

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

Form #2

Do Not Mark In This Box

FILED

2010 JUN 25 PM 2: 25

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE**

AGENCY: WV Board of Veterinary Medicine TITLE NUMBER: 26

RULE TYPE: Legislative CITE AUTHORITY: §30-10-5

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: Series 2A

TITLE OF RULE BEING AMENDED: Contested Case Hearing Procedures

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 July 26, 2010 AT 4:00 PM ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

WV Board of Veterinary Medicine

5509 Big Tyler Road, Suite 3

Cross Lanes, WV 25313

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



Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

**FISCAL NOTE FOR PROPOSED RULES**

Rule Title:

Contested Case Hearing Procedure

Type of Rule:

 Legislative  Interpretive  Procedural

Agency:

WV Board of Veterinary Medicine

Address:

5509 Big Tyler Road, Suite 3  
Cross Lanes, WV 25313

Phone Number:

304-776-8032

Email: [wgoodwin@wvnet.edu](mailto:wgoodwin@wvnet.edu)**Fiscal Note Summary**

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

No anticipated costs or revenues of state government for this rule.

**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.

<b>FISCAL YEAR</b>			
<b>Effect of Proposal</b>	<b>Current Increase/Decrease (use "-")</b>	<b>Next Increase/Decrease (use "-")</b>	<b>Fiscal Year (Upon Full Implementation)</b>
<b>1. Estimated Total Cost</b>	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
<b>2. Estimated Total Revenues</b>	0.00	0.00	0.00

Rule Title:

Contested Case Hearing Procedure

Rule Title: \_\_\_\_\_

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

No anticipated increase or decrease in 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 applies to contested case hearing procedures of the Board. No changes are being made which would affect anticipated revenues or expenditures from their current positions.

Date: June 25, 2010

Signature of Agency Head or Authorized Representative

 \_\_\_\_\_

**QUESTIONNAIRE**

*(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)*

DATE: June 25, 2010

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: *(Agency Name, Address & Phone No.)* WV Board of Veterinary medicine  
5509 Big Tyler Road, Suite 3  
Cross Lanes, WV 25313  
  
Phone: (304) 776-8032

LEGISLATIVE RULE TITLE: ~~Contested Case Hearing Procedure~~

1. Authorizing statute(s) citation 30-10-5

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:  
June 25, 2010

b. What other notice, including advertising, did you give of the hearing?  
Notice and copy of rule to WV Veterinary Medical Association  
Posting on our website

c. Date of Public Hearing(s) *or* Public Comment Period ended:  
July 26, 2010

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.  
Attached \_\_\_\_\_ No comments received \_\_\_\_\_

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

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f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Wanda Goodwin: Executive Director

WV Board of Veterinary Medicine

5509 Big Tyler Road, Suite 3

Cross Lanes, WV 25313

Ph. 304-776-8032 Fax 304-776-8256 email wgoodwin@wvnet.edu

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g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

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3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

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b. Date of hearing or comment period:

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c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

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d. Attach findings and determinations and reasons:

Attached 

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## **Statement of Circumstances**

### **West Virginia Code of State Regulations**

#### **Title 26, Series 2A**

The Board of Veterinary Medicine has determined that changes are needed to the Contested Case Hearing Procedure, Title 26, Series 2A Rule of the West Virginia Board of Veterinary Medicine.

These were primarily as a result of changes in the veterinary practice act effective June 11, 2010.

We have been working to make this rule complementary to the language in our veterinary practice act as modified this year.

This rule has been reviewed by the Board of Veterinary Medicine.

## **Brief Summary**

### **Rule 26CSR2A Contested Case Hearing Procedures**

Modifications to the rule are necessary due to changes to the veterinary practice act, which went into effect June 11, 2010.

Changes are made to comply with and complement the code. In some instances, language is stuck as it was moved from the rule and placed in code.

As the practice act as amended references causes for action against veterinarians, registered veterinary technicians and certified animal euthanasia technicians, we thought the language in this rule should specify any person under the regulatory authority of the Board. As such, we define a demanding party for purposes of denial as any person regulated by the Board. We add reference to the other forms of regulation for registered veterinary technicians and certified animal euthanasia technicians.

We also define a hearing committee as a quorum of members assigned to hear a contested case.

To avoid future confusion on matters where a settlement is reached prior to a hearing, we ask that a written record be kept of what is determined at such a settlement meeting. We recently had a situation where no record was kept and the court transcriptionist and executive director were told to leave the meeting room, and no one recalled exactly what transpired.

