

Form #3

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~~COMMONWEALTH OF VIRGINIA~~
~~SECRETARY OF STATE~~

SCANNED



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

Board Members

Governor Bob Wise
Auditor Glen B. Gainer III, Vice Chairman
Treasurer John D. Perdue
Cabinet Secretary Gregory A. Burton

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.state.wv.us/admin/cprb

Board Members

David L. Wyant, Chairman
F. Douglas Beasley
E. Gene Davis
Carl A. Guthrie
Rebecca A. Jones
William B. McGinley
Rodney A. Miller
Mary Lou Munoz
Jerry A. Weaver
Janet F. Wilson

July 23, 2002

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

Attention: Judy Cooper

Re: Proposed Rule Amendments
Title 162, Series 2, 4, 5, and Proposed New Series 9
WV Consolidated Public Retirement Board

Dear Ms. Cooper:

I am enclosing herewith one set of the documents which I understand must be filed with the Secretary of State by the West Virginia Consolidated Public Retirement Board in conjunction with the Board's proposal of amendments to the Title 162, Series 2, 4, and 5, and its proposal of a new Series 9 set of legislative rules. I am also enclosing fifteen (15) copies of the same for the Legislative Rule Making Review Committee.

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

Sincerely,

Karen S. Copeland
Asst. Benefits Manager

Enclosures

c: J. Michael Adkins
Teresa Robertson
Susan B. Saxe

OFFICE OF THE
SECRETARY OF STATE

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QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: July 23, 2002

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

FROM: **West Virginia Consolidated Public Retirement Board
State Capitol Complex
Building 5, Room 1000
1900 Kanawha Boulevard, East
Charleston, WV 25305**

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

1. Authorizing statute(s) citation: W. Va. Code § 5-10D-1

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
April 19, 2002

b. What other notice, including advertising, did you give of the hearing?

Written notice, along with a copy of the proposed rule amendments, was forwarded to the President of the WV Troopers Association, the Superintendent of the West Virginia State Police, the President of the Retired Members Association and E. Norman Henry for review and circulation to their potentially interested parties. Copies were also provided to the Chairs of the House and Senate Committees on Pension and Retirements.

c. Date of Public Hearing(s) *or* Public Comment Period ended: June 14, 2002

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached _____ No comments received X

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 23, 2002

f. Name, title, address and phone/fax/e-mail numbers of agency person(s) to

receive all *written correspondence* regarding this rule: (Please type)

J. Michael Adkins, Interim Co-Executive Director
WV Consolidated Public Retirement Board
State Capitol Complex
Building 5, Room 1000
1900 Kanawha Boulevard, East
Charleston, WV 25305
(304) 558-3570
(304) 558-1395 (fax)
madkins@gwmail.state.wv.us

- g. **IF DIFFERENT FROM ITEM 'f', please give Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

Karen S. Copeland, Asst. Benefits Manager
WV Consolidated Public Retirement Board
State Capitol Complex
Building 5, Room 1000
1900 Kanawha Boulevard, East
Charleston, WV 25305
(304) 558-3570
(304) 558-1395 (fax)
kcopeland@gwmail.state.wv.us

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:
- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.
 - b. Date of hearing or comment period:
 - c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?
 - d. Attach findings and determinations and reasons:

State of West Virginia
Consolidated Public Retirement Board

Capitol Complex, Building 5, Room 1000, Charleston, West Virginia 25305-0720
Telephone: 304-558-3570 or 800-654-4406 Fax: 304-558-6337

BRIEF SUMMARY OF PROPOSED AMENDMENT TO TITLE 162, SERIES 9

The West Virginia Consolidated Public Retirement Board ("Board"), as administrator of the State's several pension plans, proposes an amendatory addition to Title 162 to set forth a specific Rule to address and outline 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.

