



**WEST VIRGINIA SECRETARY OF STATE**

**MAC WARNER**

**ADMINISTRATIVE LAW DIVISION**

**eFILED**

6/16/2020 11:45:40 AM

Office of West Virginia  
Secretary Of State

**NOTICE OF PUBLIC COMMENT PERIOD**

AGENCY: Occupational Therapy TITLE-SERIES: 13-02

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

RULE NAME: Disciplinary, Complaint and Contested Case  
Hearing Procedures for Occupational Therapists  
and Occupational Therapy Assistants

CITE STATUTORY AUTHORITY: 30-28-6

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 08/01/2020 11:59 PM

COMMENTS MAY BE MAILED OR EMAILED TO:

NAME: Vonda Malnikoff

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PLEASE INDICATE IF THIS FILING INCLUDES:

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

INCORPORATED BY REFERENCE: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

PROVIDE A BRIEF SUMMARY OF THE CONTENT OF THE RULE:

procedures for the investigation and resolution of complaints against occupational therapists and occupational therapy assistants

SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN THE RULE AND A STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE:

remove the sixty day requirement for review and investigation of complaints that contradicts W.Va. Code 30-1-5 (c)

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

None

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

None

C. ECONOMIC IMPACT OF THE RULE ON THE STATE OR ITS RESIDENTS:

None

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2020 Increase/Decrease (use "-")	2021 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
<b>1. Estimated Total Cost</b>			
Personal Services			
Current Expenses			
Repairs and Alterations			
Assets			
Other			
<b>2. Estimated Total Revenues</b>			

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

No fiscal effect

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

Yes

**Vonda K Malnikoff -- 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 13  
PROCEDURAL RULE  
BOARD OF OCCUPATIONAL THERAPY

SERIES 2  
DISCIPLINARY, COMPLAINT AND CONTESTED CASE HEARING PROCEDURES FOR  
OCCUPATIONAL THERAPISTS AND OCCUPATIONAL THERAPY ASSISTANTS

**§13-2-1. General.**

1.1. Scope.

1.1.a. This rule specifies the procedures for the investigation and resolution of complaints against occupational therapists, occupational therapy assistants, limited permit holders and applicants and;

1.1.b. The procedure for the adjudication of contested case hearings before the Board.

1.2. Authority. -- W. Va. Code §30-28-6 et seq.

1.3. Filing Date. -- ~~July 29, 2009.~~

1.4. Effective Date. -- ~~November 1, 2009.~~

**§13-2-2. Application.**

2.1. This rule applies to all licensed occupational therapists, occupational therapy assistants, limited permit holders and applicants.

**§13-2-3. Definitions.**

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

3.1. "Applicant" means any person making application for an original or renewal license or a limited permit pursuant to W. Va. Code §30-28-13 et seq.

3.2. "Board" means the West Virginia Board of Occupational Therapy.

3.3. "License" means a license or limited permit issued by the Board pursuant to W. Va. Code §30-28-13 et seq.

3.4.

3.4.a. "Occupational Therapist" means a person licensed by the Board under the provisions of W. Va. Code §30-28 to engage in the practice of occupational therapy.

3.4.b. "Occupational Therapy Assistant" means a person licensed by the Board under the provisions of W. Va. Code §30-28 to assist in the practice of occupational therapy under the appropriate supervision of an occupational therapist as defined by §13-1-2.

3.4.c. "Limited Permit Holder" means a person who is issued a time limited permit upon determination by the Board that all requirements for licensure have been met except for the examination.

3.5. "Investigator/Inspector" means a person licensed to practice occupational therapy in this state and/or has advanced training in the field of investigation who is hired by the Board for the purposes of, but not limited to, reviewing and investigating complaints against, but not limited to, occupational therapists, occupational therapy assistants, limited permit holders and applicants.

3.6. "Complainant" means a person or institution lodging a written complaint with the Board.

3.7. "Charged Party" means the applicant, licensee, or limited permit holder who has been charged by the Board as described in Section 7.4 of these rules.

3.8. "Licensee" means an individual who holds a license to practice or assist in the practice of occupational therapy issued by the Board.

