

**WEST VIRGINIA
SECRETARY OF STATE
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ADMINISTRATIVE LAW DIVISION**

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Form #5

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: West Virginia Parole Board TITLE NUMBER: 92

CITE AUTHORITY: W.Va. Code §§ 62-12-13 & 29A-1-3(b)

RULE TYPE: PROCEDURAL x INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE _____

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

W.Va. Code §29A-1-3(b) exempts Parole Board from provisions of Chapter 29A

AMENDMENT TO AN EXISTING RULE: YES x NO _____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

TITLE OF RULE BEING AMENDED: Procedural Rules of West Virginia Board of Probation
and Parole

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS May 1, 2005

Benita J. Murphy
Authorized Signature

18.80

RULES

of the

WEST VIRGINIA PAROLE BOARD

EFFECTIVE: May 1, 2005

Rules of the West Virginia Parole Board

West Virginia Parole Board

Rules

Effective: May 1, 2005

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MISSION STATEMENT

The West Virginia Parole Board, as an integral part of West Virginia's Criminal Justice System, makes independent, quality, conditional releases of adult offenders. It also makes recommendations to the Governor for adult offenders who petition for pardons or other clemency.

The Board contributes to the protection of society by facilitating, as appropriate, the timely integration of offenders back into society.

MAKING THE MISSION A REALITY

The purpose of this Mission document is to provide direction to Board Members and support staff of the West Virginia Parole Board for the achievement of excellence in the field of corrections in general and in conditional release in particular. It is also a document that explains to our criminal justice partners, to offenders and ex-offenders, to legislators and to the public, the membership of the Board, what it stands for, what it does, and how it does it.

As part of the criminal justice system, the Board contributes to the maintenance of a just, peaceful and safe society. The Board uses the word "contribute" in its Mission Statement, as the Board is not alone in the pursuit of this goal. In its efforts to achieve this goal the Board works in conjunction with state, national and international correctional services and parole boards, police agencies, after-care agencies, prosecutors, judges, and many other organizations and individuals in the community.

The legal authority under which the Board operates is set out in Chapter Sixty-two of the West Virginia Code.

In making quality decisions regarding conditional releases and informed recommendations to the Governor in clemency cases, the Board's primary objectives are the long-term protection of society and the rehabilitation and reintegration of the offender into society. The members of the Board firmly believe law-abiding behavior can best be achieved by timely and supervised conditional release. In making its decisions, the Board is autonomous and independent. However, it is accountable for its actions to its other criminal justice partners, to legislators, the Governor, and ultimately, to all citizens of West Virginia.

*This document supplants the original West Virginia Parole Board Mission Statement adopted in 1997.

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The Board would like to thank all those who have contributed to this document; particularly those individuals from other state, federal and international boards who helped bring it to fruition.

Achieving the mandate of the West Virginia Parole Board will not be an easy accomplishment. It involves the safeguarding of two of our most precious societal values: public safety and personal freedom. "Making the Mission a Reality" therefore is a challenge that becomes the primary responsibility and obligation to all those associated with the Board.

Benita F. Murphy, Chairman

Frederick R. Bumgardner, Member

Christie Love, Member

Peggy J. Pope, Member

Brenda J. Stucky, Member

Section 1. General

1.1 SCOPE

These rules and regulations establish procedures and criteria to be employed by the Parole Board when considering inmates incarcerated by the West Virginia Division of Corrections for parole and in granting parole and establishing conditions therefor; and in revoking the parole of those inmates who violate the conditions aforementioned.

1.2 AUTHORITY

These rules and regulations are promulgated under authority of West Virginia Code, Chapter 62, Article 12, Section 13(c).

1.3 FILING DATE

February 15, 2005

1.4 EFFECTIVE DATE

May 1, 2005

1.5 PURPOSE

The general purpose of these rules and regulations is to establish procedures and criteria whereby the West Virginia Parole Board shall discharge its duties and exercise the powers described and reserved to the Board by the West Virginia Code, Sections 62-12-13, 62-12-14 and 62-12-19. Accordingly, these rules are hereby designated as procedural rules in accordance with W. Va. Code § 29A-1-2(g). These rules shall be filed with the legislature or its legislative rule making committee and in the State Register as required by W. Va. Code § 29A-1-3.

1.6 REPEAL AND REPLACE. This rule repeals and replaces 92 C.S.R. 1, "West Virginia Board of Probation and Parole Procedural Rules" effective August 23, 2001.

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Section 2. Definitions

- 2.1 The word "Board" as used herein shall mean the West Virginia Parole Board.
- 2.2 The word "Member" as used herein shall mean any member of the Parole Board.
- 2.2(a) "Presiding Member" shall be the Chairman at all functions that the Chairman is present. The Chairman shall designate one or more Parole Board members to serve as the Presiding Member in his or her absence.
- 2.3 The word "Officer" shall mean a Parole Officer under the employ of the West Virginia Division of Corrections.
- 2.4 The words "criminal violation" shall refer to a violation of any condition of the Parole Agreement, which provides that parolees shall not violate any criminal laws of the United States, or any State or Municipality.
- 2.5 The words "technical violation" shall refer to a violation of any other conditions of parole.
- 2.6 The word "Division" shall refer to the West Virginia Division of Corrections.
- 2.7 The word "institution" shall refer to either the Mount Olive Correctional Complex, the Huttonsville Correctional Center, the Pruntytown Correctional Center, the Denmark Correctional Center, the Ohio Correctional Center, the Lakin Correctional Facility for Women, the McDowell County Correctional Center, Martinsburg Correctional Center, the Northern Regional Jail and Correctional Facility, the Beckley Work Release Center, the Charleston Work Release Center, the Huntington Work Release Center, St. Mary's Correctional Center, Anthony Correctional Center or any other location designated by the State of West Virginia as a correctional facility including regional jails.
- 2.8 The words "Deputy Commissioner" shall refer to the Deputy Commissioner of the Division of Corrections or to such other employee thereof designated by the Commissioner of Corrections.

