WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #7

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OFFICE OF SECRETARY OF STATE

NOTICE OF AN EMERGENCY RULE

AGENCY: West Virginia Civil Service System TITLE NUMBER: 143

CITE AUTHORITY: Chapter 29-6-10

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES X , NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: I

TITLE OF RULE BEING AMENDED: Administrative Rules and Regulations of the West Virginia Civil Service System

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: ___

TITLE OF RULE BEING FILED AS AN EMERGENCY: ___

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE UPON FILING.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

These rules are being promulgated to implement the provisions of Chapter 5-5-3 of the West Virginia Code, as amended, which became effective July 1, 1988.

Use Additional Sheets If Necessary.

Lowell K. Basford

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(Plus all the volunteer help we can get)

September 9, 1988

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Civil Service Commission

RULE: Amendments to Section 16.3 of 143 CSR 1; Administrative Rules and Regulations of the West Virginia Civil Service System

DATE FILED AS AN EMERGENCY RULE: August 25, 1988

DECISION NO. 18-88

Following review under WV Code 29A-3-15a, it is the decision of the Secretary of State that the above emergency rule be disapproved. A copy of the complete decision with required findings is available from this office.

KEN HECHLER
Secretary of State

This EFD was not issued due to agency withdrawal of emergency rule.

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Secretary of State

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DECISION

EMERGENCY RULE DECISION
(ERD 18-88)

AGENCY: Civil Service Commission
RULE: Amendments to Section 16.3 of 143 CSR 1; Administrative Rules and Regulations of the West Virginia Civil Service System
FILED AS AN EMERGENCY RULE: August 25, 1988

par. 1 The Civil Service Commission ("Commission") has filed emergency amendments to the above cited Series 1 Legislative Rule.

par. 2 West Virginia Code 29A-3-15A requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.

par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [29A-3-15a(a)].

par. 4 Additional information for this ERD was solicited through meetings with the following interested parties on September 6, 7 and 8, 1988: Jack McCarty, House Finance; Tim Baseford, Civil Service Commission and Don Adams, Auditor's Office.

par. 5 (A) Procedural Compliance: WV Code 29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).

par. 6 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the ERD is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.

par. 7 The Commission has filed this emergency rule with supporting documents with the Secretary of State on August 25, 1988 and with the LRMRC on August 29, 1988.

par. 8 It is the determination of the Secretary of State that the Commission has complied with the procedural requirements of WV Code §29A-3-15 for adoption of an emergency rule.

par. 9 (B) Statutory Authority -- WV Code §29-6-10 reads in part:

§29-6-10. Rules of commission.

The commission shall have the authority to promulgate, amend or repeal rules, in accordance with chapter twenty-nine-a (§29A-1-1 et seq.) of this code to implement the provisions of this article.

(2) For a pay plan for all employees in the classified service, after consultation with appointing authorities and the state fiscal officers, and after a public hearing held by the commission.

par. 10 The Commission is also citing WV Code §5-5-3 as necessitating the promulgation of this emergency amendment. WV Code 5-5-3 reads:

§5-5-3. Optional payment to employee in lump sum amount for accrued and unused annual leave at termination of employment; no withholding of any employee contribution deduction; exception.

Every eligible employee, as defined in section one (§5-5-1) of this article, at the time his or her active employment ends due to resignation, death, retirement or otherwise, may be paid in a lump sum amount, at his or her option, for accrued and unused annual leave at the employee's usual rate of pay at such time. The lump sum payment shall be made by the time of what would have been the employee's next regular pay day had his employment continued. In determining the amount of annual leave entitlement, weekends, holidays or other periods of normal, noncountable time shall be excluded, and no deductions may be made for contributions toward retirement from lump sum payments for unused, accrued annual leave, since no period of service credit is granted in relation thereto; however, such lump sum payment is to be a part of final average salary compution; and where any such deduction of employee contribution may have been heretofore made, a refund of such shall be granted the former employee and made by the head of the respective former employer spending unit: Provided, That the superintendent of the department of public safety shall make deductions for retirement contributions of members of the department, since retirement benefits are based on cumulative earnings rather than period of service. (1986, c. 139; 1987, c. 107; 1988, c. 100.)

(emphasis added)

par. 11 The emergency amendment to Section 16.3 of the Commission's Series 1 rule reads in part:

3. The daily rate of pay shall be calculated by dividing the number of work days in such month(s), exclusive of weekends, holidays or other periods of normal, noncountable time, into the monthly salary. (emphasis added)

par. 12 Accompanying the emergency rule by Civil Service was the attached August 25, 1988 memorandum which reads in part:

> 4. The annual increment shall not be factored into the calculation for the payment of the annual leave. (emphasis added)

par. 13 The Auditor and the Legislature have submitted the attached August 17, 1988 Attorney General's Opinion as evidence to support the contention that the Civil Service has exceeded its authority by issuing an emergency rule which contravenes the statutory language of WV Code §5-5-3. The Attorney General's opinion reads in part:

> *. . .such annual increment constitutes an "annual salary increase" is thus an integral part of an employee's gross annual salary, and such increment is not to be deleted or subtracted in the course of determining the value of payment for accrued and unused annual leave days, either under the "remaining on the payroll" method or under the "lump sum payment" optional method, since such deletion or subtraction unlawfully reduces the value payable for accrued annual leave days.*

par. 14 The controversy involves the definition of "daily (usual) rate of pay" as presented by the Civil Service and as opposed by the Auditor. The Civil Service defines "daily (usual) rate of pay" by the formula presented in the above paragraph 11 which excludes the annual increment. (Refer to WV Code §5-5-1 and 5-5-2) The Auditor and the Attorney General's Opinion contend that "daily (usual) rate of pay" is defined by a formula which includes the annual increment. The Attorney General's opinion reads in part:

> *Accordingly, an employee's usual rate of pay is that employee's salary inclusive of that employee's entitlement to annual increment at the time of the employee's termination from employment, with such annual increment to be prorated on the basis on which the employee is paid, whether hourly, bimonthly, monthly or otherwise.*

par. 15 The Commission holds forth that any mention of a prorated payment violates the Supreme Court's decision in State of WV ex rel. Willard H. Erwin, Jr., et al. v. Glen B. Gainer, Jr., WV State Auditor (No. 16791, filed August 2, 1985) which reads in part:

> *The omission of such language in W. Va. Code, 5-5-2 (1984), we believe clearly indicates that the Legislature did not intend to have the payments under W. Va. Code, 5-5-2 (1984), prorated over the employee's normal pay period.*

par. 16 The above case involved the question of whether the annual increment paid each July 1 to eligible employees should be paid in a lump sum on July 1 or prorated over the next 12 months. The usual concept of a salary increase, in this case the annual increment, is that it is paid into the future and that to pay the increase as a lump sum on July 1 is to pay for services not yet rendered, in violation of state law. The Court clears this question by correctly stating that the annual increment is for

services rendered in the prior 12 months. It does, as mentioned in the above paragraph 15, prohibit payment on a prorated basis while being earned over the 12 months, but holds to the correct conclusion that payment of a lump sum on July 1 is the payment of a salary increase after 12 months of earning such payment. The Court did not rule on the question of whether an employee leaving employment prior to July 1 is entitled to his annual increment calculated on a prorated basis from the date of his last annual increment paycheck to the date of his separation. The Court concluded each eligible employee is earning his next annual increment during the 12 months prior to payment. To deny that portion earned each day by an eligible employee is to deny him his lawful compensation for services rendered. This would also warrant the partial payment of an eligible employee's annual increment should the employee leave service prior to July 1, 1988. It is clear that the initial payment to a "newly eligible" employee is prohibited unless they have three years service and are on the payroll on July 1 following such three years service. It is the interpretation of this office that once this three year period and subsequent payment has been made. An employee earns his/her increment with each day of service and it must be paid to the employee on a prorated basis for the time served if employment ceases prior to July 1. Just because they are not on the payroll on payday (July 1), they cannot be denied pay already earned.

par. 17 The Commission argues that "normal or usual pay" is the "base pay" presented on their pay plan, which does not include the annual increment. This goes contrary to the latest legislative definition of "compensation" found in Enrolled C/S S.B. No. 10 passed June 27, 1988 and in effect for passage which reads in part:

(14) "Compensation" means the remuneration paid a member by a participating public employer for personal services rendered by him to the participating public employer.

Likewise for tax purposes, each employee's W-2 form states, as earned income, the sum of the base salary and the annual increment.

For calculating overtime payment, the Commission approves the sum of base salary and increment to derive overtime pay. To conclude that "usual pay" excludes the annual increment goes against statutory definitions and administrative practices.

par. 18 It is the conclusion of the Secretary of State that the exclusion of the annual increment from the formula for calculating usual (daily) rate of pay found within this emergency amendment violates the statutory application of WV Code §5-5-1 et seq. and therefore represents an attempt to amend a statute by a rule in excess of the Commission's statutory authority.

par. 19 (C) Emergency: WV Code 29A-3-15(g) defines "emergency" as follows:

(g) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 20 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 21 The facts and circumstances as presented by the Commission are as follows:

These rules are being promulgated to implement the provisions of Chapter 5-5-3 of the West Virginia Code, as amended, which became effective July 1, 1988.

par. 22 Although the above facts and circumstances lack specificity the early retirement provisions of SB 10 makes it clear that there is a need for a uniform and lawful application of the provisions of WV Code §5-5-3.

par. 23 It is the determination of the Secretary of State that this emergency rule does meet the standards for an emergency.

par. 24 Although this emergency rule meets the standards for an emergency and are promulgated following proper procedures, it does, however, exceed the statutory authority of the Commission and is disapproved.

par. 25 This decision shall be cited as Emergency Rule Decision 18-88 or ERD 18-88 and may be cited as precedent. This decision is available from the Secretary of State's office and has been filed with the Committee, the Attorney General and the Legislative Rule Making Review Committee.

KEN HECHLER
SECRETARY OF STATE

Entered_____

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

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SECRETARY OF STATE

Rule Title: Administrative Rules of the West Virginia Civil Service System

Type of Rule: ___Legislative _____Interpretive _____Procedural

x Emergency

Agency WV Civil Service System Address 1900 Washington St., E

Charleston, WV 25305

1. Effect of Proposed Rule	ANNUAL Increase	ANNUAL Decrease	FISCAL YEAR Current	FISCAL YEAR Next	FISCAL YEAR Thereafter
Estimated Total Cost	$ -0-	$ -0-	$ -0-	$ -0-	$ -0-
Personal Services					
Current Expense					
Repairs and Alterations					
Equipment					
Other					

2. Explanation of above estimates:

No increase in cost is anticipated as a result of the emergency rule.

3. Objectives of these rules:

To fully implement Chapter 5-5-3 of the Code of West Virginia as amended which was effective July 1, 1988.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None estimated.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens.

None estimated.

C. Economic Impact on Citizens/Public at Large.

None estimated.

Date: 8/25/88

Signature of Agency Head or Authorized Representative

Lowell D. Barfuss

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STATE

DATE: August 25, 1988

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Lowell D. Basford, Acting Director of Personnel, WV Civil Service System

EMERGENCY RULE TITLE:

1. Date of filing: August 25, 1988

2. Statutory authority for promulgating the emergency rule: Chapter 29-6-10

3. Date of filing of proposed legislative rule: _____

4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?

Amends section 16:03 of the Civil Service Administrative Regulation

5. Has the same or similar emergency rule previously been filed and expired?

No.

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.

These emergency rules are promulgated to fully implement the provision of Chapter 5-5-3 of the Code of West Virginia, as amended, as a result amendments in 1988 Legislature which were effective July 1, 1988.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

None

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

Same as # 6

FILING OF ADMINISTRATIVE REGULATIONS

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WEST VIRGINIA ADMINISTRATIVE REGULATIONS

CIVIL SERVICE SYSTEM

Chapter 29-6-10
Series I
(1987) amended

Subject: Filing of Administrative Rules and Regulations of the West Virginia Civil Service System

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Section 1. General

1.01. Scope-These regulations establish rules for the West Virginia Civil Service System.

1.02. Authority-These regulations are issued under authority of West Virginia Code, Chapter 29, Article 6, Section 10.

1.03. Filing Date-These regulations are promulgated on the 14th day of May, 1987, and filed on the 14th day of May, 1987, in the Secretary of State's Office.

1.04. Effective Date-These regulations become effective on the First day of July, 1987.

Section 2. Preamble

Sec. 2.01. Preamble. The general purpose of the Civil Service System is to attract to the service of this State personnel of the highest ability and integrity by the establishment of a system of personnel administration based on merit principles and scientific methods governing the appointment, promotion, transfer, layoff, removal, discipline, classification, compensation, and welfare of its Civil Service employees, and other incidents of state employment. All appointments and promotions to positions in the classified service shall be made solely on the basis of merit and fitness. All employment positions not in the classified service, with the exception of the Board of Regents, are included in a classification plan known as classified-exempt service.

Section 3. Definitions

Accrue: To increase or accumulate periodically or by increment.

Agency: Any administrative department of state government established by law or executive order.

Allocation: The original assignment of a position to a class by the Director of Personnel on the basis of the kind, difficulty, and responsibility of the work performed.

Appeal: The complaint to the Civil Service Commission to correct or reverse an alleged injustice done or error committed.

Appointing Authority: The executive or administrative head of a department who is authorized by statute to appoint employees in the classified or classified-exempt service. By written notification to the Director of Personnel, the appointing authority may delegate specific powers authorized by these Rules.

Appointment: The act of hiring an applicant for employment.

Assembled Examination: An examination which, due to the testing process used, necessitates that applicants come to a testing location.

Availability: The indication, by an eligible, of the employment location and conditions under which employment would be accepted.

Carry Forward Days: The maximum number of annual leave days which can be accredited for use as of the first day of January depending on an employee's years of tenure.

Certification: The official list of eligibles given to an appointing authority for filling vacancies.

Civil Service System: The agency responsible for the system of personnel administration for the classified and classified-exempt service.

Class or Class of Positions: One or more positions sufficiently similar in duties, training, and responsibilities so that the same titles, the same qualifications, and the same schedule of compensation and benefits may be equitably applied to each position.

Classification Action: The actions of allocation, reallocation, classification, and reclassification.

Classification Plan: The official lists of classes to which positions in the classified service and classified-exempt service have been allocated by the Director of Personnel and the administrative regulations governing the administration of each plan.

Classified Employee: An employee whose job is allocated to a class in the classified service.

Section 3. Definitions (Cont'd)

Classified-Exempt Service: Those positions which satisfy the definitions for "class" and "classify" but which are not covered under the Civil Service System or by the Board of Regents.

Classified Service: Those positions which satisfy the definitions for "class" and "classify" and which are covered under the Civil Service System.

Classify: The process of ascertaining, analyzing, and evaluating the duties and responsibilities of positions to determine the number and kind of classes existing in the service.

Commission: The Civil Service Commission as provided for in Section 7, Article VI, Chapter 29 of the Code of West Virginia whose members are appointed by the Governor with the advice and consent of the Senate.

Compensation Plan: The official schedule of pay rates, the range assigned to each class of positions and the salary regulations used in pay administration by the Civil Service agencies.

Continuance: To postpone an appeal hearing to a future date.

Covered Agency: An agency of State government or certain specific positions within an agency either designated by law or executive order of the Governor to be a part of the classified service.

Covered Employee: A permanent employee of an agency affiliated with the Civil Service System.

Day: Unless otherwise specified, the use of "day" means a calendar day.

Decorum: Use of polite behavior when appearing before the Civil Service Commission.

Demotion: A change for cause in the status of an employee from a position in one class to a position in another class of lower rank as measured by salary range, minimum qualifications, or duties, or a reduction in an employee's pay to a lower step in the pay range assigned to the classification. The two types of demotions are: a) Disciplinary Demotion - A reduction in pay or a change in classification to a lower classification due to the inability of an employee to perform the duties of a classification or for improper conduct. b) Demotion Without Prejudice - A change in classification of an employee to a lower classification or a reduction of pay due to work necessity.

Director: The Director of Personnel, as provided in Section 6 and 9, Article VI, Chapter 29, of the Code of West Virginia, who serves as the executive head of the Civil Service System.

Discovery: The initial revealing of information.

Discretionary: Open to individual choice or judgement.

Section 3. Definitions (Cont'd)

Dismissal: The separation from employment of an employee by an appointing authority.

Docket: List of employees who have filed an appeal or complaint with the Civil Service Commission and who are either awaiting review of eligibility for a hearing or awaiting a scheduled hearing.

Effective Date: The established date the action takes place.

Eligible: An applicant accepted for a Civil Service System examination who receives a final passing rating and whose name is listed on the register established for the class of position.

Emergency Appointment: An appointment, for not more than thirty (30) calendar days in any twelve (12) month period, necessitated by a state of emergency.

Employee: Any person who lawfully occupies a position in an agency and who is paid a wage or salary.

Employee-Appellant: Individual who has filed an appeal with the Civil Service Commission and has been granted a hearing.

Exempt Service: All positions specifically exempted from the classified service as noted in Chapter 29, Article VI, of the Code of West Virginia (see Appendix B).

Full-time Employee: One who works the full work schedule established for the agency.

Grievance: Any matter of concern or dissatisfaction to an employee which is subject to the control of the agency management except those matters exempted under Article XXIII, Section 1.2 (see 1.2 Grievance).

Handicapped: A person who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has had a record of such impairment or is regarded as having such an impairment.

Hearing Board: The body which hears grievances.

Immediate Family: Consists of the father, mother, son, daughter, brother, sister, husband, wife, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandfather, grandmother, granddaughter, grandson, stepmother, stepfather, and stepchildren.

Incumbent: A person occupying a position in the classified service.

Intra-Agency Transfer: A transfer within a single agency.

Inter-Agency Transfer: A transfer from one agency to another.

Section 3. Definitions (Cont'd)

Intermittent Appointment: An appointment to a position which requires performance on an irregular or "as needed" basis for no more than 945 hours in a twelve month period.

Irregular Employment: Work hours which are not symmetrical from week to week.

Lateral Class Change: The movement of an employee from one class to another class in the same pay grade.

Layoff: A reduction in the number of employees caused by a reduced work load or curtailment of funds.

Leave: A fringe benefit earned by employees for time off from work.

Length of Service Category: The grouping of the number of years, months, and days of eligible employment which is used to determine the rate of accrual of annual leave benefits.

Local Facility: A sub-unit of an agency which provides services to a specified section of the State and has employees reporting to locations other than the state office headquarters.

Longevity: The length of employment; seniority.

Merit Increase: An advancement in salary granted as a reward for the quality of work performance.

Meritorious Service: Quality of work performance judged to deserve reward or honor.

Minimum Qualifications: The least experience and/or training required by the Civil Service Commission for employment in a class of position and admission to an examination.

Month: Any of the twelve parts into which the calendar year is divided.

Ninety-Day Exempt Appointment: Personnel employed for less than ninety (90) working days in a year.

Original Appointment: Initial employment of an individual into the classified service as a result of selection from a certification of names from a register.

Part-time Employee: One who works less than the full-time work schedule established for an agency.

Part-time Professional: An employee engaged in professional services without administrative duties and who works no more than half the agency's full-time work schedule.

Section 3. Definitions (Cont'd)

Pay Plan: The official schedule of salaries approved by the Governor consisting of multiple pay grades with minimum, maximum, and intervening rates of pay for each grade.

Pay Rate: One of the fixed steps or increments listed in a pay plan.

Per Diem: A daily allowance.

Permanent Employee: An employee who was hired from a register and who has completed the probationary period prescribed by the Civil Service Commission for the job class.

Personnel Officer: That employee of each agency who is immediately responsible for the personnel administration of the agency.

Physician: A person licensed under the laws of a state to practice medicine.

Policymaking Positions: A position in which the person occupying it: a) acts as an advisor to or formulates plans for the implementation of broad goals for the executive or administrative head of the agency; b) is in charge of a major administrative component of the agency; and c) reports directly and is directly accountable to the administrative or executive head of the agency.

Position: An authorized and identified group of duties and responsibilities assigned by the proper authority requiring the full-time or part-time employment of at least one person.

Postmarked: An official United States postal marking showing the mailing date.

Probationary Period: A specified trial work period prescribed by the Civil Service Commission designed to test the fitness of an employee selected from a competitive list of eligibles for the position for which an original appointment has been received.

Procedural Due Process: A course of proceedings carried out regularly and in accordance with the rules and principles established in these regulations for the protection of employees' rights.

Promotion: A change in the status of an employee from a position in one class to a position in another class of higher rank as measured by salary range and increased level of duties and/or responsibilities.

Provisional Appointment: The hiring of an employee to fill a position pending the administration of competitive examination and the establishment of a register.

Reallocation: Reassignment of a position to a different class by the Director of Personnel.

Section 3. Definitions (Cont'd)

Reclassification: The revision of a class or class series which results in a redefinition of the nature of the work performed and a reassignment of positions based on the new definition and may include a change in the title, pay grade, or minimum qualifications for the classes involved.

Reduction-in-Force: A layoff of employees occasioned by curtailment of funds or reduced work load.

Register: An official list of currently available eligibles for a job class ranked in the order of the final score as a result of the Civil Service examination for the class of position.

Regular Part-time Employment: Work hours which are symmetrical from week to week, but are less than the full time work schedule established for the agency.

Reinstatement: A type of re-employment of a former permanent covered employee.

Resignation: Voluntary separation from employment made at the request of the employee.

Salary Adjustment: A salary change resulting from a revision to the pay plan or the reclassification of a class to a different pay grade.

Salary Advancement: A salary increase within the range prescribed for the class by the classification plan.

Salary Range: The approved monthly and annual salary for a class which includes the initial, maximum, and intervening steps.

Seniority Rights: The right to continue to hold a certain job, based on length of service.

Served, Serving or Service of Process: Presentation of documents to a person either in person or by the United States mail. Service by mail is complete at the time and date of mailing.

Service: Employment time which may be used for determining annual leave accrual and order of separation in a reduction-in-force.

Shift Differential: The payment of a different rate of pay for hours worked in an approved class during prescribed evening and night shifts.

Specification: The official description of a class of position which defines the class, provides examples of work performed, knowledges, skills, and abilities, and the minimum qualifications required for employment.

Step for Step: The movement of an employee's salary to the same or corresponding step or pay rate in a higher or lower pay grade.

Section 3. Definitions (Cont'd)

Stipulation: Formal written agreement between parties.

Student Employee: An employee working for a limited period of time as qualifying under the current Student Policy approved by the Commission.

Suspension: Disciplinary action taken by an agency temporarily to relieve an employee of duties and place the employee on leave without pay.

Technical Rules of Evidence: Rules applied to civil and criminal court cases but not to administrative hearings.

Temporary Appointment: The hiring of an employee from a register for a period not to exceed 6 months.

Termination: Separation from employment by the appointing authority as a result of limited term employment.

Title Change: The revision in the title of a class by the Commission.

Transfer: The change of an employee from a position in a given class to a different position in the same class in a different subdivision or geographic location of the same or a different agency.

Unassembled Examination: An examination procedure which does not require persons being examined to gather at a test site and which does not include a written examination.

Veterans' Preference Points: An additional 5 points added to the final passing score of any veteran who has served in the armed forces of the United States of America during World War I (April 6, 1917, to November 11, 1918), World War 11 (December 7, 1941, to December 31, 1946), the Korean Conflict (June 27, 1950, to January 31, 1955), or the Vietnam Conflict (August 5, 1964, to May 7, 1975) and who has received a discharge under honorable conditions from such service. An additional 5 points are available to such veterans who also have a current and compensable service connected disability or who have received a Purple Heart award.

Work Schedule: Designation of the periods of time during which work is performed.

Year: Twelve (12) consecutive month period, unless otherwise specified.

Section 4. Organization (Cont'd)

4.04. Director of Personnel

(a) Upon recommendation of the Civil Service Commission, the Governor shall appoint a Director of Personnel. In formulating its recommendations for a Director, the Commission shall observe the following:

1. Director shall be a person who has had training or experience in personnel administration or a related field.

2. He shall be one who has known sympathies with the merit principle of government service.

3. He shall be selected from a register established as a result of competitive examination in the same manner that other Civil Service employees are selected.

4. He shall not be a candidate for or hold any elective public office nor shall he be a member of any political committee, nor shall he serve as an election official, nor shall he engage in any political activity other than to vote in behalf of or in opposition to any candidate, political party or public issue involved in the election.

(b) The salary and expenses of the Director and his staff shall be met out of any funds available for the purpose and shall be paid upon certification of the Director, in such manner as the expenses of other state employees are paid.

(c) The Director, as executive head of the department, shall direct and supervise all its administrative and technical activities. In addition to the duties imposed upon him elsewhere in this law, it shall be his duty:

1. To apply and carry out his law and the rules adopted thereunder.

2. To attend meetings of the Commission and to act as its secretary and keep minutes of its proceedings.

3. To establish and maintain a roster of all employees in the state Civil Service, in which there shall be set forth, as to each employee, the class title, pay or status, and other pertinent data.

