

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

Form #2

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2005 JUN 28 P 1:23

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia State Fire Commission TITLE NUMBER: 87

RULE TYPE: Legislative CITE AUTHORITY: W. Va. Code §29-3-9(e), §29-3-5

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: 6

TITLE OF RULE BEING PROPOSED: Rules and Procedures for Certification and Review of Local Fire Departments

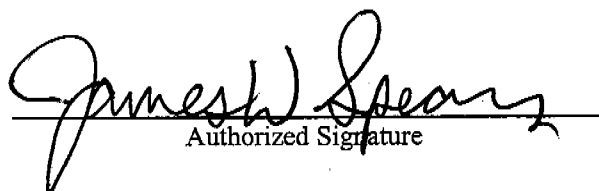
IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON July 28, 2005 AT 12:00 NOON ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

West Virginia State Fire Commission

1207 Quarrier Street, Second Floor

Charleston, WV 25301

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.


Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

\$5.40

WEST VIRGINIA STATE FIRE COMMISSION
RULES AND PROCEDURES FOR THE CERTIFICATION
AND REVIEW LOCAL FIRE DEPARTMENTS
Title 87, Series 6

STATEMENT OF CIRCUMSTANCES FOR PROPOSED RULE

West Virginia Code §29-3-9(e) requires the State Fire Commission to develop a method of certification to be applied to all fire departments and volunteer fire departments. Prior to the drafting of this rule, the State Fire Commission relied upon an undocumented procedure for the certification of new fire departments and upon statements of policy regarding the requirements and duties of local fire departments.

Recently, when issues have arisen about the authority and operations of a few local fire departments, the State Fire Commission has been required to conduct contested case hearings without fully described procedures for the initiation and hearing of such cases.

These rules are proposed to establish standard criteria for the certification and recognition of local fire departments pursuant to Code §29-3-9(e). The rules also establish detailed procedures to be applied uniformly in the investigation and the hearing of allegations of violation of the powers, duties and responsibilities of local fire departments. These rules define the due process of law to be used in process of granting or withdrawing the Commission's recognition or certification.

NOTE: This rule was originally put out for public comment with the comment period ending on June 23, 2005. Two slightly different versions of the rule were inadvertently distributed to interested groups and individuals. This rule is being resubmitted so that all affected persons will have the opportunity to comment on the proper version of the rule.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Rules & Procedures for the Certification & Review of Local Fire Departments

Type of Rule: Legislative Interpretive Procedural

Agency: West Virginia State Fire Commission

Address: 1207 Quarrier Street, Second Floor
Charleston, WV 25301

Phone Number: 304-558-2191 Email: acarico@wvfiremarshal.org

Fiscal Note Summary

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

The rule establishes procedures for the certification of local fire departments and for administrative hearings when issues arise involving a department's certification. The State Fire Commission estimates that adoption of the rule will not impose significant additional expense to the State. However, the Commission does anticipate that infrequent formal hearings, brought under this rule, will require the expenditure of up to \$5000.per year.

Fiscal Note Detail

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

FISCAL YEAR			
Effect of Proposal	2005 Increase/Decrease (use "-")	2006 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	5,000.00
Personal Services	0.00	0.00	4,500.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Equipment	0.00	0.00	0.00
Other	0.00	0.00	500.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: Rules & Procedures for the Certification & Review of Local Fire Departments

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

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

The State Fire Commission estimates that this rule can be implemented with no increase in the regular personnel expenses of the Commission or the State Fire Marshal.

However, because the rule provides detailed procedures for the hearing of contested cases, the State Fire Commission anticipates that there will be some additional costs associated with the hearing process. These expenses would include the cost of a hearing examiner, court reporter, legal services, transcriptions, photocopying, postage and court fees. Based upon recent experience, the Commission estimates that such contested cases may occur at the rate of approximately once per year.

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.

This rule imposes additional duties on the staff of the State Fire Commission and the State Fire Marshal, but the Commission believes that these additional duties can be integrated into the current functions and operations without additional cost to the agency.

