

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #7

Filing Date

FILED

AUG 11 4 30 PM '97

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Effective Date

Disapproved
Sept. 22, 1997.

NOTICE OF AN EMERGENCY RULE

AGENCY: WEST VIRGINIA STATE POLICE TITLE NUMBER: 81

CITE AUTHORITY: W. Va. Code 15-2-25

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 10

TITLE OF RULE BEING AMENDED: WVSP PROFESSIONAL STANDARDS INVESTIGATIONS,

EMPLOYEE RIGHTS, EARLY IDENTIFICATION SYSTEM, PSYCHOLOGICAL ASSESSMENT AND
PROGRESSIVE DISCIPLINE

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: N/A

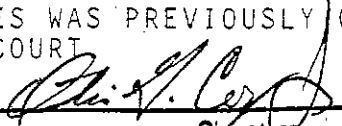
TITLE OF RULE BEING FILED AS AN EMERGENCY: N/A

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

See Attached Summary.

THE PROMULGATION OF THESE RULES WAS PREVIOUSLY ORDERED BY THE WEST VIRGINIA SUPREME COURT


Signature

Use additional sheets if necessary

\$7.60



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

Cecil A. Underwood
Governor

Colonel Gary L. Edgell
Superintendent

MEMORANDUM

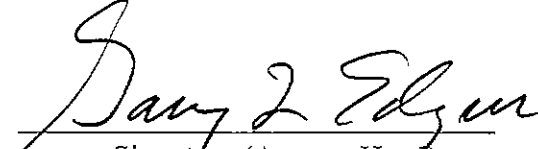
TO: Secretary of State
Legislative Rule Making

FROM: Gary L. Edgell, Superintendent
West Virginia State Police

DATE: August 4, 1997

RE: Agency Approval of Emergency Filing of Amendments
to Existing Legislative Rule Dealing with Professional
Standards Investigations.

I hereby authorize emergency filing of the attached amendments to the existing
Legislative Rule.


Signature (Agency Head)

DATE: August 11, 1997

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: West Virginia State Police

EMERGENCY RULE TITLE: WVSP PROF. STANDARDS INVESTIGATIONS, EMP. RTS. EARLY IDENTIFICATION SYSTEM, PSYCHOLOGICAL ASSESSMENT AND PROG. DISCIPLINE

1. Date of Filing August 11, 1997

2. Statutory authority for promulgating emergency rule:
W. Va. Code 15-2-25

3. Date of filing of proposed legislative rule: June 18, 1997

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?
Yes (1995)

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 previously ordered the Superintendent to promulgate rules in this area. In order to maintain this program at an optimum level, it is necessary to file the proposed rule as emergency. 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

**TITLE 81
LEGISLATIVE RULE
WEST VIRGINIA STATE POLICE
SERIES 10**

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

**EMERGENCY RULE FILING
JUSTIFICATION**

Agency: West Virginia State Police
Rule: West Virginia State Police Professional Standards Investigations, Employee Rights, Early Identification System, Psychological Assessment and Progressive Discipline
Authority: W. Va. Code §§15-2-2 & 15-2-25
Title: 81
Series: 10

PERTINENT DATES

Filed for public comment:	June 18, 1997
Public comment period ended:	July 18, 1997
Filed following public comment period:	July 30, 1997
Filed LRMRC:	July 30, 1997
Filed as emergency:	August 11, 1997

Fiscal impact:	NONE
Number of comments received:	ZERO

Summary of Rule

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.

Justification

The proposed rule amends a currently existing rule. However, we are proposing filing this rule as an emergency rule. The West Virginia Supreme Court of Appeals, in State ex rel. Billy Ray C. v. Skaff, 190 W.Va. 504, 438 S.E.2d 847 (1993) (Skaff I), issued a writ of mandamus ordering the West Virginia State Police to promulgate rules and regulations governing the investigation of allegations concerning State Police employee misconduct. The Court further held that "implicit with the Superintendent of the West Virginia Division of Public Safety's [State Police's] mandatory duty to investigate allegations of misconduct under W.Va. Code §15-2-21 (1977), there is the duty to promulgate formal, written investigation procedures." The State Police complied with this order and submitted detailed rules governing the investigation of employee misconduct, enhanced use of force reporting, progressive employee discipline, and systems designed to identify and remedy employees suffering from job related or non-job related stress. The State Police proposed that the rules embodied in this submission be promulgated as internal policies and procedures. The Court reviewed the State Police proposals and held in State ex rel. Billy Ray C. v. Skaff, No. 21894 (1995) (Skaff II), that the State Police must promulgate these proposed policies and procedures in the form of a legislative rule according to the provisions of The Administrative Procedure Act, W.Va. Code §29A-3-1, et seq.

