



**WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION**

Form #7

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Filing Date

FILED

JUL 10 2 46 PM '95

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Effective Date

Aug. 18, 1995

NOTICE OF AN EMERGENCY RULE

AGENCY: WEST VIRGINIA STATE POLICE TITLE NUMBER: 81

CITE AUTHORITY: WV CODE 15-2-25

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: 10

TITLE OF RULE BEING FILED AS AN EMERGENCY: WEST VIRGINIA STATE POLICE

PROFESSIONAL STANDARDS INVESTIGATIONS

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR ~~30~~ ^{42nd} DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

SEE ATTACHED.

THE WEST VIRGINIA SUPREME COURT HAS ORDERED THE SUPERINTENDENT TO PROMULGATE RULES IN THIS AREA.

12.06

Use additional sheets if necessary


Signature

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: West Virginia State Police Professional Standards Investigations
 Type of Rule: Legislative Interpretive Procedural
 Agency: West Virginia State Police
 Address: 725 Jefferson Road
S. Charleston, WV 25309-1698

1. Effect of Proposed Rule

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

2. Explanation of above estimates:

The proposed rule will not result in any additional costs to the West Virginia State Police. The existing Professional Standards Unit will carry out the requirements stipulated in the proposed rules.

3. Objectives of these rules:

To meet an order of the West Virginia Supreme Court of Appeals to promulgate rules governing State Police investigations of employee misconduct pursuant to W.Va. Code 15-2-21.

Rule Title: WEST VIRGINIA STATE POLICE PROFESSIONAL STANDARDS INVESTIGATION

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

No additional cost to State Government.

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

None

C. Economic Impact on Citizens/Public at Large.

None

Date: 6-29-95

Signature of Agency Head or Authorized Representative

St. Col. Gary D. Griffith

DATE: JULY 7, 1995

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: WEST VIRGINIA STATE POLICE

EMERGENCY RULE TITLE: WEST VIRGINIA STATE POLICE PROFESSIONAL STANDARDS
INVESTIGATIONS

1. Date of Filing JULY 10, 1995

2. Statutory authority for promulgating emergency rule:

WV CODE 15-2-25

3. Date of filing of proposed legislative rule: JUNE 30, 1995

4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule?

THE EMERGENCY RULE ADOPTS NEW LANGUAGE.

5. Has the same or similar emergency rule previously been filed and expired?

NO

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.

THE WEST VIRGINIA SUPREME COURT HAS ORDERED THE SUPERINTENDENT TO

PROMULGATE RULES IN THIS AREA. SEE ATTACHED SUMMARY.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

NONE APPLY.

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

SEE ATTACHED SUMMARY.

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RULE SUMMARY AND STATEMENT OF CIRCUMSTANCES
CONSTITUTING THE EMERGENCY

This legislative rule explains the processes employed by the West Virginia State Police in receiving and investigating complaints from the public dealing with allegations of employee misconduct, enhanced reporting for use of force incidents, progressive employee discipline, and internal systems aimed at evaluating and addressing employees suffering from either job-related or non-job related stress.

The filing of this rule is prompted by State ex rel. Billy Ray C. v. Skaff (Skaff I) 190 W. Va. 504, 438 S.E. 2d 847 (1993), wherein the court issued a writ of mandamus compelling the Superintendent of the State Police "...to promulgate formal, written, investigation procedures" for the investigation of complaints by citizens against state police officers. The State Police filed proposed rules with the Court in order to comply with the writ of mandamus. In the sequel, State ex rel. Billy Ray C. v. Skaff, No. 21894 (W. Va. 1995) (Skaff II), the Court held that the Superintendent must file an administrative rule detailing these investigative procedures pursuant to W. Va. Code §29A-1-2(i) (1982). The Superintendent is authorized to "...make and promulgate proper rules and regulations for the government, discipline, and control of the State Police..." pursuant to W. Va. Code §15-2-25. Finally, "...an emergency exists when the promulgation of an emergency rule is necessary... (3) to prevent substantial harm to the public interest." W. Va. Code §29A-3-15(f).

In the instant case, the Supreme Court held that the public has "...a *right* [emphasis added] to

file a complaint with the Superintendent" and that the Superintendent is required to investigate all complaints lodged against state police officers. Skaff I . By characterizing the public's ability to file complaints as a "right," the Court clearly suggests that an important public interest is implicated and that substantial harm would result to that interest unless the Superintendent promulgates formal written procedures to ensure and safeguard both the public's right to complain and the propriety of the investigation conducted by the Superintendent. Skaff II. This emergency rule embodies the entire process of complaint filing and investigation and has been approved by the Court. The State Police has been forced to implement these procedures in order to both process citizen complaints in compliance with the order of the Court and to meet the Superintendent's duty pursuant to W. Va. Code §15-2-21, to investigate the complaints. Granting emergency status to this rule would serve to prevent substantial harm to the public interest by ensuring that formal, court approved procedures are in place to address complaints against police officers, especially when, as is often the case, the allegations involve violations of the complainant's civil rights.

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FILED

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Title: West Virginia State Police Professional Standards
Investigations.

Section 1. General.

1.1 Scope - This legislative rule explains the processes employed by the West Virginia State Police in dealing with allegations of employee misconduct, enhanced reporting for use of force incidents, progressive employee discipline, and internal systems aimed at evaluating and addressing employees suffering from either job-related or non-job related stress.

1.2 Authority - W. Va. Code §15-2-24a.

1.3 Filing Date -

1.4 Effective Date -

Section 2. Definitions.

As used in this rule, unless used in a context that clearly requires a different meaning, the term:

2.1 **Complaint:** Any allegation of an act by an employee which is contrary to written rules, regulations, procedures, directives, or orders of the agency. An allegation of an act or omission which, if substantiated would constitute a violation of the law. Any allegation which tends to indicate an actual or potential defect in agency rules, regulations, policies, procedures, directives, orders, or the delivery of services.

2.2 **Employee:** Any employee of the West Virginia State Police, uniform or non-uniform.

2.3 **Administrative or Internal Investigation:** An investigation conducted at the direction of the Superintendent and pursuant to a special order, by or on behalf of the Professional Standards Unit (hereinafter "Unit"), concerning non-criminal, administrative matters intended to determine if

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administrative sanctions are warranted for employees named in complaints.

2.4 Internal Inquiry: An investigation conducted at the direction of the Superintendent not pursuant to a special order, by or on behalf of the Professional Standards Unit, concerning non-criminal, administrative matters intended to determine if administrative sanctions are warranted for employees named in complaints involving less serious violations of the State Police Code of Conduct, CSR §81-1-10 et seq.

2.5 Case File: The entire collection of documents and certain items of tangible evidence, including the final report, relating to an internal investigation.

2.6 Critical Incident: Any incident where an employee is caused to employ potentially lethal force in the form of a firearm, a vehicle, or other potentially lethal force. An incident resulting in the death or severe injury of a co-worker or any other person. The use of deadly force against the employee or his/her co-worker leading to death, physical, or psychological injury.

2.7 Early Identification System: A system designed to analyze data pertaining to complaints lodged against employees and employee uses of force in an effort to identify employees who may be experiencing job related or non-job related stress or other problems which may adversely effect job performance.

2.8 Accident Review Board: A board formed by the Superintendent to review all employee motor vehicle accidents in order to judge employee adherence to State Police driving policies and the law.

2.9 Employee Grievance Processes: The processes employed by employees to address and resolve perceived adverse supervisory decisions, policy failures, and other work-related complaints.

Section 3. Organization and Responsibilities.

3.1 The Unit will be under the command of the

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Superintendent, and will report and be directly responsible to the Superintendent. The Superintendent shall staff the Unit with appropriate investigators to conduct internal investigations and inquiries, personnel inspections, and facility inspections.

3.2 The Superintendent shall be responsible for the organization and management of the Unit and shall develop policies and guidelines for its operation. The Superintendent shall appoint a member to coordinate the activities of the Unit. The Unit Coordinator shall supervise the Unit's office staff and receive all complaints, assign internal inquiries, make recommendations to the Superintendent with regards to the assignment of internal investigations, and shall administer the early identification system, the employee grievance processes, and the accident review board.

3.3 The Superintendent shall cause all complaints, including those terminated or resolved at a lower level, to be recorded in a central log and assigned a unique case number. Complaints involving the Americans with Disabilities Act, Age Discrimination in Employment Act, or the Civil Rights Act, shall be acted upon in collaboration with the agency Equal Employment Counselor. The Superintendent shall ensure the confidentiality of all documents and reports relating to the investigation of any complaint through strict control of files both within or without the Unit's offices.

3.4 The Superintendent shall draft a letter to the complainant (if known) acknowledging that the complaint has been received for processing, including the unique case number assigned to the matter, and the name of the investigator in charge of the investigation. Also, the Superintendent shall notify the employee, in writing, concerning the nature of the complaint, its status, and if any investigation is forthcoming, as soon as a determination of the necessary scope of the investigation is complete. The Superintendent has no duty to notify an employee if the notification would hinder any investigation of the complaint or if the matter is handled as an internal inquiry. The Superintendent will consult and advise the Unit Coordinator regarding procedures used in the investigations, review of case files for completeness, and the forwarding of case files through the proper chain of command to the Superintendent for final review. The investigator may apprise the complainant

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of the status of the investigation. The Superintendent shall draft closing letters to all concerned parties relative to completed investigations.

3.5 The Superintendent shall prepare an annual statistical report concerning the Unit's activities for distribution to the public and State Police employees as a means of dispelling allegations of disciplinary secrecy often voiced by some community elements.

3.6 The Unit shall apprise the Superintendent of situations or facts concerning employee complaints and investigations that may draw media attention.

3.7 The Unit shall make information available to the general public regarding the procedures to be followed in registering complaints against the State Police or its employees. The information may be disseminated through the media, informational pamphlets at each State Police facility, or through any other reasonable means (see attachment "A").

3.8 The Investigators assigned to either internal investigations and/or inquiries shall prepare accurate and complete reports within thirty (30) working days unless an extension is granted by the Superintendent for just cause. Investigators will also perform inspection and other duties as assigned by the Unit Coordinator or other authority.

3.9 The Unit may be contacted during off-hours for emergency complaints by contacting the Unit Coordinator.

3.10 The Unit's address is: West Virginia State Police, Professional Standards Unit, 725 Jefferson Road, South Charleston, West Virginia, 25309-1698.

Section 4. Incidents to be investigated.

4.1 The State Police shall investigate all complaints made by telephone, letter, in person, or otherwise, whether or not anonymous.

4.2 The Superintendent shall determine the criteria for the assignment of minor complaints for internal inquiry to

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line supervisors in cases such as alleged rudeness, tardiness, employee insubordination, or other complaints of a similar nature. The Superintendent shall have the discretion to assign internal investigations to specially trained officers not permanently assigned to the Unit. Once assigned, that officer may be removed from his or her regular duties as required to complete the investigation. The officer assigned shall report directly to the Unit Coordinator, and shall not discuss the investigation with anyone not assigned to the Unit or specifically authorized by the Superintendent to receive the information.

