

**WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER**

ADMINISTRATIVE LAW DIVISION

Form #4

FILED

2003 DEC -5 P 3: 36

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: West Virginia Division of Labor TITLE NUMBER: 42

CITE AUTHORITY WV Code 21-5-5(c)

AMENDMENT TO AN EXISTING RULE: YES X NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 6

TITLE OF RULE BEING AMENDED: Psychophysiological Detection of Deception,
Examinations, Limitations of Use, Requirements, Licenses and Penalties

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED:

TITLE OF RULE BEING PROPOSED:

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



Authorized Signature

Do Not Mark In This Box

03 10-1 11 3:40

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

Form #3 □

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

AGENCY: West Virginia Division of Labor TITLE NUMBER: 42

CITE AUTHORITY: West Virginia Code 21-5-5 (c)

AMENDMENT TO AN EXISTING RULE: YES NO

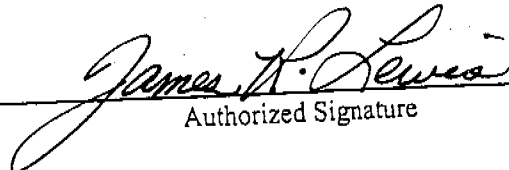
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 6

TITLE OF RULE BEING AMENDED: Psychophysiological Detection of Deception
Examinations, Limitations of Use, Requirements, Licenses and Penalties.

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

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: August 1, 2003

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) West Virginia Division of Labor

Building 6, Room B-749, Capitol Complex

Charleston, West Virginia 25305 (304) 558-7890

LEGISLATIVE RULE TITLE: 42-CSR-19.6

1. Authorizing statute(s) citation West Virginia Code 21-5-5(c)

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

July 31, 2003

b. What other notice, including advertising, did you give of the hearing?

None

c. Date of Public Hearing(s) or Public Comment Period ended:

N/A

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

Attached _____ No comments received X

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

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

Andrew Brown

- 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)

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
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #2

FILED

2003 JUL -1 A 10:58

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia Division of Labor TITLE NUMBER: 42

RULE TYPE: Legislative; CITE AUTHORITY WV Code § 21-5-5(c)

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 6

TITLE OF RULE BEING AMENDED: Psychophysiological Detection of Deception
Examinations, Limitations of Use, Requirements, Licenses and Penalties.

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 July 31, 2003 AT 5:00 pm. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

West Virginia Division of Labor

Attn; Andrew A. Brown

Room B-749, Building #6

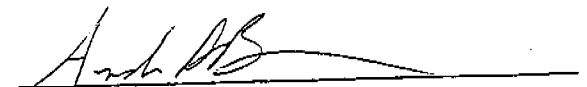
State Capitol Complex

Charleston, WV 25305

Legislative Rule Making

JUL 01 2003

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


Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

WEST VIRGINIA DIVISION OF LABOR

749-B Building 6 , Capitol Complex • Charleston, West Virginia 25305

Phone (304) 558-7890 • Fax (304) 558-3797

[HTTP://WWW.STATE.WV.US/LABOR](http://www.state.wv.us/labor)

BOB WISE
Governor



JAMES R. LEWIS
Commissioner

CIRCUMSTANCES AND SUMMARY

House Bill 2529 was passed into law during the 2003 Regular Legislative Session. This bill was an amendment to existing code. Passage of this bill has necessitated an amendment to the applicable Legislative Rule.

The Rule has been amended to insert "psychophysiological detection of deception" for the terms "polygraph" and "lie detector". This change appears throughout the rule.

The rule has been amended in subsection 3.2 to provide different education requirements for Class I and Class II licenses. A Class II license was added by H.B. 2529 to permit certain licensees to perform examinations with significant limitations.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Psychophysiological Detection of Deception Examinations, Limitations of Use, Requirements, Licenses and Penalties

Type of Rule: X Legislative Interpretive Procedural

Agency: West Virginia Division of Labor

Address: Room B-749, Building #6
State Capitol Complex
Charleston, WV 25305

1. Effect of Proposed Rule NO FISCAL IMPACT

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	HEREAFTER
ESTIMATED TOTAL COST	\$	\$	\$	\$	\$
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERATIONS					
EQUIPMENT					
OTHER					

2. Explanation of above estimates:

N/A

3. Objectives of these rules:

This rule amendment incorporates changes mandated by the passage of House Bill 2529 during the 2003 regular legislative session.

