

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

Form #3

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FILED

2005 JUL 29 P 4: 22

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: WV State Fire Commission TITLE NUMBER: 87

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 the Certification and Review
of Local Fire Departments

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.


Authorized Signature

QUESTIONNAIRE

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

DATE: July 29, 2005

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) West Virginia State Fire Commission
1207 Quarrier Street, Second Floor
Charleston, WV 25301
304-558-2191

LEGISLATIVE RULE TITLE: _____
Rules and Procedures for the Certification and Review
of Local Fire Departments

1. Authorizing statute(s) citation W Va Code §29-3-9(e), §29-3-5

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
Initially filed on May 24, 2005, but then refiled June 28, 2005.

b. What other notice, including advertising, did you give of the hearing?
A copy of the rule was posted on the State Fire Marshal's website and a copy was mailed to every recognized fire department in the state. Additional copies were presented to representatives of insurance companies and to the West Virginia Fire Chiefs Association.

c. Date of Public Hearing(s) *or* Public Comment Period ended:
July 28, 2005

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

Attached x No comments received _____

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

July 29, 2005

- f. Name, title, address and **phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Anthony Carrico, Deputy State Fire Marshal

WV State Fire Commission
1207 Quarrier Street, Second Floor
Charleston, WV 25301

Tel. 304-558-2191, Fax. 304-558-2537

acarrico@wvfiremarshal.org

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

Doren Burrell, Senior Assistant Attorney General

Office of the Attorney General
State Capitol, Room E-26
Charleston, WV 25305

Tel. 304-558-2522, Fax 304-558-2525

doren.burrell@wvago.gov

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

b. Date of hearing or comment period:

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

d. Attach findings and determinations and reasons:

Attached

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

Summary of Changes in Response to Public Comments

The term "Fire Protection District" is now used consistently throughout the rule in place of "Fire Service Area".

The definition of "Mutual Aid Agreement" has been changed to allow for agreements with any governmental agency.

The Commission has removed references to "paid municipal fire departments" that would distinguish this type of local department from all other types of local fire departments. This includes removal of all of the previous §87-6-4 relating to the authority of municipal governments.

The certification criteria in subsection 6.1 have been amended to clarify that the State Fire Marshal will review, rather than dictate, the command structure of the department seeking certification. These criteria have also been amended to provide that only the most recent records of the local fire department will be reviewed, as opposed to the entire history of a local department.

The language of the former subsection 8.2, now subsection 7.2, has been amended to show that the initiation of the process to create a new fire department originates with local entities, rather than at the direction of the State Fire Commission. The State Fire Commission retains the ultimate right of approval of a new department.

The language specifying "scheduled or unscheduled" inspections by the State Fire Marshal has been deleted.

Subsection 10.2, providing for investigations by the State Fire Marshal, has been amended to allow the State Fire Marshal to refer complaints to other governmental entities such as prosecuting attorneys, civil service commissions or municipal councils, with the authority to investigate or oversee the operation of the local fire department.

The Commission has changed the provisions for formal notice of disciplinary action to a local fire department. A copy of the State Fire Marshal report of investigation shall be provided to the local fire department at a reasonable period in advance of its consideration by the State Fire Commission. Hearing notices are to be provided thirty days in advance unless another amount of time is agreed by the parties.

The Commission has added a provision for the appropriate local government authority (city or county) to be notified if formal disciplinary action is initiated against a local fire department.

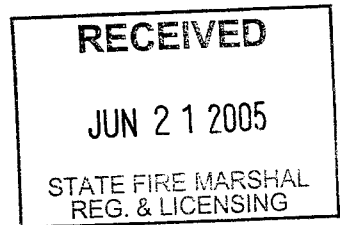
The Commission has changed a provision allowing for the suspension of a fire department that had not paid any fees due to the State. Such as suspension must now be based upon an adjudication of default by a court or administrative agency with the authority to rule upon allegations of default. (i.e. Workers Compensation Commission or Office of Tax Appeals.)

Temporary suspensions for late or incomplete applications may now be ordered by the Commission Chair or Vice-Chair, rather than by the Commission Secretary.

Redundant words for the denial or suspension of certification have been deleted.

Sub-sections and sub-divisions have be renumbered and reformatted to conform to the Rules of the Secretary of State for publication.

June 15, 2005



To - West Virginia State Fire Commission
1207 Quarrier Street, 2nd Floor
Charleston, West Virginia 25301

From - David Cline
269 South 12th Street
Weirton, WV

PUBLIC COMMENT

Proposed Legislative Rule
Title 87, Series 6
Rules and Procedures for
The Certification and Review Local Fire Departments

First, Thank you for making this proposal. The rules are needed greatly.

Comment (A)

§87-6-2 Definitions

2.3 Duel Response Area

Language is problematic - use "automatic mutual aid"

There must be a single fire department and fire chief of authority - per fire district / area

One entity responsible - with all the help they need by mutual aid

Language is problematic - tax / service fee complications

(Municipal taxes & fees, County fire board fees, County fire levies, City fire levies) see comment (G)

2.5 " Fire Service Area" - Language is problematic

use - Fire Service District or (Fire Protection District)
a public service district

- a. rural fire protection district
- b. municipal fire protection districts (cities)

There should be only one recognized fire department per district

2.6 First Due Area - wording understood - the area / district that the fire department is recognized to provide fire protection.

? Why would the fire commission assign a first due area within a fire district to any fire department other than the fire department assigned to protect that area.? -- problematic

2.8 Municipal Paid Fire Department - use the same language that is used in other fire commission rules - use word Career - Classification of WV Fire Departments.

