

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

Form #5

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FILED  
2015 JUL 17 P 3:18

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE  
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: Department of Health and Human Resources TITLE NUMBER: 69

CITE AUTHORITY: W. Va. Code §§ 5F-2-2, 16-1-15, 29A-5-1 et seq.

RULE TYPE: PROCEDURAL  INTERPRETIVE

EXEMPT LEGISLATIVE RULE

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES  NO

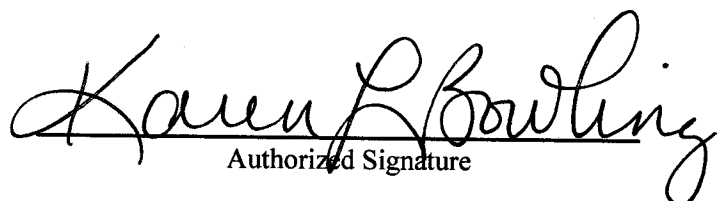
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

TITLE OF RULE BEING AMENDED: Rules for Hearings Under the Administrative Procedures Act

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 August 17, 2015

  
Authorized Signature



STATE OF WEST VIRGINIA  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
State Capitol Complex  
Building 6, Room 817-B  
Charleston, West Virginia 25305  
Telephone: (304) 558-0955  
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Earl Ray Tomblin  
Governor

Karen L. Bowling  
Cabinet Secretary

June 15, 2015

M. Katherine Lawson, Inspector General  
Department of Health and Human Resources  
Building 6, Room 817-B  
Charleston, WV 25305

Re: Proposed Amendment to Rule 69CSR1

Dear Ms. Lawson:

Thank you for the opportunity to comment on the proposed revisions to the Rules for Hearings under the Administrative Procedures Act, 69CSR1.

**Section 3.2 and 3.3** – These sections require that hearing notices be delivered either in person or by certified United States mail.

The Board of Review conducts a large number of hearings which fall under this rule and by requiring that notices be sent by certified mail it presents an increased cost that we believe is not necessary. The Board of review currently schedules nearly all its hearings via first class United States mail delivery.

To address this concern, we ask that the proposed language be modified to allow for notices to be sent via United States first class mail to all parties. We propose changing rule in Sections 3.2 and 3.3 to read as follows:

§69-1-3.2 –

Unless waived by all parties to the hearing and by the Secretary, all hearings shall be preceded by at least ten (10) days written notice. ~~calculated from the date of receipt or refusal of such notice.~~ The notice shall be given either by personal delivery thereof to the person or to the entity to be notified or by depositing such notice in the ~~certified~~ first class United States mail, postal prepaid, ~~return receipt requested~~, in an envelope addressed to such person or other entity at the last known address of such person or other entity. Proof of the giving of notice in either such manner may be made by the affidavit of any officer or assistant or employee of the Secretary, or



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by affidavit of any person over eighteen years of age, naming the person or other entity to which or to whom such notice was given and specifying the time, place and manner of giving thereof. ~~If certified~~ In the event first class United States mail is used, ~~then a copy of the return receipt shall be attached to the proof of notice.~~ the notice will be presumed delivered unless returned unclaimed by the postal service.

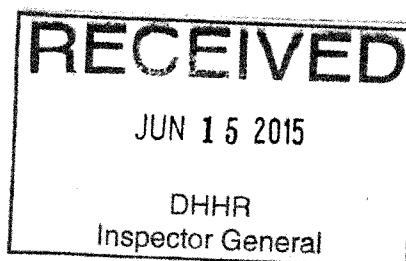
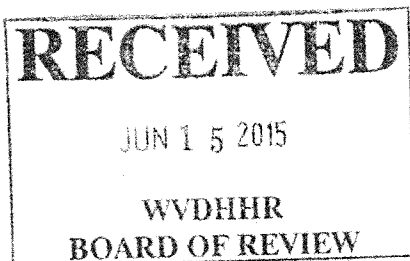
§69-1-3.3 -

...Similarly, notice shall be complete if the written notice is sent ~~by certified~~ via first class United States mail, ~~return receipt requested~~, postage prepaid, to the recipient and ~~the return receipt shows that it was either accepted by a person at the recipient's last known address or was refused by a person at the last known address.~~ and the mail is not returned unclaimed by the postal service.

Thank you in advance for your consideration of my comments.

Sincerely,

Cheryl Henson, Interim Director  
Board of Review



Title 69 Series 1  
Rules for Hearings Under the Administrative Procedures Act  
Procedural Rule  
West Virginia Department of Health and Human Resources

**Summary of Public Comments:**

**Comment #1**

The Board of Review conducts a large number of hearings pursuant to this rule, and requiring notices to be sent by certified mail is unnecessary and will present a burdensome increased cost. The Board currently schedules nearly all its hearings via first class United States mail delivery. We proposed changing sections 3.2 and 3.3 from certified mail to first class U.S. mail.

