



Final Regulation Agency Background Document

Agency name	Department of Professional and Occupational Regulation
Virginia Administrative Code (VAC) citation	18 VAC 120-30
Regulation title	Regulations Governing Polygraph Examiners
Action title	Amending
Date this document prepared	November 27, 2006

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

The regulation of polygraph examiners in the Commonwealth of Virginia began with the statutory creation of a licensing program in 1975. Since that time the regulations have evolved to include the establishment of an advisory board, implementation of an intern program for potential licensees and the adoption of standards of practice and conduct that ensure that polygraph examinations are done fairly and ethically. During this time the equipment and technology available to polygraph examiners has changed tremendously, especially in the last few years, as have techniques used to interview examinees.

The Department of Professional and Occupational Regulation (DPOR) must amend these regulations to ensure that they are applicable to current practices and meet the intent of the statutes. The proposed amendments address some of these changes, clarify existing regulations and delete unnecessary regulations.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

On October 26, 2006, the Director of the Department of Professional and Occupational Regulation adopted these amendments to 18 VAC 120-30 et seq. as final.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter numbers, if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

§ 54.1-1802 requires that the Director of the Department of Professional and Occupational Regulation “promulgate regulations that are not inconsistent with the laws of Virginia necessary to carry out the provisions of [Chapter 18 of Title 54.1 of the Code of Virginia] and Chapter 1 (§ 54.1-100 et seq).”

18 VAC 120-30-30 provides the authority for the Director of the Department of Professional and Occupational Regulation to appoint a Board to advise the Department on any matters relating to the practice or licensure of polygraph examiners.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

DPOR seeks to amend the current Regulations Governing Polygraph Examiners in order to remove redundant information, correct referenced citations, clarify language and modify licensing requirements. The clarifications and corrections are essential to protect the health, safety and welfare of citizens, as regulations that are incorrect or that cite incorrect references are confusing to the regulants and can lead to errors in examination procedures and protocols. The proposed regulations have been developed to reduce confusion and subjective interpretations of the regulations by both the licensees and the general public.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the “All changes made in this regulatory action” section.

The majority of changes are cosmetic in that they remove sections that are duplicated in statute or elsewhere in the regulations. These “administrative” changes clean-up the regulations and reduce the chances of non-compliance with other relevant sources (statutory or otherwise) that are subject to periodic amendments. Most of these changes are found in the definitions.

A large portion of the regulations have been moved to more appropriate sections, making them less confusing and easier to reference. The section that currently provides training and education

requirements for licensure, applicable primarily to interns, has been moved from the general qualifications section to the section listing eligibility criteria for interns. An additional portion of the general qualifications that provided eligibility criteria for polygraph examiners was moved to the section dealing specifically with that license.

The dishonored check fee was removed from the fee schedule to be consistent with the regulations of other DPOR programs. It has been determined, through the regulatory review process of other programs, that the dishonored check fee is an administrative fee set by the agency that encompasses all regulatory programs and is based on actual fees charged by financial institutions utilized by the agency. As an agency administration fee, it has been determined that this item should not be listed within the regulations of any specific board.

The requirement that an applicant must submit fingerprint cards along with the application has been amended to require the submission of the applicant's Central Criminal Records Exchange report (available from the Virginia State Police) in lieu of the fingerprint cards. For several months DPOR has not been able to submit fingerprint cards for processing as the State Police notified DPOR that they would be unable to continue to provide this service for programs that did not have the statutory requirement to fingerprint applicants. The agency determined that a search of the criminal data base, part of the fingerprint card processing procedures, would be sufficient to determine if an applicant has a past criminal history or arrest record.

Other changes provide clarifying language to sections that were confusing as currently written and to change referenced citations.

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
 - 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
 - 3) other pertinent matters of interest to the regulated community, government officials, and the public.*
- If there are no disadvantages to the public or the Commonwealth, please indicate.*

1) In amending these regulations the Department, with the technical expertise of the Polygraph Examiners Advisory Board, reviewed current regulations, amendments to the statutes, current Federal polygraph law and weighed them along with the protection to the public and the burden to the regulant population. Many of these amendments were the direct result of feedback received from applicants as well as input from the licensing staff, who provided anecdotal data of difficulties in processing applications and interaction with the applicant as a result of those difficulties. As a result the Board moved sections of the regulations pertaining to the eligibility requirements for licensure into an order that should mitigate confusion and make them easier to understand. There is no perceived disadvantage to changing the regulations to make them easier to understand.

Other amendments submitted with this proposal change the requirements for instructors at polygraph schools and for the schools themselves. This proposal will allow more instructors to meet the qualifications to teach, expanding the pool of available instructors. Additional changes require schools to report changes in any of the provisions that qualify them as approved schools and allow the Department to periodically review a school's qualifications. Both of these proposals are advantageous, in that they would increase the number of available instructors for certain classes, yet would give the Department the authority to requalify schools, ensuring that those offering training for licensure maintain their qualifications at all times.

