

**WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION**

Form #3

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AUG 28 4 15 PM '00

OFFICE OF THE SECRETARY OF STATE
WEST VIRGINIA

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

AGENCY: West Virginia Board of Examiners in Counseling TITLE NUMBER: 27

CITE AUTHORITY: 30-31-1 and 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: 6

TITLE OF RULE BEING PROPOSED: Contested Case Hearing Procedure

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

West Virginia Board of Examiners in Counseling

At Marshall University Graduate College

100 Angus E. Peyton Drive

South Charleston, WV 25303-1600

Phone: (304) 746-2512 Fax: (304) 746-1942

Email: jajohnson@marshall.edu

August 28, 2000

Approval of Filing

Contested Case Hearing Procedure, Series 6

The Board of Examiners in Counseling has given their approval for the filing of this legislative rule.



Robert L. Rubenstein, Chair

West Virginia Board of Examiners in Counseling

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**Brief Summary of the Proposed Rule
Contest Case Hearing Procedure
Title 27 Series 6**

This rule establishes guidelines for the Board of Examiners in Counseling contested case hearing procedures. The rule applies to all Licensed Professional Counselors (LPC) and all individuals making application to become an LPC.

This rule offers clear and concise guidelines for the individual or the Board when instituting charges against the licensee. The rule also establishes a timeline for all parties to follow.

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Statement of Circumstances

House Bill 4062, passed during the most recent Legislative Session mandated this rule, Contested Case Hearing Procedure.

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: August 28, 2000

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) West Virginia Board of Examiners in Counseling
100 Angus E. Peyton Drive
South Charleston, WV 25303-1600

304-746-2512 or 800-520-3852

LEGISLATIVE RULE TITLE: Contested Case Hearing Procedure

1. Authorizing statute(s) citation 30-31-1 and 30-1-1

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
July 3, 2000

b. What other notice, including advertising, did you give of the hearing?
Mailed out a summary of the rule and gave information
on how to obtain a copy of the proposed rule to each LPC, US mail. Sent copy to
West Virginia Counseling Association and West Virginia Licensed Professional
Counselor Association. Sent copy to graduate counseling program chairs at
Marshall, MUGC and WVU. Posted copy on our website.

c. Date of Public Hearing(s) *or* Public Comment Period ended:
August 15, 2000

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

Attached _____ No comments received x

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

N/A

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

Jean Ann Johnson, Executive Secretary	Email: jajohnson@marshall.edu
100 Angus E. Peyton Drive	Phone: 746-2512 or 800-520-3852
South Charleston, WV 25303-1600	Fax: 746-1942

- 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:

- 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.

N/A

b. Date of hearing or comment period:

N/A

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

N/A

d. Attach findings and determinations and reasons:

Attached N/A

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Contested Case Hearing Procedure

Type of Rule: Legislative Interpretive Procedural

Agency: West Virginia Board of Examiners in Counseling

Address: 100 Angus E. Peyton Drive, South Charleston, WV 25303-1600

1. Effect of Proposed rule:

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	n/a				
PERSONAL SERVICES	n/a				
CURRENT EXPENSE	n/a				
REPAIRS & ALTERATIONS	n/a				
EQUIPMENT	n/a				
OTHER	n/a				

2. Explanation of Above Estimates:

N/A

3. Objectives of These Rules:

N/A

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

N/A

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens: N/A

C. Economic Impact on Citizens/Public at Large.

N/A

Date: August 28, 2000

Signature of Agency Head or Authorized Representative:

Robert Z. Perkins

TITLE 27
LEGISLATIVE RULE
BOARD OF EXAMINERS IN COUNSELING

SERIES 6
CONTESTED CASE HEARING PROCEDURE

FILED

AUG 28 4 16 PM '00

OFFICE OF THE WEST VIRGINIA
SECRETARY OF STATE

§27-6-1. General.

1.1. Scope. -- This rule specifies the procedure for the adjudication of contested case hearings before the Board.

1.2. Authority. -- W. Va. Code §§30-31-1 et seq. and 30-1-1 et seq.

1.3. Filing Date. --

1.4. Effective Date. --

§27-6-2. Application.

This rule applies to all persons practicing or making application to practice as professional counselors.

§27-6-3. Definitions.

The following words and phrases as used in this rule shall have the following meanings, unless the context otherwise requires:

3.1. Applicant means any person making application for an original or renewal license to practice counseling.

3.2. Board means the West Virginia Board of Examiners in Counseling.

3.3. Demanding party means an individual who has been denied a license to practice counseling by the Board and who, as a result, demands that a hearing be held before the Board on the issue of the denial.

3.4. Charged party means an individual who holds a license to practice counseling issued by the Board and who has been charged by the Board as described in subsection 5.4. of this rule.

