

**WEST VIRGINIA
SECRETARY OF STATE**

JOE MANCHIN, III

ADMINISTRATIVE LAW DIVISION

Form #3 ■

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: West Virginia Division of Personnel TITLE NUMBER: 143

CITE AUTHORITY: W.V. Code 29-6-10

AMENDMENT TO AN EXISTING RULE: YES _____ NO X

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

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

SCANNED



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
Division of Personnel

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

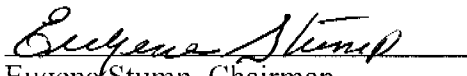
DATE: August 19, 2004

Your approval is requested for filing of proposed amendments to the *Pre-Employment Reference and Inquiry Rule* with the Legislative Rule-Making Review 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 a notice of public hearing were filed with the Secretary of State's Office and copies of the proposed rule were sent to state agencies and other interested parties for comment. The draft responses to the oral comments and the written comments are included with your materials. Also included is a copy of the proposed rule with substantial modifications made based on comments we received.

Thank you for your consideration of this request.

APPROVED:


Eugene Stump, Chairman
State Personnel Board
August 19, 2004

WMF:TMC/

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: 20 August 2004

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) West Virginia Division of Personnel
1900 Kanawha Boulevard, East
Building 6, Room 416
Charleston, WV 25305
558-3950, extension 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:
2 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 and via posting on our agency's web site.

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

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

Attached X No comments received

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

Filed with Secretary of State's Office on August 24, 2004.

- 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, Asst. Dir. for Employee Communications & Information

1900 Kanawha Boulevard, East

Building 6, Room 416

Charleston, WV 25305

Phone: 558-3950, extension 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

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.

□
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.

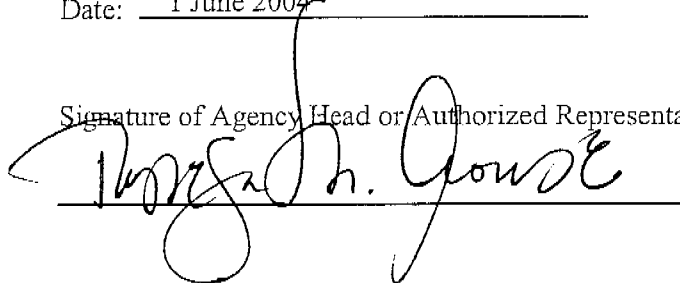
B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens: The proposed rule also applies to classified positions in county health departments. The cost for ALL county health departments is estimated to be no more than \$3,400/year. Again, it is anticipated that this 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 "Douglas H. Gould", is written over a horizontal line. The signature is fluid and cursive.

WEST VIRGINIA DIVISION OF PERSONNEL

FILED

PRE-EMPLOYMENT REFERENCE AND INQUIRIES RULE

2004 AUG 27 P 1:29

Section 1. General

OFFICE 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 suitability 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 suitability determinations.

~~2.5. Conviction~~ 2.6. Disqualifying Event: Finding of responsibility for a crime by a court of law or a juvenile court. ~~"Conviction" as used in these rules includes a~~ including any 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 disqualifying event for the purpose of this rule unless a subsequent court decision has dismissed the charges.

~~2.6. 2.5.~~ 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. Suitability Determination: The assessment of an applicant's or an employee's criminal background record, central abuse registry record, and/or driving record to determine whether the individual's employment in a particular position will be conducive to a safe workplace and public accountability and is not likely to result in actions by the individual that would cause damage to others.

~~2.11~~ 2.12. Transfer: The movement of an employee to a different subdivision or geographic location of the same or a different agency.

~~2.12~~ 2.13. 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:~~

- ~~—— 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 § 61-6-17~~
- ~~—— 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 § 61-2-28~~
- ~~—— 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~~

The Director shall disqualify any applicant and an appointing authority may dismiss any employee if that individual has a record of a disqualifying event.