Comment (B)

4.2 Use the word career not paid in the rule

Comment - (C)

6.1.a. - Use the word district not area in the rule

Comment (D)

ADD 6.1.h. - *Statement of compliance with but not limited to: WV Freedom of Information act, WV Open Meeting laws, WV equal opportunity laws.*

***Why
(the use of public funds, voting on how public funds are used, contracts etc.)
forms to be provided by Fire Marshall***

Comment (E)

8.2 "Whenever possible, ... concert and cooperation of the local government authorities ... area ... However, the State Fire Commission may authorize a 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 of the safety of people and property with such area."

Chapter 8-15 of the WV Code - authority of the municipal government?

County fire board laws ?

Would the fire commission divide a city into fire districts without the consent of the city government.

Comment (F)

§86-6-13

§86-6-14

Lack of notice to local governments, City Clerk, County Clerk of County Commission, County Fire Board, ect.

Any time a legal notice or order is sent to a local fire department, the local government should be copied. They may and should be providing public funds to the operation of providing local fire protection.

They (local government) should not be the last to know if something is wrong.

Comment (G)

Tax & Fire Service Fee issue // mandated mutual aid

Fire Districts that support their fire protection with public funding, should not be mandated to provide equal service to those areas that do not support their fire protection service providers. Fire Insurance rate ??
We do need to help each other, but their may be limits.

Not all rural fire departments choose to belong to the County Fire Board // and have the district users pay a County Fire Service fee.

Municipal governments must be free to contract outside their boundaries for services provided and not be mandated to provide the service to them at no charge. -aka automatic mutual aid

Thank you,

A handwritten signature in black ink, appearing to read "Paul C. [unclear]". The signature is written in a cursive style with a large initial "P" and "C".

Please read comment (D) again,

State Fire Commission's responses to the comments of David Cline:

(A) Request to change the term "Dual Response Area" to "automatic mutual aid."

The phrase "automatic mutual aid" is used within the fire protection community to refer to notification procedures in which a fire department will be called out to render assistance to another fire department in every instance of calls in a given area. This does not apply to all mutual aid arrangements within the state and is not the circumstance intended to be covered in the proposed rule. The Commission does not accept the requested change.

Request to change the term "Fire Service Area" to "Fire Protection Area."

The requested change is consistent with general usage and with other Code provisions. The Commission agrees to amend the rule accordingly.

Definition of "First Due Area" is questioned.

The Commission is not able to discern the substance of the question. No amendment will be made.

Request to change definition and phrase "Municipal Paid Fire Department."

This definition and use of the phrase have been deleted in response to other comments received by the agency.

(B) Change "paid" to "career" in subsection 4.2

References to paid municipal fire departments have been removed from all portions of the rule.

(C) Change "area" to "district"

This has been changed as noted above.

(D) Include a requirement to comply with the Freedom of Information Act, Open Meeting laws and other Code provisions.

This request would be redundant of requirements that are already established by statute. The Commission finds no reason to repeat such statutes in the rule.

(E) Questions the wording of former subsection 8.2, now subsection 7.2

This section has been rewritten to make it clear that new fire departments are requested by local entities. The Commission has the statutory authority to approve any new department, but will respect the authority of municipal governments to provide for fire protection within their jurisdictions. The Commission has amended the subsection, in part, to address the comment of the writer.

(F) Requesting notice of disciplinary actions to be given to local government authorities.

The Commission agrees that this is a useful request and has amended subsection 12.1 to include the following provision, "A copy of the statement of charges shall also be provided to the local government entity having jurisdiction over the area served by the local fire department."

(G) Question regarding mandatory service and rendering of aid to other departments.

This rule does not require "mandated mutual aid." To the extent that any local department has a duty to provide fire service to other areas, those requirements come from the West Virginia Code. Under the Code, municipal governments are empowered to contract for services outside of their boundaries if they so choose. No amendment will be made to the rule

Fire Department Certification Rule Comments **Fayetteville Fire Department**

- ❖ Does the State Fire Commission (SFC) have the authority to differentiate the legal authority granted municipal governments? Does the stat code treat municipal "volunteer/combination" fire departments different from municipal "paid" fire departments in respect to 87-6-4.2, 87-6-5.1, and 87-6-10.2.a?
- ❖ If regular certification renewal is not to begin until year 2007 per 87-6-7.2 then why are these proposed rules being promulgated with only a 30-day comment period? They should be submitted for adoption during the regular legislative session or with much more time for comment.
- ❖ Due to time constraints on volunteers "unscheduled inspections" per 87-6-9.1 might be difficult to meet. Will a department be sanctioned if they cannot produce an officer to meet for an "unscheduled inspection" and provide whatever information is required?
- ❖ Section 10 allows complaints against a volunteer fire department to be initiated by any person, the state fire marshal, the state fire commission, or a state fire commission staff member. It also places the responsibility for investigation with the state fire marshal and then places the determination of sanctions/disciplinary procedures with the state fire commission. This places the SFM and SFC in the position of accuser-investigator-jury-judge in total. Does this meet the requirements of law? This does not seem to be a logical separation of power and responsibility and would seem to open the process to possible bias.
- ❖ 87-6-10.5 & 10.6: Submitting the findings of an investigation to the local fire department 10 days prior to a SFC meeting for a response is entirely too little time. The local fire department should be allowed 30 days to review the findings of and respond to any report. In addition, attendance at SFC meetings within 10 days is probably impracticable for a department if the meeting is on the other side of the state.
- ❖ 87-6-11.1.a: There should be a law cite which specifically states where the "minimum levels of performance" that fire departments must meet can be found. It is reasonable to assume these will change and departments need to know exactly where to find this information.
- ❖ 87-6-11.2: Please define the differences between "withdraw, modify, and suspend" in relation to certification and how they affect a department.

