

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

Form #4

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2005 JAN 28 P 3:35

WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: West Virginia State Police TITLE NUMBER: 81

CITE AUTHORITY: 15-2-25

AMENDMENT TO AN EXISTING RULE: YES NO

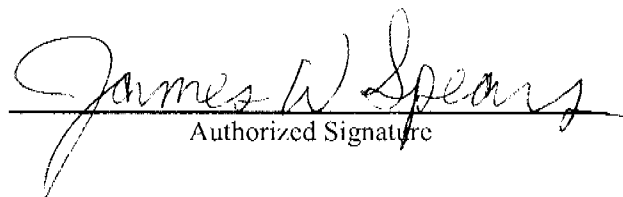
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 10

TITLE OF RULE BEING AMENDED: West Virginia State Police Professional Standards
Investigations, Employee Rights, Early Identification
System, Psychological Assessment and Progressive

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

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


Authorized Signature

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: West Virginia State Police Professional Standards Investigations, Employee Right

Type of Rule: Legislative Interpretive Procedural

Agency: West Virginia State Police

Address: 725 Jefferson Road
South Charleston, WV 25309

Phone Number: 304-746-2109 Email: mcorsaro@wvsp.state.wv.us

Fiscal Note Summary

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

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

Fiscal Note Detail

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

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

Rule Title: West Virginia State Police Professional Standards Investigations, Employee Right:

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

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

There are no additional costs associated with the proposed rule changes.

MEMORANDUM

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

N/A

Date: January 28, 2005

Signature of Agency Head or Authorized Representative

LT Col. [Signature]

FILED

TITLE 81
LEGISLATIVE RULE
WEST VIRGINIA STATE POLICE

2005 JAN 28 P 3: 35

SERIES 10
WEST VIRGINIA STATE POLICE PROFESSIONAL STANDARDS INVESTIGATIONS,
EMPLOYEE RIGHTS, EARLY IDENTIFICATION SYSTEM, PSYCHOLOGICAL
ASSESSMENT AND PROGRESSIVE DISCIPLINE

OFFICE OF THE WEST VIRGINIA
SECRETARY OF STATE

§81-10-1. 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 §15-2-25.

1.3. Filing Date. -- ~~April 9, 2002.~~

1.4. Effective Date. -- ~~May 1, 2002.~~

~~1.5. Repeal of former rule. -- This legislative rule repeals and replaces West Virginia State Police Administrative Rule 81CSR10 filed on March 27, 1996 and effective April 1, 1996.~~

§81-10-2. Definitions.

As used in this rule, unless used in a context that clearly requires a different meaning, the following terms shall mean:

2.1. 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 Section, intended to determine if misconduct has occurred and whether administrative sanctions are warranted for an employee named in a complaint.

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

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

~~2.4. Conduct Unbecoming: Misconduct of a substantial nature affecting the rights and interests of the public, or that casts aspersions or doubt upon a law enforcement officer's honesty and/or integrity and that directly affects the rights and interests of the public.~~

2.54. Counseling: A documented discussion with the employee about a work performance or behavior problem which, if not corrected, could lead to a disciplinary action.

2.65. 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; or an incident resulting in the death or severe injury of a co-worker or any other person; or the use of deadly force by anyone against the employee or a co-worker leading to death, or physical or psychological injury.

2.76. Discharge: An involuntary dismissal from employment ordered by the Superintendent and effected by written State Police special order.

2.87. Disciplinary action: 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.

2.98. 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 stress or other problems which may adversely affect job performance.

2.109. Employee: Any employee of the West Virginia State Police.

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

2.111. External Complaint: A complaint initiated by someone other than an employee.

2.112. Internal Complaint: A complaint initiated by an employee.

2.113. Internal Inquiry: An investigation conducted not pursuant to a special order, by or on behalf of the Professional Standards Section, intended to determine if misconduct has occurred and whether administrative sanctions are warranted for an employee named in a complaint involving less serious violations.

2.114. Investigator: Any supervisory member authorized by the Section to conduct an internal investigation or inquiry as provided for in this rule.

2.115. Officer-in-Charge, Professional Standards Section or OIC: That member designated by the Superintendent to oversee and direct the operations of the Section.

