

**WEST VIRGINIA
SECRETARY OF STATE**

JOE MANCHIN, III

ADMINISTRATIVE LAW DIVISION

Form #5

Do Not Mark In This Box

FILED

2002 FEB 15 P 2:55

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 Education TITLE NUMBER: 126

CITE AUTHORITY: W. Va. Constitution, Article XII, § 2, W.Va. Code §§6-9A-1, et seq., 18-2-5, 18-3-4, 18A-3-2a, and 18A-3-6.

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X
CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW
W.Va. Code §§ 29A-3B-1, et seq.; W.Va. Board of Education
v. Hechler, 180 W.Va. 451; 376 S.E.2d 839 (1988).

AMENDMENT TO AN EXISTING RULE: YES X NO _____

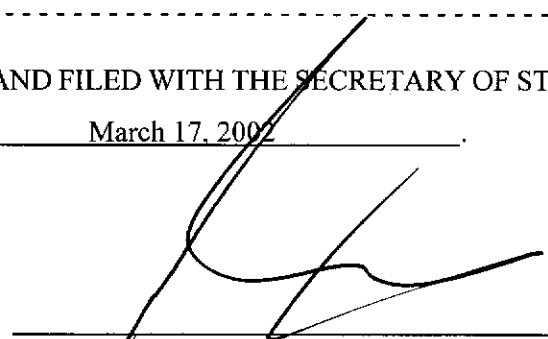
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 4

TITLE OF RULE BEING AMENDED: Rules of Procedure for Administrative Hearings and Appeals (1340)

IF NO, SERIES NUMBER OF NEW 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 March 17, 2002.



William J. Luff, Jr.
Deputy State Superintendent of Schools

SCANNED

**POLICY 1340
RULES OF PROCEDURE FOR
ADMINISTRATIVE HEARINGS AND APPEALS**

EXECUTIVE SUMMARY

Public Comment Period Ends: February 9, 2002

Background:

Policy 1340 was previously used to refer cases to the Professional Practice Panel for a recommendation to the State Superintendent regarding certification revocations and suspensions. This policy was previously out for comment and set for approval for revisions to make the denial for cause hearing process a parallel process to the revocation/suspension process. Just prior to the West Virginia State Board of Education meeting wherein the policy was to be approved, the West Virginia State Supreme Court issued a ruling indicating that our procedure was legally flawed.

Purpose:

Revisions to Policy 1340 are being recommended to centralize the language regarding hearings into one policy making the procedures for revocations, suspensions, and denials for cause identical and in conformance with the recent West Virginia Supreme Court opinion. This would permit the hearings to be conducted by the State Superintendent or his designee, an employee of the West Virginia Department of Education.

126CSR4
TITLE 126
PROCEDURAL RULE
BOARD OF EDUCATION

SERIES 4
RULES OF PROCEDURE FOR ADMINISTRATIVE
HEARINGS AND APPEALS (1340)

FILED

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GENE W. WEST VIRGINIA
SECRETARY OF STATE

§126-4-1. General.

1.1. Scope. - The "Rules of Procedure for Administrative Hearings and Appeals" are promulgated to assure procedural due process and expeditious processing of administrative proceedings before the State Superintendent of Schools. Nothing herein should be interpreted to give rise to an action on the part of any county school personnel; all remedies which are allowable by a county board of education or county school superintendent should be exhausted before appealing to the State Superintendent to hear a controversy. Employee grievances are governed by the provisions of West Virginia Code §18-29-1, *et seq.*

1.2. Authority. - W.Va. Const., Article XII, §2; W.Va. Code §§6-9A-1 et seq. 18-2-5, 18-3-4, 18A-3-2a, and 18A-3-6.

1.3. Filing Date. - February 15, 2002.

1.4. Effective Date. - March 17, 2002.

1.5. Repeal of Former Rule. This procedural rule repeals and replaces Legislative Rule WV 126CSR4 "Rules of Procedure for Administrative Hearings and Appeals" filed January 15, 1999 and effective February 15, 1999.

§126-4-2. Foreword.

2.1. This policy governs the disposition of all administrative proceedings as well as the hearing of appeals and the adjudication of controversies and disputes arising under school laws by the State Superintendent of Schools, including citizens' appeals under State Board Policy 7211.

§126-4-3. General Rules.

3.1. Definition of "Designee." As used in these rules, "Designee" shall mean that

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employee of the West Virginia Department of Education (WVDE) designated by the Superintendent to hear and determine issues pursuant to the terms and conditions of this policy.

3.2. Definition of "Superintendent." As used in these rules, unless a different meaning appears from the context, "Superintendent" shall mean the State Superintendent of Schools.

3.3. Definition of "Party." "Party" shall mean petitioner, respondent, and/or intervener. "Party" shall also mean teacher to the extent pertinent.

3.4. All parties shall receive notice at least ten (10) days prior to the hearing. The notice of hearing shall include:

3.4.1. the date, time and place of the hearing,

3.4.2. a concise statement of the purpose,

3.4.3. mention that either the Superintendent or a designee of the Superintendent shall conduct the hearing.

3.5. A copy of this policy shall be provided to the parties to the hearing.

3.6. Appearance Pro Se. Any person may either appear in person or be represented by a representative or an attorney at law admitted and authorized to practice in this State.

3.7. Authority of Superintendent. The Superintendent shall have authority to administer oaths and affirmations; examine witnesses and receive evidence; rule upon offers of proof; issue subpoenas; take or cause depositions to be taken whenever the ends of justice would, in the Superintendent's opinion, be served thereby; regulate the course of the hearing; and dispose of procedural requests or similar matters. The authority of the Superintendent shall extend to his/her designee in all cases arising under this policy when the matter is heard by the designee at the request of the Superintendent.

3.7.1. The Superintendent may also call witnesses and question them. The Superintendent may limit the number of witnesses who will be called, within reason, and may also limit the length of oral argument.

