



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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11/26/2018 3:14:58 PM

Office of West Virginia
Secretary Of State

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: Agriculture

RULE TYPE: Legislative

TITLE-SERIES: 61-38

RULE NAME: Farmers Markets

CITE AUTHORITY: §19-35-4 §19-35-5

The above proposed Legislative rules, following review by the Legislative Rule Making Review Committee, is hereby modified as a result of review and comment by the Legislative Rule Making Review Committee. The attached modifications are filed with the Secretary of State.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Norman Bailey -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

Title 61
Legislative Rule

Series 38
Farmers Markets

§61-38-1. General.

1.1. Scope. - This legislative rule establishes the framework for regulation of farmers markets and farmers market vendors, including registration, permitting, inspection, and labeling. This rule also establishes requirements for sampling at farmers markets and sets forth procedures for enforcement and hearings.

1.2. Authority. - W. Va. Code §19-35-4, §19-35-5.

1.3. Filing Date. -

1.4. Effective Date. -

1.5. Sunset Date. – This rule shall terminate and have no further force or effect five years from its effective date.

§61-38-2. Incorporated by reference.

2.1. The Farmers Market Vendor Guide, published by the West Virginia Department of Agriculture and found online at <https://agriculture.wv.gov/SiteCollectionDocuments/FMVG.pdf>, is hereby incorporated by reference.

2.2. Regulatory Guidance for Best Practices, Cottage Foods (2012), published by the Association of Food and Drug Officials and found online at www.afdo.org/resources/temp/Cottage_Foods_013.pdf, is hereby incorporated by reference.

§61-38-3. Definitions.

3.1. “Acidified foods” means low-acid foods to which acid or acid foods are added with a water activity of greater than 0.85 and a finished equilibrium of pH 4.6 or below.

3.2. “Commercially harvested mushrooms” means specific mushroom species purposely planted, cultivated and harvested for the purpose of food production either by germinated spawn or cloning.

3.3. “Commercial kitchen” means a facility designed for food production and food safety, manufacturing facility, or food establishment intended for interstate commerce.

3.4. “Commissioner” means the Commissioner of the West Virginia Department of Agriculture.

3.5. “Community kitchen” means a kitchen that is used by community members for preparing foods.

3.6. "Community supported agriculture" means a system that connects growers and consumers through a subscription model to provide access to the harvest of a farm or group of farms.

3.7. "Condiment" means a spice, sauce or preparation that is added to food to impact a particular flavor, to enhance flavor or complement a food. Examples include, but are not limited to, salad dressings and ketchup.

3.8. "Consignment farmers market" means a farmer's market in which two or more vendors deliver their own farm and food products to a common location maintained by a third party that markets the vendor's products and receives a percentage share of the profits from sales, with the individual vendor retaining ownership of the farm and food product until it is sold. A consignment farmers market may also be mobile, or in a stationary location.

3.9. "Cottage foods" means foods produced and packaged by a cottage food vendor in a kitchen and prepared for direct sale by the cottage food vendor.

3.10. "Cottage food vendor" means a person or entity that prepares food for sale at an approved food outlet under the provisions of this rule including farmers markets, consignment farmers market, Community Supported Agriculture and other direct to consumer locations.

3.11. "Department" means the West Virginia Department of Agriculture.

3.12. "Farm and food product" means any agriculture, horticulture, agroforestry, animal husbandry, dairy, livestock, cottage food, beekeeping, or other similar product.

3.13. "Farm kitchen" means an on-premise cottage food preparation facility manufacturing items for sale at a qualified farmers market for direct consumer purchase.

3.14. "Farmers market" means:

3.14.a. A traditional farmers market in which two or more vendors gather to sell farm and food products directly to consumers at a fixed location;

3.14.b. An on-farm market or farm stand run by an individual producer that sells farm and food products;

3.14.c. An online farmers market in which two or more vendors collectively market farm and food products and retain ownership of these products until they are sold; or

3.14.d. A consignment farmers market.

3.15. "Farm stand" means a farmers market operated by an individual not located on a farm and not necessarily at a fixed location.

3.16. "Farmers market vendor" means a person or entity that sells farm and food products at a farmers market.

3.17. "Fermented products" means food processed through the conversion of carbohydrates to alcohol or organic acids using microorganisms under anaerobic conditions.