2.116. Section: The Professional Standards Section of the West Virginia State Police.

2.117. Superintendent: The Superintendent of the West Virginia State Police or his or her duly authorized agent.

2.118. Suspension: An involuntary separation from the West Virginia State Police during a limited period for disciplinary reasons.

§81-10-3. Professional Standards Section Organization and Responsibilities.

3.1. The Section is under the command of the OIC, ~~and shall report~~ and is directly responsible to the Superintendent. The Superintendent shall staff the Section with appropriate investigators to conduct internal investigations and inquiries, personnel inspections, and facility inspections.

3.2. The OIC is responsible for the organization and management of the Section. The OIC shall supervise the Section'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 and the employee grievance process.

3.3. The OIC shall have all complaints recorded in a central log and assigned an individual 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 State Police Equal Employment Opportunity Counselor. The OIC shall ensure the confidentiality of all documents and reports relating to the investigation of any complaint through strict control of the Section's files.

3.4. The OIC shall send a letter to the complainant, if known, acknowledging that the complaint has been received for processing. The letter shall include the individual case number assigned to the matter and the name of a person who can relate the status of the investigation. Also, the OIC 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. There is no duty under this section to notify an employee or complainant if the notification would hinder or jeopardize any investigation of the complaint or if the matter is handled as an internal inquiry. The OIC shall advise investigators regarding procedures used in the investigations, review case files for completeness, and forward case files

through the proper chain of command to the Superintendent for final review. The OIC shall send closing letters to all concerned parties upon completion of each investigation.

3.5. The OIC shall prepare an annual statistical report concerning the Section's activities which shall be available to employees and members of the public.

3.6. The OIC shall apprise the Superintendent of situations or facts concerning employee complaints and investigations that may ~~draw media attention~~ be of public concern, or allege the commission of a serious misdemeanor or felony by an employee.

3.7. The Section 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.

3.8. Investigators assigned to either internal investigations and/or inquiries shall forward to the OIC an accurate and complete report, and the remainder of the case file, within thirty (30) working days of the day the investigation or inquiry is received by the investigator unless an extension is granted by the OIC. Investigators shall also perform inspection of State Police facilities and other duties as assigned by the OIC.

3.9. The OIC or any other Section member may be contacted during off-hours for emergency complaints by contacting the Communications Section of the State Police at (304) 746-2158.

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

§81-10-4. Incidents to be Investigated.

4.1. The State Police shall investigate through internal investigation or inquiry, all complaints

received by the Section.

4.2. The OIC shall determine the criteria for the assignment of minor complaints for internal inquiry to line supervisors as investigators in cases such as alleged rudeness, tardiness, or other complaints of a similar nature. The OIC shall have the discretion to assign internal investigations to specially trained members not permanently assigned to the Section. Once assigned, that investigator may be relieved of his or her regular duties as may be required to complete the investigation. Investigators assigned to internal investigations or inquiries shall report directly to the OIC, and shall not discuss the investigation with anyone not assigned to the Section or specifically authorized by the OIC or Superintendent to receive the information.

~~4.3. The OIC shall immediately notify the Superintendent of any complaint received by the Section alleging the commission of a serious misdemeanor or felony by an employee.~~

§81-10-5. Complaint Filing Procedure.

5.1. A person may file a complaint with any State Police employee. Whenever possible, employees receiving complaints shall attempt to refer the complainant to the affected employee's immediate supervisor who shall prepare the Personnel Complaint Form, or directly to the Section. If the immediate supervisor is not available and the complainant does not wish to contact the Section directly, the State Police employee shall take the complaint.

5.2. The employee shall accept all complaints against employees and document them on the Personnel Complaint Form. The employee shall forward the completed form via facsimile to the Section as soon as possible, and mail the original directly to the Section.

5.3. The Personnel Complaint Form shall state with particularity the allegations including the name of the involved employee, the date, time, and location of the alleged misconduct, a detailed description of the alleged misconduct, names of witnesses, and the remedy requested by the

complainant. The Personnel Complaint Form shall contain a section that advises the complainant that providing false information to the State Police is a violation of W. Va. Code §15-2-16, and that the State Police may pursue criminal and/or civil sanctions if the investigation determines the complaint or any statements made are without foundation, basis, false or not factual. The form shall advise the complainant that he or she may be required to testify in court or administrative hearings regarding the complaint.

