

Form #7

Effective Date

Authorized Signature _____

\$4.80

EMERGENCY RULE QUESTIONNAIRE

DATE: May 18, 2005

TO: **LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

FROM: **Terasa Miller, Acting Executive Director
West Virginia Consolidated Public Retirement Board
State Capitol Complex
Building 5, Room 1000
1900 Kanawha Boulevard, East
Charleston, WV 25305
558-3570 x 405**

EMERGENCY RULE TITLE: Title 162, Series 9; West Virginia State Police Retirement Disability Determination & Appeal Process

1. Date of filing: May 18, 2005
2. Statutory authority for promulgating emergency rule: W. Va. Code § 15-2A-5(b)
3. Date of filing of proposed legislative rule: May 18, 2005
4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule? The emergency rule adopts new language to a current legislative rule.
5. Has the same or similar emergency rule previously been filed and expired?
No
6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the **immediate** preservation of public peace, health, safety or welfare.
HB 2984, passed during the 2005 regular session and effective from passage, changed the provision of the State Police Retirement System (Plan B) in respect to the amount of the employer contribution to the Plan and the methodology under which the amount of the employer contribution is set. This emergency rule is necessary to establish the employer contribution rate to the Plan effective after the passage of HB 2984. The contribution rate is necessary to insure the continued funding of the State Police Retirement System and maintain the Plan on an actuarially sound funding basis.
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.

N/A

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

Without the emergency rule, the funding of the State Police Retirement System (Plan B) by the employer will cease following passage of HB 2984. The public interest will be subject to substantial harm in that the Plan's unfunded actuarial accrued liabilities will increase if the employer contributions are not re-established and funding resumed at the level called for in the emergency rule.

BRIEF SUMMARY OF PROPOSED EMERGENCY AMENDMENT TO
TITLE 162, SERIES 9

The West Virginia Consolidated Public Retirement Board (Board), as administrator of the West Virginia State Police Retirement System, proposes an emergency amendatory revision to Title 162, Series 9, of the West Virginia Code of State Regulations. Specifically, the Board proposes new language to reestablish the employer contribution rate to the West Virginia State Police Retirement System after the passage of HB 2984 during the 2005 regular session.

STATEMENT OF CIRCUMSTANCES REQUIRING
PROPOSAL AND PROMULGATION OF A PROPOSED EMERGENCY RULE CHANGE
TO SERIES 9 OF TITLE 162 OF THE WV CODE OF STATE REGULATIONS

House Bill 2984, passed during the 2005 regular session and effective from passage, changed the provision of the State Police Retirement System (Plan B) in respect to the amount of the employer contribution to the Plan and the methodology under which the amount of the employer contribution is set. This emergency rule is necessary to establish the employer contribution rate to the Plan effective after the passage of HB 2984. The contribution rate is necessary to insure the continued funding of the State Police Retirement System and maintain the Plan on an actuarially sound funding basis.

Without the emergency rule, the funding of the State Police Retirement System (Plan B) by the employer will cease following passage of HB 2984. The public interest will be subject to substantial harm in that the Plan's unfunded actuarial accrued liabilities will increase if the employer contributions are not re-established and funding resumed at the level called for in the emergency rule.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Emergency Rule Plan B

Type of Rule: ☒ Legislative ☐ Interpretive ☐ Procedural

Agency: West Virginia Consolidated Public Retirement Board

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

Phone Number: (304) 558-3570x465; 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.

This Rule will have the impact of maintaining the current employer costs for the West Virginia State Police Retirement System (Plan B) at its previous level.

Fiscal Note Detail

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

FISCAL YEAR			
Effect of Proposal	2005 Increase/Decrease (use "--")	2006 Increase/Decrease (use "--")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0	0	0
Personal Services			
Current Expenses			
Repairs & Alterations			
Assets			
Equipment			
Other			
2. Estimated Total Revenues			

Rule Title: Emergency Rule Plan B

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

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

HB 2984 which was passed in the 2005 Regular Session modified the method by which the State Police employer contribution rate to the Plan is set. It deleted the prior set employer contribution rate of 12% of base payroll and implemented an employer contribution rate as set by the Consolidated Public Retirement Board (CPRB) through a legislative rule. The contribution rate to be set by the CPRB should be sufficient to meet the funding requirements for the Plan.

