

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

Form #5

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2004 MAR 10 A 11:15

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: Bureau of Employment Programs TITLE NUMBER: 96

CITE AUTHORITY: §21A-2-6(2)

RULE TYPE: PROCEDURAL INTERPRETIVE

EXEMPT LEGISLATIVE RULE

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

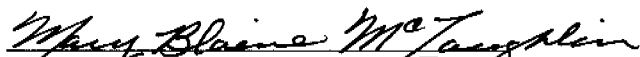
IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 2

TITLE OF RULE BEING PROPOSED: Rule for Administrative Hearing

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS April 10, 2004


Authorized Signature

This rule went through a comment period from January 22, 2004 to February 23, 2004 at 5 p.m. There were no comments and no changes were made to this rule.


Mary Blaine McLaughlin, Counsel
Bureau of Employment Programs

96CSR2

TITLE 96
PROCEDURAL RULE
BUREAU OF EMPLOYMENT PROGRAMS

SERIES 2
RULE FOR ADMINISTRATIVE HEARINGS

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OFFICE WEST VIRGINIA
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§96-2-1. General.

1.1. Scope. – This rule sets forth the procedures for administrative hearings of a contested case between the Bureau of Employment Programs and employers, with the exception of hearings where procedures already exist either in the Regulations of the Commissioner or §21A-1-1 et seq. of the West Virginia Code.

1.2. Authority. – West Virginia Code §21A-2-6(2) states that: “[t]he commissioner is the executive and administrative head of the Bureau and has the power and duty to:

...(2) Prescribe uniform rules pertaining to investigations, departmental hearings and propose rules for promulgation;”

1.3. Filing date. –

1.4. Effective date. –

§96-2-2. Definitions.

2.1. As used in this rule, the following terms, words and phrases have the meaning stated, unless in any instance where such term, word or phrase is implied and the context expressly indicates that another meaning is intended.

2.2. “Bureau” – the Bureau of Employment Programs as defined by §21A-1-4 of the West Virginia Code.

2.3. “Commissioner” – the Commissioner of the Bureau of Employment Programs as defined by §21A-2-6 of the West Virginia Code or the Commissioner’s designee.

2.4. “Cross-examination” – examination of a witness limited to matters covered on direct examination of the witness.

2.5. “Days” - concerning time limits means calendar days.

2.6. "Deposition" - a pretrial discovery device by which one party through his or her attorney asks oral questions of the other party or of a witness for the other party. The deposition is conducted under oath outside of the hearing room and is transcribed. The deposition is used in preparation for the hearing.

2.7. "Evidentiary Deposition" - a deposition taken from a witness who will likely be unable to attend a scheduled trial or hearing. If the witness is not available to attend the hearing, the testimony is read and made part of the record in court.

2.8. "Petition" - a written request for a hearing.

2.9. "Reconsideration" - a reexamination by the Commissioner of the protested decision.

2.10. "Record" - a written account of a hearing proceeding.

2.11. "Rebuttal Evidence" - evidence given to explain, repel, counteract or disprove facts given in the evidence by the opposing party.

2.12. "Rule" - the present procedural rule which is designated in the caption hereof as Title 96 Series 2.

2.13. "Subpoena" - a command to appear at a certain time and place to give testimony upon a certain matter.

2.14. "Subpoena duces tecum" - a command to a person to bring with him or her a production of books, papers and other documents.

§96-2-3. Request for Reconsideration.

3.1. Requirement. Each employer who desires to dispute a decision or action by the Commissioner is required to file a complete and timely request for reconsideration as a condition precedent to filing a petition for a hearing under this rule. Should the employer fail to file a timely and complete request for reconsideration, then the Bureau's decision or action becomes final.

3.2. Timeliness of Request. A request for reconsideration shall be filed within (30) days of the employer's receipt of notice of the disputed decision or action or in absence of such a receipt within (60) days of the date of the Commissioner's making such disputed decision or taking such disputed action. Such time limitations are a condition of the right to litigate the decision or action and are jurisdictional.

3.3. Contents for the Request for Reconsideration. In its request for reconsideration, the employer shall clearly identify the decision or action

disputed. The employer shall also clearly identify the basis on which the employer disputes the decision or action.

3.4. **Review of Request for Reconsideration.** Upon the filing of the employer's request for reconsideration, the Bureau shall review the basis for the request. Such a review may include a meeting with the employer, a review of the employer's records, or any other process calculated to provide the Bureau with the relevant information necessary to perform the review. After reviewing the request, the Bureau shall enter its final order.

3.5. **Entering a Final Decision.** The Bureau is required to enter a final decision or enter into an extension agreement with the employer within one hundred-twenty (120) days from the date the employer's request for reconsideration is filed.

