



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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7/27/2023 2:12 PM

Office of West Virginia
Secretary Of State

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE EXEMPT, INTERPRETIVE OR PROCEDURAL
RULE**

AGENCY: Miners Health Safety And Training

TITLE-SERIES: 56-13

RULE TYPE: Interpretive Amendment to Existing Rule: Yes Repeal of existing rule: No

RULE NAME: Drug Testing of Mine Inspectors and Mine Safety
Instructors

CITE STATUTORY AUTHORITY: W. Va. Code 22A-1-6, 22A-1-9, 22A-1-12 and 29A-3-1 et seq

This rule is filed with the Secretary of State. This rule becomes effective on the following date:

August 31, 2023

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

**Garner Marks -- By my signature, I certify that I am the person authorized to file
legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.**

TITLE 56
INTERPRETIVE RULE
OFFICE OF MINERS' HEALTH, SAFETY AND TRAINING

SERIES 13
DRUG TESTING OF MINE INSPECTORS
AND MINE SAFETY INSTRUCTORS

§56-13-1. General.

1.1. Scope. -- This rule clarifies the Office of Miners' Health, Safety and Training authority under W. Va. Code §§22A-1-9, 22A-1-12(a) and 22A-1-12(e) to determine whether mine inspectors, surface mine inspectors, mine safety instructors, electrical inspectors, or persons seeking appointment as a mine inspector, surface mine inspector, mine safety instructor, or electrical inspector, are of good character, reputation and temperate habits, and do not suffer from physical or mental impairment, incompetency, neglect of duty, or malfeasance in office as a result of controlled substance, or drug abuse.

1.2. Authority. -- W. Va. Code §§22A-1-6, 22A-1-9, 22A-1-12, and 29A-3-1 *et seq.*

1.3. Filing Date. -- July 27, 2023

1.4. Effective Date. -- August 31, 2023.

§56-13-2. Purpose.

2.1. The Office of Miners' Health, Safety and Training recognizes that the critical mission of mine inspections requires the maintenance of a drug free work environment and that the practice of mine inspections has several uniquely compelling interests that justify the use of drug testing. Additionally, the general citizenry of the State of West Virginia has a right to expect that mine inspectors, surface mine inspectors, mine safety instructors, electrical inspectors and others are at all times both physically and mentally able to perform their duties. The Office of Miners' Health, Safety and Training believes that there is sufficient evidence to conclude that the use of controlled substances and other forms of drug abuse could seriously impair any mine inspectors, surface mine inspectors, mine safety instructors, electrical inspectors or others physical and mental health, and thus, their job performance, and places miners, mine personnel, mine inspectors, surface mine inspectors, mine safety instructors, electrical inspectors and the general population's lives, health and welfare at risk.

§56-13-3. Definitions.

3.1. Unless the context in which a word or phrase appears clearly requires a different meaning, all terms used in this rule that are not defined herein shall have the meanings set forth in W. Va. Code §22A-1-2.

3.2. "Controlled substance" means a drug, substance or immediate precursor in Schedule I-V as defined by W. Va. Code §60A-1-101(d).

3.3. "Director" shall mean the director of the Office of Miners' Health, Safety and Training.

3.4. "Drug" shall mean substances recognized as drugs in the official "United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States", or official "National Formulary," or any supplement thereto; substances intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or animals; substances (other than food) intended to affect the structure or any function of the body of man or animals; and substances intended for use as a component of any article specified in this section.

3.5. "Electrical inspector" shall mean an electrical inspector as provided for in W. Va. Code §22A-1-11.

3.6. "Employee" shall mean a mine inspector, prospective mine inspector, mine safety instructor prospective mine safety instructor, surface mine inspector, prospective surface mine inspector, electrical inspector or prospective electrical inspector.

3.7. "Mine inspector" shall mean a state mine inspector as provided for in W. Va. Code §22A-1-8.

3.8. "Mine Safety Instructor" shall mean a state mine safety instructor as provided for in W. Va. Code §22A-1-9.

3.9. "OMHST" shall mean the Office of Miners' Health, Safety and Training.

3.10. "Post-accident drug testing" shall mean a drug test performed pursuant to an accident resulting in bodily injury to the employee or any other individual or damage to state property.

