WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION

Form #3

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: West Virginia Division of Personnel TITLE NUMBER: 143

CITE AUTHORITY: West Virginia Code §§ 23-4-1 and 23-5A-4

AMENDMENT TO AN EXISTING RULE: YES X NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 3

TITLE OF RULE BEING AMENDED: Workers' Compensation Temporary Total Disability

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: ___

TITLE OF RULE BEING PROPOSED: ___

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Authorized Signature

Department of Administration

West Virginia Division of Personnel

Sara P. Walker, Director

Earl Ray Tomblin, Governor
Robert W. Ferguson, Jr., Cabinet Secretary

MEMORANDUM

TO: Members of the State Personnel Board

FROM: Sara P. Walker, Director
Division of Personnel

DATE: July 21, 2011

RE: **Proposed Amendments to the *Administrative Rule of the West Virginia Division of Personnel* and the *West Virginia Division of Personnel Workers' Compensation Temporary Total Disability Rule***

Your approval is requested for the filing of the agency-approved proposed amendments to the *Administrative Rule of the West Virginia Division of Personnel*, 143CSR1, and the *West Virginia Division of Personnel Workers' Compensation Temporary Total Disability Rule*, 143CSR3, with the Legislative Rule-Making Review Committee and the Secretary of State's Office.

In accordance with the provisions of W. VA. CODE §29A-3-1 *et seq.*, copies of the proposed amendments and notices of public comment were filed with the Secretary of State's Office with notice also provided to state agencies and other interested parties. The draft response to the written comments is included with your materials along with a summary of changes made to the proposed amendments based on comments and/or other information received.

Thank you for your consideration of this request.

APPROVED:

Robert W. Ferguson, Jr., Chairman
State Personnel Board
July 21, 2011

SPW/jft

Attachments

Building 6, Room 420, 1900 Kanawha Boulevard, East, Charleston, West Virginia 25305-0139
TEL: 304-558-3950 ✦ VISIT OUR WEBPAGE AT: www.state.wv.us/admin/personnel ✦ FAX: 304-957-0141

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: July 21, 2011

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM:(*Agency Name, Address & Phone No.*) West Virginia Division of Personnel
1900 Kanawha Boulevard, East
Building 6, Room 416
Charleston, WV 25305
304-558-3950, ext. 57290

LEGISLATIVE RULE TITLE: Workers' Compensation Temporary Total Disability

1. Authorizing statute(s) citation West Virginia Code §§ 23-4-1 and 23-5A-4

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

   Filed with the Secretary of State May 20, 2011 - posted in register May 23, 2011

   b. What other notice, including advertising, did you give of the hearing?

   The comment period was posted on the Division of Personnel web site and communicated via email to State agencies, county health departments, and other interested entities.

   c. Date of Public Hearing(s) ***or*** Public Comment Period ended:

   June 30, 2011

   d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

   Attached X No comments received _____

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

Filed with the Secretary of State July 22, 2011

f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Joe Thomas, Assistant Director of Employee Relations
1900 Kanawha Boulevard, East
Building 6, Room 436
Charleston, WV 25305
Phone: 304-558-3950, extension 57290
Fax: 304-558-1852
Email: joe.f.thomas@wv.gov

g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

(same)

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

SUMMARY OF AMENDMENTS

The following is a summary of proposed amendments to the West Virginia Division of Personnel *Workers' Compensation Temporary Total Disability Rule* (143CSR3). This summary does not include technical amendments which merely correct errors in spelling, grammar, punctuation, and/or other such corrections. Reference is made to the sections of the Rule which have been amended.

REFERENCE	SUMMARY
3.1. b. 2.	Added language pertaining to restoration of interim sick and annual leave upon receipt of temporary total disability benefits consistent with current practices.
4.1. and 4.2.	Added language pertaining to the carrying forward of annual leave from one calendar year to another consistent with current practices.
4.2.	Added language to make consistent with language in W. Va. Code § 23-4-1(a) and the *Administrative Rule* of the Division of Personnel (143CSR1).