3.7.2. A hearing may be adjourned from one day to another or to another place either by announcement by the Superintendent at the hearing or by appropriate notice.

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3.7.3. The Superintendent may grant a continuance for good cause shown by the requesting party or upon his/her own motion.

3.8. Evidence. The formal rules of evidence shall be relaxed. Evidence will be admissible if it is material and relevant to the matter; however, irrelevant, immaterial or unduly repetitious evidence shall be excluded. All evidence, including any records, investigations, reports and documents which the Superintendent desires to consider as evidence in making a decision, shall be offered and made a part of the record in the proceeding. The Superintendent may take official notice of any fact which may be judicially noticed by a Court and, in addition, may take official notice of general, technical or scientific facts within the Superintendent's knowledge. Parties may be given a fair opportunity to refute the facts so noticed. The requirements of this rule shall not apply to cases in which the truth of the particular fact or matter is admitted or to a determination of appropriate relief.

3.9. Stenographic Transcript. Where there is available a stenographic transcript of proceedings before a county board of education, or before any court of record or other official or body whose action is called into question before the Superintendent, either party may, if at least ten (10) days' notice of intention to do so has been given to opposing parties or counsel, offer the transcript of testimony of any witness or witnesses named in said notice in lieu of producing said witness or witnesses at the hearing.

3.10. Briefs and Oral Argument. All parties shall have the opportunity to submit briefs on the matter, and to present oral argument if requested. Oral argument shall be limited to thirty (30) minutes for each party, unless the Superintendent shall otherwise order. Briefs, if any, shall be submitted within the time fixed by the Superintendent.

3.11. Failure to Cooperate. The Superintendent, on his or her own initiative or at the request of the designee, may institute judicial proceedings for punishment of persons for contemptuous conduct directed to the Superintendent or the designee, in the course of a proceeding.

3.12. Written Decision. Every determination shall be embodied in a written decision which shall contain both findings of fact and conclusions of law and an appropriate recommended order. Such decisions shall be issued by the Superintendent's designee. Upon receipt of the recommended order with findings and conclusions from such designee, the Superintendent shall review the same along with the record and issue an order adopting the findings, conclusions, and/or recommendations of the designee; rejecting the findings, conclusions and/or recommendations of the designee; or remanding the matter back to the designee with instructions for further evidence or findings, conclusions and/or recommendations. When the case is heard directly by the Superintendent, the Superintendent shall issue both a written decision, which shall set forth findings of fact and conclusions of law, and an appropriate order. Said orders shall be filed in the office of the

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Superintendent and copies thereof shall be served or mailed to the parties of record affected thereby or their attorneys of record within thirty (30) days following the Superintendent's receipt of any recommendation from his or her designee or within thirty (30) days following the hearing when heard directly by the Superintendent.

3.13. Waiving of Rules. Any of the provisions of these rules relating to the presentation of his/her case or argument may be waived by any party or his/her attorney.

3.14. Hearings shall be recorded by electronic means or by a court reporter.

§126-4-4. Rules for Hearings on Certification Suspension/Revocation/Denial for Cause.

4.1. Definition of "Hearing Officer." As used in these rules, unless a different meaning appears from the context, "Superintendent Hearing Officer" shall mean the State Superintendent of Schools, or ~~that person assigned a WVDE employee designated by the Superintendent to hear and determine issues of teaching certificate suspension and/or revocation and/or denial for cause.~~

4.2. Definition of "Teacher." As used in these rules, the word "Teacher" (and its derivatives) shall mean any person certified or otherwise professionally licensed by the Superintendent pursuant to policy, rule, or regulation of the West Virginia Board of Education or pursuant to statute, including but not limited to administrators, professionals, paraprofessionals, coaches, and holders of service certificates.

4.3. Definition of "Applicant." As used in these rules, the word "Applicant" (and its derivatives) shall mean any person applying for a teacher license issued by the Superintendent pursuant to policy, rule, or regulation of the West Virginia Board of Education or pursuant to statute.

4.4. Definition of "Party." "Party" shall mean petitioner, respondent, and/or intervener. "Party" shall also mean teacher to the extent pertinent.

4.5. Definition of "Suspension." "Suspension", as used in these rules, shall mean a temporary revocation imposed for a fixed and definite period of time. After a period of suspension has expired, the affected individual must reapply for licensure.

4.6. Grounds for Revocation or Suspension of Certificates. The Superintendent may, after ten (10) days' notice and upon proper evidence, revoke or suspend the certificate(s) of any teacher for drunkenness, untruthfulness, immorality, or for any physical, mental or moral defect which would render him/her unfit for the proper performance of his or her duties, or for any neglect of duty or refusal to perform the same, or for using fraudulent, unapproved, or insufficient credit; or for any other cause which

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would have justified the withholding of a certificate when the same was issued. (West Virginia Code §§18A-3-2a, 18A-3-6)

4.7. Grounds for Denial of Licensure for Cause. A certificate shall not be issued to any person who is not of good moral character and physically, mentally, and emotionally qualified to perform the duties for which the certification would be granted or for any other cause which would justify the revocation or suspension of certification. (West Virginia Code §§18A-3-2a, 18A-3-6)

4.8. Duty of County Superintendent. It shall be the duty of any county superintendent who knows of any immorality or neglect of duty on the part of any teacher, including student teachers, to report the same, together with all the facts and evidence, to the Superintendent for such action as may be proper. In the case of a student teacher, the county superintendent must also send the report to the appropriate teacher preparation institution. Failure to report such information, if willful, may be grounds for revocation of the certificate of the county superintendent.

4.9. Recalling Certificates for Correction. If a certificate has been granted through an error, oversight, or misinformation, the Superintendent shall have authority to recall the certificate and make such corrections as will conform to the requirements of law and State Board of Education policy.

4.10. Teaching Certificate Revocation and Suspension Proceedings; Notice. Teaching certificate revocation proceedings shall be conducted before the Hearing Officer. The teacher shall receive notice ten (10) days prior to the hearing.

