

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

Form #3

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2003 AUG -1 P 1:06

OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: West Virginia State Police TITLE NUMBER: 81

CITE AUTHORITY: 15-2-6(a)

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 8

TITLE OF RULE BEING AMENDED: West Virginia State Police Grievance Procedure

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

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

Christene Morris, Deputy Secretary
Authorized Signature WVOMAPS

QUESTIONNAIRE

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

DATE: August 1, 2003

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.)
West Virginia State Police
725 Jefferson Road
South Charleston WV 25309-1698
(304)746-2100

LEGISLATIVE RULE TITLE: _____
West Virginia State Police Grievance Procedure 81 CSR 8

1. Authorizing statute(s) citation _____
15-2-6(a)

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
July 2, 2003

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

c. Date of Public Hearing(s) *or* Public Comment Period ended:
August 1, 2003 @ 10:00 a.m.

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

Attached X No comments received _____

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

August 1, 2003

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

Major Gary McGraw, Chief of Executive Services

725 Jefferson Road
South Charleston, WV 25306-1698

(304) 746-2100 FAX: (304) 746-2246

gmcgraw@wvsp.state.wv.us

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

Steven Compton, Assistant Attorney General

725 Jefferson Road
South Charleston, WV 25306-1698

(304) 746-2100 FAX: (304) 746-2246

scompton@wvsp.state.wv.us

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

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

N/A

b. Date of hearing or comment period:

July 2, 2003 - August 1, 2003 @ 10:00 a.m.

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

**West Virginia State Police
Title 81
Series 8
West Virginia State Police Grievance Procedure**

Summary of Proposed Rule

This rule as proposed serves to eliminate time delays and added costs to the State associated with the filing and resolution of member grievances. These modifications will allow for a more expedited hearing on grievance issues at a reduced cost to the State. The use of members, as opposed to civilian hearing examiners, provides for little to no cost to the Department and allows for a more expedited resolution of issues intricate to the State Police organization and its members.

**West Virginia State Police
Title 81
Series 3**

Circumstances Requiring Filing of Rule

The Superintendent of the West Virginia State Police is required to promulgate this administrative rule pursuant to *W. Va. Code* §15-2-5 (b) & (c). The proposed amendments came about due to an effort by the administration to improve the Career Progression Systems in terms of both efficiency and its ability to identify the best candidate for a given position.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: West Virginia State Police Grievance Procedure

Type of Rule: XX Legislative Interpretive Procedural

Agency: West Virginia State Police

Address: 725 Jefferson Road

South Charleston, WV 25309

ATTN: Major Gary McGraw (304) 746-2110

1. Effect of Proposed rule:

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	0	10,000	(10,000)	(10,000)	same
PERSONAL SERVICES	0	10,000	(10,000)	same	same
CURRENT EXPENSE	0	500	(500)	same	same
REPAIRS & ALTERATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER	0	0	0	0	0

2. Explanation of Above Estimates:

Savings of payment to hearing examiners fees and travel expenses if the State Police can utilize manpower on its current payroll, thus no additional expenses or fees are incurred.

3. Objectives of These Rules:

This rule is promulgated to provide for a more expedient and cost saving grievance system.

Rule Title: West Virginia State Police Grievance Procedure

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

Lower costs and fees incurred from paid hearing examiners

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

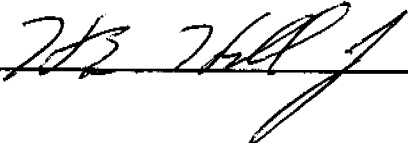
None

C. Economic Impact on Citizens/Public at Large.

None

Date: July 02, 2003

Signature of Agency Head or Authorized Representative:



FILED

TITLE 81
LEGISLATIVE RULE
WEST VIRGINIA STATE POLICE

2003 AUG -1 P 1:07

SERIES 8
WEST VIRGINIA STATE POLICE GRIEVANCE PROCEDURE

OFFICE WEST VIRGINIA
SECRETARY OF STATE

'81-8-1. General.

- 1.1. Scope. -- This rule governs and specifies a grievance procedure for sworn members of the State Police.
- 1.2. Authority. -- W. Va. Code ' 15-2-6(a).
- 1.3. Filing Date. -- _____, 2003.
- 1.4. Effective Date. -- _____, 2003.
- 1.5. Supersedes W. Va. Code ' 15-2-6(b) and all previous versions of this rule.

'81-8-2. Purpose.

2.1. The purpose of this rule is to provide a procedure for the equitable and consistent resolution of employment grievances raised by West Virginia State Police non-probationary members.

'81-8-3. Definitions.

3.1. For the purpose of this rule:

3.1.1 "Board" means panel of State Police members selected pursuant section five of this rule to hear and render decisions regarding grievances of other State Police members.

3.1.1.2. "Days" means working days exclusive of Saturday, Sunday or official holidays.