5.4. Any employee who fails to accept, record, and/or forward to the Section any complaint the employee receives is in violation of State Police policy and subject to disciplinary action. Employees receiving complaints are considered to have complied with complaint reporting requirements if the provisions of subsection 5.5. of this section are met.

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

5.6. Employees taking complaints shall not make or retain any copies of the Personnel 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.

5.7. Members accepting complaints involving the use of force by a State Police employee where the alleged victim of the use of force is present at the time the complaint is registered, shall take or cause to be taken detailed color photographs of the alleged victim whether or not any visible evidence of physical injury exists if the alleged victim consents to the taking of the photographs.

§81-10-6. 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, the Section shall retain records and documents associated with complaints for a period of ~~ten (10)~~ four (4) years from ~~the completion of the investigation~~ final disposition of the complaint that shall include, if applicable, imposition of disciplinary action, exhaustion of all appeals, and resolution of any civil action(s) relating to the complaint.

6.2. The Section shall store case files in a secured environment, with access restricted to the Superintendent, the OIC and members and civilian employees of the Section. Investigators or any other employee working with the investigator and outside of the Section office shall store and handle documents, evidence and other items related to the investigation or inquiry in a manner that shall ensure their confidentiality and integrity. ~~Investigators, or employees outside of the Section, except at the direction of the OIC, shall not duplicate, retain or disseminate any item pertaining to a Section investigation or inquiry: Documents, evidence, and other items related to complaints, internal investigations, internal inquiries and/or contained in case files shall not be released, disseminated or disclosed, except by the direction of the Superintendent or by order of a court with competent jurisdiction.~~

~~6.3. All case files shall be considered confidential.~~

§81-10-7. Operational Procedures.

7.1. If an investigation or inquiry conducted by or at the direction of the Section leads to information indicating that criminal charges could be filed, the investigator shall immediately notify the OIC who shall notify the Superintendent. The Superintendent may authorize a separate criminal investigation to be initiated by a member other than the investigator assigned to the internal investigation or inquiry. If criminal charges are filed against an employee, the Superintendent may authorize the initiation or continuation of 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, pursuant to State Police operating policy and procedure. During any administrative suspension leave attendant to an internal investigation or inquiry, the employee shall surrender his or her State Police identification, and if a member, badges, State Police issued weapons, or other State Police property in his or her possession or control. Further, members shall be relieved of any police authority during the pendency of any administrative suspension leave.

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 investigator shall not summarize or paraphrase interviews of the complainants in lieu of a handwritten or recorded statement. The investigator shall not permit conversations "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. Any tape made pursuant to this section shall become an exhibit included in the case file. The OIC may have the tape 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. The investigator shall not summarize or paraphrase interviews of the witnesses in lieu of a 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 "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. Any tapes made pursuant to this section shall become an exhibit included in the case file. The OIC may have the tape transcribed and the transcription shall become a part of the case file.

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 internal investigation or inquiry, the investigator shall avoid making assertions concerning his or her perception of the investigation which may result in the complainant reaching a premature or inappropriate conclusion regarding the final disposition of the matter. Further, the investigator shall not make 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, the employee who is the subject of the complaint, or any witnesses or other persons interviewed during the internal investigation or inquiry.

7.8. The investigator shall detail in an internal investigation report the facts ascertained during an internal investigation or inquiry. The OIC shall determine the reporting format and the substance of all forms used pursuant to this rule. The investigator shall state a conclusion of fact for each allegation of misconduct alleged by the complainant or revealed by the investigation or inquiry 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, is false, or not factual;

4) Policy Failure: The allegation is true, and although the action of the member 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; or

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

7.9. The investigator shall submit the investigation/inquiry report and the remainder of the case file as required by subsection 3.8 of this rule. The OIC shall review the entire case file for content, form, and completeness. The OIC shall formulate recommendations for final disposition of the complaint and forward the case file, with recommendations, to the Superintendent for final disposition.

§81-10-8. Employee Rights and Conduct During an Internal Investigation or Inquiry.

8.1. Prior to questioning an employee in connection with an internal or administrative investigation, the investigator shall apprise the employee 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. The investigator, at his or her discretion, shall conduct interviews at reasonable times and places.