4.10.1. The notice shall include:

- a. the date, time and place of the hearing,
- b. a concise statement of the charges,
- c. indicate that the Superintendent or his/her designee shall conduct the hearing, and
- d. the possible actions to be taken against the certificate of the teacher.

4.10.2. Upon timely request by the teacher, a more definite statement of the charges shall be received by the teacher at least ten (10) days prior to the hearing.

4.10.3. Appearance Pro Se. Any person may either appear in person with or without a representative or an attorney at law admitted and authorized to practice in this

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State.

4.11. Denial for Cause Proceedings. Denial for cause proceedings shall be conducted before the Hearing Officer. The applicant may submit a written request for an appeal hearing within thirty (30) days of notification of a recommendation of a denial for cause from the Office of Professional Preparation. If no such hearing request is timely received, the application may be denied for cause by the Superintendent. If an appeal hearing request is received, the applicant shall receive notice ten (10) days prior to the hearing.

4.11.1. The notice shall include:

a. the date, time and place of the hearing,

b. a concise statement of the reasons for the denial recommendation,
and

c. indicate that the Superintendent or his/her designee shall conduct the hearing as the Hearing Officer.

4.11.2. Appearance Pro Se. Any person may either appear in person with or without a representative or attorney at law admitted and authorized to practice in this State.

4.12. Hearing on Teaching Certification. A teaching certificate suspension, revocation, or denial for cause hearing is a continuation of the Superintendent's investigation into whether a professional teaching or administrative certificate or lesser license, a paraprofessional certificate or lesser license, a service certificate or lesser license, or a coaching certificate or lesser license should be suspended, revoked or denied for cause.

4.12.1. A teaching certificate suspension, revocation or denial for cause hearing shall be open to the public, unless the teacher or applicant requests that it be closed.

4.12.2. The purpose of a teaching certificate suspension, revocation or denial for cause hearing is to allow the teacher or applicant due process regarding the asserted causes for revocation, suspension, or denial of the teaching certificate. The teacher or applicant may present his or her position through presentation of evidence, examination and cross-examination of witnesses, and oral argument.

4.12.3. The Hearing Officer may also call witnesses and question them, as well as those called by the teacher or applicant. The Hearing Officer may limit the number

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of witnesses who will be called, within reason, and may also limit the length of oral argument.

4.12.4. A hearing may be adjourned from one day to another or to another place either by announcement by the Hearing Officer at the hearing or by appropriate notice.

4.12.5. The Superintendent or his or her designee may grant a continuance for good cause shown by the requesting party or upon his/her own motion.

4.13. Authority of Hearing Officer. The Hearing Officer shall have authority to administer oaths and affirmations; examine witnesses and receive evidence; rule upon offers of proof; issue subpoenas; take or cause depositions to be taken whenever the ends of justice would, in the Hearing Officer's opinion, be served thereby; regulate the course of the hearing; and dispose of procedural requests or similar matters.

4.13.1. The Hearing Officer shall have authority to recommend that a teacher's certificate be revoked, suspended, or denied for cause by the Superintendent.

4.14. Evidence. The formal rules of evidence shall be relaxed. Evidence will be admissible if it is material and relevant to the matter before the Hearing Officer; however, irrelevant, immaterial or unduly repetitious evidence shall be excluded. All evidence, including any records, investigations, reports and documents which the Hearing Officer desires to consider as evidence in making a decision, shall be offered and made a part of the record in the proceeding. The Hearing Officer may take official notice of any fact which may be judicially noticed by a Court and, in addition, may take official notice of general, technical or scientific facts within the Hearing Officer's knowledge. Parties may be given a fair opportunity to refute the facts so noticed. The requirements of this rule shall not apply to cases in which the truth of the particular fact or matter is admitted, or to a determination of appropriate relief. Revocation, suspension, or other action against the certificate of a teacher in another jurisdiction or refusal by another jurisdiction to issue a teacher certificate shall be *prima facie* evidence of grounds for revocation, suspension, denial for cause or other action against the certificate in West Virginia.

4.15. Stenographic Transcript. Where there is available a stenographic transcript of proceedings before a county board of education, or before any court of record or other official or body concerning issues which form or support the basis for the hearing before the Hearing Officer, either party may provide to the Hearing Officer and the other party copies of said transcripts to be used as substantive evidence in the proceedings. The transcript of testimony of any witness or witnesses may be used in lieu of producing said witness or witnesses at the hearing. The use of transcripts may also be directed by the Hearing Officer in the interest of time.

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4.16. Briefs and Oral Argument. All parties shall have the opportunity to submit briefs on the matter, and to present oral argument if requested. Oral argument shall be limited to thirty (30) minutes for each party, unless the Hearing Officer shall otherwise order. Briefs, if any, shall be submitted within the time fixed by the Hearing Officer.

4.17. Failure to Participate. Upon failure of a teacher or applicant to contest the asserted causes for revocation of a certificate or lesser license or for the denial for cause of a certificate or lesser license, or upon failure of a party respondent to appear and defend against the petitioner's claims, all of the allegations/claims duly made may be accepted by the Hearing Officer as confessed.

4.18. Failure to Cooperate. The Superintendent, on his or her own initiative or at the request of the designee, may institute judicial proceedings for punishment of persons for contemptuous conduct directed to the Hearing Officer in the course of a proceeding.

4.19. Written Decision. Every decision of the Hearing Officer shall be embodied in a written recommendation which shall contain both findings of fact and conclusions of law and an appropriate recommended order. Such written decisions shall be issued by the Hearing Officer to the Superintendent. An appropriate Order setting forth a decision regarding revocation of certification, denial for cause or other action shall be issued by the Superintendent. The Order shall either adopt the recommendation of the Hearing Officer or contain a factual or legal basis for varying from the recommendation of the Hearing Officer. When the case is heard directly by the Superintendent, the Superintendent shall issue a written decision which shall set forth the findings of fact and conclusions of law and an appropriate order. Said Orders shall be filed in the office of the Superintendent and copies thereof shall be served or mailed to the parties of record affected thereby or their attorneys of record within thirty (30) days following the receipt of the recommendations by the Superintendent or within thirty (30) days of the hearing if the same was conducted by the Superintendent.

