

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

Do Not Mark In This Box

Form #3

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: Board of Barbers and Cosmetologists TITLE NUMBER: 3

CITE AUTHORITY: 30-1-1 & 30-27-1

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: 8

TITLE OF RULE BEING PROPOSED: Disciplinary and Complaint Procedures

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.



Authorized Signature

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Disciplinary and Complaint Procedures

Rule Title: _____

Type of Rule: Legislative Interpretive Procedural

Agency: Board of Barbers and Cosmetologists

Address: 1716 Pennsylvania Ave. Suite 7
Charleston, WV 25302

Phone Number: 304-558-2924 Email: adam.l.higginbotham@wv.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

NA

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: _____

Rule Title: Disciplinary and Complaint Procedures

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

NA

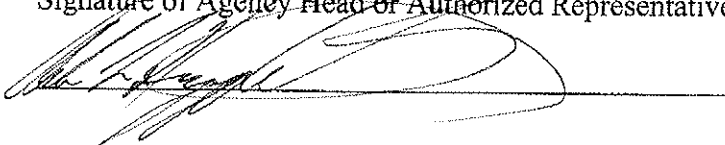
MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

This rule will have no fiscal impact for the Board . This rule establishes disciplinary and complaint procedures.

Date: 7/30/2009

Signature of Agency Head or Authorized Representative





State of West Virginia
Board of Barbers and Cosmetologists

1716 Pennsylvania Avenue, Suite 7
Charleston, West Virginia 25302
Telephone: 304-558-2924
Fax: 304-558-3450

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

Adam L. Higginbotham
Director

Date : July 30, 2009

To: Administrative Law Division of Secretary of State's Office

From: Adam L. Higginbotham, Director, Board of Barbers and Cosmetologists

Re: Disciplinary and Complaint Procedures

SUMMARY OF PROPOSAL

The rule establishes Disciplinary and Complaint Procedures for the Board.

X

Adam L. Higginbotham
Executive Director

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: 7/30/2009

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: *(Agency Name, Address & Phone No.)* Board of Barbers and Cosmetologists

1716 Pennsylvania Ave. Suite 7

Charleston, WV 25302

LEGISLATIVE RULE TITLE: _____

Disciplinary and Complaint Procedures

1. Authorizing statute(s) citation _____
30-1-1 & 30-27-1

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
6/30/2009

b. What other notice, including advertising, did you give of the hearing?
Posted on web site.

c. Date of Public Hearing(s) *or* Public Comment Period ended:
7/30/2009

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X No comments received _____

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

NA

- f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Adam L. Higginbotham, Director

1716 Pennsylvania Ave. Suite 7, Charleston, WV 25302

304-558-2924/304-558-3450/adam.l.higginbotham@wv.gov

- g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

NA

b. Date of hearing or comment period:

NA

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

NA

d. Attach findings and determinations and reasons:

Attached NA

A handwritten signature in black ink, appearing to be "M. J. H. P.", written in a cursive style.

Higginbotham, Adam L

From: Higginbotham, Adam L
Sent: Tuesday, July 21, 2009 10:53 AM
To: 'Peter Shams-Avari'
Subject: RE: Proposed rules on complain procedures

Peter,

You are absolutely right. The Board of Medical Imaging's rule was used as a template.

Thank you for catching this for us. Our Board will be sure to remove it before the July 31st submission deadline.

Adam L. Higginbotham M.B.A.
Director
1716 Pennsylvania Avenue, Suite 7
Charleston, WV 25302
304-558-2924
adam.l.higginbotham@wv.gov

From: Peter Shams-Avari [mailto:PShams-Avari@asrt.org]
Sent: Tuesday, July 21, 2009 10:47 AM
To: Higginbotham, Adam L
Subject: Proposed rules on complain procedures

Dear Adam,

Attached is comment from the American Society of Radiologic Technologists in connection to the proposed rules. In the body of the rules, radiologic technologists suddenly pops in at § 3-8-5 5.17 in a context that does not appear to make any sense. Perhaps the radiologic technology rules served as a template. Never-the-less, our tracking service caught the reference and so the attached comment.

Sincerely,
Peter K. Shams-Avari
ASRT Health Policy Manager
American Society of Radiologic Technologists
15000 Central Ave, SE
Albuquerque, NM 87123-3909
Phone: 800-444-2778, Ext. 1319 or 505-298-4500, Ext. 1319
Fax: 505-298-5063
<mailto:pshams-avari@asrt.org>
www.asrt.org

The preceding message is provided for information purposes only and should not be considered legal advice. Nothing provided herein should be accepted as a substitute for legal advice provided by a licensed attorney in your state. The information contained is confidential and should not be forwarded, posted or reprinted without the consent of the author.

Check out ASRT's exclusive All-New Member Benefits:

- **Save 20%** on more than 500 brands of shoes.
- **Save up to \$300** on your next vacation with Vacation Rewards.
- **Exclusive member-only access** to ASRT's Community of R.T. Professionals.