4. To appoint such employees of the department and such experts and special assistants as may be necessary to carry out effectively the provisions of this law.

5. To foster and develop, in cooperation with appointing authorities and others, programs for the improvement of employee effectiveness, including training, safety, health, counseling and welfare.

6. To make available to the public information about vacancies in the classified service and to strive constantly to attract to the career service of this State people of the highest ability.

Section 4. Organization

4.01. Civil Service Commission-A Civil Service Commission consisting of three members shall be appointed by the Governor by and with the advice and consent of the Senate. Members shall serve for a term of six years or until successors have been appointed. See Section 5, Article VI, Chapter 29.

4.02. Qualifications of Civil Service Commission-The present merit system council shall be transformed into the Civil Service Commission. The members of the Commission shall be persons in sympathy with the application of merit principles to public employment. No member of the Commission shall be a member of any local, state, or national committee of a political party or an officer or member of a committee in any partisan political club or organization or shall hold, or be a candidate for, any paid public office. Not more than two members of the same political party shall serve on the Commission at the same time.

4.03. Duties of the Commission-In addition to the duties expressly set forth elsewhere in this law, the Commission shall:

(a) Represent the public interest in the improvement of personnel administration in the state service.

(b) Advise the Governor and the Director on problems concerning personnel administration.

(c) Foster the interest of institutions of learning and of industrial, civic, professional and employee organizations in the improvement of personnel standards in the state service.

(d) Make any investigation which it may consider desirable concerning the administration of personnel in the state service, and make recommendations to the Director with respect thereto.

(e) Make an annual report and special reports and recommendations to the Governor.

(f) Approve the budget as prepared by the Director for administration of this article before submission to the director of the budget.

(g) The Commission shall elect one of its members chairman. It shall meet at such time and place as shall be specified by call of the chairman or the Directors. At least one meeting shall be held in each month. All meetings shall be open to the public. Notice of each meeting shall be given in writing to each member by the Director at least three days in advance of the meeting. Two members shall constitute a quorum for the transaction of business.

(h) Members of the Commission shall each be paid seventy-five dollars for each day devoted to the work of the Commission, but not more than eighteen hundred dollars in any one year. They shall be entitled to reimbursement for necessary traveling and other expenditures necessitated by their official duties.

Section 4. Organization (Cont'd)

7. To investigate from time to time the operation and effect of this law and of the rules made thereunder and to report his findings and recommendations to the Commission and to the Governor.

8. To make an annual report regarding the work of the department, and such special reports as he may consider desirable, to the Commission.

9. To prepare the annual budget for the department of personnel and when approved by the Commission, submit it to the director of the budget.

10. To perform any other lawful acts which he may consider necessary or desirable to carry out the purposes and provisions of this law.

11. To furnish copies of the minutes of all regular meetings of the Commission to each participating agency.

(d) In the event of the absence of the Director or his inability from any cause to discharge the powers and duties of his office, the Commission may from time to time designate in writing an employee of the department to act for him. In such case, the powers and duties of the Director shall devolve upon such employee designated by the Commission.

(e) The Director may designate appropriate persons, including officers and employees in the state service, to assist in the preparation and rating of tests. An appointing authority shall excuse any employee in his division from his regular duties for the time required for his work as an examiner. Such officers and employees shall not be entitled to extra pay for further services as examiners but shall be entitled to reimbursement for necessary traveling and other expenses.

4.05. Agency Personnel Officer-Each state agency shall designate a staff employee to serve as Personnel Officer. It shall be his responsibility, with such clerical assistance as may be necessary, to assure compliance with the classification and compensation plans as established by the Commission; to maintain personnel records of all persons employed in the agency, and records of all personnel actions; to notify the director as far in advance as possible of vacancies which may occur in the agency; and to perform such other duties as are prescribed in this rule and as the appointing authority may direct.

Section 5. Classification Plans

5.01. Preparation of Plans-The Commission, after conferring with the appointing authorities concerned, shall formally adopt and make effective a comprehensive classification plan for all positions. The plan shall be based on an investigation and analysis of the duties and responsibilities of each position, and each position shall be allocated by the Director of Personnel after consultation with the appointing authority concerned to its proper class in the classification plan. When complete, the classification plan shall include for each class of position an appropriate title, a description of the duties and responsibilities, and the minimum requirements of training, experience, and other qualifications.

5.02. Revision of Plans-Existing classes of positions may be abolished or changed, or new classes added, in the same manner as the classification plans were originally adopted.

5.03. Incumbents of Reallocated Positions-When a position is reallocated to a different class, the incumbent shall not be deemed eligible to continue in the position unless he would have been eligible for original appointment, promotion, transfer, or demotion, to a position of the new class while serving in the position as previously allocated. If ineligible to continue in such position, he may be transferred, promoted, or demoted by appropriate action in accordance with such provision of this rule as the Director may deem to be applicable. In any case in which the incumbent is ineligible to continue in the position, and he is not transferred, promoted, or demoted, the provisions of the rule regarding separations shall apply.

Section 6. Compensation Plan and Salary Regulations

Pursuant to the provisions of Chapter 29, Article VI, Section 10 (2) of the Code of West Virginia, the following salary regulations shall apply to employees covered by the Civil Service System.

6.01. Purpose and Intent-To attract qualified employees and retain them in the classified service, the Commission shall endeavor to provide through the pay plan adequate compensation based on the principles of equal pay for equal work among the various state agencies and on comparability to pay rates established in other public and private agencies and businesses. The intent of the Commission is to recommend to the Governor a pay plan with annual adjustments for cost-of-living increases and additional funds for merit increases.

6.02. Preparation of Plan-After consultation with the appointing authorities and State fiscal officers and after a public hearing, the Director and the Commission shall prepare and submit to the Governor for his approval an annual revision of the pay plan. The pay plan shall include salary schedules containing multiple pay grades with initial, intervening, and maximum rates of pay for each grade. Periodic amendments to the pay plan may be made in the same manner.

6.03. Adoption of Plan-The plan shall become effective only after it has been approved by the Governor. The approved pay plan shall constitute the official schedule of salaries for the classified service.

6.04. Implementation of Plan

(a) Assignment of Classes-The Commission shall assign each class of positions to an appropriate pay grade consistent with the duties outlined in the class specification. No salary shall be approved by the Director of Personnel unless it conforms to one of the pay rates in the pay grade assigned to the employee's class of position.

(b) Entry Salary-The entry salary for any employee shall be at the minimum salary for the class. However, an individual possessing qualifications, pertinent training, or experience above the minimum required for the class, as determined by the Director, may be appointed at any pay rate above the minimum, unless otherwise limited by the Commission. For each step above the minimum, the individual must have in excess of the minimum requirements at least six months of pertinent experience or equivalent pertinent training.

(c) Standard Rates of Pay-The compensation plan applies to all classes of positions in the classified service. It provides standard pay rates for full-time employees for regularly established working hours in all offices and departments. The salary or wage paid shall be determined by the pay grade to which the classification of the position has been allocated. All employees, including those serving in positions on a part-time basis, shall be paid in proportion to the actual time worked.

Section 6. Compensation Plan and Salary Regulations (Cont'd)

(d) Additional Pay-Except for authorized overtime or shift differential, no pay additional to the regular salary shall be made to any employee. The rates as provided do not include reimbursements for actual and necessary expenses incurred incident to employment such as travel expense. Additional duties imposed or volunteered shall not constitute an exception to this rule.

(e) Availability of Funds-Before a department makes salary adjustments and advancements in accordance with these regulations, its fiscal officer shall certify that funds for this purpose are available.

(f) Salary Adjustments

1. New Plan

a. Upon adoption of a new pay plan, each incumbent's salary shall be adjusted to the step in the new plan corresponding to his step in the old plan. If it is impossible due to budgetary restrictions to adjust an incumbent's pay on a step-for-step basis, the Commission shall provide for a plan of application which assures as nearly as possible that the pay of all incumbents in the classified service shall receive equal treatment (i.e., one step, two steps, etc.).

b. When the salary ranges of a new pay plan do not have the number of steps corresponding to the old plan, each incumbent's salary shall be adjusted to the next higher rate in the appropriate salary range.

c. An incumbent whose salary falls above the maximum rate of the new range shall maintain his current salary and shall be ineligible for salary advancements.

2. Pay on Reclassification

a. Higher minimum

1. When a class is reassigned by the Commission to a salary range having a higher minimum, the salaries of those incumbents below the new minimum shall be adjusted to the new minimum.

2. Where the salary of the incumbent coincides with a step in the new range, the salary shall remain unchanged.

3. Where the salary of the incumbent falls within the new range and does not correspond with a step in the range, the salary shall be adjusted to the next higher rate in the new range.

4. Where the salary of the incumbent is above the maximum rate of the new range, the salary shall remain unchanged and the incumbent shall be ineligible for salary advancements.

b. Lower Minimum

1. When a class is assigned to a salary range having a lower minimum,

Section 6. Compensation Plan and Salary Regulations (Cont'd)

the salaries of those incumbents which coincide with a step in the new range shall remain unchanged.

2. Where the salary of the incumbent falls within the new range and does not coincide with a step in the range, the Commission shall approve a plan of application which assures as nearly equal treatment of the incumbent's pay as possible.

3. Where the salary of the incumbent is above the maximum rate of the new range, the salary shall remain unchanged and the incumbent shall be ineligible for salary advancements.

3. Pay on Position Reallocation-When a position is reallocated to a different class, the salary of the incumbent shall be adjusted in accordance with salary regulations for promotion, demotion and lateral class change.

4. Separation from Employment-An employee who separates from state employment (by dismissal, resignation, layoff, termination, retirement, death) prior to the date a new pay plan becomes effective and who is continued on the payroll beyond that date for annual leave payment is not entitled to salary adjustments.

6.05. Pay on Promotion

(a) Minimum Increase-The salary of an employee who is promoted shall be adjusted to the minimum rate of the new class. If the incumbent's current pay rate is at or above the minimum rate for the new class, but coincides with a step in the new range, the salary shall be adjusted one step in the range. Where the pay rate does not coincide with a step in the new range, the salary shall be adjusted to the next higher rate which provides at least a full step increase.

(b) Additional Increase-The appointing authority may grant additional steps to an employee being promoted if the employee has sufficient qualifications in excess of the minimum required for the new class. The employee shall possess at least six months of pertinent experience or an equivalent amount of pertinent training for each additional step granted.

6.06. Pay on Demotion-An employee who is demoted and whose current pay rate is above the maximum pay rate for the new classification shall have a pay reduction to at least the maximum rate of the new classification. The employee's salary may remain the same if his pay is within the pay range of the new classification, or his pay may be reduced to a lower step in the new range. If the employee's salary before demotion falls within the range for the lower class, but does not coincide with a step in that range, his salary shall be reduced at least to the next lower step in the new range.

6.07. Pay on Lateral Class Change-Any employee who receives a lateral class change shall be paid the same salary received prior to the change. Where the rate of pay does not coincide with a step in the new range, the salary shall be adjusted to the next higher rate.

Section 6. Compensation Plan and Salary Regulations (Cont'd)

6.08. Pay for Shift Differential

(a) Eligibility-Any employee who is in a class approved by the Director of Personnel for shift differential and who is required to work, and does work, an assigned shift starting between the hours of 2:00 p.m. and 2:00 a.m. inclusive may be paid at a flat rate established by the Commission. Shift differential payments shall apply only if at least one-half the scheduled hours fall between the hours of 6:00 p.m. and 6:00 a.m.

(b) Reassignment-When an employee is reassigned to a shift or class for which shift differential has not been approved, the employee's salary shall be reduced by the amount of the shift differential.

6.09. Salary Advancements

(a) Upon Merit-All salary advancements shall be based on merit as reflected by service ratings and other recorded measures of performance.

(b) Limited to Permanent Employees-Salary advancements shall be limited to permanent employees.

(c) When made-The initial salary advancement may be effective when an employee completes the probationary period. Salary advancements for other permanent employees may be effective on or after the date on which they become eligible.

(d) One-Step Advancement-No employee shall receive a salary advancement of more than one step in the salary range for the class, except as provided in paragraph 6.09(f).

(e) Salary Advancement Interval-Except as provided in paragraph 6.09(f) the interval between salary advancements shall be at least six months.

(f) Exceptionally Meritorious Service-In cases of an employee's exceptionally meritorious service, salary advancements of more than one step in the range or at intervals of less than the regularly prescribed period are permitted. However, no employee shall receive salary advancements of more than two steps, including advancements for exceptionally meritorious service, in any twelve (12) month period.

6.10. Longevity Increases

(a) Eligibility-An employee with seven years of total state service who has attained the maximum in the range for the class without a salary increase in the immediately preceding twelve months shall be eligible for a longevity increase as prescribed in the adoption of a new pay plan.

(b) Additional Longevity Increases-In the same manner, an employee otherwise not receiving a salary increase in each succeeding 12 month period shall be eligible for a longevity increase.

Section 7. Applications and Examinations

7.01. Character of Examinations

(a) Examinations for entrance in the classified service will be conducted on an open competitive basis. Examinations shall be practical in nature, shall be constructed to reveal the capacity of the applicant for the particular position for which he is competing as well as his general background and related knowledges, and shall be rated objectively. A practical written test shall be included except when rendered impractical because of (a) exceptional qualifications of a scientific or a professional nature being required and (b) the need for ranking candidates being rendered unnecessary because of the absence of effective competition. In such exceptional cases an unassembled examination may be held upon recommendation of the Director and approval of the Commission.

(b) Examinations shall also include:

1. A rating of training and experience for the more responsible professional, technical, supervisory and administrative positions;

2. An oral examination for positions requiring frequent contact with the public or which involve important supervisory or administrative duties. However, after consultation with the agency, the Director, with the approval of the Commission, may eliminate the oral examination for those classes of positions in which it is anticipated that the entire eligible register will be exhausted within a relatively short period.

(c) The Director shall assign definite weights to each part of the examination prior to its public announcement. Qualified experts will work with the Director of Personnel in the preparation of examination material and in the rating of training and experience of applicants for professional positions. The Director of Personnel shall consult with each agency affected on general phases of examination procedure such as the determination of type of examination, and the choice of qualified experts from outside the agency.

7.02. Notice of Examinations

(a) The Director shall give public announcement of all entrance examinations for at least 15 days in advance of the closing date for receipt of applications. He shall make every reasonable effort to attract qualified persons to compete in these examinations. Notices of examinations shall be posted in important centers throughout the State and copies shall be sent to newspapers of State-wide circulation, radio stations, educational institutions, professional societies, public officials, and such other workers and individuals as the Director may determine expedient. Exceptions to the requirement that examination notices must be statewide may be made where the purpose of giving an examination is to supplement already existing registers as provided for in Section 8.02(b) and/or in order to conduct a continuous recruitment program as provided for in Section 7.03(b). In such cases, the notice and other publicity may be restricted to the places where additional eligibles are needed. Public announcement of examinations shall specify the title and salary range of the class of position, information as to the rates of pay at which appointments are expected to be made, the duties to be per-

Section 7. Applications and Examinations (Cont'd)

formed, the minimum qualifications required, the final date on which applications will be received, and all other conditions of competition, including the relative weights assigned to the various parts in the examination and the fact that failure in one part of the examination will disqualify an applicant.

(b) In order to be eligible to be admitted to examinations, applicants must be citizens of the United States and (a) have been born in West Virginia or (b) have been legal residents of or domiciled in West Virginia for at least one year prior to the date of examinations, or (c) have maintained a legal residence and domicile in West Virginia for at least 10 years of his life, provided change to another state was made no earlier than one year prior to the date of examinations. The Commission, at its discretion, may waive citizenship and residence requirements.

7.03. Filing Applications

(a) All applications shall be made on forms prescribed by the Director and approved by the Commission and must be filed with the Director on or prior to the closing date specified in the announcement or postmarked before midnight of that date. Such applications shall include a statement from the applicant of all pertinent information regarding his training, experience, and age, and, in addition, the Director may require a photograph of the applicant, a certificate of his physical fitness from one or more licensed physicians, and any other information which the Director may deem necessary. All applications shall be signed and sworn to (or affirmed) by the Applicant.

(b) For classes of positions for which recruitment is difficult, the Director, with the approval of the Commission, may provide for continuous receipt of applications and for holding examinations as needed.

7.04. Disqualification of Applicants

(a) Under the supervision and direction of the Commission, the Director may refuse to examine an applicant, or after examination, may disqualify such applicant or remove his name from a register, or refuse to certify any eligible on a register if:

1. he is found to lack any of the preliminary requirements established for the examination for the class of position;

2. he is so disabled as to be rendered unfit for the performance of the duties of the class;

3. he is addicted to the use of narcotics or the habitual use of intoxicating liquors to excess;

4. he has been convicted of an infamous crime or other crime involving moral turpitude;

5. he has made a false statement of material fact in his application;

Section 7. Applications and Examinations (Cont'd)

6. he has previously been dismissed from any public service for delinquency, misconduct, or other similar cause;

7. he has used or attempted to use political pressure or bribery to secure an advantage in the examination or appointment;

8. he has directly or indirectly obtained information regarding examinations to which as an applicant he was not entitled;

9. he has failed to submit his application correctly or within the prescribed time limits;

10. he has taken part in the compilation, administration, or correction of the examination;

11. at least three former employers state that they would not re-employ him, or otherwise indicate that his services as an employee were unsatisfactory or that he is lacking in character and fitness for the position he applied for;

12. the register from which he is certified is for a class for which an oral examination was not a part of the examination process, and at least two agencies have interviewed him and report that he is not considered to be suitable for a position in the class he was interviewed for;

13. he has otherwise violated provisions of this rule.

(b) In order to be admitted to an open competitive examination, an applicant must have satisfied all minimum qualifications of the position for which he has requested an examination, except that he may be admitted if he is qualified in all respects except for (1) a deficiency of no more than six months of qualifying training and, at the time of application, he is engaged in educational pursuits that will qualify him; or (2) a deficiency of no more than six months of qualifying experience and, at the time of application, he is employed by an agency in work that will qualify him. An applicant so admitted, and who passes the examination, may not be considered available for employment until the minimum qualifications have been satisfied. The applicant shall be responsible for furnishing evidence of subsequently satisfying the minimum qualifications.

(c) A disqualified applicant shall be promptly notified of such action, and an applicant who is not admitted to an examination because of failure to meet the preliminary requirements shall be notified by letter to his last-known address sufficiently in advance of the examination to allow for an appeal from rejection as provided in Section 14.03(a).

7.05. Conduct of Examinations

(a) Written tests shall be conducted simultaneously in as many places as are necessary for the convenience of the applicants, and as are practicable for proper administration. The requirement for simultaneous conduct of examinations may be deviated from as may be found necessary by the Director to

Section 7. Applications and Examinations (Cont'd)

administer more effectively a continuous recruitment program as provided for in Section 7.03(b). The Director may designate such monitors as may be necessary to conduct examinations under instructions prescribed by him, and may also arrange for the use of public buildings in which to conduct the examinations. The Director shall provide for the compensation of monitors and assistants in accordance with the approved budget for the purpose.

(b) The identity of persons taking competitive assembled examinations shall not be disclosed to the examiner. An identification number, which shall be used to identify all papers of each applicant, shall be assigned by the Director to each applicant. Any examination papers bearing the name of the applicant or identification other than an identification number shall be rejected. In cases of rejection the Director shall promptly notify the applicant.

7.06. Rating Examinations

(a) The Director shall determine a final score for each applicant's examination, computed in accordance with the weights for the several parts established by the Director as set forth in the announcement. Failure in any part of an examination shall disqualify the applicant in the entire examination and shall disqualify him from participation in subsequent parts of the examination. All applicants for the same position shall be accorded uniform and equal treatment in all phases of the examination procedures.

(b) Any veteran (as defined in Appendix B of this Rule) who claims veteran's preference and who has made a passing grade in an examination shall have five points added to his final earned score. An additional five points shall be added to the augmented earned score of veterans with a compensable service-connected disability or those who are awarded the purple heart. Persons claiming preference or disability preference must submit satisfactory proof thereof to the Director of Personnel prior to admission to examinations.

(c) The Director, with the approval of the Commission, shall utilize appropriate scientific techniques and procedures in rating the results of examinations and in determining the final scores of the competitors. In determining the system for rating results on the examination, the Director and the Commission shall give due regard to the number of candidates and to the number of vacancies which may reasonably be expected to occur in the life of the register.

7.07. Rating Training and Experience-If training and experience form a part of the total examination, the Director, with the approval of the Commission, shall determine a procedure for the evaluation of the training and experience qualification of the various applicants. The formula used in appraisal shall give due regard to recency and quality as well as quantity of experience and to the pertinency of the training. This procedure shall allow for the substitution of training for experience and experience for training, within the limits stated in the class specifications.

Section 7. Applications and Examinations (Cont'd)

7.08. Investigations-Before rating training and experience or prior to certification from the register, the Director shall, to the extent practicable, investigate the applicant's training and experience to verify the statements contained in his application form and to adduce evidence regarding his character and fitness. If this investigation produces information affecting the rating of training or experience, the Director shall rate or re-rate the applicant's record accordingly, and make the necessary adjustments in the register. He shall also promptly notify the applicant of such re-rating.

7.09. Oral Examinations-When an oral examination forms part of a total examination for a position, the Director shall, with the approval of the Commission, appoint one or more Oral Examination Boards as needed. An Oral Examination Board shall consist of two or more members, not more than one of whom shall be from any one agency, who shall be known to be interested in the improvement of public administration and in the selection of efficient government personnel and at least one of whom shall be technically familiar with the character of work in the position for which the applicant will be examined. Any person actively engaged in the work of any political organization, or any person holding political office, shall not serve as a member of any such board. If practicable, all applicants qualifying for the oral examination for the same class shall be rated by the same Oral Examination Board. A member of an Oral Examination Board shall disclose each instance in which, by knowing an applicant personally, he would be prejudiced either for or against the applicant, in which case he shall not rate such applicant.

7.10. Notice of Examination Results-Each applicant passing all parts of the examination shall be notified by mail by the Director of his final rating as soon as the rating of the examination has been completed and the register established. An eligible, upon request and presentation of proper identification, shall be entitled to information concerning his relative position on a register. An applicant who fails any part of the examination or the total examination shall be notified of his failure.

7.11. Special Examination-No applicant shall be given a specially administered examination unless the Commission by formal and recorded action finds that the applicant's failure to take or complete an examination was due to an obvious error for which the Director or any of his assistants is responsible. A make-up examination, administered along with a subsequent examination series, may be allowed by the Commission provided the Director certifies that it is administratively practicable. The Commission's findings and recommendations shall be recorded in its minutes. No claim for a specially administered or make-up examination shall be allowed unless it is filed in writing with the Commission within 10 days after the date of the original examination. Any specially administered or make-up examination shall be constructed on a pattern similar to the original examination.

7.12. Physical Examination-Before appointment applicants may be required to pass a satisfactory physical examination.

Section 7. Applications and Examinations (Cont'd)

7.13. Examination Records-The Director shall be responsible for the maintenance of all records pertinent to the examination program. Applications and other necessary examination records shall be kept permanently, but examination records of other applicants, not appointed, may be destroyed 30 days after the register expires. All notices of changes of address shall be filed, by applicants and eligibles, with the Director.

Section 8. Registers

8.01. Establishment of Registers-After each examination, the Director shall prepare a register of persons with passing grades. The names of such persons shall be placed on the register in the order of their final ratings starting with the highest. If two or more eligibles have final ratings which are identical, their names shall be arranged on the register in the order of their ratings on the written part of the examination. If these are the same, their names shall be arranged on the register in the order in which their applications were received, and if that be the same, then alphabetically.

8.02. Duration of Registers

(a) The life of each register shall be not longer than three years from the date of its establishment, but this period may be reduced by the Director with the approval of the Commission. A register may be deemed by the Director to be exhausted if fewer than three available eligibles remain on the register. Upon the exhaustion of a register, or if the Director, with the approval of the Commission, reduces the life of a register, he shall notify each eligible remaining on such register to this effect by mail to his last-known address.

(b) The Director may declare a register depleted even though not exhausted, if there are one or more areas in the state for which there are no available eligibles, or if the register is so near the point of exhaustion that renewed recruiting and examination appears to be required to prevent the register from becoming exhausted. In either of these events, the Commission may authorize a new examination for the class. Persons whose names are on the depleted register shall be given an option of taking the new examination or retaining their positions on the depleted register, but once the option is exercised, it shall be adhered to. In establishing the new register, the Director, with due regard to the three year limitation, shall combine or integrate the names of those remaining on the depleted register with the names of those who took the more recent examination.