Rule Title: Psychophysiological Detection of Deception, Examinations,
Limitations of Use, Requirements, Licenses and Penalties.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

-NONE-

B. Economic Impact on Political Subdivisions; Specific
Industries; Specific groups of Citizens.

-NONE-

C. Economic Impact on Citizens/Public at Large.

-NONE-

Date: July 1, 2003

Signature of Agency Head or Authorized Representative



FILED

TITLE 42
LEGISLATIVE RULES
DIVISION OF LABOR

2004 JAN 15 P 1:13

SERIES 6

WEST VIRGINIA
STATE

~~POLYGRAPH PSYCHOPHYSIOLOGICAL DETECTION OF DECEPTION~~
EXAMINATIONS, LIMITATIONS OF USE, REQUIREMENTS,
LICENSES AND PENALTIES

§42-6-1. General.

1.1. Scope. -- Pursuant to the authority granted to the Commissioner of Labor in W. Va. Code §21-5-5(c) and in accordance with the provisions of W. Va. Code §29A-1-1 ~~the following shall~~ this rule governs, ~~clarify~~ clarifies and prescribe actions necessary to comply with W. Va. Code §21-5-5(a)-(d).

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

1.3. Filing Date. -- ~~June 7, 1985.~~

1.4. Effective Date. -- ~~July 7, 1985.~~

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 applications.~~

§42-6-2. Definitions.

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

2.2. "Internship" means a course of study in the psychophysiological detection of deception, polygraph, lie detector or similar tests and the administration of ~~such~~ the tests by a trainee registered with the Commissioner of Labor. ~~Such~~ The 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~~ the 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 psychophysiological detection of deception, polygraph, lie detector or other similar tests as provided in W. Va. Code 21-5-5~~c~~ (a),(b),(c) and (d).

2.5. "License" means documented authority to practice as a ~~polygraph~~ psychophysiological detection of deception examiner as issued by the Commissioner of Labor.

2.6. "Employee" means an individual employed by an employer; except in the area of drugs as provided in W. Va. Code §21-5-5~~b~~ (b), employees have direct access to drugs, other than ordinary drugs, as defined in chapter thirty 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 psychophysiological detection of deception tests.

§42-6-3. License.

3.1. Examination required. -- After the effective date of this ~~regulation rule~~, the Commissioner of Labor shall issue a license to ~~administer a polygraph psychophysiological detection of deception 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~~ this rule and W. Va. Code §21-5-5a, b, c ~~(a),(b),(e), and d. (d)~~.

3.2. Form of request. -- An ~~applicant desiring individual applying~~ to be examined for a ~~polygraph an examiner's~~ license under the provisions of this ~~regulation rule~~ must shall as a condition precedent to ~~such the~~ examination furnish the Commissioner of Labor with the following:

(a) A completed application in writing on forms provided by the Commissioner, and containing ~~such the~~ 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 (\$100) ~~which is accompanied by the application form described in part (a) above;~~

(d) To qualify for a Class I license, satisfactory evidence that the applicant holds a baccalaureate degree and has ~~been~~ graduated from a school of polygraphy accredited by the American Polygraph Association; or

(e) To qualify for a Class II license, satisfactory evidence that the applicant holds an associate degree and has graduated from a school of polygraph accredited by the American Polygraph Association; and

(f) ~~(f)~~ Satisfactory evidence that the applicant has completed an approved internship program. ~~Provided, however, That any applicant providing satisfactory evidence that he or she has been a practicing examiner in West Virginia for a period of at least one (1) year prior to June 7, 1983, shall upon application for a license within one (1) year of June 7, 1983, be exempt from the internship requirement.~~

(g) ~~(g)~~ Satisfactory indication that the applicant subscribes to the code of ethics and standards and principles of practice of the American Polygraph Association.