4.3 The Unit Coordinator shall immediately notify the Superintendent or his or her designee of any complaint alleging employee violations of serious misdemeanors or felonies.

Section 5. Complaint filing procedure.

5.1 All complaints involving State Police employees shall be accepted and documented, on a form designed by the Unit and approved by the Superintendent (see attachment "B"), by any employee receiving the complaint. Upon completion, the form shall be mailed directly to the Unit. The Intake Form shall state with particularity the allegations including name of the involved employee, dates, times, location, a detailed description of the misconduct, names of witnesses, and the remedy requested by the complainant. Failure to accept, record, and refer to the Unit any complaint is a violation of State Police policy and shall result in disciplinary action.

5.2 Employees receiving complaints shall advise complainant(s) that they may contact the Unit directly in order to file a complaint in lieu of registering the complaint at the local State Police office. The complainant may contact the Unit by calling 304-746-2110, or by writing to or appearing at the Unit's offices.

5.3 In instances when the complainant does not wish to contact the Unit directly and whenever possible, the immediate supervisor of the employee against whom the allegation is directed shall prepare the initial complaint report. If the employee's immediate supervisor is not available, any State Police supervisor or employee shall take the initial complaint.

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5.4 Employees taking complaints shall not make or retain any copies of the initial complaint form or any related documents (other than those kept in the normal course of business) in order to ensure the confidentiality of the investigative process.

5.5 Employees receiving initial complaints involving the use of force by a State Police employee shall take or cause to be taken detailed color photographs of the complainant whether or not any visible evidence of physical injury exists; provided, that the victim consents to the taking of such photographs.

5.6 All sworn/uniform members receiving initial complaints shall apprise the complainant(s) that it is a violation of *W. Va. Code §15-2-16* to provide false information to a member of the State Police (this does not apply if the employee taking the complaint is a civilian) and that the State Police will pursue appropriate criminal or civil sanctions if the investigation determines that the complaint is without foundation or basis, false, or not factual.

Section 6. Records Retention.

6.1 In order to better facilitate the operation of a progressive system of discipline and to provide for the various statutes of limitations pertaining to civil litigation, records and documents associated with complaints will be retained by the Unit indefinitely.

6.2 Case files shall be stored by the Unit, generally locked, and with access restricted to the Superintendent, his or her designee(s), members of the Unit, and to a court of competent jurisdiction under written order. Items in the possession of investigators or secretaries working outside of the Unit office shall be stored and handled in a manner that will ensure their confidentiality and integrity. Further, no duplicate copies of any item pertaining to a Unit investigation shall be made, retained, or disseminated by any employee, investigator, or secretary outside of the Unit, except at the direction of the Superintendent.

6.3 All documents concerning complaints alleging employee misconduct shall be considered confidential.

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Section 7. Operational Procedures.

7.1 If an investigation conducted by the Unit leads to information indicating that criminal charges could be filed, the investigator shall immediately notify the Unit Coordinator who shall cause the Superintendent to be notified. The Superintendent shall cause a separate criminal investigation to be initiated by a member not assigned to the Unit. If criminal charges are filed against an employee, the Superintendent may initiate or continue an on-going administrative investigation.

7.2 By virtue of *W. Va. Code § 15-2-21*, the Superintendent has the sole discretion to demote, discharge, and suspend employees from duty. The Superintendent, upon receiving a complaint against an employee or upon otherwise learning of misconduct by an employee, may temporarily relieve the employee from duty pending further investigation, with or without compensation, when it is determined through investigation or other information that the employee may be physically or psychologically unfit for duty, pursuant to State Police operating policy and procedure. During any administrative suspension attendant to an internal investigation, the employee, if a sworn member, may be required to surrender his or her identification card, badges, State Police issued weapon(s), and other State Police property in his or her possession or control. Further, the employee may be relieved of any police authority during the pendency of any administrative suspension.

7.3 The investigator, when possible, shall record the complainant's statement on audio or video tape or by handwritten statement signed by the complainant. The tape(s) shall become an exhibit included in the case file. The investigator may cause the tape to be transcribed and the transcription shall become a part of the case file.

7.4 The investigator, when possible, shall record any witness statements on audio or video tape or by handwritten statement signed by the witness. Witness interviews will not be summarized or paraphrased by the investigator in lieu of the recorded or handwritten statement. The tapes, transcriptions, and written statements shall be included in the case file by the investigator. The investigator shall not permit conversations

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"off the record" unless the subject of the interview agrees and the record reflects when the conversation goes off of the record, the purpose for doing so, and the time.

7.5 Investigators shall gather all physical evidence connected with the case including but not limited to photographs, video tapes, audio tapes, reports, logs, drawings, sketches, pertinent records, and other background evidence.

7.6 During the investigation, the investigator shall avoid making assertions concerning his or her perception of the investigation which may result in the complainant(s) reaching a premature or inappropriate conclusion regarding the final disposition of the matter. Further, the investigator shall not make like assertions after having interviewed one principle or faction involved in the allegations.

7.7 The investigator shall include in the case file a notation of any instances of poor cooperation on the part of the complainant(s), the employee who is the subject of the complaint, or any witnesses or other persons interviewed during the investigation as well as any remedial measures employed by the investigator in an effort to compel cooperation.

7.8 The facts ascertained during an internal or administrative investigation shall be detailed in an internal investigation report (see attachment "C"). The investigator shall state a conclusion of fact for each allegation of misconduct alleged by the complainant or revealed by the investigation from among the following dispositions:

1) **Sustained:** The validity of the complaint has been established and proven by a preponderance of the evidence.

2) **Not Sustained:** The complaint is not established by the evidence and can be neither proven nor disproved by the evidence available.

3) **Unfounded:** The complaint is without foundation, basis, it is false, or not factual.

4) **Policy Failure:** The allegation is true, and although

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the action of the State Police or the employee was not inconsistent with State Police policy, the complainant suffered harm.

5) **Exonerated:** The incident occurred, but the employee acted lawfully and properly.

6) **Withdrawn:** The complaint was withdrawn by the complainant.

7.9 The investigator shall submit the case file to the Unit Coordinator upon completion of the investigation or when otherwise directed by the Superintendent or his or her designee. The Unit Coordinator shall review the case file for content, form, and completeness. The Unit Coordinator shall then forward the case file and Unit Coordinator's recommendations to the Superintendent for disposition.

Section 8. Employee rights and conduct during an internal investigation or inquiry.

8.1 Prior to an employee being questioned in connection with an internal or administrative investigation, the employee shall be apprised of the nature of the allegations in the complaint, the name of the investigator assigned to the case, and the names of all persons present during the interview session:

8.2 Interviews shall be conducted at reasonable times and places at the discretion of the investigator.

8.3 Interviews shall be conducted while the employee is normally on-duty unless the employee opts to participate in an interview while off-duty. In cases where the Superintendent or determines that the allegations involve extremely serious matters of public interest or allegations which may bring the State Police into disrepute, the employee may be questioned during off-duty or non-waking hours. This shall not apply in instances where the Superintendent has placed the employee on administrative or other leave pending the outcome of the investigation or inquiry.

8.4 All interviews shall be tape recorded, on either

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audio or video tape, and the tape shall be included in the case file as an exhibit. Copies of the original tape(s) or transcription shall be made available only to the employee who made the statement with the understanding that the employee will not disclose the contents of either; unless the employee is required to disclose as a means of defending themselves. Any breach of this procedure is an offense that may subject the employee to disciplinary action.

8.5 An employee questioned in connection with an administrative (non-criminal) investigation or inquiry has no right to counsel and no right to avoid self-incrimination. An employee may consult with legal counsel prior to or following an administrative interview. Employees who are either subject to or questioned in connection with an internal or administrative investigation are required to answer all questions truthfully, file written reports as ordered by the Superintendent or his or her designee, and testify in administrative hearings. Employees are required to cooperate fully with the investigator in all phases of any internal or administrative investigation.

8.6 The investigator shall advise employees subject to an internal or administrative investigation of the "Administrative" or "Garrity" warnings (see attachment "D"). The investigator shall read the provisions of the form into the taped record of the interview. The investigator and the employee shall sign the acknowledgement section of the form. The investigator may give a copy of the warning form to the employee, but the original form shall be retained by the investigator and included as an exhibit in the case file.

8.7 During an internal or administrative interview, no more than two investigators shall question the employee simultaneously. The investigators shall not subject the employee to offensive language, threaten punitive action, or make promises of reward as an inducement to answer questions.

8.8 Internal or administrative interviews shall be of a reasonable duration, considering the complexity and gravity of the allegations in the complaint. The employee shall be afforded reasonable time away from the interview for meals and physical necessities.

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8.9 The State Police intends to limit the use of polygraph examinations to those cases in which the allegations are relatively serious and when all other investigative leads have failed to produce a preponderance of evidence which will either prove or disprove the allegations.

8.9(1) Polygraph results will be included as additional evidence to be considered by the Superintendent, Unit Coordinator, and the investigators. No conclusion should be drawn solely on the outcome of the polygraph examination or an agreement or refusal, in the case of a complainant only, to take a polygraph examination.

8.9(2) Investigators will refrain from offering polygraph examinations during the initial interview of a complainant. However, it may be mentioned as a possibility later on in the investigation and may be conducted at the request of the complainant.

8.9(3) If the Superintendent determines that all leads have been investigated and that the offer of a polygraph examination is appropriate, the complainant will be requested to take the examination prior to the employee. If the complainant refuses to take the examination, the employee may still be required to submit to the test.

8.9(4) An employee may request to take the examination before the complainant. The decision will be made by the Superintendent if the incident is of a serious nature and would justify modification of the preceding section. The operator shall inform the employee of the "Administrative" or "Garrity" Warnings using (see attachment "D"), and the employee shall sign a waiver of liability (see attachment "E") prior to the administration of the polygraph examination.

8.9(5) An employee who refuses to take a polygraph examination when so ordered may be dismissed from employment at the discretion of the Superintendent.

8.9(6) Questions used in the polygraph examinations shall be pertinent to the subject of inquiry except that the polygraph examiner may utilize control questions as may be necessary to validate an examination within the scope of

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acceptable polygraph procedure.

8.9(7) The results of a polygraph examination of an employee shall be confidential and available only to the employee, the Superintendent or his or her designee, the Unit Coordinator, the investigator, and grievance evaluators participating in the State Police's employee grievance procedure.

8.9(8) State Police polygraph operators shall be utilized. No one operator will be used by the Unit exclusively when multiple operators are available.

8.10 As part of an internal or administrative investigation an employee may be required to:

8.10(1) Submit to medical or laboratory examinations:

8.10(2) Submit to a chemical test of his or her breath for the purpose of determining the alcoholic content of their blood.

8.10(3) Be photographed.