(c) It shall be the duty of the Personnel Officer to notify the Director as far in advance as possible of vacancies which may occur in the Agency. The Director shall be responsible for determining the adequacy of existing registers and for the establishment and maintenance of appropriate registers for all positions exclusive of exempt positions.

8.03. Removal of Names from Registers

(a) Under the supervision and direction of the Commission, the Director may remove the name of an eligible from a register:

1. for any of the causes stipulated in Section 7.04(a).

2. on evidence that the eligible cannot be located by reasonable efforts through the various means of communications.

3. on receipt of a statement from the eligible declining an appointment and stating that he no longer desires consideration for an appointment.

Section 8. Registers (Cont'd)

4. if two offers of a probationary appointment to the class for which the register was established in a location for which he has declared himself available have been declined by the eligible.

(b) The Director shall notify the eligible by mail to his last-known address of this action and the reasons therefor. An eligible's name shall be reinstated on the register upon showing of cause satisfactory to the Director or in accordance with a decision of the Commission upon appeal as provided in Section 14.05(a).

Section 9. Certification of Eligibles

9.01. Request for Certification-If a vacancy occurs in any position in an agency or if new positions are established and new employees are needed, requisitions shall be submitted by the Personnel Officer to the Director upon a prescribed form. This requisition shall state the number of positions to be filled in each class, identifying each class title and all other pertinent information.

9.02. Certification Methods

(a) Upon receipt of a requisition, the Director shall certify and submit in writing to the Personnel Officer the names of available persons on the appropriate original register established as a result of open competitive examination for the class of position, at the same time, from the appropriate promotional register, if such a register exists. The number to be certified and submitted will be governed by the following sub-paragraphs. Nothing in the following sub-paragraphs shall be construed as altering the exhaustion point of a register as described in Section 8.02(a).

1. If only one position is involved, the Director shall certify and submit the names of the five highest available eligibles, except as provided for in sub-paragraph (b). The Director may certify more than five names at his discretion.

2. If more than one position is involved, the Director may, with Commission approval, certify the names of the highest available eligibles equal in number to eight times the number of positions to be filled divided by three.

3. If the original register established as a result of a Civil Service examination for a specific class of position is exhausted, the Director shall certify and submit names from the appropriate promotional register only, until it is exhausted. If both the original register and the appropriate promotional registers are exhausted, then the Director, with the approval of the Commission, shall certify and submit names from the register, or registers, most appropriate. If there is no register which the Director, with the approval of the Commission, deems appropriate, then the Director may certify and submit names from a register established as described in Section 8.02.

(b) If an eligible receives a probationary or permanent appointment, such appointment shall constitute, for its duration, a waiver of his right to certification from any other register on which his name appears for a class of position the salary of which is either equal to or lower than that salary covered by his appointment, unless at the time of such appointment he requests in writing that his name be retained for certification from such register or registers.

(c) The name of each employee whose name appears on a register for a class of position with a higher salary range than the salary range of his present class of position shall be certified and submitted by the Director and given consideration by the Agency for the higher class of position if his name is reached.

Section 9. Certification of Eligibles (Cont'd)

(d) If in the exercise of his choice provided under Section 10.02 the appointing authority passes over the name of an eligible on a register in connection with three separate appointments he has made from the register, written request may be made of the Director that the name of such eligible be omitted from any subsequent certification of the same appointing authority from the same register. The name of such eligible shall thereafter not be certified to him from that register for future vacancies in that class of position, or from subsequent registers established for that class of position. However, upon change of the person occupying the position of appointing authority, the Director shall reinstate the name of such person for certifying purposes and shall so inform the agency. If, subsequently, the eligible is interviewed by the agency and rejected once for the same position, his name shall not again be certified for that position to that agency during the tenure of the then incumbent appointing authority.

(e) An eligible may be considered not available by the Director if he fails to reply to a written inquiry after five days or to telegraphic communication within 48 hours in addition to the time required for the transmission of the inquiry to his last-known address and reply thereto.

(f) Selective Certification by sex shall be permissible if the request with a justification in writing is approved by the Director of Personnel. Justification must clearly show that only employees of the required sex can perform the duties.

9.03. Local Office Certification

(a) Eligibles for positions in state and local offices shall be certified in the manner described in Section 9.02 except that in filling a position in a local office, the Personnel Officer may request the certification of eligibles who are residents of the area established by the Agency for such local office. Upon receipt of such a requisition, the Director shall certify and submit the names of eligibles as provided in Section 9.02 except that the Director shall certify and submit the names of the highest available eligibles who are residents of the area established by the Agency for the local office in which the vacancy exists, in accordance with the following procedure:

1. if, in certifying and submitting the names of such eligibles for a vacancy in a local office, the Director finds that there are fewer than five such eligibles who are residents of the local-office area, he shall certify and submit the names of such eligibles who are residents;

2. if no appointment is made from these eligibles, or if there is no local eligible, then certification to the vacancy in the local office shall be made from a list of eligibles in the next larger administrative area of the agency;

3. if there are then insufficient eligibles, certification shall be made on a statewide basis.

Section 10. Appointments

10.01. Appointees in Positions Added to the Classified Service

(a) When additional state agencies or parts of state agencies are added to the classified service by executive order of the Governor with the consent of the Commission and the appointing authority concerned, and when additional county or municipal agencies are added to the classified service by agreement between the local government and the Director with the approval of the Commission, a date for the addition shall be fixed by agreement.

(b) All appointments made on and after that date to the positions added to the classified service shall be made in accordance with these rules.

(c) A person employed in such a position continuously for six months immediately preceding that date may take a qualifying examination administered by the Director and may be given a probationary or permanent appointment in the position if he passes the examination. If so recommended by the appointing authority, he may be admitted to such an examination regardless of the minimum qualifications for the class to which the position is allocated. Such qualifying examinations shall be held within six months after the date of addition of the position to the classified service. Such examinations shall include appropriate written and performance tests where such tests are included in open-competitive examinations for the class. An employee who fails to pass the qualifying examination shall be separated within thirty days after the examination unless there are no available eligibles on the register for the class, in which case his employment may be continued but he must be separated within thirty days after certification of available eligibles.

(d) A person employed in such a position for less than six months preceding that date of affiliation shall be separated within thirty days after that date unless there are no available eligibles on the register for the class, in which case his employment may be continued but he must be separated within thirty days after certification of available eligibles, provided, however, that he may be given a probationary appointment if he has passed an open-competitive examination for the class and is within reach on the register for certification and original appointment.

(e) In making the appointments provided for in Section 10.03 and 10.04 it shall be optional with the appointing authority whether to count employment in the agency immediately prior to such appointments as part or all of the probationary period required under Section 11 of these rules. The appointing authority shall promptly report to the Director his decision on this matter for the records.

10.02. Original Appointments

(a) All original appointments to positions exclusive of exempt positions shall be made in accordance with this rule. Selection shall be made for each position from the five highest available names on the register, as determined by Section 9.02 exclusive of the names of those who failed to answer or who declined appointment or of those names to whom the appointing authority offers an objection in writing based on Section 7.04 which objection is sustained by the Director with the approval of the Commission.

Section 10. Appointments (Cont'd)

(b) In selecting persons from among those certified, the appointing authority shall be permitted to examine their applications and reports of investigations and to interview them. Final selection shall be reported in writing by the Personnel Officer to the Director.

(c) If the eligible selected declines the appointment, evidence of declination and other such data shall be transmitted to the Director of permanent record. An eligible may be considered by the Director as having declined appointment if he fails to reply after five days in addition to the time allowed for transmission of letter and return of reply, or 48 hours, if notified by telegram. If an eligible accepts an appointment but fails to present himself for duty at the time and place specified without giving reasons for delay satisfactory to the appointing authority and the Director, he shall be deemed to have declined the appointment.

10.03. Provisional Appointments

(a) If, in the opinion of the appointing authority, there are urgent reasons for filling a position and there are no available eligibles on the register established as a result of an examination for the position, and no appropriate promotional register or other appropriate register exists, the appointing authority may submit to the Personnel Officer the name of a person to fill the position pending examination and establishment of a register. If such person's qualifications have been certified by the Director as meeting the minimum qualifications as to training and experience for the position, such person may be provisionally appointed to fill the existing vacancy until an appropriate register is established and appointment made therefrom. No provisional appointment shall be made until the position has been classified and minimum qualifications established therefore in accordance with this rule. No provisional appointment shall be continued for more than thirty days after an appropriate register has been established for the class of position and in no event for more than 6 months from the date of appointment, nor shall successive provisional appointments of the same person be permitted, nor shall a position be filled by repeated provisional appointments.

(b) A period of provisional appointment may apply toward completion of the probationary period only for that part served continuously, in the same class, and immediately prior to an original appointment. Employees not covered by Section 10.02 of this Article and all appointments made without register subsequent to the effective date of this rule but prior to the holding of examinations shall be regarded as provisional appointments.

10.04. Intermittent Appointments

(a) The Director shall prepare lists, composed of the names of persons who have been permanent, probationary, or temporary employees appointed in accordance with this rule for at least three months. Such lists, arranged according to classes of positions, shall be known as reserve lists. If the work of the agency demands the services of a person for intermittent periods, the appointing authority may select a person from a reserve list for a class

Section 10. Appointments (Cont'd)

of position. An appointment may be made to a vacancy in the specific class of position for which the reserve list was established, as well as to a vacancy in a lower class of position, without regard to the standing of the persons on the reserve list, and without prior clearance with the Director. An intermittent appointment to a higher class of position, however, shall not be made from any list of a lower class of position. When the reserve lists become exhausted, appointments shall be made in accordance with other provisions of this Section.

(b) The Director shall also prepare lists of names of persons who have successfully passed an examination for the Intermittent positions. Such lists shall consist of the names of the successful candidate arranged in the order of final scores on the examination. Selection shall be made for each position from the five highest available names on the list. Once a person has received an intermittent appointment in accordance with this paragraph, he may be given successive intermittent appointments without regard to standing on the list.

(c) In no case shall intermittent employment of an individual continue for more than six months in any twelve-month period beginning with the date of the original intermittent appointment.

10.05. Emergency Appointments-In the event of an emergency which requires immediate addition of personnel with such urgency that appointment under other provisions of these rules is not feasible, the appointing authority may make an emergency appointment without regard to other provisions of these rules. In no case shall a person be employed under emergency appointment for more than 30 calendar days during any twelve-month period. The Personnel Officer shall immediately report each emergency appointment to the Director in writing with explanation of the nature of the emergency.

10.06. Temporary Appointments-If an employee is needed for a temporary period, a certification shall be made by the Director of the names of those eligibles in the order of their places on an appropriate register who have indicated willingness to accept temporary employment. Certification shall be made in the manner as prescribed in Section 9. Appointments shall be made in the same manner as prescribed in this rule for probationary appointments. The duration of a temporary appointment shall be limited to the period of the need and in no event shall a temporary appointment continue for more than 6 months in any twelve-month period. The acceptance or refusal of a temporary appointment shall not affect an eligible's standing on a register or his eligibility for a probationary appointment. Successive temporary appointments to the same position shall not be made nor shall an employee receive continued temporary appointments.

10.07. Posting of Job Openings-Whenever a job opening occurs in the classified service, the appointing authority shall post a notice within the building, facility or work area and throughout the agency that candidates will be considered to fill the job opening. The posting of the notice shall be at least ten (10) working days before making an appointment to fill the

Section 10. Appointments (Cont'd)

job opening. The notice shall state that a job opening has occurred, describe the duties to be performed, and the classification to be used to fill the job opening.

(a) The term job opening refers to any vacancy to be filled by promotion, lateral class change, or transfer.

(b) A vacancy is any full-time permanent unfilled budgetary position or any full-time permanent new position created by a reorganization or realignment of job functions.

(c) The posting notice shall include a description of the duties to be performed by the person selected, the minimum qualifications for the position, the job classification to be used in filling the job opening, the salary level or range that will be considered, and the job location. When appropriate, the posting notice may specify two classes in a promotional series.

An established closing date, if any, for the receipt of applications shall allow sufficient time to ensure that the job vacancy circulation has been posted throughout the agency for ten (10) working days. The naming of an individual to fill the position is the appointment and is not altered by the fact that the individual will not assume the duties until a later date. Therefore, the agency shall not make an appointment to a position prior to the deadline for receipt of applications as listed on the posting.

(d) Any employee in the classified service who believes that the posting time and notice requirements of this Section have been violated or who is denied consideration for the job opening shall have the right to initiate a grievance under Section 23 of these Rules and Regulations within five working days of becoming aware of the event or within five working days of when they should have become aware of the event.

Section 11. Probationary Period

11.01. Nature, Purpose, and Duration

(a) The probationary period shall be a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his position and to adjust himself to the organization and program of the agency. It shall be an integral part of the examination process and shall be utilized for the most effective adjustment of a new employee and the elimination of those who do not meet the required standards of work.

(b) All original appointments to permanent positions shall be made from officially promulgated registers for a probationary period of not more than one year. The Commission, after consultation with the Advisory Board, shall fix the length of the probationary period for each class of position. The appointing authority shall notify the Director of Personnel when a probationary period has been completed and permanent status has been granted. The provision shall not be construed to prohibit application of time served in a provisional status to completion of a probationary period. However, it shall be the responsibility of the appointing authority to state in writing at the time permanent status is being granted that such time served in a provisional status has been applied toward completion of a probationary period. Permanent appointment of a probationary employee shall begin with the date ending the probationary period.

11.02. Conditions Preliminary to Permanent Appointment

(a) Four weeks prior to the end of the probationary period, the appointing authority shall obtain from the probationary employee's supervisor a statement in writing recommending that the employee be continued or not be continued in service. This statement shall include an appraisal of the value of the employee's services and shall include a service rating upon a form prescribed by the Director of Personnel. In the event it is determined that the services of the employee shall be retained, the Personnel Officer shall notify the employee and the Director of Personnel of the action no later than the last day of the probationary period. In the event it is determined that the employee's services are to be terminated, the employee shall be notified of the action in writing at least 15 days in advance of the date his services are to be terminated.

(b) In the event the appointing authority takes no action on the status of a probationary employee before the expiration of the probationary period, either to retain or terminate, the employee shall be considered as having attained permanent status. In the event the appointing authority notified a probationary employee that his services are to be terminated, and if said notice is given before the date that would have otherwise been the last day of the probationary period but less than 15 days in advance of that date, the probationary period shall be extended 15 days from the date of the notice. The last sentence shall not apply to employees serving a 12 months probationary period.

11.03. Promotions during Probation-The serving of a probationary period shall not, of itself, prevent an employee from being promoted to a position

Section 11. Probationary Period (Cont'd)

in a higher class, provided he is certified from an appropriate register for such higher class of position in accordance with the provisions of Section 9. If, within the above-mentioned limitations, an employee is promoted in this way during a probationary period, the probationary period for the class of position to which he is promoted shall begin with the date of appointment to such latter class of position.

11.04. Demotions during Probation-The serving of a probationary period shall not, of itself, prevent an employee from being demoted to a position in a lower class, provided he meets the minimum qualifications of the lower class. However, such action may not be taken until the employee has been presented with the reasons in writing and has been given a reasonable time to reply thereto in writing, or to appear personally and reply to the head of the department or his deputy. Neither shall such action be taken prior to completion of one-third of the probationary period, and the probationary period for the class of position to which the employee is demoted shall begin with the date of demotion.

11.05. Transfers during Probation-An employee shall not be transferred during his probationary period to a position in another class for which a register exists, nor may an employee, certified to a vacancy in a local office on a strictly local-area basis in accordance with the provisions of Section 9.03, be transferred from that local office to any other office or class for which a register exists until at least 60 days after his appointment from the local area register.

11.06. Dismissal during Probation

(a) If at any time during the probationary period, it is determined the services of the employee are unsatisfactory, the employee may be separated from the service, but such action shall take place only after the person to be discharged has been presented with the reasons for such discharge or reduction stated in writing, and has been allowed a reasonable time to reply thereto in writing or upon request to appear personally and reply to the head of the department or his deputy. The statement of reasons and the reply shall be filed as a public record with the Director. Notification of the termination of his services shall be given to the employee 15 calendar days prior to the effective date of his release, and no further salary shall be paid to him except in payment for accrued annual leave. Fifteen days notice shall not be required for employees in certain classes where the Commission holds by formal action that the public interests are best served by withholding such notice, and shall be at the discretion of the appointing authority for employees in any class when the cause of dismissal is gross misconduct.

(b) The Director, with the approval of the Commission and after consultation with the appointing authority, may restore the name of a probationary appointee whose services have been terminated to the register from which he was certified, in accordance with procedure described in Section 13.08, but the Director shall not in the future certify the name of such person to the same appointing authority from the same register.

Section 12. Promotions, Demotions and Transfers

12.01. Method of Making Promotions

(a) Whenever practicable and in the best interest of the service, a vacancy will be filled by promotion, after consideration of the eligible permanent employees in the agency or in the career service upon the basis of demonstrated capacity and quality and length of service. In filling vacancies, an effort should be made to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees.

(b) A candidate for promotion must be certified by the Director to possess the qualifications for the position as set forth in the specifications for the class of position for which he is a candidate, and he may be required by the appointing authority to qualify for the new position by promotional competitive or non-competitive examination administered by the Director.

12.02. Promotion by Competitive Examination

(a) If it is determined by the appointing authority to fill vacancies in a particular class of position by promotion competitive examination, such examination shall be given under the direction of the Director. An employee to be eligible to compete for promotion must have permanent status and must meet the minimum qualifications as to training and experience for the class of position. A promotional competitive examination shall consist of any combination of the following: written tests, ratings on training and experience, evaluation of recorded service ratings and seniority, performance tests and oral examinations. The combination in each case and procedure for the determination of the passing grade shall be announced by the Director in advance of the examination, and shall take into consideration approved practices.

(b) All employees who receive a passing grade shall be placed on a promotional register for the class of position in order of their examination ratings.

(c) If a promotional and an original register exist, the same number of names shall be certified from each register in accordance with Section 9. The appointing authority may make his selection from the names submitted from either register, giving such preference to present employees as the good of the service will permit.

12.03. Promotion by Non-Competitive Examination-If it is determined by the appointing authority to fill a vacancy by a non-competitive promotional examination, an employee proposed for promotion shall be examined by the Director in accordance with Section 12.02, and if found to qualify for the class will be so certified by him.

12.04. Demotions-A permanent employee may be demoted for cause after the person who is to be demoted has been presented with the reasons for such reduction stated in writing, and has been allowed a reasonable time to reply

Section 12. Promotions, Demotions and Transfers (Cont'd)

thereto in writing, or upon request to appear personally and reply to the appointing authority or his deputy. The statement of reasons for the demotion and the reply shall be filed with the Director of Personnel. In all such cases the employee shall have the same right of appeal to the Commission as employees who are dismissed. A probationary employee may be demoted as provided for in Section 11.04, but shall not have the right of appeal to the Commission.

12.05. Transfers

(a) Except as otherwise provided in Section 11.05, a transfer of an employee from a position in one organizational sub-division of an agency to a position in the same or comparable class in another organizational sub-division of the same or another agency may be made at any time by the appointing authorities concerned. In the case of inter-agency transfers, annual and sick leave and all seniority rights shall be transferred with the employee.

(b) All inter and intra-agency transfers within a class shall be reported to the Director on appropriate forms at the time of the transfer. Transfers to comparable classes shall require prior approval of the Director who shall require that the employee must meet the minimum qualifications of the new class.

12.06. Posting Requirements

The vacancy posting requirements described in Section 10.07 of these Rules and Regulations shall apply to all full-time classified position vacancies except demotions with prejudice and/or transfers for cause, regardless of the means used to fill such vacancy.

Section 13. Separations, Tenure and Reinstatement

13.01. Resignations-An employee who resigns shall present the reasons therefor in writing to the appointing authority. A copy of the resignation shall be forwarded by the agency to the Director of Personnel and shall be recorded by him. If a written resignation cannot be obtained, the appointing authority shall notify the Director of Personnel of the separation of the employee and the circumstances.

13.02. Dismissals-The appointing authority, fifteen (15) calendar days after notice in writing to a permanent employee stating specific reasons therefor, may dismiss any employee for cause. The employee shall be allowed a reasonable time to reply thereto in writing, or upon request to appear personally and reply to the appointing authority or his deputy. The reasons for dismissal and the reply shall be filed with the Director of Personnel. Fifteen days notice shall not be required for employees in certain classes when the public interests are best served by withholding such notice, and shall be at the discretion of the appointing authority for employees in any class when the cause of dismissal is gross misconduct.

13.03. Suspension-The appointing authority may, upon oral notice confirmed in writing or by written notice, suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a job related adverse impact. The suspension must be for a specific period of time, except where an employee is the subject of an indictment or other criminal proceeding. The employee may be suspended without pay for less or more than thirty (30) calendar days, pending the outcome of the criminal proceeding. Permanent employees shall have the right to appeal to the Commission if suspended for more than thirty (30) calendar days in any twelve month period. The person being suspended shall be allowed a reasonable time to reply thereto in writing, or upon request to appear personally and reply to the appointing authority or deputy. The appointing authority shall file the statement of reasons for suspension and the reply with the Director of Personnel.

13.04. Reduction-in-Force-The appointing authority may release any employee, without prejudice, because of lack of funds or curtailment of work, or in order to permit reinstatement of employees upon their release from periods of military service in the armed forces of the United States. No permanent employee, however, shall be released while there are emergency, intermittent, temporary, provisional, or probationary employees serving in the same class of position in the agency. The order of separation due to reduction-in-force shall be based upon service ratings and seniority, under a formula to be formally established by the Director of Personnel and approved by the Commission, and all such separations shall be reported to the Director. For re-employment purposes, the Director shall establish a list of employees laid off in accordance with the above provisions, giving due consideration to performance records and seniority in service in compiling said list.

13.05. Like Penalties for Like Offenses-In dismissals for cause and other punishments, like penalties shall be imposed for like offenses.

Section 13. Separations, Tenure and Reinstatement (Cont'd)

13.06. Tenure of Office-The tenure of office of every permanent employee shall be during good behavior and the satisfactory performance of his duties as recorded by his service rating. This provision, however, shall not be interpreted to prevent the release of an employee for cause, or the release of an employee because of lack of funds or curtailment of work, when made in accordance with this rule.

13.07. Reinstatement to Previous Class of Position

(a) An employee with permanent status under the West Virginia Civil Service System, or a comparable system of personnel administration existing in the agency prior to the agency's affiliation with the Civil Service System, who has resigned while in good standing or who has been released without prejudice shall be eligible for reinstatement, provided he has been certified by the Director as meeting the current minimum qualifications as to training and experience of the class status of position to which he is being appointed. Prior to making such certification, the Director may require such employee to pass a qualifying examination.

(b) Provisional, probationary, or permanent employees who leave the state service to enter the armed forces of the United States in time of war or national emergency or under compulsory provisions of law of the United States in time of peace are entitled to reinstatement to their former positions or to positions of like class, seniority and pay within 30 days following application provided that within 90 days after release from active military service such employees indicate in writing or in person to the agency their readiness and ability to return to state employment. Veterans hospitalized immediately on release from the armed services due to service-connected disabilities must apply for reinstatement within 90 days of their release from hospitalization.

(c) Any veteran who has been in the armed services of the United States and who has been granted military leave from one of the Civil Service Agencies and who returns to the Agency may be granted all within-grade salary adjustments and advancements he would have received had he remained in active status in the State service, and he shall be credited with all annual, sick, and compensatory overtime leave accumulated and unused at the time the military leave began. It is understood that the regulations contained in this paragraph shall be uniformly applied to all veterans within an agency having had military leave and who return to the agency.

13.08. Reinstatement to Register

(a) A person who has had his name withdrawn from a register at his request may have his name reinstated on the currently effective register for the same position class provided the original register is still in effect and further provided that it has not exceeded a period of three years. His rank on the register shall be determined by his final earned examination rating.

(b) Reinstatement to a register as provided for in the foregoing paragraph shall be subject to the following condition:

Section 13. Separations, Tenure and Reinstatement (Cont'd).

1. The person petitioning such reinstatement shall make his request of the Director in writing and shall furnish whatever information the Director may require.

2. No person may be reinstated to a register who does not satisfy the current minimum qualifications for the position class for which the register is maintained. The Director may require that such a person pass an appropriate examination in the case of position classes requiring special skills.

3. No person may be reinstated to a register from which he has been or may be disqualified under any one of these Civil Service Rules: Section 7.04, Section 8.03, or Section 9.02.

Section 14. Appeals

14.01. Appeal from Dismissal, Suspension, Demotion, Discrimination

(a) Right of Appeal-Upon the occurrence of any one of the following events, a permanent employee shall have the right to appeal to the Commission for relief from the action complained of: dismissal; suspension for more than thirty (30) calendar days in any twelve (12) month period; demotion; discrimination in any incident of employment involving a personnel action because of political or religious opinions or affiliations, race, sex, age, handicap, national origin or other non-merit based personnel action.

