



FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE
THIS DATE Aug. 11, 1983
Administrative Law Division

State of West Virginia

Department of Mines

Charleston 25305

JOHN D. ROCKEFELLER, IV.
Governor

WALTER N. MILLER
Director

August 11, 1983

The Honorable A. James Manchin
Office of the Secretary of State
State Capitol, Main Unit
Charleston, West Virginia 25305


Re: Notice of Final Adoption of Procedural Rules
Administrative Law Division

Dear Mr. Manchin:

Please accept for filing in the State Register the enclosed final procedural rules, entitled, Procedures for Temporary Suspension of Certificates Issued to Persons Pursuant to Chapter 22 of the Code of West Virginia Pending Full Hearing Before the Board of Appeals. This letter constitutes the notice of final adoption of these procedural rules pursuant to Code §29A-3-8. The public comment period on these rules was closed on May 10, 1983. Also enclosed is a summary, fiscal note and analysis of comments.

These procedural rules shall be effective thirty days after this date of filing and supersede emergency regulations on this subject filed in the State Register on March 3, 1983.

Very truly yours,


Walter N. Miller, Director
West Virginia Department of Mines

WNM/cao

Enclosure

FILED IN THE OFFICE OF
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THIS DATE 8/11/83
Administrative Law Division

WEST VIRGINIA ADMINISTRATIVE REGULATIONS

DEPARTMENT OF MINES

CHAPTER 22-4

SERIES ~~39~~ 38

(1983)

SUBJECT: PROCEDURES FOR TEMPORARY SUSPENSION OF CERTIFICATES ISSUED TO
PERSONS PURSUANT TO CHAPTER 22 OF THE CODE OF WEST VIRGINIA
PENDING FULL HEARING BEFORE THE BOARD OF APPEALS

P R O C E D U R A L
R E G U L A T I O N S

FINAL
REGULATION

I N D E X

SUBJECT: Procedures for Temporary Suspension of Certificates Issued to Persons Pursuant to Chapter 22 of the Code of West Virginia Pending Full Hearing Before the Board of Appeals

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Persons Pursuant to Chapter 22 of the Code of West Virginia
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Section 1. General

1.01 Authority - These procedural rules are adopted pursuant to Chapter 29A, Article 3, Section 8 of the Code of West Virginia, 1931, as amended.

1.02 Filing - These regulations were filed with the Office of the Secretary of State on the 11th day of August, 1983 and are effective on the 11th day of September, 1983.

1.03 Definitions - Unless the context in which a word or term is used requires a different meaning, the definitions set out in Chapter 22, Article 1, Section 1 apply to these regulations.

Section 2. Procedures for Temporary Suspension of Certificates

2.01 Notice of Intent to Suspend. The Director shall give notice to the charged person, at the time of filing a charge of breach of duty with the Board of Appeals under Code 22-1-30(a), that he intends to temporarily suspend such certificate upon finding of probable cause by the Board. A temporary suspension shall not be valid unless such notice is given. A charged person so notified may make a request for a preliminary hearing before the Board of Appeals within

ten (10) days of the filing of the charge by the Director. Such preliminary hearing shall be held before the Board within twenty days of the filing of the charge. The rules of practice and procedure before the Board of Appeals shall apply to such a hearing.

2.02 Temporary Suspension of Certificates. The Director may order the temporary suspension of the certificate of any person certified pursuant to Chapter 22 of the Code of West Virginia, pending a full evidentiary hearing before the Board of Appeals provided that:

- (1) A finding of probable cause that such person has violated statutory duties has been made by the Board of Appeals according to the provisions of West Virginia Code 22-1-30(b); and
- (2) An investigation by authorized representatives of the Director reveals that:
 - (a) The certified person was acting in the capacity which required, or requires, the certifications issued by the Director; or that
 - (b) Such certified person is, or was, assigned by the operator or operator's agent to perform duties set out in the Code or regulations; and
 - (c) Such certified person failed and/or neglected to perform such statutory or regulatory duties; and
 - (d) Such failure and/or neglect of duty resulted in a finding by an authorized representative of the Director of a violation of a health and safety standard of the Code or regulations; and
 - (e) Such violation of a health and safety standard resulted in the occurrence or a high likelihood of the occurrence of the event against which the standard is directed or designed to prevent; and
 - (f) The temporary suspension of such certified person's certificate will lessen the risk to the lives and safety of the persons protected by the provisions of Chapter 22 of the Code of West Virginia.

The temporary suspension shall be effective upon issuance by the Director and shall remain effective until modified or terminated by the Director or the Board of Appeals.

2.03 Notification. The Director, or his authorized representative, shall notify the certified person and such person's employer in writing by personal service or certified mail that such person's certificate is temporarily suspended stating the reasons for such suspension.

2.04 Expedited Hearing. A person whose certificate has been suspended pursuant to these regulations may make a written request for a prompt evidentiary hearing before the Board of Appeals. If requested such hearing shall be held within thirty (30) days of the effective date of the suspension. If such expedited hearing is not held within thirty days of the suspension due to delay caused by either the Board of Appeals or the Director, the temporary suspension shall terminate.

