

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

Form #5

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**FILED**

**JAN 23 10 57 AM '01**

OFFICE OF 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 LICENSED DIETITIANS TITLE NUMBER: 31

CITE AUTHORITY: W.VA. CODE 30-35-4,30-1-1, AND 29A-5-1

RULE TYPE: PROCEDURAL X INTERPRETIVE \_\_\_\_\_

EXEMPT LEGISLATIVE RULE \_\_\_\_\_

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW  
\_\_\_\_\_

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 RULE BEING PROPOSED: 3

TITLE OF RULE BEING PROPOSED: CONTESTED CASE HEARING PROCEDURE  
\_\_\_\_\_

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE  
EFFECTIVE DATE OF THIS RULE IS FEBRUARY 27, 2001

Helen Lodge  
Authorized Signature

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Secretary of State

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(Plus all the volunteer  
help we can get)

# Memo

**Date:** November 20, 2000  
**Subject:** HB 207

HB 207, passed on November 14, 2000, during a special session of the Legislature, was signed into law on November 18, 2000 by the Governor. This bill allows all Boards that are licensed under Chapter 30 of the West Virginia Code to change to procedural and final file rules that had originally been filed as legislative. This applies to rules that relate **ONLY** to complaint procedures or contested case hearing procedures.

The Boards must final file their rules no later than January 31, 2001.

FILED

JAN 23 10 57 AM '01

TITLE 31  
LEGISLATIVE RULE  
WEST VIRGINIA BOARD OF LICENSED DIETITIANS

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

SERIES 3  
CONTESTED CASE HEARING PROCEDURE

**§31-3-1. General.**

1.1. Scope. -- These procedural rules establish procedures for the adjudication of contested case hearings before the Board.

1.2. Authority. -- W. Va. Code §§30-35-4 et seq., 30-1-1 et seq., and 29A-5-1 et seq.

1.3. Filing Date. --

1.4. Effective Date. --

**§31-3-2. Definitions.**

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

2.1. "Board" means the West Virginia Board of Licensed Dietitians.

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

2.3. "Charged party" means an individual who holds a license to practice dietetics issued by the Board and who has been charged by the Board as described in section 3.4 of these rules.

2.4. "Licensee" means an individual who holds a license to practice dietetics by the Board.

**§31-3-3. Hearing Procedures.**

3.1. Any person denied a license by the Board who believes such denial was in violation of W. Va. Code §§30-1-1 et seq. and/or 30-35-1

et seq. shall be entitled to a hearing on the action denying the license.

3.2. Any person who desires a hearing for the reason described in subsection 3.1 of this section must present a written demand for such to the Board.

3.3. When the Chairperson of the Board or his or her authorized designee is presented with such a demand for a hearing, he or she shall schedule a hearing not less than ten (10) nor more the thirty (30) days thereafter of receipt by him or her of such written demand, unless postponed to a later date by mutual agreement.

3.4. Charges may be instituted against any licensed dietitian by the Board when reasonable cause exists for believing that the licensed dietitian may have engaged in conduct or be 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 §30-35-1 et seq. or the Board's legislative rules. 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 such complaint. Charges may also be based upon information received solely through investigative activities undertaken by the Board.

3.5. Charges instituted against a licensee as described in subsection 3.4 of this section shall be set forth in a Complaint and Notice of Hearing issued in the name of the Board as the agency of the State regulating the practice of dietetics. Such Complaint and Notice of Hearing shall designate the Board as "Complainant", and shall designate the licensed dietitian involved in the proceeding as the "Respondent"; shall set out the substance of

each offense charged with sufficient particularity to reasonably apprise the Respondent of the nature, time and place of the conduct or condition complained of therein; shall state the date, time and place for the hearing; and, may contain a statement of intention by the Board to appoint a hearing examiner.

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

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

3.8. 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 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.

3.9. Hearings shall be conducted as follows:

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

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

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.

d. The rules of privilege recognized by

the law of this State shall be followed.

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 evidence.

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, may cross-examine witnesses called by the Board in support of the charges or in defense of its decision to deny licensure.

g. The hearing shall be held at such time and place as is designated by the Board, but no hearing shall be conducted unless at least thirty (30) days written notice thereof 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 (3) consecutive weeks in a newspaper published in this State; or such notice may be served by registered or certified mail.

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

i. Members of the Board and its officers, agents and employees shall be 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 or she so testified.

j. The hearing may be conducted by one or more Board members or by a hearing examiner appointed by the Board.

k. 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.

