

NOTICES OF SUPPLEMENTAL PROPOSED RULEMAKING

After an agency has filed a Notice of Proposed Rulemaking with the Secretary of State's Office for *Register* publication and filing and the agency decides to prepare a Notice of Supplemental Proposed Rulemaking for submission to the Office, the Secretary of State shall publish the Notice under the Administrative Procedure Act (A.R.S. § 41-1001 et seq.). Publication of the Notice of Supplemental Proposed Rulemaking shall appear in the *Register* before holding any oral proceedings (A.R.S. § 41-1022).

NOTICE OF SUPPLEMENTAL PROPOSED RULEMAKING

TITLE 4. PROFESSIONS AND OCCUPATIONS

CHAPTER 39. BOARD FOR PRIVATE POSTSECONDARY EDUCATION

PREAMBLE

1. Register citation and date for the original Notice of Proposed Rulemaking:

Notice of Proposed Rulemaking: 7 A.A.R. 1609, April 20, 2001

Notice of Supplemental Proposed Rulemaking: 7 A.A.R. 4232, October 5, 2001

2. Sections Affected

R4-39-501

R4-39-501

R4-39-502

R4-39-502

R4-39-503

Rulemaking Action

Repeal

New Section

Repeal

New Section

New Section

3. The specific authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):

Authorizing statutes: A.R.S. §§ 32-3003(A)(3), 32-3003(A)(8), 32-3003(A)(9)

Implementing statutes: A.R.S. §§ 32-3051, 32-3052, 32-3053, 32-3054, 32-3055, 32-3056

4. The name and address of agency personnel with whom persons may communicate regarding the rule:

Name: Teri Candelaria, Executive Director

Address: Board for Private Postsecondary Education
1400 West Washington, Room 260
Phoenix, AZ 85007

Telephone: (602) 542-5709

Fax: (602) 542-1253

5. An explanation of the rule, including the agency's reasons for initiating the rule:

The rulemaking is to make the rules more clear and concise, and to be consistent with required rulemaking language and style. The rules eliminate the requirement of the respondent to answer the Notice of Hearing and filing of post-hearing briefs in order to conform with current Board policy and procedures.

6. An explanation of the substantial change which resulted in this supplemental notice:

Substantial changes were made to the rules to ensure consistency with A.R.S. Title 41, Chapter 6, Article 10.

7. A showing of good cause why the rule is necessary to promote a statewide interest if the rule will diminish a previous grant of authority of a political subdivision of this state:

Not applicable

8. The summary of the economic, small business, and consumer impact statement:

The rulemaking is primarily technical and administrative in nature. The purpose of the rulemaking is to ensure consistency with A.R.S. Title 41, Chapter 6, Article 10, to conform to current Board policies and procedures and to be consistent with required rulemaking language and style.

The Board has not held a hearing since 1996.

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The rulemaking will make the rules more clear and concise. The Board and the institutions subject to licensure by the Board may benefit from decreased litigation costs from making rules most clear and ensuring consistency with the Administrative Procedures Act.

9. The name and address of agency personnel with whom persons may communicate regarding the accuracy of the economic, small business, and consumer impact statement:

Name: Teri Candelaria, Executive Director
Address: Board for Private Postsecondary Education
1400 West Washington, Room 260
Phoenix, AZ 85007
Phone: (602) 542-5709
Fax: (602) 542-1253

10. The time, place, and nature of the proceedings for the adoption, amendment, or repeal of the rule or, if no proceeding is scheduled, where, when, and how persons may request an oral proceeding on the proposed rule:

Written comments on the supplemental proposed rulemaking or the preliminary economic, small business, and consumer impact statement may be submitted no later than 5:00 p.m. January 18, 2002.

No oral proceedings are scheduled. The Board will schedule an oral proceeding on the supplemental proposed rulemaking if one person submits a written request for an oral proceeding.

11. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:

Not applicable

12. Incorporations by reference and their location in the text:

Not applicable

13. The text of the rules follows:

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CHAPTER 39. BOARD FOR PRIVATE POSTSECONDARY EDUCATION

ARTICLE 5. ~~HEARINGS AND INVESTIGATIONS~~ INVESTIGATIONS AND HEARING PROCEDURES

Section

- R4-39-501. ~~Hearing Procedures~~ Investigations
- R4-39-502. ~~Investigations~~ Hearings
- R4-39-503. ~~Rehearing or Review of Board's Decision~~

ARTICLE 5. ~~HEARINGS AND INVESTIGATIONS~~ INVESTIGATIONS AND HEARING PROCEDURES

R4-39-501. ~~Hearing Procedures~~ Investigations

- A.** ~~In any hearing, the parties include all persons named in the Notice of Hearing and all persons properly admitted as interveners.~~
- B.** ~~The Board may appoint a hearing officer to hear the matter, make findings of fact and conclusions of law and recommend action to the Board. In addition, the hearing officer may make all determinations on procedural matters in the hearing or of a rehearing.~~
- C.** ~~Notice of Hearing:~~
 - 1. ~~All parties of record shall be given written notification at least twenty (20) days prior to the hearing, of the date, time and place set for the hearing, together with a brief statement of the matters to be considered at the hearing.~~
 - 2. ~~Postponements shall be discretionary with the Board or its hearing officer.~~
 - 3. ~~Response to Notice of Hearing:~~
 - a. ~~A response to a Notice of Hearing must be filed with the Board within twenty (20) days of receipt by respondent. If the Notice of Hearing is amended at any time subsequent to service of the notice, respondent may be required to answer the amended assertions within a reasonable time.~~
 - b. ~~A response filed under this rule shall briefly state respondent's position or defenses to the proceeding and shall specifically admit or deny each of the assertions contained in the notice. If the respondent is without or is unable to reasonably obtain knowledge or information sufficient to form a belief as to the truth of an assertion, he shall so state, which shall have the effect of a denial. Any assertion not denied shall be deemed to be admitted. When a responding party intends in good faith to deny only a part of a qualification of an assertion, he shall specify so much of it as is true and shall deny only the remainder.~~

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c. If the respondent fails to file a response within the time provided, the assertions contained in the Notice of Hearing shall be deemed to be admitted.

4. Service:

- a. The Notice of Hearing shall be served personally or by certified mail, return receipt requested, upon the respondent. All subsequent notices and documents required to be served by mail or by delivery in person. Service of any document shall be deemed complete when a true copy is deposited in the United States mail with first class postage prepaid, addressed to the address of record, or upon personal delivery. All motions and other papers required to be served upon any other party to a hearing shall be made by delivery in person or by first class mail, postage prepaid. Service upon an attorney or agent who has appeared on behalf of the party shall constitute service upon such party.
- b. Copies of all papers or documents filed shall, at the time of filing, be served on the hearing officer, if any, upon the Board and upon all parties to the hearing. The Board or hearing officer may require a copy of any document to be served upon any other person as may be designated by them. Proof of service may be made by affidavit of the person making service or by written acceptance of the service by the person upon whom the document is served. An original of all documents shall be filed with the Board.

D. Motions:

- 1. All motions filed with the Board or hearing officer shall be typewritten or legibly written on paper no larger than 8 1/2" x 11", shall contain the name and address of the party or other correspondent, shall designate the title and docket number, if any, shall state the name and address of each party served with a copy, shall be properly captioned and shall be signed by the party filing it or by at least one attorney, in his or her individual name, who represents the party. The signature certifies that the signer has read the paper, that to the best of his knowledge, information and belief there is good ground to support its contents and that it is not interposed for delay.
- 2. A motion for procedural order, unless made orally during a hearing, shall be made in writing stating the grounds with particularity and setting forth the relief sought. All motions shall be served upon all of the parties who shall then have ten (10) days after service of the motion to respond. If any party fails to timely respond or any party fails to appear at oral argument on the motion, if any, the Board or hearing officer may dispose of the motion summarily. Any party may request oral argument on any motion summarily. Any party may request oral argument on any motion, or the Board or hearing officer may on their own initiative require oral argument.

E. Stipulations:

Parties to any proceeding may by stipulation in writing agree upon any matter involved in the proceeding. If approved by the Board or hearing officer the stipulation shall be binding upon all parties to the proceeding or as between those parties stipulating. Notwithstanding the foregoing, the hearing officer or Board may require presentation of evidence or proof of stipulated facts for their consideration.

F. Prehearing Statements:

Not less than five (5) days before hearing, each party shall insure that the Board or hearing officer has received a prehearing statement which shall be so designated and which shall set forth with specificity the following:

- 1. A list of all exhibits and witnesses to be used at the hearing except those to be used for impeachment;
- 2. A list of the issues of law and fact which the party submitting the prehearing statement believes to be material;
- 3. That all lists have been exchanged with the other parties to the proceeding; and
- 4. No other exhibits or witnesses shall be used during the hearing other than those listed and exchanged, except for good cause shown.

