

CHAPTER 7

RULES OF PRACTICE AND PROCEDURE FOR THE CONDUCT OF DISCIPLINARY PROCEEDINGS AGAINST PHYSICIANS AND PHYSICIAN ASSISTANTS

Section 1. Authority. These rules are promulgated pursuant to authority granted by the Act and the A.P.A.

Section 2. Purpose. These rules set forth the procedures of the board for the filing of complaints against licensees; for the conduct of investigations of, and disciplinary proceedings against, licensees; and to describe the process for license denials and appeals therefrom.

Section 3. Preliminary Complaint Evaluation

(a) All parties have a right to represent themselves or be represented by ~~counsel~~ an attorney at every stage of any investigation or disciplinary proceeding, including the informal interview. “Attorney” as used in this chapter means an attorney licensed to practice law in the State of Wyoming, or an attorney who is licensed to practice law in another state, territory or the District of Columbia and who is associated with an attorney licensed to practice law in the State of Wyoming.

(b) Proceedings under these rules shall commence when a complainant notifies the board of conduct by a licensee which falls within the board's jurisdiction and that may constitute a violation of the Act.

(c) A copy of every written complaint, and every writing in the general nature of a complaint, as well as reports of every oral communication in the nature a complaint received by the board shall be filed and maintained in the board's permanent files and entered in the ledger.

(d) Upon receipt of a complaint, the executive director of the board shall notify the complainant in writing of said receipt. The notice to the complainant required by this section shall, at a minimum, clearly state:

(i) Pursuant to W.S. 33-26-408(a)(ii), the complainant and any witnesses incur no civil liability for information provided to the board in good faith, without malice, and in reasonable belief that the information is accurate.

(ii) Any effort by the licensee named in the complaint to directly or indirectly discourage, intimidate, or otherwise impede investigation of the complaint constitutes a separate and distinct prosecutable instance of unprofessional conduct.

(iii) The complainant (or patient, if different than the complainant) and licensee shall not enter into settlement negotiations or exchange of offers of settlement or compromise of a complaint without the express written permission of the officers or, if interviewers/petitioners have been appointed, without the express written permission of the interviewers/petitioners.

(e) If cause exists to withhold the identity of the complainant from the licensee, or if

the complainant requests his identity be withheld, the staff may withhold the complainant's name from the licensee until the complaint screening. If the complainant's name has been withheld, and it is necessary to disclose the name of a particular patient in order to permit the licensee to respond to the Board's inquiry, the staff may do so with the prior approval of the officers.

(f) Board staff shall preliminarily ascertain whether the alleged conduct by a licensee may constitute a violation of the act.

(i) If the alleged conduct may constitute a violation of the act, board staff shall request a written response from the licensee. The request to the licensee shall, at a minimum, include the following:

(A) A copy of the complaint, unless the complainant's identity is being withheld pursuant to subsection (e), in which case the request shall set forth information sufficient for the licensee to understand the nature of the complaint and respond;

(B) A date by which the licensee is requested to submit a written response to the allegations in the complaint;

(C) The section(s) of the act and/or the board's rules that may have been violated by the licensee's alleged conduct;

(D) Notice that the licensee has a right to represent himself or be represented by counsel at every stage of any investigation or disciplinary proceeding, including the informal interview;

(E) Notice that any effort by the licensee named in the complaint to discourage, intimidate or otherwise impede a full and vigorous pursuit of the complaint constitutes, under board rules, a separate and reportable instance of unprofessional conduct; and

(F) Notice that the complainant will be provided a copy of the request for written response from the licensee.

(ii) If the alleged conduct is not within the Board's jurisdiction, or would not constitute a violation of the act, board staff shall provide a summary of the complaint, and the reason(s) for recommending its closure, to the officers at the next complaint screening.

(g) Upon receipt of the licensee's response to the complaint, the board staff shall review the complaint and the response. If it continues to appear that the alleged conduct may constitute a violation of the act, the board staff shall refer the complaint and the licensee's response for review at the next complaint screening.

