

**WEST VIRGINIA  
SECRETARY OF STATE**

**KEN HECHLER**

**ADMINISTRATIVE LAW DIVISION**

Form #5

Do Not Mark In this Box

FILED

Nov 29 11 PM '00

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE  
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: West Virginia Board of Embalmers & Funeral Directors TITLE NUMBER: 6

CITE AUTHORITY: 30-6-1 et seq. and HB 207, passed 11/14/00

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

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

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

HB 207

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 NEW RULE BEING ADOPTED: 4

TITLE OF RULE BEING ADOPTED: Complaint and Hearing Procedures

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE  
EFFECTIVE DATE OF THIS RULE IS January 1, 2001

*Shirley Rayglass, Exec Dir*

**KEN HECHLER**  
Secretary of State

**MARY P. RATLIFF**  
Deputy Secretary of State

**JAN CASTO**  
Deputy Secretary of State

Telephone: (304) 558-6000  
Corporations: (304) 558-8000  
FAX: (304) 558-0900  
wvsos@secretary.state.wv.us  
www.state.wv.us/sos/



**STATE OF WEST VIRGINIA**  
**SECRETARY OF STATE**  
Building 1, Suite 157-K  
1900 Kanawha Blvd., East  
Charleston, WV 25305-0770

**WILLIAM H. HARRINGTON**  
Chief of Staff

**CATHERINE FREROTTE**  
Executive Assistant

**JUDY COOPER**  
Director, Administrative Law

**PENNEY BARKER**  
Supervisor, Corporations

(Plus all the volunteer  
help we can get)

# Memo

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

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

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

FILED

NOV 29 5 11 PM '00

6CSR1  
TITLE 6  
LEGISLATIVE RULE  
BOARD OF EMBALMERS AND FUNERAL DIRECTORS

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

SERIES 4  
COMPLAINT AND HEARING PROCEDURES

§6-4-1. General.

- 1.1 Scope. - This rule relates to the complaint and hearing procedures for all licensees and registrants.
- 1.2 Authority. - WV Code §30-6-3(i), §30-1-8(h), §30-6-8 and §30-6-14.
- 1.3 Filing Date. -
- 1.4 Effective Date. -

§6-4-2. Complaint Procedures.

- 2.1. Any individual may make a complaint to the board concerning a licensee or registrant.
- 2.2. The board may accept an anonymous complaint if the information provided is adequate to begin an investigation.
- 2.3. The board shall accept a complaint in writing, by phone or in person. The board may provide a form for the purpose of submitting a written complaint, but shall accept a complaint if the information includes:
  - 2.3.1. the alleged violation which prompted the complaint;
  - 2.3.2. the name and address of the individual against whom the complaint is lodged;
  - 2.3.3. the date or dates the incident or incidents occurred; and
  - 2.3.4. the name or names of witnesses to the incident or incidents.
- 2.4. All complaints shall be referred to the Executive Director, Investigator, or counsel for the Board, who shall act as a representative for the board. A complaint committee shall be established to review such matters. This committee shall consist of two board members, with each member serving on the committee for two (2) years.
- 2.5. The board shall maintain a complaint log which records the receipt of each complaint, and the nature and the disposition of the complaint. The board shall also maintain a separate file on each complaint received, and each file shall have a number assigned it.
- 2.6. Upon receipt of complaint or on its own initiative, the representative for the board shall, within five (5) business days, issue an acknowledgment of the complaint to the complainant and shall initiate an investigation into the conduct which is occurring or has occurred which violates W.Va. Code §30-6-1 et seq. or

rules governing funeral service practitioners. The complaint committee may employ the services of consultants or other employees necessary to assist the representative for the board in an investigation.

2.6.1. The representative for the board shall issue subpoenas to gather necessary facts and evidence to determine validity of the allegations contained in the complaint. The representative shall have the authority to institute proceedings in the courts of this state to enforce its subpoenas for the production of documents and witnesses and its orders and to restrain and enjoin violations of W.Va. Code §30-6-1 et seq., or rules governing funeral service practitioners.

