

## Form #2

FILED

2005 JUN 22 P 3:24

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

Authorized Signature

**ATTACH A BRIEF SUMMARY OF YOUR PROPOSAL**

\$4.20

**BRIEF SUMMARY OF PROPOSED AMENDMENT TO TITLE 162, SERIES 2**

The West Virginia Consolidated Public Retirement Board ("Board"), as administrator of the State's several pension plans, proposes certain amendatory changes to the provisions of Title 162, Series 2, of the West Virginia Code of State Regulations. Specifically, the Board proposes an amendment that sets forth re-application guidelines for individuals who have previously applied for and been denied disability retirement benefits by the Board. The Board also proposes an amendatory revision that would require a Board selected physician to consider the award of disability benefits by the Social Security Administration in his or her examination of the member.

Other technical changes are also proposed to ensure clarity of the disability and appeal processes.

**STATEMENT OF CIRCUMSTANCES REQUIRING**  
**PROPOSAL AND PROMULGATION OF PROPOSED RULE CHANGES TO SERIES 2**  
**OF TITLE 162 OF THE WV CODE OF STATE REGULATIONS**

As statutory administrator of the State's several pension plans, the West Virginia Consolidated Public Retirement Board ("Board") proposes amendatory changes to Title 162, Series 2 of the West Virginia Code of State Regulations. Currently, the legislative rule that governs disability determinations under the Public Employees Retirement System (PERS) and the Teachers' Retirement System (TRS) do not provide re-application guidelines for individuals who have previously applied for and been denied a disability retirement benefits by the Board. This rule change is necessary to establish the process an individual may use to re-apply for disability retirement.

The Board also proposes amendatory language that would require a Board selected physician to consider the award of disability benefits by the Social Security Administration in his or her examination of the member. The current rule provisions establish a presumption, rebuttable by medical evidence or opinion to the contrary, that the member suffers from a total and probably permanent incapacity. The Board has determined that the current provisions do not comply with the statute.

Other technical changes are also proposed to ensure clarity of the disability and appeal processes.

## **FISCAL NOTE FOR PROPOSED RULES**

Rule Title: Title 162 (Series 2) Benefit Determination and Appeal

Type of Rule:   X   Legislative        Interpretive        Procedural

Agency: West Virginia Consolidated Public Retirement Board

Address: 1900 Kanawha Boulevard East  
Capitol Complex, Building 5, Room 1000  
Charleston, West Virginia 25305

Phone Number: (304) 558-3570 X 465 Email: HMandel@WVAdmin.gov

### **Fiscal Note Summary**

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

The rule is expected to eliminate certain abusive re-applications for denied disability retirements in PERS and TRS. Based on current experience, it is expected to eliminate between 60 and 80 re-applications per year. Based on average medical examination costs, it will reduce disability examination expenses by \$80,000 to \$100,000 per year.

### **Fiscal Note Detail**

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

| <b>FISCAL YEAR</b>          |                                        |                                        |                                           |
|-----------------------------|----------------------------------------|----------------------------------------|-------------------------------------------|
| Effect of Proposal          | 2005<br>Increase/Decrease<br>(use "-") | 2006<br>Increase/Decrease<br>(use "-") | Fiscal Year<br>(Upon Full Implementation) |
| 1. Estimated Total Cost     | \$ -100,000                            | \$ -100,000                            | \$ -100,000                               |
| Personal Services           |                                        |                                        |                                           |
| Current Expenses            | \$ -100,000                            | \$ -100,000                            | \$ -100,000                               |
| Repairs & Alterations       |                                        |                                        |                                           |
| Assets                      |                                        |                                        |                                           |
| Equipment                   |                                        |                                        |                                           |
| Other                       |                                        |                                        |                                           |
| 2. Estimated Total Revenues |                                        |                                        |                                           |

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

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

The rule contains certain procedural clarifications impacting the administration of appeals in both PERS and TRS. Most of these changes are technical in nature and do not directly impact the costs of administering the systems.

A change in the disability retirement application procedures implement a one year waiting period before a denied disability retirement application (following denial of final appeal) can be re-submitted for consideration for the same disability claim. A waiver of the one year period can be requested if the existing disability injury "significantly worsens" prior to one year. Currently, many applicants abuse the disability retirement application process by continually resubmitting a new disability retirement application immediately following the denial of their previously denied application. Based on a current review, about 60 to 80 annual PERS plus TRS re-applications are received prior to one year. Based on the average costs of medical examinations for disability retirement, these abusive applications add \$80,000 to \$100,000 to the administrative costs of the two systems. The one year waiting period will eliminate these costs.