(b) Written Appeal-Such appeal shall be in writing and must be postmarked no later than thirty (30) calendar days after the effective date of the action. An employee must provide in the appeal request substantial factual information including a specific recitation of the alleged act or acts about which the employee-appellant is complaining. The appeal shall be transmitted to the Director who shall docket the appeal request. If the Commission decides to hold a hearing on an appeal, the Director shall set a formal hearing before the Commission within ninety (90) calendar days after receipt of the appeal. In advance of the hearing, the Director shall furnish a copy of the appeal to the appointing authority of the agency concerned.

(c) Notice of Hearing-Both the employee and the appointing authority of the agency involved shall receive reasonable advance notification of the time and place of the hearing.

(d) Discovery-A broad form of discovery exists to simplify conduct of the Commission hearings. Both the appointing authority and the aggrieved employee-appellant shall have the right to inquire and receive answers from the other party or other persons concerning evidence relevant to the issues at the hearing. Both may inspect any documents or other evidence in the possession of the other party or other persons concerning evidence relevant to the issues at the hearing. Only matters which are part of the attorney work product or are otherwise privileged by law are exempted from the requirements of this section. The intent of this section is to allow discovery of facts in a manner similar to the West Virginia Rules of Civil Procedure including, but not limited to, use of interrogatories, depositions, requests for admissions, and requests for production of documents. The scope of discovery shall not be limited by the West Virginia Rules of Civil Procedure.

(e) Stipulations-Ten (10) calendar days prior to the Commission hearing, both the appointing authority and the employee-appellant shall submit to the Commission a signed joint stipulation setting forth the following:

1. issues to be decided;

2. statement of undisputed facts, including facts to which each witness will testify;

3. statement of disputed facts, including facts to which each witness will testify;

Section 14. Appeals (Cont'd)

4. applicable laws; and,

5. exhibits to be introduced, with or without objection.

(f) Failure of either party to comply with this section may result in an adverse decision by the Commission on the merits of the case. It will be discretionary with the Commission to waive the signed joint stipulation requirement. The parties may enter into any other stipulations helpful to the Commission.

(g) Hearing-The employee and an agency official designated by the appointing authority shall have the right to present witnesses and give evidence before the Commission. Technical rules of evidence shall not apply at the hearing of such appeals. At any such hearing, the appointing authority shall bear the burden of going forward with evidence to establish that the dismissal, demotion, suspension, or other non-merit based personnel action was not arbitrary or capricious and was for good cause. The appointing authority also bears the burden of persuasion and such burden shall remain with the appointing authority throughout every stage of such hearing.

(h) Continuance-Continuances of a hearing may be granted by the Commission only for good cause shown.

14.02. Decision

(a) Within thirty (30) calendar days after the hearing, the Commission shall report its decision in writing to the appointing authority and the employee. If the Commission finds that the action complained of was taken by the appointing authority without good cause, the employee shall be reinstated to his or her former position or a position of like status and pay without loss of pay for the period of the dismissal, suspension, demotion, denial of procedural due process rights or other non-merit based personnel action and shall be awarded his reasonable and necessary attorney fees expended therein, such fees to be paid by the appointing authority. If the Commission finds that the action complained of and taken by the appointing authority was too severe but was with good cause, the Commission may provide for such other remedy or remedies as may be deemed appropriate and in the best interest of the parties.

(b) In all cases, the Commission shall have the express authority by order to provide for such remedies as it may deem appropriate after it has made a complete review of the circumstances of each individual case. Such remedies shall include, but not be limited to, the restoration of the suspension, or reinstatement of an individual to his former position or a position of like status and pay, or re-employment to any other position which the Commission judges to be in the best interest of the parties, or any combination of such remedies. When any employee is dismissed and not reinstated after such appeal, the Commission at its discretion may direct that the employee's name be placed on an appropriate re-employment list for employment in any position other than the one from which he has been removed.

Section 14. Appeals (Cont'd)

Any final action or decision taken or made hereunder shall be subject to review by the Supreme Court of Appeals if appeal is made within sixty (60) calendar days of the action or decision complained of.

14.03. Appeal for Examination Rejection

(a) Appeal Request-Any applicant whose application for examination has been rejected may appeal to the Commission for reconsideration of his qualifications. The Commission shall consider such appeal if submitted in writing and served not later than fifteen (15) calendar days following the date the rejection notice was postmarked. Pending the outcome of the written appeal, applicants may be admitted to an examination. Admission to an examination under such circumstances shall not constitute assurance of a passing grade with respect to the other portions of the examination process.

(b) Decision-Within thirty (30) calendar days after a properly submitted appeal is received, the Director shall report the decision of the Commission in writing to the applicant. The Commission shall determine that uniform rating or review procedures have been applied. A rating in any part of an examination shall not be changed unless the Commission finds that an error has been made. Any correction resulting from the appeal shall not affect a certification or appointment which has already been made from a register.

14.04. Appeal of a Classification Action

(a) Appeal Request-When a classification action results in the movement of a position from one class to another, the affected employee or the appointing authority may, within fifteen (15) calendar days following the date the classification notice was postmarked, request a classification review. The request shall be in writing and shall concern only the allocation of the individual position to a class.

(b) First Review-The Classification Division shall review the initial request and all additional information submitted by the employee or the appointing authority within fifteen (15) calendar days from the date the classification notice was postmarked. The Classification Division shall notify the employee and appointing authority in writing of the result of the classification review.

(c) Second Review-If the decision resulting from the first review remains unacceptable, the employee or the appointing authority may file a written appeal to the Director of Personnel within fifteen (15) calendar days following the date the written decision was postmarked. Such appeal request shall include justification for changing the classification of the position.

(d) Decision-The Director shall consider all pertinent information and issue a written final allocation decision within thirty (30) calendar days after the appeal is received.

14.05. Appeal for Removal from Register

(a) Appeal Request-Any person whose name has been removed from a

Section 14. Appeals (Cont'd)

register allegedly for reasons specified in these Rules may appeal to the Commission for reconsideration. Such appeal must be filed in writing with the Director within fifteen (15) calendar days after the date on which notification to the applicant was postmarked. Such appeal shall state the reasons why the applicant should not be removed from the register.

(b) Decision-The Commission shall review all relevant information to determine if the action appealed was taken in accordance with the Rules and Regulations. Within thirty (30) calendar days after a properly submitted appeal is received, the Director shall report the decision in writing to the applicant.

14.06. Appeal for Denial of Procedural Due Process Rights

(a) Raising Issue-In any case where an employee is suspended from thirty (30) days or less in any twelve month period and was not given a statement of the reasons for the action taken against him and the opportunity to reply by an appointing authority within thirty (30) calendar days thereafter, the employee may raise the issue of a violation of the employee's procedural due process. If the Commission finds that an appointing authority has violated an employee's procedural due process rights, the Commission shall have the authority to provide any remedy it may deem appropriate as more fully set forth under Section 14.02. This section does not preclude consideration by the Commission in an appeal upon a personnel action of any procedural due process issues.

(b) Joint Statement

1. Unless waived by the Commission and at the direction of the Director of Personnel, both the appointing authority and the employee-appellant shall submit to the Commission a written statement of the procedures followed by the appointing authority and the actions taken by both the appointing authority and the employee-appellant regarding the employee's assertion of denial of procedural due process rights. This joint statement is to include (1) a copy of the notice which was given to the employee of the personnel action, (2) the time period within which the employee was required to reply to the notice of personnel action, (3) either a copy of any request by the employee for an opportunity to meet and be heard by the appointing authority or a written statement that such a request was or was not made, (4) a written summary of the meeting held regarding the personnel action, (5) the personnel action taken by the appointing authority, (6) a statement of the consideration given by the appointing authority to any reply by the employee to the notice of personnel action and any matter presented during the meeting held by the appointing authority, if any, (7) a statement of the reason for the personnel action taken by the appointing authority, and (8) a copy of the written decision advising the employee of the personnel action.

2. If the appointing authority fails or refuses to comply with the provisions relating to the joint statement required by Section 14.06(b)1 the Commission may determine that the appointing authority has failed to

Section 14. Appeals (Cont'd)

grant the procedural due process rights to which an employee is entitled. Likewise, the failure or refusal of the employee to comply with the provisions relating to the joint statement required by Section 14.06(b) may result in dismissal of the employee's appeal. For the contents of those portions of the joint statement required by Section 14.06(b) on which the appointing authority and the employee are unable to agree, and for which a specific recitation of the differences and the reason for such differences is set forth in the joint statement, no failure or refusal to comply shall be deemed to have occurred.

3. In those instances in which the joint statement unquestionably demonstrates the denial of an employee's procedural due process right, the Commission may without a hearing provide any remedy as it may deem appropriate as more fully set forth under Section 14.02.

14.07. Decorum of Parties, Witnesses, Representatives of Parties or Witnesses, and Others-All persons appearing before the Commission in person or by or through a representative shall act in a professional and ethical manner and be subject to disciplinary action by the Commission for improper conduct of any nature. Disciplinary action by the Commission will be determined in light of the conduct of the individual(s) and may include, but is not limited to, dismissal of the party's action or denial of the privilege of a person or his representative to appear before the Commission.

14.08. Cost and Expenses

(a) All state employees who are subpoenaed or required to attend Civil Service appeal hearings, whether at the request of the department or the appellant, will not be charged annual leave for their absence from their normal duties and shall be paid reasonable expenses in accordance with State Travel Regulations for attending the hearing.

(b) In accordance with Chapter 59, Article I, Section 16 of the West Virginia Code, any witness who is subpoenaed, and who is not an employee of the State, will be entitled to payment of a witness fee and mileage. The party who requests the subpoena to be issued will be responsible for the payment.

(c) The Commission may order the parties to bear costs and expenses necessitated by an appeal in any manner it deems just based on, including but not limited to, the merits of a particular action, the conduct of the parties, and such other factors as are relevant to a determination of the taxing of costs and expenses.

Section 15. Classified-Exempt Service

15.01. Classification Plan for the Classified-Exempt Service-Upon the recommendation of the Director, the Commission shall adopt and make effective a classification plan for the classified-exempt service. This plan shall be so developed and maintained that all positions sufficiently similar with respect to type, difficulty, and responsibility of work are included in the same class and are filled by the same means of recruitment. The plan shall be based on an analysis of the duties and responsibilities of each position, and each position shall be allocated by the Director of Personnel to its proper class in the plan.

15.02. Report of Duties and Responsibilities-Each appointing authority shall report to the Director the establishment of new positions or any material changes in the duties and responsibilities of existing positions in the classified-exempt service. The Director may at any time require the appointing authority to submit a statement of the duties and responsibilities of incumbents of any position in the classified-exempt service.

15.03. Report of Employees-The appointing authority shall, on the appropriate specified forms, report to the Director any changes in class title, pay, and status of any employee in the classified-exempt service.

15.04. Certification of Names for Filling Vacancies-If an appointing authority wishes to request names of applicants for consideration for employment in the classified-exempt service, he shall make the request on appropriate forms specified by the Director. To reduce the impact on hiring in classified service, the Director may send names irrespective of order of scores and may delay filling such request until certifications for the classified service are complete. In no event shall a classified service vacancy be filled from a certification prepared for a classified-exempt service vacancy.

15.05. Appeals-The employee affected by the allocation of a position to a class may file with the Director a written request for reconsideration and shall be given a reasonable opportunity to be heard by the Director. The interested appointing authority shall be given like opportunity to be heard. The appeal of a classification action shall follow the procedure established in Section 14.04 of these Rules.

Section 16. Attendance and Leave

In compliance with Chapter 21, Article 5C; Chapter 2, Article 2; and Chapter 29, Article 6, Section 10, of the Code of West Virginia, as amended, the following regulations shall apply to classified employees.

16.01. Official Holidays

In accordance with Chapter 2, Article 2, of the West Virginia Code, as amended, official holidays are New Year's Day, Martin Luther King's Birthday, Lincoln's Birthday, Washington's Birthday, Memorial Day, West Virginia Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, any day in which an election (Primary or General) is held throughout the State, and such other days as the President, Governor or other duly constituted authority shall proclaim to be legal holidays.

When a holiday falls on a Sunday, the following Monday shall be observed as the official holiday. When a holiday falls on a Saturday, the previous Friday shall be observed. When Christmas or New Year's Day occurs on Tuesday, Wednesday, Thursday, or Friday, the last half of the scheduled work day immediately preceding the holiday will be given as time off. It is recognized that some agencies must modify holiday schedules to accommodate around-the-clock shifts or other special needs. Each agency should notify employees in advance of altered holiday work schedules and should schedule altered holidays on days as close as possible to the normal holidays.

Agencies shall make reasonable accommodation to an employee's religious holidays as required by law.

16.02. Agency Work Schedules-Each appointing authority shall establish the work schedule for the employees of his agency. The work schedule shall specify the number of hours of actual attendance on duty for full-time employees during a workweek, the day and time that the workweek begins and ends, and the time that each work shift begins and ends. Such work schedules and changes thereto must be submitted to the Director within fifteen (15) calendar days after employees commence work under the schedule.

16.03. Annual Leave

(a) Amount, Accrual-Except as otherwise noted in these rules, each employee shall be entitled to annual leave with pay and benefits. The table below lists rates of accrual according to the employee's length of service category and the number of hours of annual leave that may be carried forward from one calendar year to another. Annual leave cannot be accrued for hours worked beyond the normal work week.

Section 16. Attendance and Leave (Cont'd)

Length of Service Category	Accrual Rate	Carry-forward Hours
Less than 5 years of regular employment	.05769 hour per hour paid	240 hours
5 years but less than 10 years of regular employment	.06923 hour per hour paid	240 hours
10 years but less than 15 years of regular employment	.08077 hour per hour paid	280 hours
15 years or more	.09231 hour per hour paid	320 hours

(b) Service to Qualify

1. Qualifying service for length of service category (Section 3.1) is based on State employment in an agency covered by Civil Service.

2. Credit may also be given for other State employment not in a covered Civil Service agency if requested in writing by the appointing authority of the covered agency and the executive or administrative head who is the lawfully delegated authority in the non-Civil Service agency and approved by the Director of Personnel.

(c) Requesting, Granting-Accrued annual leave shall be granted at such times as will not materially affect the agency's efficient operation. The employee shall request annual leave in advance of taking such leave except as noted elsewhere in this Section. Annual leave may not be granted in advance of the employee's accrual of such leave. Agencies are encouraged to grant annual leave when hazardous conditions make going to and from work difficult.

(d) Coverage

1. Annual leave shall not be accorded temporary, 30-day emergency, per diem, or 90-day exempt employees.

2. Annual leave shall be accorded provisional, intermittent, irregular part-time and temporary (appointed from the register) employees. Such leave must be taken prior to the expiration of the period of appointment, unless immediately followed by an appointment from the register or be forfeited.

3. Annual leave accorded part-time employees shall be computed in proportion to hours worked based on the proper length of service category.

(e) Minimum Charge-The minimum charge against annual leave may be one half (1/2) hour. Additional leave may be in multiples of a half hour.

(f) Death of Employee-Upon the death of an employee who has not used all accrued annual leave, the unused portion shall be paid in such manner as to benefit the employee's estate. Payment shall not be limited to the maximum

Section 16. Attendance and Leave (Cont'd)

carry-forward amount for length of service category and may be paid in lump sum as provided in Section 16.03(g)2 of these rules.

(g) Separation From Employment-An employee who separates from employment for any reason except as described in 16.03(f) of these Rules and Regulations shall be paid for all accrued annual leave not to exceed the maximum carryover hours for the appropriate length of service category. Annual leave does not accrue, salary adjustments shall not be given, and payment shall not be made for holidays which occur after the effective date of separation or last day worked during the notice period. Such payment shall be made according to one of the following methods:

1. An employee may elect to be paid in bi-monthly installments as if employment were continuing until the pay period during which the accrued annual leave is exhausted. If the last day for which separation leave payment is due falls before the day on which the pay period ends, separation leave payment for those days within that pay period shall be calculated using the daily rate for the month in which the last day on payroll occurs. Employees in positions allocated to job classes assigned to an hourly pay schedule or per diem pay schedule approved by the Commission shall be paid according to those standard procedures.

2. Any eligible employee as defined in § 5-5-1 of the West Virginia Code as amended, who is separated from employment by resignation, layoff, dismissal, retirement, death, or termination, may be paid in lump sum, at their option, for accrued annual leave in accordance with this section and Section 16.03(f) of these Rules and Regulations. Separation leave payment for an employee who selects a lump sum payment shall be calculated using the annualized hourly rate of pay established for the class by Civil Service.

3. An employee who retires may elect not to receive payment for any or all accrued annual leave and may apply the balance towards extended insurance coverage under guidelines established by the Public Employees Insurance Board.

(f) Separation From Employment

1. An employee who separates from employment for any reason shall be paid for all accrued and unused annual leave. The employee may elect to be paid bi-monthly installments as if employment were continuing until the pay period during which the accrued and unused annual leave is exhausted. Also, any employee as defined in § 5-5-1 of the West Virginia Code, as amended, who separates from employment for any reason may elect at their option, to be paid in lump sum for all accrued and unused annual leave. Regardless of the option the employee chooses, the amount of separation leave payment shall be calculated based on the number of countable work days using the daily rate of pay for the month of the date of their last working day and subsequent calendar months which such accrued and unused annual leave covers.

Section 16. Attendance and Leave (Cont'd)

2. In calculating the number of countable work days the period covered, weekends, holidays or other periods of normal, noncountable times shall be excluded. Annual leave does not accrue and salary adjustments shall not be given after the effective date of the separation or after the last day worked during the notice period.

3. The daily rate of pay shall be calculated by dividing the number of work days in such month(s), exclusive of weekends, holidays or other periods of normal, noncountable time, into the monthly salary. For annual leave amounting to less than a full work day of the established agency work schedule, the employee shall be paid the fractional part of the daily rate of pay which the remaining annual leave covers.

4. An employee who retires may elect not to receive payment for any or all accrued annual leave and may apply the balance towards extended insurance coverage under guidelines established by the Public Employee Insurance Agency.

(W)(g) Transfer of Annual Leave

1. When a covered employee transfers from one agency to another, all seniority rights and accrued annual leave shall be transferred. The previous employer must provide written documentation of the employee's annual leave balance to the other agency within thirty (30) calendar days after the employee commences work.

2. At the discretion of the appointing authority, annual leave accrued while in employment as defined in Section 16.03(b)2 may be transferable to covered agency employment.

(X)(h) When Sick Leave Exhausted-For illness of an employee, when the employee's sick leave and compensatory time are exhausted, or for illness in an employee's immediate family when the sick leave allowance of 24 hours per calendar year is exhausted, an employee who requests utilization of annual leave under this Section must be granted any or all accumulated annual leave, provided the employee's illness or the reasons necessitating the presence of the employee with his or her family are verified by a physician's statement in cases in which the leave extends beyond three working days. The immediate family shall be understood to include only the employee's father, mother, son, daughter, brother, sister, husband, wife, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandfather, grandmother, grandchildren, stepmother, stepfather, and stepchildren.

Section 16. Attendance and Leave (Cont'd)

16.04. Sick Leave

(a) Accrual-Except as otherwise provided in this section, each employee shall receive accrued sick leave with pay and benefits. Sick leave is computed on the basis of .06923 hour leave per hour paid not to exceed the normal work week. There shall be unlimited accumulation of sick leave.

(b) Coverage

1. Sick leave shall not be accorded temporary, 30-day emergency, 90-day exempt, or per diem employees.

2. Provisional, temporary (appointed from the register), irregular part-time and intermittent employees shall accrue sick leave. Such leave expires at the termination of the period of employment unless immediately followed by an appointment from the register.

3. Part-time, probationary, and permanent employees shall accrue sick leave with pay and benefits on the basis of .06923 hour leave per hour paid (not to exceed forty (40) hours paid per week).

(c) Minimum Charge-The minimum charge against sick leave may be one half (1/2) hour. Additional leave may be charged in multiples of one half (1/2) hour.

(d) Maximum Charge-The maximum charge against sick leave will be one work year per substantially continuous absence after which time the employee should consider disability retirement. The appointing authority may at his discretion grant additional accrued sick leave.

(e) Separation From Service-Sick leave does not accrue, salary adjustments shall not be given, and payment shall not be made for holidays which occur after the effective date of separation or last day worked during the notice period.

1. Retirement-Unused sick leave may be used to purchase extended insurance coverage upon retirement under guidelines established by the Public Employees Insurance Board.

2. All Other Separations-All accumulated sick leave shall be cancelled as of the effective date of separation of employment or last day worked during the notice period. If the employee returns to work within twelve (12) calendar months all lost sick leave shall be restored. However, if the employee returns to work after more than twelve (12) calendar months from the effective date of separation of employment, no more than thirty (30) days of lost sick leave shall be restored.

Section 16. Attendance and Leave (Cont'd)

(f) Granting-Accrued sick leave shall be granted to employees for the following reasons:

1. Illness-Sick leave may be granted in the event of an illness of, or injury to, an employee which incapacitates him from performance of his duties. An employee who elects not to utilize sick leave under this section must apply for a medical leave of absence without pay under Section 16.08(b).

2. Death in the immediate family of the employee-This provision shall be understood to include 3 days; and the immediate family shall be understood to include only the father, mother, son, daughter, brother, sister, husband or wife, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandmother, grandfather, granddaughter, grandson, stepmother, stepfather, and stepchildren.

3. Exposure to Contagious Disease-Exposure to contagious disease when a physician determines and states in writing that the employee's presence on duty may jeopardize the health of others.

4. Pregnancy-An incapacity due to pregnancy shall be charged to sick leave under the same conditions applying to any illness.

5. Routine Medical Appointments-Employee-Routine dental and medical appointments for treatment or examination of the employee may be charged to sick leave.

6. Illness and/or Routine Dental and Medical Appointments-Immediate Family-Absence for illness or routine dental or medical appointments in an employee's immediate family may be charged to accrued sick leave, not to exceed 24 hours per calendar year.

(g) Physician's Statement

1. Immediately upon return to work, an employee shall furnish a written statement from the attending physician for all consecutive days of sick leave granted beyond three working days. The physician's statement shall specify the period of incapacity and state that the employee was unable to perform his job. In the absence of the physician's statement, annual leave shall be charged for the entire period. For extended periods of sick leave, a physician's statement confirming the necessity for continued leave must be submitted every thirty (30) calendar days. The necessity for absence because of exposure to contagious disease must be verified regardless of the length of absence.

Section 16. Attendance and Leave (Cont'd)

2. The Director shall prescribe a physician's statement form to be supplied by all agencies to its employees. Use of this form is discretionary with the agency.

(h) Transfer of Sick Leave

1. When a covered employee transfers from one agency to another, all accrued sick leave shall be transferred. The previous employer must provide written documentation of the sick leave balance to the other agency within thirty (30) calendar days after the employee commences work.

2. At the discretion of the appointing authority, sick leave accrued while in employment as defined in Section 16.03(b)2 may be transferable to covered agency employment.

(i) Illness While on Annual Leave-An employee who becomes ill and who is admitted to a hospital or has medical services performed in an emergency room while on previously approved annual leave may request that all or part of the time spent in a hospital or emergency room be charged to sick leave. The employee must request such action immediately upon return to work and must provide a physician's statement or hospital statement listing the specific dates of hospitalization or emergency room services. Sick leave will be charged only for the period of time the employee is hospitalized or in the emergency room. The remainder of the time must be charged to annual leave.

16.05. Suspected Leave Abuse-When an employee appears to have a pattern of leave abuse, the appointing authority may request appropriate substantiation of the employee's claim for leave, for example, verification of illness of less than three days.

16.06. Unauthorized Leave-When an employee is absent from work without authorization for sick or annual leave, the appointing authority may dock the employee's pay for an equal amount of time paid during which no work was performed. The appointing authority must notify the employee in writing that such action is being taken. Unauthorized leave shall be used only when the employee fails to notify the appointing authority, according to agency policy, of the reason for absence. Such action must be transmitted to the Director of Personnel.

16.07. Overtime Work and Holiday Work-An appointing authority or his designated representative may require an employee to work in excess of the prescribed working hours or on holidays when such work is deemed necessary to the public interest. Compensation shall be made in accordance with the Minimum Wage and Maximum Hour Standards Employee Law, Chapter 21, Article 5C, West Virginia Code, as amended, and the West Virginia Department of Labor Administrative Regulations.

16.08. Leave of Absence Without Pay

(a) Personal Leave-Upon application in writing to and written approval of the appointing authority, a permanent, probationary, or provisional

Section 16. Attendance and Leave (Cont'd)

employee may be granted a leave of absence without pay for a specific period of time which normally should not exceed one year. A leave of absence without pay may exceed the normal one year limitation and may be granted at the discretion of the appointing authority based on the department's personnel needs. Time spent by probationary employees for leaves of absence shall not be construed as time served in completing the probationary period. This section shall not be construed to extend the provisional period limitation.