4.20. Waiving of Rules. Any of the provisions of these rules relating to the presentation of his/her case or argument may be waived by any party or his/her attorney.

4.21. Hearings shall be recorded by electronic means or by a court reporter.

§126-4-5. Other Hearings.

5.1. Hearing on Removal of a School Official. Hearings conducted for removal of a county school official shall be conducted following the general rules in §126-4-3 of this policy.

§126-4-6. Appeal to Circuit Court.

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6.1. Any party not satisfied with the decision rendered by the Superintendent or his or her designee may appeal the same to the Circuit Court within 30 days of mailing of the order to the last known address of the party.

6.2. Upon the West Virginia Department of Education's receipt of notice of an appeal, a transcript of the proceedings held in accordance with the provisions of this policy shall be forwarded to all named parties at the expense of the West Virginia Department of Education.

§126-4-7. Severability

7.1. If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this rule.

FISCAL NOTE WORKSHEET
(Submit 4 Copies)

HD NO _____ DRAFT NO _____ BILL NO _____ RESOLUTION NO _____

SUBJECT Policy 1340: Rules of Procedure for Administrative Hearings and Appeals FUND _____

SOURCE OF REVENUE: GENERAL FUND SPECIAL OTHER (SPECIFY) _____

COST OF ESTIMATE BASED ON: AN ORIGINAL ESTIMATE BUDGET BILL OTHER (SPECIFY) _____

INCOME ESTIMATE BASED ON: AN ORIGINAL ESTIMATE BUDGET BILL OTHER (SPECIFY) _____

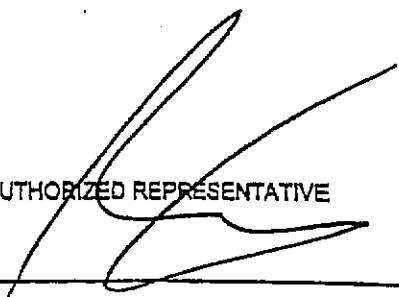
SHOW OVER-ALL EFFECT IN ITEMS 1 AND 2 & GIVE EXPLANATION OF BREAKDOWN BY FISCAL YEAR INCLUDING LONG-RANGE EFFECT

EFFECT OF PROPOSAL	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT 97-98	THEREAFTER
1. ESTIMATED TOTAL COST	\$ -0-	\$ -0-	\$ -0-	\$ -0-	\$ -0-
PERSONAL SERVICES CURRENT EXPENSES REPAIRS/ALTERATIONS EQUIPMENT OTHER	\$	\$	\$	\$	\$
2. ESTIMATED TOTAL REVENUES	\$ -0-	\$ -0-	\$ -0-	\$ -0-	\$ -0-

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

DATE
August 31, 2001

AGENCY
West Virginia Department of Education

AUTHORIZED REPRESENTATIVE


POLICY 1340: RULES OF PROCEDURE FOR ADMINISTRATIVE HEARINGS AND APPEALS

WV Board of Education approved for Comment January 9, 2002
 Comment Period ends February 9, 2002

<u>Action</u>	<u>Type</u>
N No Response	-Negative
NA Not Accepted	+Positive
A Accepted	oNeutral

Date	Individual/Organization	Comments	Action/ Type	Rationale
1/23/02	Basil Legg via e-mail General Counsel Harrison County Schools 408 E/B/ Saimders Wau C;arlsbirg. WV 26302	<p>126-4-1 - The reference to the Open Governmental Meetings Act as the source of authority for this policy seems to be in error. The section referenced contains exceptions to the Act but does not contain authorizing language to authorize the State Board to adopt this policy.</p> <p>126-4-2 - None</p> <p>126-4-3 - Superintendent is defined as including that person designated to hear and determine issues. Unfortunately, the State Superintendent of Schools is a creation of the Constitution (Art. XII Section 2) and the Legislature (W.Va. Code 18-3-1). The State Board has no authority to re-define who the State Superintendent is as including anyone other than whom the Constitution and the Legislature says he/she is.</p>	<p>NA/+</p> <p>N/o</p> <p>A/+</p>	<p>Reference to §6-9A-4 has been removed and replaced with §6-9A-1, et. seq. The Act applies to these types of hearings and the teacher has the right to request that the hearing be open.</p> <p>The definition of Designee has been inserted at section 3.1 of the revised policy.</p>

Date	Individual/Organization	Comments	Action/ Type	Rationale
	Legg Continued Page 3	<p>4.6 This is a long needed and appropriate revision.</p> <p>4.9 Does the "designee" or the "Hearing Officer" conduct these hearings, or are they one and the same?</p> <p>4.10 A provision should be asserted requiring a new notice to be sent after any continuance of the original hearing date with the new date and time and with at least ten days new notice.</p> <p>4.13 Same language regarding "relaxed" Rules of Evidence. See 3.7 comments, above.</p> <p>4.17 Where is the legal authority for the State Board to give someone the power to institute judicial proceedings? The State Superintendent has that authority pursuant to 18-3-4 but the State Board has no such grant of Legislative authority.</p> <p>4.18 Is the "Hearing Officer" to issue recommended decisions or decisions? This question relates to the comments regarding section 126-4-3, above.</p> <p>4.20 A provision should be added to provide copies of the hearing or transcripts to the teacher, upon request.</p>	<p>N/o</p> <p>N/o</p> <p>NA/-</p> <p>NA/-</p> <p>A/+</p> <p>N/o</p> <p>A/+</p>	<p>Explanation is contained in section 4.1 of the revised policy.</p> <p>The policy contains adequate notice provisions.</p> <p>The policy fully explains the limited application of the Rules of Evidence at these hearings.</p> <p>The section has been changed to reflect that the Hearing Officer recommends that the Superintendent institute the hearings.</p> <p>The duties of the Hearing Officer regarding the decision are set forth in the section (4.18).</p> <p>A provision regarding transcripts has been added in section 6.2 of the revised policy. A transcript will be provided to all parties by the WWDE upon receipt of notice of an appeal.</p>