STATEMENT OF CIRCUMSTANCES REQUIRING AMENDMENT TO THE WEST VIRGINIA DIVISION OF PERSONNEL WORKERS' COMPENSATION TEMPORARY TOTAL DISABILITY RULE

The existing Rule is being amended to clarify certain sections of the rule, to improve the consistency of the rule, and, generally, to improve the rule.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Workers' Compensation Temporary Total Disability

Type of Rule: [X] Legislative [ ] Interpretive [ ] Procedural

Agency: West Virginia Division of Personnel

Address: 1900 Kanawha Boulevard, East
Building 6, Room 416
Charleston, WV 25305

Phone Number: 304-558-3950, ext. 57290 Email: joe.f.thomas@wv.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

It is not anticipated that these amendments will have a measurable impact on the costs and revenues of State government.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: Workers' Compensation Temporary Total Disability

Rule Title: Workers' Compensation Temporary Total Disability

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

It is not anticipated that these amendments will have a measurable impact on the costs and revenues of State government.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Date: July 21, 2011

Signature of Agency Head or Authorized Representative

Sara P. Walker

143CSR3

TITLE 143
LEGISLATIVE RULE
WEST VIRGINIA DIVISION OF PERSONNEL

SERIES 3
WORKERS' COMPENSATION TEMPORARY TOTAL DISABILITY

Section 1. General

1.1. Scope: This rule implements the provisions set forth in W. Va. Code §§ 23-4-1 and 23-5A-4 regarding compensation for employees who have received personal injuries in the course of and resulting from covered employment with the State or its political subdivisions as provided in W. Va. Code § 23-4-1(a).

1.2. Authority: This rule is issued under authority of W. Va. Code §§ 23-4-1 and 23-5A-4.

1.3. Filing Date: ~~May 4, 2007~~

1.4. Effective Date: ~~May 7, 2007~~

Section 2. Definitions. Terms used in this rule which are not included in this section have the meaning given in the Administrative Rule of the Division of Personnel, 143CSR1.

2.1. Annual Increment: The incremental salary increase based on years of service as provided in W. Va. Code §§ 5-5-1 and 5-5-2.

2.2. Annual Leave: An earned employee benefit of paid time off from work as provided in the Administrative Rule of the West Virginia Division of Personnel, 143CSR1.

2.3. Appointing Authority: The executive or administrative head of a governmental unit who is authorized by statute to appoint employees in the classified and/or classified-exempt service or employees exempt from coverage.

2.4. Injury or personal injury: an injury subject to the Workers' Compensation provisions of chapter 23 of the ~~West Virginia~~ W. Va. Code.

2.5. Report of Occupational Injury: the form prescribed by W. Va. Code § 23-4-1b for report of injuries subject to chapter 23 of the ~~West Virginia~~ W. Va. Code.

2.6. Service: Total eligible employment time which is used for determining the rate of accrual of annual leave.

2.7. Sick leave: An earned employee benefit of paid time off from work for illness, injury or other circumstances as provided in the Division of Personnel Administrative Rule 143CSR1.

2.8. Temporary total disability benefits: Payments made to employees in accordance with the Workers' Compensation provisions of W. Va. Code § 23-4-1 et seq.

2.9. Years of service: full years of totaled service as an employee of the state of West Virginia as provided in W. Va. Code § 5-5-1 and 5-5-2 for the purpose of determining the amount of annual increment due an employee.

Section 3. Pay

3.1. Election of Option

a. An employee absent from work due to receiving a personal injury in the course of and resulting from his or her covered employment with the State or its political subdivisions may elect to receive either his or her accumulated sick leave or temporary total disability benefits, but not both for the same period of absence. Provided, however, that an employee of the State or one of its political subdivisions may receive his or her accumulated sick leave and temporary total disability benefits for the same period of absence if the temporary total disability benefits are paid as a result of a personal injury in the course of and resulting from his or her covered employment with an employer other than the State or one of its political subdivisions.

1. The Director of Personnel shall prescribe the form by which an employee who receives a personal injury in the course of and resulting from his or her covered employment with the State or its political subdivisions elects which option,

either accumulated sick leave or temporary total disability benefits, he or she chooses to receive for his or her absence from work.

2. It is the joint responsibility of the employer and the injured employee to file an election of option form with the Report of Occupational Injury.

3. If the employee does not file the election of option form, the default option is accumulated sick leave.

b. Interim Payment of Sick Leave

1. An employee electing to receive temporary total disability benefits may collect sick leave benefits and, upon exhaustion of sick leave benefits, annual leave benefits until he or she receives temporary total disability benefits.

