

BOARD OF POLYGRAPH EXAMINERS

**Staff Report
to the
Sunset Advisory Commission**

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FOREWORD

The Texas Sunset Act (Article 5429k V.A.C.S.) terminates named agencies on specific dates unless continued. The Act also requires an evaluation of the operations of each agency be conducted prior to the year in which it terminates to assist the Sunset Commission in developing recommendations to the legislature on the need for continuing the agency or its functions.

To satisfy the evaluation report requirements of Section 1.07, Subsection (3) of the Texas Sunset Act, the Program Evaluation section of the Legislative Budget Board has evaluated the operations of the Board of Polygraph Examiners, which will terminate on September 1, 1981 unless continued by law.

Based on the criteria set out in the Sunset Act, the evaluation report assesses the need to continue the agency or its function and provides alternative approaches to the current method of state regulation. The material contained in the report is divided into seven sections: Summary and Conclusions, Background, Review of Operations, Other Alternatives and Constraints, Compliance, Public Participation, and Statutory Changes. The Summary and Conclusions section summarizes the material developed in the report from the standpoint of whether or not Sunset criteria are being met, assesses the need for the agency or the agency's functions relative to the findings under the various criteria and develops alternative approaches for continued state regulatory activities. The Background section provides a brief history of legislative intent and a discussion of the original need for the agency. The Review of Operations section combines, for the purposes of review, the sunset criteria of efficiency, effectiveness, and the manner in which complaints are handled. The Other Alternatives and Constraints section combines the sunset criteria of overlap and duplication, potential for consolidation, less restrictive means of performing the regulation, and federal impact if the agency were modified or discontinued. The Compliance Section combines the Sunset criteria relating to conflicts of interest, compliance with the Open Meetings Act and the Open Records Act, and the equality of employment opportunities. The Public Participation section covers the sunset criterion which calls for an evaluation of the extent to which the public participates in agency activities. The final section, Statutory Changes, deals with legislation adopted which affected the agency, proposed legislation which was not adopted and statutory changes suggested by the agency in its self-evaluation report.

This report is intended to provide an objective view of agency operations based on the evaluation techniques utilized to date, thus providing a factual base for the final recommendations of the Sunset Commission as to the need to continue, abolish or restructure the agency.

I. SUMMARY AND CONCLUSIONS

The development of polygraph instruments in the early 1920's resulted not only in a tool to aid the detection of deception but created a new industry as well. Initially, the polygraph technique was used primarily by law enforcement personnel in criminal investigations. However, during the period of industrial growth following World War II, the commercial use of the polygraph was expanded greatly.

A significant increase in the commercial use of polygraphs occurred in Texas in the early 1960's. The growing use of these instruments and their product gave rise to concerns for the potential of harm to the public. This concern for protecting the public resulted in the creation of the Board of Polygraph Examiners in 1965 and provided for the licensing and regulation of polygraph examiners and polygraph equipment by that board.

The board, composed of six polygraph examiners, presently regulates 458 licensees through licensing and enforcement functions and is supported by fees charged licensees and applicants for licensure.

A review of board operations indicates that the board has only partially achieved its objective of efficient and effective regulation. The board's method of managing funds received by the agency failed to ensure that collected fees were placed in the State Treasury as statutorily required and that monies were deposited in a timely fashion. Improper examination security and unclear experience guidelines have impeded the fair and consistent application of licensure requirements. Additionally, a fee charged an applicant before taking the internship examination does not appear to be authorized by statute. Also, board efforts to enforce the provisions of the Act have been hindered by complaint procedures

which do not adequately ensure board consideration of possible grievances and by a method of judicial review that essentially nullifies board action.

Need to Regulate

As with other regulated activities, regulation of polygraph examiners should be undertaken by the state only when there is a continuing need to protect the public's health, safety, or welfare. Analysis of the conditions which existed in 1965 indicates that regulation was originally imposed in response to concerns that the public was not adequately protected from incompetent polygraph examiners and the resulting use of confidential information secured through the use of those machines.

Examination of current trends in the polygraph industry indicates a shift in the principal use of polygraph from the law enforcement field to the commercial area. This shift toward commercial polygraph testing, especially in employment situations, appears to increase rather than lessen the public's need for protection. Polygraph testing in employment situations appears to warrant greater protection than currently exists because of possible infringements of privacy rights, the intrusive nature of the polygraph, and the unproven validity of the technique in such situations. It may be concluded that there is a continuing need to continue regulatory standards relating to the qualifications of examiners and the use of the polygraph instrument.