The July 1, 2004 Actuarial Valuation for Plan B showed that the prior employer contribution rate of 12% of base pay was sufficient to meet or exceed the Plan's funding requirements. A continuation of the 12% rate is sufficient to meet the Plan's funding requirement and does not impact the State Police budget for the Plan for either the remainder of the FY 2005 nor for FY 2006 as included in the budget just passed during the legislative session.

It is expected that the CPRB will review the sufficiency of the contribution rate annually and shall modify the rate when appropriate based on the annual actuarial valuation for the Plan.

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 are noted.

Date: May 12, 2005

Signature of Authorized Representative



Harry W. Mandel

Board Actuary, MAAA, EA

FILED

TITLE 162
LEGISLATIVE RULE
CONSOLIDATED PUBLIC RETIREMENT BOARD

2005 MAY 18 P 3:18

SERIES 9
WEST VIRGINIA STATE POLICE
~~DISABILITY DETERMINATION & APPEAL PROCESS~~

OFFICE WEST VIRGINIA
SECRETARY OF STATE**§162-9-1. General.**

1.1. Scope. -- This Rule addresses ~~and outlines the general administrative procedures~~, the processes by which a member of the retirement plans for the West Virginia State Police may apply for and be granted state disability retirement, and the manner in which appeals from the disability determinations of the Consolidated Public Retirement Board may be presented for administrative resolution.

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

1.3. Filing Date. --

1.4. Effective Date. --

§162-9-2. Definitions.

2.1. "Member" refers to a sworn employee of the West Virginia State Police who is a participant in any of the Agency's retirement systems, and who has not yet entered retirement status.

2.2. "Active employment" refers to employment of a member by the West Virginia State Police during which compensation for services is actually received, other than through the receipt of regular or disability retirement benefits.

2.3. "Agency" refers to the West Virginia State Police.

2.4. "Board" refers to the West Virginia Consolidated Public Retirement Board.

2.5. "Retirement systems" refers to the West Virginia State Police Retirement Fund, or the

West Virginia State Police Death, Disability and Retirement Fund."

2.6. "Essential duties of a law enforcement officer" refers to those duties which state troopers must be capable of performing in order to be capable of continuing in active employment with the West Virginia State Police, as specified in policies set forth by the Agency.

2.7. "Vocational consultant" refers to consultants who possess the requisite training, skills, and professional certification to accurately evaluate a member's ability to engage in various types of substantial gainful activity, including but not limited to the member's ability to perform the essential duties of a law enforcement officer.

§162-9-3. Disability Applications and Petitions; Eligibility.

3.1. A member of the West Virginia State Police, or a person acting with legal authority on behalf of the member, who remains in active employment, may file a disability retirement application with the Consolidated Public Retirement Board whenever the member has reason to believe that he or she is no longer physically or mentally capable of performing the essential duties of a law enforcement officer. Application shall be made on forms approved by the Board, and the member shall cause a copy of the application to be served upon the Agency at the time of its filing with the Board.

3.2. If the Agency has reason to believe that a member is no longer physically or mentally capable of performing the essential duties of a law enforcement officer, and if the member has failed or refused to file an application for disability

retirement, the Agency may file a petition with the Board seeking the disability retirement of the member. The Agency's petition shall be made on forms approved by the Board, and a copy of the petition shall be served by the Agency upon the member at the time of the filing of the petition with the Board.

3.3. Once a member has commenced to receive a retirement benefit from the retirement systems for the Agency, the retired member is no longer eligible to apply for disability retirement benefits, unless he or she proves to the Board, by clear and convincing evidence, that his or her alleged disability is a direct and proximate result of an injury or illness sustained in the line of duty. If more than five years have passed since the time a member has commenced regular retirement on the basis of age and service, there shall be a rebuttable presumption that the retired member's illness or injury is not directly and proximately related to his or her duties as a state trooper. For members who have left the active employment of the Agency and who have elected to defer their retirement, the five year period referred to in this rule begins to run on the date the member leaves active employment.