5.1. The decision to disqualify or dismiss should be based upon a consideration of the following factors:

(a) the relevance of the disqualifying event(s) to the job-related responsibilities of the particular position for which the individual is applying or employed;

(b) the individual's employment history before and after the disposition of a disqualifying event;

(c) the length of time passed since the conclusion of prosecution for the disqualifying event; and,

(d) the individual's efforts at rehabilitation.

5.2. The Director shall notify a disqualified applicant of his or her disqualification by letter to his or her last-known address. An appointing authority shall comply with the provisions of 143CSR1, subsection 12.2 regarding the dismissal of any permanent classified employee.

Section 6. Review and Reconsideration.

~~6.1. If a subject individual wishes to~~ Subject individuals are solely responsible for dealing with any reporting agency 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. Subject individuals are solely responsible for providing the Director or qualified entity with proof of any error and correction thereof by any reporting agency.

~~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 provides proof of any error and correction thereof by any reporting agency to the Director or qualified entity, the Director or authorized designee will conduct a new criminal history check and re-evaluate the criminal history information suitability determination.~~

~~6.3. If a subject individual wishes to dispute an adverse fitness suitability determination, the subject individual may appeal the determination by requesting an administrative review. The subject individual must be notified of the opportunity for appeal request that the Director reconsider his or her suitability. The Director shall consider the request if it is submitted in writing and received not later than fifteen (15) calendar days following the date the notice of disqualification was postmarked. Within thirty (30) calendar days after a properly submitted request for reconsideration is received, the Director shall report his or her decision in writing to the subject individual.~~

~~(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).~~ disqualifying event to his or her appointing authority within five days of the disposition of the matter. Failure of an employee to report the disqualifying event within the time limit is grounds for disciplinary action up to and including dismissal.

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~~ 8.2. 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. request that the Director make a suitability determination prior to the transfer or promotion of an employee to a position for which there is a suitability standard that is different and/or more stringent than the standard for the employee's current position.~~

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).



West Virginia Division of Personnel

Willard M. Farley, Acting Director

STATE PERSONNEL BOARD

Eugene Stump, Chairman

Rev. Paul Gilmer ♦ Elizabeth Harter
Sharon Lynch

August 19, 2004

Mr. Ed Hartman, Executive Director
AFSCME, Council 77
501 Leon Sullivan Way
Charleston, West Virginia 25301

Dear Mr. Hartman,

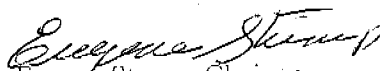
As Chairman of the State Personnel Board, I wish to thank you for taking time to review and comment on the proposed Pre-Employment Reference and Inquiries Rule.

The genesis of this rule was the primary recommendation of the 2003 Performance Evaluation of the Division of Personnel which was accepted by the Legislature. We agree with the recommendation and have attempted to implement it through the proposed legislative rule (rather than a procedural rule) to allow a comprehensive public review of this important issue. We also believe that this process will clearly demonstrate the Legislative intent with regard to this issue.

We have received many comments and recommendations on various aspects of the proposed rule which we believe will significantly improve the proposed rule. Consequently, we are incorporating these recommendations in modifications we will submit as our ***Agency Approved Proposed Rule***. I hope you find that these changes address your concerns with the original draft of the proposed rule.

Again, thank you for your participation in the process to establish this rule. In the next step of this process, the ***Agency Approved Proposed Rule*** (which will include all modifications) will be filed with the Secretary of State and the Legislative Rule-Making Review Committee by August 27, 2004. It will also be posted on our web site at www.state.wv.us/admin/personnel. The ***Agency Approved Proposed Rule*** should be considered by the Legislative Rule-Making Review Committee at interim meetings tentatively scheduled for September and/or October. If you have additional comments, you may direct them to Debra Graham, Counsel, Legislative Rule-Making Review Committee, Building 1, Room MB-49, 1900 Kanawha Boulevard, East, Charleston, West Virginia 25305.

Sincerely,


Eugene Stump, Chairman
State Personnel Board

DONNELLY & CARBONE, P.L.L.C.