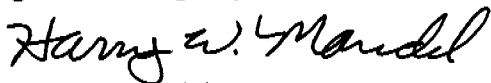
**MEMORANDUM**

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.

None.

Date: June 22, 2005

Signature of Agency Head or Authorized Representative



Harry W. Mandel

Board Actuary, MAAA, MSPA, EA

FILED

TITLE 162  
LEGISLATIVE RULE  
CONSOLIDATED PUBLIC RETIREMENT BOARD

2005 JUN 22 P 3 25

SERIES 2  
BENEFIT DETERMINATION AND APPEAL

OFFICE WEST VIRGINIA  
SECRETARY OF STATE**§162-2-1. General.**

1.1. Scope. -- ~~The scope of this Rule involves the determination of eligibility, benefits, and appeal rights to the Board not previously adopted by the Board as they relate to the several Retirement Systems. This rule addresses the processes by which a member of the retirement systems administered by the West Virginia Consolidated Public Retirement Board may apply for and be granted state disability retirement, and the manner in which appeals from the disability determinations of the Board and other appeals may be presented for administrative resolution.~~

1.2. Authority. -- W. Va. Code §5-10D-1.

1.3. Filing Date. --

1.4. Effective Date. --

**§162-2-2. Disability Application.**

2.1. An individual seeking disability retirement benefits shall apply to the Consolidated Public Retirement Board and, unless disability retirement is decided by the Governor of the State of West Virginia pursuant to statutory authority, the Board shall, as part of its initial review, decide the applicant's eligibility for disability retirement. The application shall be upon a form adopted by the Board. The employing agency shall, upon a form adopted by the Board, state the agency's position as to whether or not the disability is work related.

2.2. In the event that an individual has applied for and been denied disability retirement by the Board, such individual may not thereafter file another application for disability retirement

with the Board until the passage of one year from the date of the Board's last denial. Notwithstanding the minimum one year reapplication period, the Board may, in its sole discretion, agree to waive the minimum one year reapplication period for an individual if waiver of such reapplication period is requested by the individual on a form approved by the Board, and if the individual demonstrates to the satisfaction of the Board, through medical records, reports or other reliable evidence, that the individual has suffered a new or substantial worsening of his or her medical condition since the Board's most recent denial of his or her application for disability retirement.

**§162-2-3. Disability Medical Reports.**

3.1. The applicant and the employing agency shall furnish all current and relevant medical reports in their possession, including the report of the treating physician and/or other professional to the Board. The applicant shall obtain any additional information requested by the Board and shall complete any other forms and answer any other questions from the Board as may be appropriate. The Board shall only consider a medical report if the author of the report is a licensed practitioner of his or her profession in West Virginia or the jurisdiction in which he or she is located. At the request of the Board the applicant may be examined by an independent professional appropriate to the nature of the claimed disability. The cost of this examination shall be paid by the Board. These reports shall state a clear and understandable opinion as to whether or not the applicant is disabled as defined by then current applicable West Virginia law. The Board shall employ the faculty and staff of the Marshall University School of Medicine, the

West Virginia University School of Medicine, or the West Virginia School of Osteopathic Medicine, whenever appropriate.

### 3.2. Disability Definitions

3.2.a. For members of the Public Employees Retirement System, "totally and permanently incapacitated for employment" means a member's inability to engage in substantial gainful activity by reason of any medically determined physical or mental impairment that can be expected to result in death, or has lasted and can be expected to last for a continuous period of not less than twelve months. In order for a member of the Public Employees Retirement System to be eligible to be retired by the Board on account of the incapacity, the evidence must demonstrate that as a result of the impairment, the member's incapacity is so severe that on a probably permanent basis, he or she is not only unable to perform his or her previous state employment, but also cannot, considering his or her age, education and work experience, engage in any other kind of substantial gainful employment which exists in the state, regardless of whether: (A) the work exists in the immediate area in which the member lives; (B) a specific job vacancy exists; or (C) the member would be hired if he or she applied for work. Evidence demonstrating that the member has been awarded disability benefits by the Social Security Administration ~~establishes a presumption, rebuttable by medical evidence or opinion to the contrary, that the member suffers from a total and probably permanent incapacity under the Public Employees Retirement System.~~ shall be considered by any Board selected physician in his or her examination of the member.

