

**WEST VIRGINIA
SECRETARY OF STATE
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ADMINISTRATIVE LAW DIVISION**

Form #4

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: Consolidated Public Retirement Board TITLE NUMBER: 162

CITE AUTHORITY: W. Va. Code §5-10D-1

AMENDMENT TO AN EXISTING RULE: YES X NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 10

TITLE OF RULE BEING AMENDED: Deputy Sheriff Retirement System

IF NO, SERIES NUMBER OF RULE BEING PROPOSED:

TITLE OF RULE BEING PROPOSED:

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.

Chris Weenam LaFy
Executive Director

[Signature]
Authorized Signature

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**TITLE 162
LEGISLATIVE RULE
CONSOLIDATED PUBLIC RETIREMENT BOARD**

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**SERIES 10
DEPUTY SHERIFF RETIREMENT SYSTEM**

§162-10-1. General.

1.1. Scope. -- This rule addresses general administrative criteria, outlines the processes by which a member of the Deputy Sheriff Retirement System 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 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. --

§162-10-2. Definitions.

2.1. "Board" means the West Virginia Consolidated Public Retirement Board.

2.2. "Essential duties of a law enforcement officer" means those duties which deputy sheriffs must be capable of performing in order to be eligible to continue in covered employment.

2.3. "Sheriff" means the sheriff of the county in which the deputy sheriff is employed in covered employment.

2.4. "Substantial gainful employment" or "gainful employment" means employment in which an individual may earn up to an amount that is determined by the United States Social Security Administration as substantial gainful activity and still receive total disability benefits.

2.5. "Vocational consultant" means 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.

§162-10-3. Disability Applications and Petitions; Eligibility.

3.1. A member of the Deputy Sheriff Retirement System, or a person acting with legal authority on behalf of the member, who remains in covered employment, may file a disability retirement application with the 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 Sheriff at the time of its filing with the Board.

3.2. If the Sheriff 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 Sheriff may file a petition with the Board seeking the disability retirement of the member. The Sheriff's petition shall be made on forms approved by the Board, and a copy of the petition shall be served by the Sheriff upon the member at the time of the filing of the petition with the Board. The cost of the treating physician's examination, when requested by the Sheriff, shall be at the Sheriff's expense. 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 as requested by the Board. The

Board shall provide advance notice to the member that if he or she fails 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.

3.3. Once a member has commenced to receive a retirement benefit from the Deputy Sheriff Retirement System, 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 deputy sheriff. For members who have left covered employment 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 the active performance of the duties required of a deputy sheriff.

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 may apply to the Board for a total duty 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.

3.5. Notwithstanding any provision of this rule to the contrary, a member who has applied for and commenced to receive a partial non-duty related disability award may apply to the Board for a total non-duty 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.

3.6. In the event that an individual has

applied for and been denied disability retirement by the Board, that 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 the reapplication period is requested by the individual on a form approved by the Board. The individual shall demonstrate 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.

§162-10-4. 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, including the report of the treating physician and/or other professional, 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 Sheriff 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 Sheriff.

4.4. The Sheriff shall provide the Board with any and all relevant medical and factual records and reports in his or her 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 Sheriff. The Sheriff shall also complete the forms or reports that are considered necessary by the Board in its determination of the member's alleged disability.

§162-10-5. 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 the Board's expense. 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 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 if he or

she fails 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. 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.

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 Sheriff shall, upon request, be provided with a copy of the examining physician and vocational consultant's reports which have been generated in the disability evaluation process under this rule.

5.6. The Sheriff 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 his or her selection, either prior to or following the member's examination by a physician selected by the Board. The cost of the examination, when requested by the Sheriff, shall be at the Sheriff's expense. 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 Sheriff. Failure of the member to submit to an examination by a physician selected by the Sheriff may, in the Board's discretion, result in the denial of the disability retirement application.

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

§162-10-6. 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 applies 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 applies in the evaluation of the evidence of record.

6.3. If the member's application, or the petition of the Sheriff as provided in subdivision 10.3.2. of this rule, is not granted by the full Board, the Board shall notify both the member and the Sheriff 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 Sheriff to pursue an administrative appeal of the Board's denial of the disability application or petition.

§162-10-7. 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 Sheriff 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 Sheriff, 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 federal or state law, copies of the supplemental physician's report shall be furnished by the Board to the member or the Sheriff, 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 Sheriff 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.

§162-10-8. Decisions on Initial Review; Appeals by Sheriff 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 Sheriff 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 Sheriff who may be aggrieved by the 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.

§162-10-9. 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 will receive 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 Sheriff 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 federal or 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 constitutes 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, in which he or she states 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 Sheriff 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 Sheriff.

§162-10-10. Other Appeals.