Section 3. Board Decisions

3.1 RULE INTERPRETATION

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The Parole Board reserves for itself the authority to interpret these rules or any other rule or policy directive it may issue.

3.2 METHOD OF DECISION

Three members of the Board, which constitutes a quorum for conduct of business, shall make all substantive decisions by a concurring vote of at least two members. Procedural and evidentiary matters, such as motions to continue and decisions to admit or exclude evidence and other non-dispositive matters shall be made by the presiding member.

No inmate shall be granted parole without the consent two members, and no parolee shall have his parole revoked without the consent of two members.

3.3 PRIVACY OF DECISIONS

All deliberations and votes of the Board shall be made in private.

Section 4. Eligibility for Parole Consideration

4.1 ELIGIBILITY BASED ON TIME SERVED

- a. Any inmate, in order to be eligible for consideration for parole, must meet the following prerequisites:
 1. If the inmate is serving an indeterminate sentence, he or she must have served the minimum term of the sentence.
 2. If the inmate is serving a determinate sentence, he or she must have served one-fourth of the sentence.
 3. If the inmate is serving a sentence designated in the committing court's sentencing/commitment order as "Life with Mercy", and the crime is not First Degree Murder, he or she must have served ten years of the sentence.
 4. If the inmate is serving a sentence designated in the committing court's sentencing/commitment order as "Life with Mercy" for First Degree Murder, and the crime occurred prior to June 10, 1994, he must have served ten years of the sentence. If the crime occurred on or after June 10, 1994, he or she must have served fifteen years.
 5. If the inmate is serving a sentence designated in the committing court's sentencing/commitment order as "Life with Mercy", and he or

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she has been convicted of felony crimes twice before, he or she must serve fifteen years of the life sentence.

This provision shall apply regardless of the crime for which the life sentence was imposed, unless the crime is first degree murder or second degree murder or a violation of section three [61-8B-3], article eight-B, chapter sixty one of the West Virginia Code, and it is determined, as provided in section nineteen [61-11-19], article 11, chapter sixty-one, that such person had been before convicted in this state of first degree murder, second degree murder, or a violation of section three, article eight-b of said chapter, or has been so convicted under any law of the United States or any other state for an offense which has the same elements as any offenses described in this subsection, in which case the inmate is not eligible for parole.

6. If the inmate is serving a sentence for a drug offense and the committing court's order designated that the crime occurred within 1000 feet of a school or school property, he or she must have served three years. (W. Va. Code § 60A-4-406).
7. Notwithstanding any other provisions herein, if an inmate is sentenced under a court order showing that he committed or attempted to commit a felony with the use, presentment or brandishment of a firearm, the inmate shall be eligible for parole consideration in accordance with the following:
 1. If the inmate so committed or attempted to commit the crime of robbery as defined in Section 62-2-12 of the Code, he or she shall be eligible for parole either when he or she has served five years of the sentence or when he has served one-third of his determinate sentence.
 2. If the inmate so committed or attempted to commit any other act, and was convicted of a felony under any section of the Code, other than 62-2-12, then he or she shall be eligible for parole after he or she has served three years of the sentence or the maximum of the sentence, whichever is less.
 3. The provisions of this subsection will apply only to those inmates who were convicted of their felonies after August 1, 1981. Inmates convicted of their offenses before that date shall have their eligibility determined by subsections (1), (2), (3) and (4). Resolution of any dispute over the applicability of

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this subsection shall be made by reference to Code, Section 62-12-13(a)(1)(B).

8. If an inmate is serving two or more sentences concurrently, he or she shall be eligible for parole consideration after he or she has served the longest of the minimum terms.

If one of the sentences is a determinate sentence, then he or she shall serve one-fourth, (five years or one-third of a definite sentence if the firearm statute is applicable), of that sentence in order to be eligible for parole consideration, providing that such is longer than the minimum sentence for any concurrent indeterminate sentence.

Examples:

An inmate serving a 1 to 10 year sentence and a 5 to 20 year sentence concurrently, will be eligible for parole after serving 5 years.

An inmate serving a 3 to 18 year sentence concurrently with a determinate sentence of 20 years, shall serve one-fourth of the 20 years, (5 years) or one-third (6 years and 8 months, if the firearm statute applies), before being eligible for parole.

9. If an inmate is serving consecutive sentences, the time of parole eligibility shall be computed by adding together the minimum terms of the sentences.

If one of the sentences is a determinate sentence, then parole eligibility shall be computed by adding a number equal to one-fourth of the determinate term, (or one-third if the firearm statute is applicable), to the minimum term of the other sentences.

If the inmate is serving two determinate sentences consecutively, then parole eligibility shall be computed by adding a number equal to one-fourth, (or one-third if the firearm statute is applicable), of one determinate term to a number equal to one-fourth, (or one-third if the firearm statute applied), of the second term.

Examples:

An inmate serving a 1 to 10 year sentence consecutively with a 3 to 18 year sentence is parole eligible after serving 4 years.

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An inmate serving a 3 to 18 year term consecutively with a determinate sentence of 20 years must serve 8 years (or 9 years and 8 months if the firearm statute applies.)

An inmate serving two consecutive determinate sentences of 30 years apiece must serve 15 years (or 20 years if the firearm statute applies.)

10. When a parolee has violated the conditions of the release on parole by confessing to, or being convicted of: treason, first or second degree murder, armed/aggravated robbery, rape, or first degree sexual assault, sodomy, or incest, he shall be returned to a correctional center of this State to serve the remainder of the maximum sentence, during which remaining part of the sentence he or she shall be ineligible for further parole.
- b. Rules concerning parole eligibility shall not be interpreted to delay the actual discharge of sentence and release from the institution. If an inmate has reached the maximum discharge date by benefit of Good Time, awarded pursuant to W. Va. Code § 28-5-31, but has not reached parole eligibility, then he or she shall be discharged.
- c. An inmate who is serving a sentence designated in the committing court's sentencing/commitment order as "Life" or "Life without Mercy" shall not be eligible for parole.