Date: May 24, 2005

Signature of Agency Head or Authorized Representative

James W. Spears

WEST VIRGINIA STATE FIRE COMMISSION
RULES AND PROCEDURES FOR THE CERTIFICATION
AND REVIEW LOCAL FIRE DEPARTMENTS
Title 87, Series 6

BRIEF SUMMARY OF PROPOSED RULE

The rule establishes the requirements for certification of local fire departments, renewable after a period of five years. The rule defines the powers and duties of a certified local fire department and, in so doing, consolidates references to unconnected sections of the West Virginia Code to provide one source of reference for these powers and duties.

The rule also provides procedures for the certification, and regular renewal of certification, of a local fire department. Previously there has been no specified period for the duration of a certification and no regular review of the qualifications or performance of a local department.

In prior practice, the Commission conducted review of local fire departments and considered withdrawal of recognition on a case-by-case basis as issues would come to the attention of the Commission. This rule provides for a regular schedule for renewal and establishes detailed procedures for the investigation of complaints and the hearing of alleged violations of the powers, duties and responsibilities of a local fire department.

TITLE 87
LEGISLATIVE RULES
STATE FIRE COMMISSION

FILED

SERIES 6
RULES AND PROCEDURES FOR THE CERTIFICATION
AND REVIEW LOCAL FIRE DEPARTMENTS

2005 JUN 28 P 1:23
OFFICE WEST VIRGINIA
SECRETARY OF STATE

§87-6-1. General.

1.1. Scope. -- These rules govern the requirements and procedures for certification of local fire departments by the State Fire Commission and the circumstances for the withdrawal of certifications. This rule also delineates the scope of the powers and responsibilities of certified local departments.

1.2. Authority. -- West Virginia Code §29-3-9(e), §29-3-5, and §29A-3-1 et seq.

1.3. Filing Date. -- _____.

1.4. Effective Date. -- _____.

§87-6-2. Definitions.

As used in this Rule, the following words and terms shall have the following meanings, unless the context clearly indicates otherwise:

2.1 "Certification" and "Recognition" refers to the State Fire Commission's formal acceptance and acknowledgment of the qualifications of a local fire department to carry out fire fighting, fire suppression and rescue operations in this State.

2.2. "Commission" means the West Virginia State Fire Commission.

2.3 "Dual Response Area" refers to an area, defined by a mutual aid agreement or designated by the Commission, in which more than one local fire department may respond or may be called upon for initial response to a fire, threat of fire, or public emergency. The term "dual response area" is not mutually incompatible with the designation of a "first due area" and a dual response area may overlap, or comprise all or a portion of, a designated first due area.

2.4. "Fire Department" and "Local Fire Department" means an organization, either an administrative department of a local government authority or an independently-chartered corporation, that is established for the principal purpose of fighting and preventing fires. For the purposes of this Rule, the term "fire department" shall also include those entities, so organized, using the name "fire company" or referred to as a fire company within the West Virginia Code.

2.5 "Fire Service Area" means a geographical area, established by the Commission within fire protection boundaries approved by the Commission, for the administration of fire protection and emergency response programs and the delegation of responsibilities for fire fighting and fire protection.

2.6. "First Due Area" means a fire service area for which the Commission has assigned primary responsibility to a local fire department to provide fire protection and rescue services.

2.7 "ISO" refers to a national organization, ISO Properties, Inc., also known as the Insurance Services Office, that provides research, products, programs, and information on matters of insurance and risk management.

2.8. "Municipal Paid Fire Department" means the fire department, of a municipality, maintained and paid for out of public funds and whose employees are paid on a full-time basis out of public funds. The term shall not be taken to mean a department whose employees are paid nominal salaries or wages or are paid for services actually rendered on an hourly basis.

2.9. "Mutual Aid Agreement" is an agreement between a local fire department and another fire department, or governmental authority having jurisdiction over such other fire department, for the common protection of people and property from fire, for the reciprocal provision of emergency and rescue services and for the reciprocal use of equipment and personnel for these purposes.

§87-6-3. Requirement and Authority of Certification.

3.1. General Requirement for Certification: Every organization or corporation that is established for the principal purpose of fighting and preventing fires within local fire service areas must be certified as a local fire department by the West Virginia State Fire Commission. No organization, corporation or subdivision of a local government authority may hold itself out as a "fire department" or "fire company" without such certification, nor shall such entity conduct independent, fire-fighting operations unless recognized or certified by the Commission.