Section 4. Commencement of Disciplinary Proceedings. At the complaint screening, officers and staff review complaints, licensee responses, and reasons for closing any complaints.

(a) If the majority of the board officers cannot determine whether the complaint alleges conduct by a licensee which falls with the board's jurisdiction and/or may constitute a

violation of the Act, the officers may direct the board's staff and agents to investigate the complaint to provide sufficient information for board officers to complete the screening process.

(b) If a majority of the officers determines that the complaint alleges conduct by a licensee which falls within the board's jurisdiction and may constitute a violation of the Act, the officers shall appoint two members of the board, and one member of the advisory council if the licensee in question is a physician assistant, as interviewers, or take other appropriate action. Nothing herein precludes the appointment of a board officer as an interviewer or petitioner in any case that they have screened.

(c) If the majority of the officers cannot determine whether the complaint alleges conduct by a licensee which falls within the board's jurisdiction and/or may constitute a violation of the Act, they may direct the board's staff and agents to investigate the complaint to provide sufficient information for them to complete the screening process. If the identity of the complainant has been withheld from the licensee, the officers shall also make a determination whether to continue to withhold the complainant's name.

(d) Within fifteen (15) business days after the appointment of interviewers, the board staff shall send a notice to the licensee and to the complainant. The notice to the licensee shall include:

(i) The nature and subject matter of the petition, when it was filed, the board's appointment of interviewers;

(ii) That counsel representing the licensee may be present at the informal interview, describe the interview process;

(iii) The range of potential sanctions that may be available to the board as a result of the interviewers' recommendations; and

(iv) That any effort by the licensee named in the complaint to directly or indirectly discourage, intimidate or otherwise impede a full and vigorous pursuit of the complaint constitutes a separate and prosecutable instance of unprofessional conduct.

Section 5. Informal interview.

(a) The interviewers shall investigate the allegations against the licensee of conduct that may violate the Act and, where circumstances warrant, conduct an informal interview.

(b) The interviewers may conduct the informal interview without assistance of the board prosecutor. If the licensee notifies the board of representation by counsel, the board prosecutor shall participate in the interview. Notice by the licensee of intent to be represented by counsel shall be sent to the board in writing.

(c) The interviewers are the agents and representatives of the board.

(d) The informal interview is to determine whether: the allegations may constitute a violation of the Act; a mental, physical, or medical skills or knowledge examination of the

licensee is warranted; further investigation is warranted; additional charges should be brought; resolution of the complaint without further proceedings is possible; and, a contested case hearing should be pursued.

(e) The informal interview may be conducted by electronic means if the interviewers determine that the purpose of the interview can be achieved in such manner.

(f) The interviewers, board prosecutor, licensee and/or licensee's counsel may discuss stipulation, dismissal, the consent decrees, restrictions or any other pertinent procedural or substantive information.

(g) An electronic or stenographic record may be made and shall, if made, become part of the confidential files of the board.

(h) An informal interview is not subject to strict legal procedural or evidentiary rules. Informal interviews are not open to the public nor is their occurrence a matter of public record.

(i) If the alleged conduct is not within the Board's jurisdiction, or would not constitute a violation of the act, interviewers shall notify the complainant in writing and close the complaint. Board staff shall provide the interviewers' reason(s) for the closure of the complaint to the officers at the next complaint screening, and the closure shall be noted on the ledger.

(j) The results of any board ordered mental, physical competency or medical competency examination shall be provided to the licensee and the interviewers prior to any further board action.

(k) Following notice by the interviewers of their intent to conduct an informal interview, the licensee may, at any time, waive the right to an informal interview. Waiver of the informal interview process must be made in writing, signed by the licensee, and his attorney if represented, and sent to the Board before the scheduled informal interview. A licensee's waiver of the informal interview process shall not, in and of itself, constitute grounds for additional charges of unprofessional conduct.

(l) Settlement or stipulation.