3.3. Time of request. -- Applications must comply with the requirements of Subsection ~~20.2~~ 3.2 and must be submitted by no later than ten (10) 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 Subsections 3.2 and 3.3 ~~above of this section~~ will be issued a written authorization by the commissioner 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 Applicants~~ 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 (4) times each fiscal year. ~~Notwithstanding the above, no~~ However, the commissioner shall not schedule an examination will be scheduled in any quarter in which no person has made application satisfying the requirements of Subsection 3.4 ~~above, of this section.~~ The Commissioner may schedule the examination at ~~such any~~ additional times as he or she deems considers necessary.

3.6. Passing grade required. -- ~~A correct response to~~ An applicant must obtain a minimum score of seventy percent (70%) ~~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~~ expires 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 for a license.~~ Payment of a A renewal fee of one hundred dollars (\$100) is ~~a condition precedent to such renewal required for a renewal.~~ It ~~shall be~~ is the individual responsibility of every ~~certificate~~ license holder to contact the Commissioner and make specific request for license renewal. Licenses ~~will are not be~~ are not be automatically renewed.

3.8. Reexamination after expiration. -- Any license not renewed in accordance with the provisions of Subsection 3.7 ~~above of this section will be treated as expired~~ expires. Any expired license ~~having so expired~~ may be renewed without examination upon proper request to the Commissioner in the manner described in Subsection 3.7 ~~above of this section~~: Provided, ~~however,~~ That after September 30 from the date of expiration, no expired license will be renewed until the applicant has been reexamined in accordance with this ~~regulation~~ rule.

3.9. Reexamination upon failure. -- Any applicant who fails the license examination may take the test again at the next regularly scheduled time: Provided, ~~That that after the second examination the applicant shall the~~ payment of pay an examination fee of fifty dollars (\$50.00) to cover ~~examination the costs will be required of~~ any applicant for each attempt to pass the examination ~~after the second attempt~~: Provided ~~further however,~~ That any applicant requesting to take the examination at a time other than that time regularly scheduled by the Commissioner shall pay a separate fee of fifty dollars (\$50.00).

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~~ A material misstatement in the application for a license or in the application for a the renewal of a license;

(b) ~~Violation~~ A violation of, or aiding or abetting another in the violation of, this ~~chapter article~~ or any rule or regulation issued pursuant thereto;

(c) ~~Holder of a license being adjudged~~ The licensee is found guilty of the commission of a felony or a misdemeanor involving moral turpitude;

(d) ~~Making~~ The licensee makes any willful misrepresentation or false promises or ~~causing~~ cause to be printed any false or misleading information for the purpose of directly or indirectly obtaining business or interns;

- (e) ~~Having~~ The licensee has demonstrated unworthiness or incompetency to act as an examiner;
- (f) ~~Allowing one's~~ The licensee allows his or her license to be used by an unlicensed person;
- (g) ~~Failing~~ The licensee fails, 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~~ article.

§42-6-4. Internship training.

4.1. Requirements to begin internship. -- An ~~intern~~ individual may begin the six (6) 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~~ his or her internship supervisor who must be an examiner licensed by the Commissioner;
- (c) Files with the Commissioner a written statement from ~~the~~ his or her internship supervisor agreeing to undertake the responsibility for ~~such~~ the training and agreeing to abide by ~~regulations and requirements~~ the rules 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 (18) 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~~ psychophysiological detection of deception school accredited by the American Polygraph Association.

4.2. Requirements of internship training. -- The ~~intern shall have met the~~ requirements of the internship training ~~shall be deemed to have been met under the following conditions if:~~

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

- ~~A~~ a. ~~History~~ The history and development of ~~polygraph~~ psychophysiological detection of deception;
- ~~B~~ b. ~~Legal~~ The legal and ethical aspects of ~~polygraph~~ psychophysiological detection of deception;

- (1) W. Va. Code §21-5-5a, b, c, (a),(b),(c), and d (d) and accompanying ~~regulations~~ rules;
- (2) Statements and reports;

- (3) Civil rights of examinees; and
- (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; and
 - (5) Effects of drugs, alcohol and illness.