3.2 In addition to the general authority and responsibility for fire-fighting and fire prevention within an approved fire service area, certification of a local fire department shall have the following effect:

3.2.a. The fire chief or line officer of a certified fire department shall have the authority to exercise all powers and duties provided under the provisions of Article 3A, Chapter 29 of the *West Virginia Code*, §29-3A-1 et seq.

3.2.b. The certified local fire department may enter into mutual aid agreements with other certified fire departments or with local governmental agencies, of this state or any adjoining state, for reciprocal aid and assistance.

3.2.c. The certified local fire department constitutes a "fire department or company" for purposes of the prosecution of offenses under *West Virginia Code* §29-3A-4.

3.2.d. The certified local fire department may request aid and assistance from the State Fire Marshal under the provisions of *West Virginia Code* §29-3-12(b)

3.2.e. Members of a certified local fire department may be deputized by the State Fire Marshal under the provisions of *West Virginia Code* §29-3-12(j), subject to the conditions and restrictions in subsection (n) of that Code section.

3.2.f. The State Fire Marshall may assign registration permits for emergency vehicles to certified local fire departments and may authorize members of a certified local fire department to drive Class A vehicles equipped with emergency lights and warning devices, pursuant to the provisions of *West Virginia Code* §17C-15-26(d).

3.2.g. Certified local fire departments shall be eligible to receive distributions from the Pensions and

Protections Fund and from the Fire Protection Fund under the provisions of *West Virginia Code* §8-15-8a, §8-15-9, §33-3-14d, and §33-3-33.

3.3 No entity may exercise, or claim benefit of, the powers, privileges and responsibilities listed in this section without certification by the State Fire Commission pursuant to these rules.

3.4. In no event shall certification of a local fire department be deemed to be a grant or delegation of any of the powers of the West Virginia State Fire Commission or the State Fire Marshal unless such powers are specifically imposed by state law or expressly delegated by the Commission or the State Fire Marshal.

§87-6-4. Authority of Municipal Governments

4.1. In promulgating this rule, the West Virginia State Fire Commission recognizes that the governing body of every municipality has plenary power to provide for fire prevention and the extinguishments of fires. A municipality's governing body, therefore, has the authority to provide for the organization, equipment and government of fire companies and fire departments within its jurisdiction. Nothing in these rules shall be interpreted or construed to limit or infringe on this authority of a municipality.

4.2. The West Virginia State Fire Commission will recognize a municipal paid fire department that organized under, and actively supervised by, the governing body of a municipality, and will deem such department or company to be certified without requiring the department to apply for renewal of its certification as would otherwise be required under §87-6-7 of this rule. In order to maintain an accurate register of recognized departments, the State Fire Marshal may require municipal paid fire departments to make periodic submission of a form or statement of basic identifying and contact information.

§87-6-5. Duration of Certification.

5.1. Except as established in the rotating schedule for implementation of the certification program provided in subsection 87-6-7.2 of this rule, a certification issued by the Commission shall, if not revoked, suspended or withdrawn, be valid for a period of five years. In lieu of certifying each department for exactly five years, the Commission may establish a fixed day of a year upon which certifications will expire after the duration of approximately five years.

§87-6-6. Certification Criteria.

6.1. In conducting any review for certification or re-certification of a local fire department, the State Fire Commission may consider any and all of the following factors:

6.1.a. The location, size and boundaries of the fire service area and the location of the fire station or substations within that fire service area;

6.1.b. The number of active and available personnel to participate in fire-fighting and rescue services and the level and amount of training achieved by each active member;

6.1.c. The quantity, type, and condition of all equipment to be used by the local fire department;

6.1.d. Command structure / responsible authority;

6.1.e. The existence and substance of "911" service agreements for the area served and of any mutual aid agreements affecting the local fire department;

6.1.f. The ISO Public Protection Classification for the local fire department's fire service area;

6.1.g. The historical performance, if any, of the department in responding to emergency calls and the responsibilities of local fire departments;

6.1.h. The quality of record-keeping practices of the department, including regular and timely submission of fire loss data and reports as required by state law;

6.1.i. Any disciplinary action against the local fire department or any acts, failures to act or circumstances that would constitute grounds for disciplinary action against the local fire department under the provisions of §87-6-11 of this Rule; and

6.1.j. Any other factor or circumstance bearing upon the ability of the fire department to serve the public properly and provide for the safety of persons and property from fire and other emergencies.

