

**WEST VIRGINIA
SECRETARY OF STATE**

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #3

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FILED

JUL 26 10 25 AM '94

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: DIVISION OF PUBLIC SAFETY TITLE NUMBER: 81

CITE AUTHORITY WV CODE §15-2-6 (a)

AMENDMENT TO AN EXISTING RULE: YES ___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____


TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: SERIES VIII

TITLE OF RULE BEING PROPOSED: DIVISION OF PUBLIC SAFETY

GRIEVANCE PROCEDURE

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.



660



Joseph J. Skaff
SECRETARY
(304) 558-2930

State of West Virginia
OFFICE OF THE SECRETARY
DEPARTMENT OF MILITARY AFFAIRS
AND PUBLIC SAFETY
P. O. Box 50155
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0155

Division of Corrections
Adjutant General's Office:
Division of Engineering & Facilities/
State Armory Board
Military Awards Board
Division of Public Safety - WV State Police:
Commission on Drunk Driving Prevention
Office of Emergency Services:
Emergency Services Advisory Council
Disaster Recovery Board
Emergency Response Commission
State Fire Commission/State Fire Marshal
Board of Probation and Parole
Regional Jail and Correctional Facility Authority
Office of Veterans' Affairs

July 25, 1994

TO: Ken Hechler
Secretary of State

FROM: Joseph J. Skaff, Secretary

RE: Administrative Regulation Dealing with Trooper
Grievance Procedure

Pursuant to W. Va. Code Sec. 5F-2-2(a)(12), I have reviewed West Virginia Legislative Rule, Department of Military Affairs and Public Safety, Division of Public Safety, Title 81, Series VIII, concerning rules and regulations governing an employee grievance procedure, as proposed by the Division of Public Safety. I hereby approve the agency approved regulation for filing with the Secretary of State.

S/b

WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF MILITARY AFFAIRS AND PUBLIC SAFETY
DIVISION OF PUBLIC SAFETY
TITLE 81
SERIES VIII

CIRCUMSTANCES REQUIRING RULE

This proposed rule is required to remedy an inequitable circumstance in state law involving the exclusion of West Virginia troopers from the State Employee Grievance Procedure as enacted by the West Virginia Legislature in 1989. The rule is proposed pursuant to W. Va. Code §15-2-6 (1993), wherein the Legislature authorized the Superintendent of the West Virginia Division of Public Safety to promulgate a legislative rule to amend W. Va. Code §15-2-6(b), in order to provide a grievance procedure for State Police troopers. The current limited appeal system embodied in W. Va. Code §15-2-6(b) allows troopers to grieve disciplinary actions involving only transfers, demotions, discharges, or suspensions. The limited appeal concept has proven to be ineffective as a complaint resolution method and is, in part, responsible for reduced trooper morale and job performance. The grievance process proposed by this rule would replace subsection "b", and would allow troopers to grieve and resolve disciplinary actions as well as other job-related complaints. By providing a comprehensive grievance system, this rule would afford troopers avenues of job-related complaint

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Division of Public Safety Grievance Procedure

Type of Rule: Legislative Interpretive Procedural

Agency: West Virginia Division of Public Safety

Address: 725 Jefferson Road
South Charleston, WV 25309-1698

1. Effect of Proposed Rule

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<u>ESTIMATED TOTAL COST</u>	\$ -0-	\$ -0-	\$ -0-	\$ -0-	\$ -0-
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERNATIONS					
EQUIPMENT					
OTHER					

2. Explanation of above estimates:

We anticipate that the proposed rules will not result in any additional cost to the Division of Public Safety. A small savings could possibly be realized since many grievances should now be resolved at a lower level.

3. Objectives of these rules:

To provide a procedure for the equitable and consistent resolution of employment grievances raised by Division of Public Safety non-probationary members.

