

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

Form #2

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2013 MAR -1 PM 2:15

WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia State Fire Commission TITLE NUMBER: 87-9

RULE TYPE: Procedural
~~Legislative Rule~~ CITE AUTHORITY: W. Va. Code 29-3-5b(c)

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 87-9

TITLE OF RULE BEING PROPOSED: Contested Case Hearing Procedures for State Fire Commission

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 April 1, 2013 AT 4:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Anthony W. Carrico

State Fire Marshal's Office
1207 Quarrier Street, 2nd Floor

Charleston, WV 25301

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

Robert A. Sullivan

Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Statement of Facts and Circumstances for Promulgation of
87-9 Contested Case Hearing Procedures for State Fire Commission

This is a new rule promulgated by the Commission, with authority granted by West Virginia Code §29A-5-1(a), to provide hearing procedures for contested cases.

This rule sets forth procedures for hearings, transcription of testimony and evidence, submission of proposed findings of fact and conclusions of law, conferences, informal disposition of cases, depositions, subpoenas, orders, and appeals.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: "Contacted Case Hearing Procedures For the State Fire Commission" 87CSR9

Type of Rule: Legislative Interpretive Procedural

Agency: State Fire Commission

Address: 1207 Quarrier Street, 2nd Floor
Charleston, WV 25301

Phone Number: 304-558-2191 Email: anthony.w.carrico@wv.gov

Fiscal Note Summary

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

Proposed rule will have no fiscal impact on 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	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
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: _____

Rule Title: _____

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

None.

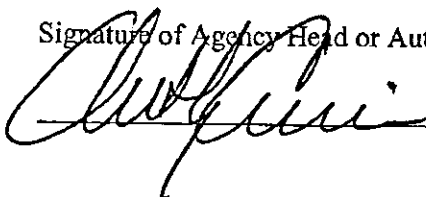
MEMORANDUM

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.

N/A

Date: March 1, 2013

Signature of Agency Head or Authorized Representative

 _____

**TITLE 87
PROCEDURAL RULE
STATE FIRE COMMISSION**

2013 MAR -1 PM 2:15

OFFICE OF THE
SECRETARY OF STATE

**SERIES 9
CONTESTED CASE HEARING PROCEDURES
FOR STATE FIRE COMMISSION**

§ 87-9-1. General.

1.1. Scope. -- This rule establishes the procedures to be followed for hearings before the Fire Commission in license, certificate and permit disciplinary and denial proceedings.

1.2. Authority. -- W. Va. Code § 29A-5-1(a).

1.3. Filing Date. --

1.4. Effective Date. -

§ 87-9-2. Hearing Procedure

2.1. Any person who desires a hearing must present a written demand for such to the Fire Commission within 30 days of issuance of an Order denying a license.

2.2. When the Fire Commission or its authorized designee is presented with such a demand for a hearing, it shall schedule a hearing within forty-five (45) days of receipt by it of such written demand, unless postponed to a later date by mutual agreement.

2.3. Charges may be instituted against any licensee, permittee, or certified individual by the Fire Marshal when probable cause exists for believing that the individual may have engaged in conduct, practices or acts in such condition that his or her license, permit or certification should be suspended, revoked or otherwise disciplined for one or more of the grounds set forth in W. Va. Code §29-3-12b or the Fire Marshal's or Fire Commission's legislative rules. Charges may be based upon information received by way of a verified written complaint filed with the Fire Marshal and further information gathered by the Fire Marshal, his or her designee, or an ethics investigator, in the process of investigating such complaint. Charges may also be based upon information received solely through investigative activities undertaken by the Fire Marshal.

2.4. Charges instituted against a licensee, permittee, or certified individual shall be set forth in a Complaint and Notice of Hearing issued in the name of the Fire Commission as the agency of the state regulating the particular profession. Such Complaint and Notice of Hearing shall designate the Fire Commission as the "Complainant", and shall designate the certified home inspector 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.

2.5. Upon receipt of a demand for a hearing described in subsections 1 and 2 of this section, the Fire Commission shall provide the demanding party, with a Complaint and Notice of Hearing issued in the name of the Fire Commission as the agency of the state regulating the practice of the profession described. Such Complaint and Notice of Hearing shall designate the demanding party as the "Complainant" and shall designate the Fire Commission as the "Respondent"; shall set out the substance of each and every reason that the Fire Commission has denied the demanding party a license, permit 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; and shall state the date, time and place for the hearing.

2.6. The Fire Commission may amend the charges set forth in a Complaint and Notice of Hearing as it deems proper.

2.7. 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.

2.8. Upon written motion received by the Fire Commission 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 certification shall be provided to the demanding or charged party or his or her counsel, at least fifteen (15) days prior to the hearing date.

2.9. Hearings shall be conducted as follows:

2.9.1. 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, or to represent his or herself.

2.9.2. The Fire Commission shall be represented by the West Virginia Attorney General's Office.

2.9.3. 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 commonly relied upon by reasonably prudent persons in the conduct of their affairs

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

2.9.5. 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.

2.9.6. 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 Fire Commission and, when appropriate, may cross-examine witnesses called by the Fire Commission in support of the charges or in defense of its decision to deny certification.

2.9.7. The hearing shall be held at such time and place as is designated by the Fire Commission, 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 last address of record in the Fire Marshal's office 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 address; 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.

