

**WEST VIRGINIA
SECRETARY OF STATE**

JOE MANCHIN, III

ADMINISTRATIVE LAW DIVISION

Form #3 ☐

Do Not Mark In This Box

FILED

2001 JUN -6 P 1:18

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: West Virginia ~~Division of Labor~~ ^{Contractor Licensing} Board TITLE NUMBER: 28

CITE AUTHORITY: WV Code §21-11-14

AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

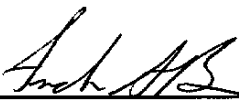
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 3

TITLE OF RULE BEING PROPOSED: West Virginia Contractor Licensing Board-Complaints

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.


Authorized Signature

QUESTIONNAIRE

DATE: June 6, 2001

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) West Virginia Division of Labor

Bldg. 6, Room B-749, Capitol Complex

Charleston, WV 25305 (304) 558-7890

LEGISLATIVE RULE TITLE: West Virginia Contractor Licensing Board-Complaints

1. Authorizing statute(s) citation WV Code 21-11-14

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

April 30, 2001 (Public Comment Period)

b. What other notice, including advertising, did you give
of the hearing?

None

c. Date of Public Hearing(s) or Public Comment Period ended:

May 31, 2001

- d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X No comments received

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

June 6, 2001

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

Andrew A. Brown, Asst. to the Commissioner

Bldg. 6, Rm. B-749, Capitol Complex
Charleston, WV 25305

PH. 558-7890 Fax 558-2273

abrown@labor.state.wv.us

- 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)

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:

N/A

- 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.

b. Date of hearing or comment period:

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

d. Attach findings and determinations and reasons:

Attached

**WEST VIRGINIA
SECRETARY OF STATE**

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #2

FILED

2001 APR 30 A 11:38

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia Division of Labor TITLE NUMBER: 28

RULE TYPE: Legislative; CITE AUTHORITY WV Code 21-11-14

AMENDMENT TO AN EXISTING RULE: YES NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED:

TITLE OF RULE BEING AMENDED:

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 3

TITLE OF RULE BEING PROPOSED: West Virginia Contractor Licensing
Board - Complaints

Legislative Rule Making

APR 30 2001

Review Committee

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 May 31, 2001 AT 5:00 pm

ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

Andrew A. Brown, Asst. to the Comm.

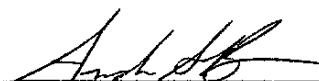
WV Division of Labor

Building #6, Room B-709

Capitol Complex

Charleston, WV 25305

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: West Virginia Contractor Licensing Board - Complaints
Type of Rule: X Legislative Interpretive Procedural
Agency West Virginia Division of Labor
Address Building # 6, Room B-749
State Capitol Complex
Charleston, WV 25305

1. Effect of Proposed Rule

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	HEREAFTER
<u>ESTIMATED TOTAL COST</u>	\$ 341,930	\$ -0-	\$ 341,930	\$ 351,023	\$ 365,949
PERSONAL SERVICES	225,930	-0-	225,930	248,523	260,949
CURRENT EXPENSE	46,500	-0-	46,500	50,000	50,000
REPAIRS & ALTERNATIONS	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	24,500	-0-	24,500	7,500	5,000
OTHER	45,000	-0-	45,000	45,000	50,000

2. **Explanation of above estimates:** The above estimate is a budgetary increase to the current appropriation of \$ 1,845,793. This rule will require the addition of five new investigators, two new clerical positions and related expenses.

3. **Objectives of these rules:** This rule was mandated by the passage of Senate Bill #103 during the 2000 Legislative Session. The Rule establishes criteria for the receipt, investigation and resolution of complaints against licensed contractors.

Rule Title: WV Contractor Licensing Board - Complaints

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

Enforcement of this rule will require a budget increase.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

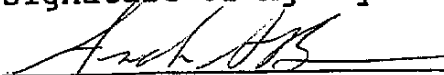
- None -

C. Economic Impact on Citizens/Public at Large.

- None -

Date: 5-1-01

Signature of Agency Head or Authorized Representative



WEST VIRGINIA DIVISION OF LABOR

749-B Building 6 , Capitol Complex • Charleston, West Virginia 25305

Phone (304) 558-7890 • Fax (304) 558-3797

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BOB WISE
Governor



JAMES R. LEWIS
Commissioner

Facts and Circumstances

During the 2000 Regular Session, the West Virginia Legislature passed Senate Bill 103. This bill was an amendment to WV Code §21-11, West Virginia Contractor Licensing Act. A provision of that amendment set a mandate before the Contractor Licensing Board. The mandate (WV Code §21-11-14(i) requires the promulgation of a legislative rule to establish criteria for the receipt, investigation and resolution of complaints against licensed contractors. The rule was filed for public comment on December 20, 2000. However, a number of public comments requiring board consideration delayed the close of the public comment period and the final filing of the rule with the Legislative Rule Making and Review Committee. The Board only meets at six week intervals and this further complicated the final filing.