G. Prehearing Conferences:

The Board or hearing officer, upon application of a party, or upon their own motion, may call a conference with all parties at any time for the purpose of clarifying the procedural steps to be followed in a hearing, or clarifying or limiting the legal or factual issues involved in a proceeding.

H. In addition to the oral arguments and evidence presented at the hearing, the Board or hearing officer may consider written statements or memoranda presented by any party prior to or at the hearing. The Board or hearing officer may also allow for a period of time not to exceed a total of sixty (60) days after the hearing for the parties to submit post-hearing memoranda or proposed findings of fact and conclusions of law.

I. The recommendation of the hearing officer shall be submitted to the Board within twenty (20) days of the completion of the hearing. The Board shall review the recommendation and may affirm, modify, reject, in whole or in part, the recommendation and may also remand it for further hearing or take evidence itself.

J. The final decision of the Board must be made within ten (10) days of receipt of the recommendation of the hearing officer or within (20) days of the completion of the hearing if held before the Board. The final decision of the Board shall be in writing, signed by the chairman or his designee, and shall state the action taken and the basis for such action. The final decision shall state separately the findings of fact and conclusions of law and the order of the Board. It shall be filed as a record of the Board and maintained in the file relating to the applicant or licensed institution. A copy of the final decision of the Board shall be served on each party.

K. A motion for rehearing may be filed by any party in accordance with A.R.S. § 32-3054.A.

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- ~~L.~~ A rehearing of the Board's decision may be granted for any of the following causes materially affecting the moving party's rights:
 - ~~1. Irregularity in the proceedings or any order or abuse of discretion, whereby the moving party was deprived of a fair hearing;~~
 - ~~2. Misconduct of the Board, its employees or hearing officer or the prevailing party;~~
 - ~~3. Accident or surprise which would not have been prevented by ordinary prudence;~~
 - ~~4. Newly discovered material evidence which could not with reasonable diligence have been discovered and produced at the original hearing;~~
 - ~~5. Excessive or insufficient penalties;~~
 - ~~6. Error in the admission or rejection of evidence or other errors of law occurring at the hearing; and~~
 - ~~7. That the decision is not justified by the evidence or is contrary to law.~~
- ~~M.~~ An order granting a rehearing shall specify with particularity the ground or grounds on which the rehearing is granted, and the rehearing shall cover only those matters so specified:
 - ~~A.~~ The Board ~~may~~ shall investigate any complaint alleging violation of A.R.S. § 32-3001 et seq. or this Chapter by a licensee or a complaint alleging that an institution is doing business without a license as required by A.R.S. § 32-3001 et seq. For purposes of this Section, "investigated party" means an entity or person who is the subject of a Board investigation.
 - ~~B.~~ The Board may request production of records of an investigated party and may request information from the complainant having specific information pertaining to the investigation. The investigated party may file written objections with the Board to the Board's request within ~~10~~ 15 days of receipt of the request. An investigated party shall not fail to produce documents or information, or fail to attempt to produce a witness, unless the investigated party timely files an objection to the Board's request. The Board shall attempt to informally resolve disputes as to requests for documents and information from persons with relevant knowledge. If no resolution is reached, the matter shall be heard and decided by the Board.
 - ~~C.~~ The Board shall not disclose ~~all~~ documents and materials relating to an investigated matter, ~~with the exception of the complainant's name, are confidential~~ except to the investigated party, until the matter is closed, settled by stipulation, or set for hearing under Title 41, Chapter 6, Article 10.
 - ~~D.~~ Upon completion of the investigation, the matter shall be referred to the Board's Complaint Committee for consideration.
 - ~~E.~~ After consideration of the matter investigated, the Complaint Committee may take the following actions:
 - ~~1. Instruct Board Staff to conduct further investigation. After further investigation, the matter may be re-heard by the Complaint Committee or referred to the Board;~~
 - ~~2. Determine that the investigation does not demonstrate a violation of A.R. S. § 32-3001 et seq. or this Chapter and recommend to the Board that the investigation be closed; or~~
 - ~~3. Determine that the investigation demonstrates there are reasonable grounds to indicate a violation of A.R.S. § 32-3001 et seq. or this Chapter and send a report of its findings and recommendation to the Board.~~
 - ~~F.~~ If the Board determines that the investigation demonstrates that there are reasonable grounds to indicate a violation of A.R.S. § 32-3001 et seq. or this Chapter, the Board shall serve notice of the Board's determination and set the matter for hearing.

