

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

Form #8

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FILED

2006 FEB 17 P 3:49

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Effective Date

NOTICE OF AN EMERGENCY AMENDMENT TO AN EMERGENCY RULE

AGENCY: West Virginia Division of Personnel TITLE NUMBER: 143

DATE EMERGENCY RULE WAS ORIGINALLY FILED: December 16, 2005

FIRST EMERGENCY AMENDMENT TO AN EXISTING RULE: YES X NO

SECOND EMERGENCY AMENDMENT TO AN EXISTING RULE: YES NO

DATE OF FIRST EMERGENCY AMENDMENT:

SERIES NUMBER OF RULE: 7

TITLE OF RULE:

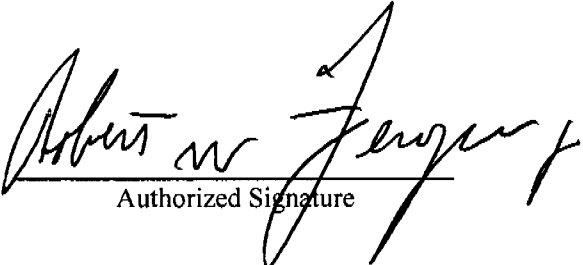
Interdepartmental Transfer of Permanent State Employees

THE ATTACHED IS AN EMERGENCY AMENDMENT TO AN EXISTING EMERGENCY RULE. THIS EMERGENCY AMENDMENT BECOMES EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY AMENDMENT ARE AS FOLLOWS:

Emergency amendments reflect modifications to proposed rule as a result of public comments.

Use additional sheets if necessary


Authorized Signature

#7.20



West Virginia Division of Personnel

Willard M. Farley, Acting Director

STATE PERSONNEL BOARD
Rev. Paul Gilmer ♦ Elizabeth Walker
Sharon Lynch ♦ Eugene Stump

MEMORANDUM

TO: Members of the State Personnel Board

FROM: Willard M. (Max) Farley, Acting Director
WV Division of Personnel 

RE: *Interdepartmental Transfer of Permanent State Employees*

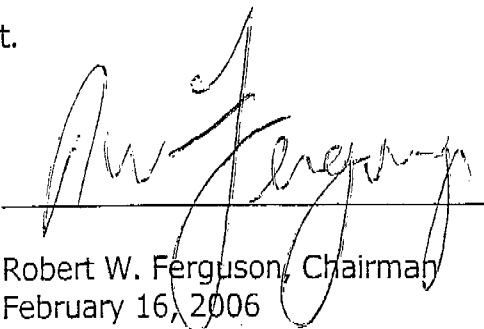
DATE: February 10, 2006

Your approval is requested for filing of a notice of amendments to an emergency rule and agency approval of a proposed rule regarding *Interdepartmental Transfer of Permanent State Employees* 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 as modified subsequent to public comment is attached.

On September 14, 2005, in its Fourth Special Session, the Legislature passed House Bill 407 to be effective from passage. The legislation relates to the power and authority of department secretaries to transfer employees between departments, establishes guidelines for the transfer of employees, protects the rights of transferred employees, requires annual reports, and requires promulgation of emergency and legislative rules. This request is made pursuant to the mandate of the Legislature.

Thank you for your consideration of this request.

APPROVED:


Robert W. Ferguson, Chairman
February 16, 2006

WMF:TMC/

Attachment

EMERGENCY RULE QUESTIONNAIRE

DATE: February 17, 2006

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) West Virginia Division of Personnel
Building 6, Room 416, State Capitol Complex
Charleston, WV 25305 558-3950, extension 202

EMERGENCY RULE TITLE: Interdepartmental Transfer of Permanent State Employees

1. Date of filing December 16, 2005
2. Statutory authority for promulgating emergency rule:
West Virginia Code §29-6-10 and §5F-2-7
3. Date of filing of proposed legislative rule: December 16, 2005
4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule? It adopts new language.
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.
N/A

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.

West Virginia Code §5F-2-7(i): "Prior to the thirty-first day of December, two thousand five, the Division of Personnel shall promulgate an emergency rule in accordance with the provisions of article three, chapter twenty-nine-a of this code, to effectuate the provisions of this section."

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

N/A

SUMMARY OF PROPOSED RULE, 143CSR7

The proposed rule implements the provisions of West Virginia Code §5F-2-7 relating to the interdepartmental transfer of permanent state employees. The rule provides a mechanism for the transfer of employees, specifies the rights of employees who are to be transferred, and requires reports relative to such transfers.

