

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

Form #1

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WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: West Virginia Division of Personnel TITLE NUMBER: 143

RULE TYPE: Legislative CITE AUTHORITY: W.V. Code 29-6-10

AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 4

TITLE OF RULE BEING PROPOSED: Pre-Employment Reference and Inquiries Rule

DATE OF PUBLIC HEARING: Thursday, July 15, 2004 TIME: 2:00 p.m.

LOCATION OF PUBLIC HEARING: State Capitol Complex
Building 6, Room 425
1900 Kanawha Boulevard, East
Charleston, WV 25305

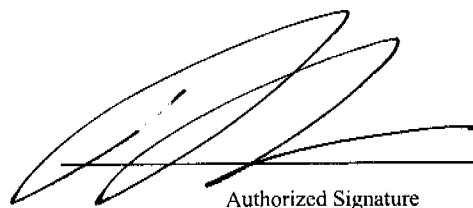
COMMENTS LIMITED TO: ORAL ☐, WRITTEN ☐, BOTH ☒
COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

West Virginia Division of Personnel
1900 Kanawha Boulevard, East
Charleston, WV 25305

The Department requests that persons wishing to make
comments at the hearing make an effort to submit written
comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL


Authorized Signature



West Virginia Division of Personnel

Willard M. Farley, Acting Director

STATE PERSONNEL BOARD

Eugene Stump, Chairman
Rev. Paul Gilmer ♦ Elizabeth Harter
Sharon Lynch

MEMORANDUM

TO: Members of the State Personnel Board

FROM: Willard M. (Max) Farley, Acting Director
WV Division of Personnel

RE: Proposed *Pre-Employment Reference and Inquiry Rule*

DATE: May 27, 2004

Your approval is requested for filing of a notice of public hearing and public comment on a proposed *Pre-Employment Reference and Inquiry Rule* with the Legislative Rule-Making Rule Committee and the Secretary of State's Office in accordance with the provisions of W.V. Code §29A-3-1 et seq. A copy of the proposed rule and the notice of public hearing is attached.

The purpose of this proposed rule is to establish uniform guidelines for obtaining employment reference and other background information concerning individuals being considered for permanent employment or transfer. This proposed rule is a direct result of the findings of the most recent performance evaluation of the Division of Personnel by the Legislative Performance Evaluation and Research Division.

Thank you for your consideration of this request.

APPROVED:
Eugene Stump, Chairman
May 27, 2004

WMF:TMC/

Attachment

SUMMARY OF PROPOSED PRE-EMPLOYMENT REFERENCE AND INQUIRIES RULE

This rule is being proposed to establish uniform standards for obtaining and using employment, education, licensure, driving, criminal and other background information to determine the suitability of applicants for employment in State government as well as for employees transferring between State agencies. A significant portion of the rule focuses on the disqualification of applicants for criminal convictions which have a reasonable connection to the positions and/or job classes for which they have applied.

The rule provides that the Director of Personnel sets reasonable requirements for eligibility for employment, prescribes the means for applicants to provide information by which their eligibility is determined, and verifies and/or investigates applicants' backgrounds. The Director is authorized to disqualify applicants for certain types of convictions, regardless of when the conviction occurred or the type of employment being sought. These convictions are enumerated. Appointing authorities are authorized to dismiss current employees for the same types of convictions.

Provisions are included in the rule for applicants to challenge the accuracy or completeness of criminal background information as well as action taken on the basis of the criminal background information. All records and reports regarding background investigations are required to be kept confidential.

**STATEMENT OF CIRCUMSTANCES REQUIRING
THE PRE-EMPLOYMENT REFERENCE AND INQUIRIES RULE**

This rule is being proposed to establish uniform standards for obtaining and using employment, education, licensure, driving, criminal and other background information to determine the suitability of applicants for employment in State government as well as for employees transferring between State agencies. This proposed rule is a result of the findings of the most recent performance evaluation of the Division of Personnel by the Legislative Performance Evaluation and Research Division.

