

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

Form #2

Do Not Mark In This Box  
**FILED**

2009 JUN 30 AM 11:34

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

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

AGENCY: Board of Barbers and Cosmetology TITLE NUMBER: 3

RULE TYPE: Legislative CITE AUTHORITY: 30-27-21 & 30-1-1

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: 12


TITLE OF RULE BEING PROPOSED: Hearing Procedures

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 30<sup>th</sup> 2009 AT 8:30 am ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

1716 Pennsylvania Ave, Suite 7  
Charleston, WV 25302

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

adam.l.higginbotham@wv.gov

  
Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

APPENDIX B

**FISCAL NOTE FOR PROPOSED RULES**

Rule Title: Hearing Procedures

Type of Rule:  Legislative  Interpretive  Procedural

Agency: Board of Barbers and Cosmetologists

Address: 1716 Pennsylvania Ave., Suite 7  
Charleston, WV 25302

Phone Number: 304-558-2924 Email: adam.l.higgintonham@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.

N/A

**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	0	0
Personal Services	0	0	0
Current Expenses	0	0	0
Repairs & Alterations	0	0	0
Assets	0	0	0
Other	0	0	0
2. Estimated Total Revenues	0	0	0

Rule Title:

Rule Title: Hearing Procedures

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

N/A

### MEMORANDUM

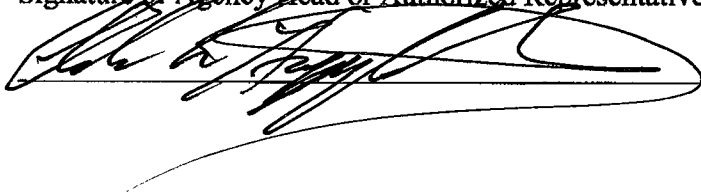
Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

This will have an unknown fiscal impact. This is based on hiring admin judges or hearing examiners for licensees that violate the laws governing the practice.

This rule establishes a much needed hearing procedure

Date: 6/29/09

Signature of Agency Head or Authorized Representative





Joe Manchin III  
Governor

Martha Yeager Walker  
Secretary

Adam L. Higginbotham  
Director

State of West Virginia  
**Board of Barbers and Cosmetologists**

1716 Pennsylvania Avenue, Suite 7  
Charleston, West Virginia 25302  
Telephone: 304-558-2924  
Fax: 304-558-3450

Date: June 29, 2009

To: Administrative Law Division of Secretary of State's Office

From: Adam L. Higginbotham, Director, Board of Barbers and Cosmetologists

Re: Hearing Procedures

SUMMARY OF PROPOSAL

This rule will establish hearing procedures for the Board of Barbers and Cosmetologists.

X

  
Adam L. Higginbotham M.B.A.  
Executive Director

FILED

TITLE 3  
PROCEDURAL RULE  
WEST VIRGINIA BOARD OF BARBERS AND COSMETOLOGISTS

2009 JUN 30 AM 11: 34

SERIES 12  
HEARING PROCEDURES

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**§3-12-1 General.**

1.1. Scope. -- These procedural rules establish procedures for hearings before the Board.

1.2. Authority. -- W. Va. Code §30-27-21 et seq., §30-1-1 et seq.

1.3. Filing Date. --

1.4. Effective Date. --

**§3-12-2. Definitions.**

The following words and phrases as used in these rules shall have the following meanings.

2.1. "Board" means the West Virginia Board of Barbers and Cosmetologists.

2.2. "Demanding party" means an individual who has been denied a license to practice barbering, cosmetology, manicuring, or aesthetics by the Board and who demands that the Board hold a hearing on the denial.

2.3. "Charged party" means an individual who holds a license to practice barbering, cosmetology, manicuring, or aesthetics issued by the Board and who has been charged by the board as described in subsections 3.3 and 3.4 of section 3 of these rules.

2.4. "Licensure" means an individual who holds a license to practice barbering, cosmetology, manicuring, aesthetics issued by the board.

2.5. "Director" means Director of the Board of Barbers and Cosmetologists.