During the 2001 Regular Session, the Legislature passed H.B. 2801 which added additional criteria to the board's disciplinary powers. This required the further modification of the proposed rule. Therefore, the original comment was allowed to expire and the rule, 28 CSR 3 is now filed for a new public comment period.

28CSR3

FILED

Legislative Rule
West Virginia Contractor Licensing Board

2001 JUN -6 P 1:18

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Series 3

§28-3-1. General.

1.1.Scope. This legislative rule governs the procedures for the handling of complaints against contractors by the West Virginia Contractor Licensing Board in accordance with W.Va. Code §21-11-14 et seq., and W.Va. Code §29A-5-1 et seq.

1.2.Authority. W.Va. Code §21-11-14.

1.3.Filing Date.

1.4.Effective Date.

§28-3-2. Application and Enforcement.

2.1. Application. This legislative rule applies to the West Virginia Division of Labor, the West Virginia Contractor Licensing Board and all persons, materials and transactions governed or otherwise defined under the coverage of the West Virginia Contractor Licensing Act, W.Va. Code §21-11-1 et seq.

2.2. Enforcement. The enforcement of this rule is vested with the West Virginia Division of Labor and the West Virginia Contractor Licensing Board.

§28-3-3. Definitions.

3.1. The "Act" means the West Virginia Contractor Licensing Act, WV Code §21-11 et seq., and applicable legislative rules, 28CSR1 and 28CSR2.

3.2. "Board" means the West Virginia Contractor Licensing Board.

3.3. "Commissioner" means the commissioner of the West Virginia Division of Labor.

3.4. "Contractor" means a person who in any capacity for compensation, other than as an employee of another, undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid to construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, structure or excavation

associated with a project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith, where the cost of the undertaking is one thousand dollars or more.

3.5. "Division" means the West Virginia Division of Labor.

3.6. "License" means a license to engage in business in this state as a contractor on one of the classifications set out in W.Va. Code §21-11-3.

3.7. "Undertaking" means the entire construction project. The value of the undertaking shall be determined by adding the cost of labor and materials required to accomplish it.

§28-3-4. Filing of Complaints.

4.1. The Board may accept complaints alleging that a contractor has done one or more of the following:

- (a) Abandonment, without legal excuse, of any construction project or operation engaged in or undertaken by the contractor;
- (b) Willful failure or refusal to complete a construction project or operation with reasonable diligence, thereby causing material injury to the consumer;
- (c) Willful departure from or disregard of plans or specifications in any material respect without the consent of the parties to the contract;
- (d) Willful or deliberate violation of the building laws or regulations of the state or of any political subdivision thereof;
- (e) Willful or deliberate failure to pay any moneys when due for any materials free from defect, or services rendered in connection with such person's operations as a contractor when such person has the capacity to pay or when such person has received sufficient funds under the contract as payment for the particular construction work for which the services or materials were rendered or purchased, or the fraudulent denial of any amount with intent to injure, delay or defraud the person to whom the debt is owed;
- (f) Willful or deliberate misrepresentation of a material fact by a contractor in obtaining a contract for construction or services or in connection with any official licensing matters;
- (g) Willful or deliberate failure to comply in any material respect with the provisions of the Act or the rules of the board;
- (h) Willfully or deliberately acting in the capacity of a contractor when not licensed, or

as a contractor by a person other than the person to whom the license is issued except as an employee of the licensee;

- (i) Willfully or deliberately acting with the intent to evade the provisions of the Act by: (i) Aiding or abetting an unlicensed person to evade the provision of the Act or its applicable rules; (ii) combining or conspiring with an unlicensed person to perform an unauthorized act; (iii) allowing a license to be used by an unlicensed person; or (iv) attempting to assign, transfer or otherwise dispose of a license or permitting the unauthorized use thereof.
- (j) Engaging in any willful, fraudulent or deceitful act in the capacity as a contractor whereby substantial injury is sustained by another;
- (k) Performing work which is not commensurate with a general standard of the specific classification of contractor or which is below a building or construction code adopted by the municipality or county in which the work is performed or any code adopted by this rule as an inspection standard; or
- (l) Knowingly employing persons who do not have the legal right to be employed in the United States.