**§13-2-4. Causes for Denial, Probation, Limitation, Discipline, Suspension or Revocation of Licenses of Occupational Therapists, Occupational Therapy Assistants, Limited Permit Holders and Applicants.**

4.1. After providing adequate notice and an opportunity for a hearing, the Board may deny or refuse to renew, suspend or revoke the license of, or impose probationary conditions upon or take disciplinary action against, any licensee, limited permit holder or applicant for any of the reasons described in W. Va. Code §30-28-16, including being guilty of unprofessional conduct. Unprofessional conduct includes, but is not limited to:

4.1.a. Obtaining a license or limited permit by fraud, misrepresentation or concealment of material facts;

4.1.b. Being convicted of a felony or other crime involving moral turpitude that relates to the licensees' or limited permit holders' ability to practice occupational therapy or immoral conduct while engaged in the practice of occupational therapy. Conduct rising to the level of immoral would be conduct that would lead, upon trial in any criminal court, state or federal, to the conviction of the accused;

4.1.c. Violating any lawful order or rule or regulation rendered or adopted by the Board;

4.1.d. Engaging in the practice or assisting in the practice of occupational therapy while in an intoxicated condition or under the influence of narcotics or any other drugs which impair consciousness, judgement or behavior;

4.1.e. Willful falsification, destruction or theft of property or records relating to the practice of occupational therapy or the health of the patient;

4.1.f. Failure to exercise due regard for the safety, the life or health of the patient. Actual injury need not be established;

4.1.g. Unauthorized disclosure of information relating to a patient or his or her records;

4.1.h. Discrimination in the practice of occupational therapy against any person for reason of race, religion, creed, color or national origin;

4.1.i. Violating any provision of W. Va. Code §30-28-1 et seq.

4.1.j. Violating any provision of the continuing competency requirements for the renewal of a license as stated under §13-4-3; or

4.1.k. Engaging in unprofessional and/or unethical behavior that results in harm to the general public or any other person covered under these rules.

4.1.l. Practicing beyond the scope of practice of occupational therapy as defined in W. Va. Code §30-28-4;

4.1.m. Performing occupational therapy services for which the occupational therapist or occupational therapy assistant is not adequately trained and competent to perform;

4.1.n. Willingly engaging in or assisting any person in engaging in, or otherwise participating in, abusive or fraudulent billing practices;

4.1.o. Knowingly aid, assist, advise or allow a person without a current and appropriate state permit or license to engage in the practice of occupational therapy; or

4.1.p. Engaging in false, fraudulent, deceptive or misleading communications to any person regarding the individual's education, training, credentials, experience or qualifications, or the status of the individual's state permit or license.

**§13-2-5. Disposition of Complaints.**

5.1. Any person, firm, corporation, member of the Board, or public officer may make a complaint to the Board which charges an occupational therapist, occupational therapy assistant, limited permit holder or applicant with a violation of W. Va. Code §30-28-16 et seq. or of the rules of the Board. The Board may provide a form for that purpose, but a complaint may be filed in any written form. Anonymous complaints will be accepted.

In addition to describing the alleged violation which prompted the complaint, the complaint should contain the following:

5.1.a. The name and address of the applicant, licensee or limited permit holder against whom the complaint is lodged;

5.1.b. The date (s) of the incident (s);

5.1.c. Other persons with knowledge of the incident;

5.1.d. The name of any person who may have treated the patient after the alleged incident, and;

5.1.e. The name of any health care institution in which the patient was an inpatient or outpatient after or during the alleged incident.

5.2. Complainants are immune from liability for the allegations contained in their complaints filed with the Board unless the complaint is filed in bad faith or for a malicious purpose.

5.3. The Board shall assign a number to the complaint and maintain a complaint log which records the receipt of each complaint, its nature, and its disposition. Information shall be logged into individual licensees' file.

5.4. Upon receipt of a complaint, the Board shall issue one of the following acknowledgments to the complainant:

5.4.a. That the complaint has been received and will be reviewed by the Board.

5.4.b. That the complaint is outside the jurisdiction of the Board; or,

5.4.c. That more information will be required in order to adequately review the individual complaint and listing the required information.