8.3. The investigator shall conduct the interview while the employee is normally on-duty unless the employee agrees to participate in an interview while off-duty. In cases where the OIC 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. The investigator shall tape record on either audio or video tape all interviews with the employee who is the subject of the investigation or inquiry. In the case of a minor complaint, a handwritten statement or letter from the employee who is the subject of the investigation may be sufficient. The investigator will not summarize or paraphrase the interview in lieu of a recorded statement. The investigator shall not permit

conversations "off the record" unless the employee agrees and the record reflects when the conversation goes off of the record, the purpose for doing so, and the time. All tapes made pursuant to this section shall become an exhibit included in the case file. The OIC may have the tapes transcribed and the transcriptions shall become a part of the case file. Copies of the original tapes or transcriptions shall be made available only to the employee who made the statement with the understanding that the employee shall not disclose the contents of either; unless the employee is required to disclose the contents as a means of defending himself or herself. 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 internal 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 investigation or inquiry shall answer all questions truthfully, file written reports as ordered by the Superintendent or OIC, and testify in administrative hearings. Employees are required to cooperate fully with the investigators in all phases of any internal investigation or inquiry.

8.6. The investigator shall advise employees subject to an internal investigation or inquiry of the "Administrative" or "Garrity" warnings, contained on West Virginia State Police form #173. The investigator shall read the provisions of the form into any taped record of the interview. The investigator and the employee shall sign the acknowledgment 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 investigation or inquiry interview, no more than two investigators shall be present with the employee during questioning. 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. The investigator shall conduct internal investigation or inquiry interviews of a reasonable duration, considering the complexity and gravity of the allegations in the complaint. The investigator shall afford the employee reasonable time away from the interview for meals and physical necessities.

8.9. The State Police shall generally limit the use of polygraph examinations to those cases in which the allegations are relatively serious. The investigator shall obtain approval for the use of polygraph examinations from the Superintendent or the OIC.

8.9.1. Polygraph results shall be included as additional evidence to be considered by the Superintendent, OIC, and the investigators. No conclusion should be drawn solely on the outcome of the polygraph examination, ~~or an agreement or refusal;~~ if the complainant is not an employee, no conclusion shall be drawn based upon an agreement or refusal to take a polygraph examination.

8.9.2. Investigators shall not offer 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, and if the complainant is an employee the polygraph may be ordered.

8.9.3. If the OIC determines that all leads have been appropriately pursued in cases where the complainant is not an employee, 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 polygraph examination, the employee may still be required to submit to the test. When the complainant is an employee, the OIC shall determine the order of polygraph administration.

8.9.4. An employee, who is the subject of the internal investigation or inquiry, may request

to take the polygraph examination before the complainant. The OIC shall decide if the incident is of a serious nature and would justify modification of subdivision 8.9.3 of this subsection. The operator shall inform the employee of the "Administrative" or "Garrity" Warnings, and the employee shall sign a waiver of liability prior to the administration of the polygraph examination.

8.9.5. The Superintendent, at his discretion, may dismiss from employment any employee who refuses to take a polygraph examination when so ordered.

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 acceptable polygraph procedure.

8.9.7. The results of a polygraph examination of an employee are confidential and shall be available only to the employee, the Superintendent, the OIC, the investigator, and grievance evaluators participating in the State Police employee grievance procedure.

8.9.8. State Police polygraph operators shall be used for internal investigations and inquiries. The Section shall not use one operator exclusively when multiple operators are available.

8.10. As part of an internal investigation or inquiry, an employee who is the subject of the investigation or inquiry 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 his or her blood;

8.10.3. Be photographed;

8.10.4. Participate in a line-up;

8.10.5. Submit financial disclosure

statements. 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 the information is necessary in investigating a possible conflict of interest with respect to the performance of his or her official duties, or unless the disclosure is required by law, or unless the information is related to an investigation;

8.10.6. Submit to psychological examinations; or

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, desks, cabinets, and briefcases.

8.11. The OIC may require an employee to submit to an examination or test when the examination is specifically directed and narrowly related to a particular internal investigation or inquiry being conducted. The requirement shall not apply if it is 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 investigation or inquiry, the State Police shall, to the degree possible, 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 or inquiry and review by the OIC and the Superintendent, the OIC shall notify the employee who is the subject of the investigation or inquiry

that the investigation is complete. The employee shall be notified if no disciplinary action is forthcoming and advised the matter is closed. The employee shall be notified in writing by the OIC if disciplinary action is authorized by the Superintendent. The employee shall be given a written statement detailing the charges attendant to the disciplinary action with appropriate citations to codes, policies, procedures or accepted operating practices where applicable.

