

**WEST VIRGINIA
SECRETARY OF STATE**

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #2

FILED
1990 JUL -2 AM 11:40

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: WV Division of Labor TITLE NUMBER: 42

RULE TYPE: Legislative; CITE AUTHORITY WV Code 21-5-5(c), 29A-1-1

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: VI

TITLE OF RULE BEING AMENDED: Polygraph Examinations, Limitations of Use, Requirements, Licenses and Penalties. Legislative and Procedural Rules and Regulations.

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

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 August 1, 1990 AT 5:00 pm. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

West Virginia Division of Labor

Office of the Commissioner

1800 Washington Street, East

Charleston, WV 25305

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

Roy M Smith

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

DATE: July 2, 1990

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: WV Division of Labor

EMERGENCY RULE TITLE:

1. Date of filing: July 1, 1990

2. Statutory authority for promulgating the emergency rule: WV Code 21-5-5(c) and 29A-1-1

3. Date of filing of proposed legislative rule: _____

4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?

This emergency rule amends existing language and adds new language relative to minimum requirements for licensure. A experience substitution has been added in lieu of the currently required baccalaureate degree.

5. Has the same or similar emergency rule previously been filed and expired?

No

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.

See attachments A & B

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

None

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

See attachments A & B

WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF LABOR
CHAPTER 21-5
SERIES VI

Title: Polygraph Examinations, Limitations of Use, Requirements, Licenses, and Penalties. Legislative and Procedural Rules and Regulations.

Section 1. General

1.1 Scope - Pursuant to the authority granted to the Commissioner of Labor in Chapter 21, Article 5, Section 5c of the Code of West Virginia, as amended, and in accordance with the provisions of Chapter 29-A, Article 1, Section 1 of the West Virginia Code, as amended, the following shall govern, clarify, and prescribe actions necessary to comply with Chapter 21, Article 5, Sections 5a-d.

1.2 Authority - W. Va. Code 21-5-5(c) and 29A-1-1.

1.3 Filing Date

1.4 Effective Date

1.5 Severability - If any provision of these regulations or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of these regulations which can be given effect without the invalid provisions or application.

Section 2. Definitions

2.1 Commissioner - means the Commissioner of Labor or his duly authorized representative.

2.2 Internship - means the course of study of polygraph, lie detector or similar tests and the administration of such tests by a trainee registered with the Commissioner of Labor. Such program shall be under the personal supervision of a licensed polygraph examiner in accordance with a course of study prescribed by the Commissioner at the commencement of such internship.

2.3 Intern - means a person registered with the Commissioner of Labor and enrolled in an approved internship program.

2.4 Examiner - means a person holding a current valid license issued by the Commissioner of Labor to administer polygraph, lie detector or other similar tests as provided in §21-5-5a, b, c, and d.

2.5 License - means documented authority to practice as a polygraph examiner as issued by the Commissioner of Labor.

*2.4 Employee - means an individual employed by an employer; except in the area of drugs as provided in §21-5-5b, employees having direct access to drugs, other than ordinary drugs, as defined in Chapter 30 of the West Virginia Code, in their daily routine job duties in an area utilized by such employee which facilities have been approved by the West Virginia Board of Pharmacy shall be the only employees of such employer who shall be subject to polygraph tests.

Section 3. License

3.1 Examination Required - After the effective date of this regulation, the Commissioner of Labor shall issue a license to administer a polygraph or similar test to an employee or prospective employee of any employer only to those persons who have satisfactorily passed an examination and who have otherwise met and complied with the requirements of these regulations and Chapter 21, Article 5, Sections 5a, b, c, and d of the West Virginia Code.