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

m. Where a hearing is held upon the instance of the Board after charges have been brought against a licensee pursuant to subsections 3.4 and 3.5 of this section the Board shall have the burden of proof and shall present its evidence and/or testimony in support of the charges first.

n. Where a hearing is held upon demand under the provisions of subsections 3.1, 3.2, 3.3 and 3.6 of this section, the demanding party shall have the burden of proof and shall therefore be required to present his or her evidence first.

o. Following the conclusion of the Board's presentation of evidence in accordance with subsection 3.10.m of this section, the Respondent or charged party shall have the right to submit his or her evidence in defense.

p. Following the conclusion of the demanding party's presentation of evidence in accordance with subsection 3.10.n of this section, the Board shall have the right to submit its evidence in defense.

q. The Board may call witnesses to testify in support of its decision to deny licensure 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.

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

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 a different place by the Board or its designee by appropriate notice to all parties.

t. Motions for a continuance of a hearing may be granted upon 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 prior to 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 date of hearing shall be denied unless the reason for the motion could not have been ascertained earlier. Motions for continuance filed prior to the date of hearing may be ruled on by the Executive Secretary or Assistant Executive Secretary of the Board or designated hearing examiner. All other motions for continuance shall be ruled on by the Board member(s) or the hearing examiner presiding over the hearing.

u. All motions related to a case set for hearing before the Board, except motions for continuance and those made during the hearing, shall be in writing and shall be received in the office of the Board at least ten (10) days before the hearing. Pre-hearing motions shall be heard at a pre-hearing conference or at the hearing prior to the commencement of testimony. The Board member(s) or the hearing examiner presiding at the hearing shall hear the motions and the response from the non-moving party and shall rule on such motions accordingly.

**§31-3-4. Transcription of Testimony and Evidence.**

4.1. All testimony, evidence, arguments and rulings on the admissibility of testimony and evidence shall be recorded by the stenographic notes and characters or by mechanical means.

4.2. All recorded materials shall be transcribed. The Board shall have the responsibility to make arrangement for the transcription of the recorded testimony and evidence.

4.3. Upon the motion of the Board or any party assigning error or omission in any part of the transcript, the Board or its appointed hearing examiner shall settle all differences arising as to whether such transcript truly discloses what occurred at the hearing and shall direct that the transcript be corrected and/or revised as appropriate so as to make it conform to the truth.

4.4. A transcript of the hearing shall 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 licensure disciplinary matter.

#### **§31-3-5. Submission of Proposed Findings of Fact and Conclusions of Law.**

5.1. Any party may submit proposed findings of fact and conclusions of law at a time and manner designated by the Board or its duly appointed hearing examiner.

#### **§31-3-6. Hearing Examiner.**

6.1. The Board may appoint a hearing examiner who shall be empowered to subpoena witnesses and documents, administer oaths and affirmations, examine witnesses under oath, rule on evidentiary matters, hold conferences for the settlement or simplification of issues by consent of the parties, cause to be prepared a record of the hearing so that the Board is able to discharge its functions and otherwise conduct hearings as provided in 19 CSR 5-3.10 herein.

6.2. Hearing examiners appointed by the Board are not authorized or empowered to grant,

suspend, revoke or otherwise discipline any license.

6.3. The hearing examiner shall prepare recommended findings of fact and conclusions of law for submission to the Board. The Board may adopt, modify or reject such findings of fact and conclusions of law.

#### **§31-3-7. Conferences; Informal Disposition of Cases.**

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

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

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

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

7.2. The Board or its appointed hearing examiner may cause such conferences to be held on its own motion or by the request of a party.

7.3. The Board may also initiate or consider stipulation or agreement proposals with regard to the informal disposition of cases and may enter into such stipulations and/or agreements without conference.

#### **§31-3-8. 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.

#### **§31-3-9. Subpoenas.**

9.1. Subpoenas to compel the attendance of witnesses and subpoenas duces tecum to compel the production of documents may be issued by the Board, its Executive Secretary, and by the hearing examiner appointed by the Board. 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 and 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 and subpoenas duces tecum shall see that they are properly served in accordance with W. Va. Code §29A-5-1(b).

**§31-3-10. Orders.**

10.1. Any final order entered by the Board following a hearing conducted pursuant to these rules shall be made pursuant to the provisions of W. Va. Code §§29A-5-3 and 30-1-8(d). Such orders shall 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 shall be served upon the demanding or charged party and/or his attorney of record, if any, within five (5) days after entry by the Board by personal service or by registered or certified mail.

**§31-3-11. Appeal.**

11.1. An appeal from any final order entered in accordance with these rules shall comply with the provisions of W. Va. Code §30-1-9.