8.14. When an employee is notified by the OIC concerning pending disciplinary action, the OIC shall inform the employee of the results of the internal investigation or inquiry, the substance of the sustained allegations, and the scope of the prospective discipline. The employee shall be given a copy of the case file upon request, but excluding the identity of confidential sources, and 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 with the State Police agreeing to not disclose any of the material contained in the case file for any purpose other than to defend himself or herself. An employee who violates this procedure may be subject to disciplinary action.

8.15. The employee shall be given at least ten calendar days to review the case file and shall be permitted to appear before the Superintendent to present a defense in the matter; if the OIC receives the employee's written request to appear before the Superintendent within the ten-day period. The employee may seek redress for any disciplinary action through the State Police employee grievance process. The provisions of this subsection do not apply to probationary members of the State Police as defined in W. Va. Code §15-2-21 et.seq., or to civilian employees during the first six months of employment.

8.16. If a criminal investigation is initiated by the State Police or another law enforcement agency regarding the allegations or events referenced in the complaint filed against a State Police employee, any information obtained from that employee pursuant to an "Administrative" or "Garrity"²² warnings given to that employee during

the internal investigation or inquiry of that complaint shall not be available to the criminal investigators unless the employee was apprised of and waived his or her constitutional rights as detailed in the State Police Miranda Warnings Form.

§81-10-9. Early Identification System.

9.1. The Early Identification System shall be maintained and administered by the Section. The Superintendent shall appoint an Internal Review Board consisting of the Deputy Superintendent, Chief of Staff Services, Chief of Field Operations, OIC, and any other persons authorized by the Superintendent 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 who have received two or more complaints (internal and/or external) or who have been involved in three or more use of force incidents during a three-month period are subject to review by the Internal Review Board. The Board may determine that no further action is required, that the employee be referred to the employee assistance program, that the employee be referred for remedial training, or that the employee be subject to review by the employee's immediate supervisor to attempt to determine the reasons for the employee's conduct or any circumstances that may have contributed to the conduct and evaluate the employee's current performance.

9.2. If the employee is subjected to supervisory review, the immediate supervisor shall forward a written summation of his or her review and evaluation to the Internal Review Board within thirty days. The Board shall review the supervisor's summation and either determine that no additional review or other action is warranted or recommend some other action to the Superintendent. In instances where the employee is referred to the employee assistance program, the Superintendent shall determine if any additional action is required in relation to the employee once the referral report is received.

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

9.4. The Section may provide the system reports to identified employee's 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 shall make no conclusions or determinations concerning job stress and/or performance problems.

9.5. The Section shall also 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 board may use the data in order to identify supervisors who may be employing ineffective or inappropriate management techniques. The names of any supervisors identified shall be forwarded to the Superintendent for review and action.

§81-10-10. Psychological Assessment Program.

10.1. This program provides a process for mandatory psychological review of employees in situations where an employee's job performance or actions may be 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 for duty is determined. Assistance shall be made available, when appropriate, to facilitate the employee's return to psychological fitness in instances where the employee is determined to be unfit for duty with a reasonable prognosis that

rehabilitation to full duty psychological fitness can be achieved.

~~10.2. An employee is considered to be psychologically fit for duty when there is reasonable assurance that he or she can. The following are examples, although not all inclusive, of circumstances in which an employee's psychological fitness for duty may be in question:~~

~~10.2.1. The employee fails to exercise sound or reasonable judgement Exercise independent judgment;~~

~~10.2.2. The employee fails to Rrecognize parameters of authority; and~~

~~10.2.3. The employee fails to Ffunction effectively within the rules, guidelines, and policies of the State Police.~~

~~10.2.4. The employee is suspected of substance abuse (alcohol or drugs);~~

~~10.2.5. The employee has continued citizen complaints regarding conduct on or off duty;~~

~~10.2.6. The employee exhibits supervisory problems, and fails to respond to corrective measures;~~