3.2 Form of Request - An applicant desiring to be examined for a polygraph license under the provisions of this regulation must as a condition precedent to such examination furnish the Commissioner of Labor with the following:

a. A completed application in writing on forms provided by the Commissioner, and containing such information as may be required by the Commissioner to determine the eligibility of the applicant.

b. A copy of the applicant's birth certificate and a recent photograph.

c. A nonrefundable fee of one hundred dollars which is accompanied by the application form described in (a) above.

d. Satisfactory evidence that the applicant holds--a baccalaureate--degree--and has been graduated from a school of polygraphy accredited by the American Polygraph Association.

*Rule was negated by Chapman v. Barker, Kanawha County Circuit Court No. 84-C-1490.

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e. Satisfactory evidence that the applicant has completed an approved internship program; provided, however, that any applicant provided satisfactory evidence that he or she has been a practicing examiner in West Virginia for a period of at least one year prior to June 7, 1983 shall upon application for a license within one year of June 7, 1983 be exempt from the internship requirement.

f. Satisfactory indication that the applicant subscribes to the code of ethics and standards and principles of practice of the American Polygraph Association.

g. Satisfactory evidence that the applicant holds a baccalaureate degree and has at least one (1) year of work experience in the field of law enforcement; OR

satisfactory evidence that the applicant holds an associate degree and has at least three (3) years of continuous work experience in the field of law enforcement; OR

satisfactory evidence that the applicant has been continuously employed in the field of law enforcement for the five (5) year period immediately preceding the date of application for licensure.

3.3 Time of Request - Applications must comply with the requirements of Subsection 20.02 by no later than ten working days in advance of the next regularly scheduled examination in order for the applicant to receive authorization to be examined.

3.4 Authorization for Examination - Applicants complying with Sub-sections 3.2 and 3.3 will be issued a written authorization acknowledging receipt of the license application fee and setting forth the time and place of the examination. The authorization will also serve as evidence to the person conducting the examination that the holder is properly authorized to be examined. Persons to be examined may be required to present further evidence of personal identification as a condition precedent to examination.

3.5 Scheduling of Examination - The Commissioner shall prepare and offer the examination at least four times each fiscal year. Notwithstanding the above, no examination will be scheduled in any quarter in which no person has made application satisfying the requirements of Section 3.4. The Commissioner may schedule the examination at such additional times as he or she deems necessary.

3.6 Passing Grade Required - A correct response to a minimum of seventy percent of the questions on the examination is necessary to permit the Commissioner to issue a license to an applicant.

3.7 Expiration and Renewal - The license shall expire on the thirtieth day of June following its issuance or renewal, as the case may be. The Commissioner shall reissue annually the license of any licensed examiner who qualifies and makes application therefor. Payment of a fee of one hundred dollars is a condition precedent to such renewal. It shall be the individual responsibility of every certificate holder to contact the Commissioner and make specific request for license renewal. Licenses will not be automatically renewed.

3.8 Re-Examination After Expiration - Any license not renewed in accordance with the provisions of Subsection 3.7 will be treated as expired. Any license having so expired may be renewed without examination upon proper request to the Commissioner in the manner described in Subsection 3.7; provided however, that after September 30 from the date of expiration, no expired license will be renewed until the applicant has been re-examined in accordance with this regulation.

3.9 Re-Examination Upon Failure - Any applicant who fails the license examination may take the test again at the next regularly scheduled time; provided that payment of an examination fee of fifty dollars to cover examination costs will be required of any applicant for each attempt to pass the examination after the second attempt; provided also that any applicant requesting to take an examination at a time other than that time regularly scheduled by the Commissioner shall pay a separate fee of fifty dollars.

3.10 Denial, Suspension or Revocation of License - The Commissioner may deny, suspend or revoke any license on any one or more of the following grounds:

a. Material misstatement in the application for a license or in the application for a renewal of a license.

b. Violation of, or aiding or abetting another in the violation of, this Chapter or any rule or regulation issued pursuant thereto.

c. Holder of a license being adjudged guilty of the commission of a felony or a misdemeanor involving moral turpitude.

d. Making any wilful misrepresentation or false promises or causing to be printed any false or misleading information for the purpose of directly or indirectly obtaining business or interns.

e. Having demonstrated unworthiness or incompetency to act as an examiner.

f. Allowing one's license to be used by an unlicensed person.

g. Failing, within a reasonable time, to provide information requested by the Commissioner as a result of a formal or informal complaint to the Commissioner, which would indicate a violation of this Chapter.