(b) Medical Leave; Notice to Employee

1. An injured or ill permanent employee upon written application to the appointing authority shall be granted a medical leave of absence without pay not to exceed six (6) months within a twelve month period provided:

a. The employee makes application (1) no later than fifteen (15) calendar days following the expiration of all sick leave and compensatory time or (2) no later than fifteen (15) calendar days following the date on which the employee filed a claim for Workmen's Compensation or (3) within fifteen (15) calendar days after the employee is injured or ill; and

b. The employee's absence is due to an illness or injury which is verified by a physician's written statement that the employee is unable to perform his or her duties and giving a tentative date for the employee's return to work; and

c. A physician's statement is submitted every thirty (30) calendar days to confirm the necessity for continued leave; and

d. The disability as verified by a physician is not of such nature as to render the employee permanently unable to perform his duties.

2. The appointing authority shall, at least 15 days prior to, if possible but no later than five (5) days following the expiration of the employee's sick leave, mail to the employee a written notice of the employee's right to a medical leave of absence without pay and that the leave will not be granted if the employee fails to apply within the above time limits.

(c) End of Leave-At the expiration of leave of absence without pay, the employee shall be reinstated to his or her former position, or one of comparable pay and duties, without loss of rights, unless the position is no longer available due to a reduction in force caused by curtailment of funds. If the leave of absence without pay was granted for illness, the employee must furnish from the attending physician a certificate indicating the ability of the employee to return to work. The appointing authority may permit an employee to return to work at or before the expiration of the leave of absence at less than full duty, but the terms of return shall be written and are subject to review and renewal every thirty (30) calendar days. Such review may include the requirement of additional certification by a physician. Failure of the employee to report promptly at the expiration of a leave of

Section 16. Attendance and Leave (Cont'd)

absence without pay, except for satisfactory reasons submitted in advance to the appointing authority, shall be cause for dismissal.

(d) Reporting Procedures-The appointing authority must report a leave of absence without pay to the Director of Personnel. The appropriate forms must include the last date on the payroll and the specific anticipated date for return to duty. An extension of a leave of absence must also be reported.

16.09. Military Leave

(a) All employees who are members of the National Guard or of any of the Reserve Components of the Armed Forces of the Federal Government shall be entitled to leave of absence from duty without loss of pay, status, or efficiency rating, on all days during which they shall be engaged in drills or parades during business hours ordered by proper authority, or for field training or active service for a maximum period of thirty calendar days in any one calendar year ordered or authorized by proper authority. The term "without loss of pay" shall mean that the employee shall continue to receive his normal salary or compensation, notwithstanding the fact that such employee may have received other compensation during the same period. An employee need not exhaust all annual leave, sick leave, or compensatory time. Furthermore, such leave of absence shall be considered as time worked for the agency in computing seniority, eligibility for increase and experience with the agency. The terms of this paragraph shall not apply under the provisions of any Selective Training and Service act, or other such act whereby the President may order into active duty the National Guard and the Reserve Components of the Armed Forces of the Federal Government. An employee shall be required to submit an official order from the appropriate military officer in support of the request for military leave above referred to.

(b) Any employee entering the U.S. armed services in time of war, national emergency or under compulsory provisions of law of the U.S. in time of peace must be granted a leave of absence from his service with the agency. Upon completion of and discharge from any such armed services and within the applicable time period described by federal statute, rule, or regulation regarding return to employment, the employee shall have the right to reassume his service with the agency without any prejudice whatsoever to his status, merit rating or standing by reason of such absence, in accordance with Section 13.07(b) of the Civil Service Rules and Regulations. Employees shall be credited with all annual leave, sick leave, and compensatory time not used at the commencement of his military leave in accordance with Section 13.07(c) of the Civil Service Rules and Regulations. This paragraph shall not be construed:

(c) As an attempt to enlarge or to extend the length of employment of any temporary employee or to create a definite term where no definite term with respect to the position heretofore existed.

(d) As providing that the salary paid by the agency shall continue to be paid to the employee while he is not performing the duties of his position with the state because of such services with the armed forces of the United States.

Section 16. Attendance and Leave (Cont'd)

(e) To the extent that any portion of this section is inconsistent with or conflicts with the requirements of any applicable federal statute, rule, or regulation regarding military leave or re-employment rights, the provisions of the applicable federal statute, rule, or regulation shall govern only to the extent that this section is inconsistent or in conflict with such federal statute, rule, or regulation.

16.10. Court, Jury, and Hearing Leave

(a) Upon application in writing, an employee shall be granted leave with pay when, in obedience to a subpoena or direction by proper authority, he serves upon a jury or appears as a witness before any court or judge, any legislative committee, or any officer, board, or body authorized by law to conduct any hearing or inquiry.

(b) The employee shall furnish such written confirmation of absence as is required by the appointing authority. The employee shall be entitled to a leave of absence with pay for the period of absence required to perform such duty. Annual leave will not be charged during the time the employee is on court, jury, or hearing leave.

16.11. Education Leave

(a) Subsidized by Agency-An agency subsidizing advanced educational training for state employees may grant to selected employees educational leave subject to conditions stipulated by that agency. The procedures for granting educational leave and compensatory payment shall be filed with the Director of Personnel. Such leave shall be considered as continuous employment, except that employees while on educational leave shall not accrue sick leave, annual leave, or compensatory time, nor shall such employees be eligible for salary advancements.

(b) Non-subsidized by Agency-Leave of absence may be granted for educational purposes. See Section 16.08(a).

16.12. Supplementary Attendance and Leave Regulations-Each agency shall prepare supplementary regulations as may be required. Copies of all such regulations shall be filed with the Director of Personnel.

16.13. Distribution of Regulations-Each agency shall make available to each of its employees a copy of these attendance and leave regulations together with the agency's own supplementary attendance and leave regulations.

16.14. Leave Records-Each agency shall maintain a current leave record of its employees' accrued and used leave. Each employee shall have access to his or her leave records subject to the appropriate agency's established rules and regulations.

Section 17. Service Ratings

The Director of Personnel, after consultation with the appointing authorities, and with the approval of the Commission, shall establish and make effective a system of service ratings designed to give a fair evaluation of the quality and quantity of work performed. Insofar as practicable the system of service ratings in the classified service shall be uniform. Such ratings shall be prepared and recorded for all permanent and provisional employees at regular intervals not to exceed twelve months. Service ratings shall be considered in determining salary advancements and in making promotions, demotions, and dismissals, and in determining the order of separations due to reduction in force. An employee shall be notified of his service rating in writing by the Personnel Officer of the appropriate agency.

Section 18. Political Activities

18.01. Prohibition of Political Activities

(a) No person shall be appointed or promoted to or demoted or dismissed from any position in the classified service or in any way favored or discriminated against with respect to such employment because of his political or religious opinions or affiliations or race; but nothing herein shall be construed as precluding the dismissal of any employee who may be engaged in subversive activities or found disloyal to the nation.

(b) No person shall seek or attempt to use any political endorsement in connection with any appointment in the classified service.

(c) No person shall use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for any consideration.

(d) No employee in the classified service or member of the Commission or the Director shall, directly or indirectly, solicit or receive any assessment, subscription or contribution, or perform any service for any political party, committee or candidate for compensation, other than for expenses actually incurred, or in any manner take part in soliciting any such assessment, subscription, contribution or service of any employee in the classified service.

(e) Notwithstanding any other provision of this code, no employee in the classified service shall:

1. Use his official authority or influence for the purpose of interferring with or affecting the result of an election or a nomination for office;

2. Directly or indirectly coerce, attempt to coerce, command or advise a state or local officer or employee to pay, lend or contribute anything of value to a party, committee, organization, agency or person for political purposes; or

3. Be a candidate for any national or state paid public office or court of record; or hold any paid public office; or be a candidate or delegate to any state or national political party convention, a member of any national, state or local committee of a political party, or a financial agent or treasurer within the meaning of the provisions of section three, four or five-e, article eight, chapter three of the Code of West Virginia, as amended. Other types of partisan or nonpartisan political campaigning and management not inconsistent with the provisions of this subdivision and with the provisions of subsection (d) of this section, shall be permitted.

Section 18. Political Activities (Cont'd)

(e) Political participation pertaining to constitutional amendments, referendums, approval of municipal ordinances or activities shall not be deemed to be prohibited by the foregoing provisions of this section.

(f) Any classified employee who becomes a candidate for any paid public office as permitted by this section shall be placed on a leave of absence without pay for the period of such candidacy, commencing upon the filing of the certificate of candidacy. If elected, such employee shall resign the position in the classified service to be effective no later than the date of assuming the elective office.

18.02. Application of the Hatch Act-Employees whose principal employment involves an activity which is financed wholly or in part by loans or grants made by the United States or a Federal agency are subject to applicable provisions of the Federal Hatch Act. These provisions shall be made known to classified employees by the appointing authority concerned and compliance adhered to.

18.03. Additional Prohibition for Highways Employees-No person may be appointed or employed in any capacity by the department who is a candidate or holds any public office or is a member of any political party committee. Employees of the Department of Highways may not be a candidate for or hold any public office or be a member of any political party committee. An employee of the Department of Highways who becomes a candidate for or holds any public office or becomes a member of any political party committee shall vacate his position with the department immediately on the date of the filing of candidacy or the date of assuming the public office or the political party committee membership.

Section 19. Other Employment

No employee shall hold other public office or have conflicting employment while in the classified service. Determination of such conflict shall be made by the appointing authority and Commission.

Section 20. Payroll Certification

(a) No state disbursing or auditing officer shall make or approve or take any part in making or approving any payment for personal service to any person holding a position in the classified service unless the payroll voucher or account of such pay bears the certification of the Director, or of his authorized agent, that the persons named therein have been appointed and employed in accordance with the provisions of this law and the rules, regulations and orders thereunder. The Director may for proper cause withhold certification from an entire payroll or from any specific item or items thereon. The Director may, however, provide that certification of payrolls may be made once every six months, and such certification shall remain in effect except in the case of any officer or employee whose status has changed after the last certification of his payroll. In the latter case no voucher for payment of salary to such employee shall be issued or payment of salary made without further certification by the Director.

(b) If an appointing authority fails to comply with an order of the Commission after a hearing, he shall be personally liable to the appealing employee for any salary due from the time of the final order of reinstatement by the Commission.

(c) If the Director wrongfully withholds certification of the payroll voucher or account of any employee, such employee may maintain a proceeding in the courts to compel the Director to certify such payroll voucher or account.

Section 21. Records and Reports

The Agency shall establish and maintain a service record for each employee, showing name, title, organizational unit, salary, changes in status, service ratings, and such other personnel information as may be considered pertinent. All personnel records shall be open to the inspection of the Commission.

Section 22. Duties of State Officers; Legal Proceedings to Secure Compliance; Penalties

22.01. Duties of State Officers-Pursuant to Chapter 29, Article 6, Section 12 of the Code, all state officers and employees shall comply with and aid in all proper ways in carrying out the provisions of Article 6, the rules, regulations, and orders thereunder. All officers and employees shall furnish any records or information which the Director or the Commission may request for any purpose of Article 6.

22.02. Legal Proceedings to Secure Compliance-Pursuant to Chapter 29, Article 6, Section 12 of the Code, the Director may institute and maintain any action or proceeding at law or in equity with what he considers necessary or appropriate to secure compliance with Article 6, the rules and orders thereunder.

22.03. Penalties-The Civil Service Commission adopts as its policy by reference thereto the provisions of Chapter 29, Article 6, Section 22(b) and will enforce the policy accordingly.

Section 23. Grievance Procedure

23.01. Grievance Procedure

(a) General Application-Except as provided in paragraphs (b) and (c) of this section, this Section applies to any matter which is subject to the control of agency management and which is of concern or dissatisfaction to an employee.

(b) Exceptions-This section does not apply to:

1. A matter subject to final administrative review outside the agency.

2. The content of published agency policy such as the mission of an agency, its budget, its organization, and assignment of personnel (other than the grievant).

3. Any action by an agency due to a Federal or State law, Civil Service law and/or regulation as well as directives from the Governor's Office.

4. Denial of a recommendation for, or disapproval of, a merit salary increase, performance award, or other kind of honorary or discretionary award.

(c) Appeals-The following events, actions, and circumstances are directly appealable to the Civil Service System and are not subject to the Grievance Procedure.

-- examination rejection
-- examination rating
-- removal from register
-- alleged discriminatory action in recruitment, examination, appointment, training, retention, discipline, or any other personnel action because of political or religious opinions or affiliations or because of race, national origin, or any other non-merit factors
-- alleged discriminatory action on the basis of age, sex, or physical disability when specific age, sex, or physical requirements do not constitute a bonafide occupational qualification
-- dismissal
-- suspension for more than thirty (30) calendar days in any twelve (12) month period
-- demotion and transfer-demotion of a permanent employee.

23.02. Purpose of Grievance-By providing a channel for appeal, a grievance procedure guarantees all employees a "fair shake" whenever there is a possibility of improper discipline or unfair treatment. The grievance procedure aims at creating a higher level of morale for the employee and increases his sense of well-being in his work situation. Ideally, the intent is to create for all employees greater job satisfaction and greater confidence in fair treatment and to provide a legitimate outlet for employee "gripes". It is believed that a fair grievance procedure will improve the quality of communication and performance in any organization.

Section 23. Grievance Procedure (Cont'd)

23.03. Who May File a Grievance-A grievance process must move upward in the chain of command. An employee may file a grievance with or against his supervisor, the supervisor with or against his chief, the chief with or against the assistant director or director, the director against the administrative officer. However, a supervisor may not file against a subordinate since the authority vested in his position permits corrective action.

23.04. Employee Representative-At all steps of the agency grievance procedure, the employee has the right, but shall not be required, to be represented by one individual of his choice. The agency may, if it desires, establish counselors to represent the employee and help solve disputes at the local level. The aggrieved employee may use this counselor if he desires or may choose to be represented by himself or another individual.

23.05. General Provisions

(a) Conflicts of Policy-The provisions of this Section shall be controlling in cases of conflict and shall supersede any past or present agency practice, policy, or procedure.

(b) Appeal Rights-Nothing herein shall be so construed as to deprive a classified employee of the right of appeal to the Director of Personnel or the Commission in appropriate cases, or to alter or extend the time within which an appeal is required to be filed with the Commission, or to alter in any way the rules of the Commission.

(c) Reprisals-Any supervisor who takes reprisal action of any kind against any employee who makes use of this Grievance Procedure shall be subject to administrative disciplinary action.

(d) Improper Influence-Any agency employee who uses his official position to coerce, attempt to coerce, or influence in any improper manner any member of a Hearing Board or witness shall be subject to administrative disciplinary action.

(e) Adverse Party-When a grievance hearing is conducted at any step under this procedure, the party against whom the grievance complaint is made shall have the right to appear and testify at the hearing.

(f) Exclusive Remedy-All agency employees shall use this Grievance Procedure for matters covered in Section 23.01.

(g) Paid Time-Off-An employee selected by a grievant to represent him in the processing of a grievance through this procedure shall be granted necessary time-off during his working hours to represent such other employee without loss of pay and without charge to annual or compensatory leave credits. Likewise, the grievant shall be granted time-off with no loss of pay and benefits. An employee may have the assistance of one other person in the preparation and presentation of the grievance. At the request of the

Section 23. Grievance Procedure (Cont'd)

grievant, such person may be present at any step of the procedure. In addition to actual time spent in grievance presentation at the first, second and third steps, the employee representative shall be granted time-off during his working hours, not to exceed four (4) hours per grievance, for the preparation of such grievance without loss of pay and without charge to annual leave or compensatory leave. Likewise, the grievant shall be granted time-off during his working hours, not to exceed four (4) hours per grievance, with no loss of pay and benefits. However, it shall be understood by all parties that the first responsibility of any State employee is the work assigned by the appointing authority to the employee. Grievance preparation and representation activities by an employee shall not seriously affect the overall productivity of the employee.

(h) Distribution of Grievance Procedure-The appointing authority shall furnish to each employee a copy of the currently approved Grievance Procedure.

(i) Informality-Meetings and hearings held between employee and employer at any step of the agency Grievance Procedure shall be conducted in an informal manner, and the technical rules of evidence shall not apply. Every effort should be made to maintain an informal, relaxed atmosphere in which an amicable resolution of the grievance may be more readily achieved.

23.06. Processing the Grievance

(a) First Step-(Discussion with Immediate Supervisor)-All grievances shall be presented within five (5) working days from the date the grievant first becomes aware of, or should have become aware of, the cause of such grievance. Where the cause of the grievance is of an ongoing or continuing nature, the grievance shall be presented within five (5) working days of the last occurrence of the cause of grievance. The aggrieved employee should present his grievance verbally to his immediate supervisor, and if possible, the grievance should be settled through discussion. The supervisor must give his verbal reply to the aggrieved employee within three (3) working days after the grievant presents his grievance.

(b) Second Step-(Section, Division, or Unit Head)-If the employee is not satisfied with the reply at the First Step or if the response is not rendered within the prescribed time limit, the employee must write the grievance and submit it to his immediate supervisor within five (5) working days. The five (5) working days shall commence from and exclude the date of the supervisor's First Step answer or the prescribed day in which the answer was due. The immediate supervisor must forward the written grievance along with a summary of the verbal response to the appropriate local section, division, or unit head, and the Director. The local section, division, or unit head shall investigate the grievance and afford the employee an opportunity to present his viewpoint during an informal hearing. Unless the relief sought by the grievant has been granted, the hearing shall not be held until at least ten (10) working days after the immediate supervisor's verbal First Step answer. The hearing must be completed and the employee given a written statement of the

Section 23. Grievance Procedure (Cont'd)

findings and recommendation of the local section, division, or unit head within fifteen (15) working days after the receipt of the immediate supervisor's verbal First Step answer. The employee shall have the right, but shall not be required, to be represented by an individual of his choice during this step of the procedure.

(c) Third Step-Hearing Board

1. Generally-In the event that the decision of the section, division, or unit head does not satisfy the employee or a decision was not rendered within the prescribed time limits, the employee may present the grievance in writing to a Hearing Board within five (5) working days of his receipt of the Second Step written findings or the prescribed day on which such written findings were due. Presentation of the grievance to the Hearing Board is accomplished by the employee's serving within the five (5) day period a written request to convene the Hearing Board upon the local section, division, or unit head and a copy thereof upon the Director.

The Hearing Board shall consist of three (3) members. One member shall be designated by the agency head and one member shall be designated by the aggrieved employee. The third member shall be appointed by the other board members and shall be the chairperson of the Board. The chairperson shall conduct the hearing and prepare the decision of the Board.

After holding the hearing, the Board shall issue a written decision notifying all parties of its decision. The hearing must be held and the decision issued within fifteen (15) working days following the date of service of the grievance in this Step. The aggrieved employee shall have the right, but shall not be required, to be represented by an individual of his choice during this step of the procedure.

2. Summary Disposition-At the time after the filing of a grievance in the Third Step, the Hearing Board may summarily dispose of the grievance on any of the following grounds:

a. The aggrieved employee has no legal right to grievance consideration.

b. The appointing authority lacks jurisdiction of the subject matter or of the person against whom relief is sought.

c. The grievance has not been made in the required manner or within the prescribed period of time.

d. The aggrieved employee has failed to appear at the time and place fixed for the grievance hearing.

e. The aggrieved employee has withdrawn or abandoned the request for grievance consideration.

Section 23. Grievance Procedure (Cont'd)

When the Hearing Board summarily disposes of a written grievance, it shall notify all interested parties in writing.

3. Employee-members-An employee designated as a member of a Hearing Board shall be granted necessary time off during his working hours, without loss of pay and without charge to annual or compensatory leave credits, to prepare for and hear appeals and prepare findings.

4. Notice of Hearing-The aggrieved employee shall be given notice at least five (5) calendar days in advance of the hearing, provided that by consent of the Hearing Board and the aggrieved employee, such notice and delay may be waived.

5. Time and Place of Hearing-The place of the grievance hearing shall be specified by the Hearing Board and shall be in a convenient place accessible to the aggrieved employee. All such hearings shall be held on the employer's premises or on other premises mutually agreeable to the parties and within regular working hours, provided that any such hearing might continue beyond normal working hours.

6. Procedures Before Hearing Board

a. The aggrieved employee, employing agency, and representatives of both shall have the right to call, examine, and cross-examine witnesses who are employees of the agency against which the grievance is lodged and who have knowledge of the facts at issue.

b. Both parties may produce witnesses other than employees of the agency against which the grievance is lodged, and such witnesses shall be subject to examination and cross-examination.

c. Reasonable and necessary travel expenses of material witnesses called under sub-section (a) above shall be paid by the agency.

d. The aggrieved employee shall have the right to require the production of books, papers, records, and other items pertinent to the facts at issue which are within the control of the agency against which the grievance is lodged and which are not held to be confidential or privileged by law.

e. The aggrieved employee shall have the right, but shall not be required, to be represented by an individual of his choice.

f. Affidavits and ex-parte statements offered during the course of a grievance hearing may be received and considered by the Hearing Board.

g. The Hearing Board shall have the right to offer examination and cross-examination of any witness and to conduct the hearing in a reasonable and orderly manner.

Section 23. Grievance Procedure (Cont'd)

h. The Hearing Board shall have the right to limit corroborative evidence.

i. When a pending case involves substantially the same question of law or fact as presented in a prior case, the Hearing Board may consider any part of the record in such previous case as it may deem relevant, provided that in the application of this provision, no party shall be deprived of the right to cross-examine any witness.

j. The Hearing Board may order that the witnesses in any hearing be separated so as to preclude any witness, other than the parties and their representatives, from hearing the testimony of any other witness.

k. When two or more grievance petitions involve similar or related circumstances, the Hearing Board may order a joint hearing of any or all the matters at issue or may order that all such petitions be consolidated.

l. Any officer or employee required to testify shall not be subjected to any disciplinary action by his appointing authority because he testifies, but may be held accountable for actions on his part revealed by his testimony.

7. The written decision of the Hearing Board shall be binding upon all parties, pending review by the Commission, and shall specify the precise remedy to be taken. The Hearing Board has the remedial power to order that the employee be made whole and the cause of the grievance be remedied. The written decision shall contain a statement of the issues presented, a statement of facts including a summary of the testimony of each witness, the opinions of the Hearing Board members including assessments of the credibility of witness, and the decision and remedy.

23.07. Review by Commission-Immediately upon issuance of the Hearing Board's written decision, the Board shall send a copy of that decision to the Commission for its review. The Commission, at its discretion, may order a hearing on the subject of the grievance. Whether or not the hearing is held, the Commission has the power to affirm, reverse, or modify the decision of the Hearing Board. If the Commission declines to order a hearing of the grievance, the Commission's decision about the grievance must be issued within forty-five (45) calendar days after the Commission's receipt of the Hearing Board's decision. If the Commission orders a hearing of the grievance, the Commission's decision about the grievance must issue as does any other appeal.

23.08. Forms-The Director of Personnel shall prescribe a uniform grievance form to be used and distributed by all agencies covered by the Civil Service System. The Director is authorized and empowered to require that every appointing authority and his agents have ample supplies of the grievance procedure and forms to be readily available to employees.

Section 23. Grievance Procedure (Cont'd)

The official Grievance Procedure Form, Standard Form CS-G-1, shall be printed in triplicate. The original copy shall be retained by the employee for personal use. The second copy shall be forwarded to the agency involved and shall be maintained by the agency in an administrative file. The third copy shall be filed with the Civil Service Commission. This grievance procedure form will be used for recording the employee's grievance and the action taken by officials at appropriate steps.

Section 24. Training

24.01. Training-Each agency is responsible for providing training to employees of the agency based upon the agency's needs and resources and the employee's needs and capability. Selection of employees for training shall ensure equal opportunity and shall not discriminate on the basis of race, sex, age, religion, national origin, political affiliation, handicap or any other non-job related factors. The Director of Personnel shall make available to the agencies technical assistance in the areas of training needs assessment, locating training materials and resources, course development, training techniques, training evaluation and coordination of training between the agencies.

(a) Required Courses-The Director shall provide training courses on specific aspects of personnel administration under Civil Service law and these rules and regulations, and shall designate employees by classification, or by duties, who must attend each type of course.

(b) General Courses-The Director shall make available to the agencies training in knowledge, skills and abilities which are applicable broadly in many classifications in all agencies. Employee selection for the courses shall be consistent with established agency and Civil Service nomination procedures.

24.02. Apprenticeship Programs-The Director of Personnel, or his designee, in cooperation with participating appointing authorities within each agency shall develop and annually revise by the thirty-first day of December a list of employment classifications appropriate for apprenticeship training. Each appointing authority shall develop apprenticeship programs for approved classes that have employees working in apprenticeable trades which are, or may be recognized by, the United States Department of Labor, Bureau of Apprenticeship and Training. The apprenticeship program shall be developed and conducted in a manner that will assure meeting the national minimum requirements of quality and be registered with the United States Department of Labor, Bureau of Apprenticeship and Training.