TITLE 26  
LEGISLATIVE RULE  
BOARD OF VETERINARY MEDICINE

FILED

2010 JUN 25 PM 2: 27

SERIES 2A  
CONTESTED CASE HEARING PROCEDURE

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**26-2A-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 § 30-10-1 *et seq.* and § 30-1-1 *et seq.*
- 1.3. Filing Date.-~~December 19, 2000~~
- 1.4. Effective Date.- ~~February 1, 2004~~

**26-2A-2. Definitions.**

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

2.1. "Board" means the West Virginia Board of Veterinary Medicine.

2.2. "Demanding party" means an individual who has been denied a license, permit, registration or certificate to practice a regulated profession as specified in §30-10-1 et seq. of W. Va. Code ~~veterinary medicine~~ by the Board and who, as a result, demands that a hearing be held before the Board on the issue of such denial, which is not related to the requirements for such license, permit, registration or certificate as specified by W. Va. Code or the Rules of the Board.

2.3. The term "Charged party" means an individual who holds a license, permit, registration or certificate to practice a profession under the authority of the Board as specified in §30-10-1 et seq. of W. Va. Code ~~veterinary medicine issued by the Board~~ and who has been charged by the Board as described in Section 3.4 of these rules.

2.4. "License" means a license or temporary permit to practice veterinary medicine issued by the Board pursuant to W. Va. Code § 30-10-1 *et seq.*

2.5. The term "Licensee" means an individual who holds a ~~permanent or temporary~~ license to practice veterinary medicine issued by the Board.

2.6. "Permit" means a temporary permit to practice veterinary medicine issued by the Board pursuant to W. Va. Code §30-10-1 et seq.

2.7. "Permittee" means a person holding a temporary permit to practice veterinary medicine.

2.8. "Registration" means a veterinary technician registration issued under the provisions of W. Va. Code §30-10-1 et seq.

2.9. "Registrant" means a person holding a registration as a veterinary technician.

2.10. "Certificate" means an animal euthanasia certificate issued under the provisions of W. Va. Code §30-10-1 et seq.

2.11. "Certificate holder" means a person holding a certificate to euthanize animals.

2.6 12. "Practice of veterinary medicine" means the practice of veterinary medicine as defined in W. Va. Code § 30-10-1.

2.13. "Hearing committee" means those members of the Board assigned to hear a contested case. The hearing committee shall consist of a quorum of the members of the Board.

### **26-2A-3. Hearing Procedure.**

3.1. Any applicant for reasons other than non-compliance with the application completion requirements set by W. Va. Code and the Rules of the Board who is denied a license, permit, registration or certificate or any licensee, permittee, registrant or certificate holder who has had their license, permit, registration or certificate suspended by the Board who believes such denial or suspension was in violation of W. Va. Code §§ 30-1-1 *et seq.* and/or 30-10-1 *et seq.* shall be entitled to a hearing on the action denying or suspending such license, permit, registration or certificate.

3.2. Any person who desires a hearing for the reason described in subsection 3.1 of this section must present a written demand for such to the Board.

3.3. When the chair 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.

3.4. Charges may be instituted against any licensee, permittee, registrant or certificate holder by the Board when probable cause exists for believing that the licensee, permittee, registrant or certificate holder may have engaged in conduct, practices or acts in such condition that his or her license, permit, registration or certificate should be suspended, revoked or otherwise disciplined for one or more of the grounds set forth in W. Va. Code §30-10-40 19 et seq. or the Board's legislative rules. Charges may be based upon information received by way of a verified 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 licensee, permittee, registrant or certificate holder as described in subsection 3.4 of this section shall be set forth in a Complaint and Notice of Hearing issued in the name of the Board as the agency of the state regulating the profession practice of veterinary medicine. Such Complaint and Notice of Hearing shall designate the Board as the "Complainant", and shall designate the licensee, permittee, registrant or certificate holder 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 or condition complained of therein; and shall state the date, time and place for the hearing.

3.6. Upon receipt of a demand for a hearing described in subsections 3.1 and 3.2 of this section, the chair 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, permit, registration or certificate with sufficient particularity to reasonably apprise the demanding party of the nature, time and place of the conduct or condition at issue therein or the deficiencies for completion of the application which caused the denial; and shall state the date, time and place for the hearing, if the reason for the hearing is unrelated to application requirements as specified by law.

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

3.8. 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.

3.9. 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 the license, permit, registration or certificate shall be provided to the demanding or charged party or his or her counsel, at least fifteen (15) days prior to the hearing date.

3.10. Hearings shall be conducted as follows:

3.10.1. 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.