3.6. **Written Extension Agreement.** The Bureau and the employer may enter into a written extension agreement for no more than an additional (60) days for the Bureau to enter a final decision.

3.7. **Failure to Enter a Final Decision.** The Bureau's failure to enter a final decision within the initial time period or extended time period, where applicable, triggers an employer's right to file a petition for hearing under this rule.

3.8. **Time Limitations.** The filing of a timely and complete request for reconsideration of a written decision or action of the Bureau stays the tolling of the time limitations for filing a petition for hearing under the provisions of this rule until the final decision is issued.

§96-2-4. **Protest: Petition, Complaint and Notification.**

4.1. **Requirements.** Any party adversely affected by a decision of the Commissioner for which there is no hearing procedure in place by either the West Virginia Code or the Regulations of the Commissioner of the Bureau of Employment Programs and who has been through a request for review procedure with the Bureau shall be entitled to a hearing on the action as stated by this rule.

4.2. **Filing the Petition.** Proceedings to request a hearing shall be instituted by filing a petition within (30) days after the mailing date of the disputed reexamined decision or action of the Bureau of Employment Programs or in absence thereof within (60) days of the date of the Bureau's making such disputed decision. A certified copy of the petition shall be served on all other parties of record via the U.S. mail. The petition shall state whether the protest of the Commissioner's decision is taken on questions of law or questions of fact or both.

4.3. Staying the Protested Decision. The Bureau of Employment Programs may stay such enforcement of its protested decision at any time after the filing of the petition for hearing.

§96-2-5. Complaint and Notice of Hearing.

5.1. Scheduling the Hearing. When the Commissioner of the Bureau of Employment Programs is presented with such a petition for a hearing the Commissioner shall schedule a hearing within (45) days of receipt of said petition, unless postponed to a later date by mutual agreement.

5.2. Complaint and Notice of Hearing. Upon receipt of the petition for a hearing the Commissioner or his or her designee shall provide the Petitioner with a Complaint and Notice of Hearing issued in the Name of the Bureau of Employment Programs.

5.3. Content of Complaint and Notice. Such Complaint and Notice of Hearing shall designate the Petitioner as the Complainant and shall designate the Bureau of Employment Programs as the Respondent, and shall set out the substance of each and every reason why the Commissioner of the Bureau has made the protested decision with sufficient particularity to reasonably appraise the Petitioner of the nature, time and place of the conduct or condition at issue therein, and shall state the date, time and place for the hearing, and shall contain a statement of intention by the Bureau of Employment Programs to appoint a hearing examiner.

5.4. Notice: Time Requirement and Proof Of. No hearing shall be conducted unless and until (30) days written notice thereof has been served upon the Complainant/Petitioner or his or her attorney, or if he or she cannot be found by delivering such certified notice at his or her usual place of abode via U. S. mail, or if he or she does not reside in this State such notice may be served by publication thereof once a week for three successive weeks in a newspaper published in this State. Proof of such notice may be made by affidavit of any person over the age of eighteen years of age. If certified mail is used, then a copy of the return receipt shall be attached to the proof of notice.

5.5. Time Limitation of Notice. In any instance where any form of notice is provided, the time period will begin to elapse with the first date following the date the notice, order or document was mailed. This rule is applicable whether the notice order or document is delivered personally or served by mail.

§96-2-6. Discovery. Discovery shall be engaged in only with the consent of the Hearing Examiner, or if a Hearing Examiner has not been appointed, with the consent of the Commissioner. All discovery requests shall be submitted to the appropriate official at the same time as the discovery request is served upon the

other party. If the Hearing Examiner determines that the requested information is relevant and material to the issues to be heard, and not unduly burdensome, the Hearing Examiner will permit the discovery and set a reasonable time frame for the disclosure of the information. Determination of a reasonable time frame will be premised upon the nature and scope of the information requested and the date on which the hearing is scheduled. The Hearing Examiner shall attempt to avoid continuing a previously scheduled hearing.

§96-2-7. Subpoenas.

7.1. Issuing Subpoenas, Subpoenas Duces Tecum. The hearing officer may issue subpoenas and compel the attendance of witnesses and the production of pertinent books, accounts, papers, records, documents and testimony. All subpoenas and subpoenas duces tecum shall be issued in the name of the Hearing Examiner, but any party requesting their issuance must see that they are properly served. All requests by parties for subpoenas and subpoena duces tecum shall be in writing and shall contain a statement acknowledging that the requesting party agrees to pay service fees and fees for the attendance and travel of witnesses.

7.2. Service of Subpoenas and Subpoenas Duces Tecum. Every subpoena or subpoena duces tecum shall be served at least (5) days before the return date thereof, either by personal service made by any person over eighteen years of age or by registered or certified mail. But a return acknowledgement signed by the person to whom the subpoena(s) or subpoena(s) duces tecum is directed shall be required to prove service by registered or certified mail. If service is by mail, then the (5) day notice period shall not begin to run until the date the subpoena or subpoena duces tecum is received by the person or entity subject thereto as shown by the date on the return receipt.