Section 4. Internship Training

4.1 Requirements to Begin Internship - An intern may begin the six-month internship program only if he or she:

a. Is registered with the Commissioner of Labor as an intern;

b. Files with the Commissioner the name and identifying information of the internship supervisor who must be an examiner licensed by the Commissioner;

c. Files with the Commissioner a written statement from the internship supervisor agreeing to undertake the responsibility for such training and agreeing to abide by regulations and requirements adopted by the Commissioner;

d. Obtains the Commissioner's permission to begin the internship program under the control of the proposed supervision;

e. Is at least eighteen years of age;

f. Is a citizen of the United States;

g. Has not been convicted of a felony or of a misdemeanor involving moral turpitude;

h. Has not been released or discharged with other than honorable conditions from the armed services of the United States or that of any other nation; and

i. Has been graduated from a polygraph school accredited by the American Polygraph Association.

4.2 Requirements of Internship Training - The requirements of the internship training shall be deemed to have been met under the following conditions:

1. The licensed examiner serving as supervisor will thoroughly cover the following areas with the intern:

- A. History and development of polygraph
- B. Legal and ethical aspects of polygraph
 - (1) Chapter 21-5-5a,b,c, and d of the West Virginia Code and accompanying regulations
 - (2) Statements and reports
 - (3) Civil rights of examinees
 - (4) Examiner and professional ethics
- C. Physiology
 - (1) Nervous system
 - (2) Autonomic Nervous System
 - (a) Sympathetic nervous system
 - (b) Parasympathetic nervous system
 - (3) Circulatory system and the heart
 - (4) Respiratory system
 - (5) Effects of drugs, alcohol and illness
- D. Psychology
 - (1) General
 - (2) Abnormal
 - (3) As applied to polygraphy
- E. Interrogation and interviews
 - (1) Receiving case briefing
 - (2) Pre-test interview
 - (3) Post-test interrogation
- F. Chart Interpretation
 - (1) All types of tests and responses
 - (2) Chart making
- G. Question formulation and test construction
 - (1) All types of tests
 - (2) All types of questions
 - (3) Semantics
- H. Instrumentation
 - (1) Construction and maintenance
 - (2) Standards of accuracy
 - (3) Nomenclature

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2. The internship program will consist of no less than 1,040 hours of work and instruction under the direct and close supervision of the licensed examiner approved as supervisor of the intern.

3. For the first 520 hours of the internship, the supervisor must be on the premises where the testing is being conducted by the intern, and must be immediately available for instruction or consultation with the intern. At the end of each examination conducted by an intern, the supervisor will review and critique the polygraph charts of every examination conducted by the intern and place his or her initials and the date of the review at the end of the chart before the results of such tests are provided to an employer or other person requesting the test.

4. At the end of the first 520 hours of the internship, the intern may conduct tests upon approval of the supervisor without the supervisor being on the premises and immediately available, but compliance with all other elements of part 3 above must be maintained.

5. The intern will be required to conduct at least fifty examinations during the internship program. The Commissioner may request and require inspection and review of any or all of such charts or any other elements of the internship program at any time during the internship program.

6. If at any time a conflict arises during an internship program, either the intern or the supervisor shall have the right to appeal in writing to the Commissioner for mediation of the conflict. The Commissioner may call upon any resident licensed examiner to assist in any hearings, reviews or critiques in order to resolve the conflict.

7. It shall be the duty of both the intern and the supervising examiner to report any infraction or violation of the rules which regulate the intern program to the Commissioner for appropriate action.