4.2 ELIGIBILITY BASED ON INSTITUTIONAL CONDUCT

- a. An inmate shall lose parole eligibility if found guilty of violating any Class I or Class II institutional disciplinary rule at any time in the month of the scheduled parole interview or in the three months prior thereto.

An inmate's loss of parole eligibility shall be temporary; the inmate shall have his or her parole eligibility postponed until the fourth month following the month in which the rule violation occurred.

- b. No inmate who is incarcerated in punitive segregation, as distinct from administrative segregation, shall be eligible for parole. Such inmate shall become eligible in the first full month following the month in which he or she is released from punitive segregation, except as otherwise provided for in the preceding section.

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4.3 DETAINERS

An inmate, who is subject to a detainer filed by authorities of any state or of the United States, will be eligible for parole interviews.

However, if parole is granted to such an inmate he or she shall be paroled to the detainer. He or she shall not be released to parole supervision without the express written consent of the authorities who filed the detainer.

Any person charged with escape from the custody of the Commissioner of Corrections shall not be released from custody while the prosecution of the alleged offense is pending.

Section 5. Interviews of Inmates

5.1 INTERVIEW SCHEDULES

Inmates who become eligible for parole shall be given an interview by the Board.

Due to the heavy caseload of the Board and the difficulties of constant travel by members, the exact date and time of any interview shall be at the sole discretion of the Board.

In cases of emergency, one board member can conduct the interview. The interview shall be recorded by magnetic tape or other reliable means, which shall then be reviewed by two other board members for their decision. Interviews may be conducted by means of video teleconference in compliance with statutory requirements.

No inmate shall have the right to an interview on any particular day. However, the inmate shall have the right to an interview within a specific month in accordance with the following:

- a. Initial Interview - When an inmate first becomes eligible for parole, he or she shall be interviewed by the Board during the month in which he or she becomes eligible.

Example:

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An inmate who was sentenced to a term of 3 to 18 years with an effective sentence date of January 14, 1995 shall have an interview scheduled for some date during the month of January 1998.

- b. An inmate who is not granted parole following the initial interview, shall be scheduled for an additional interview no more than twelve months following the month of initial eligibility except for inmates with life sentences who may be subject to extensions of this period.

Subsequent interviews will be scheduled at twelve month intervals, except as otherwise provided for herein.

An inmate who is serving a sentence designated in the committing court's sentencing/commitment order as "Life with Mercy" shall be scheduled for an interview after serving 10 years (if the crime occurred prior to June 10, 1994); or after serving 15 years (if the crime occurred on or after June 10, 1994).

Subsequent interviews may be scheduled at up to 36-month intervals in compliance with the provisions set forth in subsection (d) of section 8 of these Rules.

- c. The Board, for any reason, may advance the time of any interview, providing all other rules are complied with.

5.2 NOTICE TO INMATE

The Board shall notify inmates of the date of their individual interviews by issuance of a monthly list.

The list shall give the name of each inmate, by institution, who is to receive an interview in a given month, together with the date of such interview.

The list shall be issued by the Board on or before the first day of the month prior thereto.

The list shall be sent to each institution, and all inmates whose names appear on it shall be notified of the date of their individual interview by employees of the institution.

5.3 NOTICE TO OFFICIALS

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Written notice of each interview shall be sent by first class mail to the sentencing judge, the prosecuting attorney, and investigating or arresting police officer so that they may comment on the appropriateness of the granting of parole.

The notice shall be mailed at least ten working days prior to the interview.

If the sentencing judge is no longer on the bench, written notice will be sent to the chief judge in that judicial circuit.

5.4 NOTICE TO VICTIMS; VICTIMS RIGHT TO BE HEARD

Following the sentencing of a person who has been convicted of murder, aggravated robbery, sexual assault in the first or second degree, kidnapping, child abuse resulting in injury, child neglect resulting in injury, arson, or a sexual offense against a minor, the prosecuting attorney shall prepare a "Parole Hearing Notification Form" which shall contain the names, addresses and telephone numbers of the victims of the crime for which the offender was sentenced.

At least forty-five days prior to the date of a parole hearing, the Board shall notify those persons listed on the "Parole Hearing Notification Form" of the date, time and place at which a parole hearing will be held. Such notice shall be sent by certified mail, return receipt requested.

The notice shall state that the victims of the crime have the right to submit a written statement to the Board and to attend the parole hearing to be heard, with or without the defendant present, regarding granting parole to the inmate. The notice shall also state that only the victims may submit written statements and speak at the parole hearing unless a victim is deceased, is a minor or is otherwise incapacitated.

The Board shall inquire during the parole hearing as to whether the victims of the crime or their representatives are present. If so, the board shall permit those persons to speak.

If the Board grants parole, it shall immediately set a date for the inmate's release and shall immediately notify the victims that parole has been granted and indicate the date on which the inmate is to be released.

5.5 TIME AND PLACE OF INTERVIEW

All parole interviews shall be held at the inmate's place of confinement. If deemed in the interest of economy and expedience or for any other special circumstance, the Board may designate another secure location.

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Interviews may, in special circumstances, be held at a hospital or at the discretion of the Board.

Individual inmates shall not be scheduled in advance for specific times, unless the victim or victim's family, as mentioned in Section 5.04, has requested to attend the hearing. The Board on a given day shall commence with interviews at a prearranged time and thereafter shall interview each inmate scheduled for that day in turn. If necessary, due to time constraints, interviews may be continued to succeeding days. Parole interviews are open to the public except insofar as restrictions on attendance may be required for security reasons or institutional management considerations.

