

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

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JOE MANCHIN, III
SECRETARY OF STATE

Form #6

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED
BY THE WEST VIRGINIA LEGISLATURE**

AGENCY West Virginia Division of Labor NUMBER: 42

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 RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) SB 350

SECTION § 64-10-3(a), PASSED ON March 13, 2004

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE
FOLLOWING DATE: June 1, 2004


Authorized Signature

TITLE 42
LEGISLATIVE RULES
DIVISION OF LABOR

FILED

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SERIES 6
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 §21-5-5c and in accordance with the provisions of W. Va. Code §29A-1-1 governs, clarifies and prescribe actions necessary to comply with W. Va. Code §21-5-5a, -5b, -5c, and -5d.

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

1.3. Filing Date. -- May 4, 2004

1.4. Effective Date. -- June 1, 2004

§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, or similar tests and the administration of the tests by a trainee registered with the Commissioner of Labor. The program shall be under the personal supervision of a licensed examiner in accordance with a course of study prescribed by the Commissioner at the commencement of 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 or other similar tests as provided in W. Va. Code 21-5-5a, -5b, -5c, and -5d.

2.5. "License" means documented authority to practice as a 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 psychophysiological detection of deception tests.

§42-6-3. License.

3.1. Examination required. -- After the effective date of this rule, the Commissioner shall issue a license only those persons who have satisfactorily passed an examination and who have otherwise met and complied with the requirements of this rule and W. Va. Code §21-5-5a, -5b, -5c and -5c.

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

(a) A completed application in writing on forms provided by the Commissioner, and containing the information 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).

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

(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.

(f) Satisfactory evidence that the applicant has completed an approved internship program.

(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 3.2 and must be submitted 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 of this section and 3.3 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 also serves as evidence to the person conducting the examination that the holder is properly authorized to be examined. 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. However, the commissioner shall not schedule an examination in any quarter in which no person has made application satisfying the requirements of Subsection 3.4. The Commissioner may schedule the examination at any additional times he or she considers necessary.

3.6. Passing grade required. -- An applicant must obtain a minimum score of seventy percent (70%) on the examination to permit the Commissioner to issue a license.

3.7. Expiration and renewal.-- The license expires on the thirtieth day of June following its issuance or renewal. The Commissioner shall reissue annually the license of any licensed examiner who qualifies and makes application for a license. A renewal fee of one hundred dollars (\$100) is required for renewal. It is the

individual responsibility of every license holder to contact the Commissioner and make specific request for license renewal. Licenses are not automatically renewed.

3.8. Reexamination after expiration. -- Any license not renewed in accordance with the provisions of Subsection 3.7 of this section is expired. Any expired license may be renewed without examination upon proper request to the Commissioner in the manner described in Subsection 3.7 of this section: Provided, 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 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 after the second examination the applicant shall pay an examination fee of fifty dollars (\$50.00) to cover the costs for each attempt to pass the examination: Provided 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) A material misstatement in the application for a license or in the application for the renewal of a license.

(b) A violation of, or aiding or abetting another in the violation of W.Va. Code §§21-5-5a, -5b, -5c, and -5d or any rule issued pursuant thereto.

(c) The licensee has been found guilty of the commission of a felony or a misdemeanor involving moral turpitude.

(d) The licensee has made any willful misrepresentation or false promises or has caused to be printed any false or misleading information for the purpose of directly or indirectly obtaining business or interns.

(e) The licensee has demonstrated unworthiness or incompetency to act as an examiner.

(f) The licensee has allowed his or her license to be used by an unlicensed person.

(g) The licensee has failed, 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 article .

§42-6-4. Internship training.

4.1. Requirements to begin internship. -- An individual may begin the six (6) month internship program only if he or she:

(a) Is registered with the Commissioner as an intern;

(b) Files with the Commissioner the name and identifying information of his or her internship supervisor who must be an examiner licensed by the Commissioner;

(c) Files with the Commissioner a written statement from his or her internship supervisor agreeing to undertake the responsibility for 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 has met the requirements of the internship training if:

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

A. The history and development of polygraph

B. The legal and ethical aspects of polygraph

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

(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 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 was on the premises where the testing was being conducted by the intern, and was immediately available for instruction or consultation with the intern. At the end of each examination conducted by an intern, the supervisor shall have reviewed and critiqued the polygraph charts of every examination conducted by the intern, and placed his or her initials and the date of the review at the end of the chart before the results of tests provided to an employer or other person requesting the test; and

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 must comply with all other requirements of this subsection.

B. The intern 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.

4. If at any time a conflict arises during an internship program, either the intern or the supervisor 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.

5. The intern and the supervising examiner shall report any infraction or violation of the rules which regulate the intern program to the Commissioner for appropriate action.

6. The supervising examiner 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.

7. Supervision of interns. -- Licensed examiners 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. -- The commissioner may issue a license without examination to an applicant who is a licensee examiner under the laws of another state or territory of the United States, 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 the state or territory of the United States where the applicant is licensed, are substantially equivalent to the requirements in force in this State;
- (g) The applicant had lawfully engaged in the administration of psychophysiological detection of deception examinations under the laws of 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) 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 W.Va. Code §21-5-5a, -5b, -5c, and -5d, any appropriate employee organization may bring civil action on behalf of the individual or may intervene in any 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 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 meets the manufacturer's specifications. A log recording 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 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 psychophysiological detection of deception examination.

8.1. The minimum standards of procedure for administering psychophysiological detection of deception examinations:

(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 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 the 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 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 psychophysiological detection of deception charts;

(h) The examiner shall not conduct a 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

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 psychophysiological detection of deception examination shall be marked on the 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 psychophysiological detection of deception chart and made a part of the examinee's file. Each 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. The examiner 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) The examiner 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 rule promulgated under the Code..

8.2. Minimum standards of conditions under which a 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 psychophysiological detection of deception 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.