D. Psychology

- (1) General;
- (2) Abnormal; and
- (3) As applied to ~~polygraph~~ the psychophysiological detection of deception.

E. Interrogation and interviews

- (1) Receiving case briefing;
- (2) Pre-test interview; and
- (3) Post-test interrogation.

(F) Chart interpretation

- (1) All types of tests and responses; and
- (2) Chart making.

G. Question formulation and test construction

- (1) All types of tests;
- (2) All types of questions; and
- (3) Semantics.

H. Instrumentation

- (1) Construction and maintenance;
- (2) Standards of accuracy; and
- (3) Nomenclature;

2. The internship program ~~will consist~~ consisted of no less than one thousand forty (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 five hundred twenty (520) hours of the internship, the supervisor ~~must be~~ was on the premises where the testing ~~is~~ was being conducted by the intern, and ~~must be~~ was 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~~ shall have reviewed and critiqued the polygraph charts of every examination conducted by ~~an~~ the intern, and ~~place~~ placed 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; and

4 A. At the end of the first five hundred twenty (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.

§ B. The intern ~~will be required to conduct~~ conducted at least fifty (50) 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.

~~6.4.~~ If at any time a conflict arises during an internship program, either the intern or the supervisor ~~shall have the right to~~ may 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.

~~7.5.~~ ~~It shall be the duty of both the~~ The intern and the supervising examiner ~~to~~ shall report any infraction or violation of the rules which regulate the intern program to the Commissioner for appropriate action.

8. 6. The supervising examiner ~~must~~ shall 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.

~~4.3.7.~~ Supervision of interns. -- ~~No licensed~~ Licensed examiner shall not have more than two (2) interns under his or her supervision at any one time.

§42-6-5. Reciprocity.

5.1. Reciprocity requirements. -- ~~An~~ The commissioner may issue a license to 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 (\$100), and the production of satisfactory proof that:

- (a) The applicant is at least eighteen (18) 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 the~~ state or territory of the United States ~~were,~~ where the applicant is licensed, at the date of licensing, are substantially equivalent to the requirements ~~then~~ in force in this State;
- (g) The applicant had lawfully engaged in the administration of ~~polygraph~~ psychophysiological detection of deception examinations under the laws of ~~such the~~ state or territory in which he or she is licensed for at least two (2) years prior to application for license in West Virginia; and
- (h) ~~Such~~ The other state or territory grants similar reciprocity to license holders of this State.

§42-6-6. 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~~ article, it is the policy of the Commissioner of ~~Labor~~ that any appropriate employee organization may bring civil action on behalf of ~~such the~~ individual or may intervene in any ~~such~~ civil action.

§42-6-7. 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~~ the psychophysiological detection of deception or similar tests shall, in addition to criteria set forth in W. Va. Code §21-5-5A ~~5a~~, be calibrated or checked for accuracy by the licensed examiner at least once every six (6) months in a manner which ~~shall meet~~ meets the manufacturer's specifications. A log recording ~~such- the~~ 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~~ psychophysiological detection of deception 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.

§42-6-8. Conditions and procedures for ~~polygraph~~ psychophysiological detection of deception examination.

8.1. The ~~following shall constitute~~ minimum standards of procedure for administering ~~polygraph~~ psychophysiological detection of deception examinations are as follows:

- (a) The examiner shall inform the prospective examinee that taking the psychophysiological detection of deception examination is a voluntary act and the examiner must obtain the written consent of the examinee to

undergo ~~such~~ the examination;

(b) The examiner shall not conduct an examination on any person whom he or she believes, through observation or any other credible evidence, to be physically or psychologically unfit for ~~such~~ the 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~~ psychophysiological detection of deception examination report which is misleading, biased or falsified in any way. Each report shall be a factual, impartial and an objective account of the pertinent information developed during the examination and the examiner's professional conclusion, based on analysis of the ~~polygraph~~ psychophysiological detection of deception charts;

