

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #5

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: West Virginia Board of Dental Examiners TITLE NUMBER: 5

CITE AUTHORITY: §30-1-8

RULE TYPE: PROCEDURAL INTERPRETIVE

EXEMPT LEGISLATIVE RULE

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 4

TITLE OF RULE BEING AMENDED: Contested Case Hearing Procedures

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS June 1, 2007


Authorized Signature

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TITLE 5
PROCEDURAL RULE
WEST VIRGINIA BOARD OF DENTAL EXAMINERS

OFFICE WEST VIRGINIA
SECRETARY OF STATE

SERIES 4
CONTESTED CASE HEARING PROCEDURES

§5-4-1. 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 §30-1-8.

1.3. Filing Date. -- January 5, 2001.

1.4. Effective Date. -- June 1, 2007.

§5-4-2. Definitions.

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

2.1. "Applicant" means any person making application for an original or renewal license and/or a permit pursuant to W. Va. Code §§30-4-1 et seq. and 30-4A-1 et seq.

2.2. "Board" means the West Virginia Board of Dental Examiners.

2.3. "Demanding party" means an individual who has been denied a license and/or permit by the Board and who, as a result, demands that a hearing be held before the Board on the issue of the denial.

2.4. "Charged party" means an individual who holds a license and/or permit issued by the Board and who has been charged by the Board as described in Section 6.4 of this rule.

2.5. "License" means a license and/or permit issued by the Board pursuant to W. Va. Code §§30-4-1 et seq. and 30-4A-1 et seq.

2.6. "Licensee" means an individual who holds a license to practice issued by the Board.

2.7. "Permittee" is a person who holds a permit issued by the Board.

2.8. "Practice of dentistry" means the practice of dentistry as defined in W. Va. Code §30-4-2.

2.9. "Practice of dental hygiene" means the practice of dental hygiene as defined in W. Va. Code §30-4-3.

§5-4-3. Conferences; Informal Disposition of Cases.

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

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

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

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

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

3.3. 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.

§5-4-4. Depositions.

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

§5-4-5. Subpoenas.

5.1. 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 or its Assistant Executive Secretary.

Such subpoenas shall be issued pursuant to W. Va. Code §29A-5-1(b).

5.2. Written requests by a party for the issuance of subpoenas or subpoenas duces tecum as provided in subsection 5.1 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)

§5-4-6. Hearing Procedure.

6.1. Any applicant denied a license and/or permit or any licensee and/or permit holder who has had their license and/or permit suspended by the Board who believes the denial was in violation of W. Va. Code §§30-1-1 et seq., 30-4-1 et seq. and/or 30-4A-1 et seq., is entitled to a hearing on the action denying or suspending such license and/or permit.

6.2. Any person who desires a hearing for the reason described in subsection 6.1 of this section must present a written demand for a hearing to the Board.

6.3. 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.

6.4. Charges may be instituted against any licensee or permittee by the Board when probable

cause exists for believing that the licensee or permittee 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 §§30-1-1 et seq., 30-4-1 et seq., 30-4A-1 et seq. or the Board's legislative rules. Charges may be based upon information received by way of a written complaint filed with the Board and any information gathered by the Board in the process of investigating a complaint. Charges may also be based upon information obtained solely through investigative activities undertaken by the Board.

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

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

6.5.2. The licensee or permittee is designated as the "Respondent" in the complaint and notice of hearing.

6.5.3. The complaint and notice of hearing must clearly state the substance of each offense, act or 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.

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

6.6. Upon receipt of a demand for a hearing described in subsection 6.2 of this section, the chair or his or her designee shall provide the demanding party, with a Complaint and Notice of Hearing as set forth in subsection 6.5 of this rule.

6.7. Where a hearing is held upon demand under the provisions of subsections 6.1, 6.2, 6.3,

and 6.6 of this section, the demanding party is required to present his or her evidence first. 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, such costs may be assessed against them and may be collected in a civil action or by other proper remedy.

6.8. The Board may amend the charges set forth in a Complaint and Notice of Hearing as it deems proper with thirty (30) days notice.

6.9. 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.

6.10. Upon written motion received by the Board no later than twenty (20) days prior to the date of hearing, a more definite statement of the matters charged or the reasons stated for denial of a license and/or permit shall be provided to the demanding or charged party or his or her counsel, at least ten (10) days prior to the hearing date.

6.11. Hearings shall be conducted as follows:

6.11.1. 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.

6.11.2. 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.

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

6.11.4. 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.

6.11.5. 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 or a permit.

6.11.6. 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.

6.11.7. 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.

6.11.8. The hearing shall be conducted by a quorum of the Board. A hearing shall be held before the Board or its designee.

6.11.9. A record of the hearing, including the complaint(s), if applicable, the notice of

hearing, all pleadings, motions, rulings, stipulations, exhibits, documentary evidence, evidentiary depositions and the stenographic report of the hearing, shall be made and a transcript thereof maintained in the Board's files. Upon request, a copy of the transcript shall be furnished to any party at his or her expense.

6.11.10. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference.

6.11.11. Where a hearing is held upon the instance of the Board after charges have been brought against a licensee pursuant to subsections 6.4 and 6.5 of this rule, the Board must present its evidence and/or testimony in support of the charges first.

6.11.12. Following the conclusion of the Board's presentation of evidence in accordance with subsection 6.11.11 of this section the Respondent or charged party has the right to submit his or her evidence in defense.

6.11.13. Following the conclusion of the demanding party's presentation of evidence in accordance with subsection 6.7 of this section, the Board has the right to offer its evidence in rebuttal.

6.11.14. 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 or permittee; 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.

6.11.15. All parties has the right to offer opening and closing arguments, not to exceed ten (10) minutes for each presentation, unless otherwise lengthened by the Board.

6.11.16. Hearings held by the Board or its designee as a result of charges instituted against a licensee or permittee may be continued or adjourned to a later date or different place by the

Board or its designee by appropriate notice to all parties.

6.11.17. 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 ten (10) 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 ten (10) 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 or its designee presiding over the hearing.

6.11.18. 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. Prehearing motions will be heard 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.

§5-4-7. Transcription of Testimony and Evidence.

7.1. 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.

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

7.3. 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.

7.4. 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.

§5-4-8. Submission of Proposed Findings of Fact and Conclusions of Law.

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

§5-4-9. Orders.

9.1. 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. All final orders must be entered within sixty (60) days following the submission of all documents and materials necessary for the proper disposition of the case, including transcripts, and must contain findings of fact and conclusions of law.

9.2. 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.

§5-4-10. Appeal.

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

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April 26, 2007

Ms. Judy Cooper
Office of the Secretary of State
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Charleston, WV 25305

Dear Ms. Cooper:

Following the comment period for proposed rule Title 5, Series 4, please be advised no comments were received and no amendments were made.

Very truly yours,

A handwritten signature in cursive script that reads "Marc L. Harman".

MARC L. HARMAN
Executive Secretary

MLH/smc