3.18. "Food establishment" means an operation that stores, prepares, packages, serves, vends, or otherwise provides food for consumption.

3.19. "Food sampling" means a small portion of food product that is offered to consumers.

3.20. "Home kitchen" means a kitchen located in a residence that is equipped with non-commercial appliances and facilities and that is used to produce cottage foods.

3.21. "Kitchen" means a room or area in which food is prepared and cooked.

3.22. "Label" means a panel or panels found on a package food or cosmetic item. The principal basic information elements are contained in the provisions of 21 CFR part 101 and reviewed by the West Virginia Department of Agriculture.

3.23. "Local health department" means a health department serving one or more counties or one or more municipalities or a combination thereof.

3.24. "Low-acid canned food" means any food (other than alcoholic beverages) with a finished equilibrium pH greater than 4.6 and a water activity greater than 0.85, excluding tomatoes and tomato products having a finished equilibrium pH less than 4.7.

3.25. "Non-potentially hazardous foods" means foods that do not require time or temperature controls in order to remain safe for consumption. It includes jams, jellies, candy, dried mixes and other such food that do not meet the definition of potentially hazardous food.

3.26. "On-Farm Market" means a retail location on a vendor's farm property. This location must register with the Department as a farmers market pursuant to this rule. The sale of vendor-produced cottage foods is permitted at this location and still requires a Farmers Market Vendor permit where required by this rule.

3.27. "Online farmers market" means a farmers market in which two or more vendors collectively market farm and food products digitally and retain ownership of those products until they are delivered by the vendor directly to the consumer.

3.28. "Pickled products" means a food product that has been processed for preservation either through an anaerobic fermentation in brine or immersion in vinegar.

3.29. "Potentially hazardous foods" means any food that consists whole or in part of milk or milk products, eggs, meat, poultry, fish, shellfish, cut or sliced fruits and vegetables, edible crustaceans or other ingredients which is in a form capable of supporting rapid and progressive growth of infectious or toxigenic microorganisms, with natural or an acidified pH (see section 3.1) of 4.6 or below and a water activity (aw) of greater than .085.

3.30. "Sanitize" means to adequately treat cleaned surfaces by a process that is effective in destroying vegetative cells of pathogens, and in substantially reducing numbers of other undesirable microorganisms, but without adversely affecting the product or its safety for the consumer.

3.31. "Uncut produce" means fruits and vegetables that have not been cut beyond field harvest and are offered for sale as a whole.

§61-38-4. Farmers market registration.

4.1. All farmers markets shall register with the Department on a form provided by the Commissioner, available at <https://www.agriculture.wv.gov>, and shall include, at a minimum, the following:

- 4.1.a. Applicant's name and contact information;
- 4.1.b. The type of farmers market;
- 4.1.c. Dates and hours of operation; and
- 4.1.d. Any other information deemed relevant by the Commissioner.

4.2. Farmers market registrations are effective from April 1 through March 31 of the following year.

4.3. All applications for farmers market registrations must be received by March 1. If applications are received after the March 1 deadline, the applicant will be charged a late fee of \$20.

4.4. The Department shall take action upon all completed farmers market registration applications within thirty (30) days of receipt.

§61-38-5. Consignment farmers markets.

5.1. A consignment farmers market must obtain a food establishment permit from the appropriate local health department.

5.2. A consignment farmers market is required to register as a farmers market pursuant to section 4 of this rule. A copy of a valid food establishment permit is required on all consignment farmers market registration applications.

§61-38-6. Permitted and Prohibited Foods at Farmers Markets.

6.1. The following farm and food products may be sold at farmers markets without a farmers market vendor permit:

6.1.a. Non-potentially hazardous foods, including but not limited to:

- 6.1.a.1. Breads;
- 6.1.a.2. Cakes;
- 6.1.a.3. Candies;
- 6.1.a.4. Honey;
- 6.1.a.5. Tree syrup;
- 6.1.a.6. Apple butter;
- 6.1.a.7. Molasses;
- 6.1.a.8. Standardized, nondietary jams and jellies;
- 6.1.a.9. Dehydrated fruits and vegetables;
- 6.1.a.10. Whole uncut produce.
- 6.1.a.11. Condiments;

6.1.a.12. Commercially harvested mushrooms on the approved species list found in the West Virginia Farmers Market Vendor Guide;

6.1.a.13. Canned, whole, or chopped tomatoes;

6.1.a.14. Tomato sauce; and

6.1.a.15. Tomato juice having a finished equilibrium of pH 4.6 or below.