CIRCUMSTANCES CONSTITUTING THE EMERGENCY

The provisions of West Virginia Code §5F-2-7 require the Division of Personnel to promulgate an emergency rule prior to December 31, 2005.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 143CSR7, Interdepartmental Transfer of Permanent State Employees

Type of Rule: ☒ Legislative ☐ Interpretive ☐ Procedural

Agency: West Virginia Division of Personnel

Address: State Capitol Complex
Building 6, Room 416
Charleston, WV 25305

Phone Number: 558-3950, ext. 202 Email: tcrouse@wvadmin.gov

Fiscal Note Summary

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

This rule implements the provisions of West Virginia Code §5F-2-7 which provides for the interdepartmental transfer of permanent state employees. It is anticipated that such transfers will result in savings in personal services and benefits costs.

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			
Personal Services			
Current Expenses			
Repairs & Alterations			
Assets			
Other			
2. Estimated Total Revenues			

Rule Title: _____

Rule Title: 143CSR7, Interdepartmental Transfer of Permanent State Employees

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

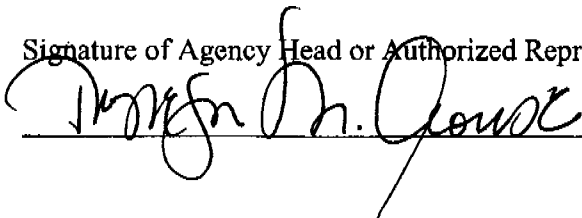
The interdepartmental transfer of permanent state employees envisioned in §5F-2-7 would be based on instant situations requiring the consolidation or elimination of positions (i.e., lack of work, lack of funds, or material changes in organization or duties). Such situations are not predictable. Consequently, it is not possible to provide a reliable estimate of the savings.

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: 17 February 2006

Signature of Agency Head or Authorized Representative



143CSR7

FILED

**TITLE 143
LEGISLATIVE RULE
WEST VIRGINIA DIVISION OF PERSONNEL**

2006 FEB 17 P 3:49

**SERIES 7
INTERDEPARTMENTAL TRANSFER OF PERMANENT STATE EMPLOYEES**

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Section 1. General

1.1. Scope: This rule implements the provisions set forth in West Virginia Code § 5F-2-7 regarding the interdepartmental transfer of permanent state employees.

1.2. Authority: This rule is issued under authority of West Virginia Code § 29-6-10 and § 5F-2-7.

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. Involuntary Transfer: Any transfer under the provisions of this rule which is not agreed to in writing by the employee being transferred.

2.2. Permanent State Employee: Any person hired for permanent employment, either full or part-time, by any department, agency, commission or board of the state created by an act of the Legislature, except those persons employed by any higher education governing board or institution, uniformed members of the department of public safety, any employees of any constitutional officer and any employees of the Legislature.

2.3. Voluntary Transfer: Any transfer under the provisions of this rule which is agreed to in writing by the employee being transferred.

Section 3. Authorization of Transfers: When it becomes necessary by reason of shortage of work or funds, abolition of position, or material changes in duties or organization, a department secretary, in lieu of or preliminary to a layoff, may enter into an agreement with another department secretary to transfer a permanent state employee from a position that is to be consolidated or eliminated to a funded vacant position in another department, in accordance with the provisions of this rule. As the intent of this rule is, whenever possible, to provide continuous employment for permanent state employees whose positions are to be consolidated or eliminated instead of laying off those employees, the Director of Personnel shall interpret this rule in a manner consistent with existing law and rule regarding layoff.

3.1. Prior to an interdepartmental transfer due to consolidation or elimination of a position, the department secretary shall submit to the State Personnel Board for approval a description

of the organizational unit or units to which a consolidation or elimination will apply and from which the transfer will be made. The organizational unit may be an entire agency, division, bureau, or other organizational unit.

3.2. Prior to the interdepartmental transfer of any employee, the department secretary shall file with the Director a proposed plan which shall include:

- a. a statement of the circumstances requiring the consolidation or elimination;
- b. the approved organizational unit(s) in which the proposed consolidation or elimination will take place;
- c. a list of each job class affected by the consolidation or elimination;
- d. a list of all employees, in order of retention, in each job class in the approved organizational unit affected by the consolidation or elimination;
- e. the number of positions, by job class, to be eliminated or consolidated; and,
- f. a copy of the proposed agreement to be entered into by the department secretaries between which the transfer is to be made, including the number of positions, by job class, into which employees are proposed to be transferred.

