

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

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WEST VIRGINIA
SECRETARY OF STATE

Form #6 ☐

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED
BY THE WEST VIRGINIA LEGISLATURE**

AGENCY: West Virginia Contractor Licensing Board TITLE NUMBER: 28

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

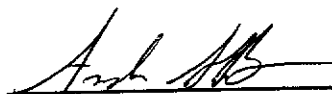
TITLE OF RULE BEING PROPOSED: West Virginia Contractor Licensing Board - Consumer
Complaints

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) SB 2001

SECTION 64-9-5, PASSED ON June 10, 2002

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE
FOLLOWING DATE: November 1, 2002



Authorized Signature

SCANNED

28 CSR 3

FILED

Legislative Rule West Virginia Contractor Licensing Board Consumer Complaints

2002 AUG -9 A 8:44
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 and W.Va. Code §29A-5-1 et seq.

1.2. Authority. W.Va. Code §21-11-14.

1.3. Filing Date. August 9, 2002

1.4. Effective Date. November 1, 2002

§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, W.Va. Code §21-11-1 et seq., and applicable legislative rules.

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 in 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) Abandoned, without legal excuse, any construction project or operation engaged in or undertaken by the contractor;
- (b) Willfully failing or refusing to complete a construction project or operation with reasonable diligence, thereby causing material injury to the consumer;
- (c) Willfully departed from or disregarded plans or specifications in any material respect without the consent of the parties to the contract;
- (d) Willfully or deliberately violated the building laws or rules of the state or of any political subdivision of the state;
- (e) Willfully or deliberately failed to pay any moneys when due for any materials free from defect, or services rendered in connection with the person's operations as a contractor when that person has the capacity to pay or when that 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) Willfully or deliberately misrepresented a material fact in obtaining a contract for construction or services or in connection with any official licensing matters;
- (g) Willfully or deliberately failing 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 provisions of the Act; (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 of the license.
- (j) Engaging in any willful, fraudulent or deceitful act in the capacity as a contractor causing substantial injury to another person;
- (k) Performing work which is not commensurate with a general standard or 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 by 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 subjected to any other action 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 W. Va. Code §21-9-1 et seq., the West Virginia Manufactured Housing Construction and Safety Standards Act, shall be deferred to the West Virginia Manufactured Housing 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 with the board. 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. If a building or construction code has been adopted by the municipality or county in which the project is located, the provisions of that code are hereby incorporated by reference and shall be the inspection standard for performing on-site project inspections. If a building or construction code has not been adopted by the municipality or county in which the project is located, then the provisions of title eighty-seven, series four Code of State Regulations [§87CSR4}, 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 his or her 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. The notice of 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 W. Va. Code §29A-5 et seq., The 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 conclusions of law to the board. The report may contain the examiner's recommendations for the final disposition of the complaint.

6.4. 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. 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 its findings and conclusions, with specific references to principal supporting items of evidence as well as the reasons or basis for the order. The board may not impose or assess damages.

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 revoking a contractor's license;
- (b) Suspending a contractor's license for a specific period of time;
- (c) Censuring or reprimanding a licensed contractor;
- (d) Imposing limitations or conditions on the professional practice of a licensed contractor;
- (e) Imposing requirements for remedial professional education to correct deficiencies in the education, training and skill of a licensee; or
- (f) Imposing 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.

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 the action to the Circuit Court of Kanawha county, West Virginia or in the circuit court of the county in which the petitioner or any one of the petitioners resides or does business.

§28-3-7. Alternate dispute resolution.

7.1. The board may on its own motion or by stipulation of the parties refer any complaint to mediation: *Provided*, That complaints demonstrating probable cause of the existence of imminent safety and/or health hazards may not be referred to mediation.

7.2. The board may maintain a list of mediators with expertise in professional and occupational licensing matters or may obtain a list of qualified mediators from the West Virginia center for dispute resolution or the West Virginia state bar mediator referral service. Division staff may be utilized to prepare any mediation agreement.

7.3. A notice of the mediation must be provided to the parties by certified mail at least twenty days in advance of the mediation date. The notice must contain the time, date and location of the mediation and the issues to be mediated.