4.2. All complaints to the board shall be in writing. The Board shall provide forms for the filing of complaints but complaints submitted in other forms shall be accepted by the Board. The board, on its own initiative, may file complaints. The board shall review each complaint to determine whether it should be dismissed, or subject to such other action as specified by this rule.

4.3. The board shall forward a copy of every complaint to the person named in the complaint. Upon receipt, the person named in the complaint has thirty (30) days in which to respond to the complaint in writing. If, upon consideration of the complaint and the response, the board determines that no violation of any applicable state or federal standard has occurred, the board may dismiss the complaint through the issuance of a written order setting forth the basis for the dismissal. If, however, the board determines that further review or other action is necessary, the board may proceed as set forth in this rule.

4.4. Complaints which are subject to the provisions of WV Code chapter twenty-one, article nine [§21-9], West Virginia Manufactured Housing Construction and Safety Standards Act, shall be deferred to the West Virginia Manufactured Construction and Safety Standards Board for investigation and resolution. The Contractor Licensing Board shall retain custody of the complaint for final resolution and disciplinary action. *Provided, however,* The Contractor Licensing Board may determine the actions of the Manufactured Housing Construction and Safety Standards Board as an acceptable final resolution of the complaint.

§28-3-5. Investigations.

5.1. The board and its authorized agents, employees, or authorized inspectors may independently investigate the basis for any complaint filed. During the course of an investigation, the board or its authorized representatives may conduct a physical inspection of the project site to assess the merits of the complaint. If at any time during the course of an investigation it becomes apparent that no violation of any applicable state standard has occurred, the board may dismiss the complaint in the manner set forth in Section 4.3 of this rule.

5.2. For the purposes of performing on-site inspections, if a building or construction code has been adopted by the municipality or county in which the projected is located, the provisions of that code are hereby incorporated by reference and shall be the inspection standard. If a building or construction code has not been adopted by the municipality or county in which the projected is located, then the provisions of §87 CSR 4, West Virginia State Building Code, shall be used as the inspection guideline.

5.3. The authorized inspector shall file a written report with the board as to their findings during the course of the inspection.

§28-3-6. Hearings.

6.1. The board may at any time after the receipt of a complaint issue a written notice of its intent to conduct a hearing. Notice of such intent shall be provided to all interested persons by certified mail at least twenty (20) days in advance of the hearing date. The notice shall include:

- (a) a statement of the time, place and nature of the proceeding; and
- (b) a statement of the subject matter of the proceeding to include the issues in question;

6.2. All hearings conducted by or on behalf of the board shall be conducted in Charleston and in accordance with the provisions of WV Code §29A-5 et seq., Administrative Procedures Act-Contested Cases.

6.3. The board may employ the services of an independent hearing examiner to conduct hearings. The examiner shall conduct all hearings in accordance with the provisions of this rule. The examiner shall submit proposed findings of fact and conclusion of law to the board. The report may contain the examiner's recommendation for the final disposition of the complaint.

6.4. The board shall issue a written order within thirty (30) days of the completion of the hearing. The order shall include a brief statement of the findings and conclusions, with specific references to principal supporting items of evidence as well as the reasons or basis therefor. The board shall have no authority to impose or assess damages. After the

Board has received the hearing examiner's report, the Board may adopt, modify or reject the hearing examiner's findings, conclusions and recommendations.

6.5. The board may order the resolution of the complaint by its dismissal or by one or more of the following sanctions:

- (a) Permanently revoke a contractor's license;
- (b) Suspend a contractor's license for a specific period of time;
- (c) Censure or reprimand a licensed contractor;
- (d) Impose limitations or conditions on the professional practice of a licensed contractor;
- (e) Impose requirements for remedial professional education to correct deficiencies in the education, training and skill of a licensee; or
- (f) Impose a probationary period requiring a licensed contractor to report regularly to the board on matters relative to the grounds for the probation; the board may withdraw probationary status if the deficiencies that require the sanction are remedied; or

6.6. Any interested person, including the board, involved in any investigation or hearing may at any time propose a settlement which may be entered into with the consent of all interested persons and the board. Final acceptance of a settlement shall be memorialized in a settlement order and signed by the board and all interested persons. The execution of a final settlement order immediately terminates any related proceedings and is binding upon the board and all interested parties.