2.9.8. The hearing shall be open to the general public, unless requested to be closed to the public by the certified home inspector or applicant.

2.9.9. The Fire Marshal, his or her employees, Members of the West Virginia State Fire Commission and its officers, agents and employees shall be competent to testify at the hearing as to material and relevant matters: Provided, That no person who testifies at such hearing shall thereafter participate in the deliberations or decisions of the Fire Commission with respect to the case in which he or she testified.

2.9.10. The hearing shall be conducted by a quorum of the Fire Commission, or a hearing officer appointed by the Fire Commission.

2.9.11. 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 Fire Commission's files. Upon request, a copy of the transcript shall be furnished to any party by the transcriptionist at his or her own expense.

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

2.9.13. Where a hearing is held upon the instance of the Fire Commission after charges have been brought against a licensee, permittee, or certified individual, the Fire Commission shall have the burden of proof and shall present its evidence and/or testimony in support of the charges first.

2.9.14. Where a hearing is held upon demand under the provisions of subsections 9.1, 9.2, 9.3, and 9.6 of this section, the demanding party shall have the burden of proof and shall therefore be required to present his or her evidence first. The Fire Commission 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 in the Order of the Fire Commission, and may be collected by forfeiture of the security posted, by assessment in an Order issued them by the Fire Commission, in a civil action or by other proper remedy.

2.9.15. Following the conclusion of the Fire Commission's presentation of evidence in accordance with subsection 2.9.13 of this section the Respondent or charged party shall have the right to submit his or her evidence in defense.

2.9.16. Following the conclusion of the demanding party's presentation of evidence in accordance with subsection 2.9.14 of this section, the Fire Commission shall have the right to offer its evidence in rebuttal.

2.9.17. The Fire Commission may call witnesses to testify in support of its decision to deny licensure, to deny a permit, or to deny a certificate or in support of the charges instituted against an individual; 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.

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

2.9.19. Hearings held by the Fire Commission as a result of charges instituted against a licensee, permittee, or certified individual may be continued or adjourned to a later date or different place by the Fire Commission or its hearing officer by appropriate notice to all parties.

2.9.20. 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 Fire Commission 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 hearing date may 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 chair of the Fire Commission, or its hearing officer. All other motions for continuance shall be ruled on by the Fire Commission member(s), the member presiding over the hearing, or the hearing officer.

2.9.21. All motions related to a case set for hearing before the Fire Commission, except motions for continuance and those made during the hearing, shall be in writing and shall be received in the office of the Fire Commission 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 Fire Commission member(s) presiding at the hearing, or the hearing officer, shall hear the motions and the response from the non-moving party and shall rule on such motions accordingly.

§ 87-9-3. Transcription of Testimony and Evidence.

3.1. 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.

3.2. All reported materials shall be transcribed. The Fire Commission shall have the responsibility to make arrangements for the transcription of the reported testimony and evidence, and each party to the hearing shall bear their own expense in obtaining a copy of such transcription.

3.3. Upon the motion of the Fire Commission or any party assigning error or omission in any part of any transcript, the Fire Commission chair or presiding member or hearing officer shall settle all differences arising as to whether such transcript truly discloses what occurred at the hearing and shall direct that the transcript be corrected and/or revised as appropriate so as to make it conform to the truth.

3.4. A transcript of the hearing shall be provided to all members of the Fire Commission for review at

least ten (10) days before the vote is taken on its decision in any certification disciplinary matter.

§ 87-9-4. Submission of Proposed Findings of Fact and Conclusions of Law.

4.1. Any party may submit proposed findings of fact and conclusions of law at a time and manner designated by the Fire Commission or hearing officer.

§ 87-9-5. Conferences; Informal Disposition of Cases.

5.1. At any time prior to the hearing or thereafter, the Fire Commission, or its hearing officer may hold conferences for the following purposes:

- 5.1.1. To dispose of procedural requests, prehearing motions or similar matters;
- 5.1.2. To simplify or settle issues by consent of the parties; or,
- 5.1.3. To provide for the informal disposition of cases by stipulation or agreement.

5.2. The Fire Commission or its hearing officer may cause such conferences to be held on its own motion or by the request of a party.

5.3. The Fire Commission 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.

§ 87-9-6. Depositions.

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

§ 87-9-7. Subpoenas for Hearings and Depositions.

7.1. Subpoenas to compel the attendance of witnesses and subpoenas duces tecum to compel the production of documents for hearings or depositions may be issued by any member of the Fire Commission, its hearing officer, or the Fire Marshal.

Such subpoenas shall be issued pursuant to W. Va. Code §29A-5-1(b).

7.2. Written requests by a party for the issuance of subpoenas or subpoenas duces tecum as provided in subsection 7.1 of this rule must be received by the party 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)

§87-9-8. Orders.

8.1. Any final order entered by the Fire Commission following a hearing conducted pursuant to these rules shall be made pursuant to the provisions of W. Va. Code §§29A-5-3. 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.

8.2. The findings of fact and conclusions of law must be approved by a majority of the Fire Commission either by a poll or vote at a meeting, before a final order is entered. A copy of the final order approved by a majority of the Fire Commission 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 Fire Commission by personal service or by registered or certified mail.

§87-9-9. Appeal.

9.1. An appeal from any final order entered in accordance with these rules shall comply with the provisions of W. Va. Code § 29A-6-1 et seq.