2) This program directly affects a small number of regulants (less than 300) and it is not anticipated that this population will change significantly as a result of these regulatory amendments. The anticipated changes should be an advantage to the licensing staff since the clarifications should lead to a decrease in telephone calls from applicants trying to understand the eligibility criteria, resulting in more time to process applications, lowering the processing time.

3) There were no other items identified that would be considered pertinent matters of interest to the regulated community, government officials or the public.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar’s office, please put an asterisk next to any substantive changes.

Section number	Requirement at proposed stage	What has changed	Rationale for change
18 VAC 120-30-55.A	Polygraph Examiner Internship requirement.	Regulation clarified to include Internship waiver for applicants who practiced polygraphy in a federal jurisdiction or in the United States Military.	This change will allow the repealing of Section 18 VAC 120-30-90.
18 VAC 120-30-90	Waiver of Polygraph Examiner Internship requirement.	Section Repealed.	This section is redundant as its substance is covered in 18 VAC 120-30-55.A
18 VAC 120-30-200.C	Polygraph Examination Recording requirement.	The word “tape” has been removed in four places, and the words “recording media” added in one place.	This change allows for the use of additional types of recording media to meet this requirement.
18 VAC 120-30-220.A.6	Examination Standards of Practice concerning an examinee’s sexual preferences or sexual activities.	Regulation clarified.	This change in language clarifies the intent of the regulation without changing the substance of the regulation.

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

Commenter	Comment	Agency response

No public comment was received.

All changes made in this regulatory action

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
18 VAC 120-30-10		Definition of "affidavit"	Removes the definition from the regulations in order to facilitate the acceptance of applications from the DPOR website.
		Definition of "Department"	Removes the definition from the regulations as it is a contained in the statutes.
		Definition of "Director"	Removes the definition from the regulations as it is currently contained in the statutes.
		Definition of "Polygraph"	Removes the definition from the regulations as it is currently contained in the statutes.
		Definition of "Polygraph examiner"	Removes the definition from the regulations as it is currently contained in the statutes.
		Definition of "Polygraph examiner intern"	Removes the definition from the regulations as it is currently contained in the statutes.
18 VAC 120-30-30		Advisory Board	Adds language to paragraph A that clarifies the authority of the Polygraph Examiners Advisory Board, consistent with statutory authority found in Title 2.2 of the Code of Virginia.
18 VAC 120-30-40		Basic Qualifications	<p>Paragraph A: removes existing sub-paragraphs 2 - 4, renumbers sub-paragraphs 5 – 10, and amends sub-paragraphs 9 & 10.</p> <p>Sub-paragraphs 2-4 were removed and placed, in substance, within another more appropriate section of the regulations. Confusion arising from applicants as to whether or not the educational requirements pertained to all applicants, interns, individuals seeking reciprocity, etc., resulted in the Board reviewing the current structure of the Entry Requirements section of the regulations. It was determined that by moving the provisions of current paragraphs 2-4 to the section of the regulations that provides for polygraph examiner interns, individuals applying for a license will find the regulations easier to understand and less of a burden when applying for licensure.</p> <p>Sub-paragraph 9 (proposed 6) is amended to remove the reference to "affidavit" in order to be consistent with the proposed amendment to the definitions.</p>

			<p>Sub-paragraph 10 (proposed 7) is amended to remove the requirements that applicants provide finger-print cards as part of the application and replaces it with a current (within 30 days) history record from the Central Criminal Records Exchange (CCRE). This regulation is proposed as a result of the Department's difficulty in getting finger-print cards processed due to workload and policy issues. Since July 2003, the Department has accepted CCRE reports from applicants for polygraph licenses due to difficulty in obtaining finger-print records. This proposed change takes that procedure and places it in the regulations.</p> <p>Paragraph B removes language providing that applicants who do not respond to requests for additional information within 30 days of that request may have their license disapproved.</p> <p>This language is being removed in order to comply with current records retention policy that provides that applications be held for one year.</p>
18 VAC 120-30-50		Polygraph Examiner Intern Registration	<p>Paragraph A is amended to add language previously located in 18 VAC 50-30-40 that is moved to this section to clarify the eligibility requirements for licensure as an intern.</p> <p>Paragraph B is amended to correct references to regulations, required due to proposed amendments.</p>
	18 VAC 120-30-55	Qualifications for licensure by examination.	<p>This newly proposed section of the regulations provides for those individuals wanting to obtain a license by examination. Paragraph A includes language from 18 VAC 50-30-40 that has been moved to this new section in order to clarify the eligibility requirements for licensure. Paragraph A also includes an internship waiver for applicants who practiced polygraphy in a federal jurisdiction or in the U.S. Military, which allows for the repealing of redundant Section 18 VAC 120-30-90. Paragraph B provides that the individual must submit a completed application and fee in order to be considered for the exam and that passing that exam will result in issuance of the license.</p>
18 VAC 120-30-90		Waiver of internship requirement	<p>This Section is repealed since it is redundant and its substance is covered in 18 VAC 120-30-55.A</p>
18 VAC 120-30-100		Fees.	<p>Paragraphs C & D remove the dishonored check fee from the regulations. The removal of the dishonored check fee from the regulations is in response to the determination by DPOR that the fee is one that should be set by the Agency as a result of the cost of processing dishonored checks. Since this fee is an administration fee not a</p>