(i) Nothing in these rules shall preclude the licensee and interviewers or petitioners from entering into, at any time before the entry of a final order in a contested case hearing, a consent decree, nor shall these rules preclude a voluntary request by the licensee for the suspension, relinquishment or restriction of the licensee's license; provided, however, that the Board may, but is not required to, grant or reject such a request.

(ii) The reasons, grounds, conditions and other provisions of any such consent decree, voluntary relinquishment, suspension or restriction or other board action taken in lieu of a contested case hearing shall be recorded in the docket file and become a permanent part of the Board's confidential files; provided, however, that any action taken by the board constituting a final action shall be a public document as provided by the Act and the Board's rules.

(iii) Such consent decree or other action may occur at any time prior to the

announcement of a final decision after a contested case hearing.

Section 6. Contested case.

(a) Any contested case before the board shall be conducted pursuant to these rules, the Act and the A.P.A.

(b) Contested cases before the board shall be initiated by a petition.

(c) At least ten (10) days prior to filing of a petition, written communication shall be sent to the respondent requiring indication whether respondent will accept service of the petition by United States certified mail, return receipt requested, or if respondent desires personal service at a place designated by him. Failure by respondent to return written election of choice of service to the board within thirty (30) days of mailing by the board shall mandate personal service. Service of a petition shall be governed by W.R.Civ.P. 4(c)-(o) and 5, and may include service by publication, as provided therein.

(d) The respondent shall file an answer to the petition, or cause an appearance to be entered in the matter before the Board, within thirty (30) days of service of the petition. Failure to file an answer or cause an appearance to be entered shall constitute a default by the respondent.

(e) Prior to any contested case hearing, other than one pursuant to a licensee's petition for reinstatement of a license or removal of restrictions or conditions on a license, an informal interview must be offered to the licensee.

Section 7. Hearing officer.

(a) Upon the filing of a petition, the board may appoint a hearing officer to preside over the contested case. The hearing officer shall not have participated in the preliminary investigation or case preparation.

(b) The hearing officer shall withdraw from the case if he deems himself to be disqualified.

(c) A party may make a written request for the removal of a hearing officer. The request shall be made as soon as the party has reasonable grounds to believe that the hearing officer is subject to disqualification. The written request shall explain the reasons for the requested disqualification and shall be accompanied by affidavits. If the hearing officer denies the request, he shall issue a written explanation of such denial and enter the explanation into the record.

(d) The hearing officer shall have those powers set forth in the A.P.A. and all such other powers as may be necessary to conduct a fair and impartial contested case hearing, including but not limited to, the power to provide for and determine the scope of discovery and set a case schedule, and may assist the board in its deliberations and the development of findings of fact and conclusions of law.

Section 8. Discovery.

(a) Discovery in board disciplinary proceedings shall be governed by W.S. 16-3-107, the Act, and these rules.

(b) Pursuant to W.S. 16-3-107, the board or its hearing officer, at the request of a party, may subpoena the attendance of witnesses or require the production of books, papers or other evidence. A respondent may apply for a subpoena subject to W.S. 33-26-408(f).

Section 9. Deleted.

Section 10. Deleted.

Section 11. Executive Session. The hearing officer shall conduct the hearing in executive session pursuant to W.S. 16-4-405(a)(ii) and/or (a)(ix), unless the respondent, by written motion filed no later than the deadline set forth in the pre-hearing order, requests a public hearing. The hearing officer may sequester witnesses upon appropriate request by any party.

Section 12. Evidentiary Hearing to Compile a Record.

(a) A hearing panel shall not be required to personally attend any part of a hearing including, but not limited to, opening statements, presentation of evidence, and/or closing arguments.

(b) Pursuant to the Office of Administrative Hearings' Uniform Rules for Contested Case Practice and Procedure, Ch. 2, §. 8(b), the hearing officer may, upon the recommendation of the board president or the executive director, or upon his own motion, receive the evidence and compile the record in a contested case outside the presence of the hearing panel.

(c) Upon the close of evidence, all evidence received and compiled by the hearing officer, and the record of the contested case, shall be given as soon as practicable to the hearing panel for their review, deliberations and decision in accordance with this chapter.