Alternatives

If the legislature determines that the regulatory function and/or the board should be continued, the following alternatives could be considered:

1. CONTINUE THE BOARD AND ITS FUNCTIONS WITH MODIFICATIONS.

This approach would maintain an independent board to perform licensing and enforcement activities at no expense to the General Revenue Fund. The review indicates that the maintenance of a separate board would require the following changes in the current methods used by the state if proper regulation is to be carried out.

a) consolidation of administrative support services under the Department of Public Safety;

b) clarification of statutory provisions relating to: 1) examination fees, 2) designating the organization to accredit colleges and universities for licensure purposes, and 3) investigative experience requirements;

c) establishment of provisions which ensure the confidentiality of polygraph examination results not related to law enforcement activities;

d) provide for the appointment of at least two members of the general public on the board; and

e) modification of the method for judicial review from trial de novo to the substantial evidence rule.

2. ABOLISH THE BOARD OF POLYGRAPH EXAMINERS AND TRANSFER THE REGULATORY FUNCTIONS TO THE DEPARTMENT OF PUBLIC SAFETY.

This approach would eliminate the independent Board of Polygraph Examiners but maintain the licensing and enforcement functions. The Department of Public Safety could perform the regulatory and administrative functions through personnel assigned to the polygraph operations of the department in the state headquarters and ten district offices. Expertise in the polygraph field would be available through personnel currently employed by the Department of Public Safety. Adoption of this alternative would not incur any additional costs and would increase the efficiency and effectiveness of the regulatory activities. If the legislature adopts this alternative, the structural and substantive changes contained in the preceding alternative in subsections (b), (c) and (e) should be made.

3. ABOLISH THE BOARD OF POLYGRAPH EXAMINERS, TRANSFER THE REGULATORY FUNCTIONS TO THE DEPARTMENT OF PUBLIC SAFETY, AND PROHIBIT THE USE OF POLYGRAPH IN EMPLOYMENT-RELATED MATTERS.

This approach offers a method by which the state could provide protection for the public by providing for the licensure and regulation of polygraph examiners by the Department of Public Safety, as well as, restricting the use of polygraph testing. Such a prohibition should prevent employers from suggesting, requiring or using polygraph examinations and results as a condition for obtaining or continuing employment. Under this approach, the use of polygraph testing would be limited essentially to law enforcement investigations.

II. BACKGROUND

Historical Perspective

The development of the polygraph instrument or "lie detector" in the 1920's and its continued evolution have greatly enhanced efforts to detect deception. Fundamentally, the use of the polygraph as an instrument to detect deception or verify truth of statements is based on the theory that the act of lying causes measurable and automatic physiological reactions. Generally, a polygraph will simultaneously record the bodily changes which occur in a person's cardio-vascular, respiratory, and perspiration patterns. The interpretation of these recordings indicates whether or not a person has responded to questions truthfully.

In regard to the validity or reliability of polygraph results, independent laboratory studies have found the polygraph technique when employed by qualified examiners to be from 76 percent to 95 percent accurate in controlled situations. The accuracy of any given polygraph examination, however, is dependent upon several factors, the most significant of which are the qualifications and experience of the examiner.

In recent years, new instruments designed to verify truth of statements have been developed. These instruments, known as a voice stress analyzers or psychological stress evaluators (PSE), are designed to detect deception through the identification of stress as indicated through analysis of changes in the voice. An independent study commissioned by the Department of Army, however, found the voice-stress method to be only 32 percent accurate. The reliability of the voice-stress method appears to be less acceptable when compared to the 76 to 95 percent accuracy rating of the polygraph technique. The use of voice-stress analyzers in

Texas to detect deception is illegal because the devices fail to meet the minimum instrumentation requirements established by the Polygraph Examiners Act. As a result, the use of lie detection equipment in Texas is limited to the more conventional polygraph machines.

Initially, polygraph results were used primarily as a tool to aid criminal investigations conducted by law enforcement agencies and officials. Even though the polygraph continues to play a significant role in many criminal investigations today, its use in criminal prosecution has been restricted by numerous court decisions.

Use of the polygraph technique in industrial and commercial settings has grown dramatically, nationwide, since World War II. Definitive statistical data on the volume of polygraph usage in business and industry is not available; however, estimates indicate as many as two million polygraph tests may have been administered nationwide in 1978. A recent survey conducted by Wichita State University researchers indicates that 20 percent of the nation's major corporations and 50 percent of the retail companies surveyed use the polygraph in personnel-related areas.

The impetus for large-scale business and industrial utilization of the polygraph developed from employer attempts to reduce loss due to employee theft. Estimates of the cost to business attributable to internal theft range from \$4 billion to \$7 billion annually.

The environment in which the polygraph was used in Texas changed markedly during the early 1960's. When the polygraph was the almost exclusive province of law enforcement agencies, there appeared to be little public concern for the

validity or use of polygraph. However, as its use by business and industry began to increase, the reliability of the results and methods of use began to receive greater attention.

Increasing commercial utilization of the polygraph technique in Texas served to amplify some of the problems generally associated with polygraph examinations, such as invasion of privacy, validity of polygraph results, and the qualifications of examiners.