			<p>licensing fee, it should not be in the regulations of a specific Board.</p> <p>The fee chart includes the addition of the fee for application by reciprocity. This fee has been made as a separate entry in order to provide clarification to individual applicants. While those individuals have always paid a licensing fee they were confused as to which category they would be included. This proposal addresses that issue and should alleviate that burden.</p>
18 VAC 50-30-150		Department discretion to deny renewal	Amends statutory reference to the Administrative Process Act to the correct statute.
18 VAC 120-30-160		Qualifications for renewal	Amends regulatory references required by these proposed regulations.
18 VAC 120-130-180		Department discretion to deny reinstatement.	Removes language referencing statutory entitlements under the Administrative Process Act. The Administrative Process Act itself, already requires disclosure to applicants by the Department and in order to reduce confusion that could result from statutory changes, should not be duplicated in the regulations.
18 VAC 120-30-190		Status of license	Added "expiration" to paragraph A in order to clarify reinstatement.
18 VAC 120-30-200		Polygraph examination procedures	Clarifying language added to paragraph C. The word "tape" has been removed in four places, and the words "recording media" added in one place in Paragraph C to allow for the use of additional types of recording media to meet the recording requirement.
18 VAC 120-30-220		Examination standards of practice	<p>Paragraph A is amended to clarify the intent of the standards or practice for the polygraph examination which includes disclosure of these provisions to the examinee.</p> <p>Paragraph B was renumbered as sub-paragraph 6 of paragraph A in order to provide continuity of these provisions. The language in sub-paragraph 6 was amended to clarify the intent of the regulation without changing the substance of the regulation.</p> <p>Paragraphs C-H were renumbered in order to incorporate the changes in paragraph B</p>
18 VAC 120-30-240		Grounds for fines	<p>Statutory reference in paragraph 2 was amended to reflect changes in Code.</p> <p>Paragraph 8 was added in order to make it a violation of the regulations, subject to sanction, if a polygraph examiner fails to follow the examination</p>

			standards of practice outlined in 18 VAC 120-30-220.
18 VAC 120-30-270		Minimum requirements for school curriculum	Clarifying language added to paragraph B and item 7 of paragraph B.
18 VAC 120-30-280		Instructor minimum requirements.	<p>Paragraph A, sub-paragraph 1 amended to require that the instructor of “Legal Aspects of Polygraph Examination” be licensed as an attorney in a state or jurisdiction of the United States. This amends current language that required that the instructor be a member of the Virginia State Bar. This was burdensome to polygraph schools located outside the Commonwealth of Virginia and was determined to be an unnecessary burden, since the vast majority of the legal aspects are actually set forth in Federal Law, not individual state law.</p> <p>Paragraph A, sub-paragraph 5 amends language that would now require instructors of other courses not specifically listed in this section, have at least five years experience as a polygraph examiner. This amendment ensures that instructors have adequate experience in the nuances of the complicated process of the polygraph examination to be able to articulate, from experience, sufficient information to the students that will equate to a level of competency allowing the potential licensee to achieve a skill level conducive to the requirements of the examination.</p>
	18 VAC 120-30-290	Amendments and changes	This proposed regulation requires that approved polygraph schools report any changes in the information provided by the school in accordance with 18 VAC 120-30-260; 18 VAC 120-30-270; 18 VAC 120-30-280, within 30 days of the change.
	18 VAC 120-30-300		This proposed regulation provides that approved polygraph schools may be subject to requalification and that the Department has the authority to ask for evidence that a school is complying with the provisions set forth in the regulations.
	18 VAC 120-30-310	Grounds for withdrawing approval from a school	This proposed regulation provides that the Department has the authority to withdraw approval from a polygraph school for a) failure to teach the curriculum as provided; b) using an individual to teach that does not meet the requirements set forth in 18 VAC 120-30-280; and c) if the owner, employee or teacher is guilty of dishonest conduct in the teaching of polygraphy.

Regulatory flexibility analysis

Please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

The majority of changes are cosmetic in that they remove sections that are duplicated in statute or elsewhere in the regulations. These administrative changes clean-up the regulations and reduce the chances of non-compliance with other laws and regulations that are subject to periodic amendments. Therefore, no other alternatives exist for amending the regulations in order to bring them into compliance with applicable law.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

These amendments will have no impact on the institution of the family or family stability.