15000 Central Ave. SE, Albuquerque, NM 87123-3917
505-298-4500 • 800-444-2778 • Fax 505-298-5063 • www.asrt.org

July 20, 2009

Department of Health and Human Resources
Board of Examiners for Barbers and Cosmetologists
Attention: Adam Higginbotham
1716 Pennsylvania Ave, Suite 7
Charleston, WV 25302

Re: Proposed Rule Pertaining to Complain Procedures
Barbers and Cosmetologists

Dear Mr. Higginbotham:

Regarding the above proposed regulation, we believe there is a typographical error in the proposed regulations. The item in question is **§ 3-8-5. Disposition of Complaints. 5.17.** which reads, "5.17. The Representative may issue subpoenas and subpoenas duces tecum to complete the Board's investigation and to determine the truth or validity of complaints. Any such request shall be accompanied by a brief statement specifying the necessity for the same. A subpoena issued hereunder may require any facility employing or licensing or practicing radiologic technology to allow inspection of the premises or other tangible things or records in the possession of or controlled by the following."

Since this rule is promulgated by the Board of Examiners for Barbers and Cosmetologists for the purpose of establishing a complain procedure, it did not make sense that radiologic technologists should suddenly appear. The way these rules are written, it would severely hinder the ability of the board to subpoena records from barbers and cosmetologists, which I do not believe is the intention of the board in promulgating these rules. Since barbers and cosmetologists generally do not employ or license radiologic technologists, you may wish to change that subsection.

Thank you for your time and opportunity to comment on the proposed regulation. If you have any questions, please call me at 800-444-2778, ext. 1319 or e-mail me at pshams-avari@asrt.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter K. Shams-Avari". The signature is fluid and cursive, written over a white background.

Peter K. Shams-Avari
Health Policy Manager

TITLE 3
PROCEDURAL RULE
WEST VIRGINIA BOARD OF BARBERS AND COSMETOLOGISTS

SERIES 8
DISCIPLINARY AND COMPLAINT PROCEDURES

§3-8-1. General.

1.1. Scope. -- This rule specifies a procedure for the investigation and resolution of complaints against a licensee or permittee.

1.2. Authority. -- W. Va. Code §§30-27-1 et seq. and 30-1-1 et seq.

1.3. Filing Date. --

1.4. Effective Date. --

§3-8-2. Application.

This rule applies to all licensees and permittees under W.Va. Code §30-27-1 et seq.

§3-8-3. Definitions.

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

3.1. “Applicant” means any person or other entity making application for a professional license, license, certificate, registration, permit or renewal under the provisions of W. Va. Code §30-27-1 et seq.

3.2. “Board” means the West Virginia Board of Barbers and Cosmetologists.

3.3. “License” has the same meaning as W. Va. Code § 30-27-3(p).

3.4. “Licensee” has the same meaning as W. Va. Code § 30-27-3(q).

3.5. “Permit” has the same meaning as W. Va. Code § 30-27-3(t).

3.6. “Permittee” has the same meaning as W. Va. Code § 30-27-2(u).

3.7. “Professional license” has the same meaning as W. Va. Code § 30-27-3(v).

3.8. “Registration” has the same meaning as W. Va. Code § 30-27-3(w).

3.9. “Registrant” has the same meaning as W. Va. Code § 30-27-3(x).

3.10. “Representative” means any member of the Board, the Executive Director of the Board or Counsel for the Board.

3.11. “Salon” has the same meaning as W. Va. Code § 30-27-3(y).

3.12 “School” has the same meaning as W. Va. Code § 30-27-3(aa).

§3-8-4. Causes for Denial, Probation, Limitation, Discipline, Suspension or Revocation of Licenses or Permit.

The Board may deny an application for license, permit or registration, place a licensee, permittee or registrant on probation, limit or restrict a license, suspend a license, permit or registration or revoke any license, permit or registration issued by the Board, upon satisfactory proof that a licensee, permittee or registrant has been convicted of any felony or misdemeanor, if the misdemeanor conviction relates to the practice of Barbering and/or Cosmetology, or is, in his or her professional capacity, engaged in conduct, practices or acts constituting professional negligence or a willful departure from accepted standards of professional conduct in violation of W. Va. Code §30-27-1 et seq. or the rules of the Board. The above objectives may be accomplished by mediation, provided that reasonable mediation cost may be reimbursed by the licensee, permittee or registrant.

§3-8-5. Disposition of Complaints.

5.1. Any individual may make a complaint to the Board concerning a licensee, permittee or registrant.

5.2. The Board may accept an anonymous complaint if the information provided is adequate to begin the investigation.

5.3. The Board may accept a complaint in writing or in person. The Board may provide a form for the purpose of submitting a written complaint, but shall accept the complaint if the information includes:

5.3.1. the alleged violation which prompted the complaint

5.3.2. the name and address of the individual against whom the complaint is lodged.