5.2. The State Fire Commission may establish specific performance criteria and minimum standards for local fire departments by separate rule or by written policy, promulgated pursuant to *West Virginia Code* §29-3-9(i).

§87-6-7. Certification and review of existing departments.

7.1. All currently local fire departments in operation and recognized by the State Fire Commission on the effective date of this rule are hereby deemed to be duly-certified departments, Provided that these local fire departments must apply for, and obtain, renewal of its certification under the schedule established below for implementation of this rule.

7.2. Schedule for implementation - Within one hundred twenty (120) days of the effective date of this rule, the State Fire Marshal shall establish geographical divisions of the entire area of the state for a system of regular review and renewal of the certifications of local fire departments. The State Fire Marshal shall have the discretion to determine the number and the boundaries of the geographical regions based upon the manpower and resources available for the review and inspection responsibilities defined herein, Provided that these geographical divisions shall contain approximately equal numbers of local fire departments. On or before the conclusion of this period, the State Fire Marshal shall assign all of the departments within a given region, by random lot, to a rotating schedule for renewal of certification in such fashion that, per year, twenty percent of the local departments within a region shall be required to apply for and obtain renewal of their certifications every year following the adoption of this rule. The schedule for regular certification renewal shall begin in the year 2007.

7.3. Applications for renewal of certification must be in writing, using forms designated by the State Fire Marshal and must be submitted no later than three months prior to the date of expiration of the certification of the local fire department.

7.4. After review of the application according to the criteria established or referenced herein, the State Fire Marshal shall submit the application to the State Fire Commission with a recommendation as to whether the application should be approved. The Commission is not bound by the recommendation of the State Fire Marshal and may independently review all materials submitted with the application.

§87-6-8. Certification of new departments.

8.1. No new local fire department or fire company will be authorized without prior approval of, and certification by, the Commission.

8.2. Whenever possible, the creation or establishment of a new department will be accomplished with the consent and cooperation of the local government authorities of the areas to be served by the new department. However, the State Fire Commission may authorize the creation of, and certify, a new local fire department if the Commission finds that the establishment of such new department will provide more comprehensive and better protection for the safety of people and property within such areas.

8.3. Application for Certification - Any organization seeking to be certified as a new local fire department shall make application to the State Fire Commission using forms designated by the State Fire Marshal. All applications shall be in writing and shall be considered public records, subject to review by the public.

8.4. Application Review - The Commission shall conduct a review of the application in a process of two phases.

8.4.a. Phase I - Initial documentation review. In this phase, the State Fire Marshal, together with such additional Commission staff as may be reasonably necessary, will review documentation of the basic organizing materials for the creation of a new department, including a letter of intent, copies of pertinent local ordinances, sign-off by appropriate local officials and a map of the proposed service area. After review of these materials, the State Fire Marshal will make a recommendation to the Commission as to whether the Commission should grant Phase I approval and authorize the organization to proceed to Phase II.

8.4.b. Phase II - In Phase II, the applying organization shall obtain and present evidence of sufficient staffing, equipment and resources to operate as a local fire department. Upon satisfactory demonstration of compliance with the requirements of the Commission, the Commission may grant approval and certification of the local fire department.

8.5. The Commission is not bound by the recommendation of the State Fire Marshal at any phase of the application process and the Commission may independently review all materials submitted with the application. The Commission may, in their discretion, make additional inquiry into the facts and circumstances of any proposal for a new department and may request that additional information be provided to the Commission in consideration of an application.

§87-6-9. Inspections.

9.1. The State Fire Marshal, a full-time deputy state marshal, or a full-time assistant state fire marshal may make scheduled or unscheduled inspections of any certified local fire department to ensure compliance with the responsibilities of the department under state law and the rules and policies of this Commission.

9.2. The Commission authorizes the State Fire Marshal to issue warning letters to a local fire department when, after inspection or investigation, it appears that the local department has, by act or omission, violated the standards for certification and safe operation as a fire department.