(h) The examiner shall not conduct a ~~polygraph~~ psychophysiological detection of deception 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 (2) or more ~~polygraph~~ psychophysiological detection of deception 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~~ psychophysiological detection of deception examination shall be marked on the ~~polygraph~~ psychophysiological detection of deception 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~~ psychophysiological detection of deception chart and made a part of the examinee's file. Each ~~polygraph~~ psychophysiological detection of deception 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~~ The examiner from describing ~~may describe~~ 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; and

(1) ~~It shall be the duty of every~~ The examiner ~~to~~ shall report to the Commissioner any action or misconduct on the part of another examiner which would be in violation of the provisions of W. Va, Code §21 et seq. or the ~~regulations~~ rules promulgated ~~thereof.~~ under the Code.

8.2. Minimum standards of conditions under which a ~~polygraph, lie detector~~ psychophysiological detection of deception 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 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~~ PDD chart; and

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

FILED

TITLE 42
LEGISLATIVE RULES
DIVISION OF LABOR

2003 DEC -5 P 3:36

SERIES 6

~~POLYGRAPH PSYCHOPHYSIOLOGICAL DETECTION OF DECEPTION~~ STATE
EXAMINATIONS, LIMITATIONS OF USE, REQUIREMENTS,
LICENSES AND PENALTIES

§42-6-1. General.

1.1. Scope. -- Pursuant to the authority granted to the Commissioner of Labor in W. Va. Code §21-5-5(c) and in accordance with the provisions of W. Va. Code §29A-1-1 ~~the following shall governs, clarify~~ clarifies and prescribe actions necessary to comply with W. Va. Code §21-5-5(a)-(d).

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

1.3. Filing Date. -- ~~June 7, 1985.~~

1.4. Effective Date. -- ~~July 7, 1985.~~

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 applications.~~

§42-6-2. Definitions.

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

2.2. "Internship" means a course of study in the psychophysiological detection of deception, polygraph, lie detector or similar tests and the administration of ~~such~~ the tests by a trainee registered with the Commissioner of Labor. ~~Such~~ The 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~~ the 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 psychophysiological detection of deception, polygraph, lie detector or other similar tests as provided in W. Va. Code 21-5-5(a),(b),(c) ~~and (d)~~.

2.5. "License" means documented authority to practice as a ~~polygraph~~ psychophysiological detection of deception examiner as issued by the Commissioner of Labor.

2.6. "Employee" means an individual employed by an employer; except in the area of drugs as provided in W. Va. Code §21-5-5(b), employees have direct access to drugs, other than ordinary drugs, as defined in chapter thirty 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 psychophysiological detection of deception tests.

§42-6-3. License.

3.1. Examination required. -- After the effective date of this ~~regulation rule~~, the Commissioner of Labor shall issue a license to ~~administer a polygraph psychophysiological detection of deception 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~~ this rule and W. Va. Code §21-5-5(a),(b),(c), ~~and (d)~~.

3.2. Form of request. -- An ~~applicant desiring~~ individual applying to be examined for a polygraph an examiner's license under the provisions of this ~~regulation rule~~ must shall as a condition precedent to ~~such the~~ examination furnish the Commissioner of Labor with the following:

(a) A completed application in writing on forms provided by the Commissioner, and containing such the 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 (\$100) ~~which is accompanied by the application form described in part (a) above;~~

(d) To qualify for a Class I license, satisfactory evidence that the applicant holds a baccalaureate degree and has ~~been~~ graduated from a school of polygraphy accredited by the American Polygraph Association; or

(e) To qualify for a Class II license, satisfactory evidence that the applicant holds an associate degree and has graduated from a school of polygraph accredited by the American Polygraph Association; and

~~(e) (f)~~ Satisfactory evidence that the applicant has completed an approved internship program. ~~Provided, however, That any applicant providing satisfactory evidence that he or she has been a practicing examiner in West Virginia for a period of at least one (1) year prior to June 7, 1983, shall upon application for a license within one (1) year of June 7, 1983, be exempt from the internship requirement.~~

