



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE EXEMPT, INTERPRETIVE OR PROCEDURAL
RULE**

AGENCY: Board Of Review

TITLE-SERIES: 84-01

RULE TYPE: Procedural Amendment to Existing Rule: Yes Repeal of existing rule: No

RULE NAME: Procedural Rule Board of Review

CITE STATUTORY AUTHORITY: WV Code Chapter 21A-4-9 (3), 21A-7-7, 21A-7-13

This rule is filed with the Secretary of State. This rule becomes effective on the following date:

July 31, 2018

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Truman L Sayre -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

**TITLE 84
PROCEDURAL RULE
BOARD OF REVIEW**

SERIES 1

Procedural rules to govern the initiation and conduct of hearings in contested unemployment compensation claims before the Board of Review and its subordinate tribunals.

§84-1-1. General.

1.1. Scope. -- These procedural rules shall govern the conduct of hearings in contested unemployment compensation claims before the Board of Review and its subordinate tribunals.

1.2. Authority. -- W. Va. Code §§21A-4-9(3), 21A-7-7, 21A-7-13.

1.3. Filing Date. -- June 14, 2018

1.4. Effective Date. -- July 31, 2018

1.5. Repeal of Former Rule. -- These procedural rules repeal and replace the Board of Review Procedural Rules filed in the Secretary of State's office September 29, 1999 and effective October 29, 1999.

§84-1-2. Basic Provisions.

2.1. Delegation of Authority. -- The Board of Review may delegate authority necessary for the fair and efficient administration of the office to the Chief Administrative Law Judge or to such other person as the Board deems fit. These powers shall include, but are not limited to, ruling on motions, continuance requests and fee petitions.

2.2. Purpose. -- The purpose of the hearing process shall be to receive and consider, as expeditiously and as fairly as possible, evidence and information relevant to the determination of the rights of the parties and to provide a review of the Deputy's decisions and determinations with regard to the granting or denial of any award, or the entry of any Order, or the granting or denial of any modification or change with respect to former findings. Orders or awards are made pursuant to the West Virginia Unemployment Compensation Law, W. Va. Code, §21A-1-1 et seq., as amended.

2.3. Appeal Tribunal.-- An Administrative Law Judge or a panel of Administrative Law Judges or the Board of Review in unemployment compensation claims or labor dispute cases.

2.4. Special Provisions.-- The Board and its subordinate tribunals shall take reasonable measures to accommodate persons appearing before them with impairments or language barriers.

2.5. The Unemployment Compensation Division of Workforce West Virginia is referred to as the Unemployment Compensation Claims Office.

§84-1-3. General Appeals.

3.1. Right of Appeal.-- Any party wishing to appeal a Deputy's decision may do so by filing an appeal with the local office of the Unemployment Compensation Claims Office where the claim was originally filed or where the claimant last reported.

3.2. Appeal in Writing.-- An appeal from a Deputy's determination shall be made either in person

at the local office using the appropriate appeal forms or by letter mailed or faxed to the local office. All such letters should include the following elements:

- 3.2.1. Name of the claimant and the employer.
- 3.2.2. Date of the Deputy's decision.
- 3.2.3. Statement of intention to appeal the decision.
- 3.2.4. Signature of the requesting party or counsel.

3.3. Time Period For Filing Appeal.-- Any appeal shall be filed within eight (8) calendar days after the decision has been mailed to the claimant and last employer as provided in W. Va. Code §21A-7-8.

3.4. Late Appeals.-- All appeals must be filed in accordance with the time periods set forth in these rules. The postmark date is the filing date. If the last filing day for an appeal falls on a weekend, or a state or federal holiday, postmarking's for the next business day will be accepted. If the postmarked date is not legible or absent, then the Board or its designee may consider other factors to determine if the appeal is timely. For good cause shown, the Board or its designee may accept and process a late appeal. A decision refusing a late appeal may be appealed to the Board.

3.5. Notice of Hearing.-- Notice of the date, time, and place of appeal hearing shall be mailed to all interested parties and their counsel at least ten (10) days in advance of the hearing date unless such time period is waived. This notice shall inform the parties of their respective rights and duties in relation to the pending proceeding.

3.6. Withdrawal of Appeal.-- If, after filing a notice of appeal, the appealing party decides to withdraw the appeal, the party must do so by filing a written notice of withdrawal to the Board.

3.7. Composition of Appeal Tribunal.-- All appeals from the decision of a Deputy shall be heard by an appeal tribunal composed, as the Board or its designee may direct, of either a single Administrative Law Judge, three Administrative Law Judges, a member of the Board, or the Board itself. W. Va. Code §21A-7-7.

3.8. Time Period for Decision.-- A decision shall be issued within twenty-one (21) days after the date the hearing is concluded and shall be mailed to all parties.

§84-1-4. Labor Dispute Cases.