- ❖ 87-6-11.2.b: This section includes the wording "violation of the standards for certification and safe operation". Nowhere in any previous sections have the words "safe operation" been included. If these are to be considered "violations" then this wording should be included and clearly defined so departments will know what operations are considered "unsafe".
- ❖ 87-6-11.4: I disagree that fire department certification could be suspended for failure to pay "any fee or assessment" due the state. This could include a many possibilities which have nothing to do with operations of a fire department.
- ❖ 87-6-12.1: The word "refusing" certification has now been added. This was not included in section 11.2.a. What is the difference between "denying" and "refusing"?
- ❖ 87-6-14.2 & 14.6: The time element of 10 days notice for hearings that are set by the SFC is entirely too short. If the SFC sets the location at the other end of the state this would put undue hardship on the department and make it impossible to attend since the department must be represented by the Chief or legal counsel. Given the cost of legal counsel this would prove an extreme monetary problem. There should be a provision that any hearings are held in the departments' home county and the time should be 30 days.
- ❖ What is the legality of having separate legal processes for municipal "volunteer/combination" vs. municipal "paid" departments in sections 14? Does the SFC have the authority to make this separation through an administrative legislative rule?

State Fire Commission's responses to the comments of Fayetteville Fire Department:

Regarding the differentiation between municipal paid fire departments and volunteer/combination departments, the Commission accepts the comment and has amended the rule to remove such distinctions.

On the question of the 30-day comment period, this rule has actually been submitted twice for comment. The first time began on May 24th and then the rule was refiled for comment on June 28th. By filing with the Legislative Rule-making and Review Committee, this rule is being subjected to the legislative process and interested parties will have additional opportunities for comment and modification.

The Commission appreciates the concern regarding "unscheduled" inspections. It is not the intention of the Commission to subject any department to "surprise inspections" on an arbitrary basis. The words "scheduled and unscheduled" have been deleted from subsection 8.1.

In response to the question regarding the role of the State Fire Marshal as investigator and the State Fire Commission as adjudicating body in disciplinary matters, the Commission believes that the rules are structured in a manner consistent with West Virginia's principles and precedents in administrative law. In addition, the rules and the state Code provide for judicial review of the Commission's actions by the circuit courts and the state Supreme Court of Appeals.

In regard to providing notice to a local fire department, the Commission recognizes that a fixed limit of ten days may not be sufficient notice to attend a proceeding before the Commission. The rules have been amended to require thirty days' notice of disciplinary hearings unless a different time is agreed by the parties (subsection 13.2). The Commission finds that there may be urgent circumstances requiring action in response to an investigation, though, and rather than specify a time limit for notice of the results of an investigation by the State Fire Marshal, the Commission believes that it is appropriate to amend subsection 9.5 to require "reasonable" notice.

Re §87-6-11.1.a (now numbered 10.1.a) pursuant to W. Va. Code §29-3-9(i) the Commission may establish, and has established, minimum levels of performance in training, equipment maintenance or fire protection procedures by policy. These policies have been published on the Commission's website and the Commission will seek to promulgate such requirements by rule in future years.

The Commission agrees the words "withdraw, modify and suspend" may be redundant or confusing. The rule will be amended to use only the word "suspend" in this context. The word "restrict" refers to use of the remedial alternative disposition measures set out in subsection 10.2.b.

In renumbered §87-6-10.2.b, Commission agrees with the comment regarding the words "and safe operation of a local fire department." These words will be deleted.

The comment also challenges a provision in former subsection 87-6-11.4 permitting a temporary suspension for failure to pay any fee due to the state. The Commission agrees that such a suspension should be decided by the full Commission, after hearing, rather than by the Chairman alone, so this provision has been moved to the current subsection 10.1.k. The Commission feels that if a local fire department will not pay a legal obligation to the state, that may be legitimate grounds for a suspension. However, to make the provision consistent with West Virginia case law, a court or administrative body with appropriate authority would have to make an adjudication of default or failure to pay as a condition precedent to any action by the Commission.

The word "refusing" will be deleted pursuant to the comment.

In response to the comment, the provision for notice of hearings, subsection 10.3, has been changed to require thirty days' notice unless the parties agree to another time.

As mentioned above, the Commission has amended the rule to remove distinctions between paid or volunteer departments.



The Senate of West Virginia

Charleston

STATE CAPITOL
BUILDING 1, ROOM 209W
CHARLESTON, WV 25305-0800
(304) 357-7984 (OFFICE)
(304) 357-7994 (FAX)
E-MAIL: SENATORMCKENZIE@AOL.COM

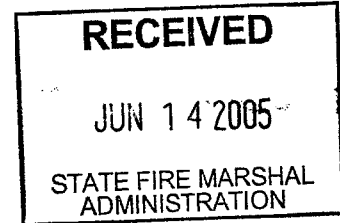
COMMITTEES:
CONFIRMATIONS
ECONOMIC DEVELOPMENT
ENERGY, INDUSTRY AND MINING
JUDICIARY
RULES
TRANSPORTATION AND
INFRASTRUCTURE

June 13, 2005

ANDY MCKENZIE
SENATE MINORITY WHIP
142 MILLER STREET
WHEELING 26003-5916

Bus. (304) 232-2550

State Fire Commission
Attention: Fire Dept. Certification Rule
1207 Quarrier Street, 2nd Floor
Charleston, WV 25301



Dear Commissioner,

I have received a letter from Joe Shankiewicz, Paper & Press, Inc, 172 Colliers Way, Weirton, WV 26062, (304) 723-3100 regarding some issues that he would like to have addressed.