Recognizing the increasing use of the polygraph and its potential for abuse, the Fifty-ninth Legislature established the Board of Polygraph Examiners in 1965 to license polygraph examiners and regulate the profession. Legislation was enacted, based on a model statute promulgated by the American Polygraph Association, to protect the public from unqualified examiners and inadequate polygraph equipment. The Texas Supreme Court, however, declared the Act unconstitutional in 1969 because of insufficiency of caption. The Sixty-first Legislature subsequently reenacted the legislation in 1969 with few modifications.

The Polygraph Examiners Act established the Board of Polygraph Examiners in the Law Enforcement Training Division of the Engineering Extension Service of the Texas A&M University System. The board is composed of six licensed polygraph examiners appointed by the governor with the advice and consent of the senate and employs one part-time administrator to assist in carrying out the provisions of the Act.

Operations of the board are supported entirely from fees collected. Accounting and other fiscal services are performed by the A&M Engineering Extension Service for which it receives 10 percent of the board's gross revenues. In fiscal year 1979, the board collected \$18,174 in fees and expended \$16,888.

Comparative Analysis

To determine the pattern of regulation of the occupation of polygraph examiners within the United States, a survey of the 50 states was conducted.

The need to regulate the occupation of polygraph examiners is currently expressed through licensing requirements imposed by 24 of the 50 states surveyed. From the standpoint of organizational patterns, four states, not including Texas, meet this expressed need through an independent board or commission whose members are appointed by the chief executive. In 18 states, the function of regulating polygraph examiners is carried out through a governmental department charged with other administrative and regulatory functions. In nine states, polygraph examiners are regulated by the State Department of Public Safety.

Of those states which utilize independent boards and commissions, all four require that appointees be confirmed by the legislature and membership in two states is limited to persons who are licensed members of the occupation. In Texas, members of the Polygraph Examiners Board established in the Engineering Extension Service, Texas A&M University System, are appointed by the governor and confirmed by the senate. Board membership is limited to persons who are licensed members of the occupation. Twenty-six percent of the states, as does Texas, utilize independent governing bodies limiting the responsibilities of the membership to that of policy-making as distinguished from the role of full-time administrators.

A majority of the states licensing polygraph examiners, not including Texas, indicate that the regulatory body, regardless of organizational form, was totally supported by appropriations from general tax revenues. Six states indicated that these bodies were solely supported by fees and charges of the agency. In all states but Kentucky, licensees are required to renew their licenses annually. Texas

licenses for a one year period. Enforcement activities in 19 states involve investigation of complaints from consumers and those engaged in the occupation of polygraph examiners. Hearings are conducted by the regulatory agency in 21 states. In Texas, hearings are conducted by the agency.

States which regulate the occupation of polygraph examiners indicate the necessity of performing the basic functions of administration, testing, license issuance and enforcement.

III. REVIEW OF OPERATIONS

The material presented in this section combines several sunset criteria for the purposes of evaluating the activities of the agency. The specific criteria covered are the efficiency with which the agency operates; the objectives of the agency and the manner in which these objectives have been achieved; and the promptness and effectiveness with which the agency disposes of complaints concerning persons affected by the agency.

Organization and Objectives

The Board of Polygraph Examiners is a six-member body appointed by the governor with the advice and consent of the senate for six-year terms. To be qualified for appointment to the board, a person must be a citizen of the United States, and must have been engaged for at least five consecutive years as a polygraph examiner prior to appointment, and must be a resident of Texas for at least two years prior to appointment. While no two board members may be employed by the same employer, two of the members must be qualified examiners of a governmental law enforcement agency (one of which must be the supervisor of the Department of Public Safety polygraph unit) and two other members must be examiners from the commercial field. Statutorily required board activities generally include issuing regulations, setting examination dates, approving interns and conducting administrative hearings to suspend, revoke or refuse issuance of a license. Complaint hearings, exam preparation and exam grading comprise the remainder of board action.

The legislature, through the enactment of the Polygraph Examiners Act, mandated the Board of Polygraph Examiners to regulate all persons who attempt to

detect deception or verify truth of statements through the use of instrumentation. Board responsibility in such regulation includes not only the persons who administer tests but also the instrument used in the process. The implementation of this statutory duty is accomplished through the licensing of qualified, competent polygraph examiners and through enforcement efforts to prevent the administration of polygraph examinations by incompetent, unqualified persons or with inadequate instrumentation.

Staff for the board consists of one part-time employee who holds the position of system administrator. Although no formal job description exists for this position, administrative functions such as processing renewals and applications, receiving and routing correspondence, and responding to telephone inquiries are duties which generally have been performed by this employee.

Administration operations of the board are essentially divided into three separate units and are geographically located in three different parts of the state. The central office of the board, which is operated by the systems administrator, is located in San Antonio and handles the general administrative work. The board's financial, accounting and purchasing needs are provided by the Texas A&M Engineering Extension Service located in College Station. All board examinations are administered by the board's elected secretary at the DPS headquarters in Austin.