2. Upon receipt of the initial temporary total disability payment the employee shall pay or assign to his or her employer the net value of the sick leave, or sick and annual leave paid, after which his or her sick leave and annual leave, if used, shall be restored to his or her current leave balance(s). The maximum number of hours of annual leave that may be carried forward from one calendar year to another, as provided in the Administrative Rule of the Division of Personnel 143CSR1, shall apply. All sick leave accrued during this period of time shall be forfeited.

c. Temporary Total Disability After Exhaustion of Sick Leave

1. An employee electing to receive accumulated sick leave may receive temporary total disability benefits upon exhaustion of his or her accumulated sick leave prior to his or her return to work.

2. An employee electing to receive temporary total disability benefits must apply for a medical leave of absence without pay.

3.2. Annual increment pay

a. An employee electing to receive accumulated sick leave continues to accrue annual increment pay and years of service credit while being paid sick leave.

b. An employee electing to receive temporary total disability benefits continues to accrue annual increment pay and credit for years of service while receiving temporary total disability benefits.

Section 4. Leave

4.1. An employee electing to receive accumulated sick leave continues to accrue and carry forward forward from one calendar year to another sick and annual leave and service credit in accordance with the provisions of the Division of Personnel Administrative Rule 143CSR1.

4.2. An employee electing to receive temporary total disability benefits due to receiving a personal injury in the course of and resulting from his or her covered employment with the State or its political subdivisions shall apply for a medical leave of absence without pay and, for purposes of leave, continues to accrue and carry forward from one calendar year to another annual leave and service credit for accrual of annual leave in accordance with the provisions of the Division of Personnel Administrative Rule 143CSR1, but does not accrue sick leave or holiday pay for the period the temporary total disability benefits are paid.

Section 5. Order of Separation for Layoff. Periods during ~~w hich~~ which an employee is paid ~~tem porary~~ temporary total disability benefits under the provisions of W. Va. Code § 23-4-1 due to receiving a personal injury in the course of and resulting from his or her covered employment as a permanent employee of a state agency or in the classified service are included as tenure as a permanent employee of a state agency or in the classified service regardless of job class or title for purposes of order of separation as provided in paragraph 12.4.(f)2 of the Division of Personnel Administrative Rule 143CSR1.

Thomas, Joe F

From: Clifton, Harold D
Sent: Tuesday, June 28, 2011 3:39 PM
To: Thomas, Joe F
Cc: Meeks, Jennifer J
Subject: Comments
Attachments: Comments on Proposed 2011 Revisions to the Administrative Rule (2).docx; Comment to Proposed TTD Revisions (2011) 143 C.docx

Joe –

As we discussed attached are OHRM's comments regarding DOP's proposed Administrative Rule changes. Let Jennifer or me know if you have questions.

Comment to Proposed Revisions of 143 C.S.R. 3

Workers' Compensation Temporary Total Disability

In Section 3.1(b), pertaining to Election of Option and the interim payment of sick and annual leave, where the employee later gets TTD benefits, the Rule now provides that:

2. "The leave shall be restored retroactively based upon the date it was initially used. The maximum number of hours of annual leave that may be carried forward from one calendar year to another, as provided in the Administrative Rule of the Division or Personnel 143 CSR 1, shall apply."

If the employee buys back annual leave in one calendar year and the leave is restored when it was initially used in the prior calendar year, then the employee may not benefit from the pay back if the hours credited back are then forfeited because of being in excess of the carry-forward limit. While this situation presumably would be rare, this agency had at least one grievance filed over a similar situation. The addition of this language may prevent settlement of such a grievance. Would it be possible to allow an employee in this rare situation to donate his or her annual leave that would otherwise be forfeited? Additionally, where an employee has separated from employment after the compensable injury occurred, this language may make it more difficult to obtain repayment for the annual leave.

Department of Administration

West Virginia Division of Personnel

Sara P. Walker, Director

Earl Ray Tomblin, Governor
Robert W. Ferguson, Jr., Cabinet Secretary

STATE PERSONNEL BOARD
Robert W. Ferguson, Jr., Chairman
John A. Canfield ✦ Mark W. Carbone
Sharon Lynch ✦ Eugene Stump
Elizabeth Walker

July 21, 2011

Harold D. Clifton, Human Resources Director
Office of Human Resources Management
Department of Health & Human Resources
One Davis Square, Suite 400
Charleston, WV 25301

Dear Mr. Clifton:

As Chairman of the State Personnel Board, I wish to thank you and your staff for taking the time to review and comment on the proposed amendments to the *Administrative Rule of the West Virginia Division of Personnel*, 143CSR1, and the *West Virginia Division of Personnel Workers' Compensation Temporary Total Disability Rule*, 143CSR3.