6.7. Any person adversely affected by any action of the board may appeal such action to the Circuit Court of Kanawha county.

§28-3-7. Confidentiality of Records.

7.1. All investigations, complaints, reports, records, proceedings and other information received by the commissioner and the board and related to complaints made to the commissioner and the board or investigations conducted by the commissioner or board pursuant to this rule, including the identity of the complainant or respondent, shall be confidential and shall not be knowingly and improperly disclosed by any member or former member of the board, the commissioner or staff, except as follows:

- (a) Upon a finding that probable cause exists to believe that a respondent has violated the provisions of the Act, the complaint and all reports, records, nonprivileged and nondeliberative materials introduced at any probable cause hearing held pursuant to

the complaint are thereafter not confidential: Provided, that the confidentiality of such information shall remain in full force and effect until the respondent has been served with a copy of the statement of charges.

- (b) Any subsequent hearing held in the matter for the purpose of receiving evidence or the arguments of the parties or their representatives shall be open to the public and all reports, records and nondeliberative materials introduced into evidence at such subsequent hearing, as well as the board's and commissioner's orders, are not confidential.
- (c) The complaint as well as the identity of the complainant shall be disclosed to a person named as respondent in any such complaint filed immediately upon the respondent's request.
- (d) Where the commissioner or board is otherwise required by the provisions of the Act to disclose such information or to proceed in such a manner that disclosure is necessary and required to fulfill such requirements.

7.2. If, in a specific case, the commissioner or board finds that there is a reasonable likelihood that the dissemination of information or opinion in connection with a pending or imminent proceeding will interfere with a fair hearing or otherwise prejudice the due administration of justice, the commissioner or board shall order that all or a portion of the information communicated to the commissioner or the board to cause an investigation and all allegations of violations or misconduct contained in a complaint shall be confidential, and the person providing such information or filing a complaint shall be bound to confidentiality until further order of the board.

WEST VIRGINIA DIVISION OF LABOR

749-B Building 6 , Capitol Complex • Charleston, West Virginia 25305

Phone (304) 558-7890 • Fax (304) 558-3797

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BOB WISE
Governor



JAMES R. LEWIS
Commissioner

Response to Public Comments.

1. The original draft of this rule adopted "accepted industry practice" as the inspection guideline in the event that an on-site inspection was required to validate a consumer complaint. The WV Code Officials Association objected to the use of industry practices as the inspection criteria and insisted that the only acceptable guideline was the State Building Code as adopted by the State Fire Commission. This position was supported by the Office of the State Fire Marshal and the comments submitted by Sweeter Land Company.

After much debate and consideration, the Contractor Licensing Board voted to adopt this Code as the official guideline for the on-site inspection of consumer complaints. The language of 28 CSR 3 -5.2 addresses this issue.

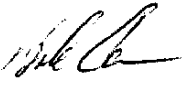
2. The remainder of the public comments were received from manufactured housing dealers, the WV Manufactured Housing Association and the WV Manufactured Housing Construction and Safety Standards Board. Basically, these comments addressed "duel regulation" by the Contractor Licensing Board and the WV Manufactured Housing Construction and Safety Standards Board. These comments requested that the Contractor Licensing Board exempt itself from hearing manufactured housing complaints and refer those complaints to the WV Manufactured Housing Construction and Safety Standards Board for resolution.

A person who engages in construction activities related to manufactured housing installation and/or repair must be licensed by the Manufactured Housing Board. Likewise, any person engaged in any type of construction activity must be licensed by the Contractor Licensing Board; thus results duel regulation.

It was the decision of the Contractor Licensing Board that the Board could not legally relieve itself of a statutory mandate to hear these complaints. However, all complaints involving manufactured housing issues could be referred to the Manufactured Housing Construction and Safety Standards Board. However, final closure of the complaint would rest with the Contractor Licensing Board. The language of 28 CSR 3 - 4.4 addresses this issue.

January 22, 2001

To : Andrew A. Brown
Asst. of the Commissioner
WV Division of Labor
Building #6, Room B-749
State Capitol Complex
Charleston, WV 25305

Fr : Bob Cannon, President 
WV Code Officials Assn.

RE : WV CLB Rule Amendment - Complaints

Please consider these comments and objections to the proposed amendment to CLB Rules to process complaints against contractors.