3.2.b. For members of the Teachers' Retirement System, "mentally or physically incapacitated for service" means a member's inability to engage in substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death, or has lasted and can be expected to last for a continuous period of not less than twelve months. In order for a member of the

Teachers' Retirement System to be eligible to be retired by the Board on account of the incapacity, the evidence must demonstrate that the member's incapacity is so severe that he or she is likely to be permanently unable to perform the duties of the position which the member occupied immediately prior to his or her disabling illness or injury. Evidence demonstrating that the member has been awarded disability benefits by the Social Security Administration ~~establishes a presumption, rebuttable by medical evidence or opinion to the contrary, that the member suffers from a mental or physical incapacitation for service under the Teachers Retirement System.~~ shall be considered by any Board selected physician in his or her examination of the member.

3.3. The member shall cooperate fully with the Board in the scheduling of the examinations, and shall appear at the time and place for scheduled examinations requested by the Board. The Board may deny the disability application if the member fails to cooperate fully in the examination process. Further, the Board shall provide advance notice to the member that should he or she fail to appear at the time and place for scheduled examinations requested by the Board, the Board may hold the member responsible for some or all fees charged by the physician's office for that scheduled exam.

### §162-2-4. Initial Determination.

4.1. The Executive Director of the Board or his or her designee, and two staff members appointed by the Executive Director, constitute the Staff Review Committee. The Staff Review Committee shall review all reports and other evidence from all sources and shall make a recommendation consistent with the evidence, the applicable Laws and Rules and the purpose of the individual retirement system to the Board Review Committee, comprised of at least three Board members and appointed by the Board. Based on information submitted by the Board Review Committee, the full Board shall then consider the recommendations of the Board Review Committee and is free to make any finding consistent with the facts. If the applicant is not granted disability

retirement benefits, the Board shall inform the applicant in writing of its decision and the basis for the decision. The notification shall state, with specificity, the action which the applicant may take to pursue an administrative appeal of the Board's denial of the disability application.

4.2. Following Board approval of a disability retirement, an applicant shall submit all required forms to the Board within six (6) months to commence his or her disability retirement. If the applicant fails to meet this requirement, the disability award terminates and the member shall file a new application for disability retirement. All medical examination costs associated with the new application process are the sole responsibility of the member.

#### **§162-2-5. Second Review.**

5.1. If the Board does not grant disability retirement benefits upon the Board's initial review of the applicant's disability retirement application, the applicant has two options. Within sixty (60) days of receipt of the notice of denial from the Board, the applicant may request an additional examination by another appropriate medical professional chosen by the Board at the applicant's expense and thereafter submit additional medical information, or the applicant may appeal the Board's decision to a hearing officer appointed by the Board as stated in section 6 of this rule.

5.2. If additional medical information is obtained, the Staff Review Committee shall review the new information concerning disability retirement benefits. The application should include all reports and other evidence, as well as any new information. The Staff Review Committee shall make a second recommendation to the Board Review Committee either to grant or not to grant disability retirement benefits. The Board Review Committee may adopt the new recommendation of the Staff Review Committee, remand the application for further study, or make any other recommendation consistent with the facts. Based on information submitted by the Board Review Committee, the full Board shall

then consider the current recommendations and shall make any finding consistent with the facts.

#### **§162-2-6. Appeal of the Decision.**

6.1. If the Board rejects the application on two (2) occasions, the Board shall notify the applicant in writing within ten (10) days from the date of rejection of the opportunity for a hearing before an independent hearing officer appointed by the Board.

6.2. Upon receipt of the Board's second rejection of the applicant's disability retirement application, the applicant has ninety (90) days within which to file a written request for an administrative appeal before an independent hearing officer appointed by the Board. An applicant who fails to request a timely appeal waives any further administrative appeal rights.