3.3. It is the duty of the Director of Personnel to verify the details on which the plan is based and to notify the department secretaries in writing of the approval of the plan.

Section 4. Notice.

4.1. After the Board has approved the organizational unit to which the consolidation or elimination will apply and the Director has notified the department secretaries of the approval of the proposed interdepartmental transfer plan, the secretary of the department from which the employee will transfer shall notify each affected employee of the consolidation or elimination and proposed transfer in writing at least fifteen days prior to the proposed transfer.

4.2. The approved proposed interdepartmental transfer plan to be followed by the department secretaries shall be provided by the department secretaries in writing, to any employee affected by the consolidation or elimination.

Section 5. Order of Transfer.

5.1. After the department secretary has determined the number of positions by job class to be consolidated or eliminated, and the Board has approved the organizational unit to which the consolidation or elimination will apply, and the Director has approved the proposed plan for the consolidation and elimination of positions and the transfer of employees, the order of transfer shall be applied in the following manner.

- a. The department secretary shall first transfer affected employees voluntarily agreeing in writing to be transferred. In all cases employees in the affected job class shall be offered the

opportunity to voluntarily transfer in order of most tenure as a permanent employee of a state agency or in the classified service.

b. If sufficient permanent employees in the affected job class in the approved organizational unit do not volunteer to be transferred, the department secretary may order an involuntary transfer. Selection of permanent employees for an involuntary transfer shall be from the affected job class in the approved organizational unit and in order of tenure as a permanent employee of a state agency or in the classified service consistent with statutory provisions regarding the receipt or withdrawal of a benefit. In all cases, employees will be retained in State employment, including employment in another department resulting from a voluntary or involuntary transfer, based on most tenure as a permanent employee of a state agency or in the classified service. An involuntary transfer may be rejected in writing by an employee if the involuntary transfer would require the employee to travel thirty miles or more, one way, than the distance, by customary route, the employee currently travels to his or her current job site.

5.2. Tenure credit does not accrue for periods during which terminal annual leave is paid or for periods during which an employee is not paid a wage or salary, except for military leave, educational leave, or periods during which the employee is paid temporary total disability benefits under the provisions of WV Code §23-4-1 for a personal injury received in the course of and resulting from covered employment as a permanent employee of a state agency or in the classified service, or unless otherwise provided by State or Federal statute.

5.3. In the event of a tie based on tenure, the department secretary or his or her representative and those employees who are tied shall agree on a means of breaking the tie and shall notify the Director in writing of the agreement and the results.

Section 6. Transfer Rights.

6.1. Transfers of classified employees under the provisions of West Virginia Code § 5F-2-7 shall comply with the provisions of the Administrative Rule of the Division of Personnel, 143CSR1, except that any employee transferred under the provisions of West Virginia Code § 5F-2-7 shall receive the same level of benefits and rate of compensation or higher, and shall retain the same level of tenure.

6.2. A classified employee who is transferred under the provisions of West Virginia Code § 5F-2-7 shall retain his or her classified status.

6.3. A classified exempt employee who is transferred under the provisions of West Virginia Code § 5F-2-7 shall retain his or her classified exempt status provided that the transfer is made in accordance with the law. A classified exempt employee who is transferred to a position in the classified service must be appointed from a register, reinstated to the classified service, or added to the classified service in accordance with the law.

Section 7. Reporting.

7.1. The department secretary shall report the names of all employees who are to be transferred to the Director of Personnel, in writing, no later than the date the department secretary notifies the employee of the transfer.

7.2. Upon completion of interdepartmental transfers made under the provisions of West Virginia Code § 5F-2-7, the department secretary shall report the details of such transfers to the Director of Personnel, including but not limited to, the names of employees voluntarily and involuntarily transferred, as well as all furniture and equipment transfers.

Section 8. Appeals. Employees shall initiate appeals from involuntary interdepartmental transfers at level three of the Education and State Employees Grievance Procedure as provided in West Virginia Code §29-6A-1 et seq.

Section 9. Post-Transfer Layoff. After all transfers have been completed, the secretary of the department consolidating or eliminating positions shall initiate a layoff in accordance with existing rule and law for all remaining positions which were identified to be consolidated or eliminated in the plan approved under the provisions of sub-section 3.3 of this rule.