The board is funded exclusively through fees collected under the provision of the Act. Permissible fees are fixed by statute as to both the amount and the basis for imposition and include those charged for certain examinations, licenses and renewals of licenses. Funds necessary for the enforcement of the Act and the administration of its provisions are appropriated by the legislature; however, in no

case may the funds appropriated exceed the total amount of the fees which are anticipated to be collected that year. All fees collected under the Act are required by statute to be placed in the State Treasury.

Evaluation of Agency Activities

As with most other licensing agencies, the operations of the Board of Polygraph Examiners can be broken down into three basic activities: administration, licensing and enforcement. Below, each of these activities were reviewed to determine the degree to which agency objectives have been met. To make this determination, the evaluation focused on whether the board has complied with statutory provisions, whether these provisions facilitate accomplishment of the objectives, whether agency organization, rules, and procedures are structured in a manner that contributes to cost-effective accomplishment of the agency's task, and whether procedures provide for fair and unbiased decision-making.

Administration

The general objective of any administration activity is to provide for the efficient operation of all agency functions. The review of the board indicated that the agency's financial records are current and well structured, thus contributing to efficient management. However, the review also indicated that the agency's administrative processes are carried out in three locations: Austin, San Antonio, and College Station. This organizational structure has hampered efficient administration in the areas of funds management and documentation of board operations regarding complaints.

Agency financial and accounting services are provided by Texas A&M Engineering Extension Service in return for a fee set by the Extension Service at 10

percent of the gross fee receipts. All checks to the board for fees are 1) made payable to Texas A&M; 2) routed through the systems administrator to the Extension Service; and 3) placed in a fund held by local banks in College Station. The board receives monthly computerized statements from A&M as to the balance in that fund and makes disbursements from the fund through vouchers provided by A&M. As indicated by the State Auditor's Office, both the fee set by A&M for the service and the receipt and voucher process are the same type of processes used for other aspects by the A&M System.

Two problems have resulted from the board's management of funds received. The fees collected by the board were held in a fund outside the Treasury until this was pointed out during the review as a violation of Sec. 6(c) of the Act which requires that all fees be deposited in the State Treasury. Also, the method used by the systems administrator in receiving and forwarding collected fees to A&M does not ensure that payments received are properly recorded and accounted for, that sufficient safeguards exist to prevent loss and that the monies are expeditiously transmitted to A&M for deposit. Prior to March 1979, no incoming mail or cash receipt system was used by the agency. Monies that were received (cash was not accepted) were placed in an unlocked file cabinet until such time as the systems administrator prepared receipts and transmitted them to A&M. Generally such deposit of funds occurred every one or two months. Although it appears that money has never been lost or not accounted for, reasonable accounting principles according to the State Auditor's Office require that monies received be deposited within a week of receipt. Since March of 1979, however, an incoming mail log has been utilized to record pertinent information, including payments received, on all correspondence arriving at the San Antonio office.

Existence of separate locations has contributed to difficulties in certain record-keeping activities, thereby hampering efficient management of agency functions. Agency personnel were not certain where complaint files were kept. Complaint records are kept in scattered files that contain assorted correspondence, but no information on disposition of the complaint or action taken.

Licensing

The objective of the licensing activity of the board is to ensure that a minimum standard of competency has been achieved by persons authorized to practice polygraphy in the state. The board issues two types of licenses: polygraph intern license, which allows an intern to conduct polygraph examinations under the direct supervision of a licensed examiner; and polygraph examiners license. The Act provides for the collection of the following fees which have never been revised since the agency was created.

Application Fee	- \$20	License Renewal	- \$25
Intern License	- \$30	Duplicate License	- \$10
Examiner License	- \$60		

The total number of licensed polygraph examiners in Texas is relatively small and has increased moderately since 1976 as Exhibit III-1 below indicates.

EXHIBIT III-1

Number of Licenses Issued

	<u>1976</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>
By Examination	25	33	49	16
By Reciprocity	1	5	5	6
By Renewal	<u>346</u>	<u>364</u>	<u>391</u>	<u>436</u>
Total	372	402	445	458
Percent Increase		8%	11%	3%

Although the number of examiners in Texas is not large, a review of licensee information suggests that the majority are active in the field of polygraphy. Exhibit III-2 gives some indication of the work setting of licensed examiners.

EXHIBIT III-2

Work Setting of Licensed Examiners

	<u>Number of Examiners</u>	<u>Percent of Total</u>
Commercial Enterprises	313	69%
Law Enforcement Agencies	73	16%
Other Governmental Agencies	20	4%
Out-of-State Licensees	<u>52</u>	<u>11%</u>
Total	458	100%

Licensed examiners concentrate in and around major metropolitan areas of the state: Dallas, Houston, San Antonio, Fort Worth and Austin.

In general, the licensing process functions adequately. The application and renewal process works smoothly, and the examination process is constructed to eliminate unqualified individuals from the profession. Additionally, recent actions of the board have improved procedures to evaluate polygraph training courses, facilitate the grading of examinations, and have provided for closer supervision of intern examiners and their sponsors. The review, however, identified two areas of concern.