6.1.b. Other non-potentially hazardous foods, as identified in the West Virginia Farmers Market Guide.

6.2. The following farm and food products may be sold at farmers markets if a vendor permit has been obtained:

6.2.a. Canned acidified foods, including but not limited to;

6.2.a.1. Pickled products;

6.2.a.2. Sauces, such as hot sauce, marinara, or spaghetti sauce;

6.2.a.3. Salsas;

6.2.a.4. Fermented products; and

6.2.a.5. Acidified fruits and vegetables;

6.2.b. Eggs; and

6.2.c. All farm and food products that are required to be time- or temperature-controlled.

6.3. The following farm and food products may be sold at farmers markets if a vendor has obtained both a vendor permit and a food establishment permit from a local health department:

6.3.a. Meat;

6.3.b. Poultry;

6.3.c. Dairy; and

6.3.d. Fish.

6.4. The following foods are not permitted to be sold at a farmers market:

6.4.a. Wild mushrooms; and

6.4.b. Sprouted seeds.

§61-38-7. Labeling.

7.1. All farm and food products sold at farmers markets shall be labeled. Labels shall contain the following information:

7.1.a. Product's common name;

7.1.b. Name and address of processor;

7.1.c. Ingredient list, with items listed in order from most to least;

7.1.d. Net weight or numerical count; and

7.1.e. Major allergens contained in product.

7.2. All farm and food products that require a Farmers Market Vendor permit shall include on the label the words "MADE IN A WV KITCHEN" in capital, bold, 10-point type or larger, with the blank space to state whether the product was made in a home, farm, community or commercial kitchen.

7.3. All farm and food products for which a farmers market vendor permit must be obtained must be labeled in compliance with the United States Food and Drug Agriculture's labeling guidelines. All such labels must be reviewed by the Department. Label review reports will be issued, and farmers market vendors shall have copies of those label review reports available for inspection upon request.

7.4. While WVDA label review may not be required, prior to selling a farm and food product, on-site inspectors may review labeling to ensure compliance with these standards.

§61-38-8. Requirements for Farmers Market Vendors.

8.1. A producer of potentially hazardous foods must have the process for preparing and preserving the products approved prior to selling the products, and must be obtained in a manner approved by the Department, as provided in the West Virginia Farmers Market Vendor Guide.

8.2. A producer of potentially hazardous foods must keep records to demonstrate that the majority of the produce in canned acidified foods shall be sourced from the vendor's West Virginia farm or garden, and records of the source of the produce shall be maintained. Recordkeeping shall include, but not be limited to:

- 8.2.a. Name of product;
- 8.2.b. Number of units prepared;
- 8.2.c. Record of raw ingredients used/and or vendor from which ingredients were sourced;
- 8.2.d. Date/Lot code; and
- 8.2.e. Where product/lot was distributed.

8.3. A cottage food operation that has a private water supply must have the supply tested prior to permitting and at least annually thereafter and demonstrate through a written record of testing for coliform bacteria to signify that the water supply is potable. The Department may require more frequent testing, or additional testing, if circumstances dictate that such testing is necessary to ensure food safety.

8.3.a. Maximum coliform levels shall be <1cfu/100mL.

8.3.b. For municipal water sources, a certificate of testing must be available for review and the person utilizing the kitchen for preparation of cottage foods should verify use during cottage food production if more than one water source is present.

8.3.c. The Department may establish additional water quality standards in order to meet state water quality guidelines.

8.4. Persons engaged in the production of cottage foods for sale at farmers markets shall attend and keep current one or more of the following and provide documentation of successful completion of the scope of curriculum from a Department-approved food-safety course:

- 8.4.a. Department-developed cottage foods training (renewed biennially);
- 8.4.b. ServSafe Food Handler Course offered by the National Restaurant Association;

8.4.c. Statewide food handlers' permit;

8.4.d. Good manufacturing practices (GMP) certificate program; or

8.4.e. Other curriculum approved by the Department.

