

WEST VIRGINIA

SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #3

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11-1-03

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

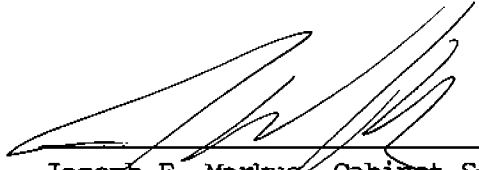
AGENCY: West Virginia Division of Personnel TITLE NUMBER: 143CITE AUTHORITY W. Va. Code §§ 23-4-1 and 23-5A-4AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 3TITLE OF RULE BEING PROPOSED: West Virginia Division of PersonnelWorkers' Compensation Temporary Total Disability Rule

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.


 Joseph F. Markus, Cabinet Secretary
 Department of Administration



West Virginia Division of Personnel

Joe E. Smith, Acting Director

Cecil H. Underwood, Governor
Joseph F. Markus, Cabinet Secretary

STATE PERSONNEL BOARD
Roger Morgan, Chairman
Rev. Paul Gilmer ♦ Elizabeth Harter
Sharon Lynch ♦ Eugene Stump

MEMORANDUM

TO: Members of the State Personnel Board

FROM:  Joe E. Smith, Acting Director
WV Division of Personnel

RE: Proposed Rule

DATE: July 15, 1999

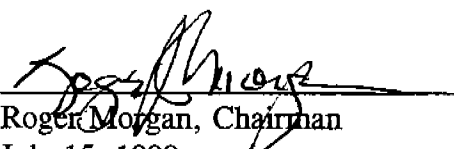
Your approval is requested for filing of the proposed Workers' Compensation Temporary Total Disability Rule with the Legislative Rule-Making Rule Committee and the Secretary of State's Office.

In accordance with the provisions of *W.V. Code* §29A-3-1 et seq., a copy of the proposed rule and a notice of public hearing was filed with the Secretary of State's Office and copies of the proposed rule were sent to state agencies and other interested parties for comment. The draft responses to the oral comments made at the public hearing and the written comments are included with your materials.

The changes made to the proposed rule based on the comments from the Division of Highways clarify that the personal injuries referenced in the rule are those received in the course of and resulting from an individual's employment with the State or its political subdivisions.

Thank you for your consideration of this request.

APPROVED:


Roger Morgan, Chairman
July 15, 1999

JES:TMC/

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: May 17, 1999

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) West Virginia Division of Personnel

Building 6, Room 416, 1900 Kanawha Boulevard, East, Charleston, WV 25305-0139

Phone: 558-3950

LEGISLATIVE RULE TITLE: West Virginia Division of Personnel Workers' Compensation
Temporary Total Disability Rule

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

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

May 18, 1999

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

Copies to all state agencies and interested employee organizations.

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

June 17, 1999 (prospective)

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

N/A

Attached _____ No comments received _____

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

N/A

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

Tari McClintock Crouse, Assistant Director for Employee Communications
Building 6, Room 416, 1900 Kanawha Blvd., E., Charleston, WV 25305-0139

Phone: 304/558-3950, extension 202; FAX: 304/558-1587

E-mail: tcrouse@gwmail.state.wv.us

- 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)

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 PROPOSED RULE

The proposed rule implements the provisions of West Virginia Code §§ 23-4-1 (1989; previously included in 143CSR1) and 23-5A-4 (1999) relating to compensation for state employees who receive personal injuries in the course of and resulting from covered employment.

The rule provides that a state employee who receives a compensable injury may elect to receive either temporary total disability (TTD) benefits or accrued sick leave for his or her absence from work, but not both for the same period. It specifies a means for the employee to elect an option. It provides that the employee, if electing to receive TTD benefits, may be paid sick leave until he or she receives TTD benefits, and that once the employee receives the TTD benefits, he or she must pay back the net value of the sick leave at which time his or her sick leave will be restored. The rule makes it clear that an employee who elects to use accrued sick leave for his or her absence may receive TTD benefits once his or her leave is exhausted.