8.10(4) Participate in a line-up.

8.10(5) Submit financial disclosure statements, although no employee shall be required or requested to disclose any item of his or her property, income assets, source of income, debts or personal domestic expenditures, including those of any member of his or her family, or household, unless such information is necessary in investigating a possible conflict of interest with respect to the performance of his or her official duties, or unless such disclosure is required by law, or unless such information is related to an investigation.

8.10(6) Submit to psychological examinations.

8.10(7) Submit to searches of any State Police supplied equipment and any personal items stored within that State Police equipment by an employee or any State Police equipment secured by a lock owned by an employee. State Police equipment includes but is not limited to vehicles, lockers,

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desks, cabinets, and briefcases.

8.11 An employee may be required to submit to an examination or test when the examination is specifically directed and narrowly related to a particular internal investigation being conducted. The requirement will not apply if in conflict with current applicable law. An example of the use of this process would be in the determination of drug use by an employee. An examination might also be required to determine fitness for duty, for example, excessive weight, apparent intoxication, alcoholism, or psychological problems.

8.12 As a part of an internal or administrative investigation the State Police shall protect an employee from exposure to the news media with or without the employee's written consent. The State Police shall not, pursuant to an internal investigation or inquiry, release an employee's home address, home telephone number, or photograph without the employee's consent.

8.13 Upon completion of the investigation and review by the Unit Coordinator and the Superintendent or his or her designee, the Superintendent shall notify the employee that the investigation is complete. If no disciplinary action is forthcoming, the employee shall be so notified and advised that the matter is closed. If disciplinary action is forthcoming, the employee shall be summoned to appear before the Superintendent unless the discipline involves a letter of reprimand or counseling. At this meeting, the employee will be given a written statement detailing the charges attendant to the disciplinary action with appropriate citations to codes, regulations, policies, procedures or accepted operating practices. The employee shall also be given a written notice of the form of the disciplinary action. All notifications shall be made in writing.

8.14 When an employee is summoned to appear before the Superintendent concerning pending disciplinary action, the Superintendent shall inform the employee of the results of the internal investigation, the substance of the sustained allegations, and the scope of the prospective discipline. The employee will be given a copy of the investigation case file upon request, but excluding the identity of confidential sources, and

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recommendations as to charges, disposition, or punishment. The employee shall sign a receipt indicating that he or she has taken possession of the case file material, and execute a confidentiality agreement (see attachment "F") with the State Police, agreeing to not disclose any of the material contained in the case file for any purpose other than to defend themselves. A violation of this procedure may subject the employee to additional disciplinary action.

8.15 The employee will be given at least ten calendar days to review the case file and will be permitted to appear before the Superintendent a second time to present a defense in the matter; provided, that the Superintendent receives the request within the period. The employee may seek redress for any disciplinary action through the State Police employee grievance procedures.

8.16 If criminal action is initiated by the State Police or another law enforcement agency based on the allegations contained in a complaint filed against a State Police employee, any information obtained pursuant to the internal or administrative investigation of that complaint shall not be used in that criminal proceeding unless the employee was apprised of and waived his or her constitutional rights as detailed in the State Police Miranda Warnings Form (see attachment "G").

Section 9. Early identification system.

9.1 The Early Identification System shall be maintained and administered by the Unit. An Internal Review Board consisting of the Deputy Superintendent, Officer in Charge of Support Services, Officer in Charge of Field Operations, Unit Coordinator, and any other persons authorized by the Superintendent shall be formed to review and evaluate employees who are identified by the system. The system shall produce quarterly, bi-annual, and yearly reports for review by the Internal Review Board naming employees who have entered the system based on external citizen complaints, internal complaints, or use of force incidents. Employees shall document all use of force incidents by using the Supervisor's Report of Use of Force to Control Form (see attachment "H") pursuant to the State Police "Use of Force" policy and procedure. Employees who have received two or more complaints or who have been involved in three or more

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use of force incidents during a three month period shall be subject to review by the Internal Review Board and may be subject to counseling by their immediate supervisor and/or referral to the Employee Assistance Program upon the recommendation of the Board.

9.2 The employee's immediate supervisor shall forward a written summation of his review including referrals to the Internal Review Board. The Board shall re-evaluate the matter and either concur with the immediate supervisor's resolution or remand the matter to the supervisor for further review and recommendations.

9.3 The annual report will serve as a secondary system to the system's quarterly report. The report will contain names of all employees entered into the system during the preceding year who meet the criteria for review. The annual report will be analyzed and employees identified who either received four or more external complaints, or who have been involved in two or more critical incidents. The analysis will serve to identify those employees who do not meet the criteria for review and counseling based on the quarterly report, but who exhibit a pattern of conduct over a longer period of time that warrants review.

9.4 The system's reports should be employed by supervisors as another resource in attempting to determine if job stress and/or performance problems exist with their subordinates. The reports should be reviewed in conjunction with other criteria known to the supervisor to facilitate a fair and meaningful assessment of the employee. The system reports make no conclusions or determinations concerning job stress and/or performance problems.

9.5 The Unit shall provide data to the Internal Review Board that will assist that body in determining if subordinates of certain supervisors tend to be employees frequently identified by the system. The data may be used by the Board in order to determine if certain supervisors are employing ineffective or inappropriate management techniques.

Section 10. Psychological assessment program.

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10.1 This procedure provides a process for mandatory psychological review of employees in situations where an employee's job performance or actions are detrimental to the State Police's mission and cause the employee's psychological fitness for duty to be in question. Through this process, the employee's level of psychological fitness is determined and assistance made available, if necessary, to facilitate the employee's return to psychological fitness.

10.2 An employee is considered to be psychologically fit for duty when there is reasonable assurance that he or she can:

10.2(1) Exercise independent judgment;

10.2(2) Recognize parameters of authority; and

10.2(3) Function effectively within the rules, guidelines, and policies of the State Police.

10.3 The following are examples, although not all inclusive, of circumstances in which an employee's psychological fitness for duty may be in question:

10.3(1) Suspected substance abuse (alcohol, other drugs).

10.3(2) Questionable duty judgment or continued citizen complaints regarding conduct on or off-duty.

10.3(3) Supervisory problems, such as when previous attempts through performance review and discipline have had little, if any, effect on resolving the undesired behavior.

10.3(4) Excessive use of sick leave, disability leave, or Worker's Compensation claims.

10.3(5) Return from sick leave and/or leave of absence precipitated by psychiatric, psychological, substance abuse, and/or stress related illness.

10.4 Procedures.

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10.4(1) The supervisor shall consult the employee's Company or Section Commander. If, in the opinion of a supervisor, an employee's immediate action(s) or culmination of previous actions bearing on the above criteria indicate a question of psychological fitness for duty, the Company or Section Commander will evaluate the situation based upon the circumstances surrounding the incident(s) and make a recommendation to the Superintendent or his or her designee concerning the employee's duty status.

10.4(2) The Superintendent may place an employee involved in a critical incident as defined by this rule on administrative leave, with or without pay, for a period of time determined by the Superintendent pending a determination of the employee's psychological fitness for duty or completion of any investigation related to the critical incident. If the employee's psychological fitness is at issue, the employee shall return to duty only after he or she is deemed to be psychologically fit. The Superintendent may consult a doctoral level clinical psychologist, psychiatrist, or licensed counselor in determining an employee's fitness for duty.

10.4(3) If a psychological fitness for duty assessment is deemed appropriate by the Superintendent, the employee shall be notified as required for internal or administrative investigations. The notification shall include a statement of the general circumstances that prompted the action, the appointment time, date, and location of the meeting with a psychotherapist designated by the State Police. The State Police shall be responsible for costs of the initial fitness for duty interview/testing and any required follow-up except in the case of a non-job related injury where the employee shall be financially responsible for additional treatment required by other than the State Police. If an employee is referred for psychological fitness for duty assessment as a result of an action(s) which may result in disciplinary action against the employee, such disciplinary action shall be delayed pending assessment and recommendation by the psychotherapist designated by the State Police.

10.5 Employee Responsibility.

10.5(1) During evaluation and subsequent

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treatment if deemed necessary, the employee will truthfully answer all questions directed to him or her and provide complete information and documents deemed necessary. The employee will submit to all examinations deemed advisable and sign waivers concerning access to records and reports that may be prepared or generated by the State Police psychotherapist. In addition, State Police employees with knowledge of the effected employee's behavior may be interviewed.

10.6 Psychotherapist Responsibility.

10.6(1) The psychotherapist designated by the State Police shall, based upon his or her professional assessment of the employee's psychological fitness, render a written report to the Superintendent which shall include the following recommendations:

10.6(1)(1) Employee returned to full duty unconditionally or with treatment recommended; or

10.6(1)(2) Employee returned to full duty conditional upon treatment; or

10.6(1)(3) Employee returned to limited duty conditional upon treatment; or

10.6(1)(4) Employee declared unfit for duty and referred for treatment.

10.6(2) If, during the employee's initial assessment by the State Police's psychotherapist, it is deemed necessary for the employee to be referred for treatment, the Superintendent shall issue a Special Order directing the employee to attend and successfully complete a therapeutic or counseling program approved by the State Police. Failure to attend and successfully complete the program shall be considered in the determination of any subsequent disciplinary action.

10.6(3) The State Police psychotherapist shall assist the employee in arranging for outside treatment. Employees shall be referred only to licensed psychiatrists, doctoral level clinical psychologists, or licensed counselors. In situations where outside referral is necessary, there shall be

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extensive communications between the State Police psychotherapist and the employee's treating psychotherapist in relation to the employee's progress in treatment and continued psychological fitness for duty. These communications shall include, but are not limited to, pertinent information such as:

10.6(3)(1) Is the employee attending scheduled appointments?

10.6(3)(2) Is the employee making reasonable progress in his or her treatment?

10.6(3)(3) Has anything occurred which could cause the psychotherapist to re-assess the employee's duty status?

10.6(4) Evaluation results, opinions, recommendations, and confidential notes provided to the State Police psychotherapist by an outside consultant shall be interpreted and monitored, but not ordinarily communicated to the Superintendent. The Superintendent, with the advice of the State Police psychotherapist, may initiate appropriate personnel action predicated on the recommendations.

10.6(5) Communications between the Superintendent and the State Police psychotherapist or outside consultant(s), regarding test results, written opinions, recommendations, notes, reports, and actions taken are confidential. These documents shall be secured in the Unit's office in locked cabinets or secure magnetic media.

Section 11. Separation from the State Police and progressive discipline.

11.1 Types of separation specified:

11.1(1) **Discharge:** an involuntary dismissal from employment ordered by the Superintendent and effected by written State Police Special Order.

11.2(2) **Suspension:** involuntary separation during a limited period for disciplinary reasons.

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11.2(3) **Resignation:** voluntary termination of the employment relationship by the employee.

11.2(4) **Layoff:** involuntary termination of the employment relationship through no fault of the employee as by reason of lack of work, lack of funds, changes in organization, completion of temporary or restricted employment, or similar causes, and without adverse effect on the employee's eligibility for future employment.