One is the manner in which the board evaluates the employment background of applicants who do not have a baccalaureate degree. Statutory provisions allow five years of active investigative experience to be accepted in lieu of a baccalaureate degree. The board is responsible for defining the term "active investiga-

tive experience" and making a determination of acceptability. The board, however, has not developed any formal rules, guidelines or definitions on which to base a determination of what types of investigative experience are acceptable. Board minutes reflect that it is the intent of the board to determine experience on a case by case basis. A review of licensing requirements in other states indicates that those states with a similar investigative experience provision also have not developed any formal definitions of acceptable experience. However, in the absence of such general standards or guidelines, the potential for bias in determining qualified applicants is increased. Additionally, prospective licensees may not be fully apprised of what types of experience would satisfy the requirements of this provision.

The review also identified some concerns with the examination process. Statutory provisions establish the requirement for a licensing examination and provide that a fee of \$20 be paid by an applicant for an examination to determine his fitness to receive a polygraph examiner's license. Additionally, by rule, the board has established an intern examination to determine an applicant's fitness to receive an intern license. A fee of \$20 is charged for the intern examination. The establishment of an intern examination appears to be allowable under the provisions of the statute; however, it is questionable as to whether the board is statutorily authorized to charge a fee for this examination. Interpretation of the Polygraph Examiners Act indicates that the \$20 fee was intended to be charged for the polygraph examiners licensing examination and since the statute does not contemplate an intern examination, the fee charged by the board is not statutorily authorized.

Additionally, concerns were identified regarding security of the examination process. The board is responsible for the development, administration, and grading

of the licensing examinations. Recent actions taken by the board have established a comprehensive procedure for admission to the examination where none existed before. However, the manner in which the test is administered creates clear possibilities for cheating during the examination. The examination consists of three phases and is conducted over a two day period. Phases II and III are administered on the second day and are both distributed to the examinees at the beginning of the test day. During the course of the day, examinees are free to take breaks and go to lunch after they have had the opportunity to review Phases II and III of the examination in their entirety. The objective of the licensing examination is to indicate a person's competence to practice polygraphy. If a condition exists which casts doubt on the manner in which the test is administered, the usefulness of the exam as an indicator of competency is decreased.

The content of the examination appears to adequately test the skills needed to function competently as a polygraph examiner. The examination also serves as an effective screening mechanism as indicated by the pass/fail rates presented in Exhibit III-3.

EXHIBIT III-3

Licensing Examination Pass/Fail Rates Fiscal Years 1976-1979

<u>Year</u>	<u>Total Examined</u>	<u>Number Passed</u>	<u>Percent Passed</u>	<u>Number Failed</u>	<u>Percent Failed</u>
1976	41	12	29.3%	29	70.7%
1977	38	12	31.6%	26	68.4%
1978	59	28	47.5%	31	52.5%
1979	<u>32</u>	<u>22</u>	<u>68.8%</u>	<u>10</u>	<u>31.2%</u>
Total	170	74	43.5%	96	56.5%

Enforcement

The basic objective of the enforcement activity is to protect the public by identifying and, where necessary, taking appropriate action against persons who do not comply with the Act or board rules. Basic enforcement responsibility is vested in the Board of Polygraph Examiners. The board's level of funding is not sufficient to provide for investigative staff and as a result enforcement activities are primarily restricted to complaint processing.

The board reports that a total of 39 complaints have been filed since 1976. Exhibit III-4 presents the source and disposition of complaints received by the board.

EXHIBIT III-4

Source and Disposition of Complaints 1976-1979

<u>DISPOSITION</u>	<u>SOURCE</u>				<u>TOTAL</u>
	<u>Consumer</u>	<u>Licensee</u>	<u>Public</u>	<u>Other</u>	
License Revoked		1	1		2
License Suspended		3	2		5
Legal Action		1			1
Warning Issued		2	1		3
Reconciliation Reached		1	1		2
No Action Required	1	2	11	2	16
Number Pending	—	<u>8</u>	<u>2</u>	—	<u>10</u>
Total	1	18	18	2	39

As the table illustrates, the total volume of complaints is low and if handled effectively would not constitute a serious problem. Through board policy, procedures for handling complaints have been established which provide for the following: 1) all complaints must be in writing and may be received by any board member or the system administrator; 2) complaints received by board members should be forwarded to the systems administrator who transmits all complaints to the chairman; 3) if no cause for complaint exists, the chairman will notify the complainant and the person complained against in writing of the reasons for dismissal; 4) if there is a basis for the complaint, the chairman will appoint a board member to investigate; 5) upon completion of the investigation, the board member presents the results at an official board meeting; 6) if no further action is warranted, the complaint is dismissed; 7) if a cause exist to suspend or revoke a license, appropriate procedural steps are followed until final disposition of the complaint. The established complaint policy adequately addresses the needs of the board, however, the actual methods used to process complaints do not conform with board policy. First, review of board minutes and other pertinent records indicates that all complaints received are not in writing and are not routed through the systems administrator. As a result, complaint files generally contain incomplete data and are not processed through a central receiving point which would facilitate proper record-keeping. Secondly, procedures for investigating complaints are unclear and investigations generally lack documentation. No complaint records exist that indicate what investigative steps were taken, who was contacted, and what information was obtained. Finally, review of the available complaint files and a survey of complainants suggests that complainants often do not receive notification of the progress or outcome of a complaint. Additionally, the information available indicates that contact with complainants after the initial filing of a complaint is minimal.