(1) If fire protection is a local issue and responsibility, why do we need a state bureaucrat running the locals? It would be interesting reading if you could get a written reply from the fire commissioner as to the necessity of these rules.

(2) Why do we have volunteers making rules for paid and paid making rules for volunteers?

(3) Is the fire commission necessary or should it be changed to return government back to the local government (county commission)?

(4) What has the fire commission done to make it easier for people to volunteer for these local VFD. You don't need a college degree to be able to put out a fire safely (even though I have one)?

(5) Has the commission advised how they plan on revoking the charter of a VFD if they remove certifications?

Please let me know your response to these comments. I look forward to hearing from you. Thank you.

Sincerely,


Senator Andy McKenzie
Senate Minority Whip

AM:wpc

cc: Joe Shankiewicz

State Fire Commission's responses to the comments of Joe Shankiewicz via Senator McKenzie:

Mr Shankiewicz' comments are directed to policy questions as to why these rules may be required and they do not address specific provisions of the rules. Therefore, the State Fire Commission has not made any amendments in response to the comments.

The Commission does, however, offer the following responses the questions presented:

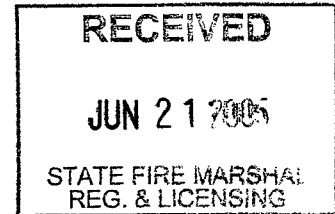
- (1) The West Virginia Legislature has chosen to assign the responsibility for the certification of local fire departments to a state agency, the State Fire Commission, in part, because money is distributed from the state treasury to those departments. The Commission does not assume control or oversight of the management of local fire departments, but, pursuant to legislative direction, the Commission merely attempts to ensure that every local department meets some basic, minimum, operating criteria.
- (2) The Commission is composed of volunteer fire fighters, career firefighters, and representatives of business and industry. The composition of the Commission is established by the Legislature.
- (3) Although state law allows for the creation of county fire boards, many counties have not exercised this option. The operation of fire fighting companies and departments is left to local entities although some local government authorities have not assumed control or responsibility for departments in their jurisdiction.
- (4) The Commission has a Firefighter Recruitment and Retention Committee that seeks to attract more people to join local fire departments and the Commission has pursued legislation to provide financial support for those participating in firefighter training programs.
- (5) The rules do not make any provision for the Commission to revoke the charter of a volunteer fire department because the Commission does not have that legal authority. Only the Secretary of State or the Attorney General may pursue the revocation of a corporation charter.

GAULEY RIVER VOLUNTEER FIRE DEPARTMENT

P. O. BOX 70

BELVA, WV 26656

JUNE 20, 2005



STATE FIRE COMMISSION

ATTN: FIRE DEPT. CERTIFICATION RULE

1207 QUARRIER STREET, 2ND FLOOR

CHARLESTON, WV 25301

Dear Sirs:

The Gauley River Volunteer Department is opposed to some portions of this legislative rule proposal for the Certification and Review Title 87, Series 6 rules and procedures.

There are some parts of this ruling that we believe that you should not have the authority over. These are the following sections or parts thereof that we oppose:

Section 87-6-5 all of this section

Section 87-6-6 subsections 6.1 A, 6.1 B, and 6.1 I

Section 87-6-7 all of this section

Section 87-6-10 we are opposed to this entire section

Section 87-6-11 subsections 11.2, 11.3 and 11.4

We feel that the fire commission should redo these rules before taking them before the legislature in order to possibly prevent losing fire departments in WV and fire protection for the residents of WV.

Gauley River Volunteer Fire Department 10109

State Fire Commission's responses to the comments of Gauley River Fire Department:

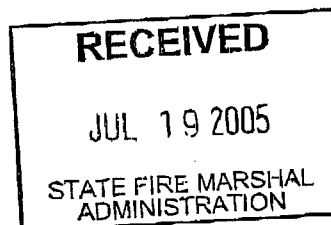
The Gauley River Fire Department has submitted comments objecting to the requirements that existing fire departments be periodically recertified and objecting to the provisions for disciplinary action to be taken against fire departments on the grounds detailed in the rules. The comments indicate a belief that the Commission should not have such authority.

The State Fire Commission responds that the Legislature has required the Commission "to develop a method of certification which can be applied to all fire departments and volunteer fire departments."

The Commission believes that periodic recertification is a reasonable requirement because conditions that might have existed when a department was created forty or fifty years ago may not continue to the present. Some, few departments have not been able to sustain a minimum level of response to their communities. A certification period of five years is a reasonable time providing a balance between the task of submitting renewal forms and the prudent, periodic review of training, responsiveness and local need.

The Commission has found that, in some isolated cases, a local department, originally recognized many years in the past, has subsequently failed to respond to its community or even caused harm to the state or to property owners. In these uncommon situations, there should be defined, objective criteria to determine whether such departments should continue to function as firefighting bodies receiving state funds.

July 17, 2005



**W. Va. State Fire Commission
1200 Quarrier Street, Second Floor
Charleston, WV 25305**

Subject: Comments on Rules [New Rules] to be accepted.

Gentlemen,

Please review these as they are written.

87-6-4

4.1. This is already in state law and most volunteer fire departments would like it removed. Many of the Towns do not make contributions to the departmnet. Please do not place it in requirements again. You should also be protecting the fire department.

87-6-5

5.1. The requiring the departments to be recertified each five year period. This should be only part of the recertification work. It should not require the remaping of their area unless it has changed. The remarking the areas should not be required, appearing before the County Commission for their approval should not be required.

If the complete process is to be completed it should be at least a ten year period.