West Virginia Division of Personnel

Willard M. Farley, Acting Director

STATE PERSONNEL BOARD
Sharon Lynch ♦ Eugene Stump
Elizabeth Walker

February 16, 2006

Christopher G. Morris, Deputy Tax Commissioner
West Virginia State Tax Department
1001 Lee Street, East
Charleston, West Virginia 25301

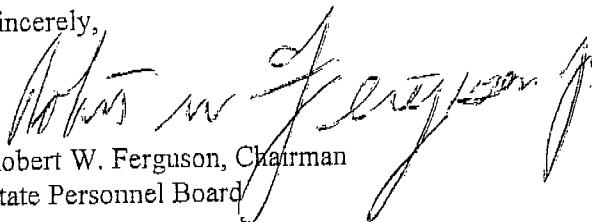
Dear Mr. Morris,

As Chairman of the State Personnel Board, I wish to thank you for sharing the proposed rule regarding Interdepartmental Transfer of Permanent State Employees with your staff and having them take the time to review and comment on this rule.

Your comments on the need for clarification of the proposed Section 8. (Rejection of Transfer) are well-taken and we believe your recommendations will significantly improve the proposed rule. Consequently, we are incorporating these recommendations in modifications we will submit as our Agency Approved Proposed Rule and as Emergency Amendments to the Emergency Rule.

Again, thank you for your participation in the process to establish this rule.

Sincerely,



Robert W. Ferguson, Chairman
State Personnel Board



STATE OF WEST VIRGINIA
Department of Revenue
State Tax Department

Joe Manchin III
Governor

Virgil T. Helton, Acting
State Tax Commissioner

MEMORANDUM

TO: Willard M. Farley, Acting Director
WV Division of Personnel

FROM: Christopher G. Morris, Deputy Tax Commissioner/ 
Chief of Staff

RE: Comment on Proposed Rule
House Bill 407

DATE: January 19, 2006

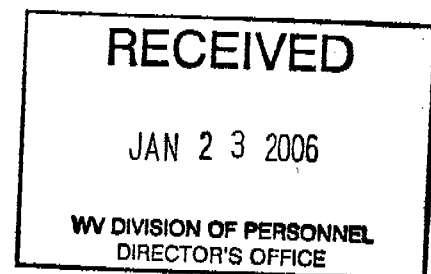
This memorandum is being submitted in response to the notice of public comment on a proposed Legislative Rule 143CSR7 regarding *Interdepartmental Transfer of Permanent State Employees*. After review of the rule, the general consensus to the proposed rule is favorable. However, comments from employees in our Department expressed the need for the proposed rule to contain language to clarify Section 8 *Rejection of Transfer*.

Please feel free to contact me at (304) 558-0751 if you should have any questions regarding this issue.

CGM/PJH

CC: John C. Musgrave, Acting Cabinet Secretary
Virgil T. Helton, Acting Tax Commissioner
Patricia J. Haddy, Director of Operations

HR Memo file





West Virginia Division of Personnel

Willard M. Farley, Acting Director

STATE PERSONNEL BOARD
Sharon Lynch ♦ Eugene Stump
Elizabeth Walker

February 16, 2006

Ms. Cheryl Turnes
214 23rd Street
Dunbar, West Virginia 25064

Dear Ms. Turnes,

As Chairman of the State Personnel Board, I wish to thank you for taking the time to review and comment on the proposed rule regarding Interdepartmental Transfer of Permanent State Employees.

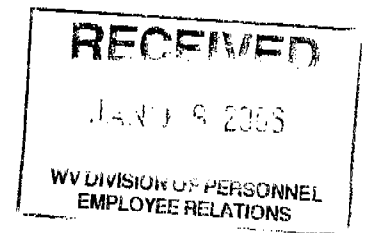
The notice requirement in Section 4.1 is specified in *West Virginia Code*, § 5F-2-7 (c) as a minimum requirement. As a matter of practice, the Division of Personnel always encourages employers to give as much notice as possible to employees in instances such as the transfers proposed in the statute, and we will continue to do so. Your comment on clarifying the level of benefits and pay upon transfer are well-taken. Consequently, we are incorporating a clarification in modifications we will submit as our Agency Approved Proposed Rule and as Emergency Amendments to the Emergency Rule.

Again, thank you for your participation in the process to establish this rule.

