

WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF PUBLIC SAFETY
CHAPTER 15-2
SERIES 1

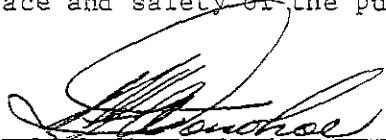
NOTICE OF EMERGENCY RULE

RULE TITLE: General Order Number Eight

Promotion Evaluation Board

The attached rule is filed as an Emergency Rule. The facts and circumstances constituting the emergency are as follows:

All permanent promotions in rank within the Department of Public Safety must be achieved by process of the Promotion Evaluation Board. The Promotion Evaluation Board is convened and conducts business pursuant to Department General Order number eight, (Legislative regulation 15-2, series 1, section 8). After a Declaratory Judgment proceeding last year, the Circuit Court of Kanawha County, per Judge MacQueen, ruled certain portions of the rule invalid and void. As a result, the normal command structure of the Department is now depleted, showing many critical vacancies, and requires immediate promotional consideration to assure the orderly operation necessary to the Department mission, and the peace and safety of the public.



SUPERINTENDENT,
DEPARTMENT OF PUBLIC SAFETY

FILED

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DEPT. OF PUBLIC SAFETY
SECRETARY'S OFFICE

WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF PUBLIC SAFETY
CHAPTER 15-2
SERIES 1
EMERGENCY FILING

FILED
1986 APR -4 PM 1:11
OFFICE OF THE CLERK
SECRETARY OF STATE

Title: General Order Number Eight - Promotion Evaluation Board

Section 1. General

1.1 Scope - This amended legislative rule re-establishes the Promotion Evaluation Board of the Department of Public Safety and specifies the process by which it shall function, and by which all permanent promotions in rank within the Department shall be achieved.

1.2 Authority & Related Code Citation(s) - W.Va. Code 15-2-9, and W.Va. Code 15-2-25.

1.3 Filing Date

1.4 Effective Date

1.5 Repeal of Former Rule - This emergency legislative rule repeals by amendment West Virginia legislative rule, Department of Public Safety, Chapter 15-2, Series I, Section 8, filed July 10, 1984.

Section 8.0 Promotion Evaluation Board

8.1 This section relates to West Virginia Code 15-2-9.

8.2 The Superintendent shall appoint a Promotion Evaluation Board representative of the commissioned and non-commissioned officers within the department. Each Board shall serve for a term of six months from the date of appointment and any Board member may, at the Superintendent's discretion, serve on consecutive Boards. Board members may be replaced during their tenure on the Board if they become unable to serve because of disability, poor health, promotion resulting in imbalance on the Board, or such other good cause coming to the attention of the Superintendent.

8.3 The Promotion Evaluation Board shall consist of not fewer than three members. The highest ranking member shall serve as Board Chairman. Each Board member shall have equal voting privileges and all actions of the Board shall be by majority decision. The Chairman shall appoint a non-board member to serve as a non-voting recorder.

FINAL DRAFT - FEBRUARY 7, 1986

Dept. of Public Safety
Leg. Rule, 15-2
Series 1, Section 8
Emergency Rule

8.4 Before the Promotion Evaluation Board assumes its duties, the Superintendent shall administer the following oath to each Board member:

"I, _____, do solemnly swear (or affirm) that I will, without prejudice or partiality, perform the duties hereby imposed upon me and further that I will not divulge the proceedings or results of this Promotion Evaluation Board except by proper authority."

The Chairman shall administer the afore oath to the recorder.

8.5 The Superintendent shall furnish the Promotion Evaluation Board with a list of ~~positions~~ ranks to which recommended eligible members ~~will~~ are to receive promotional consideration. The Superintendent will also inform the Board of current and projected operational needs of the department and the expected assignment of ranks and any specialized skills and/or knowledge deemed qualifications necessary ~~te~~ for the proper fulfillment of the duties and responsibilities of the ~~positions~~ expected assignments under consideration as well as any other guidelines deemed appropriate under the circumstances of each ~~position~~.