3.5. License means a license issued by the Board to practice counseling.

3.6. Licensee means an individual who holds a license to practice counseling issued by the Board.

3.7. Practice of counseling means the practice of counseling as defined in W. Va. Code §30-31-2 and includes counselors who hold themselves out to the public to engage in counseling or supervising those who render services for compensation or other personal gain involving the application of mental health counseling procedures to help in learning how to solve problems or make decision related to careers, personal growth, marriage, family or other interpersonal or intrapersonal concerns.

§27-6-4. Pre-conferences; Conferences; Informal Disposition of Cases.

4.1. At any time prior to the hearing or thereafter, the Board, or its designee may hold conferences for the following purposes:

4.1.a. To dispose of procedural requests, pre-hearing motions or similar matters;

4.1.b. To simplify or settle issues by consent of the parties; or,

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

4.2. The Board may require conferences to be held on its own motion or by the request of a party.

4.3. 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.

§27-6-5. Hearing Procedure.

5.1. Any applicant denied a license or any licensee or permit holder who has had their license suspended by the Board who believes the denial was in violation of W. Va. Code §§30-1-

1 et seq. and/or 30-31-1 et seq. is entitled to a hearing on the action denying or suspending such license.

5.2. Any person who desires a hearing for the reason described in subsection 5.1 of this section must present a written demand for a hearing to the Board.

5.3. A hearing will be scheduled within sixty (60) days of receipt of the written demand. The hearing may be postponed to a later date by mutual agreement.

5.4. Charges may be instituted against any licensee by the Board when probable cause exists for believing that the licensee may have engaged in conduct, practices or acts in such condition that his or her license should be suspended, revoked or otherwise disciplined for one or more of the grounds set forth in W. Va. Code §30-31-9 et seq. or Legislative rule, Title 27, all series. Charges may be based upon information received by way of a verified written complaint filed with the Board and further information gathered by the Board in the process of investigating a complaint. Charges may also be based upon information received solely through investigative activities undertaken by the Board.

5.5. A complaint and notice of hearing containing the written charges filed against a licensee must be sent to the licensee at least 30 days prior to the date of the hearing.

5.5.a. The Board is designated as the "Complainant" in the complaint and notice of hearing.

5.5.b. The licensee is designated as the "Respondent" in the complaint and notice of hearing.

5.5.c. The complaint and notice of hearing must clearly state the substance of each offense, act of failure to act in sufficient detail to advise the Respondent of the charges or complaint against him or her. This may include, but is not limited to, the time and place the act or failure to act occurred and the law or rule that was violated.

5.5.d. The complaint and notice of hearing must give the date, time and place for the hearing.

5.6. Upon receipt of a demand for a hearing described in subsections 5.1 and 5.2 of this section, the chair or his or her 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 counseling. 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 or permit 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.

5.7. The Board may require the person demanding the hearing to give security for the costs of the hearing and if the demanding party does not substantially prevail, the actual costs of the hearing may be assessed against them and may be collected in a civil action or by other proper remedy.

5.8. The Board may amend the charges set forth in a Complaint and Notice of Hearing, as it deems proper.

5.9. A Complaint and Notice of Hearing must be served upon the demanding or charged party at least thirty (30) days prior to the date of hearing.

5.10. 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.

5.11. Hearings shall be conducted as follows:

5.11.a. Any party to a hearing has the right to be represented by an attorney-at-law, duly qualified to practice law in the state of West Virginia.

5.11.b. The Board shall be represented by the West Virginia Attorney General's Office.

5.11.c. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded from the hearing. Furthermore, the rules of evidence as applied in civil cases in the circuit courts of this state shall be followed. However, when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs

5.11.d. The rules of privilege recognized by the law of this state shall be followed.

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

5.11.f. Any party to a hearing may appear with witnesses to testify on his or her behalf; may be heard in person, by counsel or both; may present such other evidence in support of his or her position as deemed appropriate by the Board and, when appropriate, may cross-examine witnesses called by the Board in support of the charges or in defense of its decision to deny licensure.

5.11.g. The hearing will be held at such time and place designated by the Board, but no hearing shall be conducted unless at least thirty (30) days written notice of the hearing has been 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 wife or her husband, or to any other person found there who is a member of his or her family and above the age of sixteen (16) years; or if neither his wife or her

husband nor any such person can be found there, and he or she cannot be found, by leaving such notice posted at the front door of such place of abode; or if he or she does not reside in this state, such 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.

5.11.h. The hearing shall be open to the general public.

5.11.i. Members of the Board and its officers, agents and employees are 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 testified.

5.11.j. The hearing shall be conducted by a quorum of the Board.

