

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #5

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2010 DEC 30 AM 8:52

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: DHHR - Bureau for Public Health TITLE NUMBER: 64

CITE AUTHORITY: WV Code §§16-1-4, 29A-4-1 and 29A-5-1(a).

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: 1

TITLE OF RULE BEING AMENDED: RULES OF PROCEDURE FOR CONTESTED CASE
HEARINGS AND DECLARATORY RULINGS

IF NO, SERIES NUMBER OF 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 Jan. 30, 2011



Authorized Signature

FILED

TITLE 64

2018 DEC 30 AM 8: 22

PROCEDURAL RULE
BUREAU FOR PUBLIC HEALTH
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

SERIES 1

RULES OF PROCEDURE FOR CONTESTED CASE
HEARINGS AND DECLARATORY RULINGS

§64-1-1. General.

1.1. Scope. -- These procedural rules establish the general procedures for conducting contested case hearings and the issuance of declaratory rulings. The purpose of these rules is to facilitate the resolution of contested cases in a just, speedy, and inexpensive manner and to provide for declaratory rulings in accordance with WV Code §29A-4-1.

1.2. Authority. -- WV Code §§16-1-4, §29A-5-1(a) and 29A-4-1.

1.3. Filing Date. --

1.4. Effective Date.

§64-1-2. Application.

2.1. These procedural rules shall apply to every person, partnership, association, corporation or public corporation affected by any rules, regulations or statutes enforceable by the bureau for public health. These rules of procedure shall not apply to contested case hearings arising under the authority of WV Code §16-2D-1, et seq.

§64-1-3. Definitions.

3.1. Bureau – The Bureau for Public Health in the Department of Health and Human Resources.

3.2. Commissioner – The Commissioner of the Bureau for Public Health or his or her designee.

3.3. Event or occurrence - The written agency action that precipitates a request for a hearing.

§64-1-4. Hearings.

4.1. Request for Hearing; Form Required - Any party who requests a hearing to determine any constitutional rights, legal rights, duties, interests or privileges of specific parties as required by law shall specify in writing the relief requested and the grounds relied upon as a basis for the relief requested.

4.2. Hearing on Written Request - When the Commissioner is presented with a request for a hearing as described in subsection 4.1. of this section he or she shall conduct a hearing within forty-five (45) days of receipt of such written request, unless postponed to a later date by mutual agreement.

4.3. A request for a hearing may be denied if the Commissioner determines that the hearing:

4.3.a. Involves an exercise of authority in excess of that available under law;

4.3.b. Would serve no useful purpose; or

4.3.c. Arises out of an event or occurrence that happened more than ninety (90) days prior to the request for a hearing.

4.4. If the Commissioner determines that the request for a hearing should be denied under section 4.3. of this rule, then the Commissioner shall, within twenty (20) days of the receipt of such request, enter an Order denying the request for hearing, including the reason for such denial. Appeal may be taken from such Order as provided in WV Code §29A-5-4.

4.5. Notice of Hearing - Upon the receipt of a request for a hearing as described in subsection 4.1. of this Section, the Commissioner shall within twenty (20) days provide the party making such request with a notice of hearing providing the Commissioner has not entered an Order denying a hearing as provided in subsections 4.3. and 4.4. of this section. Such notice shall contain:

4.5.a. The date, time and place of the hearing;

4.5.b. A short plain statement of the matters asserted; and

4.5.c. A statement of intention to appoint a hearing examiner, if one is to be appointed pursuant to Section 8 herein; such notice shall be given at least 10 days in advance of the date of the hearing.