8.5. All online cottage food sales shall be delivered in person and are not permitted to be shipped.

8.6. A home, community, farm, or commercial kitchen may be used by a cottage foods vendor. The Department reserves the right to limit the preparation and preservation of a particular cottage food to a certain type of kitchen to ensure food safety.

§61-38-9. Vendor permit process.

9.1. Vendors required to obtain a farmers market vendor permit shall apply with the Department on a form provided by the Commissioner, available online at <https://agriculture.wv.gov/forms/formsreg/Documents/Farmers%20market%20vendor%20permit%20application%20form.pdf> and shall include, at a minimum, the following information:

9.1.a. Applicant's name, mailing address, phone number, and email address;

9.1.b. Type of products being sold;

9.1.c. Physical location of growing field(s);

9.1.d. Information about the markets where vendor anticipates selling products, including:

9.1.d.1. Name of markets;

9.1.d.2. Location of markets; and

9.1.d.3. Dates when vendor plans to participate in market;

9.1.e. Satisfactory information to determine that the cottage food vendor has complied, or is compliant, with the requirements of section 8 of this rule; and

9.1.f. Any other information deemed relevant by the Commissioner.

9.2. Farmers market vendor permits are valid from April 1 through March 31 of the following year.

9.3. Farmers market vendor permit applications are due on March 1 each year and may be submitted in advance of that deadline.

9.3.a. The annual application fee for a farmers market vendor permit is \$35.

9.3.b. Farmers market vendor permit applications that are received after March 1 shall be assessed a late fee of \$20.

9.4. Once a completed vendor permit application is received, the Department shall take final action within 30 days of receipt if the permit is uncontested, or within 90 days if the permit is contested.

9.5. The following vendors shall be exempt from the requirement to obtain a farmers market vendor permit:

9.5.a. Producers delivering their products to a consignment farmers market only;

9.5.b. Vendors selling fresh uncut produce;

9.5.c. Vendors selling non-potentially hazardous foods;

9.5.d. Vendors selling farm and food products identified in section 6.1 of this rule; and

9.5.e. Vendors selling farm and food products manufactured in an FDA-inspected facility.

9.6. Farmers market vendor permits shall be displayed in a conspicuous manner at the point of sale.

§61-38-10. Inspections of farmers markets.

10.1. Inspections shall be conducted by the Department of farmers markets. Local health departments may inspect a farmers market or vendor kitchen upon receipt of a consumer complaint, which must be in writing, identification of a suspect case for adulteration, or to investigate a foodborne outbreak. All inspections conducted at farmers markets by local health departments shall be performed in consultation with the Department.

10.2. Farmers market inspections shall occur, at a minimum, once every two years. Inspections by the WVDA shall include, but are not limited to:

10.2.a. Display of current permit;

10.2.b. Current list of vendors; and

10.3.c. Compliance with sampling requirements listed in section 13 of this rule and in the Farmers Market Vendor's Guide.

10.3. The local health department in the jurisdiction of the farmers market location may invoke a cessation of production, if they have reason to believe that an imminent health hazard exists until it deems that the hazardous situation has been addressed to the satisfaction of the local health department. The local health department shall invoke cessation of production in consultation with the Department.

§61-38-11. Inspections of cottage food kitchens.

11.1. Kitchen inspections for farm and food products that require a farmers market vendor permit shall be conducted by a Department representative upon the initial application and after renewal of the annual application. Non-compliance violations may result in additional inspections.

11.2. Cottage food vendors will be charged \$27 per hour for inspections, which will be billed directly to the cottage food vendor.

11.2.a. Travel to and from the site of the inspection will be charged to the vendor.

11.2.b. Inspection costs will be assessed for both the annual inspection, as well as any follow up inspections after a violation has occurred.