5.6 CONSIDERATION OF DOCUMENTS AT INTERVIEWS

- a. At the interview the Board will consider any of the following documents, which it has obtained from appropriate sources:
 1. A current authentic copy of the inmate's criminal record issued by either the West Virginia Department of Public Safety, the Federal Bureau of Investigation, a criminal justice authority of another state, or other reliable sources such as a pre-sentence report or a post-sentence report.
 2. Reports from the institution concerning the inmate's work record, participation in therapeutic, treatment and educational programs, and overall conduct.
 3. Reports of the inmate's conduct while incarcerated, to include the record of any and all violations of Class I or Class II institutional disciplinary rules, proved and disposed of, and the sanctions imposed therefore;
 4. Reports prepared by institutional authorities concerning any improvement or other changes noted in an inmate's mental or moral condition while incarcerated, including a statement expressive of the inmate's current attitude toward society in general, toward the judge who sentenced him, toward the prosecuting attorney who convicted him, toward the law enforcement officers who arrested him, toward the crime for which he is under sentence, toward his previous criminal record and when applicable, toward the parole officer and toward any or all Parole Board members.

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5. Reports submitted to the Board by institutional authorities concerning physical, mental or psychiatric examinations of the inmate conducted by either the Division of other appropriate agencies or professionals.
 6. Sections of pre-sentence or post-sentence investigation reports, which state the sentiment held by law enforcement officers, prosecuting attorneys, or other public officials and citizens from the county where the inmate was sentenced or from the community in which the inmate resided.
 7. Sections of pre-sentence or pose-sentence investigation reports which state the facts and circumstances of the crime for which the inmate has been convicted.
 8. Records pertaining to any previous release of the inmate on home confinement, probation or parole.
- b. The inmate shall be supplied with copies of all documents to be considered by the Board, with the exception of those described in subsection (5) and (6) of the preceding section or any document that interferes with security considerations.

These copies shall be delivered to the inmate by employees of the institution at least fourteen days prior to the date of the interview.

At the time these copies are delivered, the inmate shall be asked to sign a statement acknowledging receipt of same. The date of delivery shall be noted and the executed acknowledgment shall be sent to the Board.

- c. The Board may conduct the interview without any of the aforementioned documents and reports, provided that a written statement indicating the reason for the Board deciding to proceed without them, is prepared, signed by all interviewing members, and placed in the inmate's file.

However, in the case of a prisoner who is incarcerated because such prisoner has been found guilty of, or has pleaded guilty to a felony under the provisions of section twelve [§ 61-8-12], article eight, chapter sixty-one of the West Virginia Code or under the provisions of article eight-b or eight-c [§ 61-8B-1 et seq. or 61-8C-1 et seq.] of chapter sixty-one (sex crimes), the Board may not waive the report required by subsection (5) and the report shall include a study and diagnosis which shall include an on-going treatment plan requiring active participation in sexual abuse counseling at an approved mental health facility or through some other approved program.

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5.7 CONDUCT OF THE INTERVIEW

- a. The interview will be conducted in an informal manner. The purpose of the interview is to allow the inmate to respond to facts contained in the documents and reports, to offer reasons why he should be granted parole, and to give the Board an opportunity to observe the demeanor of the inmate and pose questions to him or her. The proceedings in the interview shall be recorded by magnetic tape, stenography, or other means of equivalent competence. An interview by video teleconference may be utilized in compliance with the requirements of subsection (j) of W. Va. Code § 62-12-13.

- b. During the course of the interview, the Board shall:

1. Interrogate the inmate to ensure copies of all documents to which the inmate is entitled under Rule 5.06, were received.

If the Board learns from such inquiry that the inmate has not received all such documents, it shall give the inmate the choice of either proceeding with the interview, giving him an opportunity to learn the contents of a comment upon the documents not received, or postponing the interview until the next month.

2. Allow the inmate an opportunity to comment upon information contained in the documents or reports which the Board shall consider, and rebut any information, which the inmate believes, is false or inaccurate.

In order to so rebut or to present additional information which the inmate believes is relevant to parole consideration, the inmate may present to the Board document, affidavits or letters.

The inmate may also ask that the Board delay consideration of the case pending receipt of such documents, affidavits or letters if they are not available at the time of the interview. The Board has no responsibility for obtaining such information on the inmate's behalf.

Thereafter the Board shall allow the inmate an opportunity to make a statement as to why he should be granted parole, specifically as to why the Board should believe that if he were released on parole he could conduct himself in a lawful manner and that his release would not be incompatible with the best interests and welfare of society generally.

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Members may ask the inmate any question which relates to the matters of fact raised in the documents or reports, by the inmate himself, or which concerns the inmate's personal or family life and has demonstrated bearing on the factors considered for a grant or denial of parole.

- c. Parole interviews are open proceedings. Any person who so desires may be present for the interview as space allows. However, no person in attendance may speak except with the permission of the Board.
- d. Any person, including the inmate himself, who speaks without permission, or who disrupts the interview may be ordered to leave the room by the Board.

Any such action on the part of an inmate shall result in the loss of the hearing entitlement for at least four months.

Section 6. Factors in Decision

The Board, in considering whether parole should or should not be granted to any inmate, shall consider the following factors:

- 6.1 Whether the inmate has been found guilty of violating any Class I or Class II institutional disciplinary rules, and
- 6.2 Whether the inmate has satisfactorily participated in institutional education, work, therapeutic or treatment programs, and
- 6.3 Whether the inmate has previously been on home confinement, parole or probation, and if so, how the inmate behaved thereon and the circumstances of any violations, and
- 6.4 The sentiment expressed by members of the community, victims of the crime committed by the inmate and criminal justice officials in the area where the crime occurred and in the area where the inmate lived prior to conviction, if any such expression be available, and
- 6.5 The facts and circumstances of the crime, and
- 6.6 The demeanor of the inmate during the interview and the attitudes expressed with regard to prior criminal behavior, to social morals and law, and
- 6.7 The inmate's prior criminal record, if any, and
- 6.8 The results of any available physical, mental or psychiatric examinations.