"[A]n 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 Skaff case, the West Virginia 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 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 maintains 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.

Therefore, to ensure the public's right to file complaints and the Superintendent's ability to investigate same in the most efficient manner, the State Police believes it would be in the public's best interest to file this rule as an emergency. Granting emergency status to this rule would serve to prevent substantial harm to the public by ensuring that the most up-to-date, formal, court approved procedures are in place to address complaints against police officers, especially when the allegations involve violations of the complainant's civil rights.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: WVSP PROFESSIONAL STANDARDS INVESTIGATIONS

Type of Rule: X Legislative Interpretive Procedural

Agency WEST VIRGINIA STATE POLICE

Address 725 Jefferson Rd.
S. Charleston, WV 25309-1698

1. Effect of Proposed Rule

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	FISCAL	THE FISCAL YEAR
ESTIMATED TOTAL COST	\$ -0-	\$ -0-	\$ -0-	\$ -0-	\$ -0-
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERNATIONS					
EQUIPMENT					
OTHER					

2. Explanation of above estimates:

The proposed rules will have only nominal costs (if any at all) associated with them. Therefore, we have indicated that the proposed rules result in no costs to our agency.

3. Objectives of these rules:

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.

Rule Title: WVSP PROFESSIONAL STANDARDS INVESTIGATIONS

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

NONE

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

NONE

C. Economic Impact on Citizens/Public at Large.

NONE

Date:

June 17, 1997

Signature of Agency Head or Authorized Representative

Colonel Ray E. Egan

**TITLE 81
LEGISLATIVE RULE
WEST VIRGINIA STATE POLICE**

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

§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 §§15-2-21 and 15-2-25.

1.3. Filing Date. --

1.4. Effective Date. --

§81-10-2. Definitions.

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

2.1. ~~Accident Review Board~~Case File: ~~A board formed~~The entire collection of documents and certain items of tangible evidence, including the final report, relating to an internal investigation or inquiry and any disciplinary action imposed by the Superintendent to review all employee motor vehicle accidents in order to judge employee adherence to State Police driving policies and the law.

2.2. ~~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 misconduct has occurred and whether administrative sanctions are warranted for employees named in complaints.~~

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

Complaint: Any allegation of an act by an employee which is contrary to written rules, 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, policies, procedures, directives, orders, or the delivery of services.

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

~~2.6-~~ 2.4. 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 by anyone against the employee or a co-worker leading to death, physical, or psychological injury.

~~2.7-~~ 2.5. Discharge: an involuntary dismissal from employment ordered by the Superintendent and effected by written State Police Special Order.

~~2.8-~~ 2.6. 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.

~~2.9~~ Disciplinary action also includes documented counseling.

~~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 stress or other problems which may adversely effect job performance.

~~2.8~~ Employee: Any employee of the West Virginia State Police, provided that nothing in this rule shall be interpreted as changing the at-will status of classified-exempt civilian employees.

~~2.9~~ Employee Grievance Process: The process used by employees to address and resolve perceived adverse supervisory decisions, policy failures, and other work-related complaints.

~~2.10~~ Employee Internal Inquiry: Any employee of the West Virginia State Police An investigation conducted at the direction of the Superintendent not pursuant to a special order, by or on behalf of Professional Standards, concerning non-criminal, administrative matters, intended to determine if employees named in complaints have committed less serious acts of misconduct.