1 June 2004

□
APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Pre-Employment Reference and Inquiries Rule

Type of Rule: X Legislative Interpretive Procedural

Agency: West Virginia Division of Personnel

Address: 1900 Kanawha Boulevard, East, Building 6, Room 416

Charleston, West Virginia 25305

1. Effect of Proposed rule:

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	\$68,000	\$0.00	\$0.00	\$68,000	\$68,000
PERSONAL SERVICES					
CURRENT EXPENSE	\$68,000	\$0.00	\$0.00	\$68,000	\$68,000
REPAIRS & ALTERATIONS					
EQUIPMENT					
OTHER					

2. Explanation of Above Estimates:

The estimate is based on the cost of conducting criminal background investigations for individuals proposed for new employment with classified agencies of the State. Using 2003 employment data, the estimated cost would be \$68,000. This assumes 2,000 new hires at a cost of \$34 per new hire.

3. Objectives of These Rules:

These rules have been proposed to provide a regulatory basis for background investigations, including criminal background investigations, of applicants proposed for new employment with classified agencies of the State.

Rule Title: Pre-Employment Reference and Inquiries Rule

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

The proposed rule is estimated to increase operating costs of State government by approximately \$68,000/year. However, it is anticipated that this cost will be offset by savings attributed to improved hiring decisions based on background investigation findings.

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

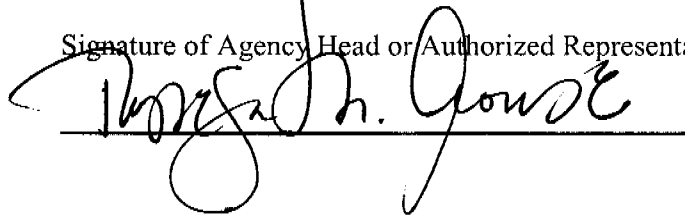
The proposed rule also applies to classified positions in county health departments. The cost for ALL county health departments is estimated to be no more than \$3,400/year. Again, it is anticipated that this cost will be offset by savings attributed improved hiring decisions.

C. Economic Impact on Citizens/Public at Large.

Based on the assumption that costs will be offset by savings, there will be no economic impact on citizens and/or the public at large.

Date: 1 June 2004

Signature of Agency Head or Authorized Representative:

A handwritten signature in black ink, appearing to read "Thomas H. Gouge", is written over a horizontal line.

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: 1 June 2004

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) West Virginia Division of Personnel
1900 Kanawha Boulevard, East, Bldg. 6, Rm. 416
Charleston, WV 25305
(304)558-3950, ext. 202

LEGISLATIVE RULE TITLE: _____
Pre-Employment Reference and Inquiries Rule

1. Authorizing statute(s) citation _____
WV Code 29-6-10

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
1 June 2004

b. What other notice, including advertising, did you give of the hearing?
Notice to all affected agencies, employees and interested employee organizations via mail/e-mail to all departments and via posting on our web site and notice in Stateline (employee newsletter) to all others (proposed).

c. Date of Public Hearing(s) *or* Public Comment Period ended:
July 15, 2004 (proposed)

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

Attached pending 7/15/04 No comments received _____

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

N/A public hearing pending - 7/15/04

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

Tari McClintock Crouse, Assistant Director for Employee Communications & Information

1900 Kanawha Boulevard, East, Bldg. 6, Rm. 416, Charleston, WV 25305

Phone: 558-3950, ext. 202 FAX: 558-1587

E-mail: tcrouse@wvadmin.gov

- 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.

N/A

b. Date of hearing or comment period:

N/A

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

N/A

d. Attach findings and determinations and reasons:

Attached N/A

WEST VIRGINIA DIVISION OF PERSONNEL
PRE-EMPLOYMENT REFERENCE AND INQUIRIES RULE

FILED

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Section 1. GeneralOFFICE OF WEST VIRGINIA
SECRETARY OF STATE

1.1. Scope: This rule implements the provisions set forth in West Virginia Code § 29-6-10 (8) regarding the eligibility of candidates or eligibles within the classified service.