The rule provides that a state employee who elects to receive TTD benefits continues to accrue annual increment pay, but not years of service credit. It provides that periods during which an employee receives TTD benefits are included as tenure for purposes of order of separation on layoff. The rule relates receipt of sick leave and TTD benefits to the attendance and leave provisions established in the Division of Personnel Administrative Rule 143CSR1.

WEST VIRGINIA DIVISION OF PERSONNEL
WORKERS' COMPENSATION TEMPORARY TOTAL DISABILITY RULE

The rule is being proposed to comply with the provisions of W.Va. Code §§ 23-4-1 and 23-5A-4 which require the Division of Personnel to promulgate legislative rules regarding compensation for state employees who have received personal injuries in the course of and resulting from covered employment.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: West Virginia Division of Personnel Workers' Compensation
Temporary Total Disability Rule

Type of Rule: X Legislative Interpretive Procedural

Agency: West Virginia Division of Personnel

Address: 1900 Kanawha Boulevard, East (Building 6, Room 416)
Charleston, West Virginia 25305-0139

1. Effect of Proposed Rule

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	\$ 0.00	\$0.00	\$0.00	\$0.00	\$0.00
PERSONAL SERVICES	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
CURRENT EXPENSE	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
REPAIRS & ALTERATIONS	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
EQUIPMENT	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
OTHER	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00

2. Explanation of above estimates:

We do not anticipate that the proposed amendments to the existing rule will have any fiscal impact on this agency or other state agencies.

3. Objectives of these rules:

These rules implement the provisions of the West Virginia Code §§ 23-4-1 and 23-5A-4 relating to State employees' accrual of increment pay while receiving temporary total disability benefits and their choice to receive either accrued sick leave or temporary disability benefits, but not both, for compensable injuries.

Rule Title: West Virginia Division of Personnel Workers' Compensation Temporary Total Disability Rule

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

N/A

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

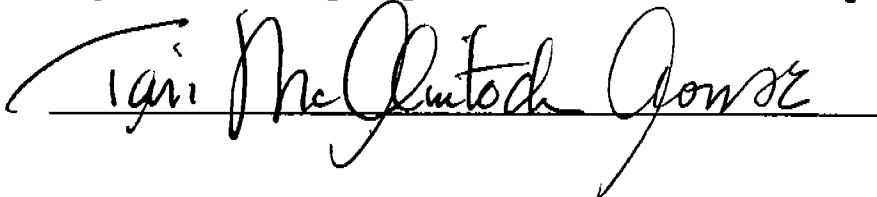
N/A

C. Economic Impact on Citizens/Public at Large.

N/A

Date: May 17, 1999

Signature of Agency Head or Authorized Representative

A handwritten signature in cursive script, reading "Iain McIntosh Jones", is written over a horizontal line.

143CSR3
WEST VIRGINIA DIVISION OF PERSONNEL
WORKERS' COMPENSATION TEMPORARY TOTAL DISABILITY RULE

RECEIVED
MAY 13 2003
3:03

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 state employees who have received personal injuries in the course of and resulting from covered employment with the State or its political subdivisions.

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

1.3. Filing Date:

1.4. Effective Date:

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 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 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.

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.

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 election of option form is not filed, the default option will be 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.

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 while receiving temporary total disability benefits but does not accrue credit for years of service.

Section 4. Leave

4.1. An employee electing to receive accumulated sick leave continues to accrue 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 must apply for a medical leave of absence without pay and, for purposes of leave, is treated the same as any other employee granted a medical leave of absence without pay in accordance with the provisions of the Division of Personnel Administrative Rule 143CSR1.

Section 5. Order of Separation for Layoff. Periods during which an employee is paid 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.