4.6. How Hearings Conducted - Hearings shall be conducted as follows:

4.6.a. Any party shall have the right to be represented by an attorney qualified to practice in the state of West Virginia;

4.6.b. The bureau may be represented by the office of the attorney general;

4.6.c. The rules of evidence as applied in civil cases in the circuit courts of this state shall be followed;

4.6.d. When necessary to ascertain facts not reasonably susceptible to proof under said rules of evidence, evidence not admissible thereunder shall be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent people in the conduct of their affairs;

4.6.e. The bureau shall be bound by the rules of privilege recognized by law;

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

4.6.g. Initially the bureau shall be given an opportunity to present evidence, including testimony, papers, records, bureau staff memoranda and documents in the possession of the bureau which it selects and determines to be in support of its position;

4.6.h. Every party shall have the right of cross-examination of witnesses who testify, and following the conclusion of the bureau's presentation, shall have the right to present evidence including testimony, papers and records and to submit rebuttal evidence;

4.6.i. The bureau shall have the right to cross-examine witnesses providing rebuttal testimony; and

4.6.j Following the presentation of all the evidence, every party, including the bureau, shall have the right to offer closing argument, not to exceed a reasonable time limit as determined by the Commissioner or the hearing examiner.

§64-1-5. Continuation and Adjournment.

Hearings may be continued from one day to another or adjourned to a later date or a different place by announcement thereof by the hearing examiner at the hearing or by appropriate notice to all parties. A written motion for a continuance shall be filed and received by the bureau and the hearing examiner at least five (5) days prior to the hearing date.

§64-1-6. Transcription of Reported Testimony and Evidence.

6.1. What Reported - 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.

6.2. Request from any Party - Upon the request to the bureau from any party to the hearing, all reported materials shall be transcribed and a copy thereof furnished to such party at his or her expense.

6.3. Transcription in the Event a Hearing Examiner is Appointed - In all cases where a hearing examiner is appointed, all reported material shall be transcribed and forwarded to the Commissioner. Any parties requesting a copy of a transcript prepared pursuant to this subsection shall be furnished a copy at their expense.

6.4. Responsibility for Transcript - The bureau shall have the responsibility for making arrangements for the transcription of the reported testimony and evidence. In the event transcription is required pursuant to this section it shall be accomplished with all dispatch.

6.5. Correction of Error in Transcript - Upon the motion of the bureau or any party assigning error or omission in any part of any transcript, the bureau, through the Commissioner or duly 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 revised in the respects designated, so as to make it conform to the whole truth.

§64-1-7. Submission of Proposed Findings of Fact and Conclusions of Law; Time for Submission.

Any party, including the bureau, may submit to the hearing examiner or administrative law judge proposed findings of fact and conclusions of law within thirty (30) days of the conclusion of a hearing or, on a time frame to be agreed upon by the parties and by the hearing examiner. In the event the proceedings of a hearing are transcribed, then the parties may submit proposed findings of fact and conclusions of law within twenty (20) days from the date the final transcript is available.

§64-1-8. Appointment of Hearing Examiner; Function of Hearing Examiner.

The Commissioner may, in his or her discretion, appoint a hearing examiner who shall be empowered to subpoena witnesses and documents, administer oaths and affirmations, to examine witnesses under oath, to rule on evidentiary questions, to hold conferences for the settlement or simplification of issues by consent of the parties and to conduct hearings as provided in section 4 herein.

§64-1-9. Conferences; Informal Disposition of Cases.

9.1. At any time prior to the hearing or thereafter but prior to the issuance of a final decision, the Commissioner, or his or her duly appointed hearing examiner may hold conferences:

9.1.a. To dispose of procedural request or similar matters;

9.1.b. To simplify or settle issues by consent of the parties; or

9.1.c. To provide for the informal disposition of cases by stipulation, agreed settlement, or consent order.

9.2. The Commissioner, or his or her duly appointed hearing examiner may cause such conferences to be held on his or her own motion or at the request of a party.

§64-1-10. Depositions Permitted.

Evidentiary depositions may be taken and read into evidence only as allowed in the rules of civil procedure as in civil actions in the circuit courts of this state.

§64-1-11. Subpoenas.

11.1. Where Permitted by Chapter 16 - In accordance with any provision contained in Chapter 16 of the West Virginia Code, authorizing the Commissioner to issue subpoenas or subpoenas duces tecum, the Commissioner or his or her duly appointed hearing examiner shall have the power to issue subpoenas or subpoenas duces tecum pursuant to the provisions set forth in WV Code §29A5-1(b).