5.11.k. A stenographic report of each proceeding on the denial, suspension or revocation of a certificate, license, registration or authority shall be made at the expense of the Board and a transcript thereof retained in the Board's files. The Board will make a written report of its findings, which shall constitute part of the record. Upon request, a copy of the report(s) will be furnished to the respondent at his or her expense.

5.11.l. Documentary evidence, written or recorded evidence, may be received in the form of copies or excerpts or by incorporation by reference.

5.11.m. Where a hearing is held upon the instance of the Board after charges have been brought against a licensee pursuant to subsections 5.4 and 5.5 of this section, the Board has the burden of proof and must present its evidence and/or testimony in support of the charges first.

5.11.n. Where a hearing is held upon demand under the provisions of subsections 5.1, 5.2, 5.3, and 5.6 of this action, the demanding party has the burden of proof and is required to present his or her evidence first.

5.11.o. Following the conclusion of the Board's presentation of evidence in accordance with subdivision 5.11.m. of this rule, the Respondent or charged party has the right to submit his or her evidence in defense.

5.11.p. Following the conclusion of the demanding party's presentation of evidence in accordance with subdivision 5.11.n of this rule, the Board has the right to offer its evidence in rebuttal.

5.11.q. The Board may call witnesses to testify in support of its decision to deny licensure, to deny a permit 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 in support of his or her position.

5.11.r. All parties have the right to offer opening and closing arguments, not to exceed ten (10) minutes for each presentation.

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

5.11.t. Motions for a 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 (7) days before 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 a continuance. A motion for a continuance filed less than seven (7) days from the hearing date may be denied unless the reason for the motion could not have been ascertained earlier. Motions for continuance filed prior to the date of hearing will be ruled on by the chair or executive secretary of the Board. All other motions for continuance will be ruled on by the Board member(s) or the member presiding over the hearing.

5.11.u. All motions related to a case set for hearing before the Board, except motions for continuance and those made during the hearing, must be in writing and received in the office of the Board at least ten (10) days before the hearing. Pre-hearing motions will be heard at a pre-hearing conference, as cited in subsection 4.1,4.2,4.3. of this rule, or at the hearing prior to the commencement of testimony. The Board member(s) presiding at the hearing will hear the motions and the response from the non-moving party and rule on the motions.

§27-6-6. Transcription of Testimony and Evidence.

6.1. All testimony, evidence, arguments and rulings on the admissibility of testimony and evidence will be reported by stenographic notes and characters or by mechanical means.

6.2. All reported materials will be transcribed. The Board has the responsibility to make arrangements for the transcription of the reported testimony and evidence.

6.3. Upon the motion of the Board or any party assigning error or omission in any part of any transcript, the Board chair or presiding member will settle all differences arising as to whether the transcript truly discloses what occurred at the hearing and will require the transcript be corrected and/or revised as appropriate so as to make it conform to the truth.

6.4. A transcript of the hearing will be provided to all members of the Board for review at least ten (10) days before the vote is taken on its decision in any licensure or permit disciplinary matter.

§27-6-7. Submission of Proposed Findings of Fact and Conclusions of Law.

7.1. Any party may submit proposed findings of fact and conclusions of law at a time and manner designated by the Board.

§27-6-8. Depositions.

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

§27-6-9. Subpoenas.

9.1. Subpoenas to compel the attendance of witnesses and subpoenas duces tecum to compel the production of documents may be issued by any member of the Board, its Executive Secretary, and its Assistant Executive Secretary. Such subpoenas shall be issued pursuant to W. Va. Code §29A-5-1(b).

9.2. Written requests by a party for the issuance of subpoenas or subpoenas duces tecum as provided in subsection 9.1 of this section must be received by the Board no later than ten (10) days before a scheduled hearing. Any party requesting the issuance of subpoenas duces tecum must have them properly served in accordance with W. Va. Code §29A-5-1(b).

§27-6-10. Orders.

10.1. Any final order entered by the Board following a hearing conducted pursuant to this rule must be made pursuant to the provisions of W. Va. Code §§29A-5-3 and 30-1-8(d). All final orders must be entered within forty-five (45) days following the submission 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.

10.2. The findings of fact and conclusions of law must be approved by a majority of the Board either by a poll or vote at a regular meeting, before a final order is entered. A copy of the final order approved by a majority of the Board must be served upon the demanding or charged party and/or his or her attorney of record, if any, within ten (10) days after entry by the Board by personal service or by registered or certified mail.

§27-6-11. Appeal.

11.1. An appeal from any final order entered in accordance with these rules must comply with the provisions of W. Va. Code §§30-1-9 and 29A-6-1 et seq.

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During the comment period, July 14, 2000 through August 15, 2000, there were no comments received by the Board pertaining to this proposed rule.