PUBLIC HEARING
June 17, 1999
Building 6, Room 425
State Capitol Complex
Charleston, West Virginia 25305

NOTE

See page three for comments on the Division of Personnel Workers' Compensation Temporary Total Disability Rule 143CSR3.

Board Members Present: Chairman Roger Morgan, Rev. Paul J. Gilmer, Eugene Stump and Elizabeth Harter.

Division of Personnel staff members present: Joe E. Smith, Acting Director, Perry Dotson, Mary Murphy, Stephanie Schulz, Alma M. Legg and Jane Fouty.

MR. MORGAN: Public Hearing is called to order. The Public Hearing is on the Administrative Rule that is in existence now and modifications to that rule. Copies of the rule have been circulated and notice of the submission of the amendments have been submitted to the Secretary of State more than thirty days ago, which is the requirement of the statute. We have in hand some comments about the rule as proposed and we are prepared in this Public Hearing to hear from anyone who wishes to address the Personnel Board with comments, modifications or suggested changes or otherwise and at this time we would open the meeting for those comments. Do we have anyone here that wishes to speak to the Administrative Rule?

HILDA WILLIAMS: I'm Hilda Williams from the Division of Corrections.

MR. MORGAN: Very good. Just give your name and speak into the microphone and we will have it on record.

MS. WILLIAMS: Thank you. Mr. Chairman, my name is Hilda Williams. I'm with the Division of Corrections and while our recommendation regarding the rule does not pertain to any

amendment that has been addressed at this particular time, we would like to present a change that we would like to see in the future, if not this time. It's regarding Provisional Appointments which is in Section 9.3 of the rule. I have provided a copy to Ms. Legg, in writing, of our proposal. I just would like to make a comment as to what we are recommending. The provisional appointments specifically states that "if there are fewer than three available eligibles on the competitive register". We would like to see that changed to ten-fewer than ten on the available register and we have several reasons why we would like to have that addressed. One being that we believe that it would give us a better opportunity for recruitment purposes and it does not limit us in the number of people that we have to pick from an applicant pool. Also, we believe that it parallels hiring in the top ten eligibles on the register. So it's something that we would be able to discuss with the staff of the Division of Personnel and something I'm sure we would have to have discussion about but that's really the only comment that I have to make at this time but we really wanted to take that opportunity.

MR. MORGAN: So you have submitted the language that you proposed?

MS. WILLIAMS: Yes, sir. I have.

MR. MORGAN: Thank you very much. We appreciated you coming forward. We have a representative of the Department of Highways. Would you come up, sir?

NOTE

This ends the comments on the proposed amendments to the Administrative Rule of the Division of Personnel 143CSR1, the subject of the public hearing which began at 2:00 p.m.. The public hearing on the proposed rule, Division of Personnel Workers' Compensation Temporary Total Disability Rule 143CSR3, was scheduled to follow at 2:15 p.m. Mr. Lilly inadvertently signed up to comment on 143CSR1 instead of 143CSR3. His comments which follow concern the Division of Personnel Workers' Compensation Temporary Total Disability Rule.

JERRY LILLY: My name is Jerry Lilly, I'm with the Department of Highways and also I'm a representative of Independent Union of Public Employees. I would like to give the Board copies of the statement.

MR. MORGAN: Thank you. Would you like to summarize what your proposal is here, we haven't had a chance to read it yet.

MR. LILLY: I'll just go ahead and read through it.

MR. MORGAN: Alright.

MR. LILLY: The Independent Union of Public Employees drafted and promoted the legislation which brought about this new rule. We are pleased that this rule corrects the prior policy of depriving injured workers full increment pay for their years of service to the state.

However, we believe that this rule falls short of eliminating the discriminatory practice in its entirety because employees still lose benefits in other areas when they are off work due to a workplace injury and choose to file Workers' Compensation claim rather than use sick leave. This rule is now contradictory and inconsistent.