~~10.2.7. The employee exhibits excessive use of sick leave, disability leave or workers compensation claims;~~

~~10.2.8. The employee's return from sick leave and/or leave of absence precipitated by psychiatric, psychological, and/or stress related illness and/or substance abuse; or~~

~~10.2.9. The employee is involved in a critical incident as defined by this rule and whose psychological fitness for duty is in question.~~

~~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; or~~

~~10.3.5. Return from sick leave and/or leave of absence precipitated by psychiatric, psychological, and/or stress-related illness and/or substance abuse.~~

~~10.43. Procedures.~~

~~10.43.1. The supervisor shall consult the employee's Troop or Section Commander, if in the opinion of a supervisor, an employee's immediate actions or culmination of previous actions bearing on the criteria set forth in subsection 10.3. of this section indicate a question of psychological fitness for duty. The Troop or Section Commander shall evaluate the situation based upon the circumstances surrounding the incidents and make a recommendation to the Superintendent concerning the employee's duty status. Any employee shall consult his or her Troop or Section Commander, if in the opinion of the employee, another employee's actions indicate a question of psychological fitness for duty. The Troop or Section Commander shall evaluate the circumstances surrounding the alleged incident, collect any supporting documentation and make a written recommendation to the Superintendent concerning the employee's duty status and/or need for a fitness for duty evaluation.~~

~~10.43.2. The Superintendent may place an employee involved in a critical incident as defined by this rule or whose psychological fitness for duty is in question on administrative leave, with or without pay pursuant to State Police~~

operating policy and procedure. During any administrative ~~suspension~~ leave attendant to a psychological fitness for duty evaluation, the employee shall surrender his or her State Police identification, and if a member, badges, State Police issued weapons, or other State Police property is his or her possession or control. Further, members on administrative leave pending a psychological fitness for duty evaluation shall be relieved of any police authority during the period of administrative leave. The employee shall remain on administrative leave 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 any critical or other incident. If the employee's psychological fitness is at issue, the employee shall return to duty only after he or she is considered 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.

10.43.3. If a psychological fitness for duty is considered 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, and the appointment time, date, and location of the meeting with a psychotherapist designated by the State Police. The State Police are 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 not required by the State Police. If an employee is referred for psychological fitness for duty assessment as a result of an action which may result in disciplinary action against the employee, the disciplinary action shall be delayed pending assessment and recommendation by the psychotherapist designated by the State Police.

10.54. Employee Responsibility.

10.54.1. During evaluation and subsequent treatment if considered necessary, the

employee shall truthfully answer all questions directed to him or her and provide complete information and documents considered necessary. The employee shall submit to all examinations 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 affected employee's behavior may be interviewed.

10.65. Psychotherapist Responsibility.

10.65.1. 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:

10.65.1.1. That the employee be returned to full duty unconditionally or with treatment recommended;

10.65.1.2. That the employee be returned to full duty conditional upon treatment;

10.65.1.3. That the employee be returned to limited duty conditional upon treatment; or

10.65.1.4. That the employee be declared unfit for duty and referred for treatment.

10.65.2. If, during the employee's initial assessment by the State Police's psychotherapist, it is determined that the employee should 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. Any employee who fails to attend and successfully complete the program shall be subject to subsequent disciplinary action.

10.65.3. 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 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 whether or not:

10.65.3.1. The employee is attending scheduled appointments;

10.65.3.2. The employee is making reasonable progress in his or her treatment; or

10.65.3.3. Anything has occurred which could cause the psychotherapist to reassess the employee's duty status.

10.65.4. 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.

10.65.5. Communications between the Superintendent and the State Police psychotherapist or outside consultants, regarding test results, written opinions, recommendations, notes, reports, and actions taken are confidential; provided that the employee who is subject to a fitness for duty evaluation, upon written request to the Superintendent within thirty days of an evaluation, may review the written recommendation submitted to the Superintendent from the psychotherapist. The Section shall secure these documents in the Section's office in locked cabinets or secure magnetic media; and shall be released only by order of a court with competent jurisdiction.

§81-10-11. Progressive Discipline.

11.1. Standards of Conduct:

The following standards are intended to be

illustrative but not all inclusive of the type of conduct expected of employees:

11.1.1. An employee is expected to attend work regularly and report to work 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;

11.1.2. 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; and

11.1.3. Employees are expected to meet established performance standards whether published in administrative rules, operating policy and procedure, State Police memorandum or notices or otherwise. Conditions or circumstances, as they become known, which 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.