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- 6.9 The Board will consider positive and negative factors in all the aforesaid areas and not confine its inquiry to particular areas to the exclusions of others.
- 6.10 The Board shall assess all factors together to determine whether:
 - a. The inmate can and will conduct himself in a lawful manner if released, and
 - b. Whether release is in the best interests of society considering public safety and rehabilitation goals.

The Board will not parole an inmate if the circumstances of the inmate's specific criminal act merit continued punishment, other factors notwithstanding.

Section 7. Waiver of Interview

The inmate may waive a parole interview either by writing a letter setting forth the desire to do so, or by executing such waiver form as provided by the Board. Such waiver shall be made no later than thirty (30) days before the interview date unless special circumstances exist for a shorter period.

Upon receipt of either a letter or waiver, the Board will treat the inmate's case as a flat denial.

The inmate may also request, by writing a letter, that the parole interview be postponed for one or more months. The Board in its discretion may grant or deny a postponement.

Section 8. Decisions of the Board

The Board at the conclusion of an interview may decide to:

- 8.1 Grant parole, or
- 8.2 Grant parole with special conditions, or
- 8.3 Defer parole, or
- 8.4 Deny parole and schedule an additional interview at anytime within the next

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twelve months. If a majority of a quorum of the Board, as set forth in section 3.2, shall determine that the inmate should have an additional interview prior to the expiration of 12 months, then the quorum shall proceed to deliberate the length of time which shall elapse before the next interview. If a majority of the quorum of the Board agrees on a specific period of time then that period of time shall be the period for the next interview. If the quorum is unable to agree upon a period of time which is less than 12 months to schedule another interview, then the chairman, or presiding member, after causing the same to be duly noted in writing, may poll each member of the quorum who shall recommend a period of time between 0 and 12 months, and reach the average of the same by adding all recommendations and dividing by the number of members making recommendations. Once this average is reached, the quorum shall again deliberate to determine if this average can be agreed upon by a majority of the quorum. If the majority cannot thereafter agree on a date for a new interview, the matter shall be referred to the Chairman who, in his or her sound judgment shall schedule another interview prior to the expiration of 12 months.

With the exception of an inmate serving a sentence designated in the committing court's sentencing/commitment order as "Life with Mercy" in which case subsequent interviews may be scheduled at up to 36 month intervals. Such extension beyond 1 year shall be made only if the Board makes a case-specific individualized determination with reasons and findings on the record showing why such extension will cause no detriment or disadvantage to the inmate. An inmate receiving such extension shall be entitled to submit information to the Board during that extension requesting an earlier parole interview.

The Board will inform the inmate of its decision in writing. After the interview, the Board may postpone its decision, deferring consideration until it receives additional information, which it deems necessary to its decision.

If the Board decides to deny parole, it shall notify the inmate by letter of the specific reasons for denial.

It may include among the reasons for denial, a statement of recommendation for future behavior that the Board believes may improve the inmate's likelihood of favorable parole consideration or improve the rehabilitation potential of the inmate.

If the Board decides to grant parole, it shall issue written notification thereof, which shall be given to the inmate with a copy to the Deputy Commissioner of the Division of Corrections.

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Section 9. Rescission of Parole

9.1 GROUNDS FOR RESCISSION

The Board may rescind any grant of parole made pursuant to these rules if the inmate commits any infraction of Class I or Class II institutional disciplinary rules after the interview and before the actual release from the institution, or if any information becomes available to the Board which contravenes the evidence the Board used to reach the parole decision. Whereupon the Board shall immediately issue a notice of temporary rescission.

9.2 PROCEDURES FOR RESCISSION

- a. Upon receipt of a written report from the Division of Corrections that the inmate has committed any infraction of Class I or Class II institutional rules, or upon receiving information contravening the evidence used by the Board to reach the parole decision, the Board shall immediately issue a written hold to the institution and the inmate which shall serve as notice that the grant of parole is temporarily rescinded until such time as a rescission hearing can be held.
- b. Within forty-five days of issuance of the written hold, the Board shall hold a rescission hearing at the institution, or other convenient location, for the purpose of determining:
 1. whether the inmate was found guilty of violating an institutional Class I or Class II disciplinary rule, and if so, whether rescission is warranted; or
 2. whether the new information, which contravenes the evidence, used to reach the parole decision, are accurate, and if so, whether rescission is warranted.
- c. The inmate and the warden of the institution shall receive written notice of the time and date of the rescission hearing at least five days prior thereto. The notice shall set forth the grounds upon which rescission may be based.
- d. The inmate may be represented at the rescission hearing by another inmate. The inmate may present witnesses, give testimony, and cross-examine all witnesses who testify against him.

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- e. Staff may be present at their own volition to testify; the Board may also require the presence of staff as circumstances dictate.
- f. Institutional disciplinary reports regularly kept shall be adopted as reliable and trustworthy evidence to prove the commission of a violation of institutional Class I or Class II disciplinary rules and the circumstances thereof, insofar as such are expressly described in the findings of fact of the Disciplinary Committee or Institutional Magistrate. However, the inmate may present evidence as to the circumstances of the violation or other mitigating factors.

Section 10. Revocation of Parole

The Board may revoke the parole of any parolee who has previously been granted parole and who has not been discharged from supervision.

However, parole shall not be revoked unless the Board specifically finds that a parolee has violated a condition of parole which has been imposed either by law, the Board or the Division.