8.6 The Promotion Evaluation Board shall prescribe and record merit standards for promotion to ranks specified by the Superintendent. Such merit standards shall reflect general requirements for duty in the rank to be promoted to and shall not reflect requirements for specific assignments after promotion. Merit standards for promotion to ranks, once prescribed by any Board, shall be furnished to the Superintendent and transmitted to each Company and Division and shall there be made available to any sworn member requesting same. The merit standards for any rank may be amended by any promotion Evaluation Board when and as they deem appropriate and upon amendment shall be in full force and effect. The Board may seek input from any source it deems appropriate in formulating and prescribing merit standards. Upon the reformulation, amendment, or ratification of existing merit standards, the Board shall apply such standards and determine to the extent reasonably possible, all eligible candidates and maintain lists of same.

8.7 ~~In regard to field promotions~~ The Promotion Evaluation Board shall transmit to Departmental senior staff, each company commander, the director of the Criminal Identification Bureau, the commandant of the Academy, and such other division commanders as the Board may direct, a list of field all promotions under consideration and appropriate prescribed merit standards. Each member ~~field company commander~~ so provided with said list shall submit to the Promotion Evaluation Board, the name of members recommended in accordance with applicable merit standards for promotional consideration to the ~~field positions~~ ranks of trooper first class, corporal, sergeant, first sergeant, and lieutenant. ~~Headquarters senior staff may also submit recommendations for field promotions~~. Recommendations may ~~shall~~ be accompanied by written justification.

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8.8 In regard to headquarters and/or staff services promotions, the senior staff shall submit to the Promotion Evaluation Board the names of members recommended in accordance with applicable merit standards prescribed by the Promotion Evaluation Board as pertaining to headquarters and/or staff services promotions. Recommendations shall be accompanied by written justification.

~~8.8~~ ~~8.9~~ The Promotion Evaluation Board shall evaluate recommended eligible members according to the current prescribed merit standards, the current and projected operational needs of the department, and any specialized skills, qualifications, and/or knowledge deemed necessary and previously communicated to the Board by the Superintendent for the proper fulfillment of the duties and responsibilities of the expected assignments of each rank, and submit to the Superintendent a ranked listing of members recommended and eligible for promotional consideration at least three names, where possible, of eligible members recommended by the Board for promotional consideration. The Board may consider any eligible candidate for promotional ranking, regardless of the recommendations received.

Said ranked listing shall be affirmed as follows:

"The Promotion Evaluation Board, acting under oath and having considered the operational needs of the department; applicable specialized skills and/or knowledge required; and the individual merits of members recommended and eligible for promotional consideration, finds, by majority decision, the member(s) named on the attached ranked listing(s) best qualified to assume the duties and responsibilities of the rank(s) indicated and recommend said member(s) be considered for promotion to the indicated rank(s).

Said ranked list(s) so established shall be filed along with the current list of eligible candidates and shall be maintained by the current Board or successor Boards until such time as amended or relisted in new ranked order by authority of the Board.

8.9 ~~8.10~~ The Promotion Evaluation Board shall be ~~dismissed~~ adjourned, either orally or in writing by the Superintendent, until such time as he may reconvene the Board or a successor Board.

8.10 ~~8.11~~ Pursuant to the provisions of Chapter 15, Article 2, Section 9 of the Code of West Virginia, as amended, the Superintendent shall promote one of the top three candidates from the list(s) established by the Promotion

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Evaluation Board to the positions rank under consideration. Said list so established shall expire by order of the Superintendent or upon filling the positions under consideration. In the event the Superintendent determines that none of the top three candidates satisfy the requirements for promotion to the rank(s) under consideration, he shall not promote any candidate and may reconvene the current Board or its successor for reconsideration of the rank(s) in question.



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(Plus all the volunteer
help we can get)

STATE OF WEST VIRGINIA

SECRETARY OF STATE

Charleston 25305

May 16, 1986

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Department of Public Safety

RULE: Series 1 Administrative regulations (General Orders) for the Government, Discipline and Control of the Department of Public Safety; Amendment to Section 8 "Promotion Evaluation Board."