7.3. Fees for Subpoena Service. All such fees related to any subpoena or subpoena duces tecum issued at the instance of an interested party shall be paid by the party who asks that such subpoena or subpoena duces tecum be issued.

7.4. Noncompliance with Subpoenas. In case of disobedience or neglect of any subpoena or subpoena duces tecum served on any person, or the refusal of any witness to testify to any matter regarding which he or she may be lawfully interrogated, the circuit court of the county in which the hearing is being held, or the judge thereof in vacation, upon application by the commissioner, or any division employee designated by the commissioner, or hearing officer appointed by the commissioner, shall compel obedience by attachment proceedings for contempt of a subpoena or subpoena duces tecum issued from such circuit court or a refusal to testify therein.

7.5. Hearing Examiner's Right to Refuse to Issue Subpoenas. The issuance of a subpoena duces tecum will be refused only in an instance when there is good reason to believe that the subpoena power is being abused. All

subpoenas and subpoenas duces tecum will state on their face the name of the party who requested it.

§96-2-8. Hearing Examiner's Powers.

8.1. Hearing Examiner's Powers. All hearings shall be conducted in an impartial manner. Any hearing examiner or other person as designated by the Commissioner to hold such hearing for the Bureau shall be an attorney licensed to practice law in the State of West Virginia and have the power to:

1. Administer oaths and affirmations;
2. Certify official acts;
3. Determine if the hearing should be held telephonically or electronically;
4. Determine if discovery needs to take place on the issues;
5. Rule upon offers of proof and receive relevant evidence;
6. Regulate the course of the hearing;
7. Hold conferences for the settlement or simplification of the issues by consent of the parties;
8. Dispose of procedural requests, motions, or similar matters arising before, during and after the hearing;
9. Take depositions;
10. Grant a continuance of a hearing when good cause is shown;
11. Allow any party prior to the rendering of any final order or decision to submit proposed findings of fact and conclusions of law. (Findings of Fact if set forth in statutory language shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings);
12. Prepare a proposed recommended decision in writing accompanied by findings of fact and conclusions of law to the Commissioner;
13. Serve a certified copy of the order or decision and accompanying findings of fact and conclusions of law upon each party or his attorney of record via the U. S. mail;
14. And take other actions as authorized by this rule.

§96-2-9. Conduct of the Hearing.

9.1. Location. The hearing shall take place at the West Virginia Bureau of Employment Programs, Charleston, Kanawha County, West Virginia.

9.2. Representation. Any party protesting the Commissioner's decision to the hearing shall have the right to be represented by an attorney-at-law duly qualified to practice in the State of West Virginia, or can represent themselves pro se. The Commissioner of the Bureau of Employment Programs shall be represented by one of the Bureau's counsel.

9.3. Burden of Proof. There is a presumption that the Bureau's decisions or actions are valid. The party contesting the Bureau's decisions or actions has the burden of overcoming this presumption by a preponderance of the evidence, or by evidence, which is more credible or convincing than the evidence which is offered in opposition to it.

9.4. Motion Opening and Closing Statements. All parties shall have the right to offer opening and closing statements not to exceed ten minutes for each presentation. The opening statement shall be a summary of the facts of the case which the party in good faith expects to prove. The closing statement summarizes the evidence which the party thinks has proven its case as well as the evidence which the party thinks the other side has failed to establish.

9.5. Motions for a Continuance. Motions for a continuance of the hearing shall be in writing and received by the Hearing Examiner no later than (10) days prior to the hearing date. A motion for a continuance filed later than (10) days from the date of the hearing shall be denied, unless the reason for the motion could not have been ascertained earlier.

9.6. Granting a Continuance. In determining whether good cause exists to continue a hearing, consideration shall be given to the ability of the party requesting the continuance to proceed effectively without a continuance.

9.7. Other Motions. All motions related to a case set for hearing with the exception of continuances, shall be in writing and shall be received by the Hearing Examiner (10) days before the hearing. A motion received later than (10) days before the hearing shall be denied, unless the reason for the motion could not have been ascertained earlier. The Hearing Examiner shall hear the motions and the response to the motions by the opposing party on the day of the hearing prior to the commencement of testimony. All motions and responses to said motions shall be transcribed.

9.8. Evidence. Irrelevant, immaterial or unduly repetitious evidence shall be excluded from the hearing. The rules of evidence as applied in civil cases in the circuit court of the State shall be followed except 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 a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. The Hearing Officer shall be bound by the rules of privilege recognized by law. Objections to evidentiary offers shall be noted in the record, but exceptions to the rulings by the hearing officer shall not be made.