11.2. Supervising for Better Work Performance.

11.2.1. 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.

11.2.2. 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 a verbal warning or a documented counseling session, depending on the severity of the situation.

11.3. Disciplinary Offenses

Unacceptable conduct shall be divided into three types of offenses according to their severity. The offenses listed in this subsection are

illustrative only, and are not intended as an exclusive list of all disciplinary offenses. 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 activities or the employee's performance shall be treated consistent with provisions of this rule.

11.3.1. Group I Offenses include, but are not limited to, those types of behavior listed below which are less severe in nature, but which require correction in the interest of maintaining a productive and well managed work force.

11.3.1.1. The employee has unsatisfactory attendance, or excessive tardiness;

11.3.1.2. The employee abused State Police time such as use of State Police time for personal business, abuse of sick leave, or failed to notify a supervisor promptly of the completion of assigned work;

11.3.1.3. The employee used obscene or abusive language or failed to deal with the public in a courteous, kind and respectful manner;

11.3.1.4. The employee has inadequate or unsatisfactory job performance;

11.3.1.5. The employee exhibits disruptive behavior;

11.3.1.6. The employee committed a chargeable accident as defined by State Police policy;

11.3.1.7. The employee violated the motor vehicle code, except those defined as Serious Traffic Offenses under W. Va. Code §17C-5-1 et. seq., which shall be included as Group III offenses; and

11.3.1.8. The employee negligently cared for, damaged, destroyed or lost any equipment or State Police property for which the employee is responsible.

11.3.2. Group II Offenses include more

severe acts and behavior including, but not limited to, those types of behavior listed below.

11.3.2.1. The employee failed to perform assigned work, or otherwise comply with State Police policy and procedure or administrative rules;

11.3.2.2. The employee violated safety rules where there is not a threat to life;

11.3.2.3. The employee took unauthorized time away from the work area or duty post or left the work site without permission during working hours;

11.3.2.4. The employee failed to report to work without proper notice to his or her supervisor; and

11.3.2.5. The employee refused to work overtime.

11.3.3. Group III Offenses include, but are not limited to, the following acts and behavior of such a serious nature that a first occurrence would warrant the Superintendent discharging an employee.

11.3.3.1. The employee has absences in excess of three days without notifying his or her supervisor;

11.3.3.2. The employee has the odor of an alcoholic beverage upon his or her breath, consumed alcohol or unlawfully used or possessed controlled substances while on the job;

11.3.3.3. The employee reported to work under the influence or when his or her ability was impaired by alcohol or a controlled substance;

11.3.3.4. The employee committed insubordination or a serious breach of discipline;

11.3.3.5. The employee falsified any records such as, but not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents, or knowingly made any false statement;

11.3.3.6. The employee willfully or negligently damaged or defaced state records, or state or employee property;

11.3.3.7. The employee stole or removed state records, state or employee property without authorization;

11.3.3.8. The employee gambled on state property;

11.3.3.9. The employee committed acts of physical violence or fighting (except official police actions);

11.3.3.10. The employee violated safety rules where there is a threat to life;

11.3.3.11. The employee slept during work hours;

11.3.3.12. The employee participated in a work slowdown, sit-down, or similar concerted interference with State Police or state operations;

11.3.3.13. The employee possessed or used firearms, dangerous weapons, or explosives without authorization;

11.3.3.14. The employee threatened or coerced employees or supervisors;

11.3.3.15. The employee received 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 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;

11.3.3.16. The employee failed to take a polygraph examination or to answer fully and truthfully any question relating to any offense requiring submission to a test;

11.3.3.17. The employee failed to take physical or mental examinations as required;

11.3.3.18. The employee used public office for private gain;

11.3.3.19. The employee violated any law or engaged in criminal conduct on or off the job, except actions that are considered Group I or II offenses;

11.3.3.20. The employee engaged in dishonest or immoral conduct that undermines the effectiveness of State Police activities or employee performance, whether on or off the job;

11.3.3.21. The employee disobeyed a lawful command of a supervisor;

11.3.3.22. The employee disclosed confidential information to any person except those who may be entitled to the information or when directed by the Superintendent or a supervisor;