11.3. During a kitchen inspection, the Department will minimally inspect to ensure the following:

11.3.a. That only the specific foods identified on the farmers market vendor permit are being produced in the kitchen during the time of production of those foods;

11.3.b. That the permitted cottage food operation understands that no person other than the vendor permit holder, or a person under his or her direct supervision, may be engaged in the processing, preparing, packaging, or handling of any cottage food products or be in the home kitchen during the preparation, packaging, or handling of any cottage food products;

11.3.c. That no preparation, packaging, or handling of cottage food products is occurring in the home kitchen concurrent with any other domestic activities, such as home meal preparation, dishwashing,

clothes washing or ironing, kitchen cleaning, or guest entertainment. Preparation activities and routine home activities must be clearly separated by time;

11.3.d. That no infants, small children, or pets are in the home kitchen during the preparation, packaging, or handling of any cottage food products;

11.3.e. That only normal, non-commercial kitchen equipment and utensils are being used to produce cottage food products, unless the permittee can demonstrate that the commercial equipment and utensils can be properly cleaned and sanitized;

11.3.f. That all food contact surfaces, equipment, and utensils used for the preparation, packaging, or handling of any cottage food products are washed, rinsed, and sanitized before each use;

11.3.g. That all food, food preparation, equipment, and storage areas are free of rodents and insects;

11.3.h. That no persons involved in the preparation and packaging of cottage food products:

11.3.h.1. Are working with exposed food, cleaning equipment, utensils, and linens; or working with unwrapped single-service or single-use articles while experiencing the following symptoms:

- 11.3.h.1.1. Vomiting;
- 11.3.h.1.2. Diarrhea;
- 11.3.h.1.3. Jaundice; or
- 11.3.h.1.4. Sore throat with fever;

11.3.h.2. Has a lesion containing pus, such as a boil or infected wound, that is open or draining and is:

- 11.3.h.2.1. On the hands or wrists, unless an impermeable cover such as single-use gloves protect the lesion;
- 11.3.h.2.2. On exposed portions of the arms, unless the lesion is protected by an impermeable cover; or
- 11.3.h.2.3. On other parts of the body, unless the lesion is covered by a dry, durable, tight-fitting bandage; or

11.3.h.3. Has symptoms of any of the following illnesses as diagnosed by a health practitioner:

- 11.3.h.3.1. *Norovirus*;
- 11.3.h.3.2. *Hepatitis A*;
- 11.3.h.3.3. *Shigella spp*;
- 11.3.h.3.4. Shiga toxin producing *E. coli*; or
- 11.3.h.3.5. *Salmonella spp*.

§61-38-12. Local permit requirements.

12.1. Certain farm and food products that require a food establishment permit or other permits to be sold at a farmers market include, but are not limited to the following:

12.1.a. Meat;

- 12.1.b. Poultry;
- 12.1.c. Dairy; and
- 12.1.d. Fish.

12.2. The local health department in the jurisdiction in which the farmers market is located has the right to inspect and suspend the food establishment permit of a farmers market vendor that sells or serves food for which a food establishment permit is required.

12.4. Farmers market vendors shall be subject to any state or federal rules and regulations that apply to certain farm and food products sold at farmers markets or at a consignment farmers market under the Food Safety Modernization Act, 21 U.S.C. §§ 2201 *et seq.*, and interstate commerce regulations.

§61-38-13. Sampling.

13.1. All sampling shall be performed in consultation with the Department. The Department allows the distribution of samples at Farmers Markets provided that:

13.1.a. The farmers market ensures that vendors are following the guidance established in the West Virginia Farmers Market Vendor Guide or the Farmers Market Vendor Guide: A Guide for Farmers, Sanitarians, and Consumers, prepared by the West Virginia Food Safety and Defense Task Force; and

13.1.b. A representative of the farmers market participates in a Department-approved training course identified in section 8.4 of this rule for good manufacturing practices on an annual basis.

13.2. Sampling stations for foods shall minimally ensure the following, with additional information available in the West Virginia Farmers Market Vendor Guide:

13.2.a. A hand washing station should be easily accessible for all food handlers;

13.2.b. Sanitary procedures are followed;

13.2.c. Proper food storage temperatures are maintained;

13.2.d. Appropriate tools for dispensing samples are used;

13.2.e. Adequate trash receptacles are available for trash generated from sampling and should be covered and emptied frequently; and

13.2.f. Samples are not exposed to environmental contaminants or pests.

13.3. A vendor is subject to food sampling and inspection by the local health department in the jurisdiction in which the farmers market is located if the local health department determines that the vendor's food product is not properly labeled or is adulterated, or if a consumer complaint has been received. All sampling and inspection shall be performed in consultation with the Department.