11.2. Time for Requesting the Issuance of Subpoenas - Written requests for the issuance of subpoenas or subpoenas duces tecum as provided in subsection 11.1. of this section shall be made no later than 10 days prior to a scheduled hearing.

§64-1-12. Orders, Content.

Every final order entered by the hearing examiner or administrative law judge, following a hearing conducted pursuant to these rules, shall be made pursuant to the provisions of WV Code §29A-5-3. 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 proposed findings of fact and conclusions of law.

§64-1-13. Declaratory Ruling - Procedures.

13.1. On petition of any interested person, the Commissioner may issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule, regulation or statute enforceable by the bureau.

13.2. Any interested person shall petition the Commissioner in writing, succinctly stating the issues upon which the declaratory ruling is requested.

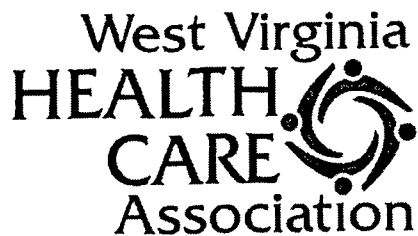
13.3. Upon receipt of such petition, the Commissioner may cause a hearing to be held for the presentation of arguments and evidence within thirty (30) days of receipt of such petition. The Commissioner shall notify the parties thereto and set a time, a place, and a date for such hearing.

13.4. A declaratory ruling issued after argument and stated to be binding shall be binding between the bureau for public health and the petitioner on the state of facts alleged, unless altered or set aside by a court in accordance with WV Code §29A-1-2. Furthermore, such declaratory ruling shall not be binding on any other person.

13.5. A declaratory ruling issued upon petition, proper notice and argument shall not preclude the petitioner from seeking a contested case hearing in accordance with the provisions of these Rules of Procedure for Contested Case Hearings and Declaratory Rulings. Such declaratory ruling shall serve only to explain or to elucidate the applicability to any person, property, or state of facts or any rule or statute enforceable by the bureau for public health.

§64-1-14. Appeal.

Appeal - an appeal from any final order or ruling entered in accordance with this rule shall be in accordance with the provisions of WV Code §29A-5-4.



July 20, 2010

Ann A. Goldberg, Director
Public Health Regulations
Bureau for Public Health
350 Capitol Street, Room 702
Charleston, West Virginia 25301

Re: Rules of Procedure for Contested Case
Hearings and Declaratory Rulings

Dear Ms. Goldberg:

Thank you for the opportunity to comment on the proposed Rules of Procedure for Contested Case Hearings and Declaratory Rulings. The following comments represent some of our concerns with the rule.

Section 4.3.c The proposed rule effectively limits the right of nursing home providers to appeal many deficiencies. The proposed rule states that a hearing may be denied for "events or occurrences that happened more than ninety (90) days prior to the request for a hearing." Survey teams often conduct closed record reviews when inspecting nursing homes. As a result, the survey team may cite a nursing home for events and occurrences that occurred many months prior to the inspection. This rule would effectively deny a nursing home and many other health care providers the right to contest these deficiencies. When a provider's license to operate is at stake, little comfort exists with the Commissioner having the discretion to deny a facility due process.

Section 4.4 This section should clearly state that a denial of a hearing request by the Commissioner constitutes an exhaustion of a party's administrative remedies.

Section 4.5 The Commissioner should be required to issue a notice of hearing within ten days, not twenty days, of the request. Because the hearing must be held within 45 days of the request, a notice sent after twenty days only gives a party 25 days to arrange for witnesses to attend the hearing. The time frame is too tight.

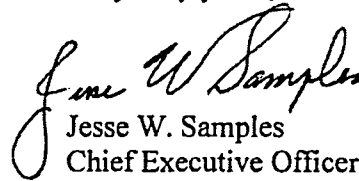
Section 4.6 Parties should be provided the opportunity to conduct limited discovery. At a minimum, the Bureau should be required to provide the parties with a copy of all of the papers and records it intends to introduce five days before the hearing.