For example, the time an employee misses while on Workers' Compensation, is credited to his or her years of service for lay-off purposes. Yet, that same employee gets no credit for that same time when the employee is ready to retire. In other words, if a 20 year DOH employee has missed 9 months of work over the years due to on the job injuries, that employee must work an additional 9 months in order to be able to retire. There is no legislator who ever voted for Workers' Compensation who intended that state employees be discriminated against in this manner.

Also, it is discriminatory because had that employee chosen to use sick leave instead of his legal entitlement to Workers' Compensation, he or she would have received full credit for work time

for retirement purposes and would even have continued to accrue sick and annual leave while off work. This new rule forces the injured employee to use up all of his or her sick leave rather than claim his or her legal entitlement to Workers' Compensation benefits. While it may look good for the employer to have fewer claims reported, and save money by extending the years needed for retirement, it is discriminatory, in bad public policy, and sets a bad example for the private sector as well.

Workers' Compensation law itself prohibits discrimination in any form against an employee for having filed a claim. Loss of benefits is included in that prohibition. Employees should not have to sue the state for restoration of their benefits. There is an opportunity here to promote a new rule which is consistent, legal and good public policy by eliminating all forms of benefit discrimination for state workers who receive Workers' Compensation benefits.

My personal experience, I'm a 20 year employee with the Department of Highways and I've never been off on comp. Fortunately, I've never been injured on the job. So we represent many members of the state workers who have and I work with guys in the shop, that their hire date, they were employed before I came to work and one guy in particular now, he has lost about two years in seniority. Due to had a severe back injury at one time and almost lost a hand down in the district shop a couple of years ago. Now, this is altogether different from somebody going off on voluntary leave of absence or medical leave of absence for non-work related injury. We're talking about folks injured on the job. You should not be discriminated against injured benefits. I mean, it could happen to anybody. It could happen to one of you guys, if you're out here in a state vehicle, and be crippled up for a couple of years. When it comes time to retire, well, you're looking at a couple of years and you thought you had it secured and you don't.

MR. MORGAN: Your not proposing any specific language to correct this?

MR. LILLY: Well, our original bill, this bill regarding this, Senate Bill 351. We had language in there that would cover all areas of this. Of course, it was met with quite a bit of opposition from Personnel Division and we ended up making a compromise and come out of there with something covered injuries which was a pretty big issue for a lot of folks throughout the state who had been off on comp. And frankly we got that through and that clarified and stopped a lot of grievances and what have you that pertains to accidents and compensations. But it need to go a little bit further. Nobody should be discriminated against and we feel the law is very specific on that and that the workers should not be discriminated on any of his benefits while off on Workers' Comp. The practice that is in place is very much discriminatory. As in the new rule in regards to lay-off for example, it is very clear that your seniority, your tenure will not be discriminated against in regard to lay-off, its counted for, and now the increment. Well if this would be discriminatory now for man to lose his increment pay in regard to being off on comp or discriminatory for a man to lose tenure in behalf of lay-off it would also have to be discriminatory for the practice of losing your time for retirement, so really it's incomplete. It's a good opportunity here to make this right. We sure appreciate the Personnel Division to address this matter.

MR. MORGAN: We appreciate your comments and thank you for coming in. We will absolutely take it under consideration and give it the attention it needs.

MR. LILLY: Thank you very much.

MR. MORGAN: Do we have anyone else here who would like to speak to the Administrative Rule? If not, our policy has been and will remain, anybody who has any suggestions or any thing they would like to offer as long as it is postmarked by tonight midnight we will give it consideration.

After that of course, the hearing will be closed to any consideration of additional materials. Anybody else who wishes to speak? If not we will close the Public Hearing on this issue and move on to a second Public Hearing with respect to a proposed rule on Workers' Compensation Temporary Total Disability Rule. This too has been filed with the Secretary of State's Office at the appropriate time and has been circulated among those who has been interested in it and we would now convene this public hearing of the issue on the Workers' Compensation Temporary Total Disability issue. Is there any comments? Do we have any writings about that, has anybody submitted anything?