3.11. "Random drug testing" shall mean that each employee subject to testing has a statistically equal chance of being selected for testing at random and at unscheduled times. The selection of employees for random testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with the employee's social security number, payroll identification number, or other comparable identifying number. Twenty-five percent (25%) of all OMHST employees shall be randomly drug tested per year. Random drug testing shall be conducted monthly.

3.12. "Pre-employment drug testing" shall mean a drug test performed on any individual seeking employment with OMHST.

3.13. "Reasonable cause" shall mean a ground for belief linked to articulable, objective facts or circumstances to warrant submitting an employee to testing.

3.14. "Reasonable cause drug testing" shall mean a drug test ordered by OMHST for an employee when OMHST has reasonable cause to believe the employee is under the influence of a controlled substance or alcohol or is a current user of a controlled substance.

3.15. "Surface mine inspector" shall mean a surface mine inspector as provided for in W. Va. Code §22A-1-13.

§56-13-4. Prohibited Activities.

4.1. Employees of OMHST shall not:

- a. Illegally possess any controlled substance;

- b. Ingest any controlled substance or any drug or prescription drug unless at the direction of a licensed medical practitioner;
- c. Ingest any prescribed or over-the-counter drug in amounts beyond the recommended dosage;
- d. Use alcohol in any manner while on duty or present themselves for duty in any state of alcohol induced intoxication;
- e. Refuse to participate in any drug test as directed by the Director; and/or
- f. Possess or submit an adulterated or substituted urine specimen.

§56-13-5. Drug Testing Procedure.

5.1. All employees of OMHST as listed in Section 5.6. of this rule form the test pool and are subject to unannounced, random drug testing procedures.

5.2. Implementation of this procedure will be delegated, on a contractual basis, to an entity or corporation approved by the Director.

5.3. All employees of OMHST may be directed to submit to reasonable cause drug testing when reasonable cause exists to warrant the testing of such employees.

5.4. Any employee of OMHST may be directed to submit to a post-accident drug test when appropriate.

5.5. The Director shall cause a randomly selected panel of employees be tested at intervals of his/her choosing. The intent is that twenty-five percent (25%) of all OMHST employees undergo a random drug test annually.

5.6. It is the intent of this procedure to include in the random drug test pool those employees whose job responsibilities involve public safety which may impact the health, safety, rights and privileges of others, or with the public welfare. Based upon the foregoing criteria, those employees who are deemed to be eligible for inclusion into the random drug test pool are:

- a. Mine inspectors;
- b. Mine safety instructors;
- c. Surface mine inspectors;
- d. Electrical inspectors; and
- e. Any employee of OMHST routinely entrusted with a state vehicle.

5.7. All random, pre-employment, post-accident and reasonable suspicion drug tests shall include a ten (10) panel urine test for the following substances:

- a. Amphetamines,

- b. Cannabinoids/THC,
- c. Cocaine,
- d. Opiates,
- e. Phencyclidine (PCP),
- f. Benzodiazepines,
- g. Propoxyphene,
- h. Methadone,
- i. Barbiturates, and
- j. Synthetic narcotics.

5.8. In addition, all random, pre-employment, post-accident and reasonable suspicion drug tests shall include a chemical test of breath for alcohol. No employee's blood alcohol level shall meet or exceed four one hundredths of one percent (.04) concentration at the time of testing.

5.9. All random, pre-employment, post-accident and reasonable suspicion drug tests shall be performed and administered in accordance with the standards and protocols set forth in the United States Department of Transportation's rule found in 49 C.F.R. Part 40, and collected by individuals who are certified as complying with said regulations.

5.10. The chemical test of breath shall be an alcohol confirmation test, as provided in 49 C.F.R. Part 40, Subpart M, taken using an evidential breath testing device listed on the National Highway Traffic Safety Administration (NHTSA) most current Conforming Products List and conducted by a breath alcohol technician meeting the training requirements found in 49 C.F.R. Part 40, Subpart J.

5.11. All random, pre-employment, post-accident and reasonable suspicion drug tests shall be tested by laboratories certified by the United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA) for collection.