11.2(5) **Retirement:** termination of the employment relationship under the provisions of *W. Va. Code §15-2-26 et seq.*

11.2(6) **Death.**

11.3 Standards of Conduct:

The following standards are intended to be illustrative but not all inclusive of the type of conduct expected of employees:

11.3(1) An employee is expected to attend work regularly and report in a timely fashion. Any extraordinary time off-duty should be planned in advance. Unexpected time-off should be communicated immediately to the employee's supervisor.

11.3(2) Employees are expected to apply themselves to their assigned duties during the time they are being compensated, except for reasonable time provided to take care of personal needs.

11.3(3) Employees are expected to meet established performance standards. Conditions or circumstances, as they become known, which shall prevent them from performing effectively or from completing their assigned tasks should be reported to the employee's immediate supervisor. Likewise, unclear instructions or procedures should be brought to the attention of the employee's supervisor.

11.4 Supervising for Better Work Performance.

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11.4(1) Supervisors should assist employees in understanding their work assignments; the standards of conduct contained in this rule; and the goals, objectives, and performance standards of their positions.

11.4(2) Supervisors should be aware of inadequate or unsatisfactory work performance or behavior on the part of employees and attempt to correct the performance or behavior immediately. Such corrective action may take the form of an informal counseling session or the issuance of a written notice, depending on the severity of the situation.

11.4(3) Counseling refers to an informal discussion with the employee about a work performance or behavior problem which, if not corrected, could lead to a disciplinary action.

11.4(4) Disciplinary action refers to formal, corrective measures based on a violation of established standards of conduct, which includes discussion of the offense, an explanation of the evidence, and issuance of a written notice by the Superintendent.

11.5 Progressive Discipline.

Unacceptable conduct shall be divided into three types of offenses according to their severity. The offenses listed herein are illustrative only, and are not intended as an exclusive list of all disciplinary offenses.

11.5(1) Group I Offenses:

11.5(1)(1) Unsatisfactory attendance, performance, or excessive tardiness.

11.5(1)(2) Abuse of State Police time such as unauthorized time away from work area, use of State Police time for personal business, abuse of sick leave, or failure to notify a supervisor promptly of the completion of assigned work.

11.5(1)(3) Obscene or abusive language.

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11.5(1)(4) Inadequate or unsatisfactory
job performance.

11.5(1)(5) Disruptive behavior.

11.5(1)(6) Conviction of a moving traffic
violation while using State Police or other public purpose
vehicle.

11.5(1)(7) First group offenses include
those types of behavior less severe in nature, but which require
correction in the interest of maintaining a productive and well
managed work force.

11.5(1)(7)(1) When issuing a
written notice for a Group I offense, such notice should be
issued as soon as is practicable.

11.5(1)(7)(2) Group I written
notices shall be cumulative in nature. Upon the accumulation of
three "active" Group I offenses, the Superintendent may suspend
the employ without pay, but such suspension shall not exceed five
days. The Superintendent may discharge an employee who
accumulates four active written notices.

11.5(1)(7)(3) Written notices for
Group I offenses shall remain "active" for two years from the
date of issuance. This is all encompassing and not extendable
should another Group I written notice be issued during the two
year period.

11.5(2) Group II Offenses.

11.5(2)(1) Failure to follow a
supervisor's instructions, perform assigned work, or otherwise
comply with State Police policy and procedure or administrative
regulations.

11.5(2)(2) Violating safety rules
where there is not a threat to life.

11.5(2)(3) Unauthorized time away
from the work area or duty post or leaving the work site without

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permission during working hours.

11.5(2)(4) Failure to report to work without proper notice to his or her supervisor.

11.5(2)(5) Refusal to work overtime.

11.5(2)(6) Group II offenses include more severe acts and behavior. Corrective action for these offenses include written notice and suspension without pay. Employees, however, may not be suspended in excess of ten working days for an offense of this nature. The Superintendent may discharge an employee who commits an additional Group II offense while a previous such offense is "active." The Superintendent may also discharge an employee who accumulates three "active" first group offenses and one active second group offense.

11.5(2)(7) When issuing a written notice for a Group II offense, such notice shall be issued as soon as is practicable. The Superintendent may reprimand or reprimand and suspend up to ten days for a single Group II offense. If mitigating circumstances exist, the Superintendent may demote the employee or suspend the employee for up to thirty days in lieu of discharge.

11.5(2)(8) If an employee is not discharged due to mitigating circumstances, the Superintendent shall notify the employee that any subsequent written notice issued during the "active" life period, regardless of level, may result in discharge.

11.5(2)(9) Written notices for Group II offenses shall remain "active" for three years from the date of issuance.

11.5(3) Group III Offenses.

11.5(3)(1) Absence in excess of three days without notifying his or her supervisor.

11.5(3)(2) Use of alcohol or unlawful use or possession of controlled substances while on the job.

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11.5(3)(3) Reporting to work under the influence or when his or her ability is impaired by alcohol or a controlled substance.

11.5(3)(4) Insubordination or serious breach of discipline.

11.5(3)(5) Falsifying any records such as, but not limited to: vouchers, reports, insurance claims, time records, leave records, or other official state documents, or knowingly making any false statement.

11.5(3)(6) Willfully or negligently damaging or defacing state records, state, or employee property.

11.5(3)(7) Theft or unauthorized removal of state records, state, or employee property.

11.5(3)(8) Gambling on state property.

11.5(3)(9) Acts of physical violence or fighting (except official police actions).

11.5(3)(10) Violating safety rules where there is a threat to life.

11.5(3)(11) Sleeping during work hours.

11.5(3)(12) Participating in any kind of work slowdown, sit-down, or similar concerted interference with State Police or state operations.

11.5(3)(13) Unauthorized possession or use of firearms, dangerous weapons, or explosives.

11.5(3)(14) Threatening or coercing employees or supervisors.

11.5(3)(15) Criminal convictions for acts of conduct occurring on or off the job which are plainly related to job performance or are of such a nature that to

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continue the employee in the assigned position could constitute negligence in regard to the State Police's duties to the public or to other state employees.

11.5(3)(16) Failure to take a polygraph examination or to answer fully and truthfully any question relating to any offense requiring submission to a test.

11.5(3)(17) Failure to take physical or mental examinations as required.

11.5(3)(18) Using public office for private gain.

11.5(3)(19) Engaging in criminal conduct on or off the job.

11.5(3)(20) Engaging in dishonest or immoral conduct that undermines the effectiveness of the State Police's activities or employee performance, whether on or off the job.

11.5(3)(21) Willful disobedience of a lawful command of a supervisor.

11.5(3)(22) Disclosure of confidential information to any person except those who may be entitled to such information or when directed by the Superintendent or a supervisor.

11.5(3)(23) Taking any action which shall impair the efficiency and/or reputation of the State Police or its employees.

11.5(3)(24) Acceptance of any bribe, gift, token, moneys, or other things of value intended as an inducement to perform or to refrain from performing any official act, or any action of extortion or other means of obtaining money or any thing of value through his or her position.

11.5(3)(25) Manifesting cowardice, feigning illness, or otherwise attempting to shirk official duty.

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11.5(3)(26) Involvement in any compromise between persons accused of a crime and the person or persons who may have suffered from criminal acts with the purpose of allowing the accused to escape punishment.

11.5(3)(27) Failure to answer questions specifically directed and related to official duties or job fitness attendant to an internal or administrative investigation.

11.5(3)(28) The use of unnecessary force during an arrest/custody procedure.

11.5(3)(29) Deviation from established procedures in the disposition of summons or arrest cases.

11.5(3)(30) Unauthorized or misuse of any state funds or other lawfully obtained funds as determined by policy and procedure.

11.5(3)(31) Theft or misappropriation of property stored in a State Police evidence room or of property destroyed pursuant to a valid court order.

11.5(3)(32) Libeling or slandering another employee, either on or off-duty.

11.5(3)(33) Group III offenses include acts and behavior of such a serious nature that a first occurrence would warrant the Superintendent discharging an employee.

11.5(3)(34) When issuing a written notice for a Group III offense, such notice should be issued as soon as practicable. The Superintendent may discharge the employee or suspend the employee for up to thirty days without pay in lieu of discharge. The Superintendent may also demote as an alternative to discharge if circumstances so dictate.

11.5(3)(35) If the employee is not discharged due to mitigating circumstances, he or she shall be notified by the Superintendent that any subsequent written notice

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during the "active" life period, regardless of level, may result in discharge.

11.5(3)(36) Written notices for Group III offenses shall remain "active" for four years from the date of issuance.

11.5(4) The offenses listed are not intended to be all inclusive. Accordingly, conduct which in the judgment of the Superintendent, although not listed in these groups of offenses, seriously undermines the effectiveness of the State Police's activities or the employee's performance shall be treated consistent with provisions of this policy.

11.5(5) All written notices shall be in letter form from the Superintendent or his or her designee. Notices may be accompanied in the employee's personnel file by letters of reprimand where appropriate.

11.5(6) The Superintendent reserves the right to demote an employee for job abolition, budgetary reduction, reduction of work, and/or employee inability to perform satisfactorily.

11.5(7) Employees found to have engaged in discrimination on the basis of race, color, religion, national origin, political affiliation, handicap, age, or sex (including sexual harassment) may be counseled or disciplined with either a Group I, II, or III offense, depending upon the specific facts and circumstances surrounding the incident.

Attachment "A"

What happens if I file a false complaint?

If you file a false complaint you will be subject to criminal prosecution. It is a violation of state law to give false or misleading information to a state police officer. Prosecution may lead to a fine and/or jail sentence. You may also be sued in civil court by the person you complain against.

**West Virginia
Division
Public Safety**



**HELP US
DO A BETTER
JOB!**

The West Virginia State Police take your ideas and comments seriously.

Helpful citizens like you help us provide better law enforcement service to the citizens of West Virginia. This pamphlet tells you how to contact the State Police if you care to comment on the job we are doing.

Who can I contact to let the State Police know that one of their employees is doing a good job?

Write a letter to: Superintendent, 725 Jefferson Rd., S. Charleston, WV, 25309-1698.

What if I have a complaint?

You can file complaints against any State Police employee if you believe that they have been rude or abusive, violated the law, caused you harm, or have failed to provide a service. You may also file a complaint against the State Police itself (as an agency of state government) for violating a law or failing to provide a service.

How do I file a complaint?

You may file a complaint with the Inspection and Internal Affairs Section of the State Police by calling them at 304-746-2110, or by appearing at your

local State Police Detachment and speaking to the Detachment Commander or his/her assistant. You

can also write to the Inspector at the address listed above, and give a detailed explanation of your complaint including dates, times, names of witnesses, locations, etc. You do not have to be directly involved to file a complaint.

What will happen after I file the complaint?