Attorneys at Law

115 GOFF MOUNTAIN ROAD • SUITE 300
CHARLESTON, WEST VIRGINIA 25313CHARLES F. DONNELLY
MARK W. CARBONE
JEFFREY G. BLAYDES(304) 342-3650 PHONE
(304) 342-3651 FAX
wvjustice@aol.com

MEMORANDUM

TO: Ed Hartman, Executive Director
AFSCME, Council 77

FROM: Jeffrey G. Blaydes

DATE: July 15, 2004

RE: West Virginia Division of Personnel "Pre-employment Reference and Inquiries Rule"
143 CSR 4; Proposed Revisions

The Division of Personnel has offered for comment certain revisions to its "Pre-Employment Reference and Inquiries Rule." 143 CSR 4.

As a part of its proposed revisions, the Division of Personnel generally intends to permit the Director of the Division of Personnel to "verify the eligibility" of certain applicants. Such verification will include, but not be limited to, state and federal criminal background checks; review of central abuse registry; driving records and other personal information.

To this end, the Division of Personnel proposes that any "applicant" will include any person applying for employment with the State of West Virginia or in the classified service within a County Health Department. Specifically, the Division of Personnel defines "applicant"

as:

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. [emphasis supplied]

As the proposed rule indicates, the Division of Personnel derives its authority to issue such a rule from West Virginia Code §29-6-10(8) which provides in pertinent part:

The board shall have the authority to promulgate, amend or repeal rules, according to chapter twenty-nine-a of this code, to implement the provisions of this article:

(8) For the rejection of candidates or eligibles within the classified service who fail to comply with reasonable requirements in regard to such factors as age, physical condition, character, training and experience who are addicted to alcohol or narcotics or who have attempted any deception or fraud in connection with an examination.

A review of the authorizing statute indicates that nothing in the provision gives the authority to the State of West Virginia to require criminal inquiries of any sort for any applicant. Moreover, nothing in this provision provides any authority for the State of West Virginia to apply this requirement and any rules promulgated pursuant to this provision to employees who are currently employed with the State of West Virginia and who are attempting to transfer within the state employment. Thus, the inclusion of the language "any employee being considered for transfer to any organizational unit with a different appointing authority" in the proposed rule is beyond the scope of authorization granted to the Division of Personnel.

Similarly, DOP lists thirty-seven specific grounds for disqualification or dismissal based on past criminal activity for which a prospective or current employee has been found guilty or entered a plea of guilty or no contest. See, §5, et seq. of 143 C.S.R. 4. Again, this provision is not specifically authorized by West Virginia Code §29-6-10(8). Thus, the inclusion of this provision is contrary to statute.

Moreover, the inclusion of this provision would interfere with the contractual or due

process rights of employees to have just cause protection in their positions. Based upon the proposed decision, an employer or DOP could terminate an employee solely based on his or her past criminal record without consideration for several crucial factors. Such factors include but are not limited to: (1) the date of the offense; (2) the passage of time since the offense occurred; (3) the employees employment history before and/or after any conviction or plea occurred; and (4) whether any rational nexus between the job duties and the crime. As written, the provision gives DOP and the appointing authority unfettered discretion to terminate or deny employment based upon the listed criminal activities. Such discretion may violate the rights of prospective and, particularly, current employees who anticipate job security as members of the classified service.

A method for termination of employees – included those within the classified service – already exists. Where an employer can show just cause for termination or some other employment action then the matter should be upheld through the grievance procedure. By adding certain grounds for termination or denial of employment not present in the statutory authority, DOP proposes to act contrary to the just cause provisions found in West Virginia Code.

It is well settled that a rule may not be promulgated that is contrary to statute. West Virginia Code §29A-3-11; Appalachian Power Co. v. State Tax Dept., 466 S.E.2d 424 (W.Va. 1995).

In summary, the language highlighted above in the proposed rule is beyond the Legislative grant of authority found in West Virginia Code §29-6-10(8) and, therefore, exceeds the rulemaking authorization granted to the Division of Personnel.



West Virginia Division of Personnel

Willard M. Farley, Acting Director

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

August 19, 2004

Mr. Jeff Black, Director
Human Resources Division
West Virginia Division of Highways
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

Dear Mr. Black,

As Chairman of the State Personnel Board, I wish to thank you for taking time to review and comment on the proposed Pre-Employment Reference and Inquiries Rule.