§87-6-10. Complaints and investigations

10.1. Any person may make a complaint regarding a local fire department, including the State Fire Marshal, or a member of the Commission or the Commission's staff. Complaints must be made in writing and the Commission may provide a form for the purpose of submitting a complaint, but a complaint may be filed in any form as long as it is made in writing and submitted to the Commission at its offices.

10.2. Upon receipt of a written complaint, the Commission will log and assign a number to the complaint. The complaint will then be delivered to the State Fire Marshal for investigation. The Fire Marshal shall first review the complaint to determine if it describes any violation of the certification requirements or responsibilities of a local fire department.

10.2.a. If the State Fire Marshal determines that the complaint is alleged against a municipal paid fire department, the State Fire Marshal shall forward the complaint to the governing body of the municipality and shall direct the complainant to pursue the complaint with that governing body.

10.2.b. If the State Fire Marshal determines that there is no violation, he shall notify the complainant of this determination and that he will recommend that the Commission dismiss the complaint at its next meeting. The State Fire Marshal will have no duty to investigate further unless the complainant amends or updates his allegations. In providing notice to the complainant pursuant to this subsection, the State Fire Marshal shall advise the complainant of the date and time of the next meeting of the State Fire Commission in which the Commission will rule upon the complaint.

10.2.c. If the State Fire Marshal determines that the complaint appears to describe conduct regulated by the certification standards for local fire departments or describes a violation of law for which the Commission has the authority to sanction a local fire department, then the Fire Marshal shall begin an investigation of the substance of the allegations stated in the complaint. No provision of these rules shall restrict the Fire Marshal from investigating additional violations if, in the course of his investigation of the complaint, the Fire Marshal becomes aware of evidence that indicates that other violations of the certification standards may have occurred.

10.3. In addition to the foregoing provisions, the Commission may upon its own motion initiate a complaint and cause the State Fire Marshal to conduct an investigation of a local fire department

10.4. As a preliminary step in the investigation, the State Fire Marshal shall send a copy of the complaint and notice to the local fire department identified in the complaint that an investigation has been initiated. The local fire department shall have thirty (30) days to prepare a response or answer to the complaint, but the State Fire Marshal may proceed with investigation of the complaint during such interval.

10.5. The State Fire Marshal shall make such investigation as is reasonably necessary to ascertain whether the local fire department has violated any of its certification requirements or the responsibilities of a local fire department. At the conclusion of the investigation, the State Fire Marshal shall make a report to the Commission as to whether there is probable cause to believe that any violation has occurred and, in the event that any violation is believe to have occurred, the report shall briefly identify the nature of the violation or violations. The findings of the State Fire Marshal shall be logged with the original complaint and served upon the local fire department at least ten (10) days prior to any meeting of the Commission in which the report of the State Fire Marshal may be considered.

10.6 The local fire department may respond in writing to the report of the State Fire Marshal and such response, together with the department's original response to the complaint, shall be delivered to the Commission along with the report of the State Fire Marshal. When the report and responses are to be considered at a meeting of the Commission, the local fire department may appear and make an oral presentation to the Commission.

§87-6-11. Grounds for Denial, Refusal, Withdrawal, Modification, Suspension or Revocation of a Certification.

11.1. The following acts, failures or circumstances are deemed to be impairments upon the certification of a local fire department that may warrant official action by the Commission:

11.1.a. Failure to maintain minimum levels of performance in training, equipment maintenance or fire protection procedures;

11.1.b. Failure to provide fire protection service to the department's assigned fire service area or to other areas served through mutual aid agreements;

11.1.c. Failure to respond, without good cause, to declared states of emergency or situations involving imminent risk of serious harm to human life;

11.1.d. A repeated pattern of failure to respond to reasonable requests and lawful directives of the State Fire Marshal or State Fire Commission;

11.1.e. Any act of deceit, falsification or misrepresentation in the creation, maintenance or submission of records that the local fire department is required to prepare or file under any provision of state law;

11.1.f. Chronic or gross abuse of the powers and privileges provided under subsection 87-6-3.3 of this rule;

11.1.g. A practice or pattern of performance that demonstrates a substantial threat to the safety of people and property within the community served, which threat may also include a substantial risk of harm to the safety to the firefighting personnel themselves;

11.1.h. Lack of an ISO Public Protection Classification, failure to obtain such classification or, except in the case of an application for a new department, a Public Protection Classification indicating no fire protection or an unacceptable level of protection;

11.1.i. Any circumstance resulting in the absence, loss, removal or substantial alteration of a first due area or other approved run area; or

11.1.j. Any act of a local governmental authority with jurisdiction over the geographical area served by the local fire department, in lawful exercise of plenary powers assigned to that authority, that effectively removes or substantially diminishes the fire service area of, or the physical facilities available to, the local fire department.