(1) The proposal appears to conflict with the Contractor Licensing Law, 21-11-14-(h) and Title 28, Legislative Rules , 7.6 ... **"Except for violations of section 13 (*not having a license*) no disciplinary action shall be taken by the board unless the licensee has been fully adjudicated as having perpetrated such act in a court of record."** Unless the "court of record" position is deleted from the law, it appears to me that "sanctions " in the proposed 28-3-6.5- (a) thru (f) are nullified.

(2) The proposed amendment is redundant as 21-11-15-(15) give the DOL power to "Provide inspection enforcement and investigative services to the board."

(3) I see a major problem with the language of the proposed 28-3-4-(k). First, ... "a general standard of the specific classification of contractor" is too vague and will be a nightmare for the board to deal with, probably resulting in litigation. The "general standard" is not listed in the contractor law and without a defined "standard" only problems can arise. Second, "below a building or construction code adopted by the municipality or county" is misleading. Only the state building code, as adopted by the state fire commission, may be adopted by a city or county. Only more stringent provisions, not contrary to WV law, may be added or adopted by cities or counties. Thus, there can be no work "below", only non-compliant with a specific building code provision.

(4) An even bigger problem is the language of the WV 29-3-5b-(a) "shall have force and effect in those counties and municipalities adopting the state building code. Lawsuits citing a violation of the state building code have been dismissed in Monongalia County in those areas outside Morgantown and Westover where the code has not been adopted These "precedents" surely will be used.

(5) I strongly object to the phrase "...or any code adopted by this rule as an inspection standard." I, and the WV Code Officials Association, cite the state building code, as **THE ONLY BUILDING INSPECTION STANDARD**. Any attempt to impose some other "standard" of inspection will be vigorously opposed

(6) DOL inspectors usually do not have any building code training, experience or certification and would lack credibility investigating complaints of violations of the proposed 28-3-4-(d) "Willful or deliberate violation of the building laws or regulations of the state or of any political subdivision thereof."

(7) In the proposed 28-3-5.2, the "generally accepted industry practices shall be the inspection standard" is indeed too vague and subjective. I believe complaint hearings under this "standard" will be moot as most will end up in court and defeat the purpose and legislative intent of expeditious resolution of bona fide complaints against licensed contractors.

May I suggest your support for:

(1) Amendment of WV 21-11-14-(h) removing the reference to **court of record** and allowing such contractor complaints to be adjudicated in a municipal, magistrate or circuit court. Contractors can appeal any municipal or magistrate court decision to circuit court and can seek transfer of such a complaint to a circuit court now. Citizens with smaller monetary complaints can be afforded quicker redress in a municipal or magistrate court but still must meet the proscribed burdens of proof before any contractor is harmed.

(2) Amendment of WV 29-3-5b-(a) deleting the words **force and effect in those counties and municipalities adopting the state building code** and substituting the word **statewide**. This would clarify the legislative intent that the state building code is the **ONLY** state standard for building construction. For items (d) and (k) of the proposed 28-3-4, the state building code **MUST** be the **standard** the board uses.

I have already suggested both changes to the State Fire Commission and will seek support of the Board, other state agencies, industry and professional associations and your help in seeking legislative approval. In my opinion it will simplify and streamline the complaint process, better address the mandate of Senate Bill 103, and be fair to both the consumer and the contractor.

WEST VIRGINIA MANUFACTURED HOUSING CONSTRUCTION AND SAFETY STANDARDS BOARD

Capitol Complex • Building 6, Room B-749 • Charleston, West Virginia 25305
Telephone: 304-558-7890 FAX: 304-558-2447

January 22, 2001

Andrew A. Brown
Assistant to the Commissioner
West Virginia Division of Labor
Building 6, Room 749B
State Capitol Complex
Charleston, WV 25305

RE: Amendment to 28CSR3

Dear Mr. Brown

The West Virginia Manufactured Housing, Construction and Safety Standards Board (MHCSSD) met on January 17, 2001 and proposed the that the new section of the legislative rules that establishes a method for filing and handling of complaints for the Contractors Licensing Board (CLB) be amended to enable the MHCSSD to continue to do the excellent work that it has done over the past several years.

The MHCSSB is responsible for licensing manufacturers, dealers, or installers of manufactured homes, and administers an alternative dispute resolution system. The MHCSSB collects funds from its licensees that it uses to pay contractors to correct problems which it discovers through its dispute resolution system. This method for handling consumer complaints was established by the federal and state government to deal with the unique nature of manufactured homes.

The MHCSSD also has the authority to bring criminal penalties in those cases where it is considered necessary.

The attached amendment is necessary for the MHCSSD to continue with the fine work it has done.

