

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

Form #4

Do Not Mark In This Box

FILED

2005 JAN 28 P 3:35

SECRETARY OF VIRGINIA  
SECRETARY OF STATE

**NOTICE OF RULE MODIFICATION OF A PROPOSED RULE**

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 RULES, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE, IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.

  
Authorized Signature

APPENDIX B

**FISCAL NOTE FOR PROPOSED RULES**

Rule Title: West Virginia State Police Grievance Procedure

Type of Rule:  Legislative  Interpretive  Procedural

Agency: West Virginia State Police

Address: 725 Jefferson Road  
South Charleston, WV 25309  
Captain David W. Skeen

Phone Number: 746-2193 Email: dskeen@wvsp.state.wv.us

**Fiscal Note Summary**

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

This rule will have no impact on the cost and revenues of state government.

**Fiscal Note Detail**

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

<b>FISCAL YEAR</b>			
Effect of Proposal	2005 Increase/Decrease (use "-")	2006 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Equipment	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: West Virginia State Police Grievance Procedure

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

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

There are no additional costs associated with the proposed rule changes. Funding for the grievance procedure is already included within the agency budget.

**MEMORANDUM**

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

N/A

Date: 01/28/05

Signature of Agency Head or Authorized Representative

Lt Col ABS Wm

FILED

TITLE 81  
LEGISLATIVE RULE  
WEST VIRGINIA STATE POLICE

2005 JAN 28 P 3:35

SERIES 8  
WEST VIRGINIA STATE POLICE GRIEVANCE PROCEDURE

WEST VIRGINIA  
COMPTROLLER 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. -- ~~May 21, 1998.~~

1.4. Effective Date. -- ~~June 15, 1998.~~

1.5. Supersedes W. Va. Code §15-2-6(b).

§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 members of the West Virginia State Police non-probationary members who have completed the post-cadet probationary period.

§81-8-3. Definitions.

3.1. For the purpose of this rule:

3.1.1. "Business Days" means Monday thru Friday, excluding weekends and holidays.

3.1.2. "Days" means working calendar days ex inclusive of Saturday, Sunday or and official holidays except where otherwise specified.

3.1.3. ~~"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.~~

3.1.4. ~~"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 under which such members work in accordance with the provisions set forth in section four of this rule. 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 ~~2~~) of this section.

3.1.5. "Grievance Board" means those members selected and authorized, pursuant to section five of this rule, to hear and render a decision on a grievance of another member of the State Police in accordance with the provisions of this rule.

3.1.8 ~~6.~~ "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.~~

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

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

3.1.9. "Representative" means any person or persons retired or active member of the Department, who is not an attorney, designated by the grievant to represent him or her in the processing of a grievance through this procedure; ~~or both.~~

3.1.10. "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.

3.1.11. "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 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 verifiable, emergency cause necessitating the grievant to take personal leave from his or her employment. ~~, or by agreement of all parties.~~ In such instances, the time shall be tolled until the member returns to duty.

4.2. Grievances shall be heard in the order they are filed, provided that extensions of time as provided in this rule may alter the order of grievances. A grievant may contact the Director of Professional Standards and obtain the number of grievances that are scheduled ahead of the grievant's case.

4.3. Failure of the Department to comply with the time lines set forth in this rule shall result in a default judgement in favor of the grievant, provided no default judgement shall be granted when:

a. The failure to comply with the time limit is due to the grievant's inability to appear for reasons set forth in section 4.1 of this rule,

b. Events or emergency situations that are beyond the control of the Department which demand the utilization of resources to an extent that such hearing can not reasonably be held during that time. Such situations shall include but are not limited to: flood details, riots, special event details, natural or man-made disasters, required federal or circuit court appearances by the grievant and/or a grievance board member that prevents the attendance of a scheduled grievance hearing. In such instances the time shall be tolled until the resolution of normal Department operations and/or the availability of the members, or

c. A Grievance Board Hearing can not be held within the specified time due to expedited grievance hearings or other Grievance Board

Hearings which have already been scheduled. The Department shall not be required to conduct more than three (3) Grievance Board Hearings in any calendar month.

d. A continuance is granted by the Grievance Board under the provisions of section 6.2 or 6.13 of this rule.