11.2. Disciplinary powers of the State Fire Commission

11.2.a The Commission may deny certification, may refuse to certify, and may withdraw, modify, suspend or revoke the certification of a local fire department upon a showing that the department or proposed department has an impairment upon its certification as set out in the preceding subsection. No modification, suspension or revocation of a certification may occur without a prior hearing conducted by the Commission, except that the Commission may temporarily suspend a certification pending a subsequent hearing if the Commission determines that continued operation of a local fire department constitutes an immediate danger to the public.

11.2.b. Remedial alternatives - Upon notice to the Commission of violation of the standards for certification and safe operation of a local fire department, the Commission may, in lieu of further disciplinary action, utilize any of the following methods to resolve or remedy the circumstances resulting in such violation:

1. The Commission may authorize the State Fire Marshal to issue a warning letter to the local fire department identifying the nature of the violation or violations and advising the local fire department that additional violations could result in the modification or loss of its certification.

2. The Commission may establish a plan and period of improvement during which the local department may attempt to correct or alleviate the circumstances giving rise to a violation and the Commission may extend such period if additional time is required to address all circumstances. If at the conclusion of such period or extended period, the local fire department has reasonably satisfied the requirements or objectives of the improvement plan, the Commission shall dismiss the complaint. If, however, the local fire department has failed to satisfy the objectives, the matter shall be set down for hearing upon the violations alleged against the local fire department.

3. The Commission may enter into a stipulation, agreed settlement or consent order with the local fire department to resolve and conclude the disciplinary action under such terms as the Commission deems reasonable and just. The Commission may authorize the State Fire Marshal or other representative of the Commission to negotiate the terms of such agreement and present the resulting agreement to the Commission for its approval.

The use of any of these remedial methods rests in the sole discretion of the Commission and the Commission may elect to proceed directly to a disciplinary hearing if it appears unlikely or impossible to remedy the situation that has given rise to the violation of the certification standards.

11.3. The Commission may deny an application for certification or refuse to issue a certification or a renewal of a certification, without a prior hearing, upon entry of a written order stating the findings of the Commission and the reasons for the denial or refusal; Provided, that the local fire department or proposed new department may request a hearing upon the action of the Commission and shall be afforded a reasonably prompt hearing following such request.

11.4. In the event that a local fire department fails to submit a timely application for renewal of certification, fails to submit a complete application for certification or fails to pay any fee or assessment due to the State under any provision of state law, the Chairman or the Secretary of the Commission may temporarily suspend the certification of the local fire department, without a hearing, until the local fire department acts to correct the deficiency; Provided, that no such suspension shall take effect until written notice of the deficiency is served upon the department by registered or certified mail or by package courier providing proof of delivery.

11.5. No local fire department shall have a guaranteed or presumed right to a certification, or to renewal or reissue of a certification if that department's certification was previously revoked or withdrawn by the Commission.

§87-6-12. Commission Actions.

12.1. Certifications of local fire departments may only be made by the State Fire Commission. Any decision approving, modifying, denying, withdrawing, refusing, suspending or revoking the certification of a local fire department of the Commission shall be made in open meeting upon a vote of the majority of those members present. When considering the regular renewal of the certifications of multiple fire

departments, the Commission may grant the renewals in one consolidated motion before the Commission.

12.2. Pursuant to *West Virginia Code* §6-9A-2(4)(A) and §6-9A-4(b)(4), the Commission may deliberate upon an issue in consideration of the granting, denial, withdrawal, modification, suspension or revocation of a certification in an executive session.

§87-6-13. Procedures for Withdrawal, Suspension or Revocation of Certification.