Section 8 Often hearing examiners are under contract with the Bureau. This practice destroys confidence in the fairness and impartiality of the proceeding. An aggrieved party cannot help but feel disadvantaged when the prosecutor (in this case, the Bureau) has picked the judge. A random pool of hearing examiners, such as the Office of Judges, should be used.

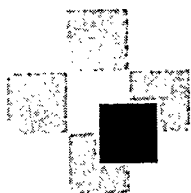
Section 9 A party requesting a conference or a prehearing conference should be granted one as a matter of right. It should not be subject to the Commissioner or Hearing Examiner's discretion.

The Department's thoughtful consideration of our concerns will be greatly appreciated.

Very truly yours,


Jesse W. Samples
Chief Executive Officer

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Behavioral
Healthcare
Providers
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July 23, 2010

Ann A. Goldberg, Director
Public Health Regulations
Bureau for Public Health
350 Capitol Street, Room 702
Charleston, WV 25301

VIA: Hand Delivery

RE: Public Comment on "Rules of Procedure for Contested Case Hearings and Declaratory Rulings"

Dear Ms. Goldberg:

Thank you for the opportunity to provide comment upon the proposed rules entitled "Rules of Procedure for Contested Case Hearings and Declaratory Rulings". The West Virginia Behavioral Health Providers Association ("WVBHPA") exists as a statewide, non-profit association representing the interests of over twenty (20) behavioral health centers throughout the State of West Virginia. The WVBHPA sponsors numerous advocacy, education, information, and technical assistance programs designed to build a stronger behavioral health system. Through these efforts, and through the efforts of its members, the WVBHPA strives to be a catalyst for positive change in the delivery of behavioral health services to all West Virginians.

The WVBHPA monitors legal developments that may have an impact upon its members, and where necessary, seeks to provide input to decision-makers. The proposed rules represent an important legal development, and the WVBHPA is keenly interested in assuring that these proposed rules offer a meaningful opportunity for its members to receive fair and impartial consideration in contested case hearings. It is the desire of the WVBHPA and its members to work responsibly within the legal process to ensure that all participants in the regulatory system are accorded due process of law.

Most of the proposed amendments to the "Rules of Procedure for Contested Case Hearings and Declaratory Rulings" are non-substantive and are intended to update and modernize the rule consistent with existing state statutes and agencies. However, because this represents the first opportunity to update these procedural rules in almost 30 years, the WVBHPA recommends that additional amendments be included. Accordingly, the WVBHPA offers the following comments for the consideration of the Bureau for Public Health.

1. Section 64-1-2.1. Since 1981, the West Virginia Legislature has added the legal structure of limited liability company to the West Virginia Code. Accordingly, the WVBHPA recommends that the term "limited liability company" be included in the first sentence as an entity that may be affected by these rules.

2. Section 64-1-4.3.b. The WVBHPA believes that this provision, which would allow the Commissioner for the Bureau for Public Health ("Commissioner") to deny a hearing if it would serve no useful purpose, is unduly vague and ambiguous. As stated in Section 64-1-4.1, a request for a hearing must be based upon a determination of constitutional rights, legal rights, duties, interests, or privileges of specific parties as required by law. It is difficult to understand how such a request could ever "serve no useful purpose." Accordingly, the WVBHPA recommends that this ground for denying a request for a hearing be deleted from the proposed rules.

3. Section 64-1-4.3.c. The WVBHPA concurs that a time limit should be established in which a request for a hearing must be submitted. The WVBHPA has no complaint that this time period be ninety (90) days. However, the WVBHPA does not concur that this 90-day period should begin to run from the date of the "event or occurrence" as set forth in the proposed rule. Frequently, our members are subject to inspections by agencies such as the Office for Health Facilities and Licensure and Certification ("OHFLAC"), after which a written report is prepared and submitted to our members. This report may not be available for several days or weeks after the inspection has been completed. This delay has the potential to substantially reduce the ninety (90) day time period in which our members may file a request for a hearing. Accordingly, the WVBHPA recommends that this subsection be re-written as follows:

4.3.c. Arises out of a written finding, determination, conclusion, or decision that was received by the party more than ninety (90) days prior to the request for a hearing.

