application is denied.

~~3-1.3:~~ 4.1.2. Service providers identified in Section ~~2-2:~~ 3.2., whose contract/grant has been suspended, terminated, or non-renewed.

~~3-1.4:~~ 4.1.3. The Bureau of Senior Services shall provide an opportunity to service providers to appeal the decision of the Area Agency on Aging as specified in Section ~~2-1:~~ 3.1.

~~3-2:~~ 4.2. Request for hearing.

~~3-2.1:~~ 4.2.1. If an entity wants a hearing/appeal, it must file a written request for a hearing with the Bureau of Senior Services within ten (10) working days following the receipt of the notice of adverse action.

~~3-2.2:~~ 4.2.2. A written request for a hearing shall contain the following information:

(a) The name, address and telephone number of the complainant.

(b) The name, address and telephone number of the respondent.

(c) A concise statement of the

complaint.

(d) A statement of all relevant facts and the grounds on which the complaint is based.

(e) The relief being sought.

~~3-3:~~ 4.3. Scheduling of the hearing.

~~3-3.1:~~ 4.3.1. Upon receipt of a request for a hearing/appeal, the Bureau of Senior Services will appoint an impartial hearing examiner to conduct the hearing.

~~3-3.2:~~ 4.3.2. The Bureau of Senior Services must complete the hearing process within sixty (60) working days of the date the request for hearing was received by the State Agency.

~~3-3.3:~~ 4.3.3. The hearing examiner shall notify the complainant and respondent, in writing, of the date, time and location of the hearing, allowing for at least ten (10) working days notice to be given to the parties and their representatives.

~~3-4:~~ 4.4. Prehearing discovery.

~~3-4.1:~~ 4.4.1. The hearing examiner shall disseminate a copy of the complainant's request for hearing to respondent and all relevant parties to the appeal.

~~3-4.2:~~ 4.4.2. The hearing examiner shall request, from the respondent, written statements in response to complainant's statement.

~~3-4.3:~~ 4.4.3. The hearing examiner shall see that all relevant parties have received written statements from all other relevant parties.

~~3-5:~~ 4.5. Conduct of the hearing.

~~3-5.1:~~ 4.5.1. A hearing examiner appointed by the Bureau of Senior Services shall preside at the hearing. Rule Formal rules of evidence shall not apply at such hearing.

~~3-5.2:~~ 4.5.2. The purpose of the hearing shall be:

(a) To give both complainant and

respondent an opportunity to appear in person and present testimony, witnesses and documentary evidence relevant to the issue in question.

(b) To give both complainant and respondent an opportunity to cross-examine the opposing party's witnesses.

~~3.5.3:~~ 4.5.3. The hearing examiner shall have the following responsibilities:

(a) To assure that all documents and records presented or referred to during the course of the hearing are made part of the record.

(b) To assure that a stenographic and tape recording be made of all proceedings. The tape shall be retained for a period of one (1) year.

~~3.6:~~ 4.6. Order of the hearing.

~~3.6.1:~~ 4.6.1. The hearing examiner shall open with a statement of the following:

(a) The purpose of the hearing.

(b) The procedure the hearing will follow.

(c) The way the decision will be transmitted to the parties.

~~3.6.2:~~ 4.6.2. The hearing examiner shall ask each party to state the issue being contested.

~~3.6.3:~~ 4.6.3. The complainant or its representative shall present its case through witnesses or documentary evidence. The respondent shall be offered the opportunity to cross-examine any witness.

~~3.6.4:~~ 4.6.4. The respondent or its representative shall present its case through witnesses or documentary evidence. The complainant shall be offered an opportunity to cross-examine any witness.

~~3.6.5:~~ 4.6.5. At any time the hearing examiner may question any witness in order to clarify the witness' testimony.

~~3.6.6:~~ 4.6.6. The hearing examiner shall give each party an opportunity to make a closing statement before terminating the hearing. Both parties shall have the option of submitting written argument should they so choose.

~~3.6.7:~~ 4.6.7. The hearing may be adjourned and continued to another date at the discretion of the hearing examiner.

~~3.6.8:~~ 4.6.8. The Bureau of Senior Services may terminate formal hearing procedures at any point if the Bureau of Senior Services or the agency or organization that requested the hearing negotiated a written agreement that resolves the issues which led to the hearing.

