



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: Psychologists

RULE TYPE: Legislative

TITLE-SERIES: 17-05

RULE NAME: Contested Case Hearing Procedure

CITE AUTHORITY: §30-21-6

The above proposed Legislative rules, following review by the Legislative Rule Making Review Committee, is hereby modified as a result of review and comment by the Legislative Rule Making Review Committee. The attached modifications are filed with the Secretary of State.

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

Yes

Kathy G Lynch -- 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.

17CSR5

TITLE 17
LEGISLATIVE RULE
WV BOARD OF EXAMINERS OF PSYCHOLOGISTS

SERIES 5
CONTESTED CASE HEARING PROCEDURE

§17-5-1. General

1.1. Scope. -- This rule specifies the procedure for the adjudication of contested case hearings before the Board.

1.2. Authority. -- W. Va. Code §§30-21- 6 and 30-1-4.

1.3. Filing Date. -- ~~January 23, 2001.~~

1.4. Effective Date. -- ~~March 1, 2001.~~

1.5. Sunset Provision. -- This rule shall terminate and have no further force or effect on August 1, 2029.

§17-5-2. Definitions.

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

2.1. "Applicant" means any person making application for an original or renewal license or a temporary permit pursuant to W. Va. Code §30-21-1 ~~et seq.~~ et seq.

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

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

2.4. "Charged party" means a psychologist or supervised psychologist who has been charged by the Board with a violation of W. Va. Code §30-21-1 ~~et seq.~~ et seq. and the rules of the Board.

2.5. "License" means a license or temporary permit issued by the Board pursuant to W. Va. Code §30-21-1 *et seq.*

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

2.7. "Practice of psychology" means the practice of psychology and the practice of school psychology as defined in W. Va. Code §30-21-2.

2.8. "Psychologist" means licensed psychologist, school psychologist, school psychologist independent practitioner and applicant.

2.9. "Supervised psychologist" means supervised psychologist, supervised school psychologist, and supervised school psychologist independent practitioner.

§17-5-3. Hearing Procedure.

3.1. Any applicant denied a license by order of the Board who believes such denial was in violation of W. Va. Code §~~§~~30-1-1 ~~et seq.~~ *et seq.* or 30-21-1 ~~et seq.~~ *et seq.* or the rules of the Board shall be entitled to a hearing on the action denying such license. Any applicant who desires a hearing for this reason must present a written demand for such to the Board. Provided, That requests for hearings shall not include cases in which the Board denies a license or certificate after an examination to test the knowledge or the ability of the applicant where the controversy concerns whether the examination was fair or whether the applicant passed the examination.

3.2. When the president 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 forty-five (45) days of receipt by him or her of such written demand, unless postponed to a later date by mutual agreement.

3.3. Any psychologist who has had his or her license suspended and any supervised psychologist who has had their approval to progress through the licensure application process suspended by the Board prior to a hearing on the basis that the psychologist's or supervised psychologist's continuation in practice constitutes an immediate danger to the public shall be considered a charged party within the meaning of this rule, and shall be entitled to a hearing on the action as set forth herein.

3.4. Charges may be instituted against any psychologist or supervised psychologist by the Board when reasonable cause exists for believing that the psychologist or supervised psychologist may have engaged in conduct, practices or acts such that his or her license or approval to progress through the licensing process should be suspended, revoked or otherwise disciplined for one or more of the grounds set forth in W. Va. Code §30-21-1 ~~et seq.~~ *et seq.* or rules of the Board. 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 investigative activities undertaken by the Board.

3.5. Charges instituted against a psychologist or supervised psychologist as described in ~~subsection~~ section 3.4. of this rule shall be set forth in a Complaint and Notice of Hearing issued in the name of the Board. Such Complaint and Notice of Hearing shall designate the Board as the "Complainant", and shall designate the psychologist or supervised psychologist 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, practices or acts complained of therein; shall state the date, time and place for the hearing; and, shall contain a statement of intention by the Board to appoint a hearing examiner.

3.6. Upon receipt of a demand for a hearing described in ~~subsections~~ sections 3.1. and 3.2. of this section, the president or his or her designee shall provide the demanding party, with a Complaint and Notice of Hearing issued in the name of the Board. Such Complaint and Notice of Hearing shall designate the demanding party as the "Complainant" and shall designate the Board as the "Respondent"; shall set out the substance of each and every reason that the Board has denied the demanding party a license with sufficient particularity to reasonably apprise the demanding party of the nature, time and place of the conduct or condition at issue therein; shall state the date, time and place for the hearing; and, shall contain a statement of intention by the Board to appoint a hearing examiner.