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The following summary, fiscal note and analysis is filed in accordance with Code §29A-3-4 and 8.

Summary of the Rule

The final regulations establish a procedure where the Director will notify the charged individual, at the time of filing a petition with the Board of Appeals, that he intends to temporarily suspend the certificate if the Board finds probable cause. The Board is required to find probable cause within twenty days of the filing of the charge. The charged party may request a preliminary hearing before the Board of Appeals prior to the finding of probable cause. The present rules adopted by the Board will govern the conduct of such proceeding.

The criteria for temporary certification have essentially remained the same as set out in the proposed regulations. First, the Board of Appeals must have found a probable cause for decertification. Second,

the inspector's investigation or the evidence at the preliminary hearing must show that the certified person was either acting in his official capacity or had been assigned to perform official duties. Third, the inspector's report or the evidence produced at the preliminary hearing must show that the certified person failed or neglected his duties. Fourth, this failure or neglect resulted in a health and safety violation.

Fifth, it must be determined that such a violation resulted either in occurrence of the unsafe practice or condition, or a high likelihood of such occurrence. For example, if a certified mine foreman-fire boss had the responsibility for examination a section of the mine which had been idle for a period of weeks and such person failed to conduct such examination, he would be liable for a temporary suspension if the Director found that a track recovery crew entered the area and caused an explosion. This would be the occurrence which the health and safety standard was designed to prevent. If the persons on this crew made an examination and found methane gas in the explosive range and further finding of restricted airways and improper ventilation, then this would be a high likelihood of the occurrence which the health and safety standard was designed to prevent.

The sixth criteria is a finding by the Director that the temporary suspension will lessen the risk to the lives and safety of the persons working in the mine. The suspension is effective upon issuance by the Director. The charged person must be notified by personal service or certified mail of such suspension, with a statement of reasons for the suspension. Such person's employer will also be notified.

The person whose certificate has been suspended may request a full evidentiary hearing before the Board of Appeals within 30 days of the suspension. If this hearing is delayed due to actions of the Director or the Board, the suspension is terminated.

Fiscal Note

The economic impact of this rule will involve the added expense of transcripts and compensation to Board members due to the possibility of a preliminary hearing where the Director seeks to temporarily suspend a certificate. These regulations impact upon the certificate holder only if the Board of Appeals finds probable cause and the Director temporarily suspends the certificate. These costs would include the costs of defense against the charge. The Department of Mines and the Board of Appeals have no control over the actions of the certificate holder's employer once the suspension has been entered.

Analysis of Comments

All comments received were either from representatives of coal mine operators or from legal counsel representing mine foremen and operators. The major objection was the apparent unconstitutionality of suspending an individual's certificate prior to a hearing. This issue was decided in the opinion of the West Virginia Supreme Court of Appeals, State ex rel. Perry v. Miller, 300 S.E. 2d 622 (W.Va. 1983), where the constitutional questions were discussed and explained.

The second major objection and comment involved the necessity of having criteria, which would allow a suspension only upon a showing of a serious or willful violation. This standard is rejected in the final regulations because Code §22-1-30(a) establishes a standard for suspension or revocation based upon the neglect or failure to perform a statutory duty. It would be improper for these rules to establish a higher standard of proof than the statute allows. The final regulations do provide for a preliminary hearing prior to temporary suspension and they also require a finding by the Director that the temporary suspension will lessen the risk to persons protected by the statute. These added procedural safeguards will help prevent erroneous certificate suspension.

The third major objection involved the question of compensation to individuals whose certificates are temporarily suspended, but are subsequently reinstated by the Board of Appeals. It must be recognized that the Director's action only affects the certificate issued by the West Virginia Department of Mines. The Director has no control over the employment or suspension and discharge of an individual certificate holder from his or her job. Therefore, there would be no right to compensation from the Department for the sole reason that a suspended certificate holder is discharged from employment. The requirements of notice and preliminary hearing prior to suspension and the right to a prompt full evidentiary hearing and compliance with the criteria for temporary suspension will reduce the possibility of erroneous suspension of certificates.

The fourth major objection is that the proposed regulations were not clear as to the sequence of procedure and the criteria established. An effort has been made to rearrange the different sections of the regulations in a more orderly manner. Some commentators objected to the legalistic language of the regulations. It is unfortunate, but it will probably be lawyers who do most of the arguing over these regulations. The summary of the rule is filed with the regulation as aid to the certificate holder in interpreting his or her rights under the regulations.

All comments received and a transcript of the public hearing held on May 2, 1983, are available for inspection and copying, pursuant to regulations of the Department of Mines, at 1615 Washington Street, East, Charleston, West Virginia 25311. Any person having questions concerning this summary, fiscal note and analysis may contact James F. Wallington, Attorney for the Department of Mines at the address above.