Your comments on definitions, disqualification of applicants, convictions while employed, and promotional standards are well-taken and we believe your recommendations will significantly improve the proposed rule. Consequently, we are incorporating these recommendations in modifications we will submit as our *Agency Approved Proposed Rule*.

Again, thank you for your participation in the process to establish this rule. In the next step of this process, the *Agency Approved Proposed Rule* (which will include all modifications) will be filed with the Secretary of State and the Legislative Rule-Making Review Committee by August 27, 2004. It will also be posted on our web site at www.state.wv.us/admin/personnel. The *Agency Approved Proposed Rule* should be considered by the Legislative Rule-Making Review Committee at interim meetings tentatively scheduled for September and/or October. If you have additional comments, you may direct them to Debra Graham, Counsel, Legislative Rule-Making Review Committee, Building 1, Room MB-49, 1900 Kanawha Boulevard, East, Charleston, West Virginia 25305.

Sincerely,

A handwritten signature in cursive script that reads "Eugene Stump".
Eugene Stump, Chairman
State Personnel Board



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
Division of Highways

1900 Kanawha Boulevard East • Building Five • Room 110
Charleston, West Virginia 25305-0430 • 304/558-3505

Bob Wise
Governor

Fred VanKirk, P. E.
Secretary/Commissioner

July 8, 2004

MEMORANDUM

TO: Max Farley
Division of Personnel

FROM: Jeff Black, Director *JB*
Human Resources Division

SUBJECT: CRIMINAL BACKGROUND INVESTIGATIONS POLICY

Please take into account the comments listed below with respect to the draft Criminal Background Investigations policy.

1) The definition of "conviction" is confusing because it includes criminal case dispositions that are not convictions. A different term such as "disqualifying event" could be used to cover convictions, nolo contendere pleas, etc.

2) It is not clear whether "fitness" and "suitability" have the same meaning or are meant to have the same meaning. If they mean the same thing, only one of the terms should be used and it should be defined.

3) The listing of crimes should be eliminated in favor of general language that more closely matches that of the legislation that was proposed last regular session.

4) Subsections 8.1 and 8.2 should be revised to more closely reflect the intent of this rule. It should require employees to report any convictions that occur while employed and specify when/how soon they need to report such convictions, to whom they must report the convictions, and the penalties for failing to report them. The intent of the proposed language should be included in the *Administrative Rule* if it isn't already there.

5) Section 9 should also include promotions when there is a different or more stringent standard for fitness or suitability for the new position than for the current position.

Thank you for your consideration of these comments. Should you require further information or clarification, please contact me.



West Virginia Division of Personnel

Willard M. Farley, Acting Director

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

August 19, 2004

Mr. Robert J. Lamont
General Counsel
Division of Banking
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

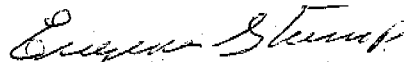
Dear Mr. Lamont,

As Chairman of the State Personnel Board, I wish to thank you for taking time to review and comment on the proposed Pre-Employment Reference and Inquiries Rule.

Your comments on disqualification of applicants and appeals are well-taken and we believe your recommendations will significantly improve the proposed rule. Consequently, we are incorporating these recommendations in modifications we will submit as our *Agency Approved Proposed Rule*.

Again, thank you for your participation in the process to establish this rule. In the next step of this process, the *Agency Approved Proposed Rule* (which will include all modifications) will be filed with the Secretary of State and the Legislative Rule-Making Review Committee by August 27, 2004. It will also be posted on our web site at www.state.wv.us/admin/personnel. The *Agency Approved Proposed Rule* should be considered by the Legislative Rule-Making Review Committee at interim meetings tentatively scheduled for September and/or October. If you have additional comments, you may direct them to Debra Graham, Counsel, Legislative Rule-Making Review Committee, Building 1, Room MB-49, 1900 Kanawha Boulevard, East, Charleston, West Virginia 25305.