8. The supervising examiner must sign a release stating that all requirements of the internship program have been met by the intern and in his or her opinion the intern is competent to be a licensed examiner before the intern will be allowed to take the license examination.

4.3 Supervision of Interns - No licensed examiner shall have more than two interns under his or her supervision at any one time.

Section 5. Reciprocity

5.1 Reciprocity Requirements - An applicant who is an examiner, licensed under the laws of another state or territory of the United States, may be issued a license without examination by the Commissioner upon payment of a fee of one hundred dollars, and the production of satisfactory proof that:

- a. The applicant is at least eighteen years of age;
- b. He or she is a citizen of the United States;
- c. He or she has not been convicted of a misdemeanor involving moral turpitude or a felony;
- d. He or she has not been released or discharged with other than honorable conditions from the armed forces of the United States or that of any other nation;
- e. He or she has met equivalents of all educational and training requirements established by the Commissioner of Labor;
- f. The requirements for the licensing of examiners in such state or territory of the United States were, at the date of licensing, substantially equivalent to the requirements then in force in this state;
- g. The applicant had lawfully engaged in the administration of polygraph examinations under the laws of such state or territory for at least two years prior to application for license in West Virginia; and
- h. Such other state or territory grants similar reciprocity to license holders of this state.

Section 6. Intervention; Employee Organizations

6.1 Intervention; Employee Organization - With the written consent of any individual who is or would be aggrieved by a violation or threatened violation of this Act, it is the policy of the Commissioner of Labor that any appropriate employee organization may bring civil action on behalf of such individual or may intervene in any such civil action.

Section 7. Standards of Accuracy

7.1 Standards of Accuracy for Machines or Other Devices - Any equipment, machines, or other devices used or to be used in polygraph, lie detector or similar tests shall, in addition to criteria set forth in §21-5-5a, be calibrated or checked for accuracy by the licensed examiner at least once every six months in a manner which shall meet the manufacturer's specifications. A log recording such calibration shall be kept with the machine at all times and shall include the date of calibration, the

specifications met, and the signature of the person performing the calibration. The polygraph chart made in connection with the most recent calibration shall be kept with the log, and the chart shall contain a notation of the date, time, and what action or adjustments were performed. The log and chart shall be made available to the Commissioner for examination at the examiner's business location upon request by the Commissioner.

Section 8. Conditions and Procedures for Polygraph Examination

8.1 The following shall constitute minimum standards of procedure for administering polygraph examinations:

a. The examiner shall inform the prospective examinee that taking the detection of deception examination is a voluntary act and the examiner must obtain the written consent of the examinee to undergo such examination.

b. The examiner shall not conduct an examination on any person whom he believes, through observation or any other credible evidence, to be physically or psychologically unfit for such an examination at that time.

c. The examiner shall, immediately upon request of the examinee, terminate an examination in progress.

d. The examiner shall not render a verbal or written opinion based on chart analysis, until the examinee has had a reasonable opportunity to explain any reactions to pertinent questions.

e. The examiner shall not interrogate or conduct an examination of an examinee's sexual behavior, or ask any questions that can be construed as being sexually oriented or personally embarrassing to the examinee, regardless of marital status, unless the topic is a specific issue or unless it refers to the basic matter pertinent to the examination.

f. The examiner shall not conduct an examination when he or she has reason to believe the examination is intended to circumvent or defy the law.

g. The examiner shall not knowingly issue a polygraph examination report which is misleading, biased, or falsified in any way. Each report shall be a factual, impartial, and objective account of the pertinent information developed during the examination and the examiner's professional conclusion, based on analysis of the polygraph charts.