Sincerely,



Bill Carmichael
Chair of MHCSSD and
Acting Commissioner of Labor

Members of the Board

Bill Carmichael, Chair Gregory R. Ahalt Jack Albert Sam Bonasso Timothy Manchin Bob Miller Tom Ryan

28CSR3

**Proposed Amendment to
Legislative Rule of
West Virginia Contractor Licensing Board
Proposed by
The West Virginia Manufactured Housing Construction
and Safety Standards Board**

That §28-3-4 be amended by adding the following:

4.4. The board shall not have jurisdiction over complaints which are within the jurisdiction of the Manufactured Construction and Safety Standards Board as set forth in Article 9, Chapter 21 of the Code nor under the federal standards which the state administrative agency is given power to enforce by the same Article.

Sweeter Land Company

205 First Avenue
Nitro, WV 25143
304/727-1509 - fax/727-1172

January 18, 2001

Andrew A. Brown
Assistant to Commissioner
WV Division of Labor
Building #6, Room B-749
State Capitol Complex
Charleston, WV 25305

Dear Mr. Brown:

I hold West Virginia Contract License WV 008457 and have held that license since the inception of the contractor licensing board. I am generally supportive of the proposed rule that has been circulated for comment with one major exception. The proposed rule will expose my company to new liability that currently does not exist. I am particularly concerned about the proposed language in §28-3-5.2. It says:

“For the purposes of performing on-site inspections, if a building or construction code has been adopted by the municipality or county in which the projected [sic] is located, the provisions of that code are hereby incorporated by reference and shall be the inspection standard. If a building or construction code has not been adopted by the municipality or county in which the projected [sic] is located, then generally accepted industry practices shall be the inspection standard.”

This language is a trial lawyer's dream come true. Under current regulations and under current law, I am advised by legal counsel that the state of West Virginia, through the state fire commission, has adopted a uniform building code that is in effect and generally accepted standard for construction throughout West Virginia. Some jurisdictions have elected to enforce the codes through local inspections, but the establishment of the standards created for the construction industry is the industry practice for construction that must be met. This observation is also substantiated by a legal opinion provided to me through one of our state trade associations that represents electrical and heating and cooling contractors (please see attached legal opinion).

West Virginia Code 21-11-14 (3) says that the contractor board will have disciplinary power for the “willful or deliberate violation of the building rule or regulations of the state or any political subdivision thereof.” It is clear that the state fire commission has established a standard for construction, which is “state-of-the-art” for the construction industry throughout West Virginia. It appears that the proposed rule seeks to abandon that position and adopt “generally accepted industry practices” in those jurisdictions that do not enforce the state codes.

This language indicates that if an individual or a firm for which I furnish contracting work disagrees with the standard or quality of my work or the conformance of the work to generally accepted codes, that individual or company could file a complaint with the contractor licensing board. At that point, the contractor licensing board would dispatch an inspector employed by the state, West Virginia Division of Labor, to inspect my work and to develop a report for the board. The inspector would not apparently use building or construction codes to evaluate my work but would use what he or other individuals might consider "generally accepted industry practices." Those practices could vary from the very worst type of workmanship to the highest standards conceivable. Without reliance on the adopted codes, the "generally accepted industry practices" deemed to be acceptable would be a subjective opinion of an inspector who may or may not be knowledgeable about the work being inspected.

As a contractor, if the "generally accepted industry practices" theory is applied to evaluate my work, I must then be prepared to demonstrate to the board and possibly ultimately to a court of law, that the work that I have done is in accordance with "generally accepted industry practices." In order to do that, I would need to obtain expert witnesses, compile evidence and provide testimony that the work that I had done in fulfilling my contract was done in "generally accepted industry practices." The complaining customer, as well as the state inspector and the contractor licensing board, would all have to do the same thing and they could in turn provide evidence, testimony, and argue criteria as to what is considered "generally accepted industry practices."

In some cases, some contractors have substantial sums of money that are being contested when a dispute arises about the merits of a complaint. For the board to propose to use a vague, non-specific term such as "generally accepted industry practices" for your inspectors to measure my work, as well as, the work of other contractors is untenable. Now, the standard that I must meet, as well as all contractors must meet, are those standards outlined in my contract agreement or spelled out by uniform building codes for construction standards.

When a dispute arises, the codes or the contract documents are the controlling factor as to what is "generally accepted industry practices." To put that power in the hands of your inspector or in the discretion of your appointed board members, negates the benefits of building codes and standards to all contractors who work outside of municipalities or counties that do not enforce the state adopted code.