87-6.6

6.1.G ? What does Historical have with this?

87-6.7

7.1 More Repeat

7.2 Too Broad

87-6.8

8.2 This is Junk

Please review this again before you adopt.

Sincerely,



Wayne A. Lewis

Former Commissioner

209 Pierpont Street

Petersburg, WV 26847

304-257-44757

State Fire Commission's responses to the comments of Wayne A. Lewis:

Mr. Lewis cites the following sections of the rule as numbered when put out for comment. The rule has been amended and renumbered so the revised section numbers are also provided.

Reference §87-6-4 (now deleted)

Mr. Lewis state that most volunteer fire departments would like this provision removed from state law even though he recognizes that similar language appears in the West Virginia Code. This section referred to the authority of municipal governments. In response to comments from other parties, though, the Commission has deleted the provision to which Mr. Lewis objected.

Reference §87-6.5.1 (now 87-6-4.1)

Recertification "should not require remapping of their area unless it has changed." The Commission agrees with this principle, and the Commission has not included any provision in the rule that would require a local fire department to remap their fire protection district.

Recertification should be a ten-year process.

The Commission believes that five years is a reasonable period as many circumstances can dramatically change over a period of ten years. Given the number of departments to be reviewed, a rotating schedule of five years is probably the most reasonable period in which review of all departments can be accomplished.

Reference §87-6-6.1.g (now 87-6-5.1.g) objecting to the use of the word "historical" performance.

The Commission agrees that "historical performance" is inappropriate in this context. Subdivision 87-6-5.1.g will be rewritten to clarify that only the record of the immediate, previous certification period should be relevant for certification renewal.

Reference to sections 87-6-7.1, 7.2 and 87-6-8.2

The comments are not sufficiently detailed for the Commission to be able to provide a meaningful response.

WEST VIRGINIA STATE FIRE COMMISSION
COMMENTS ON CERTIFICATION OF LOCAL FIRE DEPARTMENTS

TITLE 87 SERIES 6

FAX NUMBER 304-558-2537

JOHN R. ASHCRAFT
507 SOUTH CHESTER ST.
NEW CUMBERLAND, WV 26047-9422
304-564-5015

87-6-4 Authority of Municipal Governments

We respect the plenary powers of municipal authority, but who is to say they may not fall under the expectation of the fire commission. We have seen in the past how they maintain their pension funding liabilities, so they should also be inspected from time to time to uphold a high standard that is expected from all others.

87-6-6

6.1a If these stations are not in the physical place, they are deemed to be needed. What will be done about it. And who will be responsible for moving them and financing the move to a better location?

6.1d Command structure/responsible authority. Who is going to see to the set-up of the command structure. And what are they going to be responsible for.

6.1g What are the responsibilities and who determines what they are?

5.2 The State Fire Comm. may establish specific performance criteria and minimum standards for local fire depts. by separate rule or written policy. What are these rules and minimum standards? Where are they coming from?

87-6-8

8.4b Now that the fire commission is certifying these depts., what type of liability are they assuming, in doing so. If they put their stamp of approval on them, then the public has a right to expect some sort of liability on their certification.

87-6-9

9.1 Unscheduled inspections? I don't think so. The days of the S.S. are gone. We work hard in providing a service to our community to the best of our abilities. We don't need storm trooper tactics dropping in at midnite or any other unexpected time to go over, what others think we should be doing. We should be notified as in any other respectable public office should.

9.2 The commission should study the fire marshalls findings before letters are issued. the investigating body should not be the adjudicating one.

87-6-10

10.1 Should be a notarized, sworn statement. Which would hold up in a court of law.

10.2a Findings should be maintained as a record with the state fire comm. so an accurate record is kept, of all depts. in the state. Whatever be their status.

10.2c If we are investigating all violations, the local prosecuting attorney should be advised of any possible fiscal irresponsibilities that are found.

(2)

87-6-11

11.1a As long as sufficient funding is available for such standards

11.4 What fees and assessments? Don't see anything in here, as to what they are. There is not a secretary mentioned in 29-3-4 statutory language. Will Mrs. Olsen, be suspending fire departments? Once these local departments are suspended, who will be responsible to see that their area is covered? Some local departments, may not want to honor mutual aid agreements, after the state steps in to shut down their neighbor. They can see what may happen to them.

87-6-12

Where are the powers of the local county commissions in the establishment of fire departments? Are they not responsible for the safety of their local constituents?

87-6-13

13.3 What is the salary of the attorney who is appointed as a hearing examiner. Is it bid out or selected on a random basis?

For many years the fire service has served the citizens of the state, to the best of their ability. Now do to lawyers, insurance companies and bureaucrats looking for jobs. Everything has to be down in writing. The executive branch is calling for a reduction in the size of government. As i see it this will be adding on to the marshalls job. I get the excuse all the time they do not have enough people to cover only schools and places of incarceration. We have bed & breakfast, 1-6 person extended care facilities and a great number of other places of public occupancy out there that need attention.. I admit we have our problems. But it would seem we are concentrating on the stop sign violators, while the murders and dope dealers go on.

State Fire Commission's responses to the comments of John R. Ashcraft:

Mr. Ashcraft cites the following sections of the rule as numbered when put out for comment. The rule has been amended and renumbered, so the revised section numbers are also provided.

§87-6-4 (now deleted)

In response to the comments of Mr. Ashcraft and others, the Commission agrees that there should be no distinction between paid municipal fire departments and others. The rules should apply to all local fire departments and, therefore, the entire section, previously numbered 87-6-4, has been deleted.