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Series-VI, Sec. 8

h. The examiner shall not conduct a polygraph examination without first reviewing the issues to be covered during the examination and the general content of the questions to be asked during the examination with the examinee.

i. The examiner shall not render a conclusive verbal or written decision, based on chart analysis, as to the truthfulness or deception of the examinee without having administered two or more polygraph charts covering the same relevant issue. The examiner may terminate an examination in progress at his or her own discretion when, in his or her opinion, the examinee has become physically or psychologically unfit, or has become uncooperative to the point that it would be useless to continue the examination.

j. All questions and answers asked during a polygraph examination shall be marked on the polygraph charts at the appropriate place on the chart where the question was asked and the answer given. If a question sheet with numbered questions is used, the number of the asked question along with the answer given shall be noted; and the question sheet shall be attached to the polygraph chart and made a part of the examinee's file. Each polygraph chart should be identified as to the person being examined, the examiner, time and date of the examination, and the chart number.

k. The examiner shall not, unless professionally qualified to do so, include in any written report, any statement purporting to be a medical, legal, or psychiatric opinion or which would infringe upon areas under the cognizance of professionals in these fields. This shall not preclude the examiner from describing the appearance or behavior of the examinee, if this is pertinent to the examination, as long as the examiner refrains from offering any diagnosis which he or she is professionally unqualified to make.

l. It shall be the duty of every examiner to report to the Commissioner any action or misconduct on the part of another examiner which would be in violation of the provisions of Chapter 21 of the West Virginia Code or the regulations promulgated thereof.

8.2 Minimum standards or conditions under which a polygraph, lie detector, or similar test may be given are:

a. The examinee shall be afforded privacy during the examination. The only persons other than the examiner and the

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examinee who may be in the same room during an examination are a registered intern, and/or an interpreter if necessary because of language, hearing or speech difficulties or handicap.

b. The examination area shall be reasonably free of noise and interruption; and within the normally acceptable temperature ranges for office work.

c. No video or audio recorders, telephonic or speaker devices or other devices shall operate during the examination to record or broadcast any elements of the examination except the record of the polygraph chart.

d. No two-way mirrors or any other devices shall be used for observation of the examination by any persons outside the examination room.

West Virginia Department of Labor

1800 Washington Street, East, Charleston 25305 (304) 348-7890

GASTON CAPERTON
GovernorROY M. SMITH
Commissioner

May 29, 1990

Mrs. Judy Cooper, Director
Administrative Law Division
Office of the Secretary of State
Capitol Complex
Charleston, West Virginia 25305

Dear Mrs. Cooper:

I'm writing to request your approval of a rule change which I believe constitutes filing as an "Emergency Rule." This is a most unusual situation so please bear with me as I try to explain.

It has been determined that there exists in this state, an extreme shortage of licensed polygraph examiners. To correct this problem, the Department of Public Safety has contracted for an eight-week training school to qualify law enforcement personnel for licensure. The school will be conducted by Argenbright International Institute of Polygraph, an approved American Polygraph Association School. The school is scheduled to begin in September, 1990. Solicitations for candidates were sent to 264 law enforcement and related organizations around the State. To date, only one application has been received. This low response is not due to a lack of interest but rather to a problem with the minimum licensure requirements as promulgated in July, 1985. The primary problem area is that the current rule requires a baccalaureate degree with no experience substitution provision. It is the opinion of the Division of Labor and the Department of Public Safety that the degree requirement is too restrictive and disqualifies the majority of the law enforcement personnel currently interested in licensure.

It has been determined that a change in the existing rule is necessary and that an amended rule will be filed. Normally, it would be filed as a "Proposed Rule" and passed through the rule-making process to become effective upon passage. This would continue the current shortage of licensed examiners and cause the

Ms. Judy Cooper

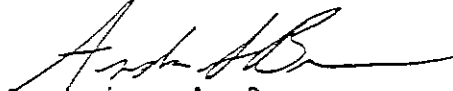
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May 29, 1990

delay of specialized schooling for 18 to 24 months. However, should the rule change be filed as an "Emergency Rule," the school could continue as scheduled and new licensures issued as early as November, 1990. It is my opinion that, under these circumstances, justification exists for an "Emergency Rule" filing to be effective from passage.