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

3.3. Time of request. -- Applications must comply with the requirements of Subsection ~~20.2~~ 3.2 and must be submitted by no later than ten (10) 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 Subsections 3.2 and 3.3 ~~above of this section~~ will be issued a written authorization by the commissioner acknowledging receipt of the license application fee and setting forth the time and place of the examination. The authorization ~~will also serve~~ serves as evidence to the person conducting the examination that the holder is properly authorized to be examined. ~~Persons~~ Applicants 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 (4) times each fiscal year. ~~Notwithstanding the above, no~~ However, the commissioner shall not schedule an examination will be scheduled in any quarter in which no person has made application satisfying the requirements of Subsection 3.4 ~~above~~ of this section. The Commissioner may schedule the examination at ~~such any~~ any additional times as he or she ~~deems~~ considers necessary.

3.6. Passing grade required. -- ~~A correct response to~~ An applicant must obtain a minimum score of seventy percent (70%) ~~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~~ expires 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 ~~therefore~~ for a license. ~~Payment of a~~ A renewal fee of one hundred dollars (\$100) is ~~a condition precedent to such renewal~~ required for a renewal. It ~~shall be~~ is the individual responsibility of every ~~certificate~~ license holder to contact the Commissioner and make specific request for license renewal. Licenses ~~will are not be~~ are not automatically renewed.

3.8. Reexamination after expiration. -- Any license not renewed in accordance with the provisions of Subsection 3.7 ~~above of this section~~ will be treated as expired. Any expired license ~~having so expired~~ may be renewed without examination upon proper request to the Commissioner in the manner described in Subsection 3.7 ~~above of this section~~: Provided, ~~however~~, That after September 30 from the date of expiration, no expired license will be renewed until the applicant has been reexamined in accordance with this ~~regulation~~ rule.

3.9. Reexamination upon failure. -- Any applicant who fails the license examination may take the test again at the next regularly scheduled time: Provided, ~~That~~ that after the second examination the applicant shall the ~~payment of pay~~ an examination fee of fifty dollars (\$50.00) to cover ~~examination the costs will be required of any applicant~~ for each attempt to pass the examination ~~after the second attempt~~: Provided ~~further however~~, That any applicant requesting to take the examination at a time other than that time regularly scheduled by the Commissioner shall pay a separate fee of fifty dollars (\$50.00).

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~~ A material misstatement in the application for a license or in the application for a the renewal of a license;

(b) ~~Violation~~ A violation of, or aiding or abetting another in the violation of, this ~~chapter~~ article or any rule ~~or regulation~~ issued pursuant thereto;

(c) ~~Holder of a license being adjudged~~ The licensee is found guilty of the commission of a felony or a misdemeanor involving moral turpitude;

(d) ~~Making~~ The licensee makes any willful misrepresentation or false promises or ~~causing~~ cause to be printed any false or misleading information for the purpose of directly or indirectly obtaining business or interns;

(e) ~~Having~~ The licensee has demonstrated unworthiness or incompetency to act as an examiner;

(f) ~~Allowing one's~~ The licensee allows his or her license to be used by an unlicensed person;

(g) ~~Failing~~ The licensee fails, 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~~ article.

§42-6-4. Internship training.

4.1. Requirements to begin internship. -- An ~~intern~~ individual may begin the six (6) 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~~ his or her internship supervisor who must be an examiner licensed by the Commissioner;

(c) Files with the Commissioner a written statement from ~~the~~ his or her internship supervisor agreeing to undertake the responsibility for ~~such~~ the 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 (18) 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 intern shall have met the requirements of the internship training ~~shall be deemed to have been met under the following conditions if:~~

1. The licensed examiner serving as supervisor ~~will~~ has thoroughly ~~ever~~ covered the following areas with the intern:

A. ~~History~~ The history and development of polygraph;

B. ~~Legal~~ The legal and ethical aspects of polygraph;

(1) W. Va. Code §21-5-5(a),(b),(c), and (d) and accompanying ~~regulations~~ rules;

(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 polygraph
- 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;

2. The internship program ~~will consist~~ consisted of no less than one thousand forty (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 five hundred twenty (520) hours of the internship, the supervisor ~~must be~~ was on the premises where the testing ~~is~~ was being conducted by the intern, and ~~must be~~ was 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~~ shall have reviewed and critiqued the polygraph charts of every examination conducted by ~~an~~ the intern, and ~~place~~ placed 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; and

4 A. At the end of the first five hundred twenty (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 B. The intern ~~will be required to conduct~~ conducted at least fifty (50) 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.