9.9. Witnesses. Any party to a hearing may appear with witnesses to testify on his or her behalf, and may present such other evidence in support of his or her position as deemed appropriate by the Hearing Examiner, and when

appropriate may cross examine witnesses in support of the complaint or in opposition to it.

9.10. Evidentiary Depositions. Evidentiary depositions may be taken and read as in a civil action in the courts of this State, but this shall only occur when it is impossible for a witness to appear due to the right of the opposing counsel to be able to cross examine that witness.

9.11. Cross-examination and Rebuttal Evidence. Every party shall have the right to cross examine witnesses who testify, and shall have the right to present rebuttal evidence.

9.12. Judicial Notice. The Hearing Examiner shall take notice of judicially cognizable facts. All parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of the materials so noticed and they shall be afforded an opportunity to contest the facts so noticed.

9.13. Objections and Vouching the Record. Objections to evidentiary offers shall be noted in the record, and every party to the hearing may vouch for the record as to any excluded testimony in other evidence, provided that the hearing officer may elect to require that the excluded testimony be submitted in written form following the hearing.

9.14. Documentary Evidence – Copies Versus Originals. Documentary evidence may be received in the form of copies of excerpts or by incorporation by reference. In all cases, copies of orders, proceedings, or records in the offices of the Bureau shall be equal to the original in evidence.

§96-2-10. Preparation of the Official Record.

10.1. Official Record. The Bureau shall prepare an official record which shall include reported testimony and exhibits in the contested case, and all Bureau and staff memoranda and data used in consideration of the case.

10.2. Arrangements for Transcription. The Bureau shall have the responsibility for making arrangements for the transcription of the reported testimony and evidence.

10.3. Correction of Error. Upon motion in writing served by any party assigning error or omission in any part of any transcript of the proceedings had and testimony taken at any such hearing, the Bureau of Employment Programs shall settle all differences arising as to whether such transcript truly discloses what occurred at the hearing and shall direct the transcript to be corrected and revised in the respects designated by the Hearing Examiner so as to make it conform to the whole truth.

10.4. Definition of Filed Record. A record of the hearing including the complaint, 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 Bureau of Employment Programs files.

§96-2-11. Written Argument.

11.1. Proposed Findings of Fact. At the conclusion of the hearing, the parties shall be permitted to file proposed findings of fact, conclusions of law, and such legal briefs and memoranda as they wish. The parties shall be permitted (10) days from receipt of the transcript to file such items which filings shall be concurrent. The parties shall be permitted (7) days to respond to the filing of any other party. No further argument shall be permitted.

11.2. Hearing Examiner's Proposed Recommendation. Thereafter, the Hearing Examiner will prepare a report and recommendation which shall contain proposed findings of fact and conclusions of law as suggested by the Hearing Examiner for the Commissioner's approval. The parties to the hearing shall then be permitted (7) days in which to file objections or comments upon the Hearing Examiner's report and recommendation and (3) more days to respond to each other's objections and comments. Thereafter, the Commissioner shall decide whether to accept, reject or modify the Hearing Examiner's report and recommendation.

11.3. Commissioner's Rights and Duties. The Commissioner retains the right to review any and all proposed findings of fact and conclusions of law submitted by the Hearing Examiner against the record and to disagree therewith provided that the Commissioner states the basis for the disagreement in the final order. The Commissioner shall render a final order or an interlocutory order as the decision may require in which the Commissioner accepts in whole or in part the proposed findings of fact and conclusions of law submitted by the Hearing Examiner, and to the extent that the Commissioner rejects or modifies the proposed recommendation or decision of the Hearing Examiner, the Commissioner shall furnish his or her own findings of fact and conclusions of law.

11.4. Entry of the Final Order. Upon disagreement of the proposed recommendation of the Hearing Examiner, the final order of the Commissioner shall be entered within (60) days following the submission of the record and the Hearing Examiner's recommended decision. If the Commissioner agrees with the proposed recommendation of the Hearing Examiner, the final order shall be entered within (30) days from the date of the Hearing Examiner's recommended decision.

§96-2-12. Distribution of Final Order and Right to Appeal.

12.1. Distribution of Order. A certified copy of the final order or decision of the Commissioner shall be served upon each party and the party's attorney of record via U. S. mail.

12.2. Appeals. All appeals from the final order or decision of the Commissioner shall be taken pursuant to West Virginia Code §29A-5-4.

§96-2-13. Severability.

13.1. Invalidity of a Provision does not Invalidate the Rule. If any provision of this rule or the application thereof to any entity or circumstance shall be held invalid, such invalidity shall not affect the provisions or the applications of this rule which can be given effect without the invalid provisions or application, and to this end the provisions of this rule are declared severable.