§87-6-6

6.1. a (now 87-6-5.1.a)

These rules do not require and do not suggest that any fire department will be required to move its station. This provision relates to requests to the Commission for new stations to be established.

6.1.d (now 87-6-5.1.d)

The Commission agrees that this section was vaguely worded and it has been amended to clarify that the Commission only seeks a report on the proposed or current structure of a local department.

6.1.g (now 87-6-5.1.g)

Mr. Ashcraft asks for clarification of the word "responsibilities." The Commission believes that the responsibilities of a local department are defined in subsection 3.2 of the rule and also established by the community served by the department.

5.2 (also now numbered 87-6-5.2)

The minimum standards are established by the Commission pursuant to the Code section cited in this section of the rule. These standards are being distributed by the Commission, including through publication on its website. In the future these may be submitted as rules for legislative review.

§87-6-8

8.4.b (now numbered 87-6-7.4.b)

Mr. Ashcraft questions about the potential legal consequences of the Commission's certification of local fire departments. The Commission acknowledges that he is correct about potential state liability, but the West Virginia Code assigns the responsibility for certification to the Commission. This section of the rule codifies the de facto procedure that has been consistently used by the Commission and the State Fire Marshal for the establishment of all new fire departments.

§87-6-9

9.1 (now numbered 87-6-8.1)

Given the state's restrictions on overtime pay, it is extremely unlikely that any of the State Fire Marshal's Office would arrive in the middle of the night to conduct the surprise inspections of concern to Mr. Ashcraft. The Commission recognizes the sensitivity of this issue, though, and has deleted the words "scheduled and unscheduled" in relation to inspection. Since there have been past instances of misconduct, including possible criminal violations by senior officials, of a very few local departments, the Commission believes that it does require the authority to conduct inspections, possibly in conjunction with the other law-enforcement functions of the State Fire Marshal.

9.2 (now numbered 87-6-8.1)

This subsection permits the issuance of warning letters by the State Fire Marshal. The concept is similar to warnings issued by traffic cops. The letter is not an adjudication - merely a warning.

§87-6-10

10.1 (now numbered 87-6-9.1)

Mr. Ashcraft suggests that complaints to the State Fire Marshal should be sworn before a notary. The Commission disagrees. Complaints merely trigger an investigation, they do not constitute official charges or findings by the Commission. Such complaints are not required to be sworn in other administrative proceedings or even, in some rules, required to be in writing.

10.2.a (now numbered 87-6-9.2.a)

The Commission agrees that the State Fire Marshal's reports to the Commission are public documents and should be maintained for public review. The Commission does not believe, though, that this needs to be expressly stated in the rule. In any event, since the matter is to be taken up by the Commission, the documents and the ruling would be reflected in the Commission minutes.

[the subdivision previously appearing at 10.2.b has been deleted]

10.2.c (now numbered 87-6-9.2.b)

The Commission agrees that evidence of criminal offenses should be referred to the local prosecuting attorney, but these rules only relate to administrative grounds for possible revocation of fire department certification. This section has been amended, though, to allow for referral by the State Fire Marshal "to another governmental entity with supervisory or enforcement authority over the local fire department."

§87-6-11

11.1.a (now numbered 87-6-10.1.a)

The Commission strongly disagrees with the comment that a local fire department should be held to minimum levels of performance only "as long as sufficient funding is available." The West Virginia Code provides for the establishment of such "minimum levels of performance" and if a local department does not have sufficient funds to meet minimum levels, this suggests that the

department is not able to serve and protect its community. If this is confirmed, it raises a legitimate question as to whether there is a justification for the continuation of the local department.

11.4 (now numbered 87-6-10.4)

The reference to fees and assessments in this section has been removed. The Commission has, however, added a separate subdivision 87-6-10.1.k. providing that an adjudication of default in obligations, taxes, or other payments to the State may be a basis for suspension or revocation of a department's certification. If a local department does not pay its Workers Compensation or tax obligations, for example, the department may not be suited to operate safely or legally as a fire department.

87-6-12 (now numbered 87-6-11)

The Commission is unable to discern how the comment regarding the authority of county commissions relates to this section. The section describes the administrative process through which the Commission's decisions are made and reported.

87-6-13 (now numbered 87-6-12)

Mr. Ashcraft poses questions about how a hearing examiner may be retained and compensated. In this respect, the Commission is subject to the contract and purchase rules of the West Virginia Department of Administration. The Commission does not feel that it is necessary to include that statement here in these rules.

In response to Mr. Ashcraft's final statements as to where the State Fire Marshal should direct his attention, these are policy considerations, shaped by the Legislature, that are beyond the scope of the rules themselves. The Commission agrees that the modern trend is to require that everything be "down in writing" and this has compelled the Commission to articulate more precisely the standards and procedures that it has previously relied upon in a less rigorous format.

State Fire Commission's responses to the comments of Jeffrey S. Bowers.
South Fork Volunteer Fire Department:

The Commission agrees with the comment that local fire departments should be allowed to enter into mutual aid agreements with any other governmental entity able to provide fire protection service. Accordingly, subsections 87-6-2.8 and 87-6-3.2.b. have been amended to remove any requirement that a mutual aid agreement would be limited to a "local" government entity.