DATE: JULY 27, 1994

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: WEST VIRGINIA DEPARTMENT OF MILITARY AFFAIRS & PUBLIC SAFETY
DIVISION OF PUBLIC SAFETY
LEGISLATIVE RULE TITLE: DIVISION OF PUBLIC SAFETY GRIEVANCE PROCEDURE

1. Authorizing statute(s) citation WV CODE §15-2-6(a)

2. a. Date filed in State Register with Notice of Hearing

JUNE 8, 1994

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

NONE

c. Date of Hearing(s) NONE

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

Attached N/A No comments received

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

JULY 27, 1994

f. Name and phone number(s) of agency person(s) to contact for additional information:

SERGEANT STEPHEN W. COGAR, 746-2112

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: 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

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DIVISION OF PUBLIC SAFETY
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SERIES VIII

PROPOSED RULE SUMMARY

This proposed rule would create and implement a grievance procedure for State Police troopers, who are currently excluded from the system provided for other state employees. The State Police system is patterned after the State Employees Grievance Procedure detailed in W. Va. Code §29-6A-1 et. seq., and the Teacher's Grievance Procedure detailed in W. Va. Code §18-29-1 et. seq. The proposed rule institutes a system that features an orderly four-step grievance process with final trooper appeals referred to an impartial hearing examiner. The system is designed to resolve work related employee complaints quickly and effectively by emphasizing interaction between the line supervisor and the trooper. Finally, the proposed rule incorporates several procedural safeguards to ensure due process for the grieving trooper, equitable resolutions, and consistency in the labor/management relationship.

resolution commensurate with the remainder of West Virginia state employees.

Rule Title: Division of Public Safety Grievance Procedure

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None

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

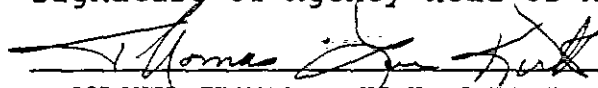
None

C. Economic Impact on Citizens/Public at Large.

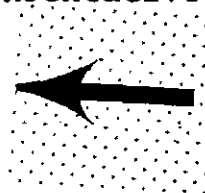
None

Date: 3-22-94

Signature of Agency Head or Authorized Representative



COLONEL THOMAS L. KIRK, SUPERINTENDENT



**SIGN
HERE**

FILED

**WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF MILITARY AFFAIRS AND PUBLIC SAFETY
DIVISION OF PUBLIC SAFETY
TITLE 81
SERIES VIII**

Jul 26 10 25 AM '94

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Title: Division of Public Safety Grievance Procedure

Section 1. General

1.1 Scope - This rule governs and specifies a grievance procedure for sworn members of the Division.

1.2 Authority - West Virginia Code 15-2-6(a).

1.3 Filing Date -

1.4 Effective Date -

1.5 Repeals West Virginia Code 15-2-6(b).

Section 2. Purpose

2.1 The purpose of this rule is to provide a procedure for the equitable and consistent resolution of employment grievances raised by Division of Public Safety non-probationary members.

Section 3. Definitions

3.1 For the purpose of this rule:

3.1.1 "Board" means the education employees grievance board created in section five 18-29-5, rule twenty-nine, chapter eighteen of this code and hereafter known as the education and state employees grievance board.

3.1.2 "Superintendent" is the executive officer-in-charge and chief administrator of the department.

3.1.3 "Days" means calendar days.

3.1.4 "Discrimination" means any difference in the treatment of members unless such differences are related to the actual job responsibilities of the members or agreed to in writing by the members.

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3.1.5 "Member" means any non-probationary sworn member employed by the Division of Public Safety.

3.1.6 "Employee organization" means the trade or professional organization which has the largest number of members of the division within its membership.

3.1.7 "Favoritism" means unfair treatment of a member as demonstrated by preferential, exceptional or advantageous treatment of another or other members.

3.1.8 "Grievance" means any claim by one or more affected Division members alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such members work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of the Division; and specifically identified incidents of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the member, excepting any incident of sexual harassment which will be resolved in accordance with the West Virginia State Police Sexual Harassment Policy. Examples of grievable matters include but are not limited to issues surrounding letters of reprimand, transfers, demotions, suspensions, discharges or semi-annual evaluations, etc. Any pension matter or other issue relating to public employees insurance, retirement, or any other matter in which the authority to act is not vested with the Division shall not be the subject of any grievance filed under this policy and procedure. Management reserves the exclusive right to manage the affairs and operations of the Division. Accordingly, complaints are not grievable under this procedure that involve a failure to be promoted (except where the employee can show established promotional policies or procedures were not followed or applied fairly).