4.4. Grievances can be filed by members regarding the following matters:

- a. Disciplinary actions, including: dismissals (whether resulting from formal discipline or unsatisfactory job performance), demotions, suspensions, letters of reprimand or counseling.
- b. The violation or improper application of policies, procedures, rules, regulations or statutes.
- c. Permanent involuntary transfers.
- d. Acts of reprisal as a result of the use of the grievance procedure or of participation in the grievance of another employee.
- e. Acts of harassment as defined in section 3.1.6. of this rule.

4.5. The Superintendent has the exclusive right to manage the affairs and operations of the Department. Accordingly, the following complaints are not grievable:

a. Establishment, elimination or revision of job classifications or revision of organizational structure.

b. The contents of established policies, procedures, rules, regulations or statutes.

c. The measurement and assessment of work activity through a performance appraisal except in instances where the member can show that the evaluation was arbitrary or capricious.

d. Failure to be promoted except

where the employee can show established promotional policies or procedures were not followed or properly applied.

e. 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.

4.2 6. 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.

4.4 7. A member may withdraw a grievance at any time by notice, in writing, to the level wherein the grievance is then current, to the Director of Professional Standards. 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 each lower administrative level.

4.5 8. Grievances may be consolidated at any level by agreement of all parties. In the event a member has multiple related grievances, all such grievances shall be heard by the same grievance Board.

~~4.6 9. A grievant may be represented by any person or persons designated by the grievant. 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. designate a representative to represent him or her before the Grievance Board. The representative must comply with the requirements of section 3.1.9 of this rule. While a member may be selected to represent a grievant, nothing in this rule shall require any member to represent another member in a grievance hearing. The Department shall be represented before the Grievance Board by the Deputy Superintendent or another member of the Senior Staff designated by the Superintendent. Nothing in this rule shall prevent the grievant or Department from securing assistance for case preparation, advice or strategy from legal counsel or any other source either party so chooses. Legal counsel for the grievant and/or Department may be present during any hearing before a Grievance Board for the purpose of providing advice or strategy but such counsel shall not represent the grievant or Department during such hearing.~~

~~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 10. 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 11. 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 12. 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 Board ~~evaluator at the level wherein the new evidence is presented.~~ If the Grievance Board ~~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 Board ~~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 13. Any change in the relief sought by the grievant shall ~~must~~ be consented agreed to by all parties or may be granted at level four within the discretion of the hearing examiner Grievance Board. A majority decision is required for the Grievance Board to change relief sought.~~

~~4.12 14. 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 access to State Police equipment for purposes of preparing grievance documents subject to the reasonable rules of the employer governing the use of such equipment.~~

~~4.13 15. 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, 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, upon agreement by both parties and majority approval of the Grievance Board, proceedings before the Grievance Board may be open to other members and/or the public.~~

4.14 16. No person shall confer or correspond with ~~a hearing examiner~~ the Grievance Board or any member thereof regarding the merits of the grievance unless all parties to the grievance are notified and agree thereto.

4.15 17. 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 18. 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 19. The aggrieved member, the State Police, ~~and~~ representatives of both and Grievance

Board members 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 20. 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.

4.19 21. 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 22. 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 23. Procedures:

4.22 23.1. The Director of Professional Standards ~~State Police grievance coordinator~~ 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 rule.

4.22 23.2. The ~~grievance coordinator~~ Director of Professional Standards 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.

~~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 24. 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 Grievance Board 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.~~

**§81-8-5. Procedural Levels and Procedure at Each Level.**

5.1. Level one: Initiation of Grievance

5.1.1. The member shall identify the grievance verbally in writing, on the form prescribed, to their his/her immediate supervisor in an informal meeting within fourteen thirty (30) days after the event or action or the discovery of the event or action which is the basis for the grievance, or within 30 days of the last occurrence

of an ongoing event or action.