DATE FILED AS AN EMERGENCY RULE: April 4, 1986

DECISION NO. 2-86

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

KEN HECHLER
Secretary of State

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE May 16, 1986
ADMINISTRATIVE LAW DIVISION

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STATE OF WEST VIRGINIA
SECRETARY OF STATE

Charleston 25305

DECISION

Emergency Rule Decision
(ERD 2-86)

AGENCY: Department of Public Safety
RULE: Series 1 Administrative Regulations (General Orders) for the Government, Discipline and Control of the Department of Public Safety; Amendment to Section 8 "Promotion Evaluation Board".

DATE FILED AS AN EMERGENCY RULE: April 4, 1986

- par. 1 The Department of Public Safety has filed as an emergency rule an amendment to their Series 1 rule titled Administrative Regulations (General Orders) for the Government, Discipline and Control of the Department of Public Safety.. The amendment is to Section 8, "Promotion Evaluation Board"; which establishes the operation, procedure and make-up of the Promotion Evaluation Board.
- par. 2 The amendment is to re-establish the Promotion Evaluation Board rules which were voided in part by Civil Action No. 84-C-4281 Harold G. Facenger, et al., v. John W. O'Rourke, Superintendent of the West Virginia Department of Public Safety, et al., entered July 2, 1985, by Chief Judge MacQueen in the Circuit Court of Kanawha County, West Virginia. (attached).
- par. 3 West Virginia Code 29A-3-15A requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 4 Following review, the Secretary of State shall issue a decision as to whether or not such emergency rule should be disapproved [29A-3-15a(a)].
- par. 5 (A) Procedural Compliance: WV Code 29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the

circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).

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

par. 7 The Department of Public Safety has filed this emergency rule with supporting documents with the Secretary of State on April 4, 1986 and with the LRMRC prior to the issuance of this decision. It is, therefore, the determination of the Secretary of State that the Department of Public Safety has complied with the procedural requirements of WV Code 29A-3-15.

par. 8 (B) Statutory Authority: WV Code 15-2-9 states:

§15-2-9. Promotions; promotion evaluation board to be established.

The superintendent shall establish within the department of public safety a promotion evaluation board, which shall be representative of commissioned and noncommissioned officers within the department. The promotion evaluation board shall prescribe merit standards for promotion and maintain lists of eligible candidates.

The superintendent shall promote a member to the permanent rank of trooper first class, corporal, sergeant, first sergeant, master sergeant or lieutenant from among the top three names on the current list of eligible candidates established by the promotion evaluation board for each rank.

par. 9. WV Code 15-2-25 reads:

§15-2-25. Rules and regulations generally; carrying of weapons.

Subject to the written approval of the governor and the provisions of this article, the superintendent may make and promulgate proper rules and regulations for the government, discipline and control of the department of public safety, and shall also cause to be established proper rules and regulations for examinations of all applicants for appointment thereto. The members of the department of public safety shall be permitted to carry arms and weapons, and no license shall be required for such privilege.

par. 10 It is the determination of the Secretary of State that the Department of Safety has not exceeded its statutory authority by amending its Series 1 rule.

par. 11 (C) Emergency: WV Code 25A-3-15(g) defines "emergency" as follows:

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

par. 12 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 13 The Department of Public Safety claims that this proposal is for "the immediate preservation of the public peace. . . safety."

par. 14 The circumstances and facts as presented by the Department of Public Safety are as follows:

- A. After a Declaratory Judgment proceeding, the Circuit Court of Kanawha County ruled certain portions of the rule invalid and void.
- B. The normal command structure of the Department is depleted, showing many critical vacancies.

par. 15 The effect of the court order invalidated enough of section 8 governing the Promotion Evaluation Board to make the Board unable to function in the capacity directed by statute.

par. 16 It is the opinion of the Secretary of State's office that when a judicial proceeding voids the content of a rule to the extent that the agency can no longer carry out its required responsibility and such a result is detrimental to a basic function of government such as law enforcement or public health, then an "immediate preservation" is called for.

par. 17 It is also the opinion of this office that the responsibilities of the Department of Public Safety represent one of the basic functions of government, law enforcement, and that without a re-establishment of a viable Promotion Evaluation Board, the Department of Public Safety would be hindered in carrying out its duties.

par. 18 The Secretary of State determines that the Department of Public Safety has demonstrated the need to make effective this proposal for the immediate preservation of the public peace and safety.

