

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #2

Do Not Mark In This Box

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2006 AUG -3 A 9:49.

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia Division of Personnel TITLE NUMBER: 143

RULE TYPE: Procedural CITE AUTHORITY: West Virginia 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: 6

TITLE OF RULE BEING PROPOSED: Appeal of Adverse Suitability Determination

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON September 5, 2006 AT 5:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

West Virginia Division of Personnel

1900 Kanawha Boulevard, East

Charleston, WV 25305

ATTN: Tari McClintock Crouse

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


Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL



Department of Administration

West Virginia Division of Personnel

Willard M. Farley, Acting Director

Joe Manchin III, Governor
Robert W. Ferguson, Jr., Cabinet Secretary

STATE PERSONNEL BOARD
Rev. Paul Gilmer ♦ Elizabeth Walker
Sharon Lynch ♦ Eugene Stump

MEMORANDUM

TO: Members of the State Personnel Board

FROM: *WMP* Willard M. (Max) Farley, Acting Director
West Virginia Division of Personnel

RE: Notice of Public Comment Period

DATE: December 9, 2005

Your approval is requested for filing of a notice of public comment on a proposed procedural rule regarding *Appeal of Adverse Suitability Determinations* (143CSR6) with the Secretary of State's Office in accordance with the provisions of West Virginia Code §29A-3-1 et seq. A copy of the proposed procedural rule is attached.

The purpose of this proposed procedural rule is to establish procedures for individuals being considered for employment to appeal adverse suitability determinations resulting from pre-employment background investigations. This procedural rule is a component of the Pre-employment Reference and Inquiries program developed to ensure that the State of West Virginia employs and retains in employment only those individuals who meet all requirements for suitability and whose employment or conduct would not jeopardize the accomplishment of the employing agency's mission. The program is also intended to protect the State from claims of negligent hiring, retention and/or referral. This program 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:

Robert W. Ferguson
Robert W. Ferguson, Chairman
December 15, 2005

WMF:JFT

143CSR6 (Proposed) - Appeal of Adverse Suitability Determination

STATEMENT OF CIRCUMSTANCES REQUIRING THIS RULE

This procedural rule is a component of the Pre-employment Reference and Inquiries program. The program was developed to ensure that the State of West Virginia employs and retains in employment only those individuals who meet all requirements for suitability and whose employment or conduct would not jeopardize the accomplishment of the employing agency's mission. The program is also intended to protect the State from claims of negligent hiring, retention and/or referral. This 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.

BRIEF SUMMARY OF RULE

Individuals being considered for employment are subject to a pre-employment background investigation. This rule applies to individuals being considered for an offer of employment in the classified service of the State of West Virginia or in the classified service within a County Health Department, and any employee being considered for transfer or promotion to a classified service position for which there is a suitability standard that is different and/or more stringent than the standard for the employee's current position. This rule establishes uniform guidelines for these individuals to appeal an adverse suitability determination resulting from a pre-employment background investigation.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Appeal of Adverse Suitability Determination

Type of Rule: ☐ Legislative ☐ Interpretive ☒ Procedural

Agency: West Virginia Division of Personnel

Address: 1900 Kanawha Boulevard, East
Charleston, WV 25305

Phone Number: 558-3950, x 202 Email: tcrouse@wvadmin.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

This measure is not expected to have any significant impact on the costs and revenues of state government.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services			
Current Expenses			
Repairs & Alterations			
Assets			
Other			
2. Estimated Total Revenues			

Rule Title: _____

Rule Title: Appeal of Adverse Suitability Determination

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

N/A.

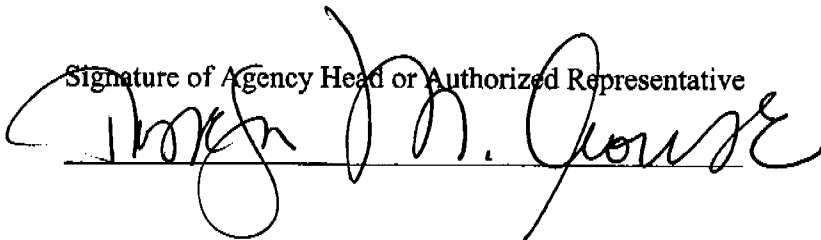
MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

N/A.