13.1. Notice - If the State Fire Marshal notifies the Commission that there is probable cause to believe a violation of the standards of certification has occurred and the Commission determines that a hearing is necessary to resolve the issues alleged, the Chairman of the Commission shall schedule a hearing upon the matters alleged against the local fire department. The State Fire Marshal shall prepare a short, plain statement of the matters to be considered at the hearing and shall prepare a written notice advising the local fire department of the date, time and location of the hearing. The notice and statement of the State Fire Marshal shall be served upon the local fire department by personal delivery upon an officer of the department or by registered or certified mail addressed to the mailing address of the department as shown on the department's application for certification.

13.2. Parties - The State Fire Marshal or his authorized representative shall have the responsibility of presenting the case in support of the complaint or the case on behalf of the Commission if the Commission has initiated the investigation of the local fire department. The local fire department shall be named as the respondent in the proceedings and may appear by the chief of the department or by counsel, or both. These parties shall be the primary participants in the case, but the Commission may, at its discretion, allow the participation of any other party as an intervenor in the proceeding, upon written motion by such party and upon a showing that such party has a substantial interest in the proceeding that is not likely to be represented by the other parties in the case.

13.3. Hearing - The Commission has the discretion to determine the time, location and duration of any hearing brought pursuant to the provisions of this rule. Hearings shall be open to the public and may be conducted before the full Commission or the Chairman may, at his discretion, designate a member to serve as a hearing examiner to conduct a hearing on behalf of the Commission. Alternatively, the State Fire Commission may authorize and empower an impartial attorney to serve as a hearing examiner. When a hearing examiner is so designated or authorized, that person shall have full authority to conduct the proceedings and may exercise all powers listed in *West Virginia Code* §29A-5-1(d). At any point in the proceedings, the Commission may choose to invoke one of the remedial alternatives described in subsection 11.2.b of this Rule to resolve and dispose of the matter.

13.4 Decision and Order - The State Fire Marshal shall have the burden of proving the matters alleged against the local fire department by a preponderance of evidence. The decision of the Commission shall be reduced to a written order and shall become final upon service of the order upon the local fire department by registered or certified mail. Any decision of the Commission, disposing of a complaint against a local fire department in any manner, shall also be served upon the complainant by certified mail.

§87-6-14. Hearings and Hearing Procedure

14.1. Hearings shall be conducted pursuant to the requirements and procedures outlined in *West Virginia Code* § 29A-5-1 et seq. In the event that any provision of this rule conflicts with those provisions of the *West Virginia Code*, then the provisions of the *Code* shall control; Provided, that the respondent shall be afforded the benefit of any provision herein that provides a more lenient requirement for the time in

which an action is to be done or completed.

14.2. Hearings shall be held at times and locations scheduled by the Commission or by its authorized hearing examiner. No hearing shall be held unless written notice of the date time and place of the hearing is served upon the respondent by certified or registered mail at least ten (10) days prior to the date of the hearing.

14.3. Continuances - A motion for continuance shall not be granted unless made in writing three days before the hearing or during the hearing, in either case for good and sufficient cause. Upon consideration of a motion for continuance, the urgency of the situation shall be determined and taken into account. Conflicting engagements of counsel or the employment of new counsel are not good grounds for a continuance unless extenuating circumstances are shown, which the State Fire Commission or hearing examiner considers adequate. The Commission or its designated hearing examiner shall have the authority to continue or reschedule hearings to a later date or different place as may be reasonably necessary to complete the proceedings.

14.4. Discovery - The Commission will not consider formal discovery requests, such as interrogatories, requests for admission or depositions, that require the preparation of materials, written responses or the production of witnesses by any party. However, any party may request a list of the names and address of witnesses to be presented by another party and may request to examine or copy any items that another party intends to use, or anticipates using, as evidence at any stage of the proceedings. Parties are encouraged to make and to honor these requests informally, but in order to invoke the enforcement of this rule, the request must be reduced to writing and presented to the other party at least three days prior to the hearing of any pertinent matter in the case.

14.5. Subpoenas and Subpoenas Duces Tecum

14.5.a. At any hearing held under this section, the testimony of witnesses and the production of documentary evidence may be required through the use of subpoenas and subpoenas duces tecum. The State Fire Commission or its hearing examiner may issue subpoenas and subpoenas duces tecum at the request of the respondent or any other party in the proceedings. A request for a subpoena or subpoena duces tecum shall be in writing and shall contain a statement acknowledging that the requesting party agrees to pay the required fee for service and for attendance of the witness. The Commission may also issue subpoenas independently of a request of any party to the proceedings.