~~2.11~~ Employee Grievance Process Internal Investigation: The process employed by employees to address and resolve perceived adverse supervisory decisions An investigation conducted at the direction of the Superintendent and pursuant to a special order, policy failures, and other work-related complaints by or on behalf of Professional Standards, concerning non-criminal, administrative matters intended to determine if misconduct has occurred.

~~2.12~~ 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 misconduct has occurred and whether administrative sanctions are warranted for employees named in complaints involving less serious violations of the State Police Code of Conduct, 81CSR1-10 et seq. or the standards of conduct in sections 11.1, 11.2 and 11.3 of this rule.

~~2.13-~~ 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.

~~2.14-~~ 2.13. Resignation: voluntary termination of the employment relationship by the employee.

~~2.15-~~ 2.14. Retirement: termination of the employment relationship under the provisions of W. Va. Code §15-2-26 et seq.

2.15. Superintendent: means the Superintendent of the West Virginia State Police or his duly authorized agent.

2.16. Superintendent: ~~means the Superintendent of the West Virginia State Police or his duly authorized agent.~~

~~2.17~~ Suspension: ~~involuntary separation during a limited period for disciplinary reasons.~~ Suspension: involuntary separation during a limited period for disciplinary reasons. However, nothing in this policy shall permit suspending without pay any employee classified as exempt under the provisions of the Fair Labor Standards Act and/or attendant regulations.

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

3.1. ~~The Unit~~Professional Standards will be under the command of the Superintendent, and will report and be directly responsible to the Deputy Superintendent. The Superintendent shall staff the ~~Unit~~ withassign an appropriate number of 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~~Professional Standards and shall develop policies and guidelines for its operation. The Superintendent shall appoint a sworn trooper to ~~coordinate~~direct the activities of the ~~Unit~~Professional Standards. The ~~Unit~~CoordinatorDirector 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, and the employee grievance process, ~~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 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 agency Equal Employment Opportunity Counselor. The Superintendent ~~or his/her designee~~ shall ensure the confidentiality of all documents and reports relating to the investigation of any complaint through strict control of case files ~~both within and outside the Unit's offices.~~

3.4. The Superintendent or ~~his~~his/her designee shall cause a letter to be sent 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 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 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 Superintendent will advise the ~~Unit~~CoordinatorDirector 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 Superintendent shall send closing letters to all concerned parties upon completion of each investigation.

3.5. The Superintendent shall prepare an annual statistical report concerning the Unit's ~~activities, complaints and their closure~~ for distribution to the public and State Police employees.

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

3.7. The ~~Unit Professional Standards~~ 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)~~ ninety (90) working days of the day the investigation or inquiry is received by the investigator unless an extension is granted by the ~~Superintendent~~ Director for just cause. ~~Investigators will also perform inspection and other duties as The investigators assigned by the Unit Coordinator, the Superintendent or his designee to internal inquiries shall prepare accurate and complete reports within thirty (30) working days of the day the inquiry is received by the investigator unless an extension is granted by the Director for just cause.~~

~~3.9 Investigators will also perform inspections and other duties as assigned by the Director, the Superintendent or his/her designee.~~

~~The Unit may be contacted during off-hours for emergency complaints by contacting the South Charleston Detachment of the West Virginia State Police.~~ 3.9. Professional Standards may be contacted during off-hours for emergency complaints by contacting the South Charleston Detachment of the West Virginia State Police.

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

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

4.1. The State Police shall investigate all complaints.

4.2. The Superintendent shall determine the criteria for the assignment of minor complaints for internal inquiry to 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 Professional Standards~~. 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~~ Director, 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~~ Director shall immediately notify the Superintendent or his designee of any complaint alleging the commission of serious misdemeanors or felonies by an employee.

§81-10-5. Complaint Filing Procedure.

5.1. All complaints involving State Police employees shall be accepted and documented, on

a form designed by the ~~Unit Professional Standards~~ 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 Professional Standards~~. The Personnel Complaint Form shall state with particularity the allegations including the name of the involved employee, dates, times, location, a detailed description of the alleged misconduct, names of witnesses, and the remedy requested by the complainant. Failure to accept, record, and refer to the ~~Unit Professional Standards~~ 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 Professional Standards~~ 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 Professional Standards~~ by calling 304-746-2110, or by writing to or appearing at the ~~Unit's Professional Standards'~~ offices.