A new system for processing complaints has recently been adopted by the board which addresses the problems outlined above. The new process provides prescribed steps and forms to be used when receiving, processing, investigating and disposing of a complaint. This process clearly sets out the procedures to be followed and should provide the documentation needed to maintain adequate complaint records if the steps are followed. An assessment of the new system's efficiency and effectiveness, however, cannot be made until it is fully implemented.

With regard to other enforcement activities, the board has experienced difficulties with the statutory stipulation which provides for judicial review. Actions taken by the board can be appealed to district court; however, all appeals prosecuted pursuant to the provisions of the Polygraph Examiners Act are statutorily mandated to be de novo rather than under the substantial evidence rule. The effect of the trial de novo requirement is to nullify any administrative actions taken when such an appeal is filed. This results in dismissals of charges or delays in the imposition of disciplinary sanctions. Such a requirement diminishes the authority and effectiveness of the board to enforce the provisions of the Act.

Summary

The Board of Polygraph Examiners has met with limited success in its efforts to efficiently and effectively regulate polygraphy. In the area of administration, the board does not operate as efficiently as it might due to its organizational structure. That structure has contributed to inadequate complaint records and problems with funds management involving the untimely disposition of cash receipts and funds being maintained outside the State Treasury in violation of statutory provisions. With respect to the licensing activity, achievement of the

objective of ensuring minimum competency has been hindered by the lack of rules which clearly define the types of experience which can be substituted for the college degree requirement, and by testing procedures which do not provide adequate examination security. Additionally, the statutory basis for the intern examination fee charged by the board is questionable. With regard to the enforcement activity, achievement of the compliance objective has been hampered by inadequate complaint procedures and a judicial review provision that essentially nullifies board action in revocation and suspension proceedings.

IV. OTHER ALTERNATIVES AND CONSTRAINTS

The material presented in this section combines several sunset criteria for the purposes of evaluating the activities of the agency. The specific criteria covered are the extent of overlap and duplication with other agencies and the potential for consolidation with other agencies; an assessment of less restrictive or alternative methods of performing any regulation that could adequately protect the public; and the impact in terms of federal intervention or the loss of federal funds if the agency is abolished.

Existence of Like Functions

Services provided by other state agencies which are similar to those provided by the Board of Polygraph Examiners have been reviewed to determine if a potential for consolidation exists within the state framework. While there is little apparent overlap or duplication of agency functions, several of the board's activities are administered by other agencies. The board's financial services are handled by Texas A&M Engineering Extension Service which also operates one of the two accredited polygraph schools in the state. Board licensure and internship examinations have been administered at Department of Public Safety headquarters for the past 16 months. Department of Public Safety currently operates a polygraph unit used in law enforcement investigations. It is staffed by a supervisor and 10 field examiners.

Because polygraph examiners are generally engaged in commercial security or law enforcement-related employment, two other agencies have populations which partially overlap that of the board. Through licensing and enforcement functions, the Board of Private Investigators and Private Security Agencies

regulates private security companies which often employ polygraph examiners as members of their security service operation. As a law enforcement training agency, the Commission on Law Enforcement Officers Standards and Education certifies peace officers throughout the state including state and local officers who might also be polygraph examiners for law enforcement units.

Since the establishment of the Board of Polygraph Examiners, DPS and Texas A&M have cooperated with the board in the administration of the Act wherever possible.

Alternative Approaches in Other States

Twenty-three other states license polygraph examiners through a variety of organizational schemes. Four states, including Oklahoma and Mississippi, maintain independent boards. In Nevada, Iowa, and Arkansas, the polygraph examiner licensure function is assumed by the state private detective agency. Only one state, Oregon, administers the licensing through the state police standards and training agency. However, in nine states, including Michigan, Massachusetts, Arizona, Kentucky, Maine, North Carolina, South Carolina, Utah and Vermont, the licensing of examiners is delegated to the state law enforcement agency. Three of these states, Michigan, Kentucky and North Carolina, retain a board to assist the law enforcement agency in policy matters.

Potential Benefits

Experiences in other states indicate that other organizational patterns could be implemented in Texas with little difficulty. In Texas, the agency best suited to assume the licensing and enforcement functions of the board is DPS. This agency, as illustrated by its efficient driver's license process, has the capability to administer the necessary licensing and renewal activities of the board. Through

the professional expertise available from the DPS polygraph unit, formulation of examinations and problems requiring technical knowledge could be managed without difficulty. Additionally, investigation of complaints relating to violations of the Act could be handled by the DPS polygraph field examiners in a timely and effective manner.