5.5. The Board shall send a copy of the complaint, including any supporting documentation, by certified mail to the licensee, limited permit holder or applicant in question for his or her written comment. The licensee, limited permit holder or applicant shall submit a written response to the Board within thirty (30) days of the date of such correspondence, or waive the right to do so.

5.6. Requests for comment on complaints sent to licensees, limited permit holders or applicants shall be considered properly served when sent to their last known address. It is the responsibility of the licensee, limited permit holder or applicant to keep the Board informed of his or her current address.

5.7. Upon receipt of a licensees' or applicants' comments in response to a complaint, the Board shall promptly send a copy of the same, including any supporting documentation, to the complainant.

5.8. After receipt and review of a complaint, unless the complaint is determined to fall within the provisions of subdivision 5.4.b. of this rule, the Board shall cause any reasonable inquiry or investigation it considers necessary to be conducted to determine the truth and the validity of the allegations set forth in the complaint. The review of complaints and any investigation thereof may, at the discretion of the Board, be assigned to a committee of the Board or to an investigator/inspector, by way of written request from the chairperson or his or her designee.

5.9. Upon receipt of a complaint the investigator/inspector or board committee shall, ~~within sixty (60) days,~~ review and investigate the same and provide the Board with a report. The investigator/inspector or board committee shall be afforded an opportunity to have an investigative interview with the applicant, licensee, or limited permit holder in question and all other involved parties. A report of the interviews shall be placed in the investigation file. The report shall contain a statement of the allegations, a statement of facts, and an analysis of the complaint including a description of the care provided, the records reviewed and documentation by the investigator/inspector or board committee of its findings for action.

5.10. To facilitate the disposition of a complaint, the Board, the committee, or the investigator/inspector may request any person to attend an informal conference, or to appear at a regular meeting of the Board, at any time prior to the Board entering any order with respect to the complaint. The informal conference may be conducted in executive session during the normal course of a public meeting at the request of the "charged party" or the Board. The Board, the committee, or the investigator/inspector shall give notice of the conference, which notice shall include a statement of issues to be informally discussed. Statements made at a conference may not be introduced at any subsequent hearing on the merits. No prejudice shall attach for failure to attend a conference pursuant to a request.

5.11. Any member of the board or the executive secretary may issue subpoenas and subpoenas duces tecum to obtain testimony and documents to aid in the investigation of allegations.

5.12. At any point in the course of an investigation or inquiry into a complaint, the Board may determine that there is not and will not be sufficient evidence to warrant further proceedings, or that the

complaint fails to allege misconduct for which a licensee, limited permit holder or applicant may be sanctioned by the Board: Provided, that in the event the review and investigation of a complaint is assigned to the committee or an investigator/inspector, the committee or investigator/inspector shall make their respective findings and recommendations to the Board prior to the Board dismissing the complaint.

5.13. In the event probable cause is found by the Board upon vote after reviewing the recommendation of the investigator/inspector or board committee, the charged party has the right to a hearing and to be represented by counsel of their own choice and expense. The Board shall be represented by the West Virginia Attorney General's office.

5.14. Any charged party has the right to enter into a consent agreement with the Board prior to the final decision by the Board. The Board has the right to offer a consent agreement to a charged party prior to a final decision being made.

5.15. The Board may also initiate or consider stipulation or agreement proposals (consent agreement) with regard to the informal disposition of cases and may enter into such stipulations and/or agreements.

#### **§13-2-6. Emergency Action Matters.**

6.1. The Board may refuse to renew a license or suspend a license if it determines there is probable cause to believe that an occupational therapist, occupational therapy assistant, or limited permit holder's conduct, practices, or acts constitute an immediate danger to the public.

#### **§13-2-7. Hearing Procedure.**

7.1. Any licensee or limited permit holder who has had their license suspended by the Board pursuant to section 6 of this rule shall be entitled to a hearing on the action suspending such license within sixty (60) days of such suspension.

7.2. Any charged party who desires a hearing must present a written demand for such to the Board within thirty (30) days of receipt of decision by the Board.