Subject to the approval of the Director of Personnel, each participating agency shall determine the location and positions in which apprenticeships shall be established. The Chief Administrative Officer of each agency shall establish procedures for the coordination of apprenticeship programs developed in accordance with this section and shall provide to the Director of Personnel, at his request, information which shall include, but not be limited to, the number of persons who applied for apprenticeship positions, the number of persons accepted into the apprenticeship programs, the number of persons who successfully completed and received a certificate of completion from the Bureau of Apprenticeship and Training, the number of persons who failed to complete apprenticeships, the number of persons who remain employed after successfully completing apprenticeships and a summary of characteristics of applicants and participants in the program.

24.03. Apprenticeship Advisory Board-The Director of Personnel shall prepare and submit necessary reports to the Apprenticeship Advisory Board established in accordance with § 29-6-17b of the West Virginia Code, as amended, regarding the achievements and deficiencies of the apprenticeship program.

Section 25. Amendments

If and when it appears desirable in the interests of good administration, the Civil Service Commission, after public notice and public hearing, may amend the rules as it becomes necessary.

CIVIL SERVICE COMMISSION
Willard H. Erwin, Jr., Chairman
Ronald F. Stein

Address Communications To:
Director of Personnel
1900 Washington Street East
Room B-456
Charleston, West Virginia 25305
Phone 348-3950

STATE OF WEST VIRGINIA

CIVIL SERVICE SYSTEM

September 9, 1988

Honorable Ken Hechler
Secretary of State
Building 1, Room W-157
State Capitol Building
Charleston, West Virginia 25305

Dear Mr. Secretary:

Please be advised that the Civil Service Commission desires to withdraw the Emergency Rules submitted on August 25, 1988 relating to Section 16.03 of the Civil Service Rules and Regulations on the payment of accrued annual leave upon separation from service.

Thank you for your cooperation in this regard.

Sincerely,

Lowell D. Basford

Lowell D. Basford
Acting Director of Personnel

LDB:ss

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OFFICE OF THE SECRETARY OF STATE

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

CHARLES G. BROWN
ATTORNEY GENERAL

(304) 348-2021

CONSUMER HOT LINE
(800) 368-8808

August 17, 1988

Honorable Glen B. Gainer, Jr.
State Auditor
State Capitol, Room W-100
Charleston, West Virginia 25305

Dear Auditor Gainer:

This office is in receipt of your request for an opinion regarding Enrolled Committee Substitute for House Bill Number 4367 Acts of the Legislature, Regular Session, 1988. The bill was passed with an effective date of July 1, 1988. The bill amended Chapter 5, Article 5, Section 3, of the Code of West Virginia of 1931, as amended (hereinafter Code).

Specifically, your inquiry addresses the question:

> "What is the maximum number of accrued annual leave days of an eligible employee under Code 5-5-3 for which, at his option, lump sum payment may be made at the termination of his employment, and in what manner are these days of accrued annual leave to be actually applied in respect of calendar months in determining the total and full amount of such lump sum salary payment to be made?"

You requested that I interpret the above question in its broadest sense to give you the guidance that this office deems necessary for the reason that the amount of an employee's lump sum payment may also be utilized at the option of the employee in enhancing the employee's retirement benefit computation.

Code 5-5-3, as amended by Enrolled Committee Substitute for House Bill No. 4367 provides in full as follows:

> "Every eligible employee, as defined in section one of this article, at the time his or

> her active employment ends due to resignation, death, retirement or otherwise, may be paid in a lump sum amount, at his or her option, for accrued and unused annual leave at the employee's usual rate of pay at such time. The lump sum payment shall be made by the time of what would have been the employee's next regular pay day had his employment continued. In determining the amount of annual leave entitlement, weekends, holidays or other periods of normal, noncountable time shall be excluded, and no deductions may be made for contributions toward retirement from lump sum payments for unused, accrued annual leave, since no period of service credit is granted in relation thereto; however, such lump sum payment is to be a part of final average salary computation; and where any such deduction of employee contribution may have been heretofore made, a refund of such shall be granted the former employee and made by the head of the respective former employer spending unit: Provided, That the superintendent of the department of public safety shall make deductions for retirement contributions of members of the department, since retirement benefits are based on cumulative earnings rather than period of service."

Code 5-5-3 refers to Code 5-5-1 for a definition of eligible employee. Code 5-5-2 provides that eligible employees with three or more years service shall receive an annual salary increase equal to thirty-six dollars times the employee's years of service not to exceed twenty years. Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intent can be gathered from the whole of the statute. Kimes v. Bechtold, ___ W. Va. ___, 342 S.E.2d 147 (1986); Manchin v. Dunfee, ___ W. Va. ___, 327 S.E.2d 710 (1984). Accordingly, Code 5-5-3 should be construed in pari materia with Code 5-5-1 and Code 5-5-2.

Code 5-5-3 first provided for an optional payment for accrued annual leave to an eligible employee in a lump sum in 1986. Prior to enactment of Code 5-5-3, the accumulation of, use of, and payment for accrued and unused annual leave days was governed by rules and regulations of the Civil Service Commission, custom and usages of constitutional officers, or rules and regulations of agencies of state government not subject to the rules and regulations of the Civil Service Commission. Constitutional offices and agencies not subject to the Civil Service

Commission frequently adopted, on a voluntary basis, the policies and procedures of the Civil Service Commission. Certain prior opinions of this office set forth the history and current practices of such rules and regulations constituting the law applicable to annual leave days. See, 51 Ops. Att'y Gen. 714 [1964-1966]; 60 Ops. Att'y Gen. 43 [1982-1984]; and 60 Ops. Att'y Gen. 118 [1982-1984].

Precedent established by long continued custom and usage is highly persuasive in construing a statute. Hechler v. McCuskey, ___ W. Va. ___, 365 S.E.2d 793 (1987); State ex rel. Moore v. Blankenship, 158 W. Va. 939, 217 S.E.2d 232 (1975); Robertson v. Hatcher, 148 W. Va. 239, 135 S.E.2d 675 (1964). The custom and usage of long precedent established within state government with respect to the termination of employment by any means is that the employee remain on the payroll of the agency or office until the accrued and unused annual leave days are exhausted. Of course, the employee receives his or her salary for such period.

Statutes creating retirement or termination benefits for public employees should be liberally construed so as to effectuate their purpose. Spence v. Yerace, 155 W. Va. 54, 180 S.E.2d 868 (1971). The custom and usage described above has not been supplanted by Code 5-5-3. Rather the Legislature has provided public employees with an option in addition to the custom and usage described above.

In response to the first part of the question raised by your request for an opinion, the maximum number of accrued annual leave days for which an eligible employee is entitled to a lump sum settlement under Code 5-5-3 is the maximum accrued annual leave days an employee could lawfully carry into a new calendar year under the rules and regulations or customs and usages of his employer plus the number of annual leave days actually accumulated by the employee within the calendar year of the employee's election to receive the lump sum settlement. For instance, assume an employee elects to retire on December 31, 1988. That employee carried over 40 days of leave on December 31, 1987, under the rules and regulations of his employer. The employee would be eligible to receive a lump sum settlement for 40 days plus any annual leave days accumulated between January 1, 1988, and through December 31, 1988. In the instance of an employee governed by the Civil Service Commission, an employee with fifteen or more years service could accrue 24 additional days for a maximum of 64 days through December 31, 1988. Of course, other agencies and offices have different rules and regulations with respect to accrual of annual leave. Each case must be judged on its own merits.

In answer to the second part of the question posed by your request for an opinion, Code 5-5-3 specifies that the lump sum settlement is to be based upon the employee's usual rate of pay at the time of his or her termination from employment for any reason. Words used in a statute are to be given their plain meaning. Thompson v. Chesapeake & Ohio Railroad Co., 76 F. Supp. 304 (S.D. W. Va. 1948). Accordingly, an employee's usual rate of pay is that employee's salary inclusive of that employee's entitlement to annual increment at the time of the employee's termination from employment, with such annual increment to be prorated on the basis on which the employee is paid, whether hourly, bimonthly, monthly, or otherwise. The lump sum payment to which an employee is entitled is to be made by such employee's "next regular payday had his employment continued." The statute looks forward in specifying the time for payment. It is the opinion of this office that the statute also looks forward in specifying that the annual leave entitlement (the amount of lump sum payment for accrued annual leave) is to be determined by excluding, as specified in the statute, noncountable time of the weekends of a calendar month, the holidays of such month, and the other periods of normal, noncountable time (such as compensatory days which are lost) and with the corollary, countable days, clearly being those workdays remaining in such calendar month and against which the employee's accrued and unused annual leave days are to be applied and credited.

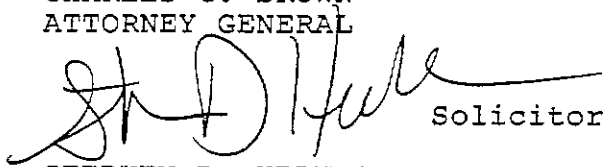
During an employee's periods of normal active employment, his accrued annual leave days are only used and credited against such countable workdays (not used against weekend days, holidays or days properly taken as compensatory days earlier earned); therefore, it is the opinion of this office that the Legislature in Code 5-5-3 generally continues such application for determining the amount of the lump sum payment at the time of termination of employment, usually through resignation or retirement. Thus, although an eligible employee will not be remaining on the payroll, but instead will be electing and exercising his option to lump sum payment; nevertheless, the calendar month of the date of his last day on the payroll and/or subsequent calendar months must be used to determine the countable days against which his accrued annual leave days are to be applied and credited and the full month's and/or portion of a month's salary for which he is entitled to be paid in lump sum amount. In respect of any portion of a month and part of month's salary to which an employee may be entitled, such is to be computed by first striking from consideration, as excludable, the aforesaid weekend days, holidays, or other noncountable time, and thereafter determining the fractional part of the monthly salary which is to constitute such lump sum payment, with the numerator thereof being the accrued leave days of an employee remaining and applicable in such month

and the denominator thereof being the countable days of such month remaining after the aforesaid exclusions.

Finally, we turn to consideration of your request that this opinion be expanded, as deemed necessary to give the clearest guidance. The statutory provision, Code 5-5-3, as we earlier noted, is cross-referenced to Code 5-5-1 wherein the increment for certain "eligible employees" is provided, and since Code 5-5-2 also addresses such increment, it must be read in pari materia with Code 5-5-1, both of which latter sections specify that such annual increment constitutes an "annual salary increase." is thus an integral part of an employee's gross annual salary, and such increment is not to be deleted or subtracted in the course of determining the value of payment for accrued and unused annual leave days, either under the "remaining on the payroll" method or under the "lump sum payment" optional method, since such deletion or subtraction unlawfully reduces the value payable for accrued annual leave days.

Very truly yours,

CHARLES G. BROWN
ATTORNEY GENERAL

By  Solicitor General

STEPHEN D. HERNDON

CGB/SDH/k

CIVIL SERVICE COMMISSION
Willard H. Erwin, Jr., Chairman
Ronald F. Stein

Address Communications To:
Director of Personnel
1900 Washington Street East
Room B-456
Charleston, West Virginia 25305
Phone 348-3950

STATE OF WEST VIRGINIA

CIVIL SERVICE SYSTEM

August 25, 1988

M E M O R A N D U M

TO: All Department Heads and Agency Personnel Officers

FROM: Lowell D. Basford
Acting Director of Personnel

SUBJECT: Emergency Rules to Implement the Provisions of Chapter 5-5-3 of the Code Relating to the Payment of Annual Leave upon Separation from Employment

The Civil Service Commission has this date promulgated Emergency Rules to implement the provisions of Chapter 5-5-3 of the West Virginia Code, as amended, relating to the calculation and payment of annual leave upon separation from employment.

Specifically, the Emergency Rule has the following provisions:

1. Upon separation from employment for any reason, an employee shall be paid for all accrued and unused annual leave as of the effective date of the separation from service or as of the last working day in the notice period.

2. The employee may, at their option, choose to be paid for the accrued and unused annual leave in lump sum which payment shall be made by the time of what would have been the employee's next regular payday had his employment continued.

3. Regardless of the option the employee chooses, the amount of separation and leave payment shall be calculated by using the daily rate of pay for the number of countable work days which such accrued and unused annual leave covers.

4. The annual increment shall not be factored into the calculation for the payment of the annual leave.

I am enclosing a copy of the Emergency Rules as promulgated.

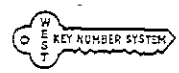
I would appreciate your posting these notices throughout your agency.

LDB:ss

Enclosures

posed of by the pleadings, the writ of mandamus prayed for is denied, and the case dismissed as moot.

Writ denied; case dismised as moot.



155 W. Va. 54

Gene R. SPENCER

v.

Joseph YERACE, et al., as members of the Board of Trustees of the Fairmont Policemen's Pension or Relief Fund, et al., etc.

No. 13047.

Supreme Court of Appeals of West Virginia.

Submitted April 20, 1971.

Decided May 11, 1971.

Mandamus proceeding by policeman to compel board of trustees of policemen's pension or relief fund and city board of directors to award him a pension by reason of his permanent physical and mental disability. From an adverse judgment of the Circuit Court, Marion County, J. Harper Meredith, J., petitioner appealed. The Supreme Court of Appeals, Haymond, J., held that under statute, in effect in January 1969 when policeman's disability occurred, governing pension awards to permanently disabled policemen, member of city police department who was permanently disabled to extent that he could not perform all ordinary services of an active policeman, and who satisfied other requirements of the statute, was entitled to pension provided by the statute, and it was duty of the board of trustees to award him such pension from date of occurrence of disability.

Motion to reverse granted; reversed and remanded with directions.

1. Statutes ⇐181(1)

In construction of statutes, it is legislative intent manifested in the statute that is important, and such intent must be determined primarily from language of the statute.

2. Municipal Corporations ⇐220(9)

Statutes creating pension and relief fund for municipal employees should receive liberal construction.

3. Statutes ⇐205, 206

In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation.

4. Municipal Corporations ⇐187(1)

Some of purposes of statutes providing for police pensions are to promote efficiency, to encourage continuity of service, and to protect the employee and his family.

5. Municipal Corporations ⇐187(5)

Legislature, in statute governing pension awards to permanently disabled policemen, intended to provide disability pensions for member of police department of municipality when his disability is such that he cannot perform all services of an active policeman, and his ability to perform light jobs or desk work or office work does not deprive him of the benefit provided by the statute. Code, 8-22-24.

6. Municipal Corporations ⇐187(5)

Under statute, in effect in January 1969 when policeman's disability occurred, governing pension awards to permanently disabled policemen, member of city police department, who was permanently disabled to extent that he could not perform all ordinary services of an active policeman, and who satisfied other requirements of the statute, was entitled to pension provided by the statute, and it was duty of board of trustees of policemen's pension or relief

fund to award him such pension from date of occurrence of disability. Code, 8-22-24.

7. Mandamus ⇐105

Duty of board of trustees of policemen's pension or relief fund to award policeman pension from date of occurrence of disability under statute governing pension awards to permanently disabled policemen may be enforced in mandamus proceeding. Code, 8-22-24.

Syllabus by the Court

Under the statute, Section 18, Article 6, Chapter 8, Code, 1931, as amended, in effect when his disability occurred, a member of the police department of a municipality who is permanently disabled to the extent that he can not perform all the ordinary services of an active policeman, and who has satisfied the other requirements of the statute, is entitled to the pension provided by the statute and it is the duty of the Board of Trustees of the Policemen's Pension or Relief Fund of the municipality to award him such pension from the date of the occurrence of such disability; and such duty may be enforced in a mandamus proceeding.

J. Patrick Bower, Clarksburg, Ross Maruka, Fairmont, for appellant.

Gary K. Rymer, Fairmont, John S. Sibray, Charleston, for appellees.

HAYMOND, Judge.

This is an appeal, granted January 18, 1971, upon the application of the petitioner, Gene R. Spencer, from the final judgment of the Circuit Court of Marion County, West Virginia, rendered October 20, 1970, which denied the petitioner a policemen's permanent disability pension and certain other relief for which he prayed in his petition.

The relief which the petitioner seeks in this mandamus proceeding instituted in the Circuit Court of Marion County, West Virginia January 30, 1970 is a writ to compel the defendants, Joseph Yerace, James Fox, Edward De Vito, Junior Slaughter and Mayor Albert F. Robinson, as members of the Board of Trustees of the Policemen's Pension or Relief Fund of the City of Fairmont, herein sometimes referred to as Trustees, and Mayor Albert F. Robinson, William G. Meyer, Forrest L. Springer and William MacOlvin, as members of the Board of Directors of the City of Fairmont, West Virginia, a municipal corporation, to cause a board of medical examiners composed of at least three physicians to be convened to determine if the petitioner is so physically or mentally permanently disabled as to render necessary his retirement from all services in the police department of the city of Fairmont, and to file a report of such examination; to promulgate adequate rules and regulations as to how temporary disability shall be paid; to pay the petitioner immediately twenty-six weekly payments of temporary disability; to evaluate his claim for disability in an impartial manner; and in effect to award the petitioner a pension by reason of his permanent physical and mental disability as provided by Section 18, Article 6, Chapter 8, Code, 1931, as amended, before that statute was amended by Chapter 86, Acts of the Legislature, 1969, regular session, effective July 1, 1969 which now appears as Section 24, Article 22, Chapter 8, Code, 1931, as so amended.

Leave to move to reverse having been granted this proceeding was submitted for decision on April 20, 1971 upon the motion of the petitioner to reverse, the record, and the briefs and the oral arguments of the attorneys for the respective parties.

The material facts are not disputed and the question for determination is whether, upon the undisputed facts, the petitioner is entitled to a permanent disability pension under the applicable provisions of the stat-

ute in effect when he became disabled in 1969, which are:

"If any member of such fire department or police department of any such municipality shall become and be found upon examination by a majority of a board of medical examiners, which board shall consist of not less than three physicians appointed by the board of trustees, to have become so physically or mentally permanently disabled by reason of services rendered in the performance of his duties in such department, as to render necessary his retirement from all service in such department, or if any member who has been such a member of either of such departments for a period of not less than five consecutive years preceding his disability become and be found upon such an examination to have become so physically or mentally permanently disabled, regardless of the cause therefor, as to render necessary his retirement from all services in such department, such board of trustees shall retire such permanently disabled persons from all services in such department: and said board of trustees of such pension or relief fund shall authorize the payment to such permanently disabled persons monthly from the pension fund the amounts as fixed by the rules hereinafter provided for. If any member of such department shall at any time be injured or become sick, so as to render such member temporarily disabled, he shall be paid from said pension or relief fund the amount to be determined by the rules established, as aforesaid, during such disability for not exceeding twenty-six weeks. No person shall be eligible for any pension unless such member shall have presented himself for an examination at the time of his appointment to the department and his condition was then approved by a majority of a board of medical examiners appointed as aforesaid by such pension board: Provided, however, that this provision shall not apply to any person who is a member of either of said departments at the time of the enactment of this law.

"Any person who has been heretofore, or who shall hereafter be, allowed a pension under the provisions of this article may be required by such board to be re-examined at any time and if he is then not disabled as aforesaid he shall be ordered by the mayor or other chief executive officer of the municipality to return to duty in his former position in the fire or police department, as the case may be, and his pension discontinued: Provided, however, that this provision shall not apply to any person until such person can and shall be restored to his former position in such department."

The petitioner became a member of the Fairmont police department October 1, 1959 and served continuously on active duty as a member of the department until January 26, 1969. During his service he attained the rank of sergeant. In January 1969 he was advised by his physician that he was incapable of performing the duties of a police officer. Under date of February 4, 1969 he applied in writing to the Board of Trustees of the Policemen's Pension or Relief Fund of the City of Fairmont for a permanent disability pension by reason of physical injury on January 19, 1967 while on duty as a patrolman. By letter dated February 15, 1969 the petitioner was informed by the Trustees that his request for permanent disability pension had been denied and the letter contained a request that the petitioner "furnish the pension board with medical reports showing us why you should be put on disability pension."

After some correspondence between an attorney of the petitioner and a member of the board of trustees the petitioner was separately examined on April 29 by three physicians who filed separate reports of his condition, dated April 29, May 2, and May 21, 1969 but they were not convened as a board of examiners to examine the petitioner and they made no finding as to disability. After his examination by those doctors the petitioner instituted this mandamus proceeding and the court issued a rule

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returnable February 14, 1970 and a hearing was held on that day.

By order entered March 6, 1970, the court found that the applicable statute had not been complied with and ordered the Trustees to appoint a board of examiners consisting of three physicians to examine the petitioner and determine whether he was physically or mentally permanently disabled from performing his duties as a police officer of the city of Fairmont from and after January, 1969. Pursuant to that order the Trustees appointed a board of medical examiners consisting of Doctors Robert S. Wilson, R. T. Humphries and L. Dale Simmons who, after examining the petitioner on March 31, 1970, reported in writing that the petitioner "Is so physically or mentally permanently disabled as to render necessary his retirement from all services in the Police Department in the City of Fairmont." To that report, however Doctor Humphries appended a supplemental written statement that the petitioner "would not be able to do heavy police work that required handling drunks or arrests for fear of injuring neck. He could be able to do light jobs and desk work." By separate notations on June 4th and 5th, 1970, Doctors Wilson and Simmons concurred in the supplemental statement of Doctor Humphries. On the basis of the supplemental statement to the effect that the petitioner could perform light jobs or desk work, the Trustees rejected the application of the petitioner for a permanent disability pension.

By its final judgment the circuit court denied the petition for a writ of mandamus to require the Trustees to grant the petitioner a disability pension on the ground that, as the record showed that the petitioner can perform light jobs and desk work, he was not entitled to the disability pension for which he had applied. The court also refused the prayer of the petition for a writ to require a hearing by the court to determine whether the Trustees had evaluated the petitioner's claim for permanent disability in an impartial and unbiased manner, on the ground that it was immaterial how other persons who received disability pensions had been treated or how the Trustees had interpreted the provisions of the statute in the past; but the court awarded a writ to require the Trustees to promulgate rules and regulations for the distribution of pension funds according to the qualifications of those to whom any portion of such funds should be paid and the amounts paid pursuant to the provisions of Section 17, Article 6, Chapter 8, Code, 1931, as amended.

[1–4] In determining whether the petitioner is entitled to the permanent disability pension for which he has applied, and which the Trustees have refused to grant him, it is necessary to ascertain the legislative intent in enacting the applicable statute, Section 18, Article 6, Chapter 8, Code, 1931, as amended, in effect when the petitioner became disabled in January, 1969. "Enactments providing for police pensions are to be construed in accordance with the legislative intention, and the terms used are to be given their reasonable meaning. Such statutes and ordinances are to be construed as a whole and together with related acts. They are to be construed in accord with their object and purpose even if it is necessary, in so doing, to restrict the force of subsidiary provisions. Pension provisions applicable to members of the police force will be liberally construed and ambiguities resolved in favor of those to be benefited. * * *." 62 C.J.S., Municipal Corporations, Section 588d. The intention of the Legislature is ascertained from the provisions of the statute by the application of sound and well-established canons of construction, and the only manner in which the will of the Legislature is expressed is in the statute itself. In the construction of statutes, it is the legislative intent manifested in the statute that is important and such intent must be determined primarily from the language of the statute. State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars of the United States, 144 W.Va. 137, 107 S.E.2d 353.

Statutes creating a pension and relief fund for municipal employees should receive a liberal construction. Cawley v. The Board of Trustees of the Firemen's Pension or Relief Fund of the City of Beckley, 138 W.Va. 571, 76 S.E.2d 683; Sturm v. Seamonds, 122 W.Va. 338, 9 S.E.2d 227. In ascertaining the legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation. Woodroof v. City of Nashville, 29 Tenn.App. 426, 197 S.W.2d 4. Some of the purposes of statutes providing for police pensions are to promote efficiency, to encourage continuity of service, and to protect the employee and his family. 62 C.J.S., Municipal Corporations, Section 588d; State ex rel. Clemens v. Kern, 215 Ind. 515, 20 N.E.2d 514, 21 N.E.2d 141; Courtney v. Courtney, 251 Wis. 443, 29 N.W.2d 759.

[5] It is reasonably clear, from the provisions of the statute, that the Legislature intended to provide disability pensions for a member of the police department of a municipality when his disability is such that he can not perform all the services of an active policeman and his ability to perform light jobs or desk work or office work does not deprive him of the benefit provided by the statute.