NOTE

As noted previously, Mr. Jerry Lilly's comments concerned the Workers' Compensation Temporary Total Disability Rule.

MR. SMITH: No.

MR. MORGAN: Well again if there's no comments from the audience, we will take in consideration anything anyone wants to offer as long as it's postmarked by tonight midnight otherwise unless there's some objections we will close this public hearing. Closed.

PUBLIC HEARING ON

June 17, 1999, 2:00 p.m.

[illegible]

Independent Union of Public Employees

***P.O. Box 5429
Charleston, WV 25361***

West Virginia Division of Personnel
Joe Smith, Acting Director

Comments Regarding Workers' Compensation Temporary Total Disability Rule 143CSR3

The Independent Union of Public Employees drafted and promoted the legislation which brought about this *new rule*. We are pleased that this rule corrects the prior policy of depriving injured workers full increment pay for their years of service to the state.

However, we believe that this rule falls short of eliminating the discriminatory practice in its entirety because employees still lose benefits in other areas when they are off work due to a workplace injury and choose to file a Workers' Compensation claim rather than use sick leave. This rule is now contradictory and inconsistent.

For example, the time an employee misses while on Workers' Compensation, is credited to his/her years of service for lay-off purposes. Yet, that same employee gets no credit for that same time when the employee is ready to retire. In other words, if a 20 year DOH employee has missed 9 months of work over the years due to on the job injuries, that employee must work an additional 9 months in order to be able to retire. There is no legislator who ever voted for Workers' Compensation who intended that state employees be discriminated against in this manner.

Also, it is discriminatory because had that employee chosen to use sick leave instead of his legal entitlement to Workers' Compensation, he/she would have received full credit for work time for retirement purposes and would even have continued to accrue sick and annual leave while off work. This *new rule* forces the injured employee to use up all of his/her sick leave rather than claim his/her legal entitlement to Workers' Compensation benefits. While it may look good for the employer to have fewer claims reported, and save money by extending the years needed for retirement, it is discriminatory, is bad public policy, and sets a bad example for the private sector as well.

Workers' Compensation law itself prohibits discrimination in any form against an employee for having filed a claim. Loss of benefits is included in that prohibition.

Employees should not have to sue the state for restoration of their benefits. There is an opportunity here to promote a *new rule* which is consistent, legal and good public policy by eliminating all forms of benefit discrimination for state workers who receive Workers' Compensation benefits.

Submitted by:


Jerry Lilly, IUPE Steering Committee



West Virginia Division of Personnel

Joe E. Smith, Acting Director

Cecil H. Underwood, Governor
Joseph F. Markus, Cabinet Secretary

STATE PERSONNEL BOARD
Roger Morgan, Chairman
Rev. Paul Gilmer ♦ Elizabeth Harter
Sharon Lynch ♦ Eugene Stump

July 15, 1999

Jerry Lilly, IUPE Steering Committee Member
Independent Union of Public Employees
P.O. Box 5429
Charleston, West Virginia 25361

Dear Mr. Lilly:

As Chairman of the State Personnel Board, I wish to respond to your comments on the proposed Workers' Compensation Temporary Total Disability Rule. I wish to thank you for taking time to review and comment on the proposed rule.

In your comments, you stated that the proposed rule provides that the time a state employee is absent from work due to a work-related injury and receiving Workers' Compensation benefits is not counted toward the employee's retirement. This is not the case. I'm pleased to advise you that the Public Employees Retirement System *Administrative Rule* §162-5-29, entitled *Member Receiving Workers' Compensation* states, in pertinent part:

Any member of the Retirement System who is injured or suffers a disease growing out of the course of his or her employment and who is receiving Workers' Compensation benefits shall receive credited service toward his or her retirement.