I have attached a copy of a letter received from the Department of Public Safety which further supports our position. Should you require additional information, please do not hesitate to contact me. Again, our question is: Does this situation justify the filing of this rule change as an "Emergency Rule"?

Sincerely,



Andrew A. Brown
Assistant to Commissioner

Attachments



Department of Public Safety
(West Virginia State Police)
725 Jefferson Road
South Charleston, West Virginia 25309

Gaston Caperton
Governor

Colonel J. R. Buckalew
Superintendent

May 18, 1990

Roy M. Smith, Commissioner
Department of Labor
Building 3, Room 319
Charleston, West Virginia 25305

Dear Commissioner Smith:

Thank you for meeting with me on May 10, 1990, and sharing concerns regarding the policy and procedure guidelines established for certifying Polygraph Examiners in West Virginia.

We have scheduled an eight-week Polygraph Examiner School at the West Virginia State Police Academy through Argenbright International Institute of Polygraph, an approved American Polygraph Association School. As we discussed, the stringent requirement for certification in West Virginia requiring a Baccalaureate Degree is having an adverse impact upon law enforcement in general. There is an expressed need for this training to assist law enforcement in West Virginia. The impact is upon city departments, sheriff departments, and the State Police.

I have checked with the surrounding states as we discussed and the following information was obtained through telephone conversation:

1. PENNSYLVANIA - Sgt. Wood, Pennsylvania State Police
(717) 783-5524
 - a. Non-licensing state
 - b. Signed 3 year commitment as Polygraph Operator
 - c. No degree required
 - d. Complete an accredited polygraph school

(Continued)

ROY M. SMITH, COMMISSIONER
MAY 18, 1990
PAGE TWO (2)

2. MARYLAND - Polygraph Section, Maryland State Police
(301) 653-4418
 - a. Recently abolished requirements which were:
 1. 3 years experience as Criminal Investigator or
 2. 60 college credits or
 3. Baccalaureate Degree
 - b. Present requirements:
 1. Off probation only
 2. Complete an accredited polygraph school
 - c. Non-licensing state

3. OHIO - Sgt. Philip Osborne, Ohio Highway Patrol
(614) 466-2163
 - a. Basic capability to perform the job
 - b. No educational requirements
 - c. No experience required
 - d. Non-licensing state
 - e. Complete an accredited polygraph school

4. KENTUCKY - Lt. Philip Wood, Kentucky State Police
(502) 564-7110
 - a. License required - licensed through Kentucky State Police
 - b. No degree required
 - c. Complete an accredited polygraph school
 - d. One year internship
 - e. Pass State Board examination

5. VIRGINIA - Lt. Zebulon Saunders, Virginia State Police
(814) 674-2000
 - a. License required - licensed through Department of Commerce, Private Security and Polygraph Section
(804) 367-8500
 - b. 5 years investigative experience and high school diploma or
 - c. Associate Degree and 3 years investigative experience or
 - d. No experience and a Baccalaureate Degree
 - e. Complete an accredited polygraph school

(Continued)

ROY M. SMITH, COMMISSIONER
MAY 18, 1990
PAGE THREE (3)

Based upon this information, West Virginia is the only state of the surrounding states which requires a Baccalaureate Degree as part of the requirement for licensing certification.

We are hopeful that the Polygraph Examiner School scheduled for September, 1990, may be offered. The greatest obstacle is the Baccalaureate Degree certification requirement. The polygraph further is an investigative tool for law enforcement which in turn, benefits our citizens. Thank you for your interest and willingness to further consider this area of concern.

Sincerely,



CAPTAIN W. J. SHAW
COMMANDANT - DIRECTOR OF TRAINING
WEST VIRGINIA STATE POLICE ACADEMY
P. O. BOX 459
INSTITUTE, WEST VIRGINIA 25112

TELEPHONE: (304) 768-5700

WJS:ljt