4.1. Notice of Hearing.-- Notice of the date, time, and place of the hearing shall be sent to all interested parties at least ten (10) days in advance of the hearing date. This notice shall also inform the parties of their respective rights and duties in relation to the pending proceeding. In labor dispute cases involving more than ten claimants, where all or some claimants are represented by counsel, then notice to the represented claimants shall be sufficient if mailed to the represented claimant's counsel.

4.2. Composition of Labor Dispute Appeal Tribunal.-- All cases relating to a labor dispute or to a disqualification under West Virginia §21A-6-3 (4) shall be heard by an appeal tribunal composed either of three Administrative Law Judges or of the Board itself, as the Board may direct. W. Va. Code §21A-7-7.

4.3. Time Period for Decision.-- Upon consideration of all evidence, the appeal tribunal shall make a decision within fourteen (14) days after the date of the hearing and shall notify all interested

parties of its findings and decision. W. Va. Code §21A-7-7a.

§84-1-5. General Hearing Procedures and Policies.

5.1. Time, Place, and Manner of Hearing.-- Upon receipt of a duly filed appeal of the decision of a deputy commissioner, or following the Commissioner's referral of a labor dispute case, the Board shall set the date, time, and place at which a hearing will be conducted. Location of the hearings shall be set by the Board at its discretion to achieve judicial efficiency.

5.1.1. Notice of Hearings.-- Notice of the date, time, and place of hearing shall be sent to all interested parties at least ten (10) days in advance of the hearing date.

5.1.2. If a continuance of the hearing is granted, the ten (10) day notice requirement may be waived.

5.2. Telephonic Hearings.-- The Board, in its discretion, may schedule appeal tribunal hearings telephonically or in person. Any party has a right to an in-person hearing. For good cause shown, the Board of Review may permit a party or witness to appear telephonically during an in-person hearing.

5.2.1. In Person Hearing -- After a telephonic hearing date has been scheduled, a party may verbally or in writing request an in-person hearing.

5.3. Rules of Evidence and Procedure.-- In the conduct of the hearings, neither the Board of Review nor its subordinate tribunals shall be bound by the usual common law or statutory rules of evidence or by the formal rules of procedure, except as provided for by these rules.

5.3.1. Discovery.-- There shall be no discovery in claims or cases before the Board or an Appeal Tribunal.

5.3.2. Subpoenas.-- The presence of a witness or production of evidence may be obtained by the issuance of a subpoena or a subpoena duces tecum by the Board or its designee.

5.3.2.a. Request.-- A subpoena may be requested verbally or in writing from the Board or its designee.

5.3.2.b. Service.-- Subpoenas may be served or accepted in any manner provided for by the rules of civil procedure with the exception that a party may serve a subpoena. Regardless of the method, service is not the responsibility of the Board.

5.3.2.c. Fee.-- Subpoenaed witnesses who testify at the hearing will be paid witness fees in accordance with the guidelines of the Circuit Court of Kanawha County, West Virginia.

5.3.2.d. Noncompliance.-- If a person refuses to comply with a subpoena, the Board may apply to a circuit court of West Virginia to compel production of the testimony or evidence sought.

5.4. Representation.-- All representation before the Board and its subordinate tribunals must comply with the following guidelines.

5.4.1. Individuals. Any claimant or employer, who is a natural person, may appear at and represent him or herself or may be represented by an attorney duly licensed or authorized to practice law in the State of West Virginia.

5.4.2. Corporations. A corporate employer may be represented only by an attorney duly licensed or authorized to practice law in the State of West Virginia. However, an employee of a corporation may testify at a hearing without the presence of counsel.

5.4.3. Government. A government employer, whether federal, state, or local, or the Unemployment Compensation Claims office, may be represented only by an attorney duly licensed or authorized to practice law in the State of West Virginia. However, an employee of a government employer or of the Unemployment Compensation Claims office may testify at a hearing without the presence of counsel.

5.5. Representation Fees.-- In any claim where a claimant is represented by counsel, any fee charged the claimant must be approved by the Board. Such fee may be contingent or based on an hourly rate or a fixed amount. An attorney's fee shall be reasonable.

5.5.1. The factors to be considered by the Board or its designee in determining whether to approve a fee shall include the following:

5.5.1.a. The time and labor required, the novelty and difficulty of the questions involved, and skill requisite to perform the legal service properly.

5.5.1.b. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney.

5.5.1.c. The fee customarily charged in the locality for similar legal services.

5.5.1.d. The amount involved and results obtained.

5.5.1.e. The time limitations imposed by the client or by the circumstances.

5.5.1.f. The nature and length of the professional relationship with the client.

5.5.1.g. The experience, reputation, and ability of the attorney or attorneys performing the services.

5.5.1.h. Whether the fee is fixed or contingent.

5.6. Initial Burden of Proof.-- The initial burden of proof shall fall as denoted below. Once this

initial burden has been met by the designated party, the burden may shift between the parties as directed by the presiding official. This provision should be read and interpreted in conjunction with W. Va. Code §21A-6-1 and §21A-6-3.