3.4. Notwithstanding any provision of this rule to the contrary, a member who has applied for and commenced to receive a partial duty related disability award is permitted to apply to the Board for a total disability award, if the member believes that his or her condition has deteriorated to the point that he or she no longer retains the mental or physical ability to engage in any gainful employment.

§162-9-4. Medical and Factual Information.

4.1. Any member whose mental or physical fitness to perform the essential duties of a law enforcement officer is at issue in any application for state disability retirement shall complete any and all forms, authorizations or releases requested by the Board for the processing of the member's alleged disability application, and shall cooperate fully in the gathering of relevant medical and factual information and records that are

determined necessary by the Board for its consideration of the application or petition for disability retirement.

4.2. Following the filing of an application for disability retirement, the member shall, upon request by the Board, provide the Board with copies of all current and past medical records, reports and information which are relevant to the Board's determination of the member's physical or mental capacity to perform the essential duties of a law enforcement officer. Failure of the applicant to provide relevant records and reports as requested by the Board, or failure to cooperate fully in the disability determination process, constitutes just cause for the Board's denial of the member's application.

4.3. Following the filing of an application for disability retirement, the Agency shall provide to the Board a copy of any fitness for duty standards which relate to the nature of the member's alleged disability. Unless the fitness for duty standards which relate to the nature of the member's alleged disability specify that corrective devices (including but not limited to hearing aids or eyeglasses) may be used to satisfy the relevant fitness standard, the Board shall presume for the purpose of its determination of the member's disability status that corrective devices may not be used to meet the standards. This presumption is rebuttable upon the presentation of clear and convincing evidence to the contrary by the member or the Agency.

4.4. The Agency shall provide the Board with any and all relevant medical and factual records and reports in its possession regarding the nature of the member's claimed disability, the duty relatedness of the member's claimed disability, and the member's fitness to perform the essential duties of a law enforcement officer as specified in policies adopted by the Agency. The Agency shall also complete such forms or reports as are considered necessary by the Board in its determination of the member's alleged disability.

§162-9-5. Disability Examinations.

5.1. Any member whose mental or physical fitness to perform the essential duties of a law enforcement officer is at issue in any application or petition for state disability retirement shall, upon request of the Board, submit to any mental or physical examinations determined necessary by the Board, in its discretion, for proper disposition of the alleged disability application or petition. The cost of the examinations, when requested by the Board, shall be at Board expense. The member shall cooperate fully with the Board in the scheduling of the examinations, and shall appear at such time and place for scheduled examinations as requested by the Board. Failure to cooperate fully in the examination process may result, in the Board's discretion, in the denial of the disability application. 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, he or she may be held responsible for some or all fees charged by the physician's office for that scheduled exam.

5.2. Any physician who performs examinations under this rule for the purpose of determining a member's fitness to perform the essential duties of a law enforcement officer shall have access to and may review any and all medical and factual records, reports or other information pertaining to the member which have been gathered by the Board pursuant to this rule, and which are relevant to the physician's full and fair evaluation of the member's disability status.

5.3. At the conclusion of any physical or mental examination of a member under this rule, the examining physician or physicians shall furnish to the Board a report which states the physician's findings and opinions regarding the nature, extent and cause of the member's allegedly disabling injury or illness. The examining physician's report shall also state his or her opinion as to whether or not the member's disability, if any, is likely to be permanent.

5.4. In the Board's discretion, the report of the examining physician and all other relevant

evidence pertaining to the allegedly disabling injury, as well as information concerning the essential duties of a law enforcement officer, may thereafter be submitted for review to a vocational consultant who has been selected by the Board. In those cases, the vocational consultant shall then provide the Board with a written opinion as to whether or not the member is mentally and physically capable of performing the essential duties of a law enforcement officer and, if not, whether or not the member retains the mental and physical capability of performing other types of gainful employment.

5.5. Subject to any confidentiality and disclosure limitations set forth in state law, the member and the Agency shall, upon request, be provided with a copy of the examining physician and vocational consultant reports which have been generated in the disability evaluation process under this rule.