(d) The evidentiary record provided to the hearing panel shall include the following:

(i) A transcript and video recording of the hearing, and any depositions entered as witness testimony in the proceedings; and,

(ii) An indexed copy of all exhibits admitted by the hearing officer during the course of the proceeding.

(e) As part of its deliberations on the case, one or more members of the hearing panel may request that a witness who previously testified in the proceeding be called before the panel, placed under oath, and asked one or more questions by the members of the hearing panel to clarify, correct or expand upon the witness's prior testimony. The board advisory attorney shall communicate the request to the hearing officer, in writing with copies to the parties. The hearing officer shall issue such orders and subpoenas as are necessary to secure the witness testimony requested by the hearing panel member(s). The hearing officer may, but is not required to, permit

the parties to question a recalled witness, and may restrict the scope of questions posed by the parties.

Section 13. Deliberations and Decision.

(a) Board counsel shall assist the hearing panel in its deliberations, and in drafting findings of fact, conclusions of law and an order.

(b) The hearing panel shall make its decision in public session, and shall serve a copy of the decision upon all parties. The decision shall include:

(i) A statement of the findings of fact and conclusions of law, separately stated and supported by concise and explicit statements, and

(ii) An order setting forth the action taken, including costs, if any, assessed against respondent.

Section 14. Record.

(a) The record in contested cases shall consist of those items set forth in W.S. 16-3-107(o) and the transcript of the proceedings.

(b) If the board's decision is appealed to the district court, the appealing party shall pay the costs of copying the transcripts and duplicating the record for submission to the court and the parties to the appeal.

Section 15. Reinstatement of, or Removal or Modification of Restrictions or Conditions on, a License.

(a) A former licensee whose license has been relinquished or revoked may file a petition for reinstatement of his license pursuant to the Act.

(b) A licensee whose license has restrictions or conditions on it may file a petition seeking removal or modification of one or more restrictions or conditions, pursuant to the Act.

(c) In the course of proceedings under subsections (a) and (b), the licensee will be designated "petitioner." The petitioners appointed during the proceedings that led to relinquishment, revocation, or placement of restrictions or conditions on an existing license shall be designated "respondent(s)." If none the previously appointed petitioners remain on the board or the advisory council, the officers shall appoint one (1) board member to serve as the respondent in the proceedings to reinstate or remove or modify conditions or restrictions.

(d) After a hearing before the board on a petition filed pursuant to this section, the board shall issue specific findings of fact, conclusions of law and a final order:

(i) Reinstating the license without restrictions or conditions;

(ii) Reinstating the license subject to restrictions or conditions;

- (iii) Removing or modifying the restrictions or conditions on the license;
- (iv) Denying reinstatement of the license or removal of the restrictions or conditions on the license; or,
- (v) Taking such action as the board deems appropriate and just in the circumstances.

(e) A licensee whose petition for reinstatement of or removal or modification or restrictions or conditions on, a license may appeal such final order to the district court pursuant to W.S. 16-3-114.

Section 16. Public inspection.

(a) The legal custodian shall segregate all documentation pertaining to any petition and place it into the appropriate docket file or the ledger of public information. The executive director shall provide proper identification of all the records in the docket files and ledger.

(b) The ledger shall be open for public inspection in the board offices.

(c) Docket files shall be confidential, segregated files not available for public inspection, maintained in the board offices.

(d) If the legal custodian or his designee denies a request to inspect or copy records, written reasons shall be given if requested and the requestor shall be advised of the right to appeal and state why inspection should be granted including the purpose for which the record is needed by the requestor.

(e) All ledger records shall be kept at the board office or in a governmental record storage site and shall be available for public inspection and copying during office hours when such inspection or copying does not unduly interfere with the work of board staff.

(f) Original ledger records shall be examined under the supervision of board staff and shall not be removed from the office.

(g) A request to inspect ledger records shall be deemed sufficient if it reasonably describes the requested records and contains the requestor's name and address.

