

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th day of January 2007, the following order was made and entered:

IN RE: Proposed Rules Governing Administrative Appeals

On the 18th day of December, 2006 came the Rules Committee for Administrative Appeals, by its chair, Kelli D. Talbott, pursuant to the order of this Court of November 3, 2005 and submitted a set of proposed rules to govern the appeals of administrative decision from various administrative agencies to the circuit courts of this state.

Thereafter upon consideration whereof, the Court is of opinion to and doth hereby approve a period of public comment on said proposed rules to conclude on March 30, 2007, with comments to be filed with the Clerk of this Court. The proposed Rules are to read as follows:

“WEST VIRGINIA RULES OF PROCEDURE FOR ADMINISTRATIVE APPEALS”

Rule 1. Scope of rules and definitions.

(a) Scope of Rules. -- These rules govern the procedures in all circuit courts for judicial review of final orders or decisions from an agency in contested cases that are governed by the Administrative Procedures Act, W. Va. Code § 29A-5 et. seq. These rules do not apply to extraordinary remedies such as certiorari which are governed by Rule 71B(a) of the West Virginia Rules of Civil Procedure.

(b) Rules Not to Affect Jurisdiction. – These rules shall not be construed to extend or limit the jurisdiction of the circuit courts as established by law.

(c) Definitions. – “Appeal” – The procedure by which a case is brought from a state agency to a circuit court.

“Certificate of Service.” – The statement signed by a party or counsel for a party describing the date and manner of serving a particular pleading on the opposing party or counsel for the opposing party.

“Circuit Court.” – Any circuit court established by law in the State of West Virginia

“Contested case.” – A proceeding before a state agency in which the legal rights, duties, interests or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing, but does not include cases in which an agency issues a license, permit or certificate after an examination to test the knowledge or ability of the applicant where the controversy concerns whether the examination was fair or whether the applicant passed

the examination and shall not include state agency rule making or applications for extraordinary remedies.

“Petition.” – The original pleading seeking an appeal in circuit court from a final order or decision of a state agency in a contested case.

“Petitioner.” – The party who takes the appeal.

“Respondent.” – The party against whom the appeal is taken and other necessary parties.

“State Agency.” – Any state government board, commission, department, office or officer authorized by law to adjudicate contested cases, except those in the legislative or judicial branches.

(d) Effective date. – These rules shall be applicable to appeals of state agency final order or decisions filed in circuit court on or after _____.

Rule 2. Commencement of appeal.

(a) Petition. – An appeal from a state agency final order or decision in a contested case is commenced by filing a Petition for judicial review in the office of the circuit clerk of the circuit court in which venue lies by law. Only issues set forth in the petition or fairly comprised therein will be considered by the circuit court on review.

(b) Time for Petition. – No Petition shall be filed from a state agency decision or final order in a contested case after the time period allowed by law. The petition shall be filed in the office of the circuit clerk of the circuit court in which venue lies by law, within 30 days after the petitioner receives notice of the final order or decision from the agency, unless otherwise provided by law.

(c) Form of Petition. – The Petition shall state the following in the order indicated:

1. Title as it was before the agency to the extent possible. The title shall include the names of the agency and the parties to the proceeding regardless of whether the title of the agency proceeding included the names of the parties, and the administrative case number.

2. The kind of proceeding and nature of the ruling by the state agency.

3. A concise statement of the facts of the case.

4. The assignments of error relied upon on appeal and the manner in which they were decided by the state agency.

5. Points and authorities relied upon, a discussion of law, and the relief prayed for.

6. A copy of the decision, order, rule or ruling from which judicial review is sought.

(d) Docketing Statement. – The Petition shall be accompanied by a completed Docketing Statement in the form contained at Appendix A to these Rules.

(e) Service of Petition. – The petitioner shall serve a copy of the Petition and the Docketing Statement upon the state agency and all other parties and counsel of record who participated in the proceeding before the state agency by registered or certified mail. The certificate of service shall show proof of service on the agency whose final decision, order, rule or ruling is involved (unless the agency is the petitioner), even if the agency is not a party. No summons shall be issued or served in connection with the Petition and Docketing Statement. Service upon a prosecuting attorney or the Attorney General alone is not a substitute for service upon the agency.

(f) Proof of Service. – A Petition and accompanying Docketing Statement filed in circuit court shall include proof of service in the form of a Certificate of Service, as defined in these Rules. If the Petitioner obtains a Return Receipt or other delivery confirmation in connection with service of the Petition by registered or certified mail, such Return Receipt or other delivery confirmation shall be filed with the office of the circuit clerk of the circuit court affixed to the certificate of service. If the Return Receipt or other delivery confirmation is not available at the

time of the filing of the Petition and accompanying Docketing Statement, it shall be filed with the circuit court promptly thereafter.