Sincerely,

Robert W. Ferguson, Chairman
State Personnel Board

214 23rd St.,
Dunbar, WV 25064
Jan. 15, 2006



WV Division of Personnel
Building 6, Room 416
State Capitol Complex
1900 Kanawha Blvd., E.
Charleston, WV 25305

Dear Sir or Madam:

In response to Rule 7, Interdepartmental Transfer of Permanent State Employees:

1. Section 4.1 should read "at least forty-five (45) days prior to the transfer."
2. Section 6.1 should be clear that the employee gets the same level of benefits and rate of compensation of his/her former position - or of the new position - whichever is higher.

Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Cheryl Turnes".

Cheryl Turnes



West Virginia Division of Personnel

Willard M. Farley, Acting Director

STATE PERSONNEL BOARD
Sharon Lynch ♦ Eugene Stump
Elizabeth Walker

February 16, 2006

Martha Yeager Walker, Cabinet Secretary
Department of Health and Human Resources
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

Dear Secretary Walker,

As Chairman of the State Personnel Board, I wish to thank you for sharing the proposed rule regarding Interdepartmental Transfer of Permanent State Employees with your staff and having them take the time to review and comment on this rule.

Your comments on areas of the rule that may need clarification are well-taken and we believe your recommendations will significantly improve the proposed rule. Consequently, we are incorporating these recommendations in modifications we will submit as our Agency Approved Proposed Rule and as Emergency Amendments to the Emergency Rule.

. Again, thank you for your participation in the process to establish this rule.

Sincerely,

Robert W. Ferguson, Chairman
State Personnel Board

**RECEIVED**

JAN 19 2006

**WV DIVISION OF PERSONNEL
DIRECTOR'S OFFICE**

STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of the Secretary

Joe Manchin III
Governor

State Capitol Complex, Building 3, Room 206
Charleston, West Virginia 25305
Telephone: (304) 558-0684 Fax: (304) 558-1130

Martha Yeager Walker
Secretary

MEMORANDUM

DATE: January 19, 2006

TO: Willard M. Farley, Acting Director
West Virginia Division of Personnel

FROM: Martha Yeager Walker, Cabinet Secretary *MYW*
West Virginia Department of Health and Human Resources

RE: Proposed Rule: Interdepartmental Transfer of Permanent State Employees

As requested in your memorandum dated January 3, 2006, the proposed rule regarding Interdepartmental Transfers of Permanent State Employees has been circulated among our staff for review and comment. Basically, the comments received address two items in the proposed rule that may need clarification. The comments are summarized below.

First, **Section 2, Definitions** of the proposed rule states: *"Terms used in this rule have the meaning given in the Administrative Rule of the Division of Personnel, 143CSR1."* The term "permanent state employee" is defined neither in the Administrative Rule of the Division of Personnel nor in the proposed rule. Because of the many types of employment in State government, it would be helpful to have the term "permanent state employee" precisely defined in the proposed rule.

Second, **Section 5.1.b.** of the proposed rule seems to afford greater rights for less tenured employees over more tenured employees. This section provides that involuntary transfer of employees will be in order of least tenure. Since the alternative to an involuntary transfer may be job loss, it would seem that involuntary transfer of employees would be in order of most tenure. In any event, it would be helpful to have this section clarified.

Questions concerning these comments may be addressed to Mike McCabe at 558-2072. If I may be of further assistance, please let me know.

MYW/vmm



West Virginia Division of Personnel

Willard M. Farley, Acting Director

STATE PERSONNEL BOARD
Sharon Lynch ♦ Eugene Stump
Elizabeth Walker

February 16, 2006

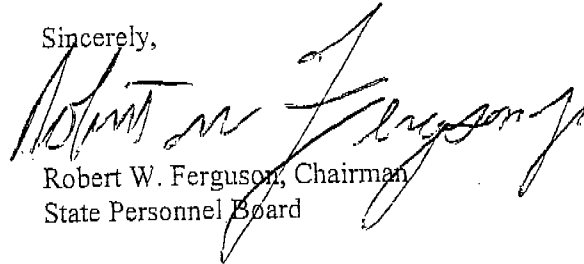
J. Michael Adkins, Deputy Director of Operations
West Virginia Public Employees Insurance Agency
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

Dear Mr. Adkins,

As Chairman of the State Personnel Board, I wish to thank you for sharing the proposed rule regarding Interdepartmental Transfer of Permanent State Employees with your staff and having them take the time to review and comment on this rule.