5.3. In instances when the complainant does not wish to contact the ~~Unit Professional Standards~~ directly and whenever possible, the ~~immediate supervisor~~ ~~a supervisory member~~ of the employee against whom the allegation is directed ~~Department~~ shall prepare the initial personnel complaint form. If the ~~employee's immediate~~ ~~a state police~~ supervisor is not available, any ~~State Police supervisor~~ or employee shall take the initial complaint.

5.4. Employees taking complaints shall not make or retain any copies of the initial 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.

5.5. 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 employees 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 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.

§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, records and documents associated with complaints will be retained by the ~~Unit Professional Standards~~ indefinitely. The Superintendent shall determine the appropriate method of storing and maintaining all records and documents.

6.2. Case files shall be stored by the ~~Unit Professional Standards~~ in a secured environment and with access restricted to the Superintendent, ~~his or his/her~~ designee(s), members of the ~~Unit Professional Standards~~, and to a court of competent jurisdiction under written order. Items in the possession of investigators or secretaries working outside of the ~~Unit Professional Standards'~~ 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 Professional Standards~~ investigation shall be made, retained, or disseminated by any employee, investigator, or secretary outside of the ~~Unit Professional Standards~~, except at the direction of the Superintendent.

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

confidential.

§81-10-7. 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 Professional Standards Director 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 Professional Standards. 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, pursuant to State Police operating policy and procedure. During any administrative suspension attendant to an internal investigation, any employee may be required to surrender his or her identification card, badges, State Police issued weapon(s), or 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. Complainant interviews will not be summarized or paraphrased by the investigator 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. 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 "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 Superintendent or his/his/her designee 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 from among the following dispositions:

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

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

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

4)(4) Policy Failure: The allegation is true, and although the action of the State Police or the employee was not inconsistent with State Police policy, the complainant suffered harm.

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

6)(6) Withdrawn: The complaint was withdrawn by the complainant or the complainant failed to cooperate with the investigation.

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

§81-10-8. 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 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 audio or video tape, and the tape shall be included in the case file as an exhibit. Copies of the original tape(s) or transcriptiontranscriptions, if made, 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 themself/himself. 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~~ ~~internal~~ (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 or inquiry are required to answer all questions truthfully, file written reports as ordered by the Superintendent or ~~his or her~~ his/her designee, and testify in administrative hearings. Employees are required to cooperate fully with the investigator ~~induring~~ all phases of any ~~internal or administrative~~ investigation or inquiry.

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~~ 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 or administrative~~ 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. ~~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.

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~~ the Director, 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 (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 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 his/her designee, the Unit Coordinator/Director, the investigator, and the 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 Professional Standards exclusively when multiple operators are available.

8.10. As part of an internal or administrative investigation or internal inquiry 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, 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 or inquiry 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 or inquiry and review by the Unit Coordinator and the Superintendent or his Director and the Superintendent or his/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 notified, in writing, by the Superintendent. The employee will be given a written statement detailing the charges attendant to the disciplinary action with appropriate citations to codes, policies, procedures or accepted operating practices. The employee shall also be given a written notice of the form of the disciplinary action.

8.14. When an employee is notified by the Superintendent concerning pending disciplinary action, the Superintendent 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 will be given a copy of the investigation 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 (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 to present a defense in the matter; provided, that the Superintendent receives the request within the ten day period. The employee may seek redress for any disciplinary action through the State Police employee grievance process.

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 or inquiry 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").

§81-10-9. Early Identification System.

9.1. The Early Identification System shall be maintained and administered by the Unit Professional Standards. An Internal Review Board consisting of the Deputy Superintendent, Officer in Charge of Support Services, Officer in Charge of Field Operations, Unit Coordinator Director of Professional Standards, 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 use of force incidents during a three month period shall be 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 or that the employee be subject to review by the employee's immediate supervisor to attempt to determine the reason(s)

for the employee's conduct or any circumstances that may have contributed to the conduct.