3.1.9 "Grievance Evaluator" means that individual authorized to render a decision on a grievance under procedural levels one, two and three as set out in section four.

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3.1.10 "Grievant" means any member or group of named members filing a grievance as defined in subsection (3.1.8) of this section.

3.1.11 "Harassment" means repeated or continual disturbance, irritation or annoyance of a member which would be contrary to the demeanor expected by law, policy and profession.

3.1.12 "Hearing examiner" means individuals employed by the board in accordance with section five of this rule.

3.1.13 "Immediate supervisor" means that person next in the chain of command of grievant possessing a degree of administrative authority and designated as such.

3.1.14 "Representative" means the trade or professional organization which has the largest number of members of the division within its membership.

3.1.15 "Reprisal" means retaliation by the superintendent of the Division of Public Safety or his designee toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.

Section 4. Grievance Procedure Generally

4.1 A grievance must be filed within the times specified in section four of this rule and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this rule shall be considered as the maximum number of days allowed and, if a decision is not rendered at any level within the prescribed time limits, the grievant may appeal to the next level: Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment.

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4.2 If the Superintendent of the Division of Public Safety or his designee intends to assert the application of any statute, policy, rule, regulation or written agreement or submits any written response to the filed grievance at any level, a copy thereof shall be forwarded to the grievant and any representative of the grievant named in the filed grievance. Anything submitted and the grievant's response thereto, if any, shall become part of the record. Failure to assert such statute, policy, rule, regulation or written agreement at any level shall not prevent the subsequent submission thereof in accordance with the provisions of this subsection.

4.3 The grievant may file the grievance at the level vested with authority to grant the requested relief if each lower administrative level agrees in writing thereto. In the event a grievance is filed at a higher level, the Division of Public Safety shall provide copies to each lower administrative level.

4.4 A member may withdraw a grievance at any time by notice, in writing, to the level wherein the grievance is then current. The grievance may not be reinstated by the grievant unless reinstatement is granted by the grievance evaluator at the level where the grievance was withdrawn. If more than one member is named as grievant in a particular grievance, the withdrawal of one member shall not prejudice the rights of any other member named in the grievance. In the event a grievance is withdrawn or a member withdraws from a grievance, the Superintendent or his designee shall notify in writing each lower administrative level.

4.5 Grievances may be consolidated at any level by agreement of all parties.

4.6 A grievant may be represented by an employee organization representative, as defined, or legal counsel including a fellow member in the preparation or presentation of the grievance. At the request of the grievant, such person or persons may be present, starting at level three and four of the procedure: Provided, That at level one and two of such grievance, as set forth in section 5.1 of this rule, a grievant may have no such representative. Employer may, likewise, only be represented at level three and four.

4.7 If a grievance is filed which cannot be resolved within the time limits set forth in section four of this rule prior to the end of the grievance employment term, the time limit set forth in said section shall be reduced as agreed to in writing by both parties so that the grievance procedure may be concluded within ten days following the end of the employment term or an otherwise reasonable time.

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4.8 No reprisals of any kind shall be taken by the Superintendent or his designee against any interested party, or any other participant in the grievance procedure by reason of such participation. A reprisal constitutes a grievance, and any person held to be responsible for reprisal action shall be subject to disciplinary action for insubordination.

4.9 Decisions rendered at all levels of the grievance procedure shall be dated, shall be in writing setting forth the decision or decisions and the reasons therefor, and shall be transmitted to the grievant and any representative named in the grievance within the time prescribed, with the exception of the verbal level of step one. If the grievant is denied the relief sought, the decision shall include the name of the individual at the next level to whom appeal may be made.

4.10 Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this rule. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level wherein the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw same, the parties may consent to such evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant must file a new grievance. The time limitation for filing the new grievance shall be measured from the date of such ruling.

4.11 Any change in the relief sought by the grievant shall be consented to by all parties or may be granted at level four within the discretion of the hearing examiner.

4.12 Forms for filing grievances, giving notice, taking appeals, making reports and recommendations, and all other necessary documents shall be made available by the immediate supervisor to any member upon request. Such forms shall include information as prescribed by the board. The grievant shall have access to the Division's equipment for purposes of preparing grievance documents subject to the reasonable rules of the employer governing the use of such equipment.

