



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: Agriculture

RULE TYPE: Legislative

TITLE-SERIES: 61-20

RULE NAME: Employment Reference And Inquiries
And Background Checks

CITE AUTHORITY: §19-1-3b

The above proposed Legislative rules, following review by the Legislative Rule Making Review Committee, is hereby modified as a result of review and comment by the Legislative Rule Making Review Committee. The attached modifications are filed with the Secretary of State.

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

Yes

Norman Bailey -- 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 61
LEGISLATIVE RULE
DEPARTMENT OF AGRICULTURE

SERIES 20
EMPLOYMENT REFERENCE AND INQUIRIES AND BACKGROUND CHECKS

§61-20-1. General.

1.1. Scope. -- This rule implements the provisions set forth in West Virginia Code §19-1-3B regarding the rejection of candidates or eligibility within the West Virginia Department of Agriculture.

1.2. Authority. -- West Virginia Code §19-1-3b.

1.3. Filing Date. -- ~~April 30, 2020~~

1.4. Effective Date. -- ~~April 30, 2020~~

1.5. Sunset Date. -- This rule shall terminate and have no further force or effect ~~April 30, 2025~~ August 1, 2034.

§61-20-2. Definitions. Terms used in this rule which are not included in this section have the meaning given as provided in the Policy and Procedure Manual of the West Virginia Department of Agriculture.

2.1. "Applicant" means an individual being considered for employment with the Department of Agriculture.

2.2. "Appointing Authority" means the Commissioner of Agriculture or his or her Authorized Designee

2.3. "Authorized Designee" means an employee who is designated by the Commissioner of Agriculture to receive and process criminal history check request forms from applicants, receive criminal history information and make suitability determinations.

2.4. "Contact Person" means an employee who is designated by the Commissioner of Agriculture to receive and process criminal history check request forms from applicants, but who is not authorized to receive criminal history information and make final suitability determinations.

2.5. "Department" means the West Virginia Department of Agriculture including all affiliated divisions, subdivisions, and related entities.

2.6. "Director" means the supervisor of a functional sub-unit of the Department.

2.7. "Disqualifying Event" means a conviction which has a rational nexus to the position for which the applicant or employee is applying. For purposes of this rule, a plea of guilty or no contest is considered a conviction unless the charge was subsequently invalidated by a court decision.

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2.8. "Employee" means any person who lawfully occupies a position in the Department, is paid a wage or salary, and has not severed the employee-employer relationship.

2.9. "Employment" means a new hire, promotion, or continued employment.

2.10. "Position" means 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.

2.11. "Qualified entity or Individual" means any ~~entity~~ entity or individual who is authorized by the Commissioner or Authorized Designee to conduct investigations and/or to secure reports in compliance with this rule.

2.12. "Subject Individual" means an applicant or employee who is subject to a criminal history check pursuant to this rule.

2.13. "Suitability Determination" means 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 damage or injury to others.

2.14. "Transfer" means the movement of an employee to a position in a different subdivision of the Department or geographic location of the same or a different subdivision.

2.15. "Year" means a twelve (12) consecutive month period, unless otherwise specified.

§61-20-3. Verification of Eligibility.

3.1. To establish the eligibility of an applicant or employee, the Director may verify information provided by the applicant, including, but not limited to:

3.1.a. current and previous employment and/or volunteer and/or student activities;

3.1.b. military service;

3.1.c. formal education; and

3.1.d. professional licensure and/or certification.

3.2. To the extent permitted by law and reasonably relevant to established eligibility standards or the nature of the position sought by the applicant or employee, the Authorized Designee may obtain and review:

3.2.a. the applicant's ~~state and/or federal criminal records history;~~ criminal record, both state and federal;

3.2.b. the central abuse registry ~~established pursuant to~~ per W. Va. Code §15-2C-1 et seq.; and

3.2.c. the applicant's driving records.

3.3. To the extent permitted by law, the Authorized Designee may require an applicant or employee to provide any information necessary to afford the Authorized Designee access to records reasonably relevant to established eligibility standards or the nature of the position sought by the applicant.

3.4. The Authorized Designee may delegate some or all of the responsibility to qualified appointing authorities in accordance with the provisions of this rule.

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

§61-20-4. Review and Reconsideration.

4.1. 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 Commissioner or Authorized Designee. Subject individuals are solely responsible for providing the Authorized Designee or qualified entity with proof of any error and correction thereof by any reporting agency.

4.2. If the subject individual provides proof of any error and correction thereof by any reporting agency to the Authorized Designee, the Authorized Designee will conduct a new suitability determination.

4.3. If the subject individual wishes to dispute an adverse suitability determination, the subject individual may request that the Authorized Designee reconsider his or her suitability. The Authorized Designee 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 or otherwise communicated or received. Within thirty (30) calendar days after a properly submitted request for reconsideration is received, the Authorized Designee shall report his or her decision in writing to the subject individual. Nothing in this rule shall require the Department to hold open a position when there is a challenge to an adverse suitability determination.

4.4. Nothing in this rule shall establish a property right in an offer of employment for an applicant upon submission to a criminal background check, even if an offer of employment has already been made. The Department reserves the right to rescind a previously issued job offer after it has been given. Nothing in this rule ~~likewise~~ shall otherwise be construed to undermine the at-will employment relationship between the Department and its employees, both prospective and current.

§61-20-5. Records and Reports.

5.1. The Authorized Designee shall maintain confidential records and reports pertaining to reference information and background investigations in a separate file if stored or maintained by the Department.

5.2. If records and reports are reviewed electronically, the Authorized Designee shall maintain secure access to records.