Once you file the complaint, you will receive a letter of confirmation. If an internal affairs investigator is assigned to the case, his/her name will be included in the letter. You will be contacted and asked to give a formal statement, unless you have chosen to remain anonymous. You may be asked to take a polygraph examination and testify in hearings. You will be expected to cooperate during any investigation and court proceedings.

When will I know the outcome of my complaint?

The investigation must be completed within thirty days unless circumstances require a time extension. The Inspector will notify

you upon completion of the investigation.

Do I need a lawyer to file a complaint?

You do not need a lawyer to file a complaint.

What if I just want to ask questions?

If you have any questions, you may call your local State Police Detachment or the Inspection and Internal Affairs Section. You may ask questions without giving your name and are not required to file a formal complaint.

What will happen to the employee if my complaint is proven correct?

Depending on the nature of the allegations, the employee may be disciplined.

What if I am harassed by the employee that I filed the complaint against?

If you are contacted by the employee, you should report the incident to your case investigator, if any, or the Inspection and Internal Affairs Section immediately.

Attachment "B"

COMPLAINT INTAKE FORM

- DOES THIS COMPLAINT DEAL WITH A LACK OF ACCOMMODATIONS FOR PHYSICALLY CHALLENGED PERSON(S) AT A DIVISION FACILITY? ___ Yes ___ No

- DOES THIS COMPLAINT DEAL WITH AN ALLEGATION THAT THE DIVISION IS FAILING TO PROVIDE ANY TYPE OF SERVICE TO THE PUBLIC? ___ Yes ___ No

COUNTY _____ INTAKE OFFICER _____

1. COMPLAINT RECEIVED: DATE: _____ TIME: _____

2. COMPLAINANT:

NAME: _____ ADDRESS: _____

CITY: _____ STATE: ___ ZIP _____ PHONE:(H) _____ (W) _____

SOCIAL SECURITY # _____ - _____ - _____ DOB: _____ CRIMINAL RECORD (if applicable): _____

3. ACCUSED (if applicable)(extra page if co-defendants):

NAME: _____ ADDRESS: _____

CITY: _____ STATE: ___ ZIP: _____ PHONE:(H) _____ (W) _____

SOCIAL SECURITY # _____ - _____ - _____ DOB: _____ CRIMINAL RECORD (if applicable): _____

4. DOES COMPLAINANT UNDERSTAND THAT W. Va. CODE §15-2-16 PROVIDES THAT KNOWINGLY GIVING FALSE INFORMATION RELATING TO AN OFFENSE TO A STATE POLICE OFFICER IS A CRIME PUNISHABLE BY UP TO SIXTY DAYS IN JAIL AND/OR A \$200.00 FINE?

If yes, complainant's initials: _____

5. DOES COMPLAINANT UNDERSTAND THAT, IF WARRANT IS OBTAINED, HE/SHE AND WITNESSES WILL BE REQUIRED TO TESTIFY?

If yes, complainant's initials: _____

6. OFFENSE ALLEGED(with code cite): _____

7. OFFENSE DATE: _____ TIME: _____ LOCATION: _____

8. COMPLAINANT'S SUMMARY (extra page if required): _____

9. WITNESSES(extra page if required):

a. Name: _____ Address: _____ Phone: _____

Expected Testimony: _____

b. Name: _____ Address: _____ Phone: _____

Expected Testimony: _____

10. WITNESSES INTERVIEWED? (YES) (NO)

TESTIMONY CONFIRMED? (YES) (NO)

EXPLAIN: _____

11. PHYSICAL EVIDENCE/DOCUMENTS: _____

12. REMEDY REQUESTED?(NOTE: if monetary, explain civil action - refer if appropriate)

13. HAS THE PRESENT COMPLAINT BEEN REPORTED TO ANY OTHER POLICE

AGENCY? (YES) (NO) If yes, to which police agency? _____

14. PRIOR OR PENDING COMPLAINTS AND DISPOSITION?

a. By this complainant? If yes, explain: _____

b. By accused? If yes, explain: _____

15. INTAKE DISPOSITION (check if applicable):

- a. No Crime Alleged _____
- b. No Probable Cause/Insufficient Evidence _____
- c. Probable Cause/Warrant Obtained or Recommended _____
- d. Follow-up Required _____
- e. Refer to P.A. _____

16. EXPLAIN DISPOSITION(if necessary): _____

17. COMPLAINANT'S SIGNATURE: _____

Attachment "C"

STATE OF WEST VIRGINIA
DIVISION OF PUBLIC SAFETY

Inspector's File Number IA-94-01 Assigned by Inspector's Office	REPORT OF INVESTIGATION	Date Completed As indicated
Date Assigned	Station	County
Date of Special Order	Duty Station of subject being investigated	Of Duty Station
Initial or Supplementary As indicated	Report Made By Investigation officer, rank, unit number	Status of Investigation Complete or Pending
Subject of Investigation Allegations of impropriety on the part (officer being investigated)		

SUBJECT OF INVESTIGATION: Give name, address and phone number of person being investigated. Indicate their duty station or assignment. If subject is a sworn member include rank and unit number.

(Example) Trooper James Cooper, Unit #000
West Virginia State Police
725 Jefferson Road
South Charleston, WV 25309
PS #746-3333

COMPLAINANT: Indicate name, address and phone number of complainant. If the investigation is requested by someone other than the complainant give name, address, phone number of that person. If it is requested by another member of this department, indicate the name, rank, and official position, company, duty station, or assignment.

(Example) Mrs. Alice Williams
Box 907
Anywhere, WV 25397
PS #348-5432

AUTHORITY FOR INVESTIGATION: Indicate whether verbal order or Special Order by the Superintendent. State the Special Order number and date if same. All correspondence and/or Special Orders relating to the assignment of such investigation will be attached to the report.

(Example) Special Order #7, dated January 5, 1994, signed by the Superintendent.

ACTION TAKEN: Show sufficient and chronological details of your investigation: Dates and times of interviews, names, addresses, phone numbers of witnesses, the collection and disposition of all evidence, etc.

(Example) On January 1, 1994, the Superintendent received a letter of complaint from Mrs. Alice Williams concerning Trooper James Cooper. This letter is attached as exhibit #1.

On January 5, 1994, Special Order #7 was issued by the Superintendent assigning this officer to conduct the investigation. A copy of this order is attached as exhibit #2.

On January 6, 1994, Trooper James Cooper was advised he was the subject of an internal affairs investigation. A copy of this letter dated January 5, 1994 is attached as exhibit #3.

On January 6, 1994, at 1300 hours a tape recorded interview was made with Mrs. Alice Williams by this officer. The cassette tape is marked as exhibit #4. A transcribed copy of this interview is attached to and made a part of this report.

Mrs. Williams related

The interview was concluded at 1410 hours.

On January 16, 1994, Trooper James Cooper was advised of his administrative rights. A copy of the signed rights form is attached as exhibit #5.

At 1520 hours this officer began a tape recorded interview with Trooper Cooper. This interview is contained on two cassette tapes marked as exhibit #6. A transcribed copy of this interview is attached to and made a part of this report.

.....

Upon submission of this report, this investigation is complete.

(List one allegation at a time followed by the finding of fact and conclusion for same.) Keep allegation, finding of fact and conclusion together as much as possible. Start each allegation on a new page when possible so there is a logical division between them.

ALLEGATION: Indicate the Statute or Department Rule allegedly violated.

FINDING OF FACT: List in chronological order those facts which were revealed as a result of the internal investigation.

CONCLUSION: Briefly state the conclusion as being Sustained, Unfounded, or Not Sustained.

(Example)

ALLEGATION #1: DPS Administrative Regulation 15-2, Series 1, Section 1.28:
 Conduct unbecoming an officer.

- (a) On-duty conduct
- (b) which specially relates to and affects the administration of the Department and
- (c) which is of a substantial nature directly affecting the rights and interests of the public.

FINDING OF FACT #1:

CONCLUSION #1: This allegation is sustained.

LIST OF EXHIBITS:

List all objects or articles that will likely be used during court or administrative hearing. The name and address of the person who has charge or possession of such articles shall also be shown. If objects or articles were examined or analyzed by the Criminal Laboratory then a copy of the Case Submission Report along with the laboratory results will be attached.

(Examples)

1. One (1) letter of complaint from Mrs. Alice Cooper dated January 1, 1994 concerning Trooper James Cooper.
2. One (1) Special Order #7 signed by the Superintendent on January 5, 1994.
3. One (1) letter to Trooper James Cooper from First Sergeant Alan Pettry dated January 5, 1994.
4. One (1) cassette tape containing the interview of Mrs. Alice Williams.
5. One (1) administrative rights form signed by Trooper James Cooper dated January 16, 1994.
6. Two (2) cassette tapes containing the interview of Trooper James Cooper.

All exhibits are attached to this report, with the exception of the cassette tapes which are in file at the Inspector's office.

WITNESSES:

List name, address, and telephone number of witnesses and a brief statement of what each can testify to. Written or taped statements will be taken during interviews. Those statements will be attached to the report.

(Examples)

Mrs. Jane Smith
Box 907
Anywhere, WV 25397
PS #348-5432

Will testify to
.....
.....
.....

First Sergeant Alan Pettry
West Virginia State Police
725 Jefferson Road
South Charleston, WV 25309
PS #746-1234

Will testify to this entire investigation and the facts contained within this report.

MILES TRAVELED AND
MAN HOURS SPENT:

List the total miles traveled and hours spent by all investigators as it relates to this investigation.

FIRST SERGEANT ALAN PETTRY

(No copies are necessary)

Send the original report and all exhibits which are not attached to the report (such as cassette tapes and/or tape recorder) to the Inspector's office upon completion. The Inspector will submit the report to the Superintendent with a cover letter.

Attachment "D"

WEST VIRGINIA DIVISION OF PUBLIC SAFETY

Administrative Rights Warning

I wish to advise you that you are about to be questioned as a part of an official investigation of the West Virginia Division of Public Safety (West Virginia State Police).

You are entitled to all the rights and privileges guaranteed by all of the laws and the Constitution of West Virginia and the United States, including the right not to be compelled to incriminate yourself relating to a criminal matter.

You will be asked questions specifically directed and narrowly related to the official performance of your duties as a member of the Division, or your fitness for office.

Your answers to any questions, as well as any evidence or other information gleaned from this investigation cannot, by law, be used against you in any subsequent criminal proceedings; however, your answers, subsequent evidence, and information may be used against you in relation to Division administrative charges for violations of Division Operating Policies and Procedures or Administrative Regulations.

Refusing to answer questions in relation to any official Division internal investigation is a violation of Division Policy and Procedure, and may result in discharge from employment.

Answering questions untruthfully is a violation of the West Virginia Code . If you elect to be untruthful, you may be discharged from employment.