1.2. Authority: This rule is issued under authority of West Virginia Code § 29-6-10.

1.3. Filing Date:

1.4. Effective Date:

Section 2. Definitions. Terms used in this rule which are not included in this section have the meaning given in the *Administrative Rule* of the Division of Personnel, 143CSR1.

2.1. Applicant: Individual being considered for employment with the State of West Virginia or in the classified service within a County Health Department; includes any employee being considered for transfer to any organizational unit with a different appointing authority.

2.2. Appointing Authority: The executive or administrative head of an agency who is authorized by statute to appoint employees in the classified or classified-exempt service. By written notification to the Director of Personnel, the appointing authority may delegate specific powers authorized by the *Administrative Rule* to persons who satisfy the definition of employee as established in the *Rule*.

2.3. Authorized Designee: Employee who is designated by an appointing authority and approved by the Division of Personnel to receive and process criminal history check request forms from applicants, receive criminal history information and make fitness determinations.

2.4. Contact Person: Employee who is designated by an appointing authority and approved by the Division of Personnel to receive and process criminal history check request forms from applicants, but who is not authorized to receive criminal history information nor to make final fitness determinations.

2.5. Conviction: Finding of responsibility for a crime by a court of law or a juvenile court. "Conviction" as used in these rules includes a finding of "guilty except by reason of insanity," "not guilty by reason of insanity," or similarly worded findings. A plea of "guilty" or "no contest" is also considered a conviction for the purpose of this rule unless a subsequent court decision has dismissed the charges.

2.6. Director: The Director of Personnel, as provided in West Virginia Code § 29-6-6 and § 29-6-9, who serves as the executive head of the Division of Personnel, or his or her designee.

2.7. Employee: Any person who lawfully occupies a position in an agency and who is paid a wage or salary and who has not severed the employee-employer relationship.

2.8. Position: An authorized and identified group of duties and responsibilities assigned by proper authority which requires the full-time or part-time employment of at least one person.

2.9. Qualified Entity: Any appointing authority authorized by the Director of Personnel to conduct investigations and/or to secure reports in compliance with this rule.

2.10. Subject Individual: An applicant or employee who is subject to a criminal history check pursuant to this rule.

2.11. Transfer: The movement of an employee to a different subdivision or geographic location of the same or a different agency.

2.12. Year: Twelve (12) consecutive month period, unless otherwise specified.

Section 3. Employment Standards. The Director shall establish reasonable requirements of education, training, experience, licensure, and other relevant standards for eligibility for employment.

Section 4. Verification of Eligibility. The Director shall prescribe information required to be submitted by applicants, including fingerprints and drivers license number, that is needed by the state police and other entities for processing or as is otherwise necessary to facilitate access to information.

4.1. The Director shall confirm that applicants meet established standards by:

(a) Verification of information provided by applicants regarding:

(1) Current and previous employment and/or volunteer activities and/or student activities, including military service;

(2) Formal education;

(3) Licensure and/or certification; and,

(4) Residency;

(b) Review of local and/or national criminal history information;

(c) Review of central abuse registry; and,

(d) Review of driving records.

4.2. The Director shall conduct or authorize appointing authorities to conduct investigations and/or secure reports necessary to assess the suitability of applicants for employment or transfer in the classified service. The Director may delegate some or all responsibility to appointing authorities as qualified entities in compliance with this Rule. The Director may authorize appointing authorities to implement additional background investigation procedures.

4.3. Nothing in this rule shall be construed as to prevent an appointing authority from obtaining a copy of the credit record of an applicant for employment in a position where the appointing authority has determined that the specific job functions of that position require a demonstration of financial responsibility.