7.3. When the chair 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 within sixty (60) days of receipt of such written demand, unless postponed to a later date by mutual written agreement.

7.4. Charges may be instituted against any licensee, limited permit holder or applicant by the Board when probable cause exists for believing that the licensee, limited permit holder or applicant 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 §30-28-16 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 further information gathered by the Board in the process of investigating such complaint. Charges may also be based upon information received solely through any investigative activities undertaken by the Board.

7.5. Charges instituted against a licensee, limited permit holder or applicant 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 occupational therapy. Such Complaint and Notice of Hearing shall designate the Board as the "Complainant", and shall designate the charged party 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; and shall state the date, time and place for the hearing.

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

7.7. 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 hearing.

7.8. Hearings shall be conducted as follows:

7.8.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.

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

7.8.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.

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

7.8.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.

7.8.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 or a permit.

7.8.g. The hearing shall be held at such time and place as is designated by the Board, but no hearing shall be conducted unless and until at least thirty (30) days written notice thereof has been served upon the charged 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.

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

7.8.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 testified.

7.8.j. The hearing shall be conducted by a quorum of the Board or the Board may elect to have an administrative law judge conduct the hearing.

7.8.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.

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

7.8.m. Where a hearing is held upon the instance of the Board after charges have been brought against a licensee pursuant to subsection 7.4 and 7.5 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.

7.8.n. Following the conclusion of the Board's presentation of evidence in accordance with subsection 7.8.m. of this section the respondent or charged party shall have the right to submit his or her evidence in defense.

7.8.o. Following the conclusion of the charged party's presentation of evidence, the Board shall have the right to offer its evidence in rebuttal.

7.8.p. 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, limited permit holder or applicant; may present such other evidence to support its position; and, may cross-examine witnesses called by the charged party in support of his or her position.

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

7.8.r. Hearings held by the Board as a result of charges instituted against a licensee, limited permit holder or applicant may be continued or adjourned to a later date or different place by the Board or its designee by appropriate notice to all parties.

7.8.s. 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. All motions for continuance filed prior to the date of hearing shall be ruled on by the Board chairperson or executive secretary of the Board.

7.8.t. All motions related to a case set for hearing before the Board, except motions for continuance, which rules set forth in subsection 7.8.s. of this section must be followed, 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. Prehearing motions shall be heard at a prehearing conference or at the hearing prior to the commencement of testimony. The Board member(s) presiding at the hearing shall hear the motions and the response from the non-moving party and shall rule on such motions accordingly.

#### **§13-2-8. Transcription of Testimony and Evidence.**

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

8.2. All reported materials shall be transcribed. The Board shall have the responsibility to make arrangements for the transcription of the reported testimony and evidence. Recorded testimony of the hearing shall be kept in the permanent record of the Board.

8.3. 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 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.

**§13-2-9. Submission of Proposed Findings of Fact and Conclusions of Law.**

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

9.2. If the hearing is conducted by an administrative law judge, the administrative law judge shall prepare a proposed written order at the conclusion of a hearing containing findings of fact and conclusions of law. The proposed order may contain proposed disciplinary actions if the board so directs. The board may accept, reject or modify the decision of the administrative law judge.

9.3. If, after a hearing, the board determines the licensee or permittee has violated any provision of W. Va. Code §30-28-1 or the board's rules, a formal written decision shall be prepared which contains findings of fact, conclusions of law and a specific description of the disciplinary actions imposed.

**§13-2-10. Depositions.**

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

**§13-2-11. Subpoenas.**

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

11.2. Written requests by a party for the issuance of subpoenas or subpoenas duces tecum as provided in subsection 11.1. 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 shall see that they are properly served in accordance with W. Va. Code §29A-5-1(b).

**§13-2-12. Orders.**

12.1. 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 sixty (60) 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.

12.2. The findings of fact and conclusions of law must be approved by a majority of the Board by vote at a Board 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 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.

**§13-2-13. Appeal.**

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

**§13-2-14. Procedures for Judicial Review.**

14.1. Any person adversely affected by a decision of the Board rendered after a hearing has the right to pursue judicial review as provided by W. Va. Code §29A-5-4.