(g) *Response to Petition.* – No response or answer to a Petition is required to be filed unless so ordered by the circuit court. When the circuit court does not order the filing of a responsive pleading, the declarations contained in the petition for judicial review shall be taken as denied. If a party respondent desires, a response may be filed within fifteen (15) days of service of the petition.

(h) *Appeal Bond.* – No appeal bond shall be required to effect an appeal of a state agency decision or final order in a contested case.

Rule 3. Stay of decision pending appeal.

(a) *Application for Stay.* – The filing of a Petition shall not stay enforcement of a state agency final order or decision. Any person desiring to obtain a stay of enforcement may file a written motion directly with the state agency or may file a written motion with the circuit court after the Petition has been filed.

(b) *Form of Application for Stay.* – An application for stay shall be made by written motion stating the reasons for the relief requested and the grounds for the underlying appeal. A copy of the written motion shall be served upon the state agency and all other parties and counsel of record who participated in the proceeding before the state agency.

(c) *Service of Application for Stay.* – Service of a motion for stay shall be made by delivering or mailing a copy to the state agency and all other parties and counsel of record. Proof of service, in the form of a Certificate of Service, shall be filed with the circuit court affixed to the motion for stay.

(d) *Response to Application for Stay.* – The Respondent may file a written response to a motion for stay within seven (7) days of receipt of the motion.

(e) *Hearing on Application for Stay.* – In the event a party files a motion to stay the action of the administrative agency, unless otherwise directed by statute, the circuit court may hold a hearing within fifteen (15) days of the filing of the motion for stay, or may decide the motion without hearing.

Rule 4. Designation and Filing of Record.

(a) Upon filing of the Petition, the petitioner shall designate those parts of the record deemed material to the questions presented in the appeal, including the relevant proceedings to be transcribed, and serve notice of such designation upon all parties below. If the petitioner has not designated the entire record, the respondent(s) shall have fifteen (15) days to file a cross-designation of additional portions of the record for review. In lieu thereof, the parties may, by written stipulation, jointly designate the parts of the record to be prepared for appeal.

(b) Within fifteen days after receipt of a copy of the petition and the complete designation of the record by the agency, or within such further time as the court may allow, the agency shall transmit to such circuit court the original or a certified copy of the entire record of the proceeding under review. If the transcripts are not yet complete, the agency has fifteen (15) days after receipt of the transcripts to transmit the record to the circuit court. The agency shall provide notice to all parties that the record has been transmitted to the circuit court.

(c) The record shall include a copy of the final opinion, order or decision being appealed. Unless otherwise provided by designation or stipulation of the parties, the record shall also include a transcript of all testimony and all papers, motions, documents, exhibits, evidence and records as were before the agency, all agency staff memoranda submitted in connection with the case, all orders or regulations promulgated in the proceeding by the agency and a statement of matters

officially noted. The papers shall be arranged, as nearly as possible, in the order of the filing and entry thereof, with a table of contents or index.

(d) The reasonable expense of preparing such record shall be taxed as a part of the costs of the appeal, unless otherwise provided by law. Upon order of the court, the petitioner shall provide security for costs satisfactory to the court. If both parties appeal, the costs shall be shared equally. Unless otherwise prohibited by statute, by stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs involved.

(e) Upon demand by any party to the appeal, the agency shall furnish, at the cost of the party requesting same, unless such party is indigent, a copy of such record. In the event the complete record is not filed with the court within the time provided for in this section, the petitioner may apply to the court to have the case docketed, and the court shall order such record filed.

(f) The provisions of this Rule are not exhaustive, and the parties should refer to the particular agency's procedural rules for more specific requirements.

(g) Unless required to do so by statute, the parties may mutually waive the filing of a transcript or otherwise limit the record on appeal.

Rule 5. Briefs.

(a) Within thirty (30) days after the record is filed with the circuit court, the Petitioner may file a brief.

(b) The Respondent may file a brief within thirty (30) days after receipt of the Petitioner's brief.

(c) The Petitioner may file a reply brief within fifteen (15) days after receipt of the Respondent's brief.

Rule 6. Hearing and Disposition.

(a) The circuit court shall only consider evidence which was made part of the record in the proceeding before the administrative agency, unless there are alleged irregularities in the procedure before the agency, not shown on the record.