Section 5. Disqualification of Applicants. The Director shall disqualify any applicant and an appointing authority may dismiss any employee if that individual has pleaded guilty or nolo contendere to, or been found guilty of, any of the following offenses by any court in the State of West Virginia or of any similar offense by a court in another state or of any similar offense by a federal court:

- 17
- 5.1. Treason, as defined in § 61-1-1
 - 5.2. Wilful disruption of governmental processes, as prohibited in § 61-6-19
 - 5.3. Threats of terrorist acts, as prohibited in § 61-6-24
 - 5.4. False reports concerning bombs or other explosive devices, as prohibited in § 61-6-
- 28
- 5.5. Murder in the first degree and second degree, as prohibited in § 61-2-1
 - 5.6. Voluntary manslaughter, as prohibited in § 61-2-4
 - 5.7. Involuntary manslaughter, as prohibited in § 61-2-5 {Misdemeanor}
 - 5.8. Negligent homicide, as prohibited in § 17C-5-1
 - 5.9. Battery, as prohibited in § 61-2-9 and § 61-2-10
 - 5.10. Malicious or unlawful assault, as prohibited in § 61-2-9 and § 61-2-10
 - 5.11. Domestic violence (domestic assault and domestic battery), as prohibited in § 61-2-
- 5.12. Kidnapping, as prohibited in § 61-2-14
 - 5.13. Kidnapping or holding hostage, as prohibited in § 61-2-14a
 - 5.14. Stalking, as prohibited in § 61-2-9a
 - 5.15. Robbery or attempted robbery, as prohibited in § 61-2-12
 - 5.16. Burglary, as prohibited in § 61-3-11 and § 61-3-12
 - 5.17. Larceny, as prohibited in § 61-3-13
 - 5.18. Extortion or attempted extortion, as prohibited in § 61-2-13
 - 5.19. Sexual offenses against children, as prohibited in § 61-8B-11a
 - 5.20. Child abuse or neglect, as prohibited in § 61-8D-1 through § 61-8D-9
 - 5.21. Filming of sexually explicit conduct of a minor, as prohibited in § 61-8C-1, et. seq.
 - 5.22. Filming and distribution and exhibiting of material depicting minors engaged in sexually explicit conduct, as prohibited in § 61-8C-2 and § 61-8C-3
 - 5.23. Distribution and display to minors of obscene matter, as prohibited in § 61-8A-2
 - 5.24. Abuse or neglect of incapacitated or incompetent adult, as prohibited in § 61-2-29
 - 5.25. Violent crimes against the elderly, as prohibited in § 61-2-10a

5.26. Sexual assault in the first degree, second degree and third degree, as prohibited in § 61-8B-3,4, & 5

5.27. Sexual abuse in the first degree, second degree and third degree, as prohibited in § 61-8B-7, 8, & 9

5.28. Incest, as prohibited in § 61-8-12

5.29. Imposition of sexual intercourse or sexual intrusion on incarcerated persons, as prohibited in § 61-8B-10

5.30. Prostitution, as prohibited in § 61-8-5

5.31. Embezzlement, as prohibited in § 61-3-20

5.32. Bribery in official matters, as prohibited in § 61-5A-3

5.33. Arson, as prohibited in § 61-3-1 through § 61-3-7

5.34. Violation of computer crimes and abuse act, as prohibited in § 61-3C-1, et. seq.

5.35. Aiding escape from a correctional facility, as prohibited in § 61-5-8

5.36. Falsifying accounts, as prohibited in § 61-3-22

5.37. Wrongfully seeking Workers' Compensation, as prohibited in § 61-3-24f

Section 6. Appeals.

6.1 If a subject individual wishes to challenge the accuracy or completeness of information provided by the West Virginia State Police, the Federal Bureau of Investigation or other agencies reporting information to the Director or qualified entity, the subject individual may appeal to the entity providing the information. Such challenges are not subject to the Division of Personnel's appeal process described in this Rule.

6.2 If the subject individual successfully contests the accuracy or completeness of information provided by the West Virginia State Police, the Federal Bureau of Investigation, or other agency reporting information to the Director, the Director or authorized designee will conduct a new criminal history check and re-evaluate the criminal history information.

6.3 If a subject individual wishes to dispute an adverse fitness determination, the subject individual may appeal the determination by requesting an administrative review. The subject individual must be notified of the opportunity for appeal.