5.1.2. The grievance complaint shall include:

a. A statement of the grievance and the facts upon which it is based.

b. Allegation of the specific wrongful act and harm done, and

c. Remedy or adjustment sought.

~~5.1.2 3. The immediate supervisor shall give a verbal response to the member within seven days following the meeting: acknowledge receipt by noting the time, date and name of the person receiving the grievance and immediately fax the grievance complaint to the Director of Professional Standards and forward the original through channels to the Superintendent. A copy of the grievance complaint may be retained by the grievant.~~

~~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 2. Level three: Mediation Conference

5.3 2.1. Within seven thirty (30) days of

~~the initial filing of a grievance 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. a mediation conference with the grievant. 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. at the conclusion of the Mediation Conference.~~

5.2.2. The written decision of the Superintendent or his or her designee shall indicate if the grievance was resolved or still pending. When a grievance is resolved as the result of a Mediation Conference the written decision shall include all terms, conditions and matters agreed to and be signed by both the grievant and the Superintendent or his or her designee. In the event the Superintendent or his or her designee enters an opinion that a matter is not grievable, the grievance shall be considered unresolved.

#### 5.4.3. Level four: Grievance Board Hearing

~~5.4.3.1. If either the grievant or the Superintendent are not satisfied with the action taken by the grievance evaluator, a grievance is not resolved as a result of the mediation conference, the matter shall proceed to the Grievance Board 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 forty-five (45) days following the Mediation Conference. request. The hearing may be held within sixty days following the request, or within such time as is mutually agreed upon by the parties.~~

5.3.2. The Grievance Board shall consist of five members selected from the ranks of Trooper First Class through First Lieutenant.

5.3.3. All Grievance Board members shall be selected by blind lot. The grievant may be present during the blind lot selection process if he/she so desires. Four candidates from the supervisory ranks ( Sergeant, First Sergeant and First Lieutenant) and three candidates from the non-supervisory ranks (Trooper First Class and Corporal) shall be selected. The grievant then has the right to strike any two (2) candidates. The grievant shall have up to twenty-four (24) hours to make the allowed strikes. If the grievant does not make the required strikes, two members will be selected by blind lot from the proposed board and stricken.

5.3.4. A member may not serve on a grievance board if:

- a. The member has a pending grievance;
- b. The member is a witness for the grievant or Department;
- c. The members is on disability leave, administrative leave, or active military duty;
- d. The member has a conflict of interest including but not limited to; being a family member of the grievant; or
- e. The member is currently stationed with a grievant.

5.3.5. There is no limit to the number of times they may serve on a Grievance Board.

5.3.6. Each Grievance Board shall elect a Chairman who will preside over the Grievance Hearing and prepare the written decision of the Grievance Board. The Chairman shall be selected by majority decision of the Grievance Board members.

5.3.7. In order to provide for consistency in Grievance Board Hearings, the chairman from a previous Grievance Board shall be selected, by blind lot, to serve as an advisor to a currently setting Grievance Board. The advisor shall assist the Grievance Board with respect to hearing procedures and preparation of written decisions of the Grievance Board. The advisor shall have no voting privileges and shall not participate in any deliberations or discussions concerning the merits of the grievance being heard.

5.3.8. A new Grievance Board shall be selected for each grievance scheduled for a hearing before a Grievance Board.

5.4 3.2 9. Within thirty five (5) business days following the hearing, the hearing examiner Grievance Board 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 Grievance Board shall be final upon the parties and shall be enforceable in circuit court.

#### 5.5 4. Expedited grievance process.

5.5 4.1. 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. Grievance Board. The expedited grievance shall be in writing and must be filed within ten days of the date of the final action by the Superintendent.