- par. 19 . It is the decision of the Secretary of State that this proposal by the Department of Public Safety is in procedural compliance with WV Code 29A-3-15; does not exceed the statutory authority of the Department of Public Safety; and that the facts and circumstances presented constitute an emergency. Therefore, the Secretary of State decides that this emergency rule should not be disapproved.
- par. 20 This decision shall be cited as Emergency Rule Decision 2-86 or ERD 2-86 and may be cited as precedent. This decision is available from the Secretary of State's office and has been filed with the Department of Public Safety, the Attorney General and the Legislative Rule Making Review Committee.



KEN HECHLER
Secretary of State
FILED IN THE OFFICE OF
THE SECRETARY OF STATE
Entered THIS DATE May 16, 1986
ADMINISTRATIVE LAW DIVISION

STATE OF WEST VIRGINIA

At a Circuit Court for Kanawha County held at the Court House thereof
on the 2nd day of July 1985

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

HAROLD G. FACEMYER, et al,

Plaintiffs,

vs.

Civil Action No. 84-C-4281

JOHN W. O'ROURKE, Superintendent
of the West Virginia Department
of Public Safety, et al,

Defendants.

ORDER

This matter came on for final hearing before the Court the 21st day of March, 1985, the same having been continued from time to time as the record in the case reflects, all parties represented by their respective counsel. In this case, plaintiffs pray for a declaratory judgment declaring null and void the eleven promotions made by the Superintendent of the West Virginia Department of Public Safety over a period from September 27, 1984, to and including October 1, 1984; declaring the promotional system of the West Virginia Department of Public Safety not in compliance with the law of the State of West Virginia; for injunctive relief and for damages against the Superintendent and the Department of Public Safety. The Court makes no finding or determinations concerning the propriety of Count III in the Complaint, praying for damages. There are two preliminary motions before the Court by defendants praying for dismissal of the Complaint because (1) the relief prayed for is barred by estoppel or

res judicata, and (2) the legislative rule making review process of the legislature in reviewing General Order 8 supercedes Chapter 15, Article 2, Section 9, of the West Virginia Code and authorizes the acts and conduct of the Superintendent and promotion evaluation board in making the promotions.

Defendants claim that the decision of the Court in the case of Trooper E. N. Henry and Trooper W. R. Cordle, plaintiffs, v. Colonel John W. O'Rourke, Superintendent of the West Virginia Department of Public Safety, an agency of The State of West Virginia, Defendant, Civil Action No. 84-C-2524, Circuit Court of Kanawha County, West Virginia, bars plaintiffs in this case. The Court has reviewed the Official Court file in that case and the transcript of proceedings had before the Court in that matter. A copy of the transcript in that case was stipulated by the parties to be considered by the Court in this case, and the parties agreed that the Court could review that file in considering defendants' motion. The Court, after hearing the evidence in the case at bar, the transcript of the proceeding in the aforesaid civil action, and the arguments of counsel, finds that since the parties are not the same in the two cases, res judicata does not bar the case at bar and their motion is denied on that basis. With respect to collateral estoppel, the Court makes the following findings:

1. On examination of the Complaint and the Order in the prior civil action, it appears superficially to address basically the questions presented in the case at bar.

2. The procedures, however, that were employed in that other case did not offer a full and fair examination of all of the points raised in the case at bar.
3. In the prior case, the decisions that were made were made in the course of preliminary argument as contrasted with presentation of factual background and development of the law as was done in the case at bar.

The Court is of the opinion that before collateral estoppel will operate to bar plaintiffs in a subsequent civil action, the procedures employed in the prior procedures must have offered a full and fair opportunity to explore all of the points raised in the proceeding which the party is seeking to have estopped. The Court finds that the prior proceeding did not afford that opportunity and, therefore, collateral estoppel does not apply in this case. Accordingly, it is ORDERED that defendants' motion to dismiss based upon collateral estoppel is denied.