13.4. For the purpose of this rule, chef demonstrations at markets and food prepared during these events are considered samples and must be served in an approved manner.

§61-38-14. Enforcement.

14.1. The Commissioner may assess a violation of W. Va. Code §19-35-1 *et seq.* or of this rule.

14.2. If a violation has been committed by either the farmers market or the vendor, or an item is found to be adulterated or misbranded, the Commissioner shall send a written "First Notice" to the vendor permit holder. This notice shall notify the vendor permit holder that a violation of W. Va. Code §19-35-1 et. seq. of this rule and the enforcement policy established by this section of the rule. A second inspection shall occur after the notification has been sent.

14.3. If a violation has been committed during the second inspection, the Commissioner shall send a written "Second Notice" to the vendor permit holder. The registrant must develop a written plan to correct the violation(s) and implement it within 7 days after the Second Notice has been sent out.

14.4. A third inspection shall occur after the receipt and acceptance of the written plan of correction.

14.5. If a violation has been committed during the third inspection, the Commissioner will issue an immediate "Suspension of Permit". The "Suspension of Permit" order will give the reason of the order, state the length of time that the Suspension of Permit order will be in effect, and specify a time and place for a hearing to be held in the matter.

14.6. The suspension shall state the time that the suspension will be effective, give the reason of the suspension, and specify a time and a place for a hearing to be held in the matter, except that in the case of a summary suspension. The Commissioner may give the manufacturer the opportunity to request a hearing in this matter subsequent to the notification of the suspension.

14.6.a. The suspension shall remain in effect until the vendor permit holder submits, and the Commissioner accepts, a written plan of correction and a request for a reinstatement of the permit.

14.6.b. The Commissioner has ten (10) business days from the date or receipt of a written plan of correction and request for the reinstatement of the permit to respond. The Commissioner shall accept or deny the application for a reinstatement of the permit and shall give the terms and conditions under which the permit will be reinstated.

14.6.c. If the Commissioner finds that after the vendor permit holder has resumed operations following a suspension of their Farmers Market Registration or Farmers Market Vendor Permit that effective corrective actions have not been taken, the Commissioner shall hold a hearing to determine if the Farmers Market Permit or the Farmers Market Vendor Permit should be revoked.

14.7. A person who performs a recall by voluntarily removing product from sale or distribution in an effective manner, so as to limit the potential harm to the health and well-being of the public, may be eligible for exemptions from the normal enforcement policy. The Commissioner shall consider the facts of each case when making a decision on an exemption.

14.8. The Commissioner may suspend the standard enforcement policy in cases where such action is necessary to protect the public health, safety, and welfare.

§61-38-15. Hearings.

15.1. If a violator requests an informal hearing or the Commissioner schedules an informal hearing, the compliance officer shall schedule a hearing in accordance with the following procedures:

15.1.a. The compliance officer shall notify any authorized representative of the Commissioner who was involved in the inspection which discovered the violation which is the subject of the hearing, and the violator of the time and place of the informal hearing;

15.1.b. The compliance officer shall notify the parties at least ten (10) business days prior to the time of the hearing; and

15.1.c. The compliance officer may continue the informal hearing only for good cause shown.

15.2. An informal hearing is intended to be an information discussion of the facts which gave rise to the issuance of a notice of violations. The hearing officers shall conduct the hearing in the following manner:

15.2.a. The hearing officer shall not discuss the case "ex parte" with either the compliance officer or other Department employees involved in the case.

15.2.b. All testimony and evidence at a hearing shall be recorded. The record shall be maintained for ninety (90) days from the date of the hearing, and the Department shall make a transcript of the hearing available to the aggrieved party.

15.2.c. Within thirty (30) days following the informal hearing, the hearing officer shall issue and furnish a written decision affirming or dismissing the initial notice of violation and reason(s) for his or her decision.

15.3. Any party who feels aggrieved of the suspension, revocation, or denial order of a license may appeal within sixty (60) days to the circuit court of the county in which the violator has located its principal place of business.

15.4. At any formal review proceedings which may occur later, any evidence, as to any statement made by one party at the informal hearing, may not be introduced as evidence by another party, nor may any statement be used to impeach a witness, unless the statement was available as competent evidence independent of its introduction during the informal hearing.