2.6.2. The board shall provide copies of complaint forms and other available evidence to the licensee or registrant against whom a complaint is filed within ten (10) days of receipt of complaint. The licensee shall respond within fourteen (14) days of such notification, to the allegations contained in the complaint, by making an appointment with the representative for the board to meet in person or by preparing a written statement and returning it to the board.

a. Exception. The board may use its discretion regarding the notification of complaint to the licensee or registrant if such notification would result in possible tampering of evidence. However, once such evidence is collected by the representative for the board, the licensee or registrant must be notified, pursuant to §6-4-2.6.2..

2.6.3 The representative for the board may depose witnesses, take sworn statements, and collect other evidence.

2.6.4 The representative for the board may require a criminal history records check. The licensee or registrant under investigation shall furnish to the board a full set of fingerprints for purposes of conducting a criminal history check. Records will be checked through the criminal identification bureau of the West Virginia State Police, a similar agency within the licensee's or registrant's state of residence, and the United States Federal Bureau of Investigation.

2.6.5. The representative for the board shall evaluate the complaint, licensee response and other investigative information to determine if a violation of law has occurred and to determine the need for additional investigation. The representative shall have the authority to enter any funeral establishment to review documents related to the complaint and to interview any individual during the course of an investigation. Subpoenas duces tecum to compel the production of documents may be issued by the representative for the board. The subpoenas shall be issued pursuant to W.Va. Code §29A-5-1(b).

2.7. Upon completion of investigation, the representative for the board shall present investigative information in a report to the complaint committee. The report shall contain a statement of allegations, a statement of facts, and an analysis of the complaint. The analysis shall consist of a description of the conduct of the licensee or registrant, the records reviewed, and a statement of findings and recommendations. If probable cause for further action is not identified, the representative may make a recommendation that a complaint be dismissed. All investigative information shall be provided to the committee for review for any case recommended for dismissal due to lack of probable cause. The committee may approve dismissal of the case or direct the representative for the board to proceed with further investigation if the committee believes further investigation is necessary.

2.8. Upon completion of investigation and investigative information has been reviewed by the complaint committee and probable cause is established, the committee may negotiate terms of a consent agreement with a licensee or recommend to the board that the case be set for hearing.

2.9. The complaint committee shall review the terms of a consent agreement and all investigative

information. The committee may then approve the consent agreement, request revisions to the consent agreement or reject the consent agreement.

2.10. If the licensee or registrant contests the allegations and refuses to enter into a consent agreement, the committee may recommend to the board that the case be set for hearing. All hearings shall be in accordance with Chapter 29A of W.Va. Code.

2.11. Members of the complaint committee shall be disqualified from the formal hearing process if the case has been presented to the committee prior to the formal hearing.

2.12. All powers of the board, the complaint committee, and its representatives may be exercised to investigate a matter, even if a hearing or disciplinary action does not result from the investigative findings.

#### §6-4-3. Public Hearing Procedures.

##### 3.1. Definitions.

3.1.1. Charged Party. For the purposes of this rule, the term "charged party" means an individual who holds a license or holds a certificate of registration issued by the Board and who has been charged by the Board as described in these rules.

3.1.2. Demanding Party. For the purpose of this rule, the term "demanding party" means an individual who has been denied a license or a certificate of registration by the Board and who, as a result, demands that a hearing be held before the Board on the issue of denial, suspension, or revocation.

##### 3.2. Hearing Procedures.

3.2.1. Any person denied a license or certificate of registration, or had a license or certificate of registration suspended or revoked by the Board who believes the denial, suspension or revocation was a violation of W.Va. Code §30-1-1 et seq and/or 30-6-1 et seq. is entitled to a hearing on the action denying the license.

3.2.2. Any person who desires a hearing for the reason described in subsection 3.2.1. of this section must present a written demand for a hearing to the Board.