Section 17. Notification. All final board orders subject to public disclosure pursuant to W.S. 33-26-408(c) shall be sent to any medical facilities where the licensee has privileges, to the appropriate state medical society and to any local county medical society to which the licensee might belong, to a wire service, to the F.S.M.B., and the N.P.D.B. and, when applicable, to the Wyoming Board of Pharmacy and the U.S. Drug Enforcement Administration, within thirty (30) days of the final disposition of the case.

Section 18. Incorporation by reference.

(a) For any rule incorporated by reference in these Board Rules:

(i) The Board has determined that incorporation of the full text in these rules would be cumbersome or inefficient given the length or nature of the rules;

(ii) The incorporation by reference does not include any later amendments or editions of the incorporated matter beyond the applicable date identified in subsection (b) of this section; and

(iii) The incorporated rule is maintained at Board Office and is available for public inspection and copying at cost at the same location.

(b) Each rule incorporated by reference is further identified as follows:

(i) Chapter 2 - Contested Case Proceedings, adopted by the Office of Administrative Hearings and effective on July 20, 2017, (found at: <https://rules.wyo.gov>, Reference Number 270.0001.2.07202017);

(ii) Rule 4(c)-(x), Wyoming Rules of Civil Procedure, adopted by the Wyoming Supreme Court and effective on March 1, 2017 (found at: <https://www.courts.state.wy.us/wp-content/uploads/2017/05/Wyoming-Rules-of-Civil-Procedure-eff.-July-2018.pdf>); and,

(iii) Rule 5, Wyoming Rules of Civil Procedure, adopted by the Wyoming Supreme Court and effective on March 1, 2017, (found at: <https://www.courts.state.wy.us/wp-content/uploads/2017/05/Wyoming-Rules-of-Civil-Procedure-eff.-July-2018.pdf>).

Section 19. Criminal History Background for Purposes of Investigations and Discipline

(a) The board may request a criminal history record report on a licensee if:

(i) A complaint against a licensee involves allegations of criminal conduct;

(ii) Any information received by the board indicates the licensee may have a criminal history that is relevant to a pending complaint, investigation or disciplinary action.

(b) Upon a determination by the executive director that a criminal history record check is appropriate, a written request shall be sent to the licensee along with the necessary forms for fingerprinting of the licensee.

(c) A licensee may receive a copy of the results of his criminal history record check upon written request submitted to the Board. If the licensee disputes the results of the criminal history check, as permitted by federal regulations, the results received by the Board shall remain a part of the application or investigation file until such time as a correction or change is effected by the FBI. The licensee shall submit to the Board a second set of forms with his fingerprints to be submitted to law enforcement for a new criminal history check, along with notice from the FBI that his challenge to the questioned information has been successful and the record has been changed accordingly.

Section 20. Proceedings to deny an application for licensure.

(a) If the application review committee recommends that an application for licensure or reactivation of a license be denied, or if after a licensure interview the Board refers an application to the application review committee for proceedings to deny an application for initial licensure or reactivation of a license, any proceedings shall be conducted pursuant to these rules.

(b) In the course of proceedings to deny an application for licensure or reactivation of a license, the applicant shall be designated "petitioner." The application review committee members shall be designated "respondents."

(c) The petitioner shall have the burden to prove, by a preponderance of evidence, that he meets all requirements for licensure or reactivation of his license, and that he can safely and skillfully practice medicine. Upon completion of the petitioner's case, the respondents shall have the burden to prove, by clear and convincing evidence, that the petitioner fails to meet all requirements for licensure or reactivation of his license, or is unable to safely and skillfully practice medicine.

(d) After a hearing before the board to deny an application for licensure or reactivation of a license, the board shall issue specific findings of fact, conclusions of law and a final order:

- (i) Granting a license without restrictions or conditions;
- (ii) Granting a license subject to restrictions or conditions;
- (iii) Denying issuance of a license; or,
- (iv) Taking such action as the board deems appropriate and just in the circumstances.

(e) An applicant whose application for licensure or for reactivation of a license is denied may appeal such final order to the district court pursuant to W.S. 16-3-114.