A court order finding a parolee guilty of any offense that occurred while he was on parole status is reliable evidence to support a revocation based on a new conviction.

The Board shall make a finding that the parolee has violated a condition only after it has conducted an evidentiary hearing, which shall be known as a revocation hearing.

Section 11. Prerequisites to Revocation Hearing

11.1 REPORT OF CHARGE

- a. The Board shall convene a revocation hearing only if it receives from the Division:
 - 1. A written report, which lists the specific conditions, the parolee is charged with violating together with the date of each alleged violation.
 - 2. A written violation report detailing how each alleged violation occurred.
 - 3. The date on which the parolee was served with written notice of the charges.

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4. The date, if any, on which the parolee was placed in jail pursuant to the charge.
 5. The date, if any, the parolee was released from jail on bond.
- b. Additionally, if a preliminary revocation hearing was held by a Division hearing examiner, it shall be the responsibility of the Division to supply the Board with:
1. The date on which the preliminary revocation hearing was held by a Division hearing examiner, and whether for each charge the hearing examiner found probable cause.
 2. A written report by the Division hearing examiner giving a complete summary of the contents of the preliminary revocation hearing, to include:
 - i. A summary of each of the charges in the order listed, to include, with respect to each charge, a summation of the testimony given, the exhibits entered into evidence, and the names and identity of those persons testifying.
 - ii. A written attestation by the hearing examiner as to the accuracy of such hearing summary.
 3. Copies of any documents or writings admitted as exhibits at the preliminary revocation hearing.
- c. In the event the parolee elects to waive the preliminary revocation hearing, it shall be the responsibility of the Division to supply the Board with:
1. A duly executed waiver of the preliminary revocation hearing.
- d. The appropriate aforementioned documentation shall be received no later than the forty -fifth day after either the date on which the parolee received written notice of the charges, or the date on which the parolee was incarcerated, whichever occurred sooner.

However, the running of the forty-five day period shall be tolled by:

1. Any continuance which is sought and obtained by counsel for the parolee prior to the preliminary revocation hearing, or

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2. The pendency of any criminal charge, which is also the basis of any charge of a violation of parole conditions. This subsection shall not be applied to toll the running of the forty-five day period for any other charge.
3. The absence of the parolee from the boundaries of this State for whatever reason, or
4. The escape or absconding of the parolee from the custody of a jail or the supervision of the Division.

The Division of Corrections shall provide a written statement to the Board explaining the facts and circumstances of any of the four aforementioned causes for cessation of the running of the forty-five day period.

11.2 DECISION TO HOLD HEARING

- a. Upon receipt of the aforementioned requisite documentation, the Board shall consider such and determine by vote whether to hold a revocation hearing and, if so, with respect to which charges.

Any charge on which the Board chooses not to hold a hearing shall be dismissed.

- b. If the Board chooses to hold a revocation hearing, it shall determine a time, date and place to hold it and it shall select one of its own members to preside thereat.

The revocation hearing shall be held no later than the thirtieth day excluding weekends and holidays following the date upon which either

the preliminary hearing is held in this State, or

the parolee is returned to the custody of the Division of Corrections through Interstate Compact, or,

a written waiver of the preliminary hearing is executed.

- c. When the Board receives a report from the Division that indicates a parolee has been charged with a criminal offense, if the report is not accompanied by a certified copy of a criminal court order setting forth a verdict of guilty on the criminal charge, then the Board may defer making a decision on whether to hold a revocation hearing. However, such deferral shall be for the sole

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purpose of awaiting the outcome of any pending criminal proceedings, and the Board shall determine whether to hold a revocation hearing upon receipt of written information of the verdict rendered by the criminal court.

11.3 NOTICE OF REVOCATION HEARING

Whenever the Board decides to schedule and hold a final revocation hearing, the Board shall issue a written notice. The notice shall set forth:

- a. The date, time and place of the hearing.
- b. The charges to be heard at the hearing and the conditions of parole which the charges allege the parolee violated.
- c. The parolee's right to be represented at the hearing by an attorney, his right to have an attorney appointed by the Circuit Court, and his right to speak on his own behalf, to stand silent, to have voluntary witnesses appear to testify on his behalf, to present documentary evidence, to confront and cross-examine witnesses unless the Board finds good cause for not allowing such confrontation.

The Board shall send notice to the parolee and to his attorney, if the existence of one is known. The method of delivery shall be either by certified mail, return receipt requested, or by delivery of the notice by personal service by hand. Notice shall be served at least five (5) days before the hearing.

Section 12. Representation by Counsel

At the final revocation hearing the parolee may be represented by counsel who may be either an attorney or lay person.

If the parolee is indigent, he has the right to have an attorney appointed for him by the Circuit Court, as provided for in West Virginia Code, Section 62-12-22.

A continuance may be granted to allow the parolee to obtain counsel if he does not have counsel and desires the services of counsel.

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Section 13. Procedure at Revocation

13.1 PRESIDING MEMBER

One or more members of the Board shall be present at the hearing. The Presiding Member shall preside thereat, keeping order and ruling on all disputes concerning evidence and procedure, in accordance with the rules.

13.2 PARTIES AT HEARING

The accused parolee and his counsel shall be present at all stages of the hearing. Either the parole officer who charged the parolee or another parole officer designated by the Deputy Commissioner shall be present to present evidence and proof of the charge(s).

13.3 ATTENDANCE OF WITNESSES

Neither the Board nor the Division enjoys subpoena power and therefore, neither the parole officer nor the parolee may compel the attendance of witnesses. Both the parole officer and the parolee shall be permitted to have voluntary witnesses. Witnesses may be excluded from the hearing except for giving testimony in compliance with Section 13.08 of these Rules.