3.2.3. When the president of the Board or his or her authorized designee is presented with a demand for a hearing, he or she shall schedule a hearing within forty-five (45) days of receipt by him or her of the written demand, unless a hearing is postponed to a later date by mutual agreement.

3.2.4. Charges may be instituted against any licensee or registrant, by the Board when reasonable cause exists for believing that the licensee or registrant, may have engaged in conduct or be in such condition that the license should be suspended, revoked or otherwise disciplined for one or more of the grounds set forth in W. Va. Code §30-6-1 et seq. or this rule. Charges may be based upon information received by a verified written complaint filed with the Board and further information gathered by the Board in the process of investigating the complaint. Charges may also be based upon information received solely through investigative activities undertaken by the Board.

3.2.5. Charges instituted against a licensee or registrant as described in subsection 3.2.4 of this section shall be set forth in a Complaint and Notice of Hearing issued in the name of the Board as the agency of the State regulating the practice of Embalming, cremation, Funeral Directing and selling of funeral goods. The Complaint and Notice of Hearing shall designate the Board as the "Complainant", and shall designate the Licensee, or

Registrant involved in the proceeding as the "Respondent"; shall set out the substance of each offense charged with sufficient particularity to reasonably apprise the Respondent of the nature, time and place of the conduct or condition complained of; 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.

3.2.6. Upon receipt of a demand for a hearing described in subsection 3.2.1. and 3.2.2. 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 as the agency of the state regulating the practice of embalming, cremation, funeral directing and selling of funeral goods. The 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; 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.

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

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

3.2.9. Upon written motion received by the Board no later than thirty (30) days prior to the date of the hearing, a more definite statement of the matters charged or the reasons stated for denial, suspension or revocation 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.

3.2.10. Hearings shall be conducted as follows:

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

b. The Board shall be represented by the West Virginia Attorney General's Office at no additional compensation.

c. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded from the hearing. Furthermore, the rules of evidence as applied in civil cases in the circuit courts of this State shall be followed. However, when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.

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

e. Objections to evidentiary offers shall be noted in the record. Any party to the hearing may vouch the record as to any excluded testimony or other evidence.

f. Any party to a hearing may appear with witnesses to testify on his or her behalf; may be heard in person, by counsel or both; may present such other evidence in support of his or her position as considered 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.

g. The hearing shall be held at such time and place as is designated by the Board, but no hearing shall be conducted unless and until at least thirty (30) days written notice thereof has been served upon the charged or demanding party and/or his or her attorney in person; or if he or she cannot be found, by delivering the notice at his or her usual place of abode, and giving information of its purport, to the party's spouse, or to any other person found there who is a member of his or her family and above the age of sixteen years; or if neither the spouse nor any such person can be found there, and he or she cannot be found, by leaving the notice posted at the front door of such place of abode; or if he or she does not reside in this State, the notice may be served by the publication thereof once a week for three successive weeks in a newspaper published in this State; or the notice may be served by registered or certified mail to the licensee's last known address as filed with the Board.

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

i. Members of the Board and its officers, agents and employees shall be competent to testify at the hearing as to material and relevant matters: Provided, that no member of the Board who testifies at the hearing shall thereafter participate in the deliberations or decisions of the Board with respect to the case in which he or she testified.

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

k. A record of the hearing, including the complaint(s), if applicable, the notice of hearing, all pleading, motions, rulings, stipulations, exhibits, documentary evidence, evidentiary depositions and the stenographic report of the hearing shall be made and a transcript thereof maintained in the Board's files. Upon request, a copy of the transcript shall be furnished to any party at his or her expense.