[6, 7] The medical board, after examining the petitioner, as provided by the statute, found that he is so physically or mentally permanently disabled as to render necessary his retirement from all services in the police department of the city of Fairmont, and though each of the doctors individually by supplemental note stated that the petitioner could perform light jobs, desk work or office work, such acts are merely incidental and are not within the ordinary duties of an active policeman. To give the statute the effect of denying a policeman a pension who is permanently disabled to the extent that he can not perform the ordinary duties of an active policeman but can perform desk duties, light jobs or office work, would defeat the purpose of the Legislature in enacting the statute and would permit the city to reduce an employee in rank, level and dignity and change his class of employment by requiring him to accept a position which would accomplish that result even though the position is in the police department. Any active policeman can, of course, perform desk duties or office work, but that is not the ordinary or essential duty of a policeman. Any person who is physically unable to perform the ordinary duties of an active policeman can, of course, perform desk duty or office work in a police department. Otherwise stated, though an active policeman can, of course, discharge such incidental duties as desk work or office work, a disabled person who is physically and mentally capable only of doing desk work or office work or answering the telephone in a police department is clearly incapable of performing the ordinary duties of an active policeman. Though the statute uses the words "all service" it is clear that the Legislature meant all ordinary services of an active policeman and did not intend to deny a policeman, who because of permanent disability is incapable of performing all the ordinary services of an active policeman, his pension because his permanent disability does not prevent him from doing desk duty or light office work. This Court accordingly holds that under the statute, Section 18, Article 6, Chapter 8, Code, 1931, as amended, in effect in January 1969 when his disability occurred, a member of the police department of a municipality who is permanently disabled to the extent that he can not perform all the ordinary services of an active policeman, and who has satisfied the other requirements of the statute, is entitled to the pension provided by the statute and it is the duty of the Board of Trustees of the Policemen's Pension or Relief Fund of the municipality to award him such pension from the date of the occurrence of such disability; and such duty may be enforced in a mandamus proceeding.

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In Mainella v. The Board of Trustees of the Policemen's Pension or Relief Fund of the City of Fairmont, 126 W.Va. 183, 27 S.E.2d 486, a suit for declaratory judgment by a policeman against the Board of Trustees of the Policemen's Pension or Relief Fund of the city in which a judgment in favor of the plaintiff was reversed because the city and its mayor who were necessary parties, had not been made parties to the suit, this Court, in considering the same statutory provision involved in this proceeding indicated clearly that the legislative intent in enacting the statute was that a policeman who was disabled to the extent that he was physically and mentally unable to perform the duties of an active policeman, was entitled to the pension provided by the statute. In the opinion this Court said: "If the plaintiff is physically and mentally able to perform the duties of an active policeman, clearly he is not entitled to a pension, but if such disability exists his right thereto is equally clear."

In Pueblo Firemen's Pension Board v. Hübersberger, 132 Colo. 344, 288 P.2d 352, the Supreme Court of Colorado held, under the statute considered in that case, that a city fireman who was injured in an accident arising out of and in the course of his employment and was disabled from functioning as a fireman, was entitled to pension and could not be required to fill a non-classified position as telephone switchboard operator in another city department. The statute under consideration in that case is similar to and almost identical with the statute involved in this case and contains these provisions: "If any member or officer of any fire department shall become mentally or physically disabled so as to render necessary his retirement from service in such department, said board of trustees shall retire such member from service in such department, and he shall receive from the pension fund an amount equal to one half of the monthly salary received by him at the time he shall become so disabled. * * *." In the opinion the court said: "It is manifest from reading the foregoing legislative enactment that once the petitioner's disability was established (as was done in this case) that it was the mandatory duty (as evidenced by the word 'shall') of the Board to retire the petitioner and grant his pension. The Board recognized the petitioner's disability by relieving him of his duties as captain in the department. We think that the statute is clear and free from ambiguity and is capable of only one interpretation, if interpretation be required." It is true that the provision that the board "shall retire such member from service in such department," does not contain the word "all" which appears in a similar provision of the statute here involved, but it is evident that the provision in the Colorado statute related to all services in the department.

In Simmons v. Policemen's Pension Commission of Borough of Deal, 111 N.J.Law 134, 166 A. 925, the court held that a policeman, who while on duty as a motorcycle policeman was seriously and permanently injured and sustained an impairment of hearing and of vision but who was able to perform desk duty or other similar duties in the performance of which perfect hearing and eyesight were not essential, was entitled to a pension under a statute which provided that a member of a police or fire department could retire by reason of injury or disease. In the opinion the court used this pertinent language: "If a policeman is unable to perform the ordinary everyday duties of a policeman, and is permanently unfitted therefor, he is under permanent disability, and it is no answer to say that the statute does not entitle him to retire, because he is able to sit at a desk and make entries in a book. * * *. We think the theory of our statute is that a fireman is a fireman, a policeman a policeman, and neither a desk clerk; and that a policeman permanently disabled to do his ordinary duty as such and otherwise within the statute is entitled to invoke it." Here the petitioner is a policeman not a desk clerk or an office worker, just as the New Jersey policeman was a policeman and not a desk clerk.

The petitioner is a policeman, not a desk clerk; and a desk clerk is not a policeman.

The motion to reverse is granted and the final judgment of the Circuit Court of Marion County, to the extent that it denies the right of the petitioner to the pension for which he made application to the Trustees, is reversed and set aside and this proceeding is remanded to that court with directions that it issue a writ to require the defendants, as members of the Board of Trustees of the Policemen's Pension or Relief Fund of the City of Fairmont, and their successors in that office, to award the petitioner the pension for which he has made proper application; such pension to be effective from the date of the disability of the petitioner in January 1969.

Motion to reverse granted; reversed and remanded with directions.

NO. _____

IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

STATE OF WEST VIRGINIA
ex rel. WILLARD H. ERWIN,
JR., in his capacity as
Chairman of the Civil
Service Commission of the
State of West Virginia;
CHARLES M. KINCAID, in
his capacity as a Commis-
sioner of the Civil Service
Commission of the State of
West Virginia; BILL J.
WELLMAN, in his capacity
as a Commissioner of the
Civil Service Commission
of the State of West Virginia;
and LOWELL D. BASFORD, in
his capacity as Acting Director
of Personnel of the Civil
Service System of the
State of West Virginia and
Secretary of the Civil Service
Commission of the State of
West Virginia,

Petitioners,

v.

Original Jurisdiction
(Mandamus)

GLEN B. GAINER, JR.,
West Virginia State Auditor,

Respondent.

MEMORANDUM OF LAW IN SUPPORT
OF PETITION FOR WRIT OF MANDAMUS

As indicated in the petition for writ of mandamus filed with this Court on July 10, 1985, the Commissioners of the West Virginia Civil Service Commission, the Director of Personnel of the West Virginia Civil Service System and the Secretary of the Civil Service Commission of the State of West Virginia (hereinafter "Petitioners") are requesting that this Court compel the West Virginia State Auditor to process payroll documentation and issue warrants for the payment of (i) the regular salaries, including the statutorily authorized five percent (5%) cost of living adjustment for fiscal year 1985-86, for employees of the State of West Virginia on a prorated basis, and (ii) the incremental salary increase for years of service authorized by W.Va. Code § 5-5-2, in lump sum form. In support of the petition and this memorandum of law, Petitioners represent as follows:

I. STATEMENT OF THE CASE

By memoranda dated June 27 and July 2, 1985 (see Exhibits A and B to Petition), John F. McCuskey, as Commissioner of the Department of Finance and Administration of the State of West Virginia, directed all heads of the various departments and agencies of the State to submit to the Department of Finance and Administration as part of the payroll process (i) a regular payroll requisition for salary for State employees for their regular salaries, salary, including the legislatively authorized five percent (5%) cost-of-living adjustment for fiscal year 1986 for the pay period ending at noon, July 16, 1985 (hereinafter all such regular salaries shall be referred to as the "Regular Salaries"), and (ii) a separate supplemental payroll requisition for a lump sum payment of the incremental salary increase based on years of service authorized by W.Va. Code § 5-5-2 (hereinafter the "§ 5-5-2 Years of Service Payment"). In early July, 1985, these requisitions were tendered to the Department of Finance and

Administration for its review and approval as part of the payroll process. On or about July 3, 1985, the requisitions of 46 various departments and agencies of the State of West Virginia were transmitted by the Department of Finance and Administration to Glen B. Gainer, Jr., West Virginia State Auditor (hereinafter "Respondent") as part of the process necessary for issuance of a warrant by the Respondent authorizing payment of the Regular Salaries and the § 5-5-2 Years of Service Payment.

In reliance on a June 28, 1985, Opinion of the Attorney General of West Virginia (see Exhibit C to Petition), addressed to the Respondent (hereinafter the "AG Opinion"), Respondent rejected and returned to the Department of Finance and Administration all the requisitions for payment of the Regular Salaries and all requisitions for payment of the § 5-5-2 Years of Service Payment. As reflected in the handwritten transmittal note from Don Adams of the Auditor's staff, the Respondent is seeking to have the § 5-5-2 Years of Service Payment included as part of the requisitions for Regular Salaries and paid on a pro-rata basis over the course of the normal pay periods in the fiscal year, rather than on a lump sum basis payable at the beginning of the fiscal year. As the return of the requisitions for both the Regular Salaries and the § 5-5-2 Years of Service Payment together with the note of Mr. Don Adams indicate, Respondent has been utilizing the § 5-5-2 Years of Service Payment in a lump sum as a basis for not paying the Regular Salaries. See Exhibit D to Petition.

On July 9, 1985, the Petitioners were informed that Respondent had modified his position regarding his prior refusal to process the requisitions for the Regular Salaries due employees of the State of West Virginia. It is the understanding of the Petitioners that the Respondent's position, as modified, is that

regular salary requisitions submitted during July, 1985, will be processed by the Respondent and warrants directing payment of the Regular Salaries will be issued. However, the Petitioners have been informed that Respondent (i) will not process or issue warrants for a lump sum payment of § 5-5-2 Years of Service Payment as of the beginning of this fiscal year and (ii) has only agreed to process and issue warrants for the payment of the Regular Salaries of the employees of the State of West Virginia for requisitions submitted during July, 1985 -- not beyond July, 1985.

II. ARGUMENT

A. THE BASIS ON WHICH THE RESPONDENT HAS REFUSED TO PROCESS REQUISITIONS AND ISSUE WARRANTS FOR PAYMENT TO STATE EMPLOYEES FOR (i) REGULAR SALARIES PRORATED OVER THE EMPLOYEE'S NORMAL PERIOD OF EMPLOYMENT AND (ii) THE W.VA. CODE § 5-5-2 YEARS OF SERVICE PAYMENT IN A LUMP SUM IS (a) NOT SUPPORTED BY CONSTITUTIONAL, STATUTORY, OR CASE LAW AUTHORITY, AND (b) REFUTED BY THE DELETION OF EXPRESS PRORATION LANGUAGE FROM W.VA. CODE § 5-5-2 WHICH HAD BEEN SET FORTH IN W.VA. CODE § 5-5-2'S PREDECESSOR, W.VA. CODE § 5-5-4.

As reflected in the Statement of the Case and in the Petition, the AG Opinion is the basis on which the Respondent has refused to process requisitions and issue warrants for (i) a lump sum payment of the § 5-5-2 Years of Service Payment and (ii) Regular Salaries submitted subsequent to July, 1985 which do not include the § 5-5-2 Years of Service Payment on a prorated basis. As the June 28, 1985 AG Opinion indicates, the Attorney General concluded that the payment of the § 5-5-2 Years of Service Payment in a lump sum is unlawful. The AG Opinion is predicated upon the following legal factors:

(1) Some of the language of W.Va. Code § 5-5-1 et seq., referring to the § 5-5-2 Years of Service Payment as a "salary increase" and, alternatively, as an "annual salary increase" (AG Opinion at pp. 1-3);

(2) The provisions of W.Va. Code § 6-7-1 providing that the salary of all State officers shall be paid in equal monthly installments as construed along with W.Va. Code §§ 12-3-10, 13, 13a (AG Opinion at p. 3);

(3) A comparison of allegedly similar provisions of W.Va. Code § 18A-4-1 et seq. relating to teachers and school personnel (AG Opinion at p. 3);

(4) The provisions of W.Va. Code § 12-3-13 providing that salaries of officers and employees shall not be paid before services have been rendered (AG Opinion at pp. 3, 4-5); and

(5) Article VI, Section 38 of the West Virginia Constitution, which, among other things, specifies ". . . no extra compensation shall be granted or allowed to any public officer, agent, servant, or contractor after the services shall have been rendered or the contract made. . . ." [Emphasis Added] (AG Opinion at p. 4)

1. Legislative Intent Indications

Initially, it is significant to note that none of the legal provisions relied upon in the AG Opinion prohibit a lump sum payment of the § 5-5-2 Years of Service Payment. The fact that some of the language of W.Va. Code § 5-5-1 speaks in terms of a "salary increase" and the language of W.Va. Code § 5-5-2 refers to an "annual salary increase" is not dispositive and does not

indicate that such a salary increase must be prorated over the entire fiscal year. Indeed, the AG Opinion recites no constitutional, statutory, or case law authority for the proposition that use of the terminology "salary increase" or "annual salary increase" requires the § 5-5-2 Years of Service Payment to be prorated.

Better evidence of legislative intention regarding § 5-5-2 than a simple assertion that use of words "salary increase" and "annual salary increase" precludes lump sum payments, is found in a comparison of the language of the predecessor provision to W.Va. Code § 5-5-2, formerly found at W.Va. Code § 5-5-4. That a proration of the § 5-5-2 Years of Service Payment is not authorized is revealed by the specific language deleted from § 5-5-2 when compared to the previous, most analogous statutory provision amended as a result of the 1984 legislative amendment and reenactment resulting in the current W.Va. Code § 5-5-1 et seq. Section 5-5-2 provides:

> "Effective for the fiscal year beginning the first day of July, one thousand nine hundred eighty-five, every eligible employee with three or more years of service shall receive an annual salary increase equal to thirty-six dollars times the employee's years of service, not to exceed twenty years of service. In each fiscal year thereafter and on the first day thereof, each such employee shall receive an annual increment increase of thirty-six dollars for such fiscal year: Provided, that every employee becoming newly eligible as a result of meeting the three years of service minimum requirement on the first day of July in any fiscal year subsequent to one thousand nine hundred eighty-five, shall be entitled to the annual salary increase equal to the aforesaid thirty-six dollars times the employee's years of service, where he has not theretofore received the benefit of any such increment computation; and shall receive a single annual increment increase

thereafter of thirty-six dollars for each such subsequent fiscal year. These incremental increases shall be in addition to any across-the-board, cost-of-living or percentage salary increases which may be granted in any fiscal year by the legislature. This article shall not be construed to prohibit other pay increases based on merit, seniority, promotion or other reason, if funds are available for such other pay increases: Provided, however, that the executive head of each spending unit shall first grant the herein mandated increase in compensation to all eligible employees prior to the consideration of any increases based on merit, seniority, promotion or other reason."

By comparison, the predecessor provision, W.Va. Code § 5-5-4, reads:

"Effective for the fiscal year beginning the first day of July, one thousand nine hundred seventy-six, every eligible employee who was an employee of the State on the first day of January, one thousand nine hundred seventy-six, and who has been continuously employed thereafter, shall receive a cost-of-living increase of one thousand dollars in the annual rate of compensation which he was receiving as of the thirtieth day of June, one thousand nine hundred seventy-six, such increase to be prorated over the employee's normal pay period. This article shall not be construed to prohibit other pay increases based on merit, seniority, promotion or other reason, if funds are available for such other pay increases: Provided, that the executive head of such spending unit shall first grant the herein mandated increase in rate of compensation to all eligible employees prior to the consideration of any increases based on merit, seniority, promotion or other reason." [Emphasis Added] [Underscroed language deleted when reenacted as W.Va. Code § 5-5-2].

* * *

The prior W.Va. Code § 5-5-4 provisions relating to a thousand dollar cost-of-living, across-the-board, salary increase, mandated that employees with service prior to the effective date of that statutory provision, July 1, 1976, be granted a one thousand dollar cost-of-living increase in their annual rate of compensation if (i) those employees employed as of July 1, 1976, were continuously employed from January 1, 1976 and thereafter and (ii) ". . . such increase [was] . . . prorated over the employee's normal pay period." Such provisions are conspicuously and significantly absent from current W.Va. Code § 5-5-2.

The Legislature's amendment and reenactment of a statute eliminating express language requiring (i) proration and (ii) continuous employment, strongly evidences that proration of the § 5-5-2 Years of Service Payment over a State employee's normal pay period is not what the Legislature intended. Had the Legislature intended for the § 5-5-2 Years of Service Payment to be prorated over an employee's normal pay period, as asserted by the Respondent in reliance on the AG Opinion, the Legislature, in copying the predecessor of § 5-5-2 -- § 5-5-4 -- simply had to reenact the already existing explicit proration language of W.Va. Code § 5-5-4. This express deletion is the best, extant evidence of the legislative intent regarding the incorrectness of the conclusion of the Attorney General and, by extension, the Respondent, that it is not lawful for the § 5-5-2 Years of Service Payment to be made in a lump sum.

In an instance in which the California legislature omitted language in a subsequent enactment related to the same subject matter, the California Court of Appeal, First District held:

> "The courts may not speculate that the legislature meant something other than what it said. Nor may they rewrite a statute to make it express an intention not expressed therein. (Hennigan v. United Pacific Ins. Co. (1975) 53 Cal.App.3d 1, 7, 125 Cal. Rptr. 408, 412). Where the Legislature omits a particular provision in a later enactment related to the same subject matter, such deliberate omission indicates a different intention which may not be supplanted in the process of judicial construction." (See Signal Oil & Gas Co. v. Bradbury (1960) 183 Cal.App.2d 40, 51, 6 Cal.Rptr. 736)." [Emphasis Supplied] Kaiser Steel Corporation v. County of Solano, 153 Cal.Rptr. 546 (1979).

The Florida Supreme Court in an analogous situation asserted:

> "The omission of a word in the amendment of a statute will be assumed to have been intentional. And, where it is apparent that substantial portions of a statute have been omitted by process of amendment, the courts have no express or implied authority to supply omissions that are material and substantive, and not merely clerical and unconsequential." Carlile v. Game and Fresh Water Fish Commission, 354 So.2d 362, 364-365 (Fla. 1978).

This same rule of determining legislative intent has been followed in other jurisdictions. See Tarver v. Dix, 421 N.E.2d 693 (Ind.App. 1981); Van Orman v. State, 416 N.E.2d 1301 (Ind.App. 1981). As a result of the omission of the proration language from W.Va. Code § 5-5-2's predecessor provision, the legislative intent had to be for no proration of the § 5-5-2 Years of Service Payment.

2. The W.Va. Code § 6-7-1 Inapplicability

The second factor on which the AG Opinion is predicated is W.Va. Code § 6-7-1, which sets forth that the salary of all State officers shall be paid in equal monthly installments, in conjunction with a prior opinion of this Court construing W.Va. Code § 6-7-1 along with W.Va. Code §§ 12-3-10, 13, and 13a. The AG Opinion clearly reveals on page 3 that W.Va. Code § 6-7-1 does not apply to State employees. It only applies to officers. W.Va. Code § 6-7-1. Consequently, this statute, standing alone, is inapplicable to the determination of the lawfulness of any lump sum payment to State employees.

Likewise, any reliance on this Court's ruling in State ex rel. Graney v. Sims, 144 W.Va. 72, 105 S.E.2d 886 (1958), that W.Va. Code 6-7-1 and W.Va. Code §§ 12-3-10, 13, and 13a should be read in pari materia to allow the Respondent for efficiency and economy reasons to promulgate rules and regulations for the time and manner of submission of payroll requisitions does not support the conclusion that these statutory provisions prohibit a lump sum payment of the § 5-5-2 Years of Service Payment. The Graney opinion construing in pari materia the provisions of W.Va. Code §§ 6-7-1 and 12-3-10, 13, and 13a, holds only that these statutes authorize the Respondent to designate, by promulgated rules and regulations, the time for presentation of payroll requisitions to enable State employees and other officials to receive compensation for service on or about the end of the month in which such services are rendered. Graney, supra at 80-82, 105 S.E.2d at 892-893. This Court's Graney opinion nowhere indicates support for a prohibition of the lump sum payment of the § 5-5-2 Years of Service Payment.

A further reason for the lack of support for the Attorney General's position and, by extension, the Respondent's, is that a critical fact relied on by this Court in its Graney opinion is absent in this case: In Graney, the Auditor had promulgated a rule pursuant to W.Va. Code § 12-3-13a. As evidenced by the notarized statement of the Secretary of State of West Virginia, attached hereto as Exhibit 1, and the affidavit of Lowell D. Basford, one of the Petitioners, attached hereto as Exhibit 2, no such rule or regulation has been filed with the Secretary of State as required by W.Va. Code § 29A-2-5 and the Auditor's office has informed Mr. Basford that no such rules or regulation relating to payroll requisitions now exist. Because of both the legal issue difference and the factual variance from this lump sum payment case, the Graney opinion offers no support for the Respondent's position.

3. The Performance of Services Before Payment Contention

The third of the factors relied upon by the Respondent under the terms of the AG Opinion is W.Va. Code § 12-3-13 which specifies

> "No money shall be drawn from the Treasury to pay the salary of any officer of employee before his services have been rendered."

It is obvious that the payment of the Regular Salaries pursuant to requisitions which prorate the Regular Salaries over the respective employee's normal pay period does not violate W.Va. Code § 12-3-13! It is also beyond dispute that W.Va. Code § 12-3-13 does not prohibit all lump sum payments. It is merely one statute related to the time of payment of salaries. Indeed, the Attorney General in a December 2, 1977, opinion to the then

Chairman of the Joint Committee on Government and Finance, the Hon. William T. Brotherton, Jr. and the Hon. Donald L. Kopp, expressly stated that ". . . accumulated annual leave legally may be paid to such State employees in a lump sum upon termination of their employment with the State." A copy of this Attorney General Opinion is attached hereto as Exhibit 3.

Further supporting the fact that W.Va. Code § 12-3-13 does not prohibit the § 5-5-2 Years of Service Payment in a lump sum is the incorrect assumption contained in the AG Opinion that employees who receive such a payment will have performed no services for the State at the time of receipt a lump sum payment. (AG Opinion at p. 4-5) This assumption overlooks the language of W.Va. Code § 5-5-2 which expressly conditions receipt of the § 5-5-2 Years of Service Payment on having performed three (3) years ~~or more of service for the State~~ and being employed on the first ~~day of each fiscal year after which each such employee has a minimum of three (3) years of service.~~ W.Va. Code § 5-5-2.

Entitlement to and vesting of the right to receive the § 5-5-2 Years of Service Payment occurs when State employees with the necessary years of prior service are also employees on the 1st day of July, 1985. For qualification for this payment in subsequent fiscal years, the respective employees must also be employed as of the first day of each subsequent fiscal year. Consequently and prior to the time by which State employees may receive this payment, each State employee will have had to have performed and is performing services for the State of West Virginia. For this reason, the portion of the AG Opinion that a § 5-5-2 Years of Service Payment in a lump sum violates W.Va. Code § 12-3-13's prohibition of payment of salary before rendering of services is based on an incorrect assumption.

Secondly, the AG Opinion has a misplaced reliance on this Court's opinion in the case of State ex rel. Lippert v. Sims, 143 W.Va. 542, 103 S.E.2d 533 (1958). The AG Opinion utilizes the Lippert opinion to support its contention that the § 5-5-2 Years of Service Payment in a lump sum would be receiving compensation prior to the rendition of service in violation of W.Va. Code § 12-3-13. It is true that Lippert, supra at 549, 103 S.E.2d at 537, sets forth this Court's holding that W.Va. Code § 12-3-13 ". . . is certainly broad enough if any such legislation was needed to prohibit the payment [of a salary] to any person who had rendered no service to the State." [Emphasis Added] However, the AG Opinion fails to mention that the Lippert opinion also indicates that (i) the proscription of W.Va. Code § 12-3-13 is applicable only "[i]n the absence of valid legislation to the contrary. . . ." Lippert, supra at 549, 103 S.E.2d at 538 and (ii) the case arose from the context of an employee attempting to force the Auditor to pay her for a period of time during which she was not employed by the State. Lippert, supra at 548, 103 S.E.2d at 537.

In the factual context of the refusal of the Respondent to process requisitions and issue warrants for the § 5-5-2 Years of Service Payment in a lump sum, no employee of the State will be paid any money when no services have been performed by each such employee for the State. Furthermore, the provisions of W.Va. Code § 5-5-1 et seq., constitute valid legislation overcoming the proscriptions of W.Va. Code § 12-3-13. Lippert, supra at 549, 103 S.E.2d at 538. As such, W.Va. Code § 12-3-13 is not a bar to the § 5-5-2 Years of Service Payment in a lump sum.