Comment by Interim Director, Board of Review

**Response #1**

The Department finds this proposal to be reasonable, and changes were made as requested.

TITLE 69  
PROCEDURAL RULES  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

FILED

SERIES 1

2015 JUL 17 P 3:18

RULES FOR HEARINGS UNDER THE ADMINISTRATIVE PROCEDURES ACT

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

**§69-1-1. General.**

1.1. Scope. – This procedural rule is intended to set forth the procedures for administrative hearings which are conducted by the Secretary of the Department of Health and Human Resources pursuant to the West Virginia Administrative Procedures Act, §29A-5-1 et seq.

1.2. Authority. – West Virginia Code, §5F-2-2, §16-1-15 and §29A-5-1 et seq.

1.3. Filing Date. –

*July 17, 2015*

1.4. Effective Date. –

**§69-1-2. Definitions.**

2.1. As used in this rule, the following terms, words, and phrases have the meanings stated unless in any instance where such term, word, or phrase is employed the context expressly indicates that another meaning is intended.

2.2. The term “act” means the specific statute under which a hearing arises and which statute is among the various statutes for which the Secretary of the Department of Health and Human Resources has administrative responsibility, under the provisions of West Virginia Code §5F-2-1(d).

2.3. The terms “Code of West Virginia” and “West Virginia Code” mean the West Virginia Code of 1931, as amended.

2.4. The term “this rule” means the present procedural rule which is designated in the caption hereof as Title 69, Series 1.

2.5. The term “secretary” means the Secretary of the Department of Health and Human Resources as provided for by West Virginia Code, §5F-1-1 (1989).

**§69-1-3. Administrative Hearings; Notice; and Place.**

3.1. All administrative hearings conducted pursuant to this rule will be held in accordance with the provisions of West Virginia Code, §29-A-5-1 et seq., and with the provisions of this rule. In any particular case, any special conditions which are set forth in the act or in other rules promulgated by the secretary and which are applicable to that case will be adhered to during administrative hearings in lieu of any contrary provision in this rule.

3.2. Unless waived by all parties to the hearing and by the secretary, all hearings shall be preceded by at least 10 days written notice, calculated from the date of ~~receipt or refusal delivery or mailing~~ of such notice. The notice shall be given either personal delivery thereof to the person or to the entity to be notified

or by depositing such notice in the ~~certified regular United States mail, postal postage prepaid, return receipt requested~~, in an envelope addressed to such person or other entity at the last known address of such person or other entity. Proof of the giving of notice in either such manner may be made by the affidavit of any officer or assistant or employee of the secretary, or by affidavit of any person over 18 years of age, naming the person or other entity to which or to whom such notice was given and specifying the time, place and manner of giving thereof. ~~If certified regular United States mail is used, then a copy of the return receipt shall be attached to the proof of notice. the notice will be presumed delivered unless returned by the Postal Service as unclaimed.~~

3.3. Notice of the hearing and service of any document or order shall be upon the parties of record except that any party who is represented by an attorney shall be deemed to have designated that attorney as the proper recipient of all such notices, documents, or orders and service upon that attorney will be equivalent for all purposes as service upon the party. Notice shall be complete if the written notice is ~~personally tendered served or delivered~~ to the intended recipient and is either accepted or refused by that recipient. Similarly, notice shall be complete if the written notice is sent by ~~certified regular United States mail, return receipt requested postage prepaid~~, to the recipient ~~and the return receipt shows that it was either accepted by a person at the last known address or was refused by a person at the last known address, and the notice is not returned by the Postal Service as unclaimed.~~

3.4. The notice in subsection 3.2 of this rule shall contain the date, time, and place of the hearing and a short and plain statement of the matters asserted. If the secretary is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application by a party a more definitive and detailed statement shall be furnished.