Date	Individual/Organization	Comments	Action/ Type	Rationale
2/11/02	WV Federation of Teachers	<p>Recently, the State Board of Education issued proposed rules of procedure for administrative hearings and appeals. The Board further set February 9, 2002, as the deadline for receipt of public comment. Based upon a review of the proposed procedural rule, the West Virginia Federation of Teachers offers the following comments:</p> <p>(1) The proposed rule violates the requirement of the West Virginia Administrative Procedures Act that all administrative hearings be conducted in an impartial manner because the hearing procedure, as proposed, places the "hearing officer" in the position of presenting the case of the Department and making a final decision on the matter. This violates the due process rights of the teacher who appears before the hearing officer.</p> <p>(2) The proposed rule exceeds the statutory authority granted to the State Superintendent by expanding the statutory grounds for the non-renewal of a teaching certificate in contravention of W.Va. Code §18A-3-3.</p> <p>(3) The proposed rule violates established concepts of due process.</p>		

Marlene Price

From: Rebecca Tinder [rtinder@access.k12.wv.us]
Sent: Wednesday, January 23, 2002 12:28 PM
To: Marlene Price
Subject: FW: Proposed Amendments to Policy 1340

-----Original Message-----

From: Basil Legg [mailto:blegg@access.k12.wv.us]
Sent: Wednesday, January 23, 2002 11:00 AM
To: rtinder@access.k12.wv.us
Subject: Proposed Amendments to Policy 1340

Please accept the attachment hereto as my comments regarding the proposed changes to Policy 1340. Sincerely, Basil R. Legg, Jr. General Counsel Harrison County Schools 408 E. B. Saunders Way Clarksburg, WV 26302. Also, could you please confirm receipt of this e-mail and the attachment via return e-mail. Thanks, Basil Legg

COMMENTS REGARDING PROPOSED AMENDMENTS TO POLICY 1340

126-4-1 – The reference to the Open Governmental Meetings Act as the source of authority for this policy seems to be in error. The section referenced contains exceptions to the Act but does not contain authorizing language to authorize the State Board to adopt this policy.

126-4-2 – None

126-4-3 - Superintendent is defined as including that person designated to hear and determine issues. Unfortunately, the State Superintendent of Schools is a creation of the Constitution (Art. XII Section 2) and the Legislature (W.Va. Code 18-3-1). The State Board has no authority to re-define who the State Superintendent is as including anyone other than whom the Constitution and the Legislature says he/she is.

Under 126-4-4 the person who hears cases is referred to as “Hearing Officer”. This section includes “Superintendent” as this person. This seems to be inconsistent usage. Is “Hearing Officer, designee and “Superintendent” all the same person?

Also, the amendment deletes the authority of the Superintendent’s designee to take any action but later in the policy the Superintendent’s designee, is this the same person as the “Hearing Officer”, must hear cases. Which is it?

3.7 There is no meaning to the concept of “relaxing” the Rules of Evidence. Either the Rules apply or they do not apply. For these hearings, the Rules of Evidence should not apply and the Rules should make this clear. If the Rules apply Section 4.14 regarding stenographic transcripts is in trouble.

126-4-4 – “Hearing Officer” should be defined in the definition section.

4.5 There is no legal authority for the State Superintendent to “suspend” certificates. 18-3-6 authorizes only revocation of licenses, not suspension. A bill should be introduced to give the Superintendent this authority, but without it, the authority does not exist.

4.6 This is a long needed and appropriate revision.

4.9 Does the “designee” or the “Hearing Officer” conduct these hearings, or are they one and the same?

4.10 A provision should be asserted requiring a new notice to be sent after any continuance of the original hearing date with the new date and time and with at least ten days new notice.

4.13 Same language regarding “relaxed” Rules of Evidence. See 3.7 comments, above.

4.17 Where is the legal authority for the State Board to give someone the power to institute judicial proceedings? The State Superintendent has that authority pursuant to 18-3-4 but the State Board has no such grant of Legislative authority.

4.18 Is the “Hearing Officer” to issue recommended decisions or decisions? This question relates to the comments regarding section 126-4-3, above.

4.20 A provision should be added to provide copies of the hearing or transcripts to the teacher, upon request.

126-4-6 – This provision should comply with the decision of the West Virginia Supreme Court of Appeals in the **Scott v Stewart** case. This ruling states that certiorari is also available as a means of obtaining judicial review of these decisions.

 **West Virginia
Federation
of Teachers** AFL-CIO

1010 LEWIS STREET
CHARLESTON, WV 25301
PHONE (304) 344-2679
(800) 222-WVFT
FAX (304) 345-5955
WEB SITE: <http://www.wvft.org>

Executive Board

Judy Hale
President

Cynthia Phillips
Vice President

Beth Kitzmiller
Secretary

Tony Lautar, Jr.
Treasurer

David Anderson

Joe Bennett
Delores Campbell
Debra Carte

Jonathan Escue

Ginger Kellogg

Alex Laska

Mary Ann Osborne

Kenny Stultz

February 8, 2002

Dave Stewart, Superintendent
WV Department of Education
Capitol Building 6, Room 358
1900 Kanawha Boulevard, East
Charleston, WV 25305

RE: Board of Education's Proposed Rule Changes
Policy 1340

Dear Dr. Stewart:

Enclosed for your consideration and use is a summary and analysis of the Department's recently announced proposed rule changes with regard to Policy 1340.