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

m. Where a hearing is held upon the instance of the Board after charges have been brought against a licensee or registrant pursuant to subsections 3.2.4. and 3.2.5. of this section, the Board has the burden of proof and shall present its evidence and/or testimony in support of the charges first.

n. Where a hearing is held upon demand under the provision of subsections 3.2.1., 3.2.2., 3.2.3., and 3.2.5. of this section, the demanding party has the burden of proof and is therefore required to present his or her evidence first.

o. Following the conclusion of the demanding party's presentation of evidence in accordance with subsection 3.2.10.(m) of this section, the Respondent or charged party has the right to submit his or her evidence in defense.

p. Following the conclusion of the demanding party's presentation of evidence in accordance with subsection 3.2.10.(n) of this section, the Board has the right to submit its evidence in defense.

q. The Board may call witnesses to testify in support of its decision to deny licensure or in support of the charges instituted against a licensee; may present other evidence to support its position; and, may cross-examine witnesses called by the demanding party or charged party in support of his or her position.

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

s. Hearings held by the Board as a result of charges instituted against a licensee or registrant may be continued or adjourned to a later date or a different place by the Board or its designee by appropriate notice to all parties.

t. Motion 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 prior to the hearing date. In determining whether good cause exists, the Board will consider the ability of the party requesting the continuance to proceed effectively without a continuance. The Board shall deny a motion for a continuance filed less than seven (7) days from the date of hearing unless the reason for the motion could not have been ascertained earlier. Motions for continuance filed prior to the date of hearing may be ruled on by the Executive Director or Assistant Executive Director of the Board or designated hearing examiner. All other motions for continuance shall be ruled on by the Board member(s) or the hearing examiner presiding over the hearing.

u. All motions related to a case set for hearing before the Board, except motions for continuance and those made during the hearing, shall be in writing and shall be received in the office of the Board at least ten (10) days before the hearing. 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 the motions accordingly.

### 3.3. Transcript of Testimony and Evidence.

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

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

3.3.3. 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 the transcript truly discloses what occurred and shall revise the transcript as appropriate so as to make it conform to the truth.

3.3.4. A transcript of the hearing shall be provided to all members of the Board for review.

3.4. Submission of Proposed Findings of Fact and Conclusions of Law. Any party may submit proposed findings of fact and conclusions of law at a time and manner designated by the Board or its duly appointed hearing examiner.

### 3.5. Hearing Examiner.

3.5.1. The Board may appoint a hearing examiner who may 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 herein.

3.5.2. Hearing examiners appointed by the Board are not authorized or empowered to grant, suspend, revoke or otherwise discipline any licensee or registrant.

3.5.3. The hearing examiner shall prepare recommended findings of fact and conclusions of the law for

submission to the Board. The Board may adopt, modify or reject the findings of fact and conclusions of law.

### 3.6. Conferences; Informal Disposition of Cases.

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

- a. To dispose of procedural requests, prehearing motions or similar matters;
- b. To simplify or settle issues by consent of the parties; or
- c. To provide for the informal disposition of cases by stipulation or agreement.

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

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

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

### 3.8. Subpoenas.

3.8.1. Subpoenas to compel the attendance of witnesses and subpoenas duces tecum to compel the production of documents may be issued by the Board, its Executive Director, Assistant Executive Director, and by the hearing examiner appointed by the Board. The subpoenas shall be issued pursuant to W. Va. Code §29A-5-1(b).

3.8.2. Written requests by a party for the issuance of subpoenas or subpoenas duces tecum as provided in subsection 3.8.1. 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 or subpoenas duces tecum shall see that they are properly served in accordance with W. Va. Code §29A-5-1(b).

### 3.9. Orders.

3.9.1. 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 §29-5-3 and §30-1-8(d). The 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.

3.9.2. The findings of fact and conclusions of law must be approved by a majority of the Board either by a poll or vote at a regular meeting, before a final order is entered. A copy of the final order approved by a majority of the Board shall be served upon the demanding or charged party and/or his attorney of record, if any, within five (5) days after entry by the Board by personal service or by registered or certified mail.

3.10. Appeals. An appeal from any final order entered in accordance with these rules shall comply with the provisions of W. Va. Code §29A-5-4.