(b) The circuit court may, on its own motion, or motion of any party, issue a schedule providing for submission of briefs as provided herein by any party, and may hold oral argument, or may issue a ruling on the petition and response, if any, without oral argument.

(c) In the event a party alleges irregularities in the procedure before the agency, the circuit court may hold a hearing and consider other testimony and evidence solely on that issue. A request for oral argument or an evidentiary hearing on matters not in the record below shall be made by the Petitioner along with the filing of the petition. Respondent may request and/or respond to Petitioner's request for oral argument or an evidentiary hearing at the time of filing response to the petition. The court shall rule on the request within thirty (30) days of the petition, and the granting thereof is at the court's discretion.

(d) Unless otherwise provided by statute, a final judgment shall be entered in an administrative appeal within six (6) months of the filing of the appeal. The court's ruling may affirm, reverse, vacate or modify the order or decision of the agency, or remand the case with instructions to the administrative tribunal for further proceedings.

(e) The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the West Virginia Supreme Court of Appeals, in accordance with West Virginia Code § 29A-6-1.

In the Circuit Court of _____ County

ADMINISTRATIVE APPEALS DOCKETING STATEMENT

Style of case (use from agency final order including case number):

Agency:

TIMELINESS OF APPEAL

Date of entry of order appealed from:

Date of filing of petition for appeal:

VENUE: If appeal is not filed in Kanawha County, do you reside in or do business in this County?

Yes No

If so, provide the street address and telephone number for your residence or business in this County.

If not, explain your reason(s) for filing this appeal outside of Kanawha County.

FINALITY OF ADMINISTRATIVE ORDER

Is the order appealed from a final decision on the merits as to all issues and parties?

Yes No

If not, what type of order are you appealing?

CASE INFORMATION

State briefly the nature of the case, the relief sought and the outcome at the agency. (Attach an additional sheet if necessary).

Does the agency decision contain factual (evidentiary errors)?

Yes No

If so, please list the evidentiary errors briefly. (Attach an additional sheet if necessary).

Does the agency order contain legal errors (errors of law)?

Yes No

If so, please list the errors of law briefly. (Attach an additional sheet if necessary).

CASE MANAGEMENT INFORMATION

Name of Party filing this appeal (Petitioner):

Do you wish to make an oral presentation to the court?

Yes No

List counsel for each party to the case at the agency. If a party is not represented by counsel, provide the requested information for that party. Include name, firm name, address and telephone number. (Attach an additional sheet if necessary).

Name of attorney or individual filing this Administrative Appeals Docketing Statement:

Attorney Non-Attorney
(self represented)

Will you be handling the appeal?

Yes No

If yes, provide name, firm name address and telephone number.

If there are multiple Petitioners add their names on an additional sheet, accompanied by a certification that all Petitioners concur in this filing.

Remember to attach:

1. Additional pages, if any, containing extended answers to questions on this form.
2. A copy of the agency final order or decision from which the appeal is taken.
3. A certificate of service, verifying that you have served this Administrative Appeals Docketing Statement upon all of the parties to the agency proceeding, the agency itself and the Attorney General's Office.

Administrative Appeal Docketing Statement

Instructions:

1. An administrative appeal docketing statement must be filed for every administrative agency case appealed to the circuit courts of West Virginia. The party filing the appeal may attach a more substantive petition or brief, but the administrative appeal docketing statement must be filed and filled out completely.
2. The completed administrative appeal docketing statement must be served upon all parties to the agency proceeding, including those parties not represented by counsel, the agency itself, and the Attorney General's Office. The administrative appeal docketing statement must be in the form approved by the Supreme Court of Appeals or in a substantially similar format.
3. Only one administrative appeal docketing statement shall be filed for each petition for appeal. If more than one party joins in a petition for appeal, they must select one party who is responsible for filing the administrative appeal docketing statement.
4. The administrative appeal docketing statement should briefly address all of the points or issues to be raised in the appeal. However, it is not the appropriate document for making arguments or motions. A supporting petition may be filed with the administrative appeal docketing statement for such purposes. Conclusory statements, such as "The decision of the agency is not supported by the law or the facts", are unacceptable.
5. While every effort should be made to include in the administrative appeal docketing statement all issues to be presented to the circuit court, the omission of an issue from the statement will not affect the jurisdiction of the circuit court to consider all issues presented by the appeal.
6. If another party to the proceeding believes that the administrative appeal docketing statement is inaccurate or incomplete, that issue should be addressed in the response to the petition for appeal."

The Court would like to thank the Rules Committee for Administrative Appeals for their insight and commitment to the creation of these rules.

A True Copy

Attest: _____
Deputy Clerk, Supreme Court of Appeals