State of West Virginia
Consolidated Public Retirement Board

Capitol Complex, Building 5, Room 1000, Charleston, West Virginia 25305-0720
Telephone: 304-558-3570 or 800-654-4406 Fax: 304-558-6337

STATEMENT OF CIRCUMSTANCES REQUIRING
PROPOSAL AND PROMULGATION OF PROPOSED RULES - SERIES 9
OF TITLE 162 OF THE WV CODE OF STATE REGULATIONS

As statutory administrator of the West Virginia State Police pension plans, the West Virginia Consolidated Public Retirement Board has determined that the legislative rules which currently exist and which are followed for disability determinations in the other state pension plans do not adequately address the unique features of the troopers plans. Therefore, this rule is designed to set forth specific procedures to be followed whenever an application is made for a state trooper to be retired from active service on the basis of disability.

APPENDIX B
FISCAL NOTE FOR PROPOSED RULES

Rule Title: Title 162 (Series 9) Disability Determination & Appeal Process

Type of Rule: X Legislative Interpretive Procedural

Agency: The State of West Virginia Consolidated Public Retirement Board

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

1. Effect of Proposed rule:

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST		Negligible			
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERATIONS					
EQUIPMENT					
OTHER					

2. Explanation of Above Estimates:

The rule changes will simplify and speed administration of disability retirement applications and appeals which will result in a slight improvement in efficiency. There are no benefit related costs associated with the rule changes impacting the Plan.

3. Objectives of These Rules:

To implement set procedures and deadlines which will simplify and speed the administrative review, approval and appeals processes for disability retirement claims.

Rule Title: Title 162 (Series 9) Disability Determination & Appeal Process

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

None. Improvement in processing efficiency.

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

None.

C. Economic Impact on Citizens/Public at Large:

None.

Date: April 12, 2002

Signature of Agency Head and/or Authorized Representative:

J. Michael Adkins 4/12/02
Michael Adkins, Acting Executive Director

Harry W. Mandel
Harry W. Mandel, MAAA

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162CSR9

**TITLE 162
LEGISLATIVE RULES**

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

§162-9-1. General.

1.1. Scope. – This Rule addresses and outlines 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" when used in this rule 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" when used in this rule 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" when used in this rule refers to the West Virginia State Police.

2.4. "Board" when used in this rule refers to the West Virginia Consolidated Public Retirement Board.

2.5. "Retirement systems" when used in this rule 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" when used in this rule 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" when used in this rule 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 disability retirement application may be filed with the Consolidated Public Retirement Board by a member of the West Virginia State Police, or by a person acting with legal authority on behalf of such member, who remains in active employment, 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 such 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 any such 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 shall commence to run on the date the member leaves active employment.

3.4. Notwithstanding any provision of these rules 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 must complete any and all forms, authorizations or releases requested by the Board for the processing of the member's alleged disability application, and must cooperate fully in the gathering of relevant medical and factual information and records as are deemed 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, will constitute 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 such 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 deemed 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 such mental or physical examinations as are deemed necessary by the Board, in its discretion, for proper disposition of the alleged disability application or petition.

The cost of such examinations, when requested by the Board, shall be at Board expense. The member shall cooperate fully with the Board in the scheduling of any such 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.

5.2. Any physician who performs examinations under these rules 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 these rules, 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 these rules, 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 to a vocational consultant who has been selected by the Board for review. In such 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 these rules.

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 any such examination shall be provided to the Board for consideration in the disability determination process, and a copy of the report shall be made

available, upon written request to the Agency, to the member. 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 such supplemental vocational review is requested, the cost of such review shall be at the expense of the requesting party.

§162-9-6. Initial Determination.

6.1. The Executive Director of the Board, and two staff members appointed by the Executive Director, shall 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 these rules 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 such 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 section 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 such 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 such 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 such 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. The supplemental physician's report will 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, will thereafter be reviewed by the Staff Review Committee. The Staff Review Committee will, 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 will thereafter consider the Staff Review Committee's recommendation, as well as the entirety of the other evidence of record, and will 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 be retired in consequence thereof, either the member or the Agency who may be aggrieved by such 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 §162-9-9 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 not be retired in consequence thereof, either the member or the agency who may be aggrieved by such 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 §162-9-9 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 such hearings shall be an attorney who is licenced 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 these rules, 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 these rules.

9.4. The rules of evidence shall not strictly apply at any administrative hearing held pursuant to these rules, 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 these rules. 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 such 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 state code.

§162-9-11. Errors.

11.1. 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.