~~6.4.~~ If at any time a conflict arises during an internship program, either the intern or the supervisor ~~shall have the right to~~ may 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.

~~7.5.~~ ~~It shall be the duty of both the~~ The intern and the supervising examiner ~~to~~ shall report any infraction or violation of the rules which regulate the intern program to the Commissioner for appropriate action.

8. ~~6.~~ The supervising examiner ~~must~~ shall 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.

~~4.3.7.~~ Supervision of interns. -- ~~No licensed~~ Licensed examiner shall not have more than two (2) interns under his or her supervision at any one time.

§42-6-5. Reciprocity.

5.1. Reciprocity requirements. -- ~~An~~ The commissioner may issue a license to 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 (\$100), and the production of satisfactory proof that:

- (a) The applicant is at least eighteen (18) 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 the~~ state or territory of the United States ~~were,~~ where the applicant is licensed, at the date of licensing, are substantially equivalent to the requirements ~~then~~ in force in this State;
- (g) The applicant had lawfully engaged in the administration of ~~polygraph~~ psychophysiological detection of deception examinations under the laws of ~~such state or territory in which he or she is licensed~~ for at least two (2) years prior to application for license in West Virginia; and
- (h) ~~Such~~ The other state or territory grants similar reciprocity to license holders of this State.

§42-6-6. 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~~ article, it is the policy of the Commissioner ~~of Labor~~ that any appropriate employee organization may bring civil action on behalf of ~~such the~~ individual or may intervene in any ~~such~~ civil action.

§42-6-7. 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~~ the psychophysiological detection of deception or similar tests shall, in addition to criteria set forth in W. Va. Code §21-5-5A, be calibrated or checked for accuracy by the licensed examiner at least once every six (6) months in a manner which ~~shall meet~~ meets the manufacturer's specifications. A log recording ~~such the~~ 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~~ PDD 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.

§42-6-8. Conditions and procedures for ~~polygraph~~ psychophysiological detection of deception examination.

8.1. The ~~following shall constitute~~ minimum standards of procedure for administering ~~polygraph~~ psychophysiological detection of deception examinations are as follows:

- (a) The examiner shall inform the prospective examinee that taking the psychophysiological 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 or she believes, through

observation or any other credible evidence, to be physically or psychologically unfit for ~~such~~ the 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~~ psychophysiological detection of deception examination report which is misleading, biased or falsified in any way. Each report shall be a factual, impartial and an objective account of the pertinent information developed during the examination and the examiner's professional conclusion, based on analysis of the ~~polygraph~~ PDD charts;

(h) The examiner shall not conduct a ~~polygraph~~ psychophysiological detection of deception 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 (2) or more ~~polygraph~~ PDD 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~~ psychophysiological detection of deception examination shall be marked on the ~~polygraph~~ PDD 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~~ PDD chart and made a part of the examinee's file. Each ~~polygraph~~ PDD 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~~ The examiner from describing may describe 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; and

(l) ~~It shall be the duty of every~~ The examiner to shall report to the Commissioner any action or misconduct on the part of another examiner which would be in violation of the provisions of W. Va, Code §21 et seq. or the ~~regulations~~ promulgated thereof, under the Code.

8.2. Minimum standards of conditions under which a ~~polygraph, lie detector~~ psychophysiological detection of deception or similar test may be given are:

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(a) The examinee shall be afforded privacy during the examination. The only persons other than the examiner and the 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~~ PDD chart; and

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