7.4. The mediation is not considered a proceeding open to the public and any reports and records introduced at the mediation are not part of the public record. The mediator and all participants in the mediation shall maintain and preserve the confidentiality of all proceedings and records. The mediator may not be subpoenaed or called to testify or otherwise be subject to process requiring disclosure of confidential information in any proceeding relating to or arising out of the complaint matter mediated: *Provided*, That any confidentiality agreement and any written agreement made and signed by the parties as a result of the mediation may be used in any proceeding subsequently instituted to enforce the written agreement. The agreement may be used in other proceedings if the parties agree to the use in writing.

7.5. The written agreement made and signed by the parties as a result of the mediation is binding and must list the issues resolved, the corrective actions, if any, agreed to, with the time frames and any issues not resolved at the mediation.

7.6. A mediated agreement under the provisions of this section does not waive a contractor's potential liability for board disciplinary action if the board determines that the contractor has violated any provisions of West Virginia code §21-11-1, *et seq.*, or legislative rules promulgated pursuant to that article.

7.7. Any issues not resolved at mediation are returned to the board for formal hearing pursuant to the provisions of section 6 of this rule.

§28-3-8. Confidentiality of Records.

8.1. 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 the board pursuant to this rule, including the identity of the complainant or respondent, are 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, non-privileged and non-deliberative materials introduced at any probable cause hearing held pursuant to the complaint are thereafter not confidential: *Provided*, that the confidentiality of

the 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 non-deliberative materials introduced into evidence at the subsequent hearing, as well as the board's and the 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 complaint filed immediately upon the respondent's request; or
- (d) Where the commissioner or board is otherwise required by the provisions of the Act to disclose the information or to proceed in a manner that disclosure is necessary and required to fulfill the requirements.

8.2. 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 is confidential, and the person providing the information or filing a complaint is bound to confidentiality until further order of the board.

ANALYSIS OF PROPOSED LEGISLATIVE RULES

Agency: West Virginia Contractor Licensing Board

Subject: West Virginia Contractor Licensing Board-Complaints,
28CSR3

PERTINENT DATES

Filed for public comment: April 30, 2001

Public comment period ended: May 31, 2001

Filed following public comment period: June 6, 2001

Filed LRMRC: June 6, 2001

Filed as emergency:

Fiscal Impact: \$341,930 increase

ABSTRACT

The proposed rule is new. The following is a section-by-section synopsis of the proposed rule.

Section 1 is the standard general section, setting forth the scope, authority, filing date and effective date of the proposed rule.

Section 2 relates to application and enforcement. It states that the rule applies to the Division of Labor, the Contractor Licensing Board and persons covered by the Contractor Licensing Act. The rule is to be enforced by the Division of Labor and the Contractor Licensing Board.

Section 3 defines terms.

Section 4 relates to the filing of complaints. It sets forth those complaints which may be accepted by the Board such as abandonment without legal excuse of a construction project or a willful or deliberate violation of building laws or rules of this state. It requires that all complaints be in writing and be on forms provided by the Board. The Board is required to forward a copy of the complaint to the person named in the complaint, and

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that person has 30 days in which to respond to the complaint in writing.

Complaints related to manufactured housing are to be deferred to the West Virginia Manufactured Housing Construction and Safety Standards Board with the Contractor Licensing Board retaining custody of the complaint for final resolution.

Section 5 relates to investigations. It allows the Board to independently investigate the basis for any filed complaint. The Board may dismiss a complaint at any time during an investigation, if it becomes apparent that no violation has occurred. It states that the West Virginia State Building Code is to be used as the inspection guideline.

Section 6 relates to hearings. It sets forth the hearing procedure and requires the Board to issue a written order within 30 days of completion of the hearing. It states that the Board has no authority to impose or assess damages. It sets forth sanctions which the Board may order to resolve a complaint that is not dismissed including the revocation or suspension of a contractor's license. Orders of the Board may be appealed to the Circuit Court of Kanawha County.

Section 7 relates to confidentiality of records. It states that all records and information relating to complaints are confidential except under certain specified circumstances.

AUTHORITY

Statutory authority: W.Va. Code, §21-11-14, which provides, in part, as follows:

...(i) On or before the first day of January, two thousand one, the board shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code, which shall specify a procedure for the investigation and resolution of all complaints against persons licensed under this chapter.

ANALYSIS

- I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

No.

- II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

Yes.

- III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

No.

- IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

Yes.

- V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

Yes.

- VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

No.

- VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISIONS OF THE CODE?

Yes.

- VIII. OTHER

Counsel has technical modifications to suggest.

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28CSR3

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No.

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Yes.

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Counsel has technical modifications to suggest.