Sincerely,


Eugene Stump, Chairman
State Personnel Board

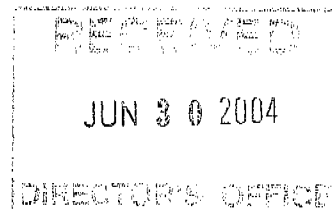


WEST VIRGINIA DIVISION OF BANKING
1900 KANAWHA BLVD., EAST
STATE CAPITOL COMPLEX, BUILDING 3, ROOM 311
CHARLESTON, WEST VIRGINIA 25305-0240

(304) 558-2294
Fax: (304) 558-0442
www.wvdob.org

June 29, 2004

Willard M. (Max) Farley
Acting Director
WV Division of Personnel
1900 Kanawha Blvd. E.
Charleston, WV 25305



Re: Comment on Proposed Legislative Rule
143 CSR Series 4, Pre-Employment Reference and Inquiries Rule

Dear Mr. Farley:

I write to comment on behalf of the West Virginia Division of Banking regarding the above-referenced proposed rule. We commend your efforts in developing this proposal. If it is adopted, it will provide significant protections to both the general public and to the existing public employee workforce.

After reviewing the language in the proposed rule, I offer the following comments:

Section 5. Disqualification of Applicants:

The language in the draft proposal provides that “

The Director **shall** disqualify 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...” (emphasis added)

It is then followed by a lengthy list of various crimes in the West Virginia Code.

We believe that this approach does not allow a consideration of a number of significant relevant factors that could legitimately be considered when making a hiring decision. We would recommend an approach that provides more flexibility and reasonable exercise of discretion. To achieve that goal, we offer the following suggested language:

The Director may disqualify any applicant after consultation with the appointing authority, and an appointing authority may dismiss any employee if that individual has pled guilty or nolo contendere to, or been found guilty of a criminal

offense. The decision to disqualify or dismiss should be based upon a consideration of the following factors:

The relevance of the criminal offense(s) to the job-related responsibilities of the particular position;

The individual's employment history before and after the disposition of a criminal prosecution;

The length of time passed since the conclusion of the criminal prosecution; and

The individual's efforts at rehabilitation.

We think that this approach will allow you and the agency to take into consideration the unique characteristics and qualifications needed for specific positions within specific agencies.

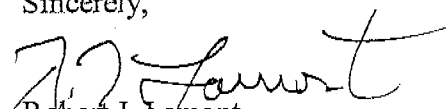
Section 6. Appeals.

Sub-section 6.3 of the proposed rule provides a fairly detailed administrative appeal process for individuals to "dispute" a determination that their criminal background renders them unfit for public employment. We question whether such a process is required by law. Nevertheless, if this subsection is retained, we suggest the following changes:

- Subdivision 6.3(a) (3) should be combined with subdivision 6.3(a)(8).
- Subdivision 6.3(a)(4) should be moved to the end of that subsection.
- Subdivision 6.3(a)(6) should be amended by adding at the end the phrase "...unless the individual requests an open meeting." Not providing the option of an open meeting could violate the provision of the Open Governmental proceedings Act. See W.Va. Code § 6-9A-4(b)(2)(A).

Again, I thank you for the opportunity to comment on this proposal and am available to discuss this issue further if you desire.

Sincerely,


Robert J. Lamont
General Counsel



West Virginia Division of Personnel

Willard M. Farley, Acting Director

STATE PERSONNEL BOARD

Eugene Stump, Chairman

Rev. Paul Gilmer ♦ Elizabeth Harter
Sharon Lynch

August 19, 2004

Paul L. Nusbaum, Secretary
Department of Health and Human Resources
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

Dear Secretary Nusbaum,

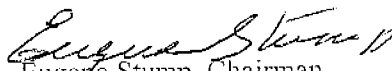
As Chairman of the State Personnel Board, I wish to thank you for sharing the proposed Pre-Employment Reference and Inquiries Rule with your staff and having them take the time to review and comment on this rule.