3.10.2. The Board shall be represented by the West Virginia Attorney General's Office.

3.10.3. 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 there under may be admitted, except where precluded by statute, if it is of a type, as determined by presiding member of the hearing committee, that is commonly relied upon by reasonably prudent persons in the conduct of their affairs.

3.10.4. The rules of privilege recognized by the law of this state shall be followed.

3.10.5. 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.

3.10.6. 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.

3.10.7. 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 and/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 written information of its purport, to his wife or her husband, or to any other person found there who is identified or identifies them self as 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.

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

3.10.9. 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 testified.

~~3.10.10. The hearing shall be conducted by a quorum of the Board.~~

3.10.11. 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.

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

3.10.13 12. Where a hearing is held upon the instance of the Board after charges have been brought against a licensee, permittee, registrant or certificate holder 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.

3.10.14 13. 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. The Board may require the person demanding the hearing to give security for the costs thereof ~~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.~~

3.10.14 ~~14~~. Following the conclusion of the Board's presentation of evidence in accordance with subsection 3.10.13 of this section the Respondent or charged party shall have the right to submit his or her evidence in defense.

3.10.15 ~~15~~. Following the conclusion of the demanding party's presentation of evidence in accordance with subsection 3.10.14 of this section, the Board shall have the right to offer its evidence in rebuttal.

3.10.16 ~~16~~. The Board may call witnesses to testify in support of its decision to deny a license, permit, registration or certificate ~~licensure, to deny a permit~~ or in support of the charges instituted against a licensee, permittee, registrant or certificate holder; 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.

3.10.17 ~~17~~. All parties shall have the right to offer opening and closing arguments, not to exceed ten (10) minutes for each presentation.

3.10.18 ~~18~~. Hearings held by the Board as a result of charges instituted against a licensee, permittee, registrant or certificate holder may be continued or adjourned to a later date or different place by the Board or its designee by appropriate notice to all parties.

3.10.19 ~~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 by the Board 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 hearing date may shall be denied unless the Board finds that the reason for the

motion could not have been ascertained earlier. Motions for continuance filed prior to the date of the hearing shall be ruled on by the chair or executive director of the Board. All other motions after motions for continuance shall be ruled on by the Board member(s) who serve on the hearing committee or the member presiding over the hearing.

3.10.24 20. All motions related to a case set for hearing before the Board, except motions for continuance as set forth in 3.10.20 of this rule 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) presiding at the hearing shall hear the motions and the response from the non-moving party and shall rule on such motions accordingly.

#### **26-2A-4. Transcription of Testimony and Evidence in a Hearing.**

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 chair or presiding member, if the Board chair is not serving on the hearing committee 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 by the hearing committee on its decision in any licensure disciplinary matter.

**26-2A-5. Submission of Proposed Findings of Fact and Conclusions of Law.**

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

**26-2A-6. Conferences; Informal Disposition of Cases.**

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

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

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

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

6.2. The Board may cause such conferences to be held on its own motion or by the request of a party, with the approval of the hearing committee.

6.3. 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.

6.4. A written record or transcript of the agreed to stipulations or consent agreement shall be made by a transcriptionist or the executive director of the Board.

6.5. Any such conference or meeting for discussion of a settlement to avoid proceeding to a hearing shall, for the record, be noted in the record as such, to assure compliance with the requirements of this section.

**26-2A-7. Depositions.**

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

### **26-2A-8. Subpoenas.**

8.1. 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 or its Executive Director . Such subpoenas and subpoenas duces tecum shall be issued pursuant to W. Va. Code §29A-5-1(b).

8.2. Written requests by a party other than the Board for the issuance of subpoenas or subpoenas duces tecum as provided in subsection 8.1 of this section must be received by the Board no later than ten (10) days before a scheduled hearing. Any such party requesting the issuance of subpoenas or subpoenas duces tecum shall see that they are properly served in accordance with W. Va. Code § 29A-5-1(b).

8.3. A person serving a subpoena or subpoena duces tecum at the request of the Board shall be authorized by law to render this service and his or her compensation for the service shall be in accordance with W. Va. Code §29A-5-1.(b).

### **26-2A-9. Orders.**

9.1. 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 30-1-8(d). 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.

9.2. The findings of fact and conclusions of law must be approved by a majority of the Board either by a written 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 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.

**26-2A-10. Appeal.**

10.1. An appeal from any final order entered in accordance with these rules shall comply with the provisions of W. Va. Code § 30-1-9 and W. Va. Code § ~~29A-6-1~~ 29A-5-4 *et seq.*