5.6. The Agency may also require a member who intends to or who has applied for a state disability retirement to submit to an examination by a physician of its selection, either prior to or following the member's examination by a physician selected by the Board. The report of that examination shall be provided to the Board for consideration in the disability determination process, and a copy of the report shall be made available to the member upon written request to the Agency. Failure of the member to submit to an examination by a physician selected by the Agency may, in the Board's discretion, result in the denial of the disability retirement application.

5.7. The member or the Agency may pursue review by vocational consultants of their choosing following receipt of the report of the Board selected vocational consultant. If a supplemental vocational review is requested, the cost of the review shall be at the expense of the requesting party.

§162-9-6. Initial Determination.

6.1. 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 for disposition of the disability application or petition, consistent with this rule and laws of the member's retirement system, to the Board's Review Committee. A preponderance of the evidence standard shall be applied in the evaluation of the evidence of record.

6.2. The Board's Review Committee shall be comprised of at least three Board members who have been appointed by the Board. The Board Review Committee shall consider the recommendations of the Staff Review Committee as well as all reports and other evidence relating to the disability application or petition. The Board Review Committee shall thereafter present its findings and position to the full Board as to whether the member is physically or mentally incapacitated from performing the essential duties of a law enforcement officer, and should be retired on the basis of the incapacity. A preponderance of the evidence standard shall apply in the evaluation of the evidence of record.

6.3. If the member's application, or the petition of the Agency as provided in subdivision 9.3.2 of this rule, is not granted by the full Board, the Board shall notify both the member and the Agency in writing of its decision and the basis for the decision. The notification shall state, with specificity, what action may be taken by the member or the Agency to pursue an administrative appeal of the Board's denial of the disability application or petition.

§162-9-7. Denial of Application; Supplemental Examination Option.

7.1. If the Board does not grant the member a disability retirement upon initial review, either the member or the Agency may, within twenty (20) days of receipt of the notice of denial from the Board, request that the member be re-examined by another physician of the Board's selection, at the expense of the requesting party.

7.2. If a second examination is requested by either the member or the Agency, the physician performing the examination shall, upon completion of the examination, furnish the Board with a written report stating his or her opinion regarding the nature, extent and cause of the member's alleged disabling injury or illness, and an opinion as to whether or not the disability is likely to be permanent. Subject to any confidentiality and disclosure limitations set forth in state law, copies of the supplemental physician's report shall be furnished by the Board to the member or the Agency, upon written request.

7.3. If a vocational consultant was used during the initial review, the supplemental physician's report shall thereafter be submitted by the staff of the Board to the vocational consultant for a second review and supplemental report.

7.4. The reports of the examining physician, the vocational consultant, and all of the other relevant evidence of record, shall thereafter be reviewed by the Staff Review Committee. The Staff Review Committee shall, following review of all reports and other evidence from all sources, make a recommendation consistent with the evidence and applicable law to the Board Review Committee. The Board Review Committee shall thereafter consider the Staff Review Committee's recommendation, as well as the entirety of the other evidence of record, and shall make a recommendation to the full Board as to whether or not the member should be retired on the basis of disability.

7.5. The Board shall notify the member and the Agency of its determination following the supplemental examination process, and shall state, with specificity, what action may be taken to pursue an administrative appeal of the Board's decision.

§162-9-8. Decisions on Initial Review; Appeals by Agency or Member.

8.1. If the Board, upon review of an application or petition for disability retirement,

determines that the member is mentally or physically incapable of performing the essential duties of a law enforcement officer and should therefore be retired, either the member or the Agency who may be aggrieved by the determination may, within twenty (20) days after receipt of the notice of favorable decision from the Board, request an appeal of the Board's decision to a hearing officer appointed by the Board as stated in section 9 of this rule.

8.2. If the Board, upon review of an application or petition for disability retirement, determines that the member is not mentally or physically incapable of performing the essential duties of a law enforcement officer and should therefore not be retired, either the member or the agency who may be aggrieved by such determination may, within twenty (20) days after receipt of the notice of the Board's decision, request an appeal of the Board's decision to a hearing officer appointed by the Board as stated in section 9 of this rule.