____ I have read the above warnings and I understand each of them.

____ The above warnings have been read to me by _____, and I understand each of them.

/S/ _____

WITNESS: _____

Attachment "E"

WEST VIRGINIA DIVISION OF PUBLIC SAFETY
Internal Affairs Polygraph Form

Date: _____

Time: _____

I, _____, have been informed of the nature of this examination and that under Division Policy and Procedure I am required to submit to the examination or face disciplinary action.

Signed: _____

W/ _____

W/ _____

Attachment "F"

**West Virginia Division of Public Safety
Confidentiality Agreement**

This agreement is made between _____, and Colonel Thomas L. Kirk, Superintendent of the West Virginia Division of Public Safety, on this ___ day of _____, 19___. The undersigned sworn member/employee hereby acknowledges that he/she received Internal Affairs Case File #_____, on the ___ day of _____, 19___. Further, that he/she agrees to maintain the confidentiality of the materials included in the case file, that he/she will not disseminate the materials, and that he/she understands that the material may only be used for official purposes pursuant to Division Operating Policy and Procedure. Finally, that he/ she understands that any failure to comply with the terms of this agreement constitutes a failure to obey a lawful order, and may result in disciplinary action.

COLONEL THOMAS L. KIRK
SUPERINTENDENT

SWORN MEMBER/EMPLOYEE

CC: Internal Affairs Case File
Employee

Attachment "G"

INTERVIEW & MIRANDA RIGHTS FORM

Location: _____ Date: _____ Time: _____

INTERVIEWEE'S INFORMATION

INTERVIEWEE'S NAME _____ ADDRESS _____ TELEPHONE NUMBER _____

DOB: _____ RACE: _____ SEX: _____ HEIGHT: _____ WEIGHT: _____ HAIR: _____ EYES: _____ SOCIAL SECURITY: _____-_____-____

Can you read English? Yes No Do you understand English? Yes No

INITIALS _____

PRE-INTERVIEW

INITIALS _____ You are under arrest for the crime of _____

INITIALS _____ You are being questioned in regard to the crime of _____

INITIALS _____ You are not under arrest and are free to leave at any time.

YOUR RIGHTS

INITIALS _____ Before we ask you any questions, you must understand your rights.

INITIALS _____ You have the right to remain silent.

INITIALS _____ Anything you say can be used against you in court.

INITIALS _____ You have the right to talk to a lawyer for advice before we ask you any questions and to have him/her with you during questioning.

INITIALS _____ If you are under arrest and cannot afford a lawyer, the court will appoint one for you before any questioning at your request.

INITIALS _____ If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF YOUR RIGHTS

I have had this statement of my rights read to me and I understand them. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me in connection with this interview. I agree to be interviewed, answer questions, and make a statement.

INTERVIEWEE'S SIGNATURE _____ DATE _____ TIME _____

WITNESS _____

WITNESS _____

Taped Interview: Yes No Counter # _____ to _____ Side "A" Counter # _____ to _____ Side "B"

Interviewer Name(s): _____

Attachment "H"

SUPERVISOR'S REPORT OF USE OF FORCE TO CONTROL

To: SUPERINTENDENT, WEST VIRGINIA STATE POLICE

From: _____
SUPERVISOR

IA CASE # _____	TIME _____
DATE _____ DAY _____	
DIST _____ DIV _____	CO _____
ADDRESS OF OCCURENCE _____	

SUBJECT NAME (LAST, FIRST)				RACE/SEX	ETHNIC	DATE OF BIRTH	AGE
DISEASE	INJURY	TREATMENT	HOSPITAL	SUSPECTED IMPAIRMENT () YES () NO		OBSERVATION BEHAVIOR	
LEVEL OF RESISTANCE _____		WEAPON USED _____		HOW USED _____	CONTACTED BY SUPERVISOR	LOC	TIME
CHARGE 1	2	3	4				

OFFICER(S) INVOLVED

NAME (LAST, FIRST)			RANK	UNIT #	RACE/SEX	ETHNIC	DATE HIRED	LOC
INJURY	TREATMENT	HOSPITAL	LEVEL OF FORCE _____		TYPE OF FORCE _____	HOW TO USED _____		
NAME (LAST, FIRST)			RANK	UNIT #	RACE/SEX	ETHNIC	DATE HIRED	LOC
INJURY	TREATMENT	HOSPITAL	LEVEL OF FORCE _____		TYPE OF FORCE _____	HOW TO USED _____		
NAME (LAST, FIRST)			RANK	UNIT #	RACE/SEX	ETHNIC	DATE HIRED	LOC
INJURY	TREATMENT	HOSPITAL	LEVEL OF FORCE _____		TYPE OF FORCE _____	HOW TO USED _____		

WITNESS(ES)

NAME (LAST, FIRST)	ADDRESS	PHONE
NAME (LAST, FIRST)	ADDRESS	PHONE
NAME (LAST, FIRST)	ADDRESS	PHONE

ADMINISTRATIVE INFORMATION

I.R. NOTIFIED () YES () NO				UNIT #	TIME	RESPONDED () YES () NO	PHOTOGRAPHS OFFICER(S) () YES () NO	TAKEN BY
TRANSPORTING OFFICER(S)				UNIT #	FROM	TO	TIME	
TRANSPORTING OFFICER(S)				UNIT #	FROM	TO	TIME	

<p>RACE</p> <p>W - White B - Black I - Indian O - Oriental/Asian U - Unknown</p> <p>ETHNIC</p> <p>A - Columbian B - Puerto Rican C - Cuban D - Other Hispanic E - Japanese F - French Canadian G - Chinese H - Haitian J - Jamaican K - Mexican L - Nicaraguan M - Nigerian All Others</p>	<p>DISEASES</p> <p>01 - None/Unknown 02 - TB(tuberculosis) 03 - AIDS 04 - Skin Diseases (open sores) 05 - Sexually Transmitted Diseases 06 - Body Parasites 07 - Hepatitis 08 - Other</p> <p>TREATMENT</p> <p>20 - None 21 - Refused 22 - First Aid 23 - Fire Rescue 24 - Hospital 25 - Personal Physician</p>	<p>INJURY</p> <p>09 - Injury not related to Use of Force 10 - No Injury 11 - Bruise/Abrasion 12 - Sprain/Strain 13 - Laceration 14 - Bite 15 - Puncture 16 - Broken Bone 17 - Internal Injury 18 - Gunshot 19 - Other</p> <p>RESISTANCE LEVEL</p> <p>50 - No Resistance 51 - Passive Resistance 52 - Attempted to flee/escape 53 - Actively resisted 54 - Actively resisted & incited bystanders 55 - Assaulted Officers</p>	<p>IMPAIRMENT</p> <p>30 - Alcohol 31 - Marijuana 32 - Cocaine 33 - Unknown 34 - Other</p> <p>OBSERVED BEHAVIOR</p> <p>40 - Calm 41 - Visibly Upset 42 - Erratic 43 - Highly Agitated 44 - Baker Act/Ex parte</p>	<p>LEVEL OF FORCE</p> <p>60 - No force used but officer injured 61 - No force used but subject complained of injury 62 - Minimum physical contact officers(s) injured 63 - Minimum force used to guide/control subject 64 - Subject resisted arrest and was forcibly subdued (hands only) 65 - Subject resisted arrest and force other than hands were used to subdue the subject</p>	<p>WEAPON USED (Subject)</p> <p>70 - None 71 - Hands/Arm 72 - Fist 73 - Feet/Leg 74 - Teeth 75 - Blunt Inst. 76 - Cutting Inst. 77 - Rock/Bottle 78 - Handgun 79 - Rifle 80 - Shotgun 81 - Vehicle 82 - Other</p>	<p>TYPE OF FORCE (Officer)</p> <p>90 - None 91 - Hands/Arm 92 - Fist 93 - Feet/Leg 94 - Radio 95 - Flashlight 96 - Baton 97 - K-9 98 - Handgun 99 - Shotgun 100 - Chem. Agent 101 - Spec Weapon 102 - Other</p>	<p>HOW USED</p> <p>110 - Threatened 111 - Grab/Hold 112 - Push/Pull 113 - Strike/Hit 114 - Bite 115 - Throw 116 - Sash 117 - Stab 118 - Discharge 119 - Diner</p>
--	--	--	--	--	--	--	--

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

STEPHEN N. REED
Deputy Secretary of State

CATHERINE FREROTTE
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Charleston, WV 25305-0770

(Plus all the volunteer
help we can get)

August 18, 1995

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: State Police

RULE: New Rule, Series 10, WV State Police Professional Standards Investigation

DATE FILED AS AN EMERGENCY RULE: July 10, 1995

DECISION NO. 14-95

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


KEN HECHLER
Secretary of State

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

AUG 18 9 16 AM '95

FILED

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Secretary of State

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Deputy Secretary of State

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help we can get)

EMERGENCY RULE DECISION (ERD 14-95)

AGENCY: State Police
RULE: New Rule, Series 10, WV State Police Professional Standards
Investigations
FILED AS AN EMERGENCY RULE: July 10, 1995

- par. 1 The State Police has filed the above new rule as an emergency rule.
- par. 2 West Virginia Code 29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [(29A-3-15a(b)].
- par. 4 (A) Procedural Compliance: WV Code 29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the thirty-five day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The State Police filed this emergency rule with supporting documents with the Secretary of State July 10, 1995 and with the LRMRC July 10, 1995.

par. 7 It is the determination of the Secretary of State that the State Police has complied with the procedural requirements of WV Code §29A-3-15 for adoption of an emergency rule.

par. 8 (B) Statutory Authority -- WV Code §15-2-25 reads in part:

Subject to the written approval of the governor and the provisions of this article, the superintendent may make and promulgate proper rules and regulations for the government, discipline and control of the division of public safety, and shall also cause to be established proper rules and regulations for the examinations of all applicants for appointment thereto.

par. 9 It is the determination of the Secretary of State that the State Police has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- WV Code 29A-3-15(f) defines "emergency" as follows:

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

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the State Police are as follows:

This legislative rule explains the process employed by the WV State Police in receiving and investigating complaints from the public dealing with allegations of employee misconduct, enhanced reporting for use of force incidents, progressive employee discipline and internal systems aimed at evaluating and addressing employees suffering from either job-related or non-job related stress. The filing of this rule is prompted by State ex rel. Billy Ray C. v. Skaff (Skaff) 190 W. Va. 504, 438 S.E. 2d 847 (1993), wherein the court issued a writ of mandamus compelling the Superintendent of the State Police "...to promulgate formal, written, investigation procedures" for the investigation of complaints by citizens against state police officers. The State Police filed proposed rules with the Court in order to comply with the writ of mandamus. In the sequel, State ex rel. Billy Ray C. v. Skaff, No 21894 (W. Va. 1995)(Skaff II), the Court held that the Superintendent must file an administrative rule detailing these investigative procedures pursuant to W. Va. Code §29A--1-2(i)(1982). The Superintendent

is authorized to "...make and promulgate proper rules and regulations for the government, discipline and control of the State Police.." pursuant to W. Va. Code §15-2-25. Finally, "an emergency exists when the promulgation of an emergency rule is necessary...(3) to prevent substantial harm to the public interest." W. Va. Code §29A-3-15(f).