Alternative Methods of Regulation

In addition to different organizational patterns, several alternative methods of regulation exist for the regulation of persons involved in the polygraph field. One is no regulation. This approach is presently used in twelve other states. With no licensing to ensure the competency level of those in the occupation and no regulation of the use of polygraph, consumers of polygraph services would have to rely, for indicators of competence, upon professional association standards and reputations of entities providing such services.

Another approach which is utilized by seventeen other states, including California and New Jersey, regulates polygraphy by statutorily limiting its use. This method of regulation generally provides that no employer may require a current or prospective employee to take a polygraph examination. Some states prevent even the suggestion of such activity. By restricting employment-related polygraph examination which accounts for about 90 percent of the commercial polygraph industry in Texas, the use of polygraph testing would be limited almost entirely to law enforcement investigative activities. Competence of examiners would be determined primarily by the local and state police agencies which use polygraph.

Although the limit on use would deprive Texas businesses of one security technique used to attempt to control or reduce employee theft, the elimination of

employment-related polygraph testing in other states generally has been supported on three grounds. First, there is considerable disagreement concerning the accuracy of polygraph testing and the validity of such testing in pre-employment situations. Second, even if the polygraph were a truly reliable, objective "lie detector", the personal nature and potential degree of coercion of the examinations administered to employees and applicants is so intrusive as to be objectionable. Finally, serious constitutional guarantees concerning a person's right to privacy may be violated through such polygraph testing, especially where economic factors due to unemployment may reduce the voluntary nature of a person's consent to be tested. However, the imposition of a limit on the use of polygraph in the commercial field would have a significant detrimental effect on the polygraph industry in Texas which is estimated to range between ten and fifteen million dollars.

To provide the greatest degree of protection to the public, a third, most restrictive, alternative which combines the functions of licensure and limitation on use could be implemented as has been done in Michigan, Massachusetts, and Oregon. This method would combine the protections provided by the limitation on the use of polygraph in employment situations and licensure of examiners. As a result, licensure would be required of all examiners and the primary use of polygraph in Texas would be left to law enforcement agencies.

Although there is presently no federal requirement, standard or regulation which would impact or effect polygraph licensure or use, S]B] 854, introduced by Senator Birch Bayh in the Ninety-sixth Congress, is designed to protect the rights guaranteed to individuals by the Constitution of the United States and to prevent unwarranted invasion of their privacy by prohibiting the use of polygraph-type

equipment for certain purposes. Passage of this legislation would impose a federal constraint through the prohibition of polygraph testing in employment situations by federal agencies and private companies engaged in interstate commerce.

Summary

The Board of Polygraph Examiners currently implements a relatively restrictive regulatory alternative involving the licensure of individuals who use instrumentation to attempt to detect deception or verify truth of statements. Both experience in other states and the existence of similar functions in other Texas agencies, indicate that other organizational approaches which have been tested in other states could be implemented in Texas with little difficulty to improve the current organizational framework. Other states have also developed other less restrictive patterns of regulation which could be used by Texas.

V. COMPLIANCE

The material presented in this section combines several sunset criteria for the purposes of evaluating the activities of the agency. The specific criteria covered are the extent to which the agency issues and enforces rules relating to potential conflict-of-interest of its employees; the extent to which the agency complies with the Open Records Act and the Open Meetings Act; and the extent to which the agency has complied with necessary requirements concerning equality of employment opportunities and the rights and privacy of individuals.

In its efforts to protect the public through licensing and enforcement, the agency's operations should be structured in a manner that is fair and impartial to all interests. The degree to which this objective is met can be partially judged on the basis of potential conflicts of interest in agency organization and operation, as well as agency compliance with statutes relating to conflicts of interest, open meetings, and open records.

Conflict of Interest

Article 6252.9b, V.A.C.S., relating to the conduct of certain state officers who have private interests that may conflict with those of their office, applies to the Board of Polygraph Examiners and requires that certain disclosure statements be filed with the Secretary of State if a state officer has substantial business interests which are regulated by a state agency. Documents filed with the Secretary of State indicate that the board has only partially complied with the statutory requirements. Financial disclosure affidavits for one prior board member and the current Systems Administrator, who both appear to have substantial

business interests which are regulated by the board, have not been filed with the Secretary of State's Office. Contact with the administrator indicates that this oversight will be corrected.

Open Meetings - Open Records

Meetings and activities conducted by the Board of Polygraph Examiners seem to generally comply with the requirements outlined in the Texas Open Meetings Act and the Texas Open Records Act. An examination of the Texas Register and board minutes of meetings disclose a history of adequate and timely publication of notice for board meetings and proper procedure relating to executive sessions. Only two types of records, examination questions and examination papers, appear to be considered confidential by the board and therefore are not subject to public dissemination. Because both classes of information are exempt from public disclosure under Sec. 3 of the Open Records Act, the agency action in asserting the confidential nature is statutorily authorized.