Thank you for your participation in the process to establish this rule. The proposed rule will be reviewed by the Legislative Rule-Making Review Committee at interim meetings tentatively scheduled for August and/or September. If you have additional comments, you may direct them to Debra Graham, Counsel, Legislative Rule-Making Review Committee, Building 1, Room MB-49, 1900 Kanawha Boulevard, East, Charleston, West Virginia 25305-0470.

Sincerely,


Roger Morgan, Chairman
State Personnel Board

RM:TMC/

c: State Personnel Board Members
Joe E. Smith, Acting Director

Cecil H. Underwood
Governor

William F. Vieweg
Commissioner



West Virginia Bureau of Employment Programs
• Job Service/Job Training Programs • Labor Market Information
• Unemployment Compensation • Workers' Compensation
an equal opportunity/affirmative action employer

MEMORANDUM

RECEIVED
JUN 17 1999
DIRECTORS OFFICE - DOP
3:30 PM

To: Joe Smith, Acting Director
WV Division of Personnel

From: Thomas K. Rardin
BEP Personnel Administrator

Date: June 16, 1999

Subject: Comment Regarding Legislative Rule Title 143

We sent a copy of the proposed Administrative Rule to each of the Bureau's Division Directors for comment. The only comment received was from Ed Burdette, Executive Director of the Workers' Compensation Division. Mr. Burdette's memorandum is attached.

Thank you for the opportunity to comment on the proposed changes.

Attachment: Memorandum from Ed Burdette

Cecil H. Underwood
Governor

William F. Vieweg
Commissioner



West Virginia Bureau of Employment Programs

- Job Service/Job Training Programs • Labor Market Information
 - Unemployment Compensation • Workers' Compensation
- an equal opportunity/affirmative action employer

MEMORANDUM

TO: Thomas K. Rardin
Personnel Administrator

FROM: Ed Burdette
Executive Director

DATE: June 15, 1999

RE: Division of Personnel Legislative Rule Title 143

I have reviewed the West Virginia Division of Personnel Workers' Compensation Temporary and Total Disability Rule and find that it comports to the law and have no additional comments relating to this rule.

I do know that in conversation with our Director of Ratemaking, Mr. Smith raised questions about our definition of payroll from which workers' compensation premiums are calculated. This matter does not appear to be in the rules currently under consideration.

It may be appropriate to obtain a copy of the public comments relating to these rules to see if this issue surfaces in a format under which we should be concerned. In the conversation Mr. Smith had with Ms. Ranson, the definition of payroll was of particular importance as it related to the annual increment.

EB:mb

*Follow through
request per [signature]
for information*
1999 JUN 16 PM 1:45
RECEIVED
OFFICE OF
PERSONNEL SERVICES
JON
6/16/99

Worker's Compensation Division
Office of the Executive Director

Post Office Box 3824, Charleston, West Virginia 25338-3824 • <http://www.state.wv.us/bep>
Offices located at 4700 MacCorkle Avenue SE, Charleston • Telephone: 304/926-5048



West Virginia Division of Personnel

Joe E. Smith, Acting Director

STATE PERSONNEL BOARD
Roger Morgan, Chairman
Rev. Paul Gilmer ♦ Elizabeth Harter
Sharon Lynch ♦ Eugene Stump

July 15, 1999

Thomas K. Rardin, Personnel Administrator
West Virginia Bureau of Employment Programs
112 California Avenue
Charleston, West Virginia 25305

Dear Mr. Rardin:

Thank you for coordinating the review of the proposed Workers' Compensation Temporary Total Disability Rule within the Bureau of Employment Programs. In response to Mr. Burdette's comments, I would like to share the following information.

The Division of Personnel continues to be concerned about Workers' Compensation's definition of payroll to the extent that it is related to the calculation of temporary total disability (TTD) benefits. Since 1992, the Division has formally instructed State agencies to include the appropriate pro rata share of annual increment in the daily rate of pay reported on Workers' Compensation claim forms. This inclusion provides that the annual increment is calculated as part of lost wages which is then replaced by the TTD benefits. A pro rata adjustment is then made to the annual increment payment to avoid a double payment (i.e. paid once in the TTD benefit and then paid again in the annual increment check) to employees.