§61-20-6. Employee and Applicant Responsibilities.

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6.1. It is the responsibility of the employee or applicant to report any disqualifying event or event that may be disqualifying to his or her Director or Authorized Designee within five days of the disposition of the matter.

6.2. If the Department has reason to believe or notice of a disqualifying event that an employee has failed to report, the Department may require the employee to ~~conduct a~~ submit for a background check.

6.3. Upon request, each applicant or employee shall provide information, including fingerprints, required by the state police or other entities for processing or to facilitate access to: driving records; verification of employment, education, licensure, and residence; and state and federal criminal history information.

6.4. Failure of an employee to report a disqualifying event within the time provided is grounds for disciplinary action up to and including dismissal.

6.5. Nothing in this rule shall be construed to limit the authority or ability of the Department to conduct an investigation if there is reason to believe that an applicant or employee was untruthful or provided false information, either on an application or during the course of his or her employment, or has otherwise engaged in conduct that the Commissioner concludes may impact the ability of an applicant or employee to effectively perform the functions of his or her job.

§61-20-7. Department Staff Responsibilities.

7.1. All Department ~~Staff~~ staff involved in this process must comply with this rule and the procedures established by the Department for implementation of the rule.

7.2. The ~~director of a functional unit shall request that the~~ Authorized Designee may assess and thereafter make a suitability determination prior to the transfer or promotion of an employee to a ~~classified service~~ position for which there is a different suitability standard ~~that is different and/or more stringent than the standard for~~ pertinent to the employee's current position.

7.3. The appointing authority shall ensure adequate training is provided to all authorized designees, ~~and contact persons~~ and other involved department staff, and shall further ensure records and reports are maintained in accordance with §61-20-5.

7.4 While background checks are required of new applicants for employment with WVDA, all lateral employment changes require a drug screen and fingerprint check. The change in classification applies to role changes of any internal nature including those made via promotion, transfer within different divisions of WVDA, or an internal change of otherwise substantially different nature to a job description (e.g., change in job title and duties altogether, shift to another division but title is the same in the new division), The provisions of this section applies to current employees or returning former employees of WVDA.

§61-20-8. Period of Disqualification.

8.1. Subject to the provisions of section 8.2 of this rule, applicants who are disqualified for employment because of a conviction that has not been reversed shall be afforded the opportunity to reapply for open positions after the expiration of five years from the date of conviction or date of release from the imposed penalty, whichever is later, if the individual had not been convicted of any other crime during that period.

8.2. Convictions for violent or sexual offenses shall be subject to a longer period of disqualification.

8.2.a. The Department may impose a period of disqualification of ten years for violent offenses for all positions within the Department.

8.2.b. The Department may impose a period of disqualification of twenty years for sexual offenses for all positions within the Department.

8.2.c. The Department may impose a period of disqualification of longer than the minimum period set forth in this subsection if the offense is of the type to create an ongoing disqualification from the specific criteria for a particular position for which the applicant has applied.

§61-20-9. Petition.

9.1. ~~If an individual with a criminal record wishes to~~ The following provisions apply to current employees and individuals seeking employment at the WVDA who have not been previously employed by the Department: individuals with criminal records may petition the Commissioner or his or her Authorized Designee for a determination of whether the individual's criminal record will disqualify them from obtaining employment with the Department, the individual must provide by providing:

9.1.a. For new applicants, individuals with criminal records may petition the Commissioner or his or her Authorized Designee for a determination of whether the individual's criminal record will disqualify them from obtaining employment with the Department, by providing:

9.1.a.1. ~~Social~~ Their social security number;

9.1.a.2. ~~Jurisdiction~~ The jurisdiction(s) where the conviction(s) occurred;

9.1.a.3. ~~Date~~ The date(s) of the conviction(s);

9.1.a.4. ~~Specific nature of the conviction with sufficient detail to disclose all pertinent aspects of the offense;~~ A description of the circumstances or nature of the conviction(s) or crime(s) leading to such conviction, if appropriate, as well as any further relevant documentation or information petitioner believes may be of importance or useful to commissioner in his review of the petition for employment, including, but not limited to the following examples: description(s) or any available documentation, such as court filings, disposition, or other information as appropriate; and

9.1.eb. For new applicants and current employees applying for promotion or alternate position:

9.1.b.1. The position(s) for employment within the West Virginia Department of Agriculture that is desired by the petitioner.

9.1.c. Both categories of applicant shall have a right to petition the Commissioner for a determination as described in §61-20-9.1.a.; those who are currently employed by the WVDA, shall do so if required by the Authorized Designee to provide information as set forth in §61-20-3.3 and/or if the employee is required to self-report as set forth in §61-20-6.1 or the Department has reason to believe or notice of a disqualifying event as set forth in §61-20-6.2.

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~~9.1.f. Either type of applicant shall have a right to petition the Commissioner for a determination as described in this section; meaning that both those who have been previously employed by the WVDA, or those seeking employment at WVDA as a new applicant may petition the Commissioner or his or her Authorized designee as described in this section.~~

~~9.1.e. Education;~~

~~9.1.f. Training;~~

~~9.1.g. Military service; and~~

~~9.1.h. A complete work history that will be included in a background check.~~

~~9.1.i. The individual must also indicate the type(s) of positions that they are interested in.~~

9.2. The information gathered from the background check will be evaluated against the specific nature, duties and location(s) of position(s) that they indicate an interest in for the Commissioner to render a decision.

9.3. The petitioner will be informed of the decision within 60 days of receipt of the petition.