4. The Analogy to Chapter 18A, Article 4

A fourth factor utilized to support the Respondent's position as set forth in the AG Opinion is the comparison of allegedly similar provisions of the West Virginia Code, W.Va. Code § 18A-4-1 et seq., which relate, among other things, to compensation for teachers and other school personnel and this Court's opinion in State ex rel. Payne v. Board of Education of Jefferson County, 135 W.Va. 349, 63 S.E.2d 579 (1951), which construed a predecessor statute similar to Chapter 18A, Article 4. This comparison is set forth on page 3 of the AG Opinion.

It is set forth in the AG Opinion that the purpose of the § 5-5-2 Years of Service Payment was ". . . generally considered an effort to provide some degree of parity between educators and other State employees." Relying on this allegation for which no authority is recited, it is contended that it is relevant that the Legislature awarded incremental salary increases to teachers and other school service personnel on a monthly basis. However, the AG Opinion fails to mention that the case cited in support of this proposition, State ex rel. Payne v. Board of Education of Jefferson County, 135 W.Va. 349, 63 S.E.2d 579 (1951), arose from a factual background of a statutory enactment in which the statute expressly set forth the petitioner-teacher's salary on a monthly basis. Payne, supra at 351-352, 63 S.E.2d 581-582. No such specification is contained in W.Va. Code § 5-5-2 and, as previously indicated, language which would have required a proration of the § 5-5-2 Years of Service Payment was omitted from W.Va. Code § 5-5-2.

Also, a perusal of Chapter 18A, Article 4, reveals that the statutory provisions relied upon by the AG Opinion support the propriety of allowing a lump sum payment of the § 5-5-2 Years of Service Payment. W.Va. Code 18A-4-9 includes this:

* * *

"Notwithstanding any other provisions of this chapter and chapter eighteen [§ 18-1- et seq.], the number of pays to be made during the school year to the various classes of employees shall be determined by the board: Provided, that the sum of such pays for any employee does not exceed the equivalent of an annual salary based upon twelve calendar months. In the event a teacher or other employee is not paid the full salary or wage earned in the fiscal year in which the work is performed, the unpaid amount may be paid during July and August of the following fiscal year. Adjustments for time loss due to absence may be made in the next pay check following such time loss." [Emphasis Added]

* * *

This provision expressly authorizes the various county Boards of Education to determine the number of pay periods for teachers and other school personnel, for the payment of wages or salary earned in a prior fiscal year during July and August of the following fiscal year, and adjustments for the overpayment of a salary or wage during one pay period by a reduction in a salary or wages paid in the next pay period. Another section, W.Va. Code 18A-4-8a, specifying service personnel minimum monthly salaries expressly states the salaries on a monthly basis. Finally, W.Va. Code § 18A-4-10a authorizes the payment of a bonus for unused days of personal leave. It provides:

"County boards of education are authorized to pay to their employees or to defined groups thereof, for the purpose of reducing absenteeism, a bonus at the end of an employment term for each unused day of personal leave accumulated by the employee during that employment term." [Emphasis Added]

Simply stated, the comparison urged in the AG Opinion of

the various provisions of Chapter 18A, Article 4, does not support any argument that the § 5-5-2 Years of Service Payment may not be made in a lump sum. Rather, certain of these provisions allow a lump sum payment of a bonus (W.Va. Code § 18A-4-10a), the payment for days for which services have not yet been performed (W.Va. Code § 18A-4-9), delegation of the determination of the number of pay periods and the amounts of such payments subject to a maximum limit of the total annual salary (W.Va. Code § 18A-4-9), and payment for services performed in a prior fiscal year during the next (W.Va. Code § 18A-4-9). With the possible exception of delegation of determination of the number of pay periods, all of these provisions referred to in this memorandum as cited are, in fact, improper under the analysis of the AG Opinion. The inescapable conclusion is that the AG Opinion's analogy to Chapter 18A, Article 4 does not support his contention that the payment of the § 5-5-2 Years of Service Payment in a lump sum is unlawful.

5. The Absence of an Article VI, § 38 Constitutional Prohibition

The final factor relied upon by the AG Opinion in support of its contention that the § 5-5-2 Years of Service Payment in a lump sum is unlawful is Article VI, § 38 of the West Virginia Constitution which sets forth in pertinent part:

> "No extra compensation shall be granted or allowed to any public officer, agent, servant or contractor, after the services shall have been rendered and the contract made; . . . ." [Emphasis Added]

On page 4 of the AG Opinion, it is included that a lump sum or bonus type payment for public employees or contractors is not allowed by Article VI, § 38. This assertion is too broad in its application and has no application to a § 5-5-2 Years of Service Payment in a

lump sum. This is because W.Va. Code § 5-5-2 provides a measure of increased compensation for individuals employed as of the 1st day of July of 1985, who have at least three (3) prior years of service. As such, it is a measure of current compensation to be paid utilizing prior years of service for the State along with performance of current services on July 1, 1985. As such, the § 5-5-2 Years of Service Payment is not extra compensation paid after services have been rendered within the meaning of Article VI, § 38. Highlighting the analytical error of the AG Opinion's Article VI, § 38 analysis is the fact that this constitutional provision does not contain language in any way prohibiting any lump sum payment to State employees while they are currently performing services for the State.

Further dispatching the AG Opinion's constitutional argument is its misplaced reliance on this Court's Springer v. Board of Education of Ohio County, 117 W.Va. 413, 185 S.E. 692 (1936), opinion: The Springer case relates to the portion of Article VI, § 38 which provides that "nor shall the salary of any public officer be increased or diminished during his term of office. . . ." Springer involved the question of whether it was unconstitutional to increase the salary of a public official -- the superintendent of schools of Ohio County, West Virginia -- during his term of office. In concluding that the increase in salary in the Springer case was constitutional, the Supreme Court of Appeals of West Virginia was not discussing the first clause of Article VI, § 38 relating to extra compensation after services have been rendered. Springer, supra at 415, 185 S.E. 693 (1936). For this reason, the Springer opinion grants no support to the AG Opinion's argument that § 5-5-2 Years of Service Payment in a lump sum is unconstitutional.

As a review of the legal factors relied upon by the Respondent through his reliance on the AG Opinion indicates, not one of the factors supports the AG Opinion conclusion that a § 5-5-2 Years of Service Payment in a lump sum is unlawful. Likewise, none support the Respondent's refusal to process and issue warrants for the Regular Salaries which do not include a prorated portion of the § 5-5-2 Years of Service Payment.

B. IN THE ABSENCE OF THE FACTORS ON WHICH THE RESPONDENT MAY REFUSE TO PROCESS AND ISSUE WARRANTS FOR PAYMENT OF REQUISITIONS SUBMITTED TO HIM FOR STATE EMPLOYEES' REGULAR SALARIES AND THEIR W.VA. CODE § 5-5-2 YEARS OF SERVICE PAYMENT, THE ISSUANCE OF A WRIT OF MANDAMUS REQUIRING THE RESPONDENT TO PROCESS AND ISSUE WARRANTS FOR PAYMENT OF THE REGULAR SALARIES AND THE § 5-5-2 YEARS OF SERVICE PAYMENT IS PROPER.

As this Court has indicated in State ex rel. Foster v. Gainer, 272 S.E.2d 666 (W.Va. 1980), the provisions of W.Va. Code § 12-3-5 specify when a requisition to the Auditor is sufficient authority for issuing a warrant a payment. The provisions of W.Va. Code § 12-3-5 are:

> "When appropriation has been made by law, subject to the order or payable on the requisition of a particular officer, board, or person, the order or requisition in writing of such officer, board, or person shall be sufficient authority to the auditor to issue his warrant for the same or any part thereof. Provided, that the appropriation has not expired and the amount thereof shall not be exceeded."

In addition, this Court enumerated through reference to 45 Op. Atty. Gen. 583, 601 (1954) those factors which justify an auditor's refusal to pay a requisition. These are:

"a. If there is no appropriation for the proposed expenditure;

"b. if there is no statute, State or Federal, authorizing the proposed expenditure;

"c. if the statute authorizing the proposed expenditure is unconstitutional;

"d. if the appropriation for the proposed expenditure is not for a public purpose;

"e. if the requisition for the proposed expenditure shows on its face that it is for a public or other lawful purpose, but the Auditor has reasonable proof available that, in fact, the money has been spent, or is proposed to be spent, for personal or private gain."

State ex rel. Foster, supra at 667.

In this case, (i) there is no dispute that an appropriation has been made for payment of either the Regular Salaries or the § 5-5-2 Years of Service Payment, (ii) there is a statute authorizing the proposed expenditure for both Regular Salaries and the § 5-5-2 Years of Service Payment, (iii) there is no basis for holding the Regular Salaries' statutory provisions or W.Va. Code § 5-5-2 unconstitutional because of a lump sum payment of the § 5-5-2 Years of Service Payment, (iv) the appropriation of both the Regular Salaries and the § 5-5-2 Years of Service Payment is for a public purpose, and (v) there is no contention that any Regular Salaries payment or § 5-5-2 Years of Service Payment have been or are proposed to be spent for anything other than a lawful or public purpose.

Because none of the reasons for which the Auditor may refuse to process requisitions for the expenditure of public funds and issue warrants for payment of such requisitions exists, it is inappropriate for the Respondent/Auditor to substitute his

opinion or judgment for that of the various State departments and agencies seeking payment for each's eligible employees of the Regular Salaries on a prorated basis and the statutorily authorized § 5-5-2 Years of Service Payment in a lump sum. State ex rel. Foster, supra at 668; State ex rel. West Virginia Board of Education v. Sims, 139 W.Va. 802, 81 S.E.2d 665 (1954). Accordingly, under the State ex rel. Foster, supra opinion, this is a case in which this Court should issue the writ of mandamus requested by the Petitioners.

III. CONCLUSION

Since (i) the reasons for which the Respondent refuses to process and issue warrants for payment of requisitions for Regular Salaries on a prorated basis and the § 5-5-2 Years of Service Payment in a lump sum as set forth in the AG Opinion are unsupported in law and (ii) the only reasons which this Court has allowed the Respondent to refuse to honor such requisitions do not exist, it is appropriate for this Court to issue a writ of mandamus to require the Auditor to process and issue warrants for payment of the § 5-5-2 Years of Service Payment in a lump sum and to process and issue warrants for payment of requisitions for Regular Salaries which do not include on a prorated basis the § 5-5-2 Years of Service Payment.

Respectfully submitted,

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JOHN W. WOODS
THOMAS A. HEYWOOD
SCOT A. KATONA
CAMDEN P. SIEGRIST
WILLIAM B. GERWIG, III

August 5, 1985

Lowell D. Basford
Acting Director of Personnel
State of West Virginia
Civil Service Commission
1900 Washington Street, E.
Room B-456
Charleston, West Virginia 25305

Re: State of West Virginia ex rel. Willard H. Erwin, Jr., et al., v. Glen B. Gainer, Jr., West Virginia State Auditor, No. 16791 (W. Va. Sup. Ct. of ~~App.~~)--Opinion and Order

Dear Mr. Basford:

I have enclosed for your information a copy of the order of the Supreme Court of Appeals of West Virginia in connection with the petition for writ of mandamus sought on behalf of the West Virginia Civil Service Commission against Glen B. Gainer, Jr., requiring the lump sum payment of the W. Va. Code § 5-5-2 incremental salary increases. As the opinion indicates, our position has been accepted in toto by the Supreme Court and the Auditor has been directed to pay the W. Va. Code § 5-5-2 incremental salary increase in a lump sum.

Once you have had a chance to review the opinion, I will be glad to respond to any questions which you may have. By separate cover, I will tender our firm's invoice for the services rendered in connection with this matter.

Very truly yours,

Thomas B. Bennett

TBB/rts
Enclosure
cc: The Honorable Willard H. Erwin
The Honorable Bill J. Wellman

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CIVIL SERVICE COMMISSION

§ 5-4-2. Secretary; records.

The secretary of state shall act as secretary of the board, and shall keep a record of the official acts thereof, and shall discharge such other duties as may be by the board prescribed. The proceedings of each day shall be signed by the officer presiding on that day and shall at all times be open to inspection. (1863, c. 43, § 2; Code 1868, c. 56, § 2; 1882, c. 100, § 2; Code 1923, c. 56, § 2.)

§§ 5-4-3 to 5-4-13.

Repealed by Acts 1969, c. 13.

ARTICLE 5.

SALARY INCREASE FOR STATE EMPLOYEES.

Sec.
5-5-1. Definitions.
5-5-2. Granting incremental salary increases based on years of service.
5-5-3. Optional payment to employee in lump sum amount for accrued and unused annual leave at conclusion of employment; application thereof.

Revision of article. — Acts 1984, c. 151, amended and reenacted this article, effective July 1, 1984, substituting present §§ 5-5-1 and 5-5-2 for former §§ 5-5-1 — 5-5-8 (Acts 1976, c. 48). As present §§ 5-5-1 and 5-5-2 are similar to former §§ 5-5-3 and 5-5-4, historical citations for those former sections have been added to the new sections.

Editor's notes. — The act originally codified as article 5, relating to the state budget office, was repealed by Acts 1961, c. 132.

Generally. — The incremental salary increases provided for in this article constitute an increase in, and an integral part of, the annual salary of an eligible state employee, and may not be lawfully paid out of the state treasury until after services have been rendered to the State. Payment of the incremental salary increase is to be made proportionately throughout the payment year, and within and as a part of each pay period. Therefore, any contemplated payment of an incremental salary increase in a lump-sum or on a bonus-type basis would not be permissible. Op. Att'y Gen., June 28, 1985, No. 11.

§ 5-5-1. Definitions.

For the purposes of this article: (1) "Eligible employee" means any regular full-time employee of the state or any spending unit thereof who is eligible for membership in any state retirement system of the state of West Virginia or other retirement plan authorized by the state: Provided, That the mandatory salary increase required by this article shall not apply to any faculty employee at public institutions of higher learning or any employee of the state whose compensation is fixed by statute or by statutory schedule, (except that the clerks, deputy clerks and magistrate assistants of magistrate courts shall be eligible for the incremental salary increases provided in this article and with such increases to be allowable in addition to the maximum salaries and compensation for such employee offices under the magistrate court system

statutes of article one [§ 50-1-1 et seq.], chapter fifty of the code), nor shall this article be construed to mandate an increase in the salary of any elected or appointed officer of the states; (2) "years of service" means full years of totaled service as an employee of the state of West Virginia; (3) "spending unit" means any state office, department, agency, board, commission, institution, bureau or other designated body authorized to hire employees. (1976, c. 48; 1984, c. 151; 1986, 1st Ex. Sess., c. 16.)

Effect of amendment of 1986. — The amendment added the exception in parentheses; and made other minor changes.

§ 5-5-2. Granting incremental salary increases based on years of service.

Effective for the fiscal year beginning the first day of July, one thousand nine hundred eighty-five, every eligible employee with three or more years of service shall receive an annual salary increase equal to thirty-six dollars times the employees' years of service, not to exceed twenty years of service. In each fiscal year thereafter and on the first day thereof, each such employee shall receive an annual increment increase of thirty-six dollars for such fiscal year: Provided, That every employee becoming newly eligible as a result of meeting the three years of service minimum requirement on the first day of July in any fiscal year subsequent to one thousand nine hundred eighty-five, shall be entitled to the annual salary increase equal to the aforesaid thirty-six dollars times the employee's years of service, where he has not theretofore received the benefit of any such increment computation; and shall receive a single annual increment increase thereafter of thirty-six dollars for each such subsequent fiscal year. These incremental increases shall be in addition to any across-the-board, cost-of-living or percentage salary increases which may be granted in any fiscal year by the Legislature. This article shall not be construed to prohibit other pay increases based on merit, seniority, promotion or other reason, if funds are available for such other pay increases: Provided, however, That the executive head of each spending unit shall first grant the herein mandated increase in compensation to all eligible employees prior to the consideration of any increases based on merit, seniority, promotion or other reason. (1976, c. 48; 1984, c. 151.)

Generally. — The incremental salary increases provided for in this chapter constitute an increase in, and an integral part of, the annual salary of an eligible state employee, and may not be lawfully paid out of the state treasury until after services have been rendered to the State. Payment of the incremental salary increase is to be made proportionately throughout the payment year, and within and as a part of each pay period. Therefore, any contemplated payment of an incremental salary increase in a lump-sum or on a bonus-type basis would not be permissible. Op. Att'y Gen., June 28, 1985, No. 11.

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such prosecuting attorney is elected and for the performance of which duties outside of the county in which he is elected the prosecuting attorney shall be paid his actual traveling and other expenses out of the appropriation for contingent expenses for the department for which such services are rendered; the attorney general shall keep in proper books, a register of all causes prosecuted or defended by him in behalf of the state or its officers and of the proceedings had in relation thereto, and deliver the same to his successor in office; and he shall preserve in his office all his official opinions and publish the same in his biennial report.

Upon request of any member of the West Virginia national guard who has been named defendant in any civil action arising out of that guardsman's action while under orders from the governor relating to national guard assistance in disasters and civil disorders, the attorney general shall appear as counsel for and represent such guardsman. (Code 1849, c. 165, § 2; Code 1860, c. 165, § 2; Code 1868, c. 120, § 2; 1872-3, c. 54, § 2; 1882, c. 133, § 2; 1909, c. 48; Code 1923, c. 120, § 2; 1937, c. 84; 1972, c. 13; 1987, c. 13.)

Effect of amendment of 1987. — The amendment, near the middle of the first paragraph, added "he shall, when requested ... of the prosecuting attorney inadequate to prosecute said cases."

ARTICLE 5.

SALARY INCREASE FOR STATE EMPLOYEES; LUMP SUM PAYMENTS FOR ANNUAL LEAVE AT RETIREMENT.

Sec.
5-5-3. Optional payment to employee in lump sum amount for accrued and unused annual leave at termination of employment; no withholding of any employee contribution deduction; exception.

§ 5-5-3. Optional payment to employee in lump sum amount for accrued and unused annual leave at termination of employment; no withholding of any employee contribution deduction; exception.

Every eligible employee, as defined in section one [§ 5-5-1] of this article, at the time his or her active employment ends due to resignation, death, retirement or otherwise, may be paid in a lump sum amount, at his or her option, for accrued and unused annual leave at the employee's usual rate of pay at such time. The lump sum payment shall be made by the time of what would have been the employee's next regular pay day had his employment continued. In determining the amount of annual leave entitlement, weekends, holidays or other periods of normal, noncountable time shall be excluded, and no deductions may be made for contributions toward retirement from lump sum payments for unusued, accrued annual leave, since no period of service credit

is granted in relation thereto; however, such lump sum payment is to be a part of final average salary computation; and where any such deduction of employee contribution may have been heretofore made, a refund of such shall be granted the former employee and made by the head of the respective former employer spending unit: Provided, That the superintendent of the department of public safety shall make deductions for retirement contributions of members of the department, since retirement benefits are based on cumulative earnings rather than period of service. (1986, c. 139; 1987, c. 107; 1988, c. 100.)

Effect of amendment of 1987. — The amendment, effective March 14, 1987, rewrote this section.

Effect of amendment of 1988. — The amendment, effective July 1, 1988, added "; however, such lump sum payment is to be a part of final average salary computation" and the proviso in the last sentence.

ARTICLE 8.

PUBLIC RECORDS MANAGEMENT AND PRESERVATION ACT.

Cited in Daily Gazette Co. v. Withrow, 350 S.E.2d 738 (W. Va. 1986).

§ 5-8-7. Duties of administrator.

Quoted in Daily Gazette Co. v. Withrow, 350 S.E.2d 738 (W. Va. 1986).

ARTICLE 10.

WEST VIRGINIA PUBLIC EMPLOYEES RETIREMENT ACT.

Sec.
5-10-14. Service credit.
5-10-18. Termination of membership; reentry.
5-10-22c. Temporary incentive for early retirement: cancellation of positions; increased annuity for extended service.
5-10-31a. Retroactive contributions to the retirement system for retroactive services credit granted; one year period for application.
5-10-53. Transfer to public employees retirement system II.

Cited in State ex rel. Manchin v. West Virginia Secondary School Activities Comm'n, 364 S.E.2d 25 (W. Va. 1987).

§ 5-10-2. Definitions.

Full-time credit for part-time servic
Many legislative officers and employees participate in public employees' retire pursuant to a proviso in subdivision (6) of section receive full-time credit for part- service. For example, a legislator who ser 60 day session receives service credit of one year in the public employees' retirement tem. Additional beneficiaries of this pra include county commissioners, city cou men, county board of education members, other "members of the legislative body of political subdivision" under subdivision This occurs administratively despite lang to the contrary in West Virginia § 5-10-14(a). DePond v. Gainer, 351 S.E.2d (W. Va. 1986).

Judicial retirement.
A member of the judiciary who chose to ticipate in the public employees' retire

§ 5-10-3. Retirement syste corporate.

Stated in Flanigan v. West Virginia Employees' Retirement Sys., 342 S.E.2d (W. Va. 1986).

§ 5-10-3a. Article to be li federal social

Stated in Flanigan v. West Virginia Employees' Retirement Sys., 342 S.E.2d (W. Va. 1986).

§ 5-10-5. Board of trustees erally; compos

Stated in Flanigan v. West Virginia Employees' Retirement Sys., 342 S.E.2d (W. Va. 1986).

§ 5-10-9. Chairman and tary; employee ary.

Applied in Flanigan v. West Virginia Employees' Retirement Sys., 352 S.E.2d 81 Va. 1986).

FILED

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CLERK OF THE SUPREME COURT
OF APPEALS OF WEST VIRGINIA

Per Curiam

State of West Virginia ex rel.
Willard H. Erwin, Jr., et al.

No. 16791 v.

Glen B. Gainer, Jr., West Virginia
State Auditor

On the 30th day of July, 1985, this original proceeding in mandamus came on for hearing upon the petition of Willard H. Erwin, et al., upon a rule to show cause issued on July 11, 1985, upon the response of Glen B. Gainer, Jr., West Virginia State Auditor, and upon the briefs and oral arguments of the respective parties, including an amicus curiae brief by the American Federation of State, County and Municipal Employees.

Upon mature consideration of the matters before it, this Court is of the opinion that W. Va. Code, 5-5-2 (1984), mandates the payment of incremental salary increases as therein authorized to be made in a lump sum payment on the first day of July, 1985. The statute is designed to provide supplemental salary increments based not only on past services but for services rendered since the enactment of the statute. The effective date of W. Va. Code, 5-5-2 (1984), is July 1, 1984, but the date of the first payment is July 1, 1985. Thus, respondent's argument that the statute violates W. Va. Code, 12-3-13, which prohibits payment of salaries until services are rendered is without merit. Even if W. Va. Code, 5-5-2 (1984), could be said to conflict with W. Va. Code, 12-3-13, the former being a more recent and specific enactment would prevail over the older, more

general provisions of W. Va. Code, 12-3-13. United Mine Workers of America v. Kingdon, ___ W. Va. ___, 325 S.E.2d 120 (1984).

The respondent argues that Article VI, Section 38 of the West Virginia Constitution prohibits any lump sum payment because of the language in this section barring extra compensation after services have been rendered. We find this provision to be inapplicable to the incremental pay schedule contained in W. Va. Code, 5-5-2 (1984), because it is designed to supplement the regular pay of eligible State employees on the basis of past and present services. Furthermore, if respondent's argument is carried to its logical conclusion, no payment would be authorized under W. Va. Code, 5-5-2 (1984), even on a prorated basis because the only difference between the lump sum and prorated payment is in the manner of the actual payment. Respondent does not argue that Article VI, Section 38 forecloses all payments under W. Va. Code, 5-5-2 (1984).

Finally, the Court finds that under the former provisions of W. Va. Code, 5-5-4 (1976), which provided for a general annual cost of living salary increase for the fiscal year beginning July 1, 1976 (this provision was abolished in 1984 by the reenactment of W. Va. Code, 5-5-1 and -2), the Legislature expressly provided for proration "over the employee's normal pay period." This language was omitted in W. Va. Code, 5-5-2 (1984). The omission of such language in W. Va. Code, 5-5-2 (1984), we believe clearly indicates that the Legislature did not intend to have the payments under W. Va. Code, 5-5-2 (1984), prorated over the employee's normal pay period.

Having found that W. Va. Code, 5-5-2 (1984), is not unconstitutional nor otherwise unlawful, and there being no dispute that the funds are available, we believe that under W. Va. Code, 12-3-5, the respondent Auditor has a mandatory

ministerial duty to pay the funds as requested by the relators in a lump sum salary increment. See State ex rel. Foster v. Gainer, ___ W. Va. ___, 272 S.E.2d 666 (1980). It is, therefore

ADJUDGED, ORDERED and DECREED that the respondent Auditor shall pay the salary supplement as set out in W. Va. Code, 5-5-2 (1984), in a lump sum amount, and it is also

ADJUDGED, ORDERED and DECREED that the service of an attested copy of this Order upon the respondent Auditor shall have the same effect as the service of a formal writ of mandamus.

Justice Brotherton dissents.