Anthony Carrico

From: Judy Cooper [jcooper@wvsos.com]
Sent: Thursday, July 28, 2005 7:40 AM
To: Tony Carrico (E-mail)
Subject: FW: AGENCY WV STATE FIRE COMISSION/TITLE #87

-----Original Message-----

From: Jeff Bowers [mailto:JSBRealLaw@beaconnet.net]
Sent: Thursday, July 28, 2005 6:39 AM
To: WV Secretary of State
Subject: AGENCY WV STATE FIRE COMISSION/TITLE #87

AGENCY WV STATE FIRE COMISSION
TITLE #87
RULE TYPE: LEGISLATIVE
NUMBER OF RULE BEING PURPOSED, 6

ATTN: JAMES SPEARS

ON BEHALF OF THE SOUTH FORK VOLUNTEER FIRE DEPARTMENT, PLEASE CONSIDER THIS AS COMMENTS BEING MADE IN REGARD TO THE PERIOD ON THE PURPOSED RULES AND PROCEDURES FOR THE CERTIFICATION AND REVIEW OF LOCAL FIRE DEPARTMENTS.

IN PARTICULAR, REFERENCE IS HEREWITH MADE TO SECTION 2.9 AND 3.2.b. AS IT RELATES TO MUTUAL AID BETWEEN A VOLUNTEER FIRE DEPARTMENT AND GOVERNMENTAL AGENCIES.

CURRENTLY WE HAVE A MUTUAL AID AGREEMENT WITH THE US NAVAL FACILITY IN SUGAR GROVE, WEST VIRGINIA, WHICH MAY OR MAY NOT BE CONSIDERED A LOCAL GOVERNMENTAL AGENCY OR GOVERNMENTAL AUTHORITY AS IT RELATES TO THE PURPOSED RULE. THAT MUTUAL AID AGREEMENT IS EXTREMELY ESSENTIAL TO THE PROPERTY AND LIVES IN THE SOUTH FORK OF PENDLETON COUNTY, WEST VIRGINIA, IN THAT ALL FIRE DEPARTMENTS ARE VOLUNTEER WITH THE VAST MAJORITY OF THE VOLUNTEERS WORKING AWAY FROM THE AREA THROUGHOUT THE DAY FOR EMPLOYMENT PURPOSES. FORTUNATELY THE US NAVAL FACILITY FIRE DEPARTMENT HAS PAID CIVILIAN EMPLOYEES THAT ARE AVAILABLE 24 HOURS A DAY AND ABLE TO IMMEDIATELY RESPONSE TO CALLS WHERE WE HAVE A TREMENDOUS LACK OF MAN POWER BECAUSE OF EMPLOYMENT OF THE VOLUNTEERS OUT OF OUR GEOGRAPHICAL AREA.

IN THAT REGARD, WE WOULD PROPOSE THAT THE WORD "LOCAL" BE DELETED FROM GOVERNMENTAL AGENCIES AND THAT MUTUAL AID AGREEMENTS BE FULLY PREMISIBLE WITH ANY GOVERNMENTAL AGENCY.

SINCERELY,

OK

JEFFREY S. BOWERS, PRESIDENT
SOUTH FORK VOLUNTEER FIRE DEPARTMENT

State Fire Commission's responses to the comments of the
Boone County Firefighters and Mutual Aid Association and of the
Lincoln County Firefighters Association:

The comments state that the proposed rules may be unfair and that they are unclear, but the comments do not refer to any particular provisions. For this reason, the State Fire Commission is unable to provide a specific response to the comments.

The comment urges that the rules be tabled for further discussion or to be "reworked." Again, without more specific information, the Commission is unable to respond.

Due to the long lead-time required by the rule review process, tabling these rules would significantly impair the ability of the Commission to carry out its statutory responsibilities for at least an additional year. The current absence of such rules has been raised as an issue in a proceeding now pending before the West Virginia Supreme Court of Appeals. For these reasons, the Commission has voted to proceed with the approval of the rules, as amended, for consideration through the legislative process.

Boone County Firefighters and Mutual Aid Association

P.O. BOX 1542
Danville, WV 25053

West Virginia State Fire Commission
1207 Quarrier St. 2nd Floor
Charleston, WV 25301

Dear Commissioners,

In reference to "Rules and Procedures for Certification and Review of Local Fire Departments", please consider the following comments submitted by the body of this association.

The proposed rule has been reviewed by this association and we feel that several unclear and unspecified issues have been placed thereby being detrimental to the fire departments like the ones here in Boone County. It is also viewed as unfair to all departments in the state.

We the Boone County Firefighters and Mutual Association feel uneasy situations and litigational proceedings will arise if the rule is proposed in its present form, therefore we are requesting the rule be tabled until the language be reworked to benefit and be approved by all fire departments in this great state.

This association will support any efforts to promote fairness in any rulings and procedures the commission submits.

We want to take time in thanking you for your consideration in this matter and we will also help the commission to better the fire service in West Virginia.

Sincerely,



Richard D. Smith, President, BCFMAA

**LINCOLN COUNTY FIREFIGHTER'S ASSOCIATION
POST OFFICE BOX 12
SPURLOCKVILLE, WV 25565**

July 26, 2005

West Virginia State Fire Commission
1207 Quarrier Street, 2nd Floor
Charleston, WV 25301

Dear Commissioners,

Regarding the proposed rules titled "Rules and Procedures for Certification and Review of Local Fire Departments", we respectfully submit the following comments for your consideration.

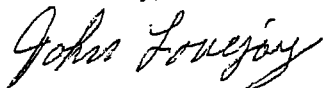
We have reviewed the proposed rule and find many unclear and unspecified issues that are central to the fire service in West Virginia. Primarily, the issue of combination department's requirements under this rule, as well as volunteer fire departments located within a municipality.

Additionally, we think that any rule that would not impose equal requirements upon all fire departments in West Virginia is unfair and selected enforcement.

We are very concerned that a legislative battle will erupt if this proposed rule is moved forward in the present form. Such a battle would accomplish nothing towards the betterment of the fire service. We respectfully request that the fire commission withdraw this rule and rework the document over the next year with input from the fire service organizations in the state. We pledge our support to the commission in developing a set of requirements that are fair and promote improvement of the fire service in West Virginia.