5.6.1. Quit Without Good Cause ¥¥ Claimant.

5.6.2. Quit for Personal Reasons ¥¥ Claimant.

5.6.3. Quit for Educational Reasons ¥¥ Claimant.

5.6.4. Discharge for Misconduct ¥¥ Employer.

5.6.5. Failure to Accept Suitable Work ¥¥ Unemployment Compensation Claims Office or Employer.

5.6.6. Existence of a Strike or Other Bona Fide Labor Dispute – Employer

5.6.7. Existence of a lockout – Claimant

5.6.8. Receipt of Other Compensation ¥¥ Unemployment Compensation Claims Office or Employer.

5.6.9. Sports or Athletics ¥¥ Claimant.

5.6.10. Illegal Aliens ¥¥ Unemployment Compensation Claims Office or Employer.

5.6.11. Vacation ¥¥ Employer.

5.6.12. Federal Benefits ¥¥ Unemployment Compensation Claims Office or Employer.

5.6.13. Fraud ¥¥ Unemployment Compensation Claims Office or Employer.

5.6.14. Eligibility ¥¥ Claimant.

5.6.15. Other issues as determined by the Administrative Law Judge at the hearing.

5.7. Continuance of Hearing ¥ Continuances shall be granted only upon the request of a party for good cause shown. After a hearing date has been set, a party may request a continuance from the Board of Review setting forth in detail the reasons why such a continuance is necessary. The Board of Review may request documentation to be considered. Such request for a continuance must be provided to the Board of Review not less than two (2) business days prior to the hearing, except in exigent circumstances.

5.8. Reconsideration ¥ Requests or motions for reconsideration will not be considered except those involving administrative or clerical error.

§84-1-6. Appeal From Appeal Tribunal's Decision.

6.1. Right to Appeal.-- Any party wishing to appeal an appeal tribunal's decision may do so by

filing a written notice of appeal with the Board or with the local office of the Unemployment Compensation Claims Office where the claim was originally filed or where the claimant last reported.

6.2. Appeal in writing.-- An appeal under this section shall be made either in person or by letter mailed to the Unemployment Compensation Claims Office or to the Board office. All such letters should include the following elements:

6.2.1. Name of the claimant, the employer, and case number.

6.2.2. Date of the decision.

6.2.3. Statement of intention to appeal the appeal tribunal's decision.

6.2.4. Signature of the appealing party or counsel.

6.3. Time period for Filing Appeal.-- Any appeal shall be filed within eight (8) calendar days after the decision has been mailed to the claimant and last employer as provided in W. Va. Code §21A-7-9.

6.4. Late Appeals.-- All appeals must be filed in accordance with the time periods set forth in these rules. For computation purposes, the postmark date is considered the filing date. If the last filing day for an appeal falls on a weekend, state or federal holiday, postmarking on the next business day will be accepted. For good cause shown, the Board or its designee may accept and process a late appeal.

6.5. Review by the Board on its Own Motion.-- Within eight days following a decision by an appeal tribunal, and in the absence of an appeal by a party, the Board may, on its own motion, order a hearing before the Board on the claim or any issue involved therein.

6.6. Transcription.-- Once an appeal has been duly filed with the Board, a transcript of the appeal tribunal proceeding shall be prepared and mailed to all interested parties and their representatives.

6.7. Notice of Hearing.-- Notice of the date, time, and place of appeal hearing shall be sent to all interested parties and their counsel at least eight (8) days in advance of the hearing date.

6.8. Request for a Remand De Novo – Motion for a Remand De Novo may be presented to the Board of Review for good cause shown or when a party misses the Administrative Law Judge hearing for good cause shown. The party asking for new Administrative Law Judge hearing must show good cause for the Board of Review to grant the new Administrative Law Judge hearing.

6.9. Remand Motions for Additional Evidence.-- Motions for a Remand to present additional evidence will not be granted upon appeal to the Board except for good cause shown. To establish good cause, a party must demonstrate that the evidence was not available prior to the appeal tribunal hearing or that he or she did not know, nor reasonably could have known, of the evidence in question at that time, and that the proffered evidence could impact the outcome of the Tribunal's decision. Any party having good cause to offer additional evidence should forward a written request to the Board for an opportunity to present such evidence. A copy of such request must be served on all parties.

6.10 Remand by the Board on its Own Motion. – For good cause shown, the Board on its own motion may order a Remand De Novo or a Remand to present additional evidence.

6.11. Argumentation.-- The Board may limit the parties to oral argument, or the filing of written argument, or both.

6.12. Withdrawal of Appeals.-- If, after filing a notice of appeal, the appealing party decides to withdraw the appeal, the party must do so by filing a written notice of withdrawal to the Board.

6.13. Quorum.-- All appeals from the decision of an appeal tribunal shall be heard by at least two Board members.

6.14. Notice of Decision.-- Upon consideration of all evidence, the Board shall issue a decision within ten (10) days of the conclusion of the hearing and mail a copy to all parties.