3.5. The hearing shall be held in the county selected by the secretary. Hearings may be held by electronic means.

#### **§69-1-4. Parties and Conduct of Hearings.**

4.1. At the hearing, an opportunity shall be afforded all parties to present evidence and argument with respect to the matters and issues involved. Any person interested in the proceeding, but not a party thereof, shall be permitted to testify as to the issues in controversy after first being placed under oath or affirmation. Any such interested person who is not a party, shall not, however, be permitted to submit argument or to cross-examine other witnesses. Argument may be restricted to a presentation in written form. All of the testimony and evidence at the hearing shall be reported by stenographic notes and characters or by mechanical or electronic means. All rulings on the admissibility of testimony and evidence shall also be reported. The secretary shall prepare an official record, that shall include reported testimony and exhibits in each contested case, and all agency staff memoranda and data used in consideration of the case, but it shall not be necessary to transcribe the reported testimony unless required for purposes of rehearing or judicial review. Upon request from any party to the hearing, all reported testimony and evidence at a hearing shall be transcribed, and a copy thereof furnished to the party at its expense. The secretary shall have the responsibility for making arrangements for the transcription of the reported testimony. ~~and evidence and such transcription shall be accomplished with all dispatch.~~

4.2. Evidentiary depositions may be taken and read as in civil actions in the circuit court of this state.

4.3. Except to the extent required by statute or by this rule, all hearings under this rule will be conducted in accordance with the current versions of the "Rules of Civil Procedure for Trial Courts of Record," "Trial Court Rules for Trial Courts of Record," and "Local Rules for Kanawha County Civil Courts" as those rules would apply to a trial court sitting without a jury.

4.4 All hearings shall be conducted in an impartial manner. All hearings and shall be open to members of the public except hearings arising under West Virginia Code §49-2-105 and §9-6-1 et seq. Decisions for all hearings held on or before May 17, 2015, and not subject to this rule shall be issued on or before July 1, 2015. The secretary and every hearing officer appointed by the secretary shall have the power to administer oaths and affirmations, certify official acts, take depositions, rule upon offers of proof and receive relevant evidence, regulate the course of the hearing, hold conferences for the settlement or simplification of the issues by consent of the parties, dispose of procedural requests, motions, or similar matters, and take such other actions as are authorized by this rule. The secretary and every hearing officer shall adopt appropriate measures to protect the confidentiality of patient information. Such measures may include, but shall not be limited to: deleting references to all patient identifying information in documents and testimony; referring to patients by a non-identifying designation (e.g., "Patient A"); or hearing in camera any testimony which might require divulging patient identifying information.

4.5. During a hearing, irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The current "Rules of Evidence" as applied in civil cases by a court sitting without a jury 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 in their office. The hearing officer shall be bound by the rules of privilege recognized by law. Objections to evidentiary offers shall be noted in the record, but exceptions to rulings by the hearing officer shall not be made. Any party to any hearing may vouch the record as to any excluded testimony or other evidence provided that the hearing officer may elect to require that the excluded testimony be submitted in written form following the hearing.

4.6. All evidence, including papers, records, agency staff memoranda and documents in the possession of the secretary, of which he or she desires to avail himself or herself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies of excerpts or by incorporation by reference. ~~In all cases, copies of orders, proceedings, or records in the office of the Secretary shall be equal to the original in evidence.~~

4.7. Every party, as well as the secretary and his or her staff, shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.

4.8. All witnesses who testify at a hearing shall first be subject to oath or affirmation and any testimony submitted by deposition shall show on the face thereof that the witness was so qualified.

4.9. The hearing officer may take notice of judicially cognizable facts. All parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.

#### **§69-1-5. Correction of Record.**

Upon motion in writing served by any party or by the secretary as notice may be served pursuant to subsection 3.2 of this rule and therein assigning error or omission in any part of any transcript of the proceedings had and testimony taken at any such hearing, the hearing officer shall settle all differences arising as to whether such transcript truly discloses what occurred at the hearing or shall direct that the transcript be corrected and revised in the respects designated by the hearing officer, so as to make it conform to the whole truth.

#### **§69-1-6. Subpoenas.**

6.1. The secretary may issue subpoenas and compel the attendance of witnesses and the production of pertinent books, accounts, papers, records, documents, and testimony. All subpoenas and subpoenas duces tecum shall be issued in the name of the secretary, but any party requesting their issuance must see that they are properly served. Service of subpoenas duces tecum issued at the instance of the secretary shall be the responsibility of the secretary. All requests by interested parties for subpoenas and subpoenas duces tecum shall be in writing and shall contain a statement acknowledging that the requesting party agrees to pay service fees and fees for the attendance and travel of witnesses.

6.2. Every subpoena or subpoena duces tecum shall be served at least five days before the return date thereof, either by personal service made by any person over 18 years of age or by registered or certified mail. But a return acknowledgment signed by the person to whom the subpoena or subpoena duces tecum is directed shall be required to prove service by registered or certified mail. If service is by mail, then the five-day notice period shall not begin to run until the date the subpoena or subpoena duces tecum is received by the person or entity subject thereto as shown by the date on the return receipt.