**§3-12-3. Hearing Procedures.**

3.1. Any person that has a pending revocation of a license or has been denied a license by the board who believes the denial was in violation of W. Va. Code §30-1-1 et seq. and/or 30-27-1 et seq. shall be entitled to a hearing on the denial upon presenting a written demand for hearing to the Board.

3.2. When a written demand for hearing is received by the Board, the Director shall schedule a hearing within sixty (60) days of receipt of the demand, unless postponed to a later date by mutual agreement of the demanding party and the chair/chairperson or the Director of the Board.

3.3. The Board may institute charges against any licensee when cause exists for reasonable belief that licensee to be charged has engaged in conduct or is in a condition that his or her barbering, cosmetology, manicuring, or aesthetics license should be suspended, revoked or be made subject to probationary conditions pursuant to grounds set forth in W. Va. Code §30-27-1 et seq. or the Board's legislative rules. Charges may be based upon a verified written complaint

filed with the Board and information gathered pursuant to the Board's investigation of the complaint. Charges may be based on information gained solely through investigation by the Board.

3.4. Charges initiated against a licensee as described in subsection 3.3 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 practices of barbering, cosmetology, manicuring, or aesthetics. The complaint and notice of hearing shall designate the Board as "Complainant", and designate the licensee involved as the "Respondent"; shall state 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 which is the subject of the complaint; and, shall state the time, date and place of hearing.

3.5. Upon receipt of a demand for a hearing described in subsection 3.1 and 3.2 of this section, the Chair/Chairperson of the Board or the chair/chairperson's designee shall provide the demanding party with a Complaint and Notice Of Hearing issued in the name of the Board as the agency of the state regulating the practice of massage therapy. 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 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.

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

3.7. A complaint and Notice of Hearing, original or amended shall be served on the demanding or charged party at least thirty (30) days prior to the date of hearing.

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

3.9. Hearings shall be conducted as follows:

3.9.1. Each party to a hearing shall be entitled to be represented by an attorney-at-law, duly qualified to practice law in the State of West Virginia.

3.9.2. The Board may be represented by counsel from the West Virginia Attorney General's office.

3.9.3. The rules of evidence as applied in civil cases in the circuit courts of this State shall be followed, but shall be liberally construed to achieve justice.

3.9.4. The rules of privilege recognized by State law shall be followed.

3.9.5. Objections to offers of evidence shall be noted in the record. Any party to the hearing may vouch the record as to any excluded testimony or other evidence.

3.9.6. Any party to a hearing may present witnesses to testify; may be heard in person, by counsel, or both; may present such other evidence as deemed appropriate by the Board or its hearing examiner; and, may cross-examine witnesses.

3.9.7. The hearing shall be held at a time and place designated by the Board, but no hearing shall be conducted unless and until at least thirty (30) days written notice is provided. Written notice must be 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 information of its purport, to his or her spouse or to any member of his or her family found there who is above the age of 16 years; or if service on the party or on a family member can not be made, by leaving such notice posted at the front door of such place of abode; or if the charged or demanding party does not reside in the state, 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.

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

3.9.9. 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 or she so testified.

3.9.10. The hearing may be conducted by one or more Board members or by a hearing examiner appointed by the Board.

3.9.11. A record of the hearing, including all pleadings, 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.

3.9.12. In a hearing initiated by the Board as a result of charges against a licensee pursuant to subsections 3.3 and 3.4 of this section, the Board shall present its evidence and/or testimony first, and shall have the burden of proof.

3.9.13. Where a hearing is held upon demand under provisions of subsections 3.1, 3.2, and 3.5 of this section, the demanding party shall present evidence first, and shall have the burden of proof.

3.9.14. The Board may call witnesses to testify in support of its decision to deny licensure or in support of the charges instituted against a licensee; may present such other evidence to support its position; and, may cross-examine witnesses called by the demanding party or charged party.

3.9.15. All parties shall have the right to present opening and closing arguments, the length of which may be set by the Board or hearing examiner, except that each party shall be given equal time for closing arguments.