Your comments on multiple sections of the Rules are well-taken and consequently we have made modifications on various sections that we will submit as our agency-approved Rules. I have enclosed a summary of your comments with responses to each.

Again, thank you for your participation in the process to revise these Rules.

Sincerely,

Robert W. Ferguson, Jr., Chairman
State Personnel Board

Enclosure

Building 6, Room 420, 1900 Kanawha Boulevard, East, Charleston, West Virginia 25305-0139
TEL: 304-558-3950 VISIT OUR WEBPAGE AT: www.state.wv.us/admin/personnel FAX: 304-957-0141

Comment to Proposed Revisions of 143 C.S.R. 3

Workers' Compensation Temporary Total Disability

In Section 3.1(b), pertaining to Election of Option and the interim payment of sick and annual leave, where the employee later gets TTD benefits, the Rule now provides that:

2. "The leave shall be restored retroactively based upon the date it was initially used. The maximum number of hours of annual leave that may be carried forward from one calendar year to another, as provided in the Administrative Rule of the Division or Personnel 143 CSR 1, shall apply."

If the employee buys back annual leave in one calendar year and the leave is restored when it was initially used in the prior calendar year, then the employee may not benefit from the pay back if the hours credited back are then forfeited because of being in excess of the carry-forward limit. While this situation presumably would be rare, this agency had at least one grievance filed over a similar situation. The addition of this language may prevent settlement of such a grievance. Would it be possible to allow an employee in this rare situation to donate his or her annual leave that would otherwise be forfeited? Additionally, where an employee has separated from employment after the compensable injury occurred, this language may make it more difficult to obtain repayment for the annual leave.

- *The language has been amended consistent with the comments. However, DOP believes the impact of the revision to be negligible for the following reasons:*

    a. *Employees may now only receive TTD payments for two years rather than five.*

    b. *In compliance with the Rule and DOP's Workers' Compensation/Sick Leave policy (DOP-P7), the leave should be bought back immediately upon receipt of the initial TTD payment.*

AMENDMENTS MADE TO THE PROPOSED AMENDMENTS AS A RESULT OF COMMENTS OR OTHER INFORMATION RECEIVED

The following is a summary of amendments to the proposed amendments to West Virginia Division of Personnel *Workers' Compensation Temporary Total Disability Rule* (143CSR3) as a result of comments or other information received during the public comment period. This summary does not include technical amendments which merely correct errors in spelling, grammar, punctuation, and/or other such corrections.

AMENDED FROM:

3.1. Election of Option

b. Interim Payment of Sick Leave

2. Upon receipt of the initial temporary total disability payment the employee shall pay or assign to his or her employer the net value of the sick leave, or sick and annual leave paid, after which his or her sick leave and annual leave, if used, shall be restored. The leave shall be restored retroactively based upon the date it was initially used. The maximum number of hours of annual leave that may be carried forward from one calendar year to another, as provided in the Administrative Rule of the Division of Personnel 143CSR1, shall apply. All sick leave accrued during this period of time shall be forfeited.

AMENDED TO:

3.1. Election of Option

b. Interim Payment of Sick Leave

2. Upon receipt of the initial temporary total disability payment the employee shall pay or assign to his or her employer the net value of the sick leave, or sick and annual leave paid, after which his or her sick leave and annual leave, if used, shall be restored to his or her current leave balance(s). The maximum number of hours of annual leave that may be carried forward from one calendar year to another, as

provided in the Administrative Rule of the Division of Personnel 143CSR1, shall apply. All sick leave accrued during this period of time shall be forfeited.

REASON FOR THE AMENDMENTS:

The Division of Personnel (DOP) received a comment that the retroactive restoration of leave may unfairly result in the employee not realizing the benefit of the annual leave purchased if he or she exceeds the maximum carry forward rate. DOP believes the impact of the revision to be negligible since employees may only receive TTD payments for two years rather than five and the leave should be bought back immediately upon receipt of the initial TTD payment.