With respect to the issue of the relationship of General Order 8 to Chapter 15, Article 2, Section 9, the Court is of the opinion that:

1. If it is possible to read a substantive statute (such as 15-2-9) and a rule approved by the legislature (such as General Order 8) in pari materia, without any conflict, then that should be done and

that ought to be the Court's objective.

2. However, when the two cannot be read in pari materia without conflict, the substantive law must prevail because:

(a) The substantive law most directly states the objectives of the legislature; and

(b) In some instances, the review process is too obtuse to rely on as an affirmative act of amendment or revocation or repeal of a substantive statute.

Accordingly, the Court is of the opinion that where Chapter 15, Article 2, Section 9, of the West Virginia Code conflicts with General Order 8, that Chapter 15, Article 2, Section 9, and its purpose, ought to take precedence over the rule and it is ORDERED that defendants' motion in that regard shall be likewise denied.

The Court finds that there is no disagreement between the parties as to the objectives or purposes of Chapter 15, Article 2, Section 9, of the West Virginia Code, and the Court finds that among its objectives and purposes are:

1. To establish a merit system for promotions in the Department of Public Safety.
2. It was adopted to curtail the Superintendent's unilateral discretionary authority to promote by

imposing the promotion evaluation board and all candidates for promotion must be made by the promotion evaluation board before they can ever be promoted by the Superintendent.

3. It was intended to impose objective criteria for making promotions in the form of merit standards.
4. It was not intended to affect the Superintendent's unilateral authority to place people in various job positions, so long as the Superintendent doesn't act unlawfully otherwise.

With respect to General Order 8, the Court finds that the challenge by plaintiffs to its validity by reason of failure to timely make various filing deadlines is a mere technical deficiency which is not sufficiently serious to adversely affect its validity. Therefore, the Court finds that General Order 8 was approved by the legislature pursuant to the law of the State of West Virginia, Chapter 29A, Article 3, of the West Virginia Code.

With respect to the September, 1984, promotions in question in the case at bar, the Court finds that the following took place:

1. Created an ad hoc board.
2. Established ad hoc standards.
3. Developed an ad hoc list of persons to be considered for promotions.

4. Mixed standards for rank and criteria for job function or job classification.

Therefore, inasmuch as Chapter 15, Article 2, Section 9, of the West Virginia Code says the Board shall ". . . maintain a list . . .," and it does not say that the Board shall ". . . from time to time create a list as requested to do so . . .," the Court is of the opinion that the practice used by the defendants here takes the objectivity, the continuity and the predictability away from the system and that the latter three things are the core of any merit system.

The Court further finds that General Order 8, Section 8.11, which provides for the Superintendent to unilaterally expire the list of eligible candidates is a direct infringement on the Board's prerogative.

The Court makes the following findings as to the intent and purpose of 15-2-9 and the practice of defendant in making promotions during September 27, 1984, to October 1, 1984:

1. The Board, according to 15-2-9, is to establish and maintain lists of potential promotees of candidates for promotion.
2. That the latter function is very particularly circumscribed from the Superintendent.
3. To allow the Superintendent to expire a list of candidates is an irreconcilable conflict of 15-2-9.

4. "Maintain" list, as used in the statute means some degree of continuity.
5. That its intent and language of 15-2-9 was to have the Board maintain a list, not necessarily the same people all the time but, in perpetuity, persons may be added to or taken away as they meet or fail to meet the objective criteria in the standards as required by the Board.
6. That the intent and language of 15-2-9 requires that there must be maintained some durable or enduring merit standards.
7. The merit standards should only be criteria for promotion in rank and should have nothing to do with position, because:
 - (a) To allow the board to set standards for job position would be to usurp authority from the Superintendent.
 - (b) To allow adding criteria that relates to position allows the Superintendent to make it practically impossible for the board to maintain its own list when a criteria fits only one person.

8. There must be continuity to the existence of the promotion evaluation board as contemplated in 15-2-9; the statute mandates that there must be some enduring board.
9. There ought to be one board to be maintained continually with persons and terms of appointment to reasonably and lawfully be fixed by the Superintendent.
10. The rules cannot use an ad hoc process in the appointment and dismissal of the board.