11.3.3.23. The employee took any action which impairs the efficiency and/or reputation of the State Police or its employees;

11.3.3.24. The employee accepted 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;

11.3.3.25. The employee manifested cowardice, feigned illness, or otherwise attempted to shirk official duty;

11.3.3.26. The employee was involved 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;

11.3.3.27. The employee failed to answer fully and truthfully any questions specifically directed and related to official duties or job fitness attendant to an internal or administrative investigation;

11.3.3.28. The employee used unnecessary force during an arrest/custody procedure;

11.3.3.29. The employee deviated from established procedures in the disposition of summons or arrest cases;

11.3.3.30. The employee used without authority or misused any state funds or other lawfully obtained funds as determined by policy and procedure;

11.3.3.31. The employee stole or misappropriated evidence, or property stored in a State Police evidence room, or property to be destroyed pursuant to a valid court order;

11.3.3.32. The employee libeled or slandered another employee, either on or off-duty;

11.3.3.33. The employee committed conduct unbecoming; misconduct of a substantial nature affecting the rights and interests of the public, or that casts aspersions or doubt upon a law enforcement officer's honesty and/or integrity and that directly affects the rights and interests of the public;

11.3.3.34. The employee interfered with the rights or property of others; or

11.3.3.35. The employee violated the motor vehicle code defined as Serious Traffic Offenses under W. Va. Code §17C-5-1 et. seq.

11.4. Application of Progressive Discipline.

11.4.1. Sustained Group I Offenses are cumulative in nature. Upon the accumulation of three "active" Group I offenses, the Superintendent may suspend the employee without pay, but the suspension shall not exceed five working days. The Superintendent may discharge an employee who accumulates four active Group I offenses. The Superintendent may demote or suspend the employee for up to thirty working days in lieu of discharge, if mitigating circumstances exist.

11.4.1.1. The Superintendent may order counseling, ~~issue a verbal warning,~~ issue a written reprimand or suspend an employee for one working day for a single Group I offense.

11.4.1.2. Sustained Group I offenses remain "active" for ~~two~~ one (1) years from the date of issuance.

11.4.2. For Group II offenses the Superintendent may order counseling, ~~issue a verbal warning,~~ issue a written reprimand, or suspend an employee. Employees, however, may not be suspended in excess of ten working days for an offense of this nature.

11.4.2.1. The Superintendent may discharge an employee who commits an additional Group II offense or if more than one Group II offense is committed during the same incident while a previous offense is "active." The Superintendent may also discharge an employee who accumulates three "active" first group offenses and one active second group offense. The Superintendent may demote or suspend the employee for up to thirty working days in lieu of discharge, if mitigating circumstances exist.

11.4.2.2. If an employee is not discharged due to mitigating circumstances, the Superintendent shall notify the employee that any subsequent violation during the "active" life period, regardless of level, may result in discharge.

11.4.2.3. Sustained Group II offenses shall remain "active" for ~~three~~ two (2) years from the date of issuance.

11.4.3. The Superintendent may discharge the employee or suspend the employee for up to thirty working days without pay in lieu of discharge for committing a Group III Offense. The Superintendent may demote or suspend the employee for up to thirty working days in lieu of discharge, if mitigating circumstances exist, or issue a written reprimand.

11.4.3.1. If the Superintendent does not discharge the employee due to mitigating

circumstances, he or she shall be notified that any subsequent violation during the "active" life period, regardless of level, may result in discharge.

11.4.3.2. Sustained Group III offenses remain "active" for ~~four~~ three (3) years from the date of issuance.

11.5. The Superintendent, at his discretion, may permit employees who are suspended as a result of a violation of a Group I, Group II, or Group III offense to exchange accumulated annual leave days for a portion or all of the suspension.

11.56. The Superintendent may demote or discharge an employee for job abolition, budgetary reduction, reduction of work, State Police reorganization, or for other reasons not related to the employee's job performance, but which nevertheless require the Superintendent to demote or discharge the employee. In these instances, the Superintendent shall notify the employee in writing why he or she is being demoted or discharged. This notice shall include instructions indicating how the employee may apply for another position within the West Virginia State Police.

11.67. 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, pursuant to State Police operating policy and procedure.