14.5.b. Every subpoena or subpoena duces tecum must be served at least five (5) days before the return date of that subpoena, either by personal service made by a person eighteen (18) years of age or older, or by registered or certified mail. A return acknowledgment, signed by the person to whom the subpoena or subpoena duces tecum is directed, is required to prove service by registered or certified mail.

14.5.c. Any party requesting a subpoena or subpoena duces tecum shall see that it is properly served. Service of a subpoena or subpoena duces tecum issued at the insistence of the State Fire Commission is the responsibility of the State Fire Commission.

14.5.d. Any public official who serves any subpoena or subpoena duces tecum is entitled to the same fee as a Sheriff who serves a witness subpoena for a circuit court of this state; and fees for the attendance and travel of witnesses are the same as for witnesses before the circuit courts of this state. All fees related to any subpoena or subpoena duces tecum shall be paid by the party requesting the subpoena or subpoena duces tecum. If the subpoena or subpoena duces tecum is issued at the instance of the State Fire Commission, then all necessary fees shall be paid by the Commission.

14.6. Absence of the Fire Department or Counsel at the Scheduled Hearing - A hearing by the Fire

Commission shall not be delayed or continued due to the absence of the representative of the local fire department or its legal counsel at a hearing, after service of notice of the time, date, and place of the hearing. The hearing shall proceed and the case shall be submitted for decision regardless of the attendance or appearance of the respondent.

14.7. Evidence

14.7.a. All witnesses appearing at the hearing shall testify under oath or affirmation. Every adverse party has the right of cross-examination of witnesses who testify, and has the right to submit rebuttal evidence.

14.7.b. All relevant and material evidence, including papers, records, agency staff memoranda and documents in the possession of the State Fire Commission or the State Fire Marshal, of which any party desires to avail himself or herself, may be offered and made a part of the record in the case.

14.7.c. Members of the Commission and its staff, agents and employees shall be competent to testify at the hearing as to material and relevant matters; Provided, that no member of the Commission who testifies at such hearing shall thereafter participate in the deliberations or decisions of the Commission with respect to the case in which he or she so testified.

14.8. Record of Proceedings - All of the testimony, evidence, legal argument and rulings on admissibility or procedural matters at any hearing shall be recorded by a certified court reporter. The Commission shall prepare an official record of the hearing and all related proceedings. A party to the proceedings may receive a transcript or copy of the transcript upon written request and the payment, in advance, of the estimated cost of preparing the transcript or copy.

14.9. Decision by the State Fire Commission - The decision of the Commission shall be made upon the record and entered as a written order containing the Commission's findings of fact and conclusions of law. If the hearing is conducted by a hearing examiner, the hearing examiner shall prepare a recommended decision and order addressing all matters raised in the proceedings. If any party chooses to submit proposed findings of fact and conclusions of law to the hearing examiner or to the Commission, the parties shall follow the provisions of *West Virginia Code* §29A-5-3. The State Fire Commission may accept, modify, or reject the hearing examiner's recommended decision. If the Commission accepts the hearing examiner's recommendation, it shall enter an order to that effect. If the Commission rejects or modifies the recommended decision of the hearing examiner, the Commission shall enter an order stating the reasons for its action. A copy of the Commission's decision and order shall be served on all parties to the hearing and all attorneys of record, if any, by certified mail, return receipt requested.

14.10 Finality of Decision - The order entered by the State Fire Commission shall be final unless vacated or modified upon judicial review thereof; Provided, that upon request and a showing of good cause, the Commission may stay its order to permit a party to pursue judicial review of the decision and order.

§87-6-15. Appeals.

15.1. An appeal from any final order or decision of the Commission, rendered under the provisions of these rules, may be pursued under the provisions for judicial review as established in *West Virginia Code* §29A-5-4 and §29A-6-1.

§87-1-16. Severability.

16.1. If any provision of these rules or their application to any person, agency or institution is held to be invalid, such invalidity shall not affect those provisions or application of the rules that may be given effect without the invalid provisions or application, and to this end the provisions of these rules are declared to be severable.