3.7. The Respondent, whether a charged party or a demanding party, shall, within thirty (30) days of the date of the issuance of the Complaint and Notice of Hearing, serve an answer, in writing, on the Board. The Respondent may respond personally or through his or her attorney, but the answer shall address the substantive allegations set forth in the Board's complaint or order.

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

3.9. 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.

3.10. Upon written motion received by the Board no later than twenty (20) days prior to the date of hearing, a more definite statement of the matters charged or the reasons stated for denial of 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.

3.11. Hearings shall be conducted as follows:

3.11.1. 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.

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

3.11.3. 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.

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

3.11.5. 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.

3.11.6. 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 or its designated hearing examiner; 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.

3.11.7. 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 or demanding party 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.

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

3.11.9. 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 testified.

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

3.11.11. 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.

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

3.11.13. Where a hearing is held upon the instance of the Board after charges have been brought against a psychologist or supervised psychologist pursuant to ~~subsection~~ section 3.4₂ and 3.5₂ 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.

3.11.14. Where a hearing is held upon demand under the provisions of ~~subsections~~ sections 3.1₂, 3.2₂, 3.3₂, and 3.6₂ of this action, the demanding party shall have the burden of proof and shall therefore be required to present his or her evidence first.

3.11.15. Following the conclusion of the Board's presentation of evidence in accordance with ~~subsection~~ section 3.11.13₂ of this section the Respondent or charged party shall have the right to submit his or her evidence in defense.

3.11.16. Following the conclusion of the demanding party's presentation of evidence in accordance with ~~subsection~~ section 3.11.14₂ of this section, the Board shall have the right to submit its evidence in defense.

3.11.17. 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.

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

3.11.19. Hearings held by the Board as a result of charges instituted against a psychologist or supervised psychologist 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.

3.11.20. 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 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 shall be ruled on by the Executive Secretary of the Board. All other motions for continuance shall be ruled on by the Board member(s) or the hearing examiner presiding over the hearing.

3.11.21. 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. Prehearing motions shall be heard at a prehearing 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.

§17-5-4. Transcription of Testimony and Evidence.

4.1. 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.

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

4.3. Upon the motion of the Board or any party assigning error or omission in any part of any 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 disciplinary matter.

§17-5-5. 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~~ and manner designated by the Board or its duly appointed hearing examiner.

§17-5-6. 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 ~~section~~ subsection 3.11, of this rule.

6.2. Hearing examiners appointed by the Board are not authorized or empowered to grant, suspend, revoke or otherwise discipline any psychologist or supervised psychologist.

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.

§17-5-7. 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:

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

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

7.1.3. 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.

§17-5-8. 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.

§17-5-9. 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 President, 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 or subpoenas duces tecum as provided in ~~subsection~~ section 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 duces tecum shall see that they are properly served in accordance with W. Va. Code §29A-5-1(b).

§17-5-10. 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 30-21-11. 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 or his or her attorney of record, if any, within five (5) days after entry by the Board by personal service or by registered or certified mail.

§17-5-11. Penalties.

11.1. In connection with its review and investigation of a complaint against a psychologist or supervised psychologist, the Board is authorized to enter into consent decrees, to reprimand, to enter into probation orders and to levy fines not to exceed one thousand dollars per day per violation, or any of these, singly or in combination.

11.2. The Board is further authorized to place a supervised psychologist on probation, to require additional years of supervision for supervised psychologists, to limit, restrict, suspend or revoke the approval of any supervised psychologist to progress through the licensure application process, to place a licensee on probation or to limit, restrict, suspend or revoke any license issued by the Board.

11.3. Probation, limitations and restrictions on psychologists and supervised psychologists may involve the imposition of any lawful conditions and requirements for a period of time, which the Board in its discretion deems just and proper, including, but not necessarily limited to, counseling or psychotherapy, special supervision, limitations on the types of patients which can be treated and additional training or education.

§17-5-12. Appeal.

12.1. ~~An appeal from any final order entered in accordance with these rules shall comply with the provisions of W. Va. Code §§29A-5-4 and 30-21-12. Any person adversely affected by an order of the Board may appeal the order to the Intermediate Court of Appeals in accordance with W.Va. Code §§29A-5-4 and 51-11-1 *et seq.*~~