6.3. The Board shall not hear appeals directly, but shall appoint a hearing officer who will make a complete and independent review of the disability application and then make recommendations to the Board. The hearing officer hired by the Board shall be an attorney who has a license to practice law in the State of West Virginia. The hearing officer shall conduct the hearing. Within sixty (60) days of the notice from the applicant of the desire to appeal the decision, the hearing officer shall schedule a time and place to hear the appeal and give the applicant ten (10) days written notice of the hearing. At the hearing, the applicant may represent himself or herself or may be represented by counsel or a representative and witnesses or written evidence may be submitted by both parties. The rules of evidence shall not strictly apply, and the applicant has the right to any and all relevant documents, subject to any confidentiality and disclosure limitations set forth in federal and state law, in the possession of the Consolidated Public Retirement Board. The hearing officer may subpoena documents and witnesses if the information is relevant and reasonable in order for the hearing officer to make a recommendation on the appeal. The interests of justice and fair play shall guide procedure before the hearing officer. The Board

shall retain but not transcribe a stenographic recording of the hearing which is the official record of the hearing. The hearing officer shall, within sixty (60) days of receiving all documents, prepare formal findings, stating the reasons for the findings, in clear language, and noting all medical and other evidence considered. After proper notice, the hearing officer shall present the information at the next regular meeting of the Consolidated Public Retirement Board. The staff on behalf of the Board shall notify the applicant of the date, time, and place that the appeal will be acted upon by the Board. The Board, in open session, shall then make a decision based on the recommendation of the hearing officer and accept the recommendation unless there is an abuse of discretion in finding or the finding is contrary to law. The applicant also has the right to propose a final order.

#### **§162-2-7. Other Appeals.**

7.1. Any other type of appeal other than for disability retirement benefits shall be considered by the Board's staff of the Consolidated Public Retirement Board. If the Board's staff does not believe that the request should be granted, the staff shall notify the applicant in writing stating the reasons for the denial and informing him or her of his or her right to appeal to the Board.

7.2. The applicant has ninety (90) days upon receipt of the written denial within which to file a written request for an administrative appeal. If the applicant appeals the decision of the staff, the staff shall refer the appeal to the hearing officer hired by the Board.

7.2.1. Within sixty (60) days of the notice from the applicant of the desire to appeal the denial, the hearing officer shall schedule a time and place to hear the appeal and give the applicant ten (10) days written notice of the hearing. ~~The applicant may represent himself or herself or may be represented by counsel or another representative and witnesses or written evidence may be submitted by both parties at this hearing. The rules of evidence shall not strictly apply and the applicant has the right to any and all relevant~~

~~documents in the possession of the Consolidated Public Retirement Board. The hearing officer may subpoena documents and witnesses if the information is relevant and reasonable in order for the hearing officer to arrive at a finding of fact and to make a recommendation on the appeal. The interest of justice and fair play shall guide proceedings before the hearing officer. The Board shall retain but not transcribe a stenographic recording of the hearing which is the official record of the hearing. The hearing officer shall within sixty (60) days of receiving all documents prepare formal findings stating the reasons for the findings. The hearing officer shall prepare a final recommendation in clear language, and noting all evidence considered. Thereafter, the finding and recommendation of the hearing officer shall be presented at the next regularly scheduled meeting of the Consolidated Public Retirement Board. The Board's staff shall notify the applicant of the date, time, and place that the appeal will be acted upon by the Board. The applicant also has the right to propose and submit a final order for consideration by the Board. The Board, in open session, shall then make a decision on the findings and recommendation of the hearing officer and accept the recommendation unless the Board finds that the hearing officer has abused his or her discretion in the findings, or the findings are contrary to law.~~

7.2.2. At any hearing conducted pursuant to this rule, the applicant may appear pro se, or may be represented by counsel or by a lay representative. Counsel for the Board may also appear at any hearing held pursuant to this rule. Witnesses or written evidence may be submitted by both parties at this hearing.

7.2.3. The rules of evidence shall not strictly apply and the applicant has the right to any and all relevant documents in the possession of the Consolidated Public Retirement Board.

7.2.4. The hearing officer may subpoena documents and witnesses if the information is relevant and reasonable in order for the hearing officer to arrive at a finding of fact and to make a recommendation on the appeal. The interest of

justice and fair play shall guide proceedings before the hearing officer.

7.2.5. The Board shall retain but not transcribe a stenographic recording of the hearing which is the official record of the hearing.

7.2.6. The hearing officer shall within sixty (60) days of receiving all documents and evidentiary testimony, prepare formal findings of fact and conclusions of law, in which he or she states the reasons for his or her findings, and noting with specificity the evidence considered in reaching a recommendation.