The genesis of this rule was the primary recommendation of the 2003 Performance Evaluation of the Division of Personnel which was accepted by the Legislature. Included in the information provided to the Legislature was the estimated cost of implementing the recommendations. Consequently, while we agree that the proposed rule has cost implications, we believe those implications have already been considered by the Legislature and will again be considered with this rule submission.

Your comments on incorporating flexibility in the disqualification of applicants, citations or infractions while employed, and eligibility for hire pending the outcome of a background check are well-taken and we believe your recommendations will significantly improve the proposed rule. Consequently, we are incorporating these recommendations in modifications we will submit as our ***Agency Approved Proposed Rule***.

Again, thank you for your participation in the process to establish this rule. In the next step of this process, the ***Agency Approved Proposed Rule*** (which will include all modifications) will be filed with the Secretary of State and the Legislative Rule-Making Review Committee by August 27, 2004. It will also be posted on our web site at www.state.wv.us/admin/personnel. The ***Agency Approved Proposed Rule*** should be considered by the Legislative Rule-Making Review Committee at interim meetings tentatively scheduled for September and/or October. If you have additional comments, you may direct them to Debra Graham, Counsel, Legislative Rule-Making Review Committee, Building 1, Room MB-49, 1900 Kanawha Boulevard, East, Charleston, West Virginia 25305.

Sincerely,


Eugene Stump, Chairman
State Personnel Board



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

Office of the Secretary

State Capitol Complex, Building 3, Room 206
Charleston, West Virginia 25305
Telephone: (304) 558-0684 Fax: (304) 558-1130

Bob Wise
Governor

Paul L. Nusbaum
Secretary

RECEIVED
JUL 15 2004
OFFICE OF THE SECRETARY

MEMORANDUM

DATE: July 15, 2004

TO: Willard M. Farley, Acting Director
West Virginia Division of Personnel

FROM: Paul L. Nusbaum, Secretary
Department of Health and Human Resources

RE: Proposed Pre-Employment Reference and Inquiry Rule

As requested, the proposed "Pre-Employment Reference and Inquiry Rule" has been shared with staff in this agency for review and comment. The primary concerns about the proposed rule are summarized below.

First, of concern is the anticipated cost, both in dollars and time, of requesting a criminal background check on every new hire, promotion and transfer. A state criminal background check costs \$20, unless the employee meets certain criteria involving working with children or the elderly, in which case the check costs \$10. Additionally, a federal criminal background check costs \$24. Thus, the average criminal background check will cost \$44. We estimate the rule will require this agency to process approximately 1,200 criminal background checks per year at a cost of \$52,000 per year, plus the administrative time. While we recognize the need for thorough background checks on potential employees, costs in time and money imposed by the proposed rule are a concern. The costs for administrative time associated with processing and resolving criminal background checks are potentially much greater than the fees charged by law enforcement agencies for processing the checks.

Second, Section 5 is overly broad and too restrictive. The rule should allow some flexibility to appointing authorities for determining the nexus of specific offenses and crimes to specific jobs. The rule should compel appointing authorities to conduct thorough background checks on job applicants, but also should afford the appointing authority a reasonable level of discretion in determining an individual's fitness for employment in specific areas of assignment with regard to the nature of offenses revealed through the checks. As written, Section 5 of the proposed rule and the rule in general may be inconsistent with provisions of the West Virginia Human Rights Act and other provisions of law intended for the protection of rights and privileges of minority and economically disadvantaged citizens.

MEMORANDUM

Willard M. Farley

July 15, 2004

Page 2

Third, with regard to Section 8.1 of the proposed rule, it may be prudent to establish the basis in law, within the final rule, for requiring existing employees to report "any citations or infractions which occur during the employee's off duty hours." This section needs to be better defined and more specific.

Fourth, it would be helpful for the rule, as a point of clarification, to indicate whether an individual can be hired pending the outcome of a background check.

Thank you for the opportunity to offer comments on the proposed rule. I hope the comments are helpful.

Questions may be directed to Mike McCabe, Director, Office of Personnel Services, at 558-2072, or Susan Stewart, General Counsel, Office of the Inspector General, at 558-1117.