4.13 Notwithstanding the provisions of section three {§6-9A-3} rule nine-a, chapter six of this code, or any other provision relating to open proceedings, all conferences and hearings pursuant to this rule shall be conducted in private except that, upon the grievant's request, conferences and hearings at levels two and three shall be open to employees of the grievant's immediate office or work area.

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Within the discretion of the hearing examiner, conferences and hearings may be public at level four.

4.14 No person shall confer or correspond with a hearing examiner regarding the merits of the grievance unless all parties to the grievance are present.

4.15 Grievances shall be processed during regular working hours. Attempts shall be made to process the grievance in a manner which does not interfere with the normal operation of the Division.

4.16 The grievant or the member selected by a grievant to represent him in the processing of a grievance through this procedure, or both, shall be granted necessary time off during working hours for the grievance procedure without loss of pay and without charge to annual or compensatory leave credits. In addition to actual time spent in grievance conferences and hearings, the grievant or the grievant's representative, or both, shall be granted time off during working hours, not to exceed four hours per grievance, for the preparation of such grievance without loss of pay and without charge to annual or compensatory leave credits. However, it shall be understood by all parties that the first responsibility of any member is the work assigned by the Division of Public Safety to the member. Grievance preparation and representation activities by a member shall not seriously affect the overall productivity of the member. Employees submitting complaints or grievances, employees involved in compliant and grievance investigations, and employees participating in complaint and grievance meetings and proceedings may do so during working hours without loss of pay and without charge to accumulated leave, after requesting permission from the supervisor to do so, which permission shall not be unreasonably withheld.

4.17 The aggrieved member, the Division of Public Safety and representatives of both shall have the right to call, examine and cross-examine witnesses who are employees of the Division of Public Safety against which the grievance is lodged and who have knowledge of the facts at issue.

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

4.19 Should the Superintendent or his designee cause a conference or hearing to be postponed without adequate notice to employees who are scheduled to appear during their normal work day, such employees will not suffer any loss in pay for work time lost.

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4.20 Any grievance evaluator may be excused from participation in the grievance process for reasonable cause, including, but not limited to, conflict of interest or incapacitation, and in such case the grievance evaluator at the next higher level shall designate an alternative grievance evaluator if such is deemed reasonable and necessary.

4.21 No less than one year following resolution of a grievance at any level, the grievant may by request in writing have removed any record of the grievant's identity from any file kept by the Division of Public Safety.

4.22 Procedures:

4.22.1 The Division Inspector shall be responsible for the coordination of grievance procedures. Such coordination shall include the training of supervisors in grievance procedures, providing notification to the Superintendent of filed grievances and their progression and other grievance management functions as required to ensure administrative compliance with this policy.

4.22.2 The Division Inspector shall maintain and control finalized grievance records within the security of the Inspector's files and will take necessary precautions to ensure controlled access to sensitive grievance records and documents.

4.22.3 The Division Inspector shall cause an annual analysis of grievances to identify any trend in filed grievances and will recommend any actions that may minimize or correct the causes of future grievances.

4.22.4 First level supervisors receiving a grievance form will acknowledge receipt by noting the time, date and name of the person receiving the grievant will immediately forward a copy of the grievance to the Division Inspector.

4.22.5 The supervisor responsible for administering the grievance procedure at each level will furnish the original grievance form and the original copy of the written decision to the member and will forward a copy of the grievance form and decision to the Inspector. The supervisor administering the grievance procedure will NOT retain a record of the grievance or the decision.

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4.22.6 A record of each member's grievance and the grievance disposition will be filed by the Inspector's office and will be available for review by the member or his representative.

4.23 The number of grievances filed against the Superintendent or his designee or by an employee shall not, per se, be an indication of the Superintendent's or his designee's or such employee's job performance.

4.24 The Superintendent with whom a grievance was filed may appeal a level four decision on the grounds that the decision (1) was contrary to law or lawfully adopted rule, regulation or written policy of the employer, (2) exceeded the hearing examiner's statutory authority, (3) was the result of fraud or deceit, (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary or capricious or characterized by abuse of discretion. Such appeal shall follow the procedure regarding appeal provided the grievant in section 5.1 et seq of this rule and provided both parties in section 7.1 of this rule.