In the instant case, the Supreme Court held that the public has "...a **right** (emphasis added) to file a complaint with the Superintendent" and that the Superintendent is required to investigate all complaints lodged against state police officers. Skaff I. By characterizing the public's ability to file complaints as a "right," the Court clearly suggests that an important public interest is implicated and that substantial harm would result to that interest unless the superintendent promulgates formal written procedures to ensure and safeguard both the public's right to complain and the propriety of the investigation conducted by the Superintendent. Skaff II. This emergency rule embodies the entire process of complaint filing and investigation and has been approved by the Court. The State Police has been forced to implement these procedures in order to both process citizen complaints in compliance with the order of the Court and to meet the Superintendent's duty pursuant to W. Va. Code §15-2-21, to investigate the complaints. Granting emergency status to this rule would serve to prevent substantial harm to the public interest by ensuring that formal, court approved procedures are in place to address complaints against police officers, especially when, as is often the case, the allegations involve violations of the complainant's civil rights.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "to prevent substantial harm to the public interest" and a court order.

par. 14 This decision shall be cited as Emergency Rule Decision 14-95 or ERD 14-95 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the State Police, the Attorney General and the Legislative Rule Making Review Commission.



KEN HECHLER
Secretary of State

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

AUG 18 9 26 AM '95

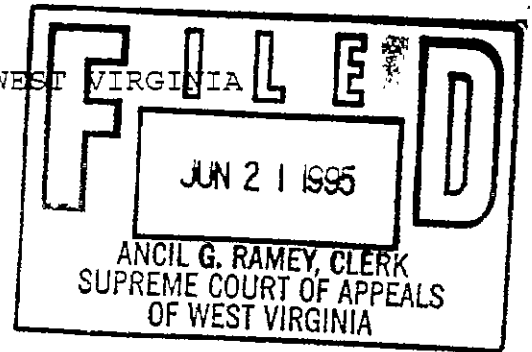
FILED

Entered _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1995 Term

No. 21894



STATE OF WEST VIRGINIA EX REL. BILLY RAY C., JR.,
Petitioner

v.

MAJOR GENERAL JOSEPH J. SKAFF, SECRETARY, WEST VIRGINIA
DEPARTMENT OF MILITARY AFFAIRS AND PUBLIC SAFETY,
THOMAS L. KIRK, DEPUTY SECRETARY, DEPARTMENT OF
MILITARY AFFAIRS AND PUBLIC SAFETY; AND LARRY HITE, DAVID
SHIRLAW AND KELLY GEORGE, MEMBERS OF THE WEST VIRGINIA
STATE BOARD OF RISK AND INSURANCE MANAGEMENT,
Respondents

WRIT OF MANDAMUS

WRIT GRANTED AS MOULDED

Submitted: May 2, 1995
Filed: June 21, 1995

Daniel F. Hedges, Esq.
Charleston, West Virginia
Attorney for Petitioner

Bradford W. Deel, Esq.
Assistant Attorney General
Charleston, West Virginia
Attorney for Department of Public Safety

The Opinion of the Court was delivered PER CURIAM.
JUSTICE BROTHERTON and JUSTICE RECHT did not participate.
JUSTICE CLECKLEY, deeming himself disqualified,
did not participate.
RETIRED JUSTICE MILLER, JUDGE FOX and JUDGE RANSON
sitting by temporary assignment.

SYLLABUS BY THE COURT

1. "Implicit within the Superintendent of the West Virginia Division of Public Safety's mandatory duty to investigate allegations of misconduct under W. Va. Code, 15-2-21 (1977), there is a duty to promulgate formal, written investigation procedures. These procedures should outline (1) how a citizen may notify the Superintendent of alleged misconduct by a State Police officer, and (2) the specific procedure to be followed to ensure that a thorough investigation is conducted by an impartial and neutral party. These procedures also should require that a report of the investigation be given to the Superintendent on which to base his decision." Syllabus Point 4, State ex rel. Billy Ray C. v. Skaff, 190 W. Va. 504, 438 S.E.2d 847 (1993).

2. "'Mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse so to do, in violation of their duty, but it is never employed to prescribe in what manner they shall act, or to correct errors they have made.' Syl. pt. 1, State ex rel. Buxton v. O'Brien, 97 W. Va. 343, 125 S.E. 154 (1924). Syl. pt. 2, State ex rel Lambert v. Cortellessi, 182 W. Va. 142, 386 S.E.2d 640 (1989). Syllabus, Ney v. West Virginia Workers' Compensation Fund, 186 W. Va. 180, 411 S.E.2d 699 (1991). Syllabus Point 6, Lyons v. Richardson, 189 W. Va. 157, 429 S.E.2d 44 (1993)." Syllabus Point 3, Anderson v. Richardson, 191 W. Va. 488, 446 S.E.2d 710 (1994).

3. "Under W. Va. Code, 29-12-5 (1986), which delegates to the West Virginia State Board of Risk and Insurance Management

the authority to investigate and settle claims under the State's liability insurance, the Board of Risk is required to promulgate rules or regulations for State agencies covered by the State's liability insurance policy that will enable the Board to promptly identify potential liability claims against the State." Syllabus Point 5, State ex rel. Billy Ray C. v. Skaff, 190 W. Va. 504, 438 S.E.2d 847 (1993).

PER CURIAM:

This is a sequel to our opinion in State ex rel. Billy Ray C. v. Skaff, 190 W. Va. 504, 438 S.E.2d 847 (1993) (Skaff I) in which the relator sought a writ of mandamus to compel the respondent Major General Skaff, as the Secretary of the West Virginia Department of Military Affairs and Public Safety, and Colonel Kirk, the Superintendent of the West Virginia Division of Public Safety, to promulgate formal written investigation procedures to handle complaints of misconduct against state police officers (the respondents). We determined that a writ of mandamus was proper setting out by way of summary our conclusions in Syllabus Point 4:

Implicit within the Superintendent of the West Virginia Division of Public Safety's mandatory duty to investigate allegations of misconduct under W. Va. Code, 15-2-21 (1977), there is a duty to promulgate formal, written investigation procedures. These procedures should outline (1) how a citizen may notify the Superintendent of alleged misconduct by a State Police officer, and (2) the specific procedure to be followed to ensure that a thorough investigation is conducted by an impartial and neutral party. These procedures also should require that a report of the investigation be given to the Superintendent on which to base his decision.

I

Following our opinion in Skaff I, the respondents filed proposed regulations in April 1994. Copies were sent to counsel for the relator who in June of 1994 made written comments and

1

objections. We permitted respondents to file written comments to relator's objections.

The proposed regulations may be generally summarized as creating an Inspection and Internal Affairs Section (Section) that is "under the command of the agency's Inspector" who reports to the Superintendent. Section 3.00. This Section is composed of trained investigators.¹ The Inspector receives the initial complaint and assigns it to an investigator with directions as to the procedures to be used. Section 3.03. There are detailed operational procedures covering the conduct of the investigation by an investigator in Sections 7.00 through 7.08. At the conclusion of the investigation, the investigator prepares a case file and written recommendations which are submitted to the Inspector. The

¹The Superintendent states in his April 4, 1994 Response which accompanied the proposed regulations that:

Twenty-one troopers recently attended and successfully completed a basic internal affairs investigation training program. The course was taught at the State Police Academy by representatives of the Institute of Police Technology and Management of North Florida University, at Jacksonville, Florida. The goal of the training was to enhance the Division's ability to investigate all complaints and personnel problems in a competent, neutral and timely manner. . . .

Two Division officers have completed an Advanced Proactive Internal Affairs course conducted by the International Chiefs of Police Association. The course focused on current case law and the implementation of internal management systems aimed at identifying personnel problems before they manifest themselves as inappropriate on or off-duty behavior.

Inspector reviews the case file and recommendations, then makes his own recommendation to the Superintendent who, under W. Va. Code, 15-2-21 (1977), is charged with making the final determination.

Relator made six objections to the proposed regulations filed on behalf of the Department of Public Safety.² This Court concluded that it lacked the expertise to fully evaluate the proposed regulations and the objections made to them. Consequently, we obtained the services of Professor James J. Fyke, Ph.D. of the Department of Criminal Justice at Temple University to review the Department's proposed regulations and the various comments that had been received from the parties. Thereafter, in January of 1995, we received a written report from Professor Fyke. Copies of his report were transmitted to the parties by an Order entered on January 6, 1995, with the request that they file responses to the report by March 1, 1995. This matter was reset for argument on May 2, 1995.

²The relator's six objections to the regulations proposed by the Superintendent are summarized as follows:

- 1) Reliance on a group of troopers to conduct employee investigations rather than one or two full time investigators (Section 3.0).
- 2) Routine use of polygraph on the complaint. (Section 7.2).
- 3) Informing complainant that the law makes it a misdemeanor to give false information to a state police officer. (Section 7.2).
- 4) Lack of details in annual report summary. (Section 3.04).
- 5) Lack of mandatory trooper incident report where observable injury to another has occurred.
- 6) Lack of public access to reports of investigations.

Professor Fyke's report raised a new issue that the relator now adopts; that the proposed internal investigation regulations are inherently defective. It is recommended that there be a civilian police advisory committee that should review complaints against members of the department of public safety. The basis for this recommendation is that this would enhance the public perception that an unbiased tribunal was handling misconduct and abuse charges.

The exact structure of this type of procedure is not set out. Even the general role of the civilian committee is not stated as to whether it would investigate the complaint initially, or use investigators and then act as a decision panel. We are also not informed as to whether the civilian panel's decision is final or subject to ultimate review by the Superintendent. As we explained in Skaff I, under W. Va. Code, 15-2-21 (1977), the Legislature has reposed the ultimate decision as to disciplinary matters in the office of the Superintendent of the Department of Public Safety.

We decline to require a civilian review panel for several reasons. First, in view of the ultimate decision having to be made by the Superintendent, it would seem that civilian input into the process would not ultimately satisfy a complainant who has received an adverse ruling from the Superintendent. A second and more compelling reason is that from a legal standpoint, we have traditionally stated that while mandamus is an appropriate remedy to require public officials to perform their prescribed duties, it is not available to prescribe in what particular manner they shall

act as illustrated by Syllabus Point 3 of Anderson v. Richardson, 191 W. Va. 488, 446 S.E.2d 710 (1994):

Mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse so to do, in violation of their duty, but it is never employed to prescribe in what manner they shall act, or to correct errors they have made. Syl. pt. 1, State ex rel. Buxton v. O'Brien, 97 W. Va. 343, 125 S.E. 154 (1924). Syl. pt. 2, State ex rel Lambert v. Cortellessi, 182 W. Va. 142, 386 S.E.2d 640 (1989). Syllabus, Ney v. West Virginia Workers' Compensation Fund, 186 W. Va. 180, 411 S.E.2d 699 (1991). Syllabus Point 6, Lyons v. Richardson, 189 W. Va. 157, 429 S.E.2d 44 (1993).