Date: 2 August 2006

Signature of Agency Head or Authorized Representative



143CSR6

FILED

TITLE 143

2006 AUG -3 A 9:50

PROCEDURAL RULE

WEST VIRGINIA DIVISION OF PERSONNEL OFFICE WEST VIRGINIA
SECRETARY OF STATE

SERIES 6

APPEAL OF ADVERSE SUITABILITY DETERMINATION

Section 1. General

1.1. Scope: This rule implements the provisions set forth in the West Virginia Division of Personnel *Pre-employment Reference and Inquiries Rule* (143CSR4). The information contained in this procedural rule should not be construed to supercede any State or federal law or administrative rule. In the event of any inconsistencies between the procedural rule and such law and/or regulation, the statutory and/or administrative rule provisions shall prevail.

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 document which are not included in this section have the meaning given in the Division of Personnel *Administrative Rule*, 143CSR1, and *Pre-employment Reference and Inquiries Rule*, 143CSR4.

2.1 Applicant: Individual being considered for employment in the classified service of the State of West Virginia, or in the classified service within a County Health Department, and any employee being considered for transfer or promotion to a classified service position for which there is a suitability standard that is different and/or more stringent than the standard for the employee's current position.

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 this rule to persons who satisfy the definition of employee as established in this rule.

2.3 Authorized Designee: Employee who is designated by a Qualified Entity and approved by the Division of Personnel to receive and process criminal history check request forms from subject individuals, receive criminal history information and make 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 subject individuals, but who is neither authorized to receive criminal history information nor to make final suitability determinations.

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

2.6 Disqualifying Event: Events for which a subject individual may be denied employment to include those items provided in Section 6.4(a) of the West Virginia Division of Personnel *Administrative Rule* (143CSR1). For the purposes of this definition, a plea of "guilty" or "no contest" is considered a conviction unless the charge was subsequently invalidated by a court decision or a full pardon by the Governor or the President of the United States.

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 the proper authority requiring 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 the *Pre-employment Reference and Inquiries Rule* (143CSR4).

2.10 Subject Individual: An applicant or employee who is subject to a criminal history check pursuant to the *Pre-employment Reference and Inquiries Rule* (143CSR4).

2.11 Suitability Determination: The assessment of a subject individual'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 damage or injury to others.

2.12 Transfer: The movement of an employee to a classified service position in a different subdivision or geographic location of the same or a different agency.

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

Section 3. Notice of suitability determination

3.1 The Authorized Designee shall review the criminal history request form established by the Division of Personnel and make a preliminary suitability determination. If the criminal history request form completed by the subject individual contains information that would make her or him ineligible for employment, a suitability determination may be made without requesting a criminal history check.

3.2 Within ten (10) working days after receiving the criminal history reports, the Authorized Designee shall complete the notice of suitability determination form established by the West Virginia Division of Personnel and forward it to the subject individual. The notice of suitability determination form shall contain information regarding the opportunity for appeal.

Section 4. Challenging a suitability determination

4.1 If a subject individual wishes to challenge an adverse suitability determination he or she may appeal the determination by requesting an administrative review. The appointing authority shall not fill the vacant position for which the subject individual applied until completion of the appeal process.

a. In order to request an administrative review, the subject individual or the subject individual's representative must complete and sign the *Administrative Review Request*, Form PRIA-1, (provided as Attachment A).

b. The subject individual must file the completed and signed PRIA-1 form with the Director not later than fifteen (15) calendar days after the notice of suitability determination has been received. The Director may extend the time to appeal if the Director determines the delay was caused by factors beyond the reasonable control of the subject individual.

4.2 When adverse action is taken against a subject individual by an appointing authority and the subject individual requests an administrative review, the Director shall conduct the review with the Authorized Designee who made the suitability determination. If, in the opinion of the Director, an administrative hearing is necessary, the subject individual shall be notified by the Director in writing of the request for a hearing. Procedural rules set forth in West Virginia Code § 29A, *State Administrative Procedures Act*, shall apply.

a. The subject individual and, if applicable, the subject individual's representative must participate in the administrative review and/or hearing. If the subject individual fails to participate, 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.

b. The purpose of the administrative review determination or hearing is to:

1. Inform the subject individual of the rules, regulations, laws, etc., that serve as the basis for the denial,

2. 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,

3. Ensure the subject individual is provided a thorough explanation of the reason for the denial,

4. Give the Director and the subject individual the opportunity to correct any misunderstanding of the facts, and

5. Provide an opportunity for the Director and the subject individual to resolve the situation.

c. Upon completion of the administrative review, the subject individual and Authorized Designee are advised by the Director in writing of the decision within thirty (30) calendar days.