This rule proposes to render meaningless to contractors the benefits of having the uniform building code in West Virginia and will clearly result in disputes about construction being resolved by lawyers in courts and before hearing examiners rather than by established uniform building codes.

Andrew Brown
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January 18, 2001

I would urge the board to reconsider its position. I can build according to an architect's or engineer's planned design and building codes, it is unfair to ask me to follow "generally accepted industry practices" and then try to defend that standard before the West Virginia contractor licensing board or a trial court with a jury.

Respectfully Submitted,
Leff Moore, Owner
Sweeter Land Company

WAUGH'S MOBILE HOMES
Rt. 5 Box 9705
Berkeley Springs, WV 25411
304-258-5001

Andrew A. Brown, Asst. To Comm.
WV Divisions of Labor
Building # 6, Room B-749
State Capitol Complex
Charleston, WV 25305
January 29, 2001

Dear Mr. Brown,

I urge the contractor Licensing Board to amend it's proposed rule by excluding manufactured home installing contractors and all contracting related to manufactured homes to the authority of the West Virginia Manufactured Housing Construction and Safety Standards Board under the jurisdiction created by West Virginia Code 21-9. We do not believe that the legislature intended to place the manufactured housing industry and it consumers under two duplicative administrative processes that will not afford new protection to any consumer that is not already established under curent law.

I ask that you amend your proposed rule to defer administrative regulatory primacy to the manufactured housing construction and safety board under West Virginia Code 21-9 and exclude from regulations by the contractor licensing those engaged in manufactured housing sales, manufacture or installation who hold a license under West Virginia Code 21-9 and are in compliance with that code section and 42 Series 19 of the Code of State Regulations as promulgated by the West Virginia Manufactured Housing Construction and Safety Board.

Sincerely,

Randy L. Waugh
Waugh's Mobile Homes





West Virginia Manufactured Housing Association

205 First Avenue, Nitro, WV 25143 • Phone (304) 727-7431 • Fax (304) 727-1172 • e-mail: WVASOFF@newwave.net

January 17, 2001

Andrew A. Brown
Assistant to Commissioner
WV Division of Labor
Building #6, Room B-749
State Capitol Complex
Charleston, WV 25305

Dear Mr. Brown:

Please find attached comments of the West Virginia Manufactured Housing Association relative to a proposed rule by the West Virginia Contractor Licensing Board.

It is our understanding that the division has elected to receive written comments in lieu of a public hearing. Please note that our industry respectfully requests that the division and the contractor licensing board reconsider that position and hold public hearings on the proposed rule. Because of the complexity of the rule and its profound impact on all aspects of the contractors and licensees that we represent, we believe that it is difficult for most licensees to convey in writing the practical impact of the rule on their business.

Please find enclosed our Association's draft written comments in compliance with your stated comment period.

Sincerely yours,

Leff Moore
Executive Director

LM/bod



West Virginia Manufactured Housing Association

205 First Avenue, Nitro, WV 25143 • Phone (304) 727-7431 • Fax (304) 727-1172 • e-mail: WVASOFF@newwave.net

COMMENTS

FOR THE
WEST VIRGINIA DIVISION OF LABOR
CONTRACTOR'S LICENSING BOARD

BY THE
WEST VIRGINIA MANUFACTURED
HOUSING ASSOCIATION

LEFF MOORE
EXECUTIVE DIRECTOR

COMMENTS

The proposed rule by the West Virginia Contractor Licensing Board establishes a complaint process for consumers which duplicates existing requirements already imposed by the Division of Labor under West Virginia Code 21-9, The West Virginia Manufactured Housing Construction and Safety Standards Act and the West Virginia Manufactured Housing Construction and Safety Standards Board.

West Virginia law requires that installing contractors, including retailers of manufactured homes, must be licensed by both the West Virginia Manufactured Housing Construction and Safety Standards Board and the West Virginia Contractor Licensing Board. Since its inception in 1988, the West Virginia Manufactured Housing Construction and Safety Standards Board requires of their licensees compliance with all the consumer protection aspects of the manufactured housing contractor's and retailer's law. The Manufactured Housing Construction and Safety Standards Board established under its authorizing legislation a system that allows consumers to file complaints with that board and allows that board to conduct investigations, hold hearings, review records, and take disciplinary actions against their licensees.