7.2.7. Following written notice and tender of the hearing officer's recommended decision to all parties, the hearing officer shall present his or her recommended decision to the full Board at its next regularly scheduled meeting. The staff of the Board shall notify the member and counsel for the Board of the date, time and place of the Board's meeting during which the appeal and the recommended decision will be presented to the Board by the hearing officer. Any party has the right to submit, in writing, a proposed final order to the hearing officer for consideration prior to presentation of the case to the Board.

7.3. The Board shall take action, in open session, on the recommendation of the hearing officer on any appeal held pursuant to this rule. Presentation of the appeal shall be made by the hearing officer, and no additional oral argument is permitted.

7.3.1. The Board shall accept the recommendation of the hearing officer unless an abuse of discretion is found to have occurred, or unless the recommendation is found to be based upon an error in facts or contrary to law. The Board's final decision shall be sent, by certified mail, to the member.

7.2.7.4. An applicant who fails to request a timely appeal waives any further administrative appeal rights.

#### **§162-2-8. Appeal Denied.**

8.1. If an appeal is denied in whole or in part by the Board pursuant to sections 6 and 7 of this rule (a final decision), an applicant may request a transcript of the appeal hearing, with the cost to be paid by the applicant. An individual aggrieved by a final decision of the Board has a right of appeal to the Circuit Court of Kanawha County pursuant to W. Va. Code §29A-5-4.

#### **§162-2-9. Annual Statement.**

9.1. The Board may require a disability benefit recipient awarded a disability retirement under the provisions of this rule to file an annual statement of earnings and any other financial information required by the Board. If a disability recipient refuses to file the statement or financial information as requested by the Board, the Board shall suspend the disability benefit until the statement or financial information are filed. If the refusal continues for sixty (60) days, the Board shall terminate the recipient's right to the disability benefit.

#### **§162-2-10. Errors.**

10.1. Each level of review is presumed to cure all errors in procedure of any prior level, and no right to remand to cure procedural errors exists, but each level of review shall make an independent determination upon the facts.



**Board Members**

Governor Joe Manchin III  
Auditor Glen B. Gainer III, Vice Chairman  
Treasurer John D. Perdue  
EIS Commissioner Robert W. Ferguson, Jr.

**State of West Virginia  
Consolidated Public Retirement Board**

Capitol Complex, Building 5, Suite 1000  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305-0720  
Telephone: 304-558-3570 or 800-654-4406  
Fax: 304-558-6337  
email: CPRB@wvretirement.com  
www.wvretirement.com

**Board Members**

David L. Wyant, Chairman  
David Anderson  
F. Douglas Beasley  
E. Gene Davis  
Carl A. Guthrie  
William B. McGinley  
D. Todd Murray  
Janet F. Wilson

June 22, 2005

Administrative Law Division  
WV Secretary of State  
Building 1, Suite 157K  
State Capitol Complex  
Charleston, West Virginia 25305-0771

Attention: Judy Cooper

Re: West Virginia Consolidated Public Retirement Board  
2005 Proposed Amendments to Title 162  
-Series 2 Benefit Determination and Appeal  
-Series 4 Teachers' Defined Benefit Plan  
-Series 6 Procedural Rules of the WVCPRB of Representatives to the WVIMB  
-Series 8 Service Credit for Accrued and Unused Sick and Annual Leave  
-Series 9 West Virginia State Police  
-Series 10 Deputy Sheriff Retirement System

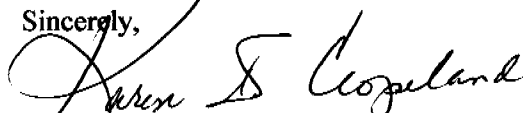
Dear Ms. Cooper:

Enclosed please find an original and two copies of proposed amendments to Title 162, along with the "Notice of a Comment Period on a Proposed Rule" and the other forms and documents which I understand are required for the filing of proposed rules.

It is my understanding that one copy of the rule will be forwarded, by your office, to the Legislative Rule Making Committee. Please date stamp the remaining copy and return to CPRB.

Thank you for your assistance and cooperation in this matter. Should you have any questions, please feel free to contact me.

Sincerely,

  
Karen S. Copeland  
Contributions Manager

**Enclosures**

C: Terasa Miller  
Harry Mandel  
Anne Lambright  
Donna Lipscomb