d. If the administrative review reverses the adverse action, the appointing authority shall consider the subject individual for the position and the Division of Personnel will permit the subject individual to participate in the competitive employment process and, if applicable, re-certify the subject individual. However, if the administrative review upholds the original suitability determination, the appointing authority shall not give consideration to the subject individual for the position in question. Further, the Division of Personnel may remove the subject individual from and/or bar the subject individual from certification to applicable civil service registers and/or shall find the subject individual ineligible for promotion into all applicable classifications.

e. The Director of Personnel may authorize employees of the Division of Personnel to act on her or his behalf during an administrative review and/or hearing. The Director retains the right to be represented by the Attorney General in administrative hearings in which the Director issued the initial suitability determination. Such hearings shall be conducted by either the Assistant Director of Staffing Services or the Assistant Director of Employee Relations.

f. Administrative hearings are not open to the public.

g. The subject individual may withdraw an administrative review request by notifying the Director orally or in writing at any time. The withdrawal is effective the date the Director receives notification, after which he or she will issue a dismissal order.

h. When an appeal is resolved, the Director will issue a final order.

i. The Director shall issue an order effective the date of the scheduled hearing dismissing the appeal if neither the subject individual nor the subject individual's representative appear at the time and place specified for the hearing. The Director will cancel the dismissal order on request of the subject individual or the subject individual's representative on a showing that the subject individual and the subject individual's representative were unable to attend the hearing and unable to request a postponement for reasons beyond their control.

ATTACHMENT A

 West Virginia Division of Personnel ADMINISTRATIVE REVIEW REQUEST
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1) Name of Subject Individual (Claimant) (Last / First / Middle)		2) Date of Birth (mm/dd/yyyy)	3) Social Security Number
4) Mailing Address		5) Home Phone () -	
		6) Date of Suitability Determination (See Box 10 on PRI-3)	
7) Name of Representative (Optional)		8) Phone Number of Representative () -	
9) Address of Representative			
10) Explain why you disagree with the Suitability Determination. Provide supporting documentation (attach additional pages if needed).			
11) Is an interpreter or alternate format required? [list need(s)]		12) Signature	13) Date Signed
If you are denied or restricted following a criminal history check, you may request an administrative review. To request a review, this form must be completed and received by the Director of the West Virginia Division of Personnel not later than fifteen (15) calendar days after the notice of the suitability determination is mailed. Attach a copy of your Criminal History Request form (PRI-2) and the Notice of Suitability Determination (PRI-3) and mail the forms to: ATTN: Director of Personnel West Virginia Division of Personnel Capitol Complex, Bldg. 6, Room B-416 1900 Kanawha Blvd., East Charleston, West Virginia 25305-0139 If, in the opinion of the Director, an administrative hearing is necessary, you will be notified in writing of the request for a hearing. You have the right to be represented by a representative of your choosing and may have witnesses testify on your behalf at your own expense. You may withdraw the appeal at any time. Administrative reviews and/or hearings are conducted in accordance with the West Virginia Division of Personnel <i>Pre-employment Reference and Inquiries Rule</i> (143CSR4) and procedures. If you disagree with the information provided by the West Virginia State Police or Federal Bureau of Investigation, you must cause the reporting entity to submit a copy of the amended record to the Director if you successfully contest the accuracy or completeness of information provided by the applicable entity. Information on how to contact law enforcement agencies is located on the back of the Criminal History Request form (PRI-2). Pursuant to Section 7 of the Privacy Act of 1974, disclosure of social security numbers (SSN) is mandatory. Social security numbers are required to investigate backgrounds with the State Police, Federal Bureau of Investigation, and/or other appropriate entity. Failure to provide a SSN will result in the application being considered incomplete and withdrawn. The West Virginia Division of Personnel has authority to solicit SSN's pursuant to W. Va. Code § 29-6-1, et seq.			
DOP USE ONLY	Date Request Received	DOP Representative (Print)	DOP Representative Signature
	Date of Hearing (if applicable)	Outcome of Administrative Review ☐ Initial Suitability Determination upheld ☐ Amended Suitability Determination issued	Date Decision Mailed