Some years later, the West Virginia Legislature established the West Virginia Contractor Licensing Act. Until recent legislation authorizing the proposed rule, the contractor's board had little authority over contracting activity in the manufactured housing industry except to require a license be held by manufactured housing industry firms and the authority to revoke their license if a licensee was adjudged by a court of record to have violated the contractor licensing act. During this period, the manufactured housing industry contractors were subject to more complex, comprehensive, and stringent licensing requirements which required that licensees comply with codes, laws, standards and performance under contractor obligations and requirements of the manufactured housing construction and safety standards board. That Board already provides to consumers a formal consumer complaint process similar to that being proposed by the rule.

The basis for complaints and regulations under the manufactured housing construction and safety standards board, is in fact more comprehensive from a consumer standpoint than that being proposed under your rule §28-3-4. The West Virginia Division of Labor is also empowered through the manufactured housing construction and safety standards board to conduct investigations under that rule and under their rules in effect, 42 Series 19. Existing rules governing the manufactured housing industry board and its licensees already provided for the hearings and administrative process proposed with section §28-3-6 of your proposed rule.

Sanctions against licensees, as well as those who fail to hold a license, are greater potentially under the manufactured housing construction and safety standards board and law than those proposed under your proposed rule §28-3-6.5.

The West Virginia Manufactured Housing Construction and Safety Standards rule establishes an industry recovery fund whereby consumers who are adjudged by the board to be victims of

substandard, incomplete or non-complying work by a contractor licensee of that board can be made whole. Your proposed rule provides no such recovery mechanism for consumers.

The West Virginia Manufactured Housing Construction and Safety Standards Act not only deals with contracting and installation for manufactured homes, but further establishes the manufactured housing construction and safety standards board as its state administrative agency for the United States Department of Housing and Urban Development. HUD establishes construction standards and safety standards for manufactured homes nationally and West Virginia Code 21-9 provides for oversight in West Virginia of those standards by the West Virginia Manufactured Housing Construction and Safety Standards Board.

Our industry has recognized the benefit of holding a license under both boards since the contractor's law became effective. While the contractor's law generally provides little consumer protection, it does require that licensees of the contractor board must be tested in order to hold a license. Testing requirements for licensees have not been a part of the requirement to hold a license under the West Virginia Manufactured Housing Construction and Safety Standards Board. The regulatory system of dual licensing of the manufactured housing industry firms has afforded manufactured homebuyers with a complete, comprehensive system of consumer protection, code compliance and government oversight, as well as, an alternative dispute resolution system.

Under the proposal, if a manufactured homeowner feels aggrieved and seeks to file a complaint to seek assistance from government, confusion will certainly prevail. As currently written, the contractor's proposed rule does not defer manufactured housing related complaints to the manufactured housing construction and safety standards board. If the rule were adopted in its current form, consumers would certainly have a right to file a consumer complaint with two separate boards. Each board would be required to follow a predetermined administrative process outlined in those respective rules. This duplication of regulatory effort would prove confusing and inefficient for consumers and onerous, duplicative and chaotic to licensees.

We urge the contractor licensing board to amend its proposed rule by excluding manufactured home installing contractors and all contracting related to manufactured homes to the authority of the West Virginia Manufactured Housing Construction and Safety Standards Board under the jurisdiction created by West Virginia Code 21-9. Our industry understands that the majority of West Virginia contractors and their consumers have, in the past, not been subjected to the oversight, regulation and consumer protection laws afforded to the purchasers of manufactured homes. We believe that government has an obligation to fairly and uniformly provide those protections to the consumer established by the legislature by Senate Bill 103 which requires the promulgation of this rule and the receipt, investigation, and resolution of complaints against licensed contractors. We do not believe that the legislature intended to place the manufactured housing industry and its consumers under two duplicative administrative processes that will not afford any new protection to any consumer that is not already established under current law.

We further believe that the contractor licensing board does not have adequate, trained staff to deal with consumer complaints within the manufactured housing industry, particularly those that deal with federal HUD code construction standards.

We urge that you amend your proposed rule to defer administrative regulatory primacy to the manufactured housing construction and safety standards board under West Virginia Code 21-9 and exclude from regulations by the contractor licensing board those engaged in manufactured housing sales, manufacture or installation who hold a license under West Virginia Code 21-9 and are in compliance with that code section and 42 Series 19 of the Code of State Regulations as promulgated by the West Virginia Manufactured Housing Construction and Safety Standards Board. In those cases where contracting activity is done by installers who are in violation of West Virginia Code 21-9, both boards would retain regulatory authority over those performing work without the appropriate licenses.

Respectfully Submitted,
Leff Moore
Executive Director