With best personal regards, I am

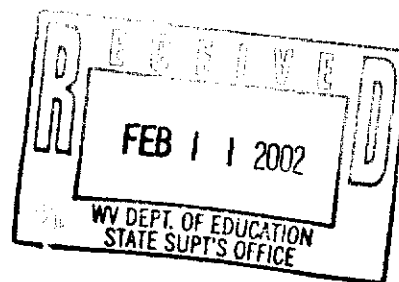
Very truly yours,



Judy Hale

JH/bh

cc: Board Members



Comments of the WVFT with regard to the Proposed Procedural Rule of the West Virginia

Department of Education:

“Rules of Procedure for Administrative Hearings and Appeals,” 126 C.S.R. Series 4

Recently, the State Board of Education issued proposed rules of procedure for administrative hearings and appeals. The Board further set February 9, 2002, as the deadline for receipt of public comment. Based upon a review of the proposed procedural rule, the West Virginia Federation of Teachers offers the following comments:

- (1) The proposed rule violates the requirement of the West Virginia Administrative Procedures Act that all administrative hearings be conducted in an impartial manner because the hearing procedure, as proposed, places the “hearing officer” in the position of presenting the case of the Department *and* making a final decision on the matter. This violates the due process rights of the teacher who appears before the hearing officer.
- (2) The proposed rule exceeds the statutory authority granted to the State Superintendent by expanding the statutory grounds for the non-renewal of a teaching certificate in contravention of W. Va. Code § 18A-3-3.
- (3) The proposed rule violates established concepts of due process.

A more thorough discussion of these issues and suggested solutions follows in the attached memorandum.

Memorandum in Support of Comments of the WVFT with regard to the Proposed Procedural

Rule of the West Virginia Department of Education:

“Rules of Procedure for Administrative Hearings and Appeals,” 126 C.S.R. Series 4

(1) The proposed rule violates the requirement of the West Virginia Administrative Procedures Act that all administrative hearings be conducted in an impartial manner because the hearing procedure, as proposed, places the “hearing officer” in the position of presenting the case of the Department *and* making a final decision on the matter. This violates the due process rights of the teacher who appears before the hearing officer.

The West Virginia Administrative Procedures Act provides in pertinent part,

“All hearings shall be conducted in an impartial manner.”

W. Va. Code § 29A-5-1(d).

As currently written and as will be discussed more thoroughly below, the proposed “Rules of Procedure for Administrative Hearings and Appeals,” fail to comport with this statutory requirement.¹ The portions of the sections are sections 126-4-3 and 126-4-4.

Generally, these sections fails to distinguish between the role of the hearing examiner and the role of a quasi-prosecutor or advocate for the State. *Nothing* in this rule requires the Department to have an advocate that is separate and apart from the hearing examiner. Nor

¹This rule is issued in the wake of December 12, 2001, decision of the West Virginia Supreme Court of Appeals in *Scott v. Stuart*, slip opinion 29772 (September, 2001) in which the Court, in part, determined that the use of a “Professional Practice Panel” by the Department of Education in certification hearings was contrary to law. In apparent response to that decision the Department has generally removed any reference to “Professional Practice Panel” and “Licensure Appeal Panel” and has replaced the with references to a “hearing officer.” Although this revision to the rule may address the specific matter raised in the *Scott* decision, it fails to address certain other problems dealing with basic issues of fairness and due process in the conduct of hearings involving the fundamental rights of teachers. These issues are addressed herein.

does the rule separate Department personnel who have participated in a decision from the personnel who will hear the teachers case. Instead, the rule specifically empowers the hearing examiner to also act as the advocate for the Department and permits the superintendent to assign a hearing officer who may have participated in the decision-making process. The following discussion addresses these issue with regard to Rules § 126-4-3 et seq (General Rules) and § 126-4-4 et seq (Hearing for Certification, Revocation, Denial for Cause). These sections are nearly identical and, therefore, exhibit the same deficiencies.

Proposed rule 126 C.S.R. Series 4, 3.6 provides as follows:

Authority of Superintendent ~~or his or her designee~~. The Superintendent ~~or his or her designee~~ shall have authority to administer oaths and affirmations; examine witnesses and receive evidence; rule upon offers of proof; issue subpoenas; take or cause depositions to be taken whenever the ends of justice would, in the Superintendent's ~~or his or her designee~~ opinion, be served thereby; regulate the course of the hearing; and dispose of procedural requests or similar matters.

The authority of the Superintendent is then potentially delegated to a "Hearing Officer" which is defined as follows:

As used in these rules, unless a different meaning appears from the context, "~~Superintendent~~ Hearing Officer" shall mean the State Superintendent of Schools, or ~~that person assigned a WVDE employee designated~~ by the Superintendent to hear and determine issue of teaching certificate suspension and/or revocation.

126 C.S.R. Series 4, 4.1.

When read in *pari materia*, proposed rules 4.1 and 3.6 place the Superintendent or hearing officer in the role of a true administrative law judge or hearing examiner. When these

rules are read in conjunction with proposed rule 4.11.3, it becomes abundantly clear that the Superintendent's designee will also be presenting the Superintendent's case -- while *maintaining the authority to rule on the ultimate outcome of the case (not to mention all evidentiary matters)*. Proposed rule 4.11.3 provides as follows:

The ~~Superintendent~~ Hearing Officer may also call witnesses and question them, as well as those called by the teacher or applicant. The Chair of the Professional Practice Panel or Licensure Appeal Panel Hearing Officer may limit the number of witnesses who will be called, within reason, and may also limit the length of oral argument.

This rule directly contradicts the provisions of the Administrative Procedures Act, W. Va. Code § 29A-5-1(d) provides in pertinent part:

All hearings shall be conducted in an impartial manner. The agency, any member of the body which comprises the agency, or any hearing examiner or other person permitted by statute to hold any such hearing for such agency, and duly authorized by such agency so to do, shall have the power to: (1) Administer oaths and affirmations, (2) rule upon offers of proof and receive relevant evidence, (3) regulate the course of the hearing, (4) hold conferences for the settlement or simplification of the issues by consent of the parties, (5) dispose of procedural requests or similar matters, and (6) take any other action authorized by a rule adopted by the agency in accordance with article three . . . of this chapter.