PLN/smb

cc: Susan Stewart
Mike McCabe



West Virginia Division of Personnel

Willard M. Farley, Acting Director

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

August 19, 2004

Mr. J. Michael Adkins
Deputy Director of Operations
Public Employees' Insurance Agency
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

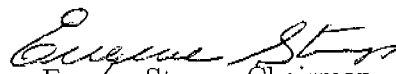
Dear Mr. Adkins,

As Chairman of the State Personnel Board, I wish to thank you for taking time to review and comment on the proposed Pre-Employment Reference and Inquiries Rule.

Your comments on disqualification of applicants and appeals are well-taken and we believe your recommendations will significantly improve the proposed rule. Consequently, we are incorporating these recommendations in modifications we will submit as our *Agency Approved Proposed Rule*.

Again, thank you for your participation in the process to establish this rule. In the next step of this process, the *Agency Approved Proposed Rule* (which will include all modifications) will be filed with the Secretary of State and the Legislative Rule-Making Review Committee by August 27, 2004. It will also be posted on our web site at www.state.wv.us/admin/personnel. The *Agency Approved Proposed Rule* should be considered by the Legislative Rule-Making Review Committee at interim meetings tentatively scheduled for September and/or October. If you have additional comments, you may direct them to Debra Graham, Counsel, Legislative Rule-Making Review Committee, Building 1, Room MB-49, 1900 Kanawha Boulevard, East, Charleston, West Virginia 25305.

Sincerely,


Eugene Stump, Chairman
State Personnel Board

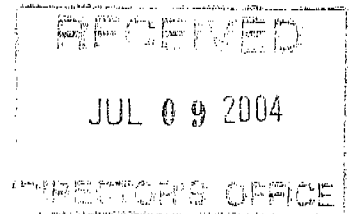
Bob Wise
Governor



Keith Huffman
General Counsel

WV Toll-free: 1-800-654-4406 • Phone: 1-304-558-7850 • Fax: 1-304-558-2516 • Internet: www.wvpeia.com

July 9, 2004



Max Farley, Acting Director
WV Division of Personnel
Bldg. 6, Room 416
1900 Kanawha Blvd., E.
Charleston, WV 25305-0139

Re: Response to Proposed Division of Personnel Administrative Rule 143CSR4

Dear Mr. Farley:

I would like to take this opportunity to respond to the proposed Division of Personnel Administrative Rule 143CSR4. The need for the rule is apparent and I support its concept, however, I believe that some improvements to the structure and language are needed.

The following are my recommendations:

Section 5. Disqualification of Applicants.

Subsections 5.1 through 5.37 should be removed. The detailed listing of the crimes provides problems in administration of the rule, primarily related to the specific cites and changes to statute, and the justification for disqualification if the convictions are not directly related to positions applied for by the individual. *Section 5* should have its language modified to allow for the disqualification of an applicant when a conviction is found that is related to the responsibilities and performance of the advertised position.

Further, some language should be added to address the need for notifying the applicant of their disqualification for the position for which they applied due to their criminal conviction. As the individual is, in effect, being removed from any future consideration for that position as a result of the background check, the applicant must be informed of the reason for their current disqualification now and in the future.

Page 2
July 9, 2004
Response to Rule

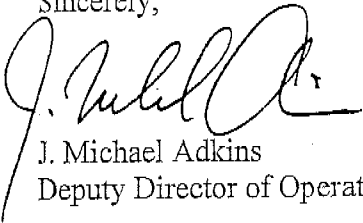
Section 6. Appeals.

Subsection 6.1 must clearly state that the burden of proof in demonstrating error in a police record or credit review is the applicant's. The Director of Personnel will not have the authority or ability to modify or redact information provided by law enforcement agencies or credit institutions. Therefore, if an error does exist in the record, the applicant must be responsible for correcting the error with the reporting authority and then provide proof of error to the Director prior to the Division of Personnel removing the disqualification of the individual.