Section 5. Procedural Levels and Procedure at Each Level

5.1 Level one.

5.1.1 The member shall identify the grievance verbally to the immediate supervisor in an informal meeting within fourteen calendar days after the event or action or the discovery of the event or action which is the basis for the grievance.

5.1.2 The immediate supervisor shall give a verbal response to the member within seven days following the meeting.

5.1.3 If a resolution is not reached at this point, the member shall submit to the immediate supervisor on a prescribed form the nature of the grievance and the specific relief requested with seven days following the date of receipt of the verbal response.

5.1.4 The supervisor, in turn, shall give written response on a prescribed form within seven days of receipt of the prescribed form.

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5.2 Level two

5.2.1 Within seven days of receiving the decision of the immediate supervisor, the grievant may file a written appeal to the appropriate division supervisor. The supervisor shall hold a conference within seven days of the receipt of the appeal and issue a written decision upon the appeal within seven days of the conference.

5.3 Level three

5.3.1 Within seven days of receiving the decision of the appropriate division supervisor, the grievant may file a written appeal of the decision with the Superintendent. The Superintendent or his designee shall hold a hearing in accordance with section 6.1 of this rule within ten days of receiving the appeal. The Superintendent or his designee shall issue a written decision affirming, modifying or reversing the level two decision within seven days of such hearing.

5.4 Level four.

5.4.1 If the grievant is not satisfied with the action taken by the Superintendent or his designee, within fourteen days of the written decision, the grievant may request, in writing, on a form furnished by the Division, that the grievance be submitted to a hearing examiner as provided for in section five {§29-6A-5} of this rule, such hearing to be conducted in accordance with section six of this rule within thirty days following the request therefor; Provided, That such hearing may be held within sixty days following the request, or within such time as is mutually agreed upon by the parties, if the hearing examiner gives reasonable cause, in writing, as to the necessity for such delay. A copy of the appeal shall be served by the grievant upon the West Virginia Education and State Employees' Grievance Board.

5.4.2 Within thirty days following the hearing, the hearing examiner shall render a decision in writing to all parties setting forth findings and conclusions on the issues submitted. Subject to the provisions of section seven of this rule, the decision of the hearing examiner shall be final upon the parties and shall be enforceable in circuit court.

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5.5 Expedited grievance process.

5.5.1 A member may grieve a final action of the Division involving a dismissal, demotion, transfer or suspension exceeding twenty days directly to the hearing examiner. The expedited grievance shall be in writing and must be filed within ten days of the date of the final action with the Superintendent.

Section 6. Hearings Generally

6.1 The Superintendent or his designee acting as a grievance evaluator or the hearing examiner shall conduct all hearings in an impartial manner and shall ensure that all parties are accorded procedural and substantive due process. All parties shall have an opportunity to present evidence and argument with respect to the matters and issues involved, to cross-examine and to rebut evidence. Reasonable notice of a hearing shall be sent prior to the hearing to all parties and their named representative and shall include the date, time and place of the hearing. Level one, level two and level three hearings shall be at a convenient place accessible to the grieved employee. All such hearings shall be held on the employer's premises or on other premises mutually agreeable to the parties and within regular working hours: Provided, That any such hearing might continue beyond normal working hours. Level four hearings shall be at a place to be designated by the hearing examiner.

6.2 The Division shall produce prior to such hearing any documents, not privileged, and which are relevant to the subject matter involved in the pending grievance, that have been requested by the grievant, in writing.

6.3 The Superintendent or his designee or the hearing examiner shall have the power to (1) administer oaths and affirmations, (2) subpoena witnesses, (3) regulate the course of the hearing, (4) hold conferences for the settlement or simplification of the issues by consent of the parties, (5) exclude immaterial, irrelevant or repetitious evidence, (6) sequester witnesses, (7) restrict the number of advocates, and take any other action not inconsistent with the rules and regulations of the board or the provisions of this rule.

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6.4 All the testimony and evidence at any level three or level four hearing shall be recorded by mechanical means, and all recorded testimony and evidence at such hearing shall be transcribed and certified by affidavit. The Superintendent shall be responsible for promptly providing a copy of the certified transcript of a level three hearing to any party to that hearing who requests such transcript. The hearing examiner may also request and be provided a transcript upon appeal to level four and allocate the costs therefor as prescribed in section eight (§29-6A-8) of this rule. The board shall be responsible for promptly providing a copy of the certified transcript of a level four hearing to any party to that hearing who requests such transcript.

6.5 Formal rules of evidence shall not be applied, but parties shall be bound by the rules of privilege recognized by law. No member shall be compelled to testify against himself or herself in a grievance involving disciplinary action. The burden of proof shall rest with the Division in disciplinary matters.

6.6 — All materials submitted in accordance with section three of this rule; the mechanical recording of all testimony and evidence or the transcription thereof, if any; the decision, and any other materials considered in reaching the decision shall be made a part and shall constitute the record of a grievance. Such record shall be submitted to any level at which appeal has been made, and such record shall be considered, but the development of such record shall not be limited thereby.

6.7 Every decision pursuant to a hearing shall be in writing and shall be accompanied by findings of fact and conclusions of law.

6.8 Prior to such decision any party may propose findings of fact and conclusions of law.

Section 7. Enforcement and Reviewability; Costs; Good Faith

7.1 The decision of the hearing examiner shall be final upon the parties and shall be enforceable in circuit court: Provided, That either party may appeal to the circuit court of the county in which the grievance occurred on the grounds that the hearing examiner's decision (1) was contrary to law or a lawfully adopted rule, regulation or written policy of the employer, (2) exceeded the hearing examiner's statutory authority, (3) was the result of fraud or deceit, (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

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Such appeal shall be filed in the circuit court of the county in which the grievance occurred within thirty days of receipt of the hearing examiner's decision. The decision of the hearing examiner shall not be stayed, automatically, upon the filing of an appeal, but a stay may be granted by the circuit court upon separate motion therefor.

7.2 The court's ruling shall be upon the entire record made before the hearing examiner, and the court may hear oral arguments and require written briefs. The court may reverse, vacate or modify the decision of the hearing examiner or may remand the grievance to the appropriate chief administrator for further proceedings.

7.3 Both Division and member shall at all times act in good faith and make every possible effort to resolve disputes at the lowest level of the grievance procedure. The hearing examiner may make a determination of bad faith and in extreme instances allocate the cost of the hearing to the party found to be acting in bad faith. Such allocation of costs shall be based on the relative ability of the party to pay such costs.

Section 8. Allocation of Costs

8.1 Any expenses incurred relative to the grievance procedure at levels one through three shall be borne by the party incurring such expenses (1988,c.62)

8.2 An aggrieved member has the right to use, free of charge, the Division's copy machine for the purpose of copying grievance documents and the transcript of the employment grievance hearing.

Section 9. Mandamus Proceeding

9.1 Should the Division fail to comply with the provisions of this rule, it may be compelled to do so by mandamus proceeding and shall be liable to any party prevailing against the Division for court costs and attorney fees, as determined and established by the court.

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Section 10. Member's Right to Attorney's Fees and Costs

10.1 If a member shall appeal to a circuit court an adverse decision of a hearing examiner rendered in a grievance proceeding pursuant to provisions of this rule or is required to defend an appeal and such member shall substantially prevail, the Division shall be liable to such member upon final judgment or order, for court costs, and for reasonable attorney's fees, to be set by the court, for representing such member in all administrative hearings and before the circuit court and the supreme court of appeals, and shall be further liable to such member for any court reporter's costs incurred during any such administrative hearings or court proceedings: Provided, That in no event shall such attorney's fees be awarded in excess of a total of one thousand dollars for the administrative hearings and circuit court proceedings nor an additional one thousand dollars for supreme court proceedings: Provided, however, That the requirements of this section shall not be construed to limit the member's right to recover reasonable attorney's fees in a mandamus proceeding brought under section nine of this rule.

Section 11. Application of Rule

11.1 This regulation applies to all grievances on or after the effective date of this rule. This regulation supersedes and replaces West Virginia Code §15-2-6(b).

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REPORT ON NOTICE/COMMENT PERIOD

During the notice/comment period, which was held between June 8, 1994, and July 11, 1994, no comments or other information was received in relation to the proposed regulation. No public hearing was held. The proposed regulation has not been amended.