[emphasis supplied]

As drafted, the Board's proposed rule does not provide for an "impartial hearing.

Furthermore, nothing in this provision permits the hearing officer to also present the case of the agency. Indeed, this provision clearly calls for the hearing officer to act as an administrative law judge; not judge, jury and prosecutor.² Nor does this provision protect the

² The Department may assert that the last portion of this section permits it to pass a legislative rule that would allow such unfettered authority -- as it has done in the

due process rights of the teacher.³ These issues can be addressed and due process concerns satisfied by incorporating the following concepts in the proposed rule:

1. Separate the role of advocate and hearing officer by requiring that the Department provide a representative -- lay employees of the Department, in-house counsel, or representative from the Office of the Attorney General.⁴
2. Appoint a hearing examiner that has the role of an administrative law judge, without the duties of an advocate. In other words, authorize the hearing officer to hear the evidence, rule on objections, and issue a recommended decision. Do

instant case. Because this rule directly contradicts the requirement that the hearing be held in an "impartial manner," it exceeds the authority granted by W. Va. Code § 29A-5-1(d).

³In a typical hearing where the due process rights of the litigants are protected, the hearing examiner functions independently of the two parties; that is, the hearing examiner will be unfamiliar with the issues presented by the case unless *both* parties have had an opportunity to present positions on pre-hearing matters; each party will be responsible for preserving objections by making them on the record and the hearing examiner will then be expected to rule on them after hearing argument from *both parties*; the parties will be responsible for selecting and presenting their own evidence and witnesses that they believe will prove their respective cases. As the procedure is presented in this rule, none of these safeguards exist. First, it is possible -- indeed likely -- that the hearing examiner will come to the hearing having a familiarity with the facts and law *from the perspective of the Department*. In fact, as previously noted, nothing in this proposed rule prevents the Department from appointing a hearing officer who *participated* in the investigation leading to a determination that a hearing should be held.

Second, it is likely that the objections of the teacher or his or her representative will not be granted the comity that due process dictates if the advocate for the state also serves as the hearing examiner. Simply put, one of advocates in the matters is granted the authority of the hearing officer. While it may be possible for an advocate to wear both hats, its seems highly unlikely that the teacher will get a fair hearing. At a minimum, this dynamic creates a significant appearance of unfairness.

Third, there will be an inherent bias on the part of the hearing officer to favor his case -- not only for the foregoing reasons, but because he or she has selected the evidence to be presented on behalf of the State.

⁴Other agencies provide such safeguards. In note for example, that the Procedural Rule for the West Virginia Board of Medicine, II C.S.R. 3, provides that the Board may ask the office of the Attorney General to represent it in its hearings to present the case of the Department.

not, however, place the hearing officer in the position of an advocate as well.

3. Shield the hearing officer from the deliberative process that occurs prior to the hearing. This will insure that the hearing officer is not predisposed to -- or, perhaps, personally vested -- in a particular outcome of the case. This can be most easily achieved where the agency hires an attorney working outside of the Department of Education to hear the matter.⁵

With such safeguards in place, greater protection is provided to the due process rights of the teacher.

(2) The proposed rule exceeds the statutory authority granted to the State Superintendent by expanding the statutory grounds for the non-renewal of a teaching certificate in contravention of W. Va. Code § 18A-3-3.

In addition to the issues raised above, proposed rule 4.6 exceeds the statutory authority of the Superintendent with regard to non-renewal or denials of an application for certification. Rule 4.6 attempts to vest the Superintendent with authority to deny an application for certification that is not present in W. Va. Code § 18A-3-1 et seq. A review of the statutory grounds for the issuance, non-renewal and revocation of a teaching certificate is necessary.

First, W. Va. Code § 18A-3-2a provides the grounds for denial of an application for a teaching certificate. This section indicates in pertinent part:

In accordance with the state board of education rules for the education of professional educators adopted after consultation with the secretary of education and the arts, the state superintendent of schools may issue certificates valid in public schools of the state, Provided: That a certificate shall not be issued to any person who is not a citizen of the United States, is not of good moral character and physically, mentally and emotionally qualified to perform

⁵Again, the West Virginia Board of Medicine Procedural Rule, 11 C.S.R. 3, includes safeguards to avoid such conflicts. For example, 11 C.S.R. 3, 11.5 (a) provides that a member of the board who testifies at a hearing "shall" not participate in the decision.

the duties for which the certification would be granted and who has not attained the age of eighteen years on or before the first day of October of the year in which the certificate is issued.

Pursuant to this statute, an *initial* application for a teaching certificate may only be denied for the following reasons:

- (1) the applicant is not a citizen of the United States;
- (2) the applicant is not of good moral character and physically, mentally and emotionally qualified to perform the duties for which the certification would be granted; or
- (3) the applicant will not be eighteen years of age prior to October one in the year in which the certificate would be issued.

Once an application is issued, W. Va. Code § 18A-3-3 provides that certification *shall* be renewable provided the certificate holder:

- (1) Files application on a prescribed form with the state department of education;
- (2) presents an official transcript of six semester hours of approved credit, as may be prescribed by the state board: Provided, That such renewal is completed after the beginning of the period of validity of the certificate to be renewed and within the five-year period immediately preceding the date of application for renewal;
- (3) successfully completes a beginning teacher internship program, if applicable; and
- (4) submits a recommendation based on successful teaching experience from the county superintendent of schools of the county in which the holder last taught or resides.

Moreover, W. Va. Code §18A-3-3 further provides that:

The holder of a professional certificate, valid for five years, shall have the certificate made permanent upon meeting either of the following requirements:

- (1) Completion of the second renewal, in accordance with the provisions set forth in (2) above;
- (2) after five years of service in the public schools, presentation of a transcript showing the completion of requirements for a

master's degree from an institution of higher education accredited to offer the master's degree and in a program relevant to the public school program or completes the fifth year of training leading to a bachelor's degree in library science from a school fully approved by the American library association.