Subsection 6.3 appears to provide a process for an applicant to appeal their disqualification or removal from a register because of a criminal conviction. As the result of the criminal conviction disqualification is the same as any other disqualification from a register, the appeal process should not vary from existing procedure. The existing appeal process used for disqualification because the applicant does not meet the minimum training requirements, etc. would work just as well in this situation.

Thank you for the opportunity to comment. Should you have any questions regarding my recommendations, please feel free to contact me at 558-6244, ext. 230.

Sincerely,



J. Michael Adkins
Deputy Director of Operations

JMA/jma

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**Public Hearing on the Proposed Amendments to the Proposed
Pre-Employment Reference and Inquiry Rule
July 15, 2004 at 2:00 p.m.**

Chairman Stump: We will now open the meeting for the proposed new Pre-Employment Reference Inquiries Rule and I have Mr. Richard Patrick signed up he represents the American Federation of State County and Municipal Employees, Mr. Patrick.

Richard Patrick: (Mr. Patrick distributes a copy of a letter to members of the Board) This is from our legal counsel to our Director so we just passed it right on to you folks as a written. Again I'm Richard Patrick with the American Federation of State County & Municipal Employees and we've submitted our concerns and objections regarding the proposed Pre-Employment Reference Inquiries for the record. AFSCME represents quite a large group of state employees and has significant concerns about several of the proposed changes to the overall Administrative Rule or the Personnel Rule which is noted here. Some of the rule changes simply lessen the state employee's current rights some afford unlimited discretion to management and some are possibly illegal and some of the housekeeping proposal changes are opening a huge loophole and set the stage for some strange interpretation which would naturally mean a pile of grievances which costs the state and the citizens. We do not plan to outline these issues today, however, if these proposed changes are passed today, we plan to work with our elected officials, members of the legislature to correct the problems. That's it.

Chairman Stump: Thank you Mr. Patrick, any questions? The Board and staff will consider your comments Mr. Patrick and respond. Anybody else who wishes to speak on the Pre-Employment Reference Rule? Hearing none, that hearing will also be closed and written comments will be taken if they are postmarked by midnight tonight.

AMENDMENTS SUBSEQUENT TO PUBLIC HEARING
and
PUBLIC COMMENT PERIOD
August 2004

The proposed *Pre-Employment Reference and Inquiries Rule* has been extensively modified based on comments received during the public comment period which ended on July 15, 2004. These amendments are reflected via strike-throughs (deleted language) and underlines (new language) in the copy of the "Agency Approved Proposed Rule" submitted herewith.

Generally, we found that the comments and recommendations would significantly improve the proposed rule. The specific reasons for the amendments are as follows.

- 2.6. The defined term *conviction* has been changed to *disqualifying event* to eliminate any confusion due to the inclusion of, for example, "guilty by reason of insanity" or a guilty plea as convictions. The new term more accurately encompasses the intent of the rule.
- 2.11. The terms *suitability*, *fitness*, and *fitness determination* were used through the originally proposed rule interchangeably and without definition. The appropriate term has been determined to be *suitability determination*, and it has defined.
- 5.1. The listing of various disqualifying criminal convictions has been eliminated in favor of more general language which allows the consideration of factors relevant to the hiring/retention decision.
- 5.2. Language has been added which provides for notification of applicants of their disqualification and the use of the established rule for dismissal of employees.
- 6.1. This subsection has been amended to more clearly specify that subject individuals are solely responsible for dealing with any reporting agency to challenge the accuracy or completeness of information provided by the reporting agency. The amendments further specify that subject individuals are responsible for providing corrected reports to the Director.
- 6.2. Amendments provide for a new suitability determination upon provision by the subject individual of corrected information from a reporting agency.
- 6.3. This subsection has been amended to provide applicants receiving adverse suitability determinations the same reconsideration provisions now available to applicants who are disqualified from examination or removed from a register.
- 8.1. and 8.2. These subsections have been amended and deleted respectively to focus on employees' requirements to report disqualifying events – changes which more closely reflect the intent of the proposed rule.
- 9.1. This subsection has been amended to provide for suitability determinations prior to an employee's transfer or promotion to a position with a different or more stringent suitability standard.