9.2. The employee's immediate supervisor shall forward a written summation of his review including referrals to the Internal Review Board within thirty days of receipt of the Board's recommendation. 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 Professional Standards 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.

§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 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, or 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.

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/his/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 or whose psychological fitness for duty is in question on administrative leave, with or without pay. 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 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 not required by 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 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 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 Professional Standards' office in locked cabinets or secure magnetic media.

§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 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.

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 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.

11.2. 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 an informal counseling session or the issuance of a written notice, depending on the severity of the situation.

11.3. 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.

11.3.1. Group I Offenses:

11.3.1.1. Unsatisfactory attendance, performance, or excessive tardiness.

11.3.1.2. 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.

11.3.1.3. Obscene or abusive language.

11.3.1.4. Inadequate or unsatisfactory job performance.

11.3.1.5. Disruptive behavior.

11.3.1.6. Conviction of a moving traffic violation while using State Police or other public purpose vehicle.

11.3.1.7. 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.

~~11.3.1.7.1. When issuing a written notice for a Group I offense, such notice should be issued as soon as is practicable. Group I written notices shall be cumulative in nature.~~

~~11.3.1.7.1.1. The Superintendent may order counseling, issue a written reprimand, or suspend for one (1) working day for a single Group I offense.~~

~~11.3.1.7.1.2. Upon the accumulation of three active Group I offenses, the Superintendent may suspend the employee without pay, but such suspension shall not exceed five (5) working days.~~

~~11.3.1.7.1.3. The Superintendent may discharge an employee who accumulates four written Group I actions. The Superintendent may demote and/or suspend the employee for up to thirty (30) working days in lieu of discharge if mitigating circumstances exist.~~

~~11.3.1.7.2. 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 working days. The Superintendent may discharge an employee who accumulates four active written notices. The Superintendent may demote or suspend the employee for up to thirty working days in lieu of discharge if mitigating circumstances exist. When issuing a disciplinary action for a Group I offense, such notice should be issued as soon as is practicable.~~

~~11.3.1.7.3. The Superintendent may order counseling, issue a verbal warning, issue a written reprimand or suspend for one working day for a single Group I offense.~~

~~11.3.1.7.4. 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.~~

11.3.2. Group II Offenses.

11.3.2.1. Failure to perform assigned work, or otherwise comply with State Police policy and procedure or administrative rules.

11.3.2.2. Violating safety rules where there is not a threat to life.

11.3.2.3. Unauthorized time away from the work area or duty post or leaving the work site without permission during working hours.

11.3.2.4. Failure to report to work without proper notice to his or her supervisor.

11.3.2.5. Refusal to work overtime.

11.3.2.6. Group II offenses include more severe acts and behavior.

Corrective action for these offenses include written notice and suspension without pay. ~~11.3.2.6.1. Employees, however, The Superintendent may not be suspended in excess of issue documented counseling, reprimand, and/or suspend up to ten (10) working days for a single Group II offense of this nature.~~

~~The Superintendent may discharge an employee who commits an additional Group II offense or if more than one Group Two offense is committed during the same incident while a previous such offense is "active".~~ ~~11.3.2.6.2. 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 such offense is "active."~~

~~The Superintendent may also discharge an employee who accumulates three "active" first group offenses and one active second group offense.~~ ~~11.3.2.6.3. The Superintendent may demote or suspend the employee for up to thirty working days in lieu of also discharge if mitigating circumstances exist an employee who accumulates three "active" Group I offenses and one "active" Group II offense.~~

~~11.3.2.7~~ ~~11.3.2.6.4. When issuing a written notice The Superintendent may suspend the employee for a Group II offense, such notice shall be issued as soon as is practicable up to sixty (60) working days and/or demote the employee in lieu of discharge if mitigating circumstances exists. The Superintendent may reprimand or reprimand and suspend up to ten days for a single Group II offense.~~

~~The Superintendent may demote or suspend the employee for up to thirty working days in lieu of discharge if mitigating circumstances exist.~~ ~~11.3.2.7.~~

~~11.3.2.8. 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.~~

~~11.3.2.8. When issuing a disciplinary action for a Group II offense, such notice should be issued as soon as practicable.~~

~~11.3.2.9. Written notices for Group II offenses shall remain "active" for three years from the date of issuance.~~

11.3.3. Group III Offenses.

11.3.3.1. Absence in excess of three working days without notifying his or her supervisor.

11.3.3.2. Use of alcohol or unlawful use or possession of controlled substances while on the job.

11.3.3.3. Reporting to work under the influence or when his or her ability is impaired by alcohol or a controlled substance.