### **§81-8-6. Hearings Generally.**

6.1. The Grievance Board Superintendent or his or her 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, to rebut evidence and to submit written proposed findings of fact to the Grievance Board at the conclusion of the hearing. 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. and Hearings shall be held within regular working hours, Hearings however they may continue beyond normal working hours at the discretion of the Grievance Board.

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. The grievant may file a written request for discovery at the time of the initial filing of the grievance and up to five (5) days after the Mediation Conference. The Department shall have ten (10) days to respond to any such discovery requests. Requests for discovery shall be sent to the Director of Professional Standards. If evidence is presented by either party after a written request for discovery has been filed and such evidence would have been subject to the discovery request, the Grievance Board may recess and/or continue a hearing up to ten (10) calendar days to allow the opposing party the opportunity to review such evidence.

6.3. The Grievance Board At levels 3 or 4 the Superintendent or his or her 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 provisions of this rule.

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 upon written request of either party or the level 4 hearing examiner, Grievance Board shall be transcribed and certified by affidavit. Grievance Board deliberations shall not be recorded.

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

6.6. A grievance may be dismissed by the Grievance Board if no claim upon which relief can be granted is stated, a remedy wholly unavailable to the grievant is requested or the Grievance Board determines the issue is not a grievable matter. Any such dismissal requires a majority decision by the Grievance Board.

6.6 7. 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.

6.7. Prior to the decisions rendered at levels 3 or 4 any party may propose findings of fact and conclusions of law which shall be submitted in writing.

6.8. Every decision rendered by the Grievance Board at levels 3 or 4, pursuant to a hearing, shall be in writing and shall be accompanied by findings of fact and conclusions of law. The written decision shall put forth the evidence and reasons for the Grievance Board Decision.

6.9. A Grievance Board member who has a dissenting opinion may, at the board member's discretion, issue a written dissent. Any such

opinion shall be attached to the written decision of the Grievance Board. Any dissenting opinion shall not alter the final decision of the Grievance Board as determined by majority decision.

6.10. In matters of discipline or termination, the Grievance 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 Grievance Board in reaching its decision unless the discipline is not permitted as provided by §81CSR10 or the grievance is in reference to disparity of treatment as it relates to discipline.

6.10.1 Allegations of disparity of treatment may be considered only with regard to other disciplinary actions taken by the current administration: i.e. The fact a member receiving a higher degree of discipline than a member under a previous administration is not grievable as disparate treatment.

6.10.2. In instances of a grievance relating to disparity of treatment in disciplinary matters, if the Grievance Board rules in favor of the grievant, the Grievance Board shall issue a non-binding recommendation to the Superintendent that the discipline issued be reviewed.

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

6.12. Grievance Board decisions require a simple majority decision.

6.13. During a Grievance Board hearing if a member of the Grievance Board is unable to complete the hearing due to emergency circumstances; such as a required federal or circuit court appearance, death in the family, illness or accident, the grievant shall have the following options:

a. Allow the previous Grievance Board chairman, currently serving as an advisor, to replace the member on the Grievance Board,

b. Allow a continuance until the Grievance Board member can return, or

c. Request that a new Grievance Board be selected and the grievance hearing rescheduled.

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

7.1. The decision of the Grievance Board hearing examiner shall be final upon the parties and shall be enforceable in circuit court. The grievant or Superintendent may appeal to the circuit court of the county in which the grievance occurred on the grounds that the Grievance Board's hearing examiner'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 Grievance 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 Grievance Board's decision. The decision of the hearing examiner Grievance Board shall not be stayed, automatically, upon the filing of an appeal, but a stay may be granted by the circuit court upon separate motion.

7.2. The court's ruling shall be upon the entire record made before the Grievance Board 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 Grievance 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 1. 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. Mandamus Proceeding.**

Should the State Police 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 State Police for court costs and attorney fees, as determined and established by the court.

**§81-8-10. Grievant's Right to Attorney's Fees and Costs.**

If a member shall appeal to a circuit court an adverse decision of the Grievance Board 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 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 five hundred 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. Application of Rule.**

**81CSR8**

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.