Thank you for your consideration of our request and we look forward to assisting the commission in completing its' missions in the future.

Sincerely,



John Lovejoy, President

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.

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.

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: acarrico@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)
I. 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

TITLE 87
LEGISLATIVE RULES
STATE FIRE COMMISSION

FILED

2005 JUL 29 P 4: 22

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

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 Protection District" 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 protection district 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. "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 protection districts 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 protection district, certification of a local fire department shall have the following effect:

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.

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

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.

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)

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.

f. The State Fire Marshall may assign registration permits for emergency vehicles to certified local fire departments and 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).

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. Duration of Certification.

4.1. Except as established in the rotating schedule for implementation of the certification program provided in subsection 87-6-6.2 of this rule, a certification issued by the Commission shall, if not revoked, suspended or restricted, 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.

§87-6-5. Certification Criteria.

5.1. 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:

a. The location, size and boundaries of the fire protection district and the location of the fire station or substations within that fire protection district;

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;

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

d. The administrative structure of the department including the designation of a chain of command and responsibilities of the respective office holders;

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

f. The ISO Public Protection Classification for the local fire department's fire protection district;

g. The record, if any, of the department in responding to emergency calls and the responsibilities of local fire departments throughout the previous certification period;

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;

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 §87-6-10 of this Rule; and

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).

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

6.1. All 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.

6.2. 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.

6.3. 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.

6.4. 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.

§87-6-7. Certification of new departments.

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

7.2. The creation a new local fire department is initiated by an application from the local company or the local government entity with jurisdiction over the area to be served by the proposed department. The State Fire Commission retains the ultimate authority to authorize the creation of, certify, and establish fire protection areas for, a new local fire department when the Commission determines that the establishment of such new department will provide more comprehensive and necessary protection for the safety of people and property within such areas. In making such determinations, the State Fire Commission shall attempt to do so with the consent and cooperation of all local government authorities in the areas to be served by the new department, with due consideration for the plenary authority of municipal governments to provide for fire protection for their constituents.

7.3. 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.

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

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.

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.

7.5. 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.

§87-6-8. Inspections.

8.1. The State Fire Marshal, a full-time deputy state marshal, or a full-time assistant state fire marshal may make 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.

8.2. 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.

§87-6-9. Complaints and investigations

9.1. 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.

9.2. 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.

a. 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.

b. 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 either begin an investigation of the allegations stated in the complaint or refer the complaint to another governmental entity with supervisory or enforcement authority over the local fire department identified 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.

9.3. 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

9.4. As a preliminary step in the investigation, the State Fire Marshal shall provide notice to the local fire department identified in the complaint that an investigation has been initiated and shall include a statement of the substance of the allegations in the complaint. 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.

9.5. 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 a reasonable period in advance of any meeting of the Commission in which the report of the State Fire Marshal may be considered.

9.6 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.

§87-6-10. Grounds for Denial, Restriction, Suspension or Revocation of a Certification.

10.1. 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:

- a. Failure to maintain minimum levels of performance in training, equipment maintenance or fire protection procedures;
- b. Failure to provide fire protection service to the department's assigned fire protection district or to other areas served through mutual aid agreements;
- c. Failure to respond, without good cause, to declared states of emergency or situations involving imminent risk of serious harm to human life;
- d. A repeated pattern of failure to respond to reasonable requests and lawful directives of the State Fire Marshal or State Fire Commission;
- 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;
- f. Chronic or gross abuse of the powers and privileges provided under subsection 87-6-3.3 of this rule;
- 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;
- 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;
- i. Any circumstance resulting in the absence, loss, removal or substantial alteration of a first

due area or other approved run area;

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 protection district of, or the physical facilities available to, the local fire department; or

k. An adjudication that the local fire department is in default of payment of any fees, taxes, invoices or premiums due to the State of West Virginia if such adjudication is rendered by a court of competent jurisdiction or by an administrative agency with specific statutory authority to determine such failure or default.

10.2. Disciplinary powers of the State Fire Commission

a. The Commission may deny certification and may restrict, 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 restriction, 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.

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, at any point, in lieu of other 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.

10.3. 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.

10.4. In the event that a local fire department fails to submit a timely application for renewal of certification or fails to submit a complete application for certification, the Chairman or the Vice-Chairman 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.

10.5. 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.

§87-6-11. Commission Actions.

11.1. Certifications of local fire departments may only be made by the State Fire Commission. Any decision approving, denying, restricting, 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.

11.2. 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.

§87-6-12. Procedures for Withdrawal, Suspension or Revocation of Certification.

12.1. 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. A copy of the statement of charges shall also be provided to the local government entity having jurisdiction over the area served by the local fire department.

12.2. 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.

12.3. 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 10.2.b of this Rule to resolve and dispose of the matter.

12.4. 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.

§87-6-13. Hearings and Hearing Procedure

13.1. 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.

13.2. Hearings shall be held at times and locations scheduled by the Commission or by its authorized hearing examiner. Written notice of the date time and place of the hearing shall served upon the respondent by certified or registered mail at least thirty (30) days prior to the date of the hearing unless the matter be continued to another date or unless the parties agree to an earlier hearing date.

13.3. 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.

13.4. 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.

13.5. Subpoenas and Subpoenas Duces Tecum

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.

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.

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.

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.

13.6. 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.

13.7. Evidence

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.

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.

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.

13.8. 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.

13.9. 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.

13.10 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.

§87-6-14. Appeals.

14.1. 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.

§87-1-15. Severability.

15.1. 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.