§162-9-9. Processes for Appeal of Board Decisions.

9.1. The Board shall not hear appeals directly, but shall appoint a hearing officer who shall make a complete and independent review of the disability application or petition, and make recommendations to the Board. The hearing officer who is retained by the Board for the hearings shall be an attorney who is licensed to practice law in the State of West Virginia.

9.2. The hearing officer shall, within sixty (60) days of the Board's receipt of notice of an appeal request, schedule a time and place for the appeal to be heard. All parties to the appeal shall be given at least ten (10) days written notice of the hearing.

9.3. 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. The Agency has the right to appear by a lay designee, or by counsel. Counsel for the Board may also appear at any hearing held

pursuant to this rule.

9.4. The rules of evidence shall not strictly apply at any administrative hearing held pursuant to this rule, and the interests of justice and fair play shall guide the proceedings.

9.5. All parties to the appeal are, subject to any confidentiality or disclosure limitations of state law, entitled to copies of any and all relevant medical and factual documents and reports which are in the possession of the Board, and which were previously considered by the Board in its prior decision on the disability application or petition.

9.6. The hearing officer may subpoena documents and witnesses if the information sought is relevant and necessary to a proper analysis of the disability claim and the formulation of his or her recommendation to the Board.

9.7. The Board shall cause a stenographic recording of the administrative hearing to be made which shall constitute the official record of the hearing. The recording shall not be transcribed except upon request of any party, at the requesting party's expense.

9.8. The hearing officer shall, within sixty (60) days of his or her receipt of any and all documents and evidentiary testimony, prepare formal findings of fact and conclusions of law, stating therein the reasons for his or her findings, and noting with specificity the medical and other evidence considered in reaching a recommendation.

9.9. 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, the Agency 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.

9.10. 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.

9.11. 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 and to the Agency.

§162-9-10. Appeal Denied.

10.1. If an appeal is denied in whole or in part by final decision of the Board pursuant to this rule, the aggrieved party may request a transcript of the administrative hearing, with cost of the preparation of the transcript being paid by the requesting party. An individual aggrieved by a final decision of the Board may pursue a judicial appeal to the Circuit Court of Kanawha County within the time limits set forth in Chapter 29A of the W. Va. code.

§162-9-11. Annual Statement.

11.1. The Board may require a disability benefit recipient awarded a total 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 is filed. If the refusal continues for sixty (60) days, the Board shall terminate the recipient's right to the disability benefit.

§162-9-12. WV State Police Retirement System Employer Contributions.

12.1 The Agency shall contribute twelve percent (12%) of the monthly salary of each member of the West Virginia State Police Retirement System. The sums are due out of the annual appropriation for the Agency. Each remittance shall be accompanied by a detailed summary of the sums withheld from the compensation of each member and the credited service each employee was entitled to for that month.

§162-9-12.13. Errors.

~~12.1~~ 13.1 Each level of review is presumed to cure all errors in procedure of any prior level, and no right to remand in order to cure procedural errors exists. An independent determination of the facts shall, however, be made at each level of administrative review.



Board Members

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

Executive Director

Joseph J. Jankowski, 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

May 18, 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
Proposed Emergency Amendments to Title 162, Series 9
WV State Police Disability Determination & Appeal Process

Dear Ms. Cooper:

Enclosed is an original and fifteen copies of the documents which I understand must be filed with the Secretary of State in conjunction with the Board's proposal of emergency amendments to the Title 162, Series 9.

It is my understanding that fourteen copies of the rule shall be forwarded to the Legislative Rule Making Committee. Please date stamp the remaining copy and return to me.

Thank you for your assistance and cooperation in this matter. Should you have any questions, please let me know.

Sincerely,

Karen S. Copeland
Contributions Manager

Enclosures

c: Terasa Miller
Donna Lipscomb

OFFICE WEST VIRGINIA
SECRETARY OF STATE

2005 MAY 18 P 3:17

FILED