6.3. The person who serves any such subpoena or subpoena duces tecum shall be entitled to the same fee as sheriffs who serve witness subpoenas for the circuit courts of this state. Fees for the attendance and travel of witnesses shall be the same as for the witnesses before the circuit courts of this state. All such fees shall be paid by the secretary if the subpoena or subpoena duces tecum was issued, without the request of an interested party, at the instance of the secretary. All such fees related to any subpoena or subpoena duces tecum issued at the same instance of an interested party shall be paid by the party who asks that such subpoena or subpoena duces tecum be issued.

6.4. Upon motion made promptly and in any event before the time specified in a subpoena duces tecum for compliance therewith, the circuit court of the county in which hearing is to be held, or the circuit court in which the subpoena duces tecum was served, or the judge of either such court in vacation, may grant any relief with respect to such subpoena duces tecum which either such court, under the West Virginia Rules of Civil Procedure for Trial Courts of Record, could grant, and for any of the same reasons, with respect to a subpoena duces tecum issued from either such court.

6.5. In case of disobedience or neglect of any subpoena or subpoena duces tecum served on any person, or the refusal of any witness to testify to any matter regarding which he or she may be lawfully interrogated, the circuit court of the county in which the hearing is being held, or the judge thereof in vacation, upon application by the secretary, shall compel obedience by attachment proceedings for contempt of a subpoena or subpoena duces tecum issued from such circuit court or a refusal to testify therein.

6.6. The issuance of a subpoena duces tecum will be refused only in an instance where there is good reason to believe that the subpoena power is being abused. All subpoenas and subpoenas duces tecum will state on their face the name of the party who requested it.

**§69-1-7. Discovery.**

Discovery shall be engaged in only with the consent of the hearing officer or, if a hearing officer has not yet been assigned, with the consent of the secretary. All discovery requests will be submitted to the appropriate official at the same time as the discovery request is served upon the other party. If the official determines that the requested information is relevant and material to the issues to be heard and not unduly burdensome, the official will permit the discovery and set a reasonable time frame for the disclosure of the information. Determination of a reasonable time frame will be premised upon the nature and scope of the information requested and the date on which the hearing is scheduled. The official shall attempt to avoid continuing a previously scheduled hearing.

**§69-1-8. Hearing Officers.**

8.1. Every hearing officer appointed by the secretary to conduct a hearing under this rule who is not a member of the Board of Review shall be an attorney licensed to practice law in the state.

8.2. The hearing officer is authorized to receive and rule upon any procedural matter arising before, during, or after a hearing. All final rulings on substantive matters shall be made by the secretary or as designated by the secretary to the Board of Review.

8.3. The hearing officer may continue a hearing upon motion of the secretary or other party. Requests for continuances shall not be granted as a matter of course, but only upon a showing of good cause.

**§69-1-9. Concluding the Hearing.**

9.1. At the conclusion of the hearing, the parties shall be permitted to file proposed findings of fact, conclusions of law, and such legal briefs or memoranda as they wish, which filings shall be concurrent. The parties shall be permitted to respond to the filing of any other party. No further argument shall be permitted.

9.2. Thereafter, unless the secretary or a member of the Board of Review served as the hearing officer in the particular case, the hearing officer will prepare a report and recommendation which shall contain proposed findings of fact and conclusions of law as suggested by the hearing officer for the secretary's approval. The parties to the hearing shall then be permitted seven days in which to file objections or comments upon the report and recommendation and three more days to respond to each others' objections or comments. Thereafter, the secretary shall decide whether to accept the report and recommendation, to reject it, to modify to, or to remand the matter to the hearing officer for further proceedings or upon other instructions. The secretary retains his or her right to review any and all proposed findings of facts against the record and to disagree therewith provided that the secretary states the basis for the disagreement in his or her final order. The secretary shall render either a final order or an interlocutory order as his or her decision may require in which the secretary accepts in whole or in part the proposed findings of fact and conclusions of law submitted by the hearing officer and, to the extent that the secretary rejects or modifies the report and recommendation of the hearing officer, the secretary shall furnish his or her own findings of fact and conclusions of law. If in a particular case the secretary or member of the Board of Review ~~personally~~ served as the hearing officer, the secretary or member of the Board of Review shall issue a decision following his or her review of the proposed finds of fact, conclusions of law, and legal briefs or memoranda.

9.3. A copy of the final order or decision of the secretary shall be served upon each party and or the party's attorney of record. ~~, if any, either in person or by certified mail.~~

9.4. All appeals from the final order or decision of the secretary shall be taken pursuant to West Virginia Code, §29A-5-4.

**§69-1-10. Severability.**

If any provision of this rule or the application thereof to any entity or circumstance shall be held invalid, such invalidity shall not affect the provisions or the applications of this rule which can be given effect without the invalid provisions or application and to this end the provisions of this rule are declared to be severable.