11.3.3.4. Insubordination or serious breach of discipline.

11.3.3.5. 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.

11.3.3.6. Willfully or negligently, ~~altering, damaging or, and/or~~ defacing state records, state, ~~or property, and/or~~ employee property.

11.3.3.7. Theft or unauthorized removal of state records, state, ~~or property, and/or~~ employee property.

11.3.3.8. Gambling on state property.

11.3.3.9. Acts of physical violence or fighting (except official police actions) ~~against other employees.~~

11.3.3.10. Violating safety rules where there is a threat to life.

11.3.3.11. Sleeping during work hours.

11.3.3.12. Participating in any kind of work slowdown, sit-down, or similar concerted interference with State Police or state operations.

11.3.3.13. Unauthorized possession or use of firearms, dangerous weapons, or explosives.

11.3.3.14. Threatening or coercing employees or supervisors.

11.3.3.15. 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 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. Failure 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. Failure to take physical or mental examinations as required.

11.3.3.18. Using public office for private gain.

11.3.3.19. Engaging in criminal conduct on or off the job.

11.3.3.20. 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.

11.3.3.21. Disobedience of a lawful command of a supervisor.

11.3.3.22. 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.

11.3.3.23. Taking any action which shall impair the efficiency and/or reputation of the State Police or its employees.

11.3.3.24. 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.

11.3.3.25. Manifesting cowardice, feigning illness, or otherwise attempting to shirk official duty.

11.3.3.26. 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.

11.3.3.27. Failure to answer questions specifically directed and related to official duties or job fitness attendant to an internal or administrative investigation or inquiry.

11.3.3.28. The use of unnecessary force during an arrest/custody procedure.

11.3.3.29. Deviation from established procedures in the disposition of summons or arrest cases.

11.3.3.30. Unauthorized or misuse of any state funds, state property, or other lawfully obtained funds as determined by policy and procedure.

11.3.3.31. Theft or misappropriation of property stored in a State Police evidence room or of property destroyed pursuant to a valid court order.

11.3.3.32. Libeling or slandering another employee, either on or off-duty.

11.3.3.33. Group III offenses include acts and behavior of such a serious nature that a first occurrence would warrant the Superintendent discharging an employee.

11.3.3.33.1. The Superintendent may demote, or suspend the employee for up to ninety (90) working days without pay, in lieu of discharge for a Group III violation.

11.3.3.33.2. If the employee is not discharged due to mitigating circumstances, he or she shall be notified by the Superintendent that any subsequent written notice during the "active" life period, regardless of level, may result in discharge.

11.3.3.34. 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 working days without pay in lieu of discharge. The Superintendent may demote or suspend the employee for up to thirty working days in lieu of discharge if mitigating circumstances exist.~~ 11.3.3.35. If the employee is not discharged due to mitigating circumstances, he or she shall be notified by the Superintendent that any subsequent written notice during the "active" life period; regardless of level, may result in discharge.

~~11.3.3.36. Written notices for Group III offenses shall remain "active" for four years from the date of issuance. Disciplinary action for Group III offenses shall remain "active" for four~~

years from the date of issuance.

11.3.4. 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 rule.

~~11.3.5. 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.~~

~~11.3.6. The Superintendent reserves the right to 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 requires the Superintendent to demote or discharge the employee. In these instances, the employee shall be notified 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.~~

~~11.3.7~~11.3.6. 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 for either a Group I, II, or III offense, depending upon the specific facts and circumstances surrounding the incident.

