

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

Form #4

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WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: WV Consolidated Public Retirement Board TITLE NUMBER: 162

CITE AUTHORITY: W. Va. Code § 5-10D-1

AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: Series 9

TITLE OF RULE BEING PROPOSED: West Virginia State Police Disability Determination & Appeal Process

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


Authorized Signature

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**TITLE 162
LEGISLATIVE RULES**

WEST VIRGINIA
SECRETARY OF STATE

**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” 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.

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, 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 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. 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 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 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. 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.