You were correct in your surmise that the reporting of the transfer of all furniture and equipment was part of the legislation requiring the development of the rule. Again, thank you for your participation in the process to establish this rule.

Sincerely,



Robert W. Ferguson, Chairman
State Personnel Board

Joe Manchin III
Governor

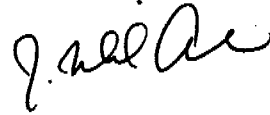


Keith Huffman
Acting Co-Director
and
General Counsel

WV Toll-free: 1-888-680-7342 • Phone: 1-304-558-7850 • Fax: 1-304-558-2516 • Internet: www.wvpeia.com

MEMORANDUM

To: Willard M. (Max) Farley, Acting Director
WV Division of Personnel

From: J. Michael Adkins, Deputy Director of Operations 

cc: B. Keith Huffman, General Counsel & Acting Co-Executive Director
Jason Haught, CFO & Acting Co-Executive Director
Gloria Long, Deputy Director & Acting Co-Executive Director

Re: Comment on Proposed Rule
Interdepartmental Transfer of Permanent State Employees

Date: January 9, 2006

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JAN 18 2006

WV DIVISION OF PERSONNEL
DIRECTOR'S OFFICE

Under **Section 7. Reporting. 7.2** the department secretary is required to provide a report to the Director of Personnel that includes the names of employees voluntarily and involuntarily transferred, "*as well as all furniture and equipment transfers.*"

The reporting of the transfer of voluntarily and involuntarily employees to the Director of Personnel are consistent with the intent of the rule and is without question within the scope of responsibility of the Director. However, a report to the Director on the transfer of furniture and equipment appears to be outside the bounds of the rule and the authority of the Director and is not logically connected to the legal and appropriate transfer of personnel from one department to another.

Physical assets of one agency being transferred to another agency fall under a variety of rules and procedures that ensure the proper disposition of those items. The intervention of the Director of Personnel into that process is not necessary or beneficial in any way.

I would recommend the removal of the statement "*as well as all furniture and equipment transfers*" from Section 7. Reporting. 7.2. unless, of course, this particular wording was part of the legislation requiring the development of this rule.



West Virginia Division of Personnel

Willard M. Farley, Acting Director

STATE PERSONNEL BOARD
Sharon Lynch ♦ Eugene Stump
Elizabeth Walker

February 16, 2006

Earl W. Maxwell, Director
West Virginia Education and State Employees Grievance Board
808 Greenbrier Street
Charleston, West Virginia 25311

Dear Mr. Maxwell,

As Chairman of the State Personnel Board, I wish to thank you for sharing the proposed rule regarding Interdepartmental Transfer of Permanent State Employees with your staff and having them take the time to review and comment on this rule.

Your comments on initiating the appeal process at level three and obtaining written agreement or rejection of transfers are well-taken and we believe your recommendations will significantly improve the proposed rule. Consequently, we are incorporating these recommendations in modifications we will submit as our Agency Approved Proposed Rule and as Emergency Amendments to the Emergency Rule.

Again, thank you for your participation in the process to establish this rule.

Sincerely,

Robert W. Ferguson, Chairman
State Personnel Board



**EDUCATION AND STATE
EMPLOYEES GRIEVANCE BOARD**

808 GREENBRIER STREET, CHARLESTON, WV 25311

(304) 558-3361 • FAX 558-1106

TOLL FREE (866) 747-6743

WVGB@WVGB.ORG

WWW.STATE.WV.US/ADMIN/GRIEVANC

GOVERNOR
JOE MANCHIN, III

BOARD MEMBERS
DAVID K. HENDRICKSON, ESQ.
CAM LEWIS
EDGAR MORANO

DIRECTOR
EARL W. MAXWELL, ESQ.

January 17, 2006

Willard M. Farley, Acting Director
Division of Personnel
Bldg. 6, Room 416
State Capitol Complex
Charleston, WV 25305

Re: Comment on Proposed Rule,
Interdepartmental Transfer of State Employees
143 C.S.R. 7

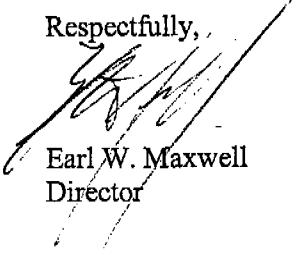
Dear Mr. Farley:

After review of the proposed Rule governing interdepartmental transfers of permanent state employees, the Grievance Board would suggest the following revisions:

- Section 9.1 would promote a more efficient appeal process if it were to direct grievance appeals be initiated at level three. West Virginia Code § 29-6A-3(c) permits an employee to file at the level vested with authority to grant the requested relief, if the lower level supervisors agree in writing. Under the proposed rule, the transfer decision would be initiated by the departmental secretary, so lower level supervisors would have no authority to act on the grievance. The proposed rule could eliminate the need for the lower levels to agree in writing without prejudice to the employee, as that requirement is basically a measure of protection for the employer.
- In Section 5, if there were a requirement that an employee agree *in writing* to a proposed transfer, or reject *in writing* an involuntary transfer, the employer would have a defense to a challenge of that transfer based on discrimination, one of the most likely grounds for appealing the decision through the grievance process. Under W. VA. CODE § 29-6A-2(d), "Discrimination" is defined as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees *or agreed to in writing by the employees.*" (Emphasis added).

The Grievance Board has no objections to any other portions of the proposed rule, and appreciates the opportunity to comment on the proposal.

Respectfully,


Earl W. Maxwell
Director



West Virginia Division of Personnel

Willard M. Farley, Acting Director

STATE PERSONNEL BOARD
Sharon Lynch ♦ Eugene Stump
Elizabeth Walker

February 16, 2006

American Federation of State, County and Municipal Employees, Council 77
Communications Workers of America

To whom it may concern,

As Chairman of the State Personnel Board, I wish to thank you for taking the time to review and comment on the proposed rule regarding Interdepartmental Transfer of Permanent State Employees.

Your comments regarding Section 8 (Rejection of Transfer) pointed out the need to clarify that the interdepartmental transfer of permanent state employees is intended to prevent the layoff of such employees by allowing them to continue employment in another department via a transfer. Any layoff of employees must be done in compliance with existing law and rule regarding layoff. Consequently, we are incorporating a clarification in modifications we will submit as our Agency Approved Proposed Rule and as Emergency Amendments to the Emergency Rule.

Again, thank you for your participation in the process to establish this rule.

Sincerely,

A handwritten signature in cursive script, reading "Robert W. Ferguson, Jr.", written in dark ink.

Robert W. Ferguson, Chairman
State Personnel Board

RECEIVED

JAN 19 2006

WV DIVISION OF PERSONNEL
DIRECTOR'S OFFICE

MEMORANDUM FOR PUBLIC COMMENT

TO: West Virginia Division of Personnel

FROM: American Federation of State, County and Municipal Employees, Council 77, and the Communications Workers of America

RE: Public Comment regarding proposed rule "Interdepartmental Transfer of Permanent State Employees", Title 143, Series 7.

DATE: January 19, 2006

On December 16, 2005, the West Virginia Division of Personnel filed a Notice of Comment period on a proposed rule for the "Interdepartmental Transfer of Permanent State Employees". The proposed rule is Title 143, Series 7 in the West Virginia Code of State Regulations. The American Federation of State, County and Municipal Employees and the Communication Workers of America now write in opposition to the proposed rule. Both entities generally contend that the rule is constitutionally defective and should be rejected or modified in order to cure the defects currently present in the proposed rule for the following reasons.

Employees covered by the state civil service system are imbued with certain constitutional due process property rights. Generally, these rights require that prior to a member of the classified service being terminated, that employee can be terminated only for "cause." This right to just cause protection is found in W. Va. Code §29-6-10. A decision to discharge or reduce the rank or grade of a civil service employee requires "cause" on the part of the employer. W. Va. Code §29-6-10(12). This standard is analogous to the "just cause" standard commonly employed by collective bargaining contracts and labor arbitrators. The grounds for "cause" must specifically relate to and affect the administration and duties of the position, and must be of a substantial nature and directly affect the rights and interests of the public.

The West Virginia Supreme Court of Appeals has routinely interpreted this just cause protection as providing employees with significant property rights that can only be interfered with or undone in a particular manner. Sloan v. Department of Health and Human Resources, 215 W. Va. 657, 600 S.E.2d 554 (2004); Reece v. Bd. Of Trustees/Marshall Univ., 202 W. Va. 89, 502 S.E.2d 186 (1998); Roach v. Regional Jail Authority, 198 W. Va. 679, 482 S.E.2d 679 (1996); Mangum v. Lambert, 183 W. Va. 184, 394 S.E.2d 879 (1990); Oakes Department of Finance and Administration, 164 W. Va. 384, 264 S.E.2d 151 (1980); Thurmond v. Steele, 159 W. Va. 630, 225 S.E.2d 210 (1976); Guine v. Civil Service Commission, 149 W. Va. 461, 141

S.E.2d 364 (1965). The determination of whether "cause" exists must be made on a case-by-case basis, depending on all of the facts and circumstances of each case. Thurmond, 225 S.E.2d 210.