However, it has not been apparent to employees that their annual increment is included in their TTD benefits. They are accustomed to an annual increment payment made once a year by separate check. Consequently, the primary thrust of *W. Va. Code* § 23-5A-4 (1999) is to allow employees to continue to accrue increment pay while receiving temporary total disability benefits. As envisioned, employees would continue to accrue this pay and receive the full amount in July, while receiving temporary total disability benefits in lieu of all other pay. In essence, the State would be "self insuring" for annual increment pay and employees would receive their annual increment pay in the customary lump sum check. Unfortunately, it does not appear that this result can be accomplished within the constraints of *W. Va. Code* §§ 23-4-6 and 23-4-14 and Section 7.1a of the Risk Management rule.

As the staff of the Division of Personnel understand *W. Va. Code* §§ 23-4-6 and 23-4-14 and Section 7.1a of the Risk Management rule, the annual increment payment must be included in reportable wages for purposes of premium payments and calculation of benefits, even though employees will suffer no loss of these wages. According to staff from the Workers' Compensation Division, the provisions of *W. Va. Code* § 23-5A-4 (1999) do not override *W. Va. Code* §§ 23-4-6

Tom Rardin
Page two
July 15, 1999

and 23-4-14 and Section 7.1a of the Risk Management rule. As a result, State employees would receive at least double the statutory benefit for annual increment for all periods during which they also receive TTD benefits. Also, since the annual increment payment is made in lump sum, it is probable that many State employees would receive quintuple the statutory benefit for annual increment for all periods during which they also receive TTD benefits. This is due to the basis for the benefit calculation provided in *W. Va. Code* § 23-4-14(b)(2); that is, "...computed based upon the daily rate of pay at the time of the injury or upon the weekly average derived from the best quarter of wages out of the preceding four quarters...whichever is most favorable to the injured employee...".

Considering the specific language in *W. Va. Code* § 23-4-1 prohibiting public employees from receiving TTD benefits and paid sick leave benefits for the same period of time, we do not believe that the Legislature intended that *W. Va. Code* § 23-5A-4 (1999) provide employees receiving TTD benefits a greater annual increment benefit than they would have received absent their job-related injury. However, we have not found a means to reconcile the intent of *W. Va. Code* § 23-5A-4 (1999) with the specific provisions of *W. Va. Code* §§ 23-4-6 and 23-4-14 and Section 7.1a of the Risk Management rule. Any assistance you may be able to provide in this regard would be greatly appreciated.

Thank you for your participation in the process to establish the Workers' Compensation Temporary Total Disability Rule. The Rule will be reviewed by the Legislative Rule-Making Review Committee at interim meetings tentatively scheduled for August and/or September. If you have additional comments, you may direct them to Debra Graham, Counsel, Legislative Rule-Making Review Committee, Building 1, Room MB-49, 1900 Kanawha Boulevard, East, Charleston, West Virginia 25305-0470.

Sincerely,


Roger Morgan, Chairman
State Personnel Board

c: William F. Vieweg, Commissioner
Bureau of Employment Programs
Ed Burdette, Executive Director
Workers' Compensation Division
Joe Smith, Acting Director
Division of Personnel

RM/TMC

**AMENDMENTS SUBSEQUENT TO PUBLIC HEARING
and
PUBLIC COMMENT PERIOD**

New language was added to the proposed Division of Personnel Workers' Compensation Temporary Total Disability Rule to clarify that the work related injuries addressed in this rule are limited to those injuries which occur in the course of and resulting from covered employment with the State or its political subdivisions. The sections with changes are shown below with the new language underlined.

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 state employees who have received personal injuries in the course of and resulting from covered employment with the State or its political subdivisions.

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.

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.

Section 5. Order of Separation for Layoff. Periods during which an employee is paid 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.