4. Section 64-1-4.5.b. A fundamental concept of due process of law is the receipt of adequate notice of any charges or complaints against a party. Currently, the proposed rule states that the Notice of Hearing must contain a "short plain statement of the matters asserted." Frequently, such a "short plain statement" provides insufficient notice to a party of the nature and scope of the pending proceeding. Under the West Virginia Administrative Procedures Act, at § 29A-5-1(a), a party may apply for and receive a more definite and detailed statement of the grounds for an administrative hearing. Accordingly, the WVBHPA recommends that this subsection be re-written as follows:

4.5.b. A short plain statement of the matters asserted, provided however, upon application by a party, a more definitive and detailed statement shall be furnished by the Commissioner.

5. Section 64-1-6.2. The WVBHPA recommends that whenever any party requests the transcription of a contested hearing, the Commissioner should have the responsibility for making all arrangements for a court reporter at the Commissioner's expense.

Certainly the WVBHPA does not disagree that each party should bear the expense of any copies of this transcription.

6. Proposed § 64-1-6.6. Having a complete and well-delineated record is important not only for the Commissioner in making his/her decision, but also for purposes of appeal. Accordingly, the WVBHPA recommends an additional subsection to read as follows:

6.6. The Commissioner shall prepare an official record, which shall include the reported testimony and all exhibits in each contested case, as well as any other papers, records, agency staff memoranda, documents, and any other items which were offered and made a part of the record of the hearing.

7. Section 64-1-7.1. The reference in this provision to the "hearing examiner or administrative law judge" is confusing. The proposed rule seems to only provide for the appointment of a hearing examiner to conduct the proceeding in lieu of the Commissioner. If an "administrative law judge" is something different than a "hearing examiner," the proposed rules do not otherwise contemplate the appointment of such an officer to conduct the proceedings.

8. Section 64-1-8.1. The WVBHPA recommends that the function of the hearing examiner should be enlarged at Section 64-1-8.1 to include the following additional language:

All hearings shall be conducted by the hearing examiner in an impartial manner, and shall be open to members of the public. The hearing examiner shall adopt appropriate measures to protect the confidentiality of patient information. Such measures may include, but shall not be limited to, deleting references to all patient identifying information in documents and testimony, and referring to patients by non-identifying designations. If necessary, the hearing examiner may take testimony *in camera* to avoid divulging patient identifying information. At the conclusion of the hearing and the receipt of proposed findings of fact, conclusions of law, and briefs from the parties, the hearing examiner shall prepare a report and recommendation which shall contain his/her proposed findings of fact and conclusions of law for the consideration of the Commissioner. The parties shall then be permitted seven (7) days in which to file objections or comments upon the report and recommendation of the hearing examiner. Thereafter, the Commissioner shall decide whether to accept the report and recommendation, to reject it, to modify it, or to remand the matter to the hearing officer for further proceedings upon instructions. The Commissioner shall retain his/her right to review any and all proposed findings of fact and conclusions of law against the record, and to disagree therewith, provided that the Commissioner

shall state the basis for such disagreement in his/her final order. In the absence of a hearing examiner, and in the case where the Commissioner personally served as the hearing officer, the Commissioner shall issue a decision following his/her review of the proposed findings of fact, conclusions of law, and legal briefs.

9. Section 64-1-9. This provision allows for the informal disposition of cases by stipulation, agreed settlement, or consent order at any time prior to the hearing or thereafter, but prior to the issuance of a final decision. The WVBHPA has no objection to the language as proposed. However, the WVBHPA is aware of other informal dispute processes that are currently utilized by agencies such as the OHFLAC, and which do not fit neatly within the provision as written. Attached hereto is a copy of the informal dispute process related to "Licensure Activity" currently offered by OHFLAC to members of the WVBHPA. It is unclear to our membership whether this informal process is in addition to the procedures outlined in the proposed rules, or in lieu thereof. Further, it is unclear whether the informal dispute process utilized by OHFLAC is mandatory, and how it affects the time period for requesting a formal hearing under the proposed rules. Accordingly, the WVBHPA recommends that the proposed rules specifically recognize the existence of these informal dispute processes, and clarify that an agency's use of these processes is subject to the following requirements:

(a) that these informal dispute processes are entirely discretionary, and may be utilized or not utilized by affected parties without incurring agency disfavor or other disadvantage;

(b) that these informal dispute processes shall not be in lieu of any of the procedures guaranteed under the proposed rules;

(c) that any informal decision rendered at the end of an informal dispute process shall begin the running of the ninety (90) day period in which to request a hearing, and that a request for hearing under the proposed rules may be filed any time within ninety (90) days after the issuance of the informal decision; and

(d) all communications, including the informal decision rendered at the end of the informal dispute process, cannot be used by or against a party in the event a formal hearing is subsequently requested under the proposed rules.

10. Section 64-1-10. This provision currently allows evidentiary depositions to be taken and read into evidence in accordance with the West Virginia Rules of Civil Procedure. The WVBHPA recommends enlarging the scope of this provision to enable the parties to engage in discovery generally. The current procedural rule for the Department of Health and Human Resources contained at Title 69, Series 1 ("Rules for Hearings Under the Administrative Procedures Act"), contains such a provision. Accordingly, the WVBHPA recommends that the following additional discovery provision be included in the proposed rules at the end of Section 64-1-10:

Ann A. Goldberg, Director

Page 5

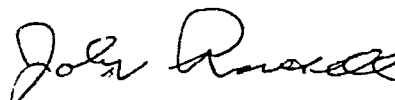
July 23, 2010

Discovery shall be engaged in with the consent of the Commissioner, or if a hearing examiner has been assigned, with the consent of the hearing examiner. All discovery requests will be submitted to the Commissioner or the hearing examiner, as appropriate, and served upon the other party. If the Commissioner or the hearing examiner, as appropriate, determines that the requested information is relevant and material to the issues to be heard and not unduly burdensome, the Commissioner or hearing examiner, as appropriate, 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 the scope of the information requested and the date on which the hearing is scheduled.

The provision is vitally important to our members. Without such discovery, it is often impossible to prepare and tender an adequate defense to charges, complaints, etc. The proposed rules should avoid "trial by ambush," and should instead encourage a full and complete hearing based upon all relevant facts and circumstances.

The WVBHPA and its membership appreciate the opportunity to provide input on these important proposed procedural rules. We trust that these comments will assist the Bureau for Public Health in making their final changes to a procedural rule that is badly in need of updating and modernization.

Sincerely,



John Russell
Executive Director
West Virginia Behavioral Health
Providers Association

Enclosure

{C1835185.1}

**Office of Health Facility Licensure and Certification
Behavioral Health Program**

**Informal Dispute Process
Related to Licensure Activity**

Introduction

The Office of Health Facility Licensure and Certification (OHFLAC) Behavioral Health Program shall offer an opportunity for an informal hearing at which a Behavioral Health Center may dispute licensure deficiencies cited during any survey or complaint investigation.

Purpose

The purpose of this informal process is to give providers one (1) opportunity to refute cited licensure deficiencies after any survey. As this is an informal process, neither party may be represented by an attorney.

Elements of Informal Appeal Process (Informal Dispute Resolution)

The following elements are included in each informal appeal process offered:

1. Upon their receipt of the Statement of Deficiencies Behavioral Health Centers are offered one (1) informal opportunity, if they request it, to dispute licensure deficiencies with the OHFLAC Behavioral Health Program, the entity that conducted the survey.
2. Behavioral Health Centers may not use the informal dispute resolution (IDR) process to delay the formal imposition of remedies or to challenge any other aspect of the survey process, including:
 - a. Remedy(ies) imposed by the enforcing agency;
 - b. Alleged failure of the survey team to comply with a requirement of the survey process;
 - c. Alleged inconsistency of the survey team in citing deficiencies among Behavioral Health Centers; or
 - d. Alleged inadequacy or inaccuracy of the IDR process.
3. Behavioral Health Centers shall be notified of the availability of the informal hearing

process in the letter accompanying the Statement of Deficiencies. Notification of this process will inform the center:

- a. That it may request the opportunity for an informal hearing, and that if it requests the opportunity, the request must be submitted in writing along with an explanation of the specific deficiencies that are being disputed;
 - b. That the request must be made within the same ten (10) working day period the center has for submitting an acceptable Plan of Correction to the Behavioral Health Program and must be submitted separately from the Plan of Correction;
 - c. That the request should be submitted to the Behavioral Health Program Manager, Office of Health Facility Licensure and Certification;
 - d. That the informal hearing process will be accomplished via a face-to-face meeting;
 - e. That at the informal hearing, neither party may be represented by an attorney; and
 - f. Of the name and/or the position title of the person who will be conducting the informal hearing, if known.
4. Informal hearings shall be held within twenty (20) working days of the Behavioral Health Program's receipt of a timely request for an informal appeal hearing, unless the Behavioral Health Center consents to a postponement or continuance. In no event may the informal appeal hearing occur more than thirty (30) business days after the OHFLAC Behavioral Health Program receives the timely request for the informal appeal hearing.
 5. Failure to complete the informal appeal hearing process timely will not delay the effective date of any enforcement action against the Behavioral Health Center.
 6. The IDR Review Committee, comprised of the Behavioral Health Program Manager, and one other Health Facility Surveyor who was not involved in the survey event in dispute, will review documentation provided by the center in support of their dispute.
 7. When a Behavioral Health Center is unsuccessful during the informal appeal hearing at demonstrating that a deficiency should not have been cited, the Behavioral Health Program Manager, as a member of the IDR Review Committee, and on behalf of the committee as a whole, will notify the center's administrator in writing that the appeal was unsuccessful.
 8. When a Behavioral Health Center is successful during the informal appeal hearing at

demonstrating that a deficiency should not have been cited, the Behavioral Health Program Manager, as a member of the IDR Review Committee, and on behalf of the committee as a whole, will:

- a. Notify the center's administration in writing that the center was successful, and provide details of the outcome of the informal hearing (e.g., deficiency deleted in entirety; individual finding within a deficiency deleted, etc.);
- b. Mark on the Statement of Deficiencies that the deficiency (or finding) is deleted, and sign and date the notation;
- c. Recommend to the Director of OHFLAC that any enforcement action(s) that had been imposed solely because of the deficiency citation be rescinded.

NOTE: The center has the option to request a clean (new) copy of the Statement of Deficiencies. However, the clean copy will be the releasable copy only when a clean (new) Plan of Correction is both provided and signed by the Behavioral Health Center. The original Statement of Deficiencies is disclosable when a clean Plan of Correction is not submitted and signed by the Behavioral Health Center.

9. All communications during an informal appeal hearing are confidential and cannot be used by or against the Behavioral Health Center or OHFLAC in the event a formal hearing takes place.
10. A written description of the Behavioral Health Program's informal appeal hearing process will be made available to a center upon the center's request.

Judy Cooper

From: Goldberg, Ann A [Ann.A.Goldberg@wv.gov]
Sent: Tuesday, January 04, 2011 3:24 PM
To: Judy Cooper
Cc: El Sheikh, Sherri E; Sargent, Kathy E
Subject: Comments on 64CSR1, BPH Procedural rule on Contested Case Hearings
Attachments: 64CSR1 COMMENTS.pdf

Judy,

Attached are the two comment letters we received on the BPH rule, Rules for Contested Case Hearings and Declaratory Rulings, 64CSR1.

I met with Jesse Samples to discuss the comments from the WV Health Care Association and added a definition at §3.3. as a result of our discussion.

I spoke by phone with Mr. Russell but did not make changes to the rule.

Ann

Ann A. Goldberg
Director, Public Health Regulations
Bureau for Public Health
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Charleston, WV 25301
304 558-0035
ann.a.goldberg@wv.gov

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