Based upon the foregoing statute, a certificant may only be denied renewal if he or she fails to meet one of the specific criteria set forth above. If the certificant meets the qualifications set forth above, the statute mandates that the certificate "shall" be renewed. Nothing in this statute provides that the grounds for revocation under W. Va. Code § 18A-3-6 shall also function as grounds for denial of an initial or renewal certificate.

Thus, W. Va. Code § 18A-3-3 cabins the circumstances under which a certificant may be denied renewal. Only where the applicant fails to meet one of the circumstances set forth above will the Department have "cause" for non-renewal. Indeed, W. Va. Code § 18A-3-3 contemplates a permanent certificate after 5 years upon either completion of a second renewal or completion of a Master's degree.

Once a teacher has met the qualifications set forth in W. Va. Code § 18A-3-3 or been awarded a permanent certificate as set forth in Paragraph 2 of that section, the right to teach pursuant to that certificate may only be removed by expiration of the certificate pursuant to W. Va. Code § 18A-3-2 or by a revocation proceeding pursuant to W. Va. Code § 18A-3-6.

The grounds for revocation of a certificate are as follows:

The state superintendent may, after ten days' notice, and upon proper evidence, revoke the certificates of any teacher for drunkenness, untruthfulness, immorality, or for any physical, mental or moral defect which would render him unfit for the proper performance of this duties

as a teacher, or for any neglect of duty or refusal to perform the same, or for using fraudulent, unapproved, or insufficient credit, or for any other cause which would have justified withholding of a certificate when the same was issued. Nothing in this section states that the grounds for revocation may also be used for grounds for a non-renewal or denial of an initial certification.

Proposed Rule 4.6 provides as follows:

Grounds for Denial of Licensure for Cause: A certificate shall not be issued to any person who is not of good moral character and physically, mentally, and emotionally qualified to perform the duties for which the certification would be granted or for any other cause which would justify the revocation or suspension of certification.

[bold emphasis supplied]

As discussed above, W. Va. Code § 18A-3-3 sets for the grounds for renewal of a certificate. Nothing in that provision authorizes the Superintendent to deny an initial or renewal certification application for "cause which would justify revocation or suspension of certification."⁶ Thus, this Rule exceeds the statutory authority granted by W. Va. Code §§ 18A-3-2a and 3.

(3) The proposed rule violates established concepts of due process.

As currently written, Proposed Rule 4.6 not only exceeds the statutory authority for

⁶It appears that the Department has used the term "for cause" as a basis to generally extend the grounds for non-renewal. Nothing in the pertinent statutory provisions allows for this. W. Va. Code § 18A-3-3, refers to "just cause" only in the context of whether a County Superintendent has improperly denied a recommendation. Nothing in this section, permits an expansion of the grounds for non-renewal to those provided for revocation. It should be noted that the Department has also amended its "Policy 5202: Minimum Requirements for the Licensure of Professional/Paraprofessional Personnel and Advanced Salary Classifications," 126 C.S.R. 136, and has included the same unlawful "for cause" language at § 4.13.

denial or non-renewal of a teaching certificate, but, if enforced as written, will unlawfully affect the due process rights of teachers.

When a teacher is denied initial or renewal certification, the teacher is -- at the time of the denial -- without certification to perform the functions of that position (that is, barring a rule or regulation that permits a teacher to work without a certificate)⁷. Indeed, W. Va. Code § 18A-3-2 provides that a certificate will expire, or cease to exist without renewal, on June 30th of the last year for which the certificate is licensed. At the time that the Superintendent determines that a license shall not be renewed, an order is entered to that effect. From the effective date of that order, the teacher will be without certification. As a result, the teacher loses his certification *without first having a hearing*.

Moreover, in practice, once a non-renewal decision is issued (and a teacher is deprived of his/her credentials) the Department, utilizing the "hearing" procedures set forth in Policy 5202⁸, shifts the burden to the teacher to convince the Superintendent that his decision not to

⁷ In other words, the license or certificate of the teacher has been summarily "revoked" prior to and without any hearing of due process. Nothing in the authorizing statutes of the Department permits a summary taking of a license. Note, however, that in the context of medical license, the legislature does permit a summary taking to protect safety interests of the public. *See e.g. West Virginia Code, § § 30-3-14(j)*

⁸The "hearing" provisions of Policy 5202 are set forth at 126 C.S.R. 136, 26.8. This provision provides,

"In all reviews or hearings referred to the Appeal Panel, the appellant shall bear the burden of proving by a preponderance of the evidence, that the judgment made by the responding party (i.e., Superintendent) is erroneous."

renew the license or application was wrong. Thus, the teacher is deprived of his/her property right (i.e., teaching credentials) without due process prior to the deprivation.

Additionally, under Policy 5202, the Superintendent expressly has empowered himself to base a non-renewal decision "on factors outside the current licensure regulations."⁹

The proposed rule fails to make any provision for the abolition of these unconstitutional and extrastatutory practices.

In contrast, when the Superintendent determines that he or she will revoke a license, the Superintendent is required to give notice and a hearing to a teacher *prior* to revoking the license. Thus, the teacher's right to continue teaching is protected until the administrative (and any appeal) proceedings are completed. As noted, the proposed rules do not safeguard against a *defacto* revocation of a teacher's application prior to any hearing or due process.

CONCLUSION

In sum, the proposed rules, when considered as a whole, impermissibly expand the Superintendent's authority well beyond any arguable statutory basis for the issuance and/or renewal of teacher's certification by adding grounds that are currently reserved as a basis for a

While we submit that the continued viability of the Licensure Appeal Panel is questionable in light of the Supreme Court's recent ruling in Scott v. Stewart, *supra*. At p. 2, fn.1, the practice of shifting the burden to teacher after the fact continues.

⁹126 C.S.R. 136, 26.2.

revocation proceeding. Further, the proposed rule completely eviscerates concepts of due process both substantively and procedurally. As such, they should not be promulgated, adopted, or approved in their present form.