R4-39-502. Investigations-Hearings

- ~~A.~~ Board staff and designees of the Board shall investigate alleged violations of A.R.S. § 32-3001, et seq. or these rules by any applicant, program or institution covered by A.R.S. § 32-3001, et seq. upon request of the Board or upon receipt of a verified, written complaint.
- ~~B.~~ Following an investigation, staff or the Board's designee shall report its findings and recommendation to the Board, in writing.
- ~~C.~~ Board members, staff and designees of the Board may review the records of any institution being investigated and may request information from persons having specific information pertaining to the investigation. Staff and designees of the Board may request the production of documents and witnesses during the investigation. The institution may file written objections to the request within 15 days of receipt. Staff and designees of the Board shall attempt to resolve disputes as to production of documents and persons. If no resolution is reached, the matter shall be heard and decided by the Board.
- ~~D.~~ Failure to produce documents or information, or failure to attempt to produce a witness, as requested by the staff and designees of the Board, and not objected to, in writing, shall, absent good cause, constitute a violation of these rules.
- ~~A.~~ All hearings shall be conducted before the Board or an Administrative Law Judge under A.R.S. Title 41, Chapter 6, Article 10.
 - ~~1. Parties may stipulate to any facts that are not in dispute. Stipulations may be made in writing or orally by reading the stipulations into the record of the hearing. A stipulation is binding upon the parties unless the Board grants the party permission to withdraw from the stipulation. The Board may, on its own motion, set aside any stipulation and proceed to ascertain the facts.~~
 - ~~2. The Board may, on its own motion or at the request of any party, call a conference of the parties at the opening of any hearing or at any subsequent time to clarify the procedures for the hearing or the legal or factual issues involved.~~
 - ~~3. By order of the Board, proceedings involving a common question of law or fact may be consolidated for hearing of any or all of the matters at issue.~~

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B. If a licensee fails to appear at any proceeding before the Board, after proper notice, the Board may render a decision based upon the evidence and information available to the Board without further notice to the licensee.

R4-39-503. Rehearing or Review of Board's Decision

A. Any party aggrieved by a final administrative decision of the Board may file with the Board no later than 30 days after service of the decision, a written motion for rehearing or review of the decision specifying the particular grounds as provided in subsection (C). A rehearing shall be conducted before the Board or an Administrative Law Judge under A.R.S. § 41-1092.09.

B. A motion for rehearing or review may be amended at any time before it is ruled upon by the Board. A response may be filed by any other party within 15 days after service of a motion or amended motion. The Board may require the filing of written briefs on the issues raised in the motion and may provide for oral argument.

C. The Board shall grant a rehearing or review of a decision for any of the following reason that materially affect the moving party's rights:

1. Irregularity in the administrative proceedings of the Board or the Administrative Law Judge or any order or abuse of discretion that deprives the moving party of a fair hearing;
2. Misconduct of the Board, the Administrative Law Judge, or the prevailing party;
3. Accident or surprise that could not have been prevented by ordinary prudence;
4. Newly discovered material evidence that could not with reasonable diligence have been discovered and produced at the original hearing;
5. An excessive or insufficient penalty;
6. Error in the admission or rejection of evidence or other error of law occurring at the administrative hearing; or
7. The decision is not justified by the evidence or is contrary to law.

D. The Board may affirm or modify the decision or grant a rehearing or review on all issues or part of an issue for any of the reasons in subsection (C). After giving the parties or their counsel notice and an opportunity to be heard on the matter, the Board may grant a motion for rehearing for a reason not stated in the motion. An order granting a rehearing or review shall cover only those matters specified.

E. No later than 10 days after a decision is rendered, the Board may on its own initiative order a rehearing or review of its decision for any reason listed in subsection (C). An order granting such a rehearing or review shall specify the grounds on which it is granted.

F. When a motion for rehearing or review is based upon affidavits, the affidavits shall be filed and served with the motion. An opposing party may, within 15 days after service, file and serve opposing affidavits. The Board may extend the period for serving opposing affidavits for not more than 20 days for good cause shown or by written stipulation of the parties. Reply affidavits may be permitted.

G. If the Board determines that the immediate effectiveness of a decision is necessary for the preservation of the public health, safety, and welfare and that a rehearing or review of the decision is impractical, unnecessary or contrary to the public interest, the decision may be issued as a final decision without an opportunity for rehearing or review. If a decision is issued as a final decision without an opportunity for rehearing or review, an application for judicial review of the decision shall be made within the time limits permitted for application for judicial review of a final decision.