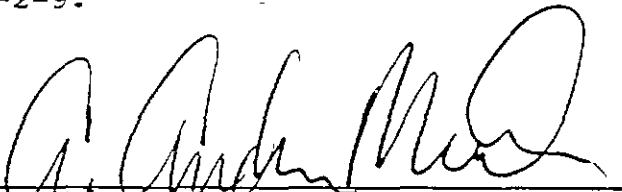
The Court, therefore, after considering all of the evidence in this case and after hearing the argument of counsel, finds that the practices used by the Superintendent and Department in the set of challenged promotions and generally as described by the evidence and as established by General Order 8 are improper and unlawful. Accordingly, to the extent that General Order 8 is inconsistent with this Court's interpretation and findings of the requirements of 15-2-9, General Order 8 is invalid.

Therefore, it is ORDERED that the eleven promotions made by the Superintendent on September 27, 1984, and October 1, 1984, be and the same are hereby declared null and void and of no force and effect inasmuch as they were not made in accordance with 15-2-9 of the West Virginia Code.

It is FURTHER ORDERED that nothing contained in the provisions of this paragraph shall effect in any way, to void, or otherwise, any Orders, directives or reports made or submitted by the eleven defendants previously promoted under the contested practices herein.

The Court further finds that the plaintiffs, having established the prerequisites therefor, and that the same is proper, are entitled to an injunction in this case as are consistent with the findings and conclusions herein contained. It is, therefore, ORDERED that defendants, Superintendent of the West Virginia Department of Public Safety and the West Virginia Department of Public Safety, are enjoined and restrained from making promotions which are inconsistent with the Court's findings and conclusions as to the intent and purpose of 15-2-9.

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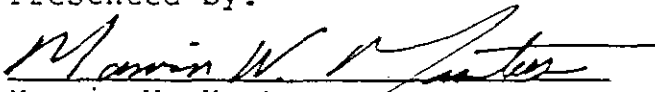


Chief Judge

DATE:

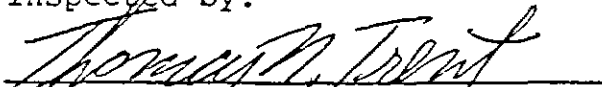
7/2/85

Presented by:



Marvin W. Masters
Counsel for Plaintiffs

Inspected by:

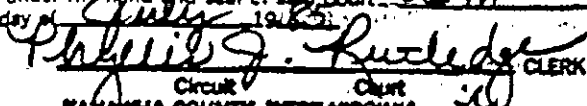


Thomas N. Trent

John Swisher
Counsel for Defendants

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS.

I, Phillip G. Ruediger, Clerk of the Circuit Court of said County and
do hereby certify that the foregoing is a true copy from the
records of said Court.

Given under my hand and seal of said Court, 25th
day of July, 1985.


Circuit Court
KANAWHA COUNTY, WEST VIRGINIA
CLERK
ju



KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

BARBARA STARCHER
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STATE OF WEST VIRGINIA
SECRETARY OF STATE

Charleston 25305

Oct 2, 1986

NOTICE OF EXPIRATION OF AN EMERGENCY RULE

AGENCY DEPARTMENT OF PUBLIC SAFETY
RULE TITLE AMENDMENTS TO SERIES 1, Administrative Regulations..., Section 8,
Promotion Evaluation Board.

DATE FILED AS AN EMERGENCY RULE April 4, 1986

THE ABOVE RULE WAS FILED AS AN EMERGENCY RULE. PURSUANT TO WV CODE 29A-3-15(a)(3)
THIS EMERGENCY EXPIRES ON THIS DATE. THIS DOES NOT AFFECT THE AGENCY CONTINUING
TO PURSUE THIS RULE AS A PROPOSED RULE THROUGH THE RULE MAKING PROCEDURES NEEDED
TO ADOPT AS A REGULAR RULE FOLLOWING LEGISLATIVE AUTHORIZATION.

RICH O. HARTMAN, DIR. ADMIN. LAW DIV.

FILED
1986 OCT -2 PM 1:45
OFFICE OF THE SECRETARY OF STATE