5.3.3. the date the incident occurred; and

5.3.4. the name or names of witnesses to the incident.

5.4. All complaints shall be referred to the Executive Director or Counsel for the Board.

5.5. A complaint against a licensee or permittee shall allege that such person has been convicted, while licensed, of a felony or misdemeanor, if the misdemeanor conviction relates to the practice of Barbering and/or Cosmetology, or is, in his or her professional capacity, engaging in conduct, practices or acts constituting professional negligence or a willful departure from accepted standards of professional or ethical conduct in violation of W. Va. Code §30-27-1 et seq. or the rules of the Board.

5.6. Complainants are immune from liability for the allegations contained in their complaints filed with the Board unless the complaint is filed in bad faith or for a malicious purpose.

5.7. The Board shall maintain a complaint log which records the receipt of each complaint, its nature and its disposition.

5.8. The Board shall maintain a separate file on each complaint received, and each file shall have a number assigned to it.

5.9. The Representative shall conduct an investigation to determine the validity of the allegation contained in the complaint.

5.10. The Representative shall determine if the complaint is outside the jurisdiction of the Board, with suggestions as to how the complainant might best obtain a resolution of his or her problem.

5.11. The Board may provide a copy of the complaint, including any supporting documentation to the licensee, permittee, registrant or applicant in question for his or her written comment, and he or she shall submit a written response to the Board within thirty (30) days of the date of such correspondence, or waive the right to do so.

5.12. Requests for comment on complaints sent to licensees, permittees, registrants or applicants shall be considered properly served when sent to their last known address. It is the responsibility of the licensee, permittee, registrant or applicants to keep the Board informed of his or her current address.

5.13. Upon receipt of a licensee's, permittee's, registrant's or applicant's comments in response to a complaint, the Board shall promptly send a copy of the same, including any supporting documentation, to the complainant.

5.14. Upon receipt of a complaint the Representative shall, by the next scheduled Board meeting, review and investigate the same and provide the Board with a report. The report shall contain a statement of the allegations, a statement of facts, and an analysis of the complaint including a description of the services provided, the records reviewed and a statement of the Representative's findings and recommendations.

5.15. The Representative shall, upon request, be afforded an opportunity to have an investigation interview with the licensee, permittee, registrant or applicant in question or other involved parties, a report of which shall be placed in the investigation file.

5.16. To facilitate the disposition of a complaint, the Representative may request any person to attend an informal conference, or to appear at a regular meeting of the Board, at any time prior to the Board entering any order with respect to the complaint. The Representative shall give notice of the conference, which notice shall include a statement of issues to be informally discussed. Statements made at a conference may not be introduced at any subsequent hearing on the merits without the consent of all parties to the hearing. No prejudice shall attach for failure to attend a conference pursuant to a request.

5.17. The Representative may issue subpoenas and subpoenas duces tecum to complete the Board's investigation and to determine the truth or validity of complaints. Any such request shall be accompanied by a brief statement specifying the necessity for the same. A subpoena issued hereunder may require any facility employing or licensing or practicing beauty culture to allow inspection of the premises or other tangible things or records in the possession of or controlled by the following.

5.18. At any point in the course of an investigation or inquiry into a complaint, the Board may determine that there is not and will not be sufficient evidence to warrant further proceedings, or that the complaint fails to allege misconduct for which a licensee, permittee or registrant may be sanctioned by the Board: Provided, that in the event the review and investigation of a complaint is initiated by the Representative, respective findings and recommendations shall be made to the Board prior to the Board dismissing the complaint.

5.19. Upon completion of the investigation and approval of the Board, the Representative may negotiate terms of a consent agreement if probable cause for disciplinary action is established.

5.20. The Board shall review the terms of the consent agreement and all investigative information. The Board may approve the consent agreement, request revisions to the consent agreement, or reject the

consent agreement.

5.21. If the Board rejects the consent agreement, the Representative shall schedule a hearing on the complaint.

5.22. If the licensee, permittee or registrant contests the allegations and an agreement can not be reached, the Representative shall schedule a hearing on the complaint. All hearings shall be in accordance with the W. Va. Code §29A-5-1 et seq. of the Administrative Procedures Act.

5.23. A hearing shall be held before a hearing examiner or before members of the Board, pursuant to 3CSR .

§3-8-6. Contested Case Hearings.

6.1. The Board may refuse to renew a license, permit or registration or suspend a license, permit or registration if it determines there is probable cause to believe that licensee's, permittee's or registrant's conduct, practices or acts constitute an immediate danger to the public.

§3-8-7. Appeals.

7.1. Any applicant who has had his or her application for a license, permit or registration denied by order of the Board may appeal the order within thirty (30) days of that action in accordance with the contested case hearing procedures set forth in W. Va. Code § 29A-6-1 et seq. and the rules of the Board: Provided, that the appeal 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.