The proposed rule as currently drafted interferes with this well-settled property right.

As currently drafted, when a department secretary (with the approval of the State Personnel Board) implements transfers of classified employees, affected employees will initially be given the option of voluntarily transferring. If, however, an insufficient number of permanent employees volunteer a transfer, "the department secretary may order an involuntary transfer." The proposed language is as follows:

b. If sufficient permanent employees in the affected job class in the approved organizational unit do not volunteer to be transferred, the department secretary may order an involuntary transfer. Selection of permanent employees for an involuntary transfer shall be from the affected job class in the approved organization unit and in order of least tenure as a permanent employee of a state agency or in the classified service. An involuntary transfer may be rejected by an employee if the involuntary transfer would require the employee to travel thirty miles or more, one way, than the distance, by customary route, the employee currently travels to his or her current job site.

c. Tenure credit does not accrue for periods during which terminal annual leave is paid or for periods during which an employee is not paid a wage or salary, except for military leave, educational leave, or periods during which the employee is paid temporary total disability benefits under the provisions of W. Va. Code §23-4-1 for a personal injury received in the course of and resulting from covered employment as a permanent employee of a state agency or in the classified service, or unless otherwise provided by State or Federal statute.

d. In the event of a tie in the order of separation, the department secretary or his or her representative and those employees who are tied shall agree on a means of breaking the tie and shall notify the Director in writing of the agreement and the results.

Crucially, when an employee rejects a transfer, that employee "shall be laid off in accordance with the law." 143 CSR Series 7, Section 8 [emphasis supplied]. Thus, as a result of an employee refusing an involuntary transfer, an employee can, essentially, lose their civil service position. This, without any requirement that "just cause" exists in order to effectuate this separation from employment.

A grant of such authority to the Division of Personnel and/or the appointing authority or department secretary violates the well-settled constitutional due process rights of those in the classified service. There is no requirement under section eight (8) that an employee be removed for just cause; instead, such an employee can be laid off or terminated from his or her position simply for refusing a transfer. This authority is in direct conflict with existing statutory and

regulatory rights protecting those in the classified service.¹

For these reasons, AFSCME and CWA respectfully urge the rejection or modification of the proposed rule.

¹The undersigned recognizes that W. Va. Code §5F-2-7(g) also provides that “an employee who qualifies for and chooses to reject a transfer shall be laid off in accordance with the law.” The undersigned contend that this provision, likewise, violates the due process rights of those in the classified service in permitting a termination to occur without requiring that just cause for such a termination exists.

SUMMARY OF AMENDMENTS, 143CSR7

Amendment	Reason for Amendment
Section 2 - Definitions added.	To include definitions for terms that were not clear as indicated by comments.
Section 3 - Intent stated. Clarification of relationship to layoff added.	To clarify that the transfer of employees under the provision of this rule is in lieu of or preliminary to a layoff and that this rule will be interpreted consistent with current rule and law regarding layoff. These amendments were made due to comments that indicated that the intent of the rule was not clear.
Section 4 - Clarification of notice requirement.	Language was added to make the notice requirements consistent with clarifications in other sections.
Section 5 - Clarification of tenure as the basis for transfer.	Language was added to clarify that in all cases employees will be retained in state employment based on most tenure as a permanent employee.
Section 6 - Clarification of relationship of this rule to the Administrative Rule of the Division of Personnel.	Language was added to clarify that this rule is consistent with the Administrative Rule except in cases where the Administrative Rule would require a reduction in an employee's compensation due to a transfer.
Section 8 - Previous Section 8 was deleted. New Section 8 (previous Section 9) was amended.	The original language in this section was deleted and a new Section 9 was added. The new Section 8 (Appeals) was amended, as a result of comment, to provide for appeals to be initiated at level three of the grievance procedure.
Section 9 - New Section 9 was added in place of the previous Section 8.	Comments indicated that the language in the previous Section 8, while identical to the statutory language, was not clear. The new Section 9 was added for clarification of the relationship of this rule to the existing rule and law regarding layoff.