We initially issued the mandamus in Skaff I because we found that W. Va. Code, 15-2-21 (1977) provided a basis for requiring rules and regulations for handling complaints against members of the department of public safety. The argument now advanced for a civilian oversight panel is an effort to have us prescribe details of the type of system that must be used.³ This we decline to do.

Finally, respondents point out that the standards, adopted by the Commission on Accreditation for Law Enforcement Agencies, Inc., do not mandate a civilian review panel in its section on Internal Affairs.⁴

³We have recognized that mandamus can be brought to control what may be termed discretionary acts if it can be shown that the public official or agency was acting contrary to law or the conduct was fraudulent. See Syllabus Point 1 Pell v. Board of Education of Monroe County, 188 W. Va. 718, 426 S.E.2d 510 (1992).

⁴Section 52 of the Standards deals with the structure of an
(continued...)

⁴(...continued)

Internal Affairs section as follows. The designation (M) is for a mandatory provision and (O) indicates it is optional.

52.1 Administration

52.1.1 A written directive establishes the agency's internal affairs function. (M)

52.1.2 Deleted as of November 20, 1992.

52.1.3 A written directive specifies the activities of the internal affairs function, to include:

(i) recording, registering, and controlling the investigation of complaints against officers; (ii) supervising and controlling the investigation of alleged or suspected misconduct within the agency; and (iii) maintaining the confidentiality of the internal affairs investigation and records. (M)

52.1.4 A written directive specifies the categories of complaints that require investigation by the internal affairs function. (M)

52.1.5 A written directive specifies a position in the agency responsible for the internal affairs function with the authority to report directly to the agency's chief executive officer. (M)

52.1.6 Written directives relating to the administration of the internal affairs function are disseminated to all personnel. (M)

52.1.7 When employees are notified that they have become the subject of an internal affairs investigation, the agency issues the employee a written statement of the allegations and the employee's rights and responsibilities relative to the investigation. (M)

52.2 Complaint Processing

52.2.1 A written directive requires the agency to investigate all complaints against the agency or employees of the agency. (M)

52.2.2 A written directive requires the agency to maintain a record of all complaints against the agency or its employees. (M)

52.2.3 The agency provides written verification to complainants that the complaint has been received for processing. (O)

(continued...)

⁴(...continued)

52.2.4 The agency disseminates information to the public on procedures to be followed in registering complaints against the agency or its employees. (O)

52.2.5 A written directive requires that the agency notify the complainant concerning the status of complaints against the agency or its employees. (O)

52.2.6 A written directive specifies the procedures for notifying the agency's chief executive officer of complaints against the agency or its employees. (O)

52.2.7 Records pertaining to internal affairs investigations are maintained in a secure area by the individual responsible for the internal affairs function. (O)

52.2.8 The agency publishes annual statistical summaries, based on the records of internal affairs investigations, for dissemination to the public and to agency employees. (O)

52.3 Operational Procedures

52.3.1 The agency maintains liaison with the prosecutor's office in investigations involving alleged criminal conduct on the part of an employee. (O)

52.3.2 A written directive defines the type of complaints to be investigated by line supervisors that are to be reviewed by the agency's internal affairs function. (O)

52.3.3 A written directive specifies the circumstances in which an employee may be relieved from duty. (O)

52.3.4 A written directive specifies the conditions, if any, under which instruments for the detection of deception are used in conducting internal affairs investigations. (O)

52.3.5 A written directive specifies the conditions under which:

- (i) medical or laboratory examinations are administered in conducting internal affairs investigations;
- (ii) photographs are taken of employees in conducting internal affairs investigations;
- (iii) an employee may be directed to participate in a line-up as part of an internal affairs investigation; and
- (iv) an employee may be required to submit

(continued...)

When we turn to the original six objections made by the relator, we find that some of them are resolved in the June 17, 1994 Response of the Superintendent. As to the first objection, relating to the lack of a small group of full time investigators, it is pointed out that the twenty-one trained investigators are a preliminary measure. They are to be considered as a pool from which the "Division intends to select from this specially trained group a contingent of three to five investigators to staff the Inspection and Internal Affairs Section on an exclusive, full-time basis." We accept this representation and find that it satisfies the relator's first objection.

The relator's second objection on the use of a polygraph in the investigation of complaints is not well-founded. First, the proposed regulations make it clear that use of polygraph examinations are limited ". . . to those cases in which the allegations are relatively serious and all other investigative leads have failed to produce a preponderance of evidence which will either prove or disprove the allegations." Section 8.08. Moreover, under Section 8.08(3), the ". . . complainant [can] refuse . . . to take the examination. . . ."

⁴(...continued)

financial disclosure statements as part of an internal affairs investigation. (O)
52.3.6 A written directive specifies a 30-day time limit for completing an internal affairs investigation, with status reports due every seven days. (O)

The third objection is to the provision in Section 5.06 requiring that, at the time the initial written complaint is taken by a state police officer, the complainant is to be advised that it is a violation of W. Va. Code, 15-2-16 (1977) to provide false information.⁵ The relator claims that this will intimidate persons from making complaints. However, we do not agree as this provision is nothing more than a statement of existing law.

The fourth objection by the relator dealt with the lack of a thorough annual report. However, this claim is based on the general language of Section 3.04 which merely requires that "The Inspector shall prepare an annual statistical report." The respondents' point out that W. Va. Code, 15-2-23 (1977) authorizes an annual report, and that this annual report "is a matter of public record . . . and contains . . . a detailed synopsis of every facet of activities within the Inspection and Internal Affairs Section, including but not limited to data on complaints filed, investigations, dispositions, and discipline." A copy of an annual report has been furnished and we find that it is adequate.

⁵W. Va. Code, 15-2-16 (1977) states, in relevant part:

Any person who shall at any time . . . who knowingly gives false or misleading information to a member of the department, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than twenty-five dollars nor more than two hundred dollars, or imprisoned in the county jail for not more than sixty days, or both fined and imprisoned.

The fifth objection was that there were no incident report forms to report injuries to others. The respondents dispute this claim by pointing to Section 9.00 and accompanying Exhibits H and I attached to the proposed regulations. These are forms for reporting any use of force by state police. Consequently, we find no merit as to this objection.

The final objection relates to public access to various internal documents generated in investigation of complaints. We decline to address this general claim as obviously, this issue would be controlled by the West Virginia Freedom of Information Act, W. Va. Code, 29B-1-1, et seq. (1977), and we decline to give any general advisory opinion in this area.

We note that during the course of oral argument, the attorney representing the respondents, acknowledged that its brochure regarding the filing of complaints was misleading, as to the requirements for taking a polygraph examination, because it did not comport with its Section 8.08. The same problem existed as to its language regarding the filing of a false complaint. We were advised that new brochures were being prepared to correct these deficiencies. We accept this representation.

Finally, we address the question of which type of rules should be published. The proposed regulations which have been referred to in this opinion are quite detailed. It appears that the Superintendent, rather than publish these regulations under The Administrative Procedure Act, W. Va. Code, 29A-3-1, et seq. (1988) (Act), proposes to publish a brief synopsis of the proposed

regulations, some of which may be misleading.⁶ We believe that W. Va. Code, 29A-3-2 (1982) dealing with what must be published under the Act⁷, when read in conjunction with the definition of "Rule" contained in W. Va. Code, 29A-1-2(i) (1982),⁸ requires that

⁶For example the proposed draft to be filed as Legislative Rules contains in Rule 7.1 only a brief statement relating to the use of polygraphs that the "complainant may be asked to submit to a polygraph examination . . ." whereas the detailed regulations clearly indicate that polygraph examinations are limited under Section 8.08 and may be refused under 8.08(3).

⁷W. Va. Code, 29A-3-2 (1982) states in relevant part:

(a) Except when, and to the extent; that this chapter or any other provision of law now or hereafter made expressly exempts an agency, or a particular grant of the rule-making power, from the provisions of this article, every grant of rule-making authority to an executive or administrative officer, office or agency, heretofore provided, shall be construed and applied to be effective only:

(1) If heretofore lawfully exercised in accordance with the prior provisions of this chapter and the resulting rule has not been revoked or invalidated by the provisions hereof or by the agency; or

(2) If exercised in accordance with the provisions hereof.

There is no applicable exemption for the proposed rules.

⁸W. Va. Code, 29A-1-2(i) (1982) states:

(i) "Rule" includes every regulation, standard or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, affecting private rights, privileges or interests, or the procedures available to the public, adopted by an agency to implement, extend, apply, interpret or make specific the law enforced or administered by it or to govern its organization or procedure,

(continued...)

the full proposed regulations need to be published in accordance with the procedures set out in the Act. See generally West Virginia Chiropractic Society, Inc. v. Merritt, 178 W. Va. 173, 358 S.E.2d 432 (1987).

II.

In addition, the relator had sought mandamus against the members of the West Virginia State Board of Risk and Insurance Management (Board) to require it to adopt regulations to identify police misconduct claims because they would have an impact on the State's liability insurance which is supervised by the Board. This request was also granted as summarized in Syllabus Point 5 of Skaff I:

Under W. Va. Code, 29-12-5 (1986), which delegates to the West Virginia State Board of Risk and Insurance Management the authority to investigate and settle claims under the State's liability insurance, the Board of Risk is required to promulgate rules or regulations for State agencies covered by the State's liability insurance policy that will enable the Board to promptly identify potential liability claims against the State.

⁶(...continued)

but does not include regulations relating solely to the internal management of the agency, nor regulations of which notice is customarily given to the public by markers or signs, nor mere instructions. Every rule shall be classified as "legislative rule," "interpretive rule" or "procedural rule," all as defined in this section, and shall be effective only as provided in this chapter. . . .

The relator's chief complaint to the regulations is that the term "incident" as defined in its proposed rule is too narrow⁹ and should be broadened as follows:

3.4: Incident means any activity, whether participated in by an employee, observed by an employee, or made known to an employee, and whether intentional or unintentional, which has or might have resulted in physical or property damage to another or to another's property and which has the potential for resulting in a claim against the State of West Virginia for damages.

During the course of oral argument the attorney for the Board agreed to accept the relator's proposed definitions of the term "risk".¹⁰ We accept this representation.

For the foregoing reasons, and subject to the representations made by the various parties, we conclude that the regulations proposed by the respondents and the Board are acceptable.

Writ granted as moulded.

⁹The Board's proposed definition of "incident" was:

3.4 - "Incident" means any activity either observed by an "Employee" or made known to him or her, which has or may have resulted in physical or property damage to a third party or to his or her property and which has the potential of resulting in a claim against the State of West Virginia for damages.

¹⁰The relator also claimed that the three (3) year retention period for the initial reporting form is insufficient. However, this particular section states "three (3) years or longer". Moreover, this term is merely for the initial reporting forms. It is contemplated that a further investigation will be made.