~~3.1.2. "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.~~

~~3.1.3. "Favoritism" means unfair treatment of a member as demonstrated by preferential, exceptional or advantageous treatment of another or other members.~~

~~3.1.4.3. "Grievance" means any claim by one or more affected State Police members alleging a violation, a misapplication or a misinterpretation of the statutes, written policies, rules, regulations or written agreements pertaining to the enumerated issues provided in section 4.1.1 below. under which such members work. 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 State Police 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 State Police.~~

~~3.1.5. "Grievance coordinator" means that individual designated by the Superintendent to oversee and coordinate the administration of employee grievances.~~

~~3.1.6. "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.~~

~~3.1.7.4. "Grievant" means any member or group of named members filing a grievance as defined in subsection (3.1.5) of this section.~~

~~3.1.8. "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.~~

~~3.1.9. "Hearing examiner" means individuals employed by the State Police in accordance with section five of this rule.~~

~~3.1.10. "Immediate supervisor" means that person next in the chain of command of the grievant possessing a degree of administrative authority and designated as such.~~

~~3.1.11.5. "Member" means any non-probationary sworn member employed by the State Police.~~

3.1.6 "Professional Standards Section (PSS)" means the unit of the West Virginia State Police in charge of investigating complaints and charges of misconduct levied against employees to determine the validity of said complaints and charges. The PSS is also in charge of coordinating all grievances of members to insure that the grievance is provided with an opportunity to be addressed pursuant to these rules.

~~3.1.12. "Representative" means any person or persons designated by the grievant to represent him or her in the processing and litigation of a grievance through this procedure, or both.~~

~~3.1.13. "Reprisal" means retaliation by the Superintendent or his or her 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.~~

~~3.1.14.7. "Superintendent" is the executive officer-in-charge and chief administrator of the State Police.~~

' 81-8-4. Grievance Procedure Generally.

4.1. A grievance must be filed **and scheduled for hearing** within the times specified in section four **and six** of this rule and shall be processed as rapidly as possible. **Calculation of the time frames shall be consistent with the methods for computing time as set forth by West Virginia Rule of Civil Procedure 6.** 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 or **tolled** whenever a grievant or **other necessary party** is not **available working for justifiable cause or upon the agreement of the parties.** ~~because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment, or by agreement of all parties.~~

4.2 Grievances can be filed by members regarding the following matters.

a. Termination

b. Suspensions**c. Demotions resulting from discipline****d. Permanent Involuntary Transfers**

4.2. If the Superintendent or his or her designee or the grievant intends to assert the application of any federal statute, administrative rule, federal regulation or written agreement or submits any written response to the filed grievance at any level, the citation thereof shall be forwarded to the grievant and any representative of the grievant named in the filed grievance or the Superintendent. Any documents 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 State Police shall provide copies to each lower administrative level

The Grievant shall file his or her original grievance with the Professional Standards Section (PSS) within 14 days of receipt of the order to be grieved

4.4. A member may withdraw a grievance at any time by notice, in writing, to PSS the level wherein the grievance is then current. 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 or her designee shall notify in writing all involved parties, each lower administrative level.

4.5. Grievances may be consolidated at any level by agreement of all parties or by order of the Grievance Board.

4.6 A grievant may be represented by legal counsel or any person or persons designated by the grievant. **The Superintendent may be represented by legal counsel or any person designated by the Superintendent.** At the request of the grievant, such person or persons may be present, starting at levels three and four of the procedure. Provided, that at levels 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 levels 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 grievant's 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.

4.8. No reprisals of any kind shall be taken by the Superintendent or his or her 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.

4.9.7. Written decisions rendered at all levels of the grievance procedure shall be dated, shall set forth the decision or decisions and the reasons therefor, and shall be transmitted to the grievant and any representative at levels 3 or 4 named in the grievance within the time prescribed.

4.10.8. Once a grievance has been filed, **any change which** 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.~~ **or substantially alters the relief sought, must be amended by either consent of the opposing party or by Order of the Board.**

~~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. 9.~~ 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 Superintendent. The grievant shall have **reasonable** access to State Police **computers, copiers and printers** equipment for purposes of preparing grievance documents. ~~subject to the reasonable rules of the employer governing the use of such equipment.~~

~~4.13.10.~~ Notwithstanding the provisions of W. Va. Code 6-9A-3, or any other provision relating to open proceedings, all conferences and hearings pursuant to this rule shall be conducted in private except that **either party can make a motion that the proceedings be open to other members and/or the public.** ~~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. Within the discretion of the hearing examiner, conferences and hearings may be public at level four.~~

~~4.14.11.~~ No person shall confer or correspond with a **Board Member** ~~hearing examiner~~ regarding the merits of the grievance unless all parties to the grievance are notified and agree thereto.

~~4.15.12.~~ 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 State Police.