Summary

In conclusion, though financial disclosure affidavits have apparently not been filed in two applicable cases, the board appears to substantially comply with the Conflicts of Interest statute, the Open Meetings Act, and the Open Records Act, all designed to insure the fair and impartial operation of an agency.

VI. PUBLIC PARTICIPATION

The review under this section covers the sunset criterion which calls for an evaluation of the extent to which the agency has encouraged participation by the public in making its rules and decisions as opposed to participation solely by those it regulates and the extent to which the public participation has resulted in rules compatible with the objectives of the agency.

The degree to which the agency has involved the public in the rules and decisions of the agency can be judged on the basis of agency compliance with statutory provisions on public participation, the nature of rule changes adopted, the availability of information concerning rules and agency operations, and the existence of public members of the board.

Agency Activities

Since fiscal year 1976, twenty-one rule changes or additions were considered by the board, with six modifications finally being adopted. In deliberating these modifications, the board has complied with public notification requirements found in general state law. In addition, all proposed changes are published in the newsletter of the Texas Association of Polygraph Examiners.

The efforts of the agency have resulted in limited public involvement in agency rule changes. The board reports that there was no public testimony presented with regard to rule proposals. In addition, analysis of the rules considered since fiscal year 1976 indicates that several proposals aimed at providing additional public protection were rejected.

The agency distributes no descriptive information on its operations. However, the board does publish a copy of its enabling legislation and rules and regulations which are distributed to licensees and applicants at no cost.

On occasion, efforts are made to inform the general public about provisions of the Polygraph Examiners Act through the use of press releases.

Public Membership

Review of the statutory composition of the board also indicates the absence of any members from the general public. The lack of such members impedes the ability of any board to fairly and effectively represent the point of view of the general public in the development of rules and the deliberation of other matters. This drawback is even more significant for a small board such as the Polygraph Examiners whose regulatory activities are not readily visible to the public.

Summary

With regard to meetings to discuss possible rule changes, the agency has adhered to notification requirements set out in general state law. However, involvement of the public in the proposed modifications has been minimal. In addition, proposed changes benefitting the general public have usually been rejected. To help insure that the public's point of view is properly represented, public members could be placed on the board, currently composed entirely of experienced licensees.

VII. STATUTORY CHANGES

The material presented in this section combines several sunset criteria for the purposes of evaluating the activities of the agency. The specific criteria covered are whether statutory changes recommended by the agency or others were calculated to be of benefit to the public rather than to an occupation, business, or institution the agency regulates; and statutory changes recommended by the agency for the improvement of the regulatory function performed.

Past Legislative Action

The Polygraph Examiners Act was originally adopted in 1965. However, in March 1969 the Texas Supreme Court held that the Act was unconstitutional as the caption of the bill was defective in that it did not give notice that the Act regulates all persons who use any device to test or question individuals for the purpose of verifying truth of statements. That same year, the legislature essentially reenacted the same act with an acceptable caption and only a few changed provisions. Significant among these changes was the new provision which changed the method of judicial review from the substantial evidence rule to trial de novo.

After this reenactment, the Act has been amended only twice. In 1973 the board was given the authority to stagger the renewal of licenses (Senate Bill No. 831, Sixty-third Legislature), and in 1977 the board was made subject to the provisions of the Sunset Act (Senate Bill No. 54, Sixty-fifth Legislature).

Proposed Legislative Action

Apart from the successful legislation mentioned above, three bills affecting the board's operation have been unsuccessfully proposed. These are House Bill Nos.

1462 and 1169, Sixty-fourth Legislature (1975) and House Bill 376, Sixty-fifth Legislature (1977). All three of these proposals were designed to prohibit an employer from requiring a polygraph examination as a condition for obtaining or continuing employment.

Both the agency's self-evaluation report and a review of proposed legislation indicate that no statutory changes have been recommended by the board during the last four legislative sessions. Although the board appears to be satisfied with the Act under which it is currently operating, the minutes of several board meetings suggest that since October 1975, the board has recognized an apparent need to amend that provision of the Act relating to the accreditation of colleges or universities recognized by the board. Under that provision, the American Association of Collegiate Registrars and Admissions Officers was selected to accredit colleges and universities for polygraph examiner's licensure requirements. The association, however, has refused to perform that function resulting in apparent confusion as to the educational requirements necessary to obtain licensure under the Act.

Summary

In conclusion, after the reenactment of the board's enabling legislation in 1969, the Act has been amended only twice to authorize a staggered renewal process and to bring the board under the Sunset Act. Additionally, three unsuccessful bills were introduced in 1975 and 1977. These bills would have prohibited employers from requiring a polygraph examination as a condition of employment. Finally, the current Act specifies that an applicant for licensure must have earned a college degree from an institution accredited by the American

Association of Collegiate Registrars and Admissions Officers if