~~3.7~~ 4.7. The decision.

~~3.7.1:~~ 4.7.1. The hearing examiner shall submit an impartial, written recommendation to the Bureau of Senior Services, setting forth the reasons for and the evidence on which the recommendation is based. The recommendation shall be submitted within ten (10) working days following the conclusion of the hearing; provided, should the parties agree to waive this timeline, the parties, subject to the approval of the hearing examiner, may expand the period for issuance of the decision a reasonable period of time.

~~3.7.2:~~ 4.7.2. The Bureau of Senior Services shall review the recommendation of the hearing examiner and render a decision.

~~3.7.3:~~ 4.7.3. The Bureau of Senior Services shall issue the written decision within five (5) working days following the receipt of the hearing examiner's recommendations. The decision shall set forth the reasons for the decision and the evidence on which the decision is based, along with any necessary instructions to facilitate the implementation of the decision.

~~3.7.4:~~ 4.7.4. Copies of the decision shall be sent to all parties.

~~3.8:~~ 4.8. Final appeal.

~~3.8.1:~~ 4.8.1. The hearing/appeal before the Bureau of Senior Services is final and exhausts all

administrative remedies, with one (1) exception: Any applicant for designation in a planning and services area whose application is denied by the Bureau of Senior Services may appeal the denial to the Assistant Secretary for Aging, Administration on Aging.

3.9. Definitions:

3.1.1. Bureau of Senior Services

The agency created by the Legislature pursuant to West Virginia Code §16-5P-1, et seq; to promote services, enhance the health, safety and welfare of West Virginia's senior population; and serve as the primary agency within State Government to provide service to the senior population:

3.1.2. Commissioner:

The chief administrative officer appointed to administer the duties and responsibility of the Bureau of Senior Services:

3.1.3. Area Agency on Aging (AAA):

An agency designated by the Bureau of Senior Services to develop and administer the area plan for a comprehensive and coordinated system of services for older persons. The AAA serves as the advocate and focal point for older persons in the planning and service area:

3.1.4. Adverse action:

An action or decision not to act which directly affects the complainant and with which the complainant disagrees and wishes to appeal:

3.1.5. Service provider:

An entity that is awarded a grant/contract from an Area Agency to provide services. (Note: An Area Agency on Aging or the Bureau of Senior Services contract with a profit-making organization requires prior approval from the Bureau of Senior Services.)

3.1.6. Hearing:

A proceeding where the relevant facts and applicable law will be addressed and considered:

3.1.7. Complainant:

A party who makes the complaint in a formal action or proceeding:

3.1.8. Respondent:

The party against whom the appeal or complaint is brought:

3.1.9. Hearing Examiner:

A person designated by the Bureau of Senior Services to preside at hearings, take evidence and make factual and legal findings:

3.1.10. Parties:

The complainant and respondent

§76-1-5. Due Process Hearings Procedures for Area Agencies on Aging.

5.1. The Bureau of Senior Services shall provide due process to an area agencies on aging where the Bureau of Senior Services initiates proceedings to:

5.1.1. revoke or decline to renew the designation of the area agency or agencies;

5.1.2. designate an additional planning and service area in the State;

5.1.3. divide the State into different planning and service areas; or

5.1.4. disapprove the area plan or plan amendment submitted by the Area Agency on Aging as specified in 45 C.F.R. §1321.39(b); or

5.1.5. suspend, terminate or non-renew the Area Agency on Aging grant/contract.

5.1.6. otherwise affect the boundaries of the planning and service areas of the State.

5.2. When the Bureau of Senior Services initiates proceedings as described in Section 5.1, the Bureau of Senior Services shall:

5.2.1. Notify the area agency or agencies that its decision may be appealed to the Assistant Secretary of the Administration on Aging.

5.3. An appeal by an area agency or agencies, as described in Section 5.1, must be made in 30 days after receipt of the decision by the Bureau of Senior Services to the Assistant Secretary of the Administration on Aging.

5.4.. Should the Assistant Secretary of the Administration on Aging reverse or modify the decision fo the Bureau of Senior Services, the action of the Bureau of Senior Services shall be nullified or modified.