10.1. The Board's staff shall consider any other type of appeal other than for disability retirement benefits. 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.

10.2. 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.

10.2.1. 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.

10.2.2. 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.

10.2.3. 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 Board.

10.2.4. 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.

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

10.2.6. 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.

10.2.7. 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.

10.3. 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.

10.3.1. 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.

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

§162-10-11. Appeal Denied.

11.1. 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.

§162-10-12. Annual Statement.

12.1. 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 is filed. If the refusal continues for sixty (60) days, the Board shall terminate the recipient's right to the disability benefit.

§162-10-13. Disability Re-certification.

13.1. At least once each year during the first five years following the retirement of a member on account of disability, as provided in this rule, and at least once in each three-year period thereafter, the Board may require a disability retiree, who has not attained age sixty years, to undergo a medical examination to be made by or under the direction of a physician designated by the Board. If the retiree refuses to submit to the medical examination in any period, his or her disability annuity may be discontinued by the Board until his or her withdrawal of the refusal. If the refusal continues for one year, all his or her rights in and to his or her annuity may be revoked by the Board. If upon medical examination of a disability retiree, the physician reports to the Board that the retiree is physically able and capable of resuming employment, his or her disability annuity shall terminate: Provided, That the report of the physician is concurred in by the Staff Review Committee, the Board's Review Committee and the full Board.

13.2. A disability retiree who returns to employment as a deputy sheriff shall again become a member of the Deputy Sheriff Retirement System and his or her credited service in force at the time

of his or her retirement shall be restored to his or her credit.

§162-10-14. Member Receiving Workers' Compensation.

14.1. Any member of the Deputy Sheriff Retirement System who is injured or suffers a disease growing out of the course of his or her covered employment and who is receiving temporary total Workers' Compensation benefits shall receive credited service toward his or her retirement: Provided, That the credited service ceases when a member returns to paid employment with a covered employer or is granted a disability or regular retirement under the provisions of the Deputy Sheriff Retirement System.

§162-10-15. Refunds of Contributions Where an Annuity May Be Payable.

15.1. Any member of the Deputy Sheriff Retirement System who terminates employment after attaining age sixty (60) and who has five (5) or more years credited service and is otherwise entitled to an annuity payable from the Deputy Sheriff Retirement System, is not eligible for a refund of contributions made to the Deputy Sheriff Retirement System, but, in lieu thereof, is entitled to a monthly annuity payable pursuant to W. Va. Code §7-14D-11.

15.2. Any member of the Deputy Sheriff Retirement System who terminates employment before attaining age sixty (60) and who is otherwise entitled to a normal retirement annuity payable from the Deputy Sheriff Retirement System at the time of his or her application for a refund, is not eligible for a refund of contributions made to the Deputy Sheriff Retirement System, but, in lieu thereof, is entitled to a monthly annuity payable pursuant to W. Va. Code §7-14D-11.

15.3. Any member of the Deputy Sheriff Retirement System who terminates employment before attaining age sixty (60) and who is not immediately entitled to a normal retirement

annuity payable from the Deputy Sheriff Retirement System, even though he or she may be entitled to early or deferred benefits, is entitled to a refund of contributions upon written application filed with the Deputy Sheriff Retirement System.

§162-10-16. Final Average Salary.

16.1. In computing a member's Final average salary, the Board shall consider the following:

16.1.1. The member's last ten (10) years of service is the ten (10) plan years of covered employment immediately preceding the member's effective date of retirement; and

16.1.2. The five (5) consecutive plan years for which the member's compensation was the highest, is the highest aggregate of his or her annual compensation for the five (5) consecutive plan years of service contained within the member's last ten (10) plan years as determined in Subdivision 16.1.1. of this Rule; and

16.1.3. The member's Final average salary shall be one-fifth (1/5) of the aggregate salary determined in Subdivision 16.1.2. of this Rule; and

16.1.4. The member's monthly salaries shall be annualized for any plan year during his or her Final average salary period that contains a break in employment. Provided, that for any Sheriff member who received any payments for bonuses or commissions, those amounts shall not be annualized.

§162-10-17. Surcharge for Delinquency of Employer and Employee Contributions.

17.1. Any participating employer who fails to make any payment due the Retirement System by the fifteenth (15th) day following the end of each calendar month in which the contributions are due may be required to pay the actuarial rate of interest lost on the total employee and employer contributions owed for each day the payment is delinquent. Accrual of the loss in earnings owed by the delinquent employer commences after the fifteenth (15th) day following the end of the

calendar month in which the contributions are due and continues until receipt of the delinquent employee and employer contributions. Interest compounds daily and the minimum surcharge is fifty (50) dollars.

§162-10-18. Errors.

~~16.1.~~ 18.1 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.