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

JAN CASTO
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

Telephone: (304) 558-6000
Corporations: (304) 558-8000
FAX: (304) 558-0900



**STATE OF WEST VIRGINIA
SECRETARY OF STATE**

Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305-0770

WILLIAM H. HARRINGTON
Chief of Staff

JUDY COOPER
Director, Administrative Law

PENNEY BARKER
Supervisor, Corporations

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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help we can get)

SEP 22 11 31 AM '97

FILED

September 22, 1997

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: West Virginia State Police

RULE: Amendment, Series 10, WVSP Professional Standards Investigations, Employee Rights, Early Identification System, Psychological Assessment & Progressive Discipline

DATE FILED AS AN EMERGENCY RULE: August 11, 1997

DECISION NO. 12-97

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



KEN HECHLER
Secretary of State

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Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

JAN CASTO
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

Telephone: (304) 558-6000
Corporations: (304) 558-8000
FAX: (304) 558-0900



WILLIAM H. HARRINGTON
Chief of Staff

JUDY COOPER
Director, Administrative Law

PENNEY BARKER
Supervisor, Corporations

**STATE OF WEST VIRGINIA
SECRETARY OF STATE**

Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305-0770

(Plus all the volunteer
help we can get)

**EMERGENCY RULE DECISION
(ERD 12-97)**

AGENCY: West Virginia State Police
RULE: Series 2, Amendments, WVSP Professional Standards Investigations,
Employee Rights, Early Identification System, Psychological
Assessment & Progressive Discipline

FILED AS AN EMERGENCY RULE: August 11, 1997

- par. 1 The West Virginia State Police (State Police) has filed the above amendments to an existing 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].
- 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 forty-two 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 August 11, 1997 and with the LRMRC August 11, 1997.

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 in part reads:

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. The members of the division of public safety shall be permitted to carry arms and weapons and no license shall be required for such privilege.

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:

The proposed rule amends a currently existing rule. However, we are proposing filing this rule as an emergency rule. The West Virginia Supreme Court of Appeals, in State ex rel. Billy Ray C. v. Skaff 190 W.Va. 504, 438 S.E.2d 847 (1993) (Skaff I), issued a writ of mandamus ordering the West Virginia State Police to promulgate rules and regulations governing the investigation of allegations concerning State Police employee misconduct. The Court further held that "implicit with the Superintendent of the West Virginia Division of Public Safety's (State police's) mandatory duty to investigate allegations of misconduct under W. Va. Code §15-2-21, there is the duty to promulgate formal, written investigation procedures." The State Police complied with this order and submitted detailed rules governing the investigation of employee misconduct, enhanced use of force reporting, progressive employee discipline and systems designed to identify and remedy employees suffering from job related or non-job related stress. The State Police proposed that the rules embodied in this submission be promulgated as internal policies and

procedures. The Court reviewed the State Police proposals and held in State ex rel. Billy Ray C. v. Skaff, No 218944 (1995)(Skaff II), that the State Police must promulgate these proposed policies and procedures in the form of a legislative rule according to the provisions of §29A-3-1 et seq.

"An emergency exists when the promulgation of an emergency rule is necessary... (3) to prevent substantial harm to the public interest." In the Skaff case, the WV Supreme Court held that the public has "a right to file a complaint with the Superintendent" and that the Superintendent is required to investigate all complaints lodged against 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 maintains formal written procedures to ensure and safeguard both the public's right to complain and the propriety of the investigation conducted by the Superintendent.

Therefore to ensure the public's right to file complaints and the Superintendent's ability to investigate same in the most efficient manner, the State Police believes it would be in the public's best interest to file this rule as an emergency. Granting emergency status to this rule would serve to prevent substantial harm to the public by ensuring that the most up-to-date, formal, court approved procedures are in place to address complaints against police officers, especially, when the allegations involve violations of the complainant's civil rights.

par. 13 It is the determination of the Secretary of State that this proposal does not qualify under the definition of an emergency as defined in §29A-3-15(f).

par. 14 This decision shall be cited as Emergency Rule Decision 12-97 or ERD 12-97 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the West Virginia State Police, the Attorney General and the Legislative Rule Making Review Commission.



KEN HECHLER
Secretary of State

Entered _____

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

SEP 22 11 31 AM '97

FILED