5.12. Reasonable cause drug testing is based on a totality of circumstances. A variety of factors may be considered when establishing reasonable cause. Such factors may include, but are not limited to, the following:

5.12.1. A pattern of abnormal conduct or specific behaviors or deviations from expected performance including but not limited to:

- 1. Frequent absences/tardiness;
- 2. Serious errors in judgment;
- 3. Numerous accidents both on and off duty;

4. Chronic missed deadlines;
5. Mood swings, irrational behavior or unpredictable hostility; and/or
6. Repeated instances of violations of policies and procedures.

5.12.2. Observation, such as direct observation of use and/or physical symptoms of being under the influence of a controlled substance.

5.13. The Director may place the employee on administrative leave, pending disciplinary action, upon being notified of a positive and/or a failed random, reasonable suspicion or post-accident drug test result.

5.14. Employees who are the subject of a positive and/or a failed random, reasonable suspicion or post-accident drug test shall have the right to request that the split specimen be tested.

5.14.1. Testing of the split specimen shall be performed at the sole expense of the employee at the prevailing rate then charged by the testing company and any such request must be made in writing to the Director by the employee immediately upon notification of an initial positive test result.

5.14.2. A different SAMHSA accredited laboratory may be used to perform the test of the split specimen if so requested by the employee.

5.14.3. The test of the split specimen will be performed immediately upon receipt of the request and the results thereof will be reported to the Director by the MRO as soon as they are available.

5.14.4. In the event the test of the split specimen is a negative test result, OMHST shall reimburse the affected employee all reasonable costs associated with the test of the split specimen.

5.15. The Director, at his/her discretion, may afford the employee an opportunity to seek professional medical and/or psychological treatment for substance abuse for a first positive and/or failed random, reasonable suspicion or post-accident drug test. The employee may be required to agree, in writing, to:

- a. Immediately enroll in a substance abuse treatment program approved by the Director;
- b. Sign a medical records release authorization, which relates solely to the employee's treatment for substance abuse and provide timely progress reports to the Director;
- c. Successfully complete the substance abuse treatment program; and
- d. Submit to unannounced drug tests for a period of not less than twelve (12) calendar months.

5.16. The Director may initiate disciplinary action against an employee who violates a provision of this rule even though the affected employee has been afforded an opportunity to seek professional medical and/or psychological treatment.

5.17. For purposes of a positive test for THC, the employee may not rely upon a medical prescription or other type of medical permission for marijuana, including a valid identification card issued under W. Va.

Code §16A-5-1 *et seq.* authorizing the employee to access medical cannabis under the West Virginia Medical Cannabis Act.

5.18. For purposes of a positive test for THC, the employee may not excuse such a positive test based upon the fact that the THC came entirely from a legal CBD product or any other legal product.

5.19. In the event an employee's initial and/or split specimen tests positive and/or the employee fails the drug screening due to having refused to submit a sample or possessing an adulterated sample, and/or the employee submitted a substituted or an adulterated sample, then the Director shall issue an immediate temporary suspension of all certifications held by the employee pending a hearing before the Board of Appeals pursuant to W. Va. Code §22A-1A-2.

5.20. All individual records pertaining to random, pre-employment, post-accident and reasonable suspicion drug tests of affected employees shall be deemed confidential medical records and shall not be disseminated except at the express direction of the Director, and without the express written consent of the employee.

5.21. The Director may immediately terminate any employee who violates this rule where such termination of the employee is deemed by the Director to be in the best interest of OMHST or the public in accordance with the requirements set forth in W. Va. Code §22A-1-1 *et seq.*

5.22. All successful applicants for the position of mine inspector, mine safety instructor, surface mine inspector or electrical inspector shall submit to a pre-employment drug screening test, as set forth in this rule and in the same manner as current employees subject to random, post-accident and reasonable suspicion drug tests, and shall successfully pass such drug screening test before assuming the responsibilities and duties of the applicant's respective job.

5.23. In the event a successful applicant for the position of mine inspector, mine safety instructor, surface mine inspector or electrical inspector, and who has not assumed the responsibilities and duties of his or her job, fails the pre-employment drug test, including any subsequent drug screening test utilized to verify the results of the first failed drug screening test, such failure will constitute cause to immediately dismiss the applicant.