13.4 CONTINUANCES

Continuances may be granted by the Board to the presiding member, the parole officer, or the parolee, for good cause. The hearing may be continued past the thirtieth day, excluding weekends and holidays, upon which either the preliminary hearing is held in this State, the parolee is returned to the custody of the Division of Corrections, within this State, or a written waiver of the preliminary hearing is executed.

A motion for a continuance shall be made in writing before the hearing. Such motion in writing should be made two (2) days prior to the hearing date to prevent inconvenience to victims or others and waste of resources expended for travel and attendance by members and others. At no time, except in extreme emergency, will a continuance be granted that is made less than twenty-four (24) hours before any hearing.

The Board may refuse to grant a continuance if it determines there is not good cause to grant the motion.

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Good cause shall include, but not be limited to: (a) the parolee's attorney's conflict with a scheduled court appearance, (b) the inability of a desired witness to appear at the originally scheduled hearing, (c) illness, or (d) inadequate time to prepare a defense or similar reasons applicable to Board members or staff.

13.5 RECORD OF HEARING

Final parole revocation hearings shall be recorded by magnetic tape or other reliable means.

13.6 COMMENCEMENT OF HEARING

At the commencement of the hearing, the presiding member shall identify for the record, the name of the parolee, the date, time and place of the hearing, and the names of those present in the room.

He or she shall read aloud the charges to be considered at the hearing and the conditions, which the parolee is charged with violating.

13.7 PLEA

- a. After reading each charge, the presiding member shall ask the parolee to plead either guilty or not guilty in his own words. If the parolee refuses to respond, the presiding member shall note such refusal for the record. A refusal to plead shall be considered as a plea of not guilty.
- b. If the plea is guilty, the parole officer need not present evidence of the charge; the parolee shall be permitted to speak or otherwise present evidence in mitigation. The parole officer may present rebuttal evidence.
- c. If the parolee pleads not guilty, the parole officer shall be required to present evidence tending to support the charge, following which the parolee may present evidence in his or her own defense. Proof of the violation shall be by a preponderance of evidence as set forth in Section 13.10. Both the parole officer and the parolee shall be permitted to present evidence to rebut that of the other.

13.8 WITNESSES AND TESTIMONY

- a. The parole officer, the parolee, or the presiding member may demand that all witnesses be excluded from the room except when called upon to testify.
- b. All witnesses shall be placed under oath to tell the truth before testifying.

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- c. The parolee may cross-examine witnesses presented by the parole officer, including the parole officer himself, should he choose to testify.

The presiding member may rule that there is a justifiable fear of harm to an informant if he were to directly testify or if his identity were to be disclosed. The risk of harm must be demonstrated by an overt threat to the informant, by implicit threats, or by any circumstances, which would lead reasonable minds to believe that harm would be likely to result, then the parolee shall not be present during that witness' testimony.

The parole officer may examine all witnesses who testify and may cross-examine those presented by the parolee. The presiding member may ask questions of any witness at any time.

13.9 RULES OF EVIDENCE FOR REVOCATION HEARING

- a. Formal rules of evidence do not apply and the decision to hear or exclude evidence shall be at the discretion of the presiding member, who should not refrain from relying on the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.

In any event the presiding member shall resolve concerning the admissibility of evidence in accordance with these rules:

- b. Evidence may be excluded if it is:
 - 1. Clearly irrelevant,
 - 2. Redundant or repetitious, or
 - 3. Evidence of a person's character, criminal record or habits, except as such is evidence of a witness' propensity for telling the truth, or except as it may be directly relevant to whether the parolee is guilty of the charges.
- c. Hearsay evidence, as defined by the West Virginia Rules of Evidence shall not be admitted, except when:
 - 1. It is both reliable and trustworthy in its source and is credible,
 - 2. It is evidence of a statement made by a person who has explicitly refused to attend the revocation hearing to testify.

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3. It is evidence of a confession or an admission made by the accused parolee,
4. It is evidence of a recorded memorandum of a witness' statement who can no longer remember the statement or is unavailable to testify, or is a regularly kept business record or a public record or a statement against interest,
5. It is hearsay evidence offered by the parole officer or other competent witness of the statement of a confidential informant. Such hearsay evidence shall not be admitted unless the presiding member is satisfied that there is a justifiable fear of harm to the informant if he or she were to directly testify or if his identity were to be disclosed and there are indications that such evidence is reliable and trustworthy.
6. Such hearsay evidence would otherwise be admitted under the West Virginia Rules of Evidence.

The presiding member may accept into evidence the hearsay testimony of the parole officer or other competent witness, and the affidavit of the informant, or a private examination of the informant, from which the parolee may be excluded if the justifications set forth in Section 13.8 are present.

- d. Notwithstanding any other rule, documentary evidence may be admitted for the truth of the matters set forth in the document if:
 1. The document is prepared by a person with direct knowledge of relevant facts, who is unable to appear to testify, provided that the document is accompanied by an affidavit signed by the author attesting to the document's authenticity and accuracy or there are indications that the document is reliable and trustworthy.
 2. The document was prepared by and within the scope of duty of a public employee, excepting a parole officer, and was prepared at or near the time of the act, condition, or event, and the source of information and method and time of preparation was such as to indicate its trustworthiness.
 3. The document is a report from the Department of Public Safety of scientific testing for identification of alcohol or controlled substance or firearm or other forensic testing.