(a) When adverse action is taken against a subject individual and the subject individual requests an administrative review, the Director shall conduct the review with the authorized designee who made the fitness decision.

(1) The subject individual and, if applicable, the subject individual's legal representative, must participate in the administrative review. The subject individual's right to an administrative review is terminated if, in the opinion of the Director, the subject individual lacks good cause for failure to participate.

(2) The administrative review may also be used to:

(A) Inform the subject individual of the rules that serve as the basis for the denial.

(B) Ensure the subject individual understands the reason for the denial.

(C) Give the subject individual an opportunity to review the information that is the basis for the denial, except as prohibited by state or federal law.

(D) Give the Director and the subject individual the opportunity to correct any misunderstanding of the facts.

(E) Provide an opportunity for the Director and the subject individual to resolve the situation.

(3) Upon completion of the administrative review, the subject individual is advised by the Director in writing of the finding within 14 days.

(4) If the administrative review reverses the adverse action, the subject individual shall be given consideration for the position and permitted to participate in the competitive employment process.

(5) Employees of the Division of Personnel may be authorized by the Director to represent the Director for the administrative review. The Director retains the right to be represented by the Attorney General.

(6) The administrative review is not open to the public.

(7) The subject individual may withdraw an administrative review request orally or in writing at any time. The withdrawal is effective the date it is received by the Director. A dismissal order will be issued by the Director. The subject individual may cancel the withdrawal up to 10 workdays after the date the order is served.

(8) When an appeal is resolved, the Director will serve a final order confirming the resolution.

(9) An administrative review request is dismissed by order when neither the subject individual nor the subject individual's legal representative appears at the time and place specified for the review. The order is effective on the date scheduled for the review and is served by the Director. The Director will cancel the dismissal order on request of the subject individual or the subject individual's legal representative on a showing that the subject individual and the subject individual's legal representative were unable to attend the review and unable to request a postponement for reasons beyond their control.

Section 7. Records and Reports.

7.1. The Director or authorized appointing authority shall maintain confidential records and reports pertaining to reference information and background investigations in a separate file in compliance with the standards and procedures established by the Division of Personnel.

7.2. The appointing authority shall provide all required and requested information and reports in accordance with procedures established by the Division of Personnel.

Section 8. Employee and Applicant Responsibilities.

8.1. It shall be the responsibility of the employee to report any citations for infractions which occur during the employee's off duty hours if the citation will have an impact upon the employee's ability to perform assigned duties (e.g., loss/suspension of driving privileges).

8.2. It shall be the responsibility of the employee to report any suspension or loss of licensure or certification required to perform the essential functions of his or her position.

8.3. Each applicant or employee shall provide information, including fingerprints, that is needed by the state police and other entities for processing or as is otherwise necessary to facilitate access to: driving records; verification of employment, education, licensure, and residence; and state and federal criminal history information.

Section 9. Appointing Authority Responsibilities. The appointing authority must comply with this rule and the procedures established by the Division of Personnel for implementation of the rule.

9.1. The authorized appointing authority shall consider the employment/volunteer/student references and criminal conviction record of an individual prior to employing applicants or transferring employees. The job-related circumstances surrounding a conviction shall be considered when determining whether the employment or transfer of the individual would be consistent with the safe and efficient operation of the unit. The factors to consider may include, but are not limited to, the time, nature and number of convictions, the facts surrounding an offense, the job-relatedness of each conviction, the length of time between a conviction and the employment decision, the individual's employment history before and after the conviction and the individual's efforts at rehabilitation.

(a) When considering the transfer of an employee, it is not required that the employee's criminal history information be obtained if the responsibilities in the new position do not differ significantly or if the employee's information was obtained within two years prior to the date of transfer.

9.2. The appointing authority shall ensure adequate training is provided to all authorized designees and contact persons.

Section 10. Division of Personnel's Responsibilities. The Division of Personnel is responsible for establishing standards and procedures for implementation of this rule in accordance with West Virginia Code § 29-6-7(b)(4).