3.9.16. Hearings held as a result of charges instituted by the Board against a licensee may be continued to a later date or a different place by the Board or its designee by appropriate notice to all parties.

3.9.17. Motions for 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 days prior to 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 the requested continuance. A motion for continuance filed less than seven (7) days from the date of the hearing shall be denied unless the reason for the motion could not by due diligence have been ascertained earlier. Motions for continuance filed prior to the date of hearing may be ruled on by the chair/chairperson of the Board or the chair/chairperson's designee, or an appointed hearing examiner. The Board member(s) or presiding hearing examiner shall rule on all other motions for continuance.

3.9.18. All motions in a case set for hearing, except motions for continuance 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 set by the Board or hearing examiner, or, at the hearing prior to commencement of testimony. The Board member(s) or hearing examiner presiding at the hearing shall rule after hearing a motion and response from the non-moving party.

#### **§3-12-4. Transcription of Testimony and Evidence.**

4.1. All testimony, evidence, arguments and rulings on the admissibility of testimony and evidence shall be recorded by stenographic notes or by mechanical means.

4.2. All recorded materials shall be transcribed. The Board shall have the responsibility to make arrangements for the transcription of the recorded testimony and evidence.

4.3. Upon motion of the Board or any party assigning error or omission in any part of a transcript, the Board or its appointed hearing examiner shall settle all differences arising as to whether the 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 hearing.

4.4. A transcript of the hearing shall be provided to all members of the Board for review at least fifteen (15) days before the Board's vote is taken on its decision in any licensure or licensure disciplinary matter.

**§3-12-5. Submission of Proposed Findings of Fact and Conclusions of Law.**

Any party may submit proposed findings of fact and conclusions of law at a time and in a manner designated by the Board or its appointed hearing examiner.

**§3-12-6. Hearing Examiner.**

6.1. The Board may appoint a hearing examiner who shall be empowered to subpoena witnesses and documents, administer oaths and affirmations, examine witnesses under oath, rule on evidentiary matters, hold conferences for the settlement or simplifications of issues by consent of the parties, cause to be prepared a record of the hearing so that the Board is able to discharge its functions, and otherwise conduct hearings.

6.2. Hearing examiners appointed by the Board are not authorized or empowered to grant, suspend, revoke or annul any license.

6.3. The hearing examiner shall prepare recommended findings of fact and conclusions of law for submission to the Board. The Board may adopt, modify or reject the hearing examiner's findings of fact and conclusions of law.

**§3-12-7. Conferences: Informal Disposition of Cases.**

7.1. At any time prior to the beginning of the hearing or thereafter, the Board, its designee or its appointed hearing examiner may hold conferences for the following purposes:

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

7.1.2. To narrow or settle issues by consent of the parties; or

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

7.2. The Board or its appointed hearing examiner may cause such conferences to be held on its own motion or by the request of the party.

7.3. The Board may also initiate or consider stipulation or agreement proposals with regard to the informal disposition of cases and may enter into stipulations and/or agreements without conference.

**§3-12-8. Depositions.**

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

**§3-12-9. Subpoena.**

Subpoenas to compel the attendance of witnesses and subpoenas duces tecum to compel the production of documents may be issued by the Board, the Director of the Board, the Board's

designee, or by the hearing examiner appointed by the Board. Subpoenas shall be issued pursuant to W. Va. Code §29A-5-1(b).

**§3-12-10. Orders.**

11.1. Any final order entered by the Board following a hearing conducted by these rules shall be entered within 45 days following the submission to the Board 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, pursuant to W. Va. Code §§29A-5-3 and 30-1-8(d).

11.2. The findings of fact and conclusions of law must be approved by a majority of the Board either by a poll or vote as 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 attorney of record, if any, within fifteen (15) days after entry by the Board by person service or by registered or certified mail.

**§3-12-11. Appeal.**

An appeal from any final order entered in accordance with these rules shall comply with W. Va. Code §30-1-9.

**§3-12-12. Severability**

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