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- e. Originals or certified copies of Interstate Compact Reports, Preliminary Hearing transcripts and findings, and correspondence from out-of-state parole officers, to include reports, letters or memorandums, may be submitted as evidence in the final parole revocation hearing.
- f. The presentation of a certified copy of a court order is conclusive proof that the parolee is guilty of committing a time. Proof of an arrest or indictment is not proof of a crime.
- g. Proof of a charge of parole violation cannot rely on hearsay evidence alone. If hearsay evidence of the type described in subsection (c) or (d) is offered by the parole officer as proof of a violation of a condition of parole, the parole officer must also offer some other reliable evidence, either direct or circumstantial, to prove the charge. Documentary evidence of the type described in subsection (f) is sufficient proof of a charge.
- h. The presiding member may strike or limit any questioning of witnesses which is abusive of or clearly intended to harass, intimidate or insult a witness.
- i. If the charges being considered at the hearing include a charge relating to the commission of a felony for which the parolee is being criminally charged, the presiding member shall hear evidence of the current status of the criminal proceeding.
- j. Telephonic or video conference testimony may be had by a witness for either the parolee or the Division. It shall be the sole responsibility of the party seeking to present such testimony to make all necessary advance arrangements to call such witness without undue delay. For purposes of this rule, that would mean making certain that there is a telephone with speaker phone capability at the hearing location and making certain that the witness is available on the other end of the telephone or video connection when the time for their testimony arrives. Any party desiring to call a witness by telephonic or video conference means shall disclose such the same to the Board and shall advise the Board that they have made the necessary arrangements.

13.10 BURDEN OF PROOF

The Board shall not order that parole be revoked unless it finds by a preponderance of the evidence submitted at the revocation hearing that the parolee violated a condition of parole. The burden rests with the parole officer to prove the parole violation. Where there are factual disputes on key issues in a parole revocation

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hearing, the Board shall set forth a statement on how and why the dispute was settled in a certain way to assist in judicial review.

Section 14. Waiver of Revocation Hearing

- 14.1 The parolee may waive the final revocation hearing. He or she may also waive the five-day notice of the hearing. A waiver of the final revocation hearing shall be construed as a plea of guilty to the charge(s) and may result in revocation of parole.
- 14.2 The procedure for waiver of the final revocation hearing is as follows:
 - a. If the parolee desires to waive the final hearing, and is not represented by legal counsel, he shall inform the parole officer of his desire to waive; this must be done in writing via an executed waiver of the final hearing on the charge of parole violation.
 - b. If the parolee waives the final hearing, the parolee shall sign a waiver form. The parolee's signature on the waiver must be witnessed by two people, one of whom can be the parole officer.
- 14.3 In lieu of the above procedure, if the parolee is represented by legal counsel, his attorney shall inform the Board of his desire to waive the final hearing; this must be done in writing.

Section 15. Decision by the Board

- 15.1 The presiding member shall prepare a written summary of the revocation hearing, giving his findings and recommendations, a description of the evidence and testimony presented as to each charge, together with his findings with respect to each charge.

Upon review of the hearing transcript or upon receipt of the waiver of the hearing, the Board may decide the case by:

- a. Finding the parolee not guilty of the charges and reinstating the parole, or
- b. Finding the parolee guilty of one or more charges and reinstating the parole with or without additional special conditions, or
- c. Finding the parolee guilty of one or more charges and revoking the parole.

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- 15.2 The Board shall prepare a notice in which it shall state its decision with respect to each charge.

If the Board finds the parolee guilty of any charge it shall set forth in the notice a description of the evidence it considered in arriving at the finding of guilt.

The Board need not describe the evidence for those charges of which the parolee was found not guilty.

- 15.3 If the Board decides not to revoke parole, it shall send a notice to the parolee, his attorney, the parole officer and the Deputy Commissioner, advising of the decision.

Section 16. Revocation Procedure

If the Board decides to revoke the parole, it will issue a formal Order of Revocation, copies of which shall be forwarded to the Division of Corrections, the Records Clerk at the parent institution, the sheriff/administrator of the facility holding the parolee, the parolee's attorney, and the parole officer, advising of the decision. It shall be the responsibility of the Division to supply the parolee with a copy of the Order of Revocation of Parole.

The formal Order of Revocation issued by the Board shall state:

- a. The parolee's name and DOC number.
- b. The effective sentence date(s), offense(s), county or counties of conviction and sentence(s) for which the parolee was incarcerated at the time he was granted parole.
- c. The date the parolee was granted parole.
- d. The charges of parole violation and the evidence relied on for each of the charges where a finding of guilt was made.
- e. The new parole eligibility date.

The Board shall also issue a document for the Division, which shall state:

- a. The date of the parolee's release on parole.

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- b. The date on which the parolee was incarcerated in jail pursuant to being charged with the violation(s), which caused his parole to be revoked.
- c. The dates, if any, on which the parolee was released from jail on bond and subsequently reincarcerated, and
- d. If applicable, the date on which the parolee was taken into custody pursuant to issuance of the revocation order.

Section 17. Severability

These rules are considered to be severable. In the event, these rules are inconsistent with or contrary to any statute, the provisions of the statute shall be applied.

a. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the Board or by any of the parties shall be grounds for granting a new hearing or for vacating, modifying or otherwise disturbing a decision or order, unless refusal to take such action is inconsistent with substantial justice. Any error, defect or irregularity, or variance, which does not affect substantial rights, may be disregarded.

Also these rules, including any time frames herein, are intended to serve only as guidelines for procedural functions of the Board. Nothing herein is intended to vest any person with any right, substantive or otherwise which is greater than otherwise exists in law.

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL



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STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON, WEST VIRGINIA 25305

February 10, 2005

Hon. Betty Ireland
Secretary of State
1900 Kanawha Blvd.
Charleston, WV 25305

Re: Rules of the West Virginia Parole Board

Dear Ms. Ireland:

Enclosed herewith, for filing in the State Register, please find the Rules of the West Virginia Parole Board, intended to become effective May 1, 2005. These rules are filed in accordance with W.Va. Code § 29A-1-3(b) which exempts the West Virginia Parole Board from the requirements of the Administrative Procedures Act.

If you require anything further please do not hesitate to let me know.

Sincerely,

A handwritten signature in dark ink, appearing to read "CH", is written over the word "Sincerely,".

Charles Houdyschell Jr.
Senior Assistant Attorney General