~~4.16.13.~~ The grievant or the member selected by a grievant to represent him or her 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 State Police to the member. Grievance preparation and representation activities by a member shall not seriously affect the overall productivity of the member. Members and other employees submitting complaints or grievances, who are involved in complaint and grievance investigations, and who are 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 their immediate supervisor to do so, which permission shall not be unreasonably withheld.

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

~~4.18.14.~~ Both parties may produce witnesses other than employees of the State Police against which the

~~grievance is lodged, and such witnesses shall be subject to examination and cross examination.~~

Subpoenas and subpoenas duces tecum. -- Parties who wish to obtain subpoenas to require the attendance and testimony of witnesses, or subpoenas requiring the production of documents, must file a written motion or request for subpoenas with the Board. The written request should be submitted as soon as possible, so that the subpoena can be served at least five (5) days before to the scheduled hearing. Subpoenas and subpoenas duces tecum will be issued in the discretion of the Board. The written request shall include the full name and address of each person to be subpoenaed (and for subpoenas duces tecum, a complete description of the document or item to be produced), together with a statement accepting responsibility for service, and for witness and mileage fees, if any. Witness and mileage fees shall be the same as are paid witnesses in the courts of this state. Employees of the State Police shall not be paid witness fees and mileage fees. Reasonable mileage fees for traveling greater than 30 miles from their residence or place of employment to the location of the hearing, whichever is the shortest, may be paid to State Police employees if the individual has to use their personal vehicle for transportation to the hearing and a department owned vehicle is not available. Any party requesting a subpoena or subpoena duces tecum must advise all other parties of the request at the time it is made. The parties are required to exchange a list of witnesses and all discovery, documentation or other evidence to be used as their case-in-chief ten days prior to the hearing before the Board. The Board shall prohibit the testimony of any witnesses, other than those called for rebuttal, whom are not disclosed to the opposing party within the allotted time frame unless the party provides good cause for failing to disclose or if the opposing party does not object to the appearance of the witness. Subpoenas and subpoenas duces tecum may be enforced as provided by law.

Upon motion made promptly, and in any event at or before the time specified in the subpoena for compliance, the Board may quash or modify a subpoena or subpoena duces tecum if it is unreasonable and oppressive, or requires disclosure of privileged or otherwise irrelevant information. The Board may require the advance payment, by the requesting party, of the reasonable cost of producing and/or researching the books, papers, documents, or tangible things prior to issuing the subpoena duces tecum.

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

~~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 request in writing to have removed any record of the grievant's identity from any file kept by the State Police.~~

4.22.16. Procedures:

4.22.16.1. ~~The State Police grievance coordinator~~ The PSS shall be responsible for the coordination of grievance procedures. Such coordination shall can 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 rule.

4.22.16.2. ~~The grievance coordinator~~ The PSS shall maintain and control finalized grievance records

within the security of its files and will take necessary precautions to ensure controlled access to sensitive grievance records and documents. **Said files may be destroyed after ten (10) years from the date of the closing of the grievance unless otherwise designated by court order, rule of law or the Superintendent.**

~~4.22.3. First level supervisors receiving a grievance form shall acknowledge receipt by noting the time, date and name of the person receiving the grievance and shall immediately forward a copy of the grievance to the grievance coordinator.~~

~~4.22.4. The supervisor responsible for administering the grievance procedure at each level shall 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 grievance coordinator. The supervisor administering the grievance procedure shall NOT retain a record of the grievance or the decision.~~

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

~~4.24. The Superintendent may appeal a level four decision on the grounds that the decision (1) was contrary to law or lawfully adopted rule 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.~~

~~181-8-5. 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 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 within 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.~~

~~5.2. Level two.~~

~~5.2.1. Within seven days of receiving the written decision of the immediate supervisor the grievant or Superintendent may file a written appeal to the appropriate State Police 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 State Police supervisor the~~

~~grievant or Superintendent may file a written appeal of the decision with the Superintendent. The Superintendent or his or her 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 or her 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 either the grievant or the Superintendent are not satisfied with the action taken by the grievance evaluator, within fourteen days of receiving the written decision the grievant or Superintendent may request, in writing, on a form furnished by the State Police, that the grievance be submitted to a hearing examiner. Within seven days after receipt of the notice of appeal from the grievant, the Superintendent or his or her designee shall mail to the grievant a strike list of names of hearing examiners. A hearing examiner selection committee consisting of one person designated by the Superintendent, one person by the trade or professional organization which has the largest number of members of the State Police within its membership, and one acting or senior status circuit judge agreed upon by the Superintendent's designee and the trade or professional organization's designee, shall compile the strike list. The strike list shall consist of attorneys licensed to practice in West Virginia. The hearing shall be conducted in accordance with section six of this rule within thirty days following the request. The hearing may be held within sixty days following the request, or within such time as is mutually agreed upon by the parties.~~

~~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.~~

~~5.5. Expedited grievance process.~~

~~5.5.1. A member may grieve a final action of the Superintendent 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 by the Superintendent.~~

81-8-5. Selection of the Board.

5.1 The Board shall be made up of five members of the State police which shall consist of one member each from the ranks of Captain, 1st Lieutenant, 1st Sergeant, Sergeant and from a rank below that of Sergeant.

5.2 The Superintendent shall nominate five members from the rank of Captain, five members from the rank of 1st Lieutenant, five members from the ranks of 1st Sergeant and Sergeant and ten members from a rank below that of Sergeant. The Membership shall vote for one Captain, one 1st Lieutenant, one 1st Sergeant or Sergeant and two members from a rank below that of Sergeant to sit on the Board. The members from each of the slots receiving the highest number of votes shall be elected to the Board. The member from each rank receiving the next highest number of votes shall be deemed an alternate in the case that the Board member from that slot is unable to serve due to conflict or other unavoidable reason. Promotion of a Board member during his/her term on the Board shall not affect his/her eligibility to remain on the Board for the remainder of its term.

5.3 The Superintendent shall forward a ballot containing the nominees to all members on or before May 15 of each year. Ballots shall be returned to the Superintendent by close of business June 1 (or next business day if June 1st falls on a weekend). Ballots will be placed in a sealed envelope with the

members name and permanent identification number written on the outside. Upon receipt, ballots shall be removed from the envelope and place in a locked box for subsequent tallying. Ballot envelopes shall be retained for the purpose of election verification and to prevent unauthorized voting. Ballots shall be tallied after June 1st but no later than June 10. Election results will then be forwarded to the membership.

5.4 The Board will receive training as designated by the Superintendent and can develop written guidelines to provide orderly application of their duties consistent with the rules set forth in 81 C.S.R. 8 et al.

1 81-8-6. Hearings Generally.

6.1. ~~The Superintendent or his or her designee acting as a grievance evaluator or the hearing examiner~~ **The Board** 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. All Hearings shall be scheduled by the Board within 60 days of the filing of the grievance. 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. All such hearings shall be held at Department Headquarters unless an alternate location is selected by the Superintendent. ~~a location selected by the Superintendent~~ and Hearings shall be held within regular working hours, however they ~~may continue beyond normal working hours~~ with the consent of the Board and agreement of the parties.

6.2. ~~Upon written request, the grievant or Superintendent shall produce prior to such hearing any documents, not privileged which are relevant to the subject matter involved in the pending grievance.~~

6.3.2. ~~At levels 3 or 4 the Superintendent or his or her designee or the hearing examiner~~ **The Board** 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 provisions of this rule.

6.4.3. 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 upon written request of either party or the **Board** ~~level 4 hearing examiner~~, shall be transcribed and certified by affidavit. Such transcripts of proceedings shall be subject to disclosure by subpoena. Such records may be bound by a confidentiality agreement if so Ordered by the Board.

6.5.4. 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 Superintendent in disciplinary matters. The burden of proof shall rest with the grievant on all other matters or defenses.

6.6.5. 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. ~~The record shall be submitted to any level at which appeal has been made, and the record shall be considered, but the development of such record shall not be limited thereby.~~

6.6. A grievance may be dismissed, in the discretion of the Board, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested. Said dismissal shall be made in writing by the Board.

6.7. Prior to the decisions rendered at levels 3 or 4 **by the Board**, any party may propose findings of fact and conclusions of law which shall be submitted in writing **within 30 days of the receipt of a transcript of the proceedings. Said time frame may only be extended by written Order of the Board.**

6.8. Every decision rendered at levels 3 or 4, pursuant to a hearing, **by the Board** shall be in **writing and transmitted to the parties.** ~~shall be accompanied by findings of fact and conclusions of law.~~ **Final Decisions by the Board shall be by a majority vote and shall be issued in writing within 30 days of the date for submission by the parties of findings of fact and conclusions of law. The written decision shall put forth the evidence and reasons for the Board's Decision. In matters of Suspension, Demotion or Termination, the Board shall only decide if the charge against the grievant is sustainable. Severity of the discipline is not a factor to be considered by the Board in reaching its decision unless the discipline is not permitted as provided by the 81 C.S.R. 10**

6.9. After the Board issues a final decision in a grievance, the Board retains jurisdiction to amend the decision to correct clerical errors by errata notice during the appeal period.

6.10. The Board will, under no circumstances, issue an advisory opinion, i.e., an opinion on an issue not directly raised before the Board in a grievance.

6.11. A party seeking to prevail by default must file a written claim seeking relief by default with the Board and provide a copy of the claim to the opposing party. After the opposing party receives the written claim for default, the opposing party may request a hearing with the Board. Upon receipt of a claim for relief by default, the Board will place the claim for default on its next available docket and set the claim for hearing. The issues to be decided include whether the opposing party has a statutory or justifiable excuse for not responding within the time required by law or by these rules and/or whether the relief sought is contrary to law; arbitrary and capricious; unreasonable or clearly wrong. Once a party files a written claim for relief by default with the Board, all proceedings are automatically stayed until all default matters have been ruled upon.

6.12. The Board, Board Member or other third party, upon agreement of the Parties, may serve as a mediator in an effort to resolve the grievance prior to a hearing. Once mediation is requested, all time frames shall be tolled until the mediation is completed.

' 81-8-7. Enforcement and Reviewability; Costs; Good Faith.

7.1. The decision of the ~~hearing examiner~~ **Board** shall be final upon the parties and shall be enforceable in circuit court. The grievant or Superintendent may appeal to the **Kanawha County Circuit Court** ~~circuit court of the county in which the grievance occurred~~ on the grounds that the ~~hearing examiner's~~ **Board's** decision (1) was contrary to law or a lawfully adopted rule or written policy of the State Police, (2) exceeded the ~~hearing examiner's~~ **Board'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. The 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~~ **Board's** decision. The decision of the ~~hearing examiner~~ **Board** shall not be **automatically** stayed;

automatically, upon the filing of an appeal, but however a stay may be granted by the circuit court upon separate motion. In every matter appealed to circuit court, the appealing party shall serve a copy of the appeal petition upon the Board as required by W. Va. Code 29A-5-4(b), and will provide the Board with the civil action number so that the certified record can be properly filed with the circuit court. The party prevailing on the appeal shall furnish the Board with a copy of the final decision of the circuit court and any accompanying order within twenty days of its receipt.

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

~~7.3. Both the State Police 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.~~

~~81-8-8. 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.~~

~~8.2. A grievant has the right to use, free of charge, any State Police copy machine for the purpose of copying grievance documents and the transcript of the employment grievance hearing.~~

~~81-8-9.8. Mandamus Proceeding.~~

~~9.8.1. Should the State Police either party fail to comply with the provisions of this rule, it may be compelled to do so by mandamus proceeding and the non-complying party shall be liable to any the prevailing party prevailing against the State Police for court costs and reasonable attorney fees, as determined and established by the court.~~

~~81-8-10.9. Grievant's Right to Attorney's Fees and Costs.~~

~~10.9.1. 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 State Police shall may be liable to such member upon final judgment or order, for court costs and for reasonable attorney fees to be set by the court for representing the member in all administrative hearings and before the circuit court and the supreme court of appeals and shall be further liable to the member for any court reporter costs incurred during any administrative hearings or court proceedings. In no event shall 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. The requirements of this section shall not be construed to limit the grievant's right to recover reasonable attorney's fees in a mandamus proceeding brought under section nine of this rule.~~

~~81-8-11.10. Application of Rule.~~

~~11.10.1. This rule applies to all grievances on or after the effective date of this rule. This rule supersedes W. Va. Code ' 15-2-6(b) and all previous versions of this rule.~~

**West Virginia State Police
Title 81
Series 8
West Virginia State Police Grievance Procedure**

Summary of Comments

Comments received on July 17, 2003 from 1LT G. A Ingold, Operations Officer for Professional Standards Section West Virginia State Police:

Comment 1: recommendation that word “five” should replace the asterisks in section 3.1.1 as the section of the rule that addresses the Board’s selection.

Response: Accepted recommendation as requested due to the asterisks being a typographical error. Change reflected in Rule submitted.

Comment 2: recommendation that section 4.3 should permit the grievant to have 14 days from receipt of the Order and not date of Order.

Response: Accepted recommendation as requested. Agreed that change would promote consistency in the time frame allowed for filing. Change reflected in Rule submitted.

Comment 3: Requested that language be added to address the purging of grievance files.

Response: Added the following language to sec 4.16.2. “Said files may be destroyed after ten (10) years from the date of the closing of the grievance unless otherwise designated by court order, rule of law, or the Superintendent.” PSS files do not need to be maintained indefinitely and the added language would allow for the purging of the files after a period of ten years.

Comment 4: Suggested that the Board membership be increased from three to five members with the addition of a Captain and a member below the rank of sergeant.

Response: Based upon this recommendation and the comments from the West Virginia Troopers Association (discussed below), the Rule has been amended to increase the Board’s size from three to five members with the addition of a Captain and two members below the rank of sergeant. The slots for first sergeant and sergeant have been combined into one slot. This allows for the inclusion of two members who are not in a supervisory position in the West Virginia State Police while maintaining an odd number of members for voting purposes. Change reflected in Rule submitted.

Comment 5: Recommendation to change the word “Discipline” to “Suspension, Demotion”

Response: Accepted recommendation as requested. This provides for consistency within the Rule. Change reflected in Rule submitted.

Comments received July 28, 2003 from Joseph R. Adams, President, West Virginia Troopers Association.

Comment 1: WVTA RESPONSE TO DEPARTMENT'S ARGUMENT OF COST SAVINGS TO DEPARTMENT.

Response: As provided in the response to Comment 4 from Lt. G.A. Ingold above, the Rule has been amended to increase the Board's size from three to five members with the addition of a Captain and two members below the rank of sergeant (non-supervisory members, in other words). The slots for first sergeant and sergeant have been combined into one slot. This allows for the inclusion of two members who are not in a supervisory position in the West Virginia State Police. This should address the concerns regarding the membership of the Board. The membership can additionally select from five nominees in each slot which allows for the membership's input rather than allowing the Superintendent to handpick the members.

From a review of the WVTA comments, it appears that they misunderstand the intent and design of the proposed Rule. Currently, the grievance procedures provide for four levels in-house. The first two are handled by chain of command supervisors and the third is an appeal to a member of the senior staff of the WVSP. The Fourth level provides for a hearing before an appointed hearing examiner. Contrary to assertions by the WVTA, grievances are rarely if ever resolved at the first two levels because those supervisors do not have the authority necessary to grant the relief that is requested by the grievant. It provides for additional time delay and forces the member to continue the appeal process at least to level three. With the current proposal, the third level has now become a mediation level with the grievant meeting with a member of the senior staff in order to see if the grievance can be resolved through informal discussions.

The WVTA incorrectly states that we are "requesting the removal of the first four levels of the grievance procedure." To the contrary, we are requesting that the first two levels of the procedure be removed since the supervisors at that level generally have no authority to grant the requested relief and a third level of organized mediation apply to encourage the early resolution of the matter prior to a level four hearing. A level four hearing will still be held, except a Board of peers will hear the matter instead of an outside hearing examiner.

To summarize, this new rule will basically speed up the grievance procedure by the elimination of the first two levels while retaining the ability to mediate and then hear the matter in a formal matter if it can not be resolved through mediation. Again, and contrary to the representations of the WVTA, there has never been a level five in the grievance procedure. Any party who is aggrieved by the decision at level four can proceed on

appeal to the Circuit Court of Kanawha County. This appellate review, as with all appellate reviews, is based on the record below.

Further, the Department has in-house assistant attorney generals to defend these appeals, (not retained counsel as articulated in the WVTA's comments) so the costs to defend the matter in Circuit Court would be the same. The fiscal savings of \$10,000 for hearing examiners at level four is actually in error. The true yearly cost of having outside hearing examiners is in excess of \$30,000.

Comment 2: WVTA RESPONSE TO DEPARTMENTS ARGUMENT OF EFFICIENCY

The reduction of the various nonproductive grievance levels and the addition of the informal mediation meeting will improve efficiency not hamper it. The backlog of cases in the Department was present before this current administration came in and had been bottlenecked for many years. There has been no conduct on the part of the Department to intentionally delay or ignore the pending cases. This administration, however, has been able to effectively reduce this backlog from prior years. The coordination of counsel's dates and hearing examiner availability, as well as necessary continuances by both parties adds to the bottlenecking problem.

Further, as indicated above, a mediation opportunity would additionally be a good way to allow the parties to informally resolve conflicts prior to the expending of significant time and money on a formal hearing procedure.

Admittedly, as the WVTA points out, the Department recognizes that a default provision would be helpful in moving these cases more expeditiously; therefore, such has been included in this new grievance rule.

Comment 3: THE PROPOSED LEGISLATIVE RULE CHANGE DEPRIVES THE MEMBER OF ADMINISTRATIVE DUE PROCESS

Contrary to the assertion by the WVTA, the elimination of some of the now grievable categories does not deny any member of due process, but allows for the system to handle more efficiently, the most important and the most depriving issues affecting the members. This type of grievance system can not handle the workload as contemplated by the WVTA for members to grieve **any act** which they believe is a wrong against them. It does allow the members to file grievances which impact them financially and in a permanent manner. For instance, if the WVTA's argument re: expansion of grievances is accepted, a Trooper could grieve trivial issues, for instances, the color of the car, he/she was assigned, or the shift they were required to work. Clearly such issues are better handled through the chain of command and not through the grievance system. The more grievances filed, the more the system is congested. The more the system is congested, the longer it takes to resolve and hear cases involving deprivation which should be heard and decided timely. No matter the issue, each grievance takes a great deal of time to work through the system. The expansion of grievable issues only adds to

the delay of which the WVTA now complains. No change has been made to the Rule to expand the list of grievances that can be heard.

Comment 4: NO LEGAL PRECEDENT MAY BE SET BY THE PROPOSED LEGISLATIVE RULE CHANGE

WVTA argues that by allowing peers to make administrative decisions in grievances causes the decision to carry no legal precedential value. However, this argument is inapposite to the State Police historical legal framework and our current legal system. First, the system as currently proposed, substantially mirrors a grievance system that was used by the State Police for many years. In fact, the WV Code §15-2-6 still recognizes this system and the use of State Police members as a “Board” to hear these grievances. It further recognizes that “either party aggrieved by the decision of [this peer group] may appeal the decision to the Circuit Court of Kanawha County”. WV Code §15-2-6(b). Thus, nothing is lost, either by way of precedent or impact, by virtue of the fact that we would use non-lawyer peers to hear these cases. This point is further illustrated by our use of magistrates in our current legal system. Such magistrates are not required to have a law degree, yet still render decisions with precedential value. As such, this argument by the WVTA is disingenuous. No change will be made to the proposed rule.



Handwritten initials and date: 7-17-03

West Virginia State Police
725 Jefferson Road
South Charleston, West Virginia 25309-1698
Executive Office

Bob Wise
Governor

MEMORANDUM

Colonel H. E. Hill, Jr.
Superintendent

TO: Major G. L. McGraw
FROM: Lieutenant G. A. Ingold *GAI*
DATE: July 17, 2003
RE: Series 8, Grievance Procedure

I have reviewed a copy of the revised version of the grievance procedure and in my opinion there are some areas where changes may improve the rule.

On page one in section 3.1.1, in the definition of Board, the word five should replace the asterisks as the section of the rule that addresses the Board's selection.

On page three in section 4.3, the grievant should have 14 days from receipt of the order to grieve and not from the date of the order since the order may not be served timely.

On page five in section 4.16.2, I suggest something be added addressing the purging of the grievance files since they don't need to be maintained indefinitely.

On page seven in section 5.1, I suggest increasing the number of Board members from three to five adding a Captain and one member from below the rank of sergeant.

On page nine in section 6.8, I suggest deleting the word Discipline and replacing it with suspension, demotion, since discipline is not defined in the rule and suspension and demotion are the only issues besides termination to be grieved because of a sustained violation.



Local 2019

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www.wvtroopers.org



July 28, 2003

RECEIVED

JUL 28 2003

EXECUTIVE OFFICE

Honorable Joe Manchin
West Virginia Secretary of State
Capitol Complex
Charleston, West Virginia 25305

HAND DELIVERED

Re: Legislative Rule Changes to West Virginia State Police Grievance Procedure

Rule Change Proposed: WV State Police
Comment Period Deadline: August 1, 2003 10:00 a.m.

WEST VIRGINIA TROOPER'S ASSOCIATION RESPONSE TO PROPOSED LEGISLATIVE RULE CHANGE OF GRIEVANCE PROCEDURES

Comes now, the West Virginia Troopers Association (WVTA), and responds to the proposed Legislative Rule Change for the West Virginia State Police Grievance Procedure. As for any and all proposed deletions and additions, reflected in the proposal as strike-throughs and underlines, the WVTA adamantly opposes any and all changes proposed. The WVTA believes that the changes proposed would be to the detriment of the uniformed members of the West Virginia State Police, for whom the grievance procedure was designed to protect. In support of said objections, the WVTA offers the following:

**WVTA RESPONSE TO DEPARTMENT'S ARGUMENT OF COST SAVINGS
TO DEPARTMENT**

On page 1, Appendix B of the proposed legislative rule change, the West Virginia State Police (Department) has proposed the change and supported said change by stating that there would be a \$10,000 savings to the Department. The savings would be demonstrated by the elimination of the retention of hearing examiners at level 4 of the current grievance procedure.

In response, the WVTA argues that there would be an INCREASE of expenditures by the changes proposed by the Department to the rules. The Department is requesting the removal of the first four levels of the grievance procedure, to be replaced by a panel or board of three persons, nominated by the Superintendent, and then voted on by the membership. Such election of the board members is neither democratic, nor representative of the Trooper who is most likely to file a grievance with the Department. The three board members are proposed to be from the ranks of Sergeant, 1st/Sergeant and 1st/ Lieutenant. All three ranks listed for the board are *supervisory* in occupation, and therefore are not representative of the field trooper who is normally below the rank of Sergeant. Further, the proposal requires that the Superintendent shall select the nominees for the ballot, which has the appearance of an impropriety for trustworthy procedural representation. Since the board would not be representative, there would be no trust from the grievant, and therefore would force the grievant to advance to what is now level five (5) of the grievance procedures, which is Circuit Court.

The Department hears and disposes of numerous grievances by uniformed members prior to reaching the level four of the grievance procedures. By eliminating

those levels where the grievances may be disposed of, more members will advance to level five, or Circuit Court, where attorneys for the Department have to be retained. The cost to defend one grievance at Circuit Court level may, and often will, exceed the total cost the Department has provided for savings for the current level Four, hearing examiners. The savings projected was for an entire fiscal year and encompasses all grievances by members. Again, only one case in the new Department proposal could exceed the savings projected.

Further, in light of the budget of the WV State Police, the percentage of savings, if realized, would be minute when compared with the millions of dollars allotted to the Department by the Legislature. Savings would be realized by a fraction of 1% of the budget. The benefits to the department are outweighed by the detriment to the uniformed member who will suffer without the procedural due process that is now in existence.

WVTA RESPONSE TO DEPARTMENTS ARGUMENT OF EFFICIENCY

The Department argues that the efficiency of the grievance process would be improved if the proposed changes were implemented. As stated above, most grievances that are now taken care of or disposed of through the first three levels would most likely find their way to Circuit Court. Thus, the time efficiency argued by the Department is only referring to *their* docket and/or grievance calendar. By the projected increase in circuit court cases, the timeframe of disposing of grievances would actually increase, not decrease, if more cases were taken to Circuit Court. The Department would in no way be in charge or responsible for expediency, but rather the judges of the circuit, who control their own docket.

Under the current system, the Superintendent and Department are responsible for setting the grievance dates and are mandated through the Code of State Rules as to the maximum time limits allowed by the Department to set the hearings. Currently, the Department is in violation of numerous scheduled dates in reference to when the uniformed members filed their grievances, or when they have advanced them to the next stage. Thus, the “backlog” of the grievance files and the slow process, in which they are disposed of, is a direct result of the Department’s lackadaisical attitude toward setting the dates for the hearings. It would appear to be more advantageous for expediency if the Department would continue with the current grievance procedure guidelines and set dates and times for the grievance hearings according to their mandate.

Further, the “backlog” of grievances now being experienced by the Department could be eliminated with a provision for a default judgment clause that is afforded to other state employees in their respective grievance systems. The State Police is the only state agency that does not provide default judgment when the agency does not conform to the grievance time restrictions. Thus, if the default clause were implemented, the efficiency would be increased without implementing the proposed legislative rule changes.

**THE PROPOSED LEGISLATIVE RULE CHANGE DEPRIVES THE
MEMBER OF ADMINISTRATIVE DUE PROCESS**

Pursuant to the creation of the “board” through the legislative rule change proposal, the uniformed members would be deprived of their due process to grieve circumstances they are now entitled to protest and have a forum to be heard. The new proposal would alleviate all but four areas that a member could grieve. The four

areas are 1. termination 2. suspensions 3. demotions resulting from discipline, and 4. permanent involuntary transfers.

Currently, the members are permitted to grieve areas such as where the law or Code is misapplied by the department, for inconsistencies, promotional deficiencies on behalf of the department, etc. The new proposal would limit the member to only four areas to take to the newly created "board", which would leave the only avenue of redress straight to Circuit Court. Again, the Circuit Courts would be ever increasingly used if the administration, Department, were permitted to ignore and refuse to address their administrative issues.

Further, the member would lose due process rights because the "board" would be able to decide if witnesses are to be subpoenaed, evidence used and/or if documents were to be presented on behalf of the grievant. Under the current system, level four provides a forum for the administrative hearing examiner, a lawyer, to hear the evidence and apply the rules of evidence and civil procedure to the hearings. The three proposed "board" members are laymen in legal procedures and could not apply the proper legal authority in each case. Thus, again, the grievant would have no recourse but to take his/her grievance to the level of the Circuit Court.

**NO LEGAL PRECEDENT MAY BE SET BY THE PROPOSED
LEGISLATIVE RULE CHANGE**

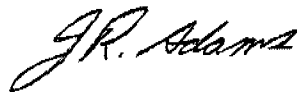
Pursuant to the current requirements and guidelines of the grievance procedures, at level four, an administrative hearing examiner holds the hearing and listens to the evidence presented. Both during the hearing and subsequent to the hearing, the examiner makes legal rulings and findings and then adopts and incorporates the

findings into a final decision that is then recorded as "administrative law". These administrative law decisions by the examiners, who are attorneys, making binding precedent that holds the administration to certain standards. Those standards may then be used by the members of the West Virginia State Police to base arguments on in the future for any similar alleged misdeeds by the Department.

By removing the level four from the grievance procedure, the Department would be free to conduct any decision on a subjective basis, without the guidance of the administrative holdings. The absence of the administrative decisions would facilitate inconsistency and unfairness from case to case and subject the member to differing standards with each scenario.

Therefore, based on the forgoing points of argument, the WVTA respectfully and adamantly objects to any and all legislative rule changes proposed by the West Virginia State Police to the Grievance Procedure. The WVTA requests that the current grievance procedure continue to be in affect because it more adequately addresses the member's due process rights and provides an adequate forum for the member to be heard on issues.

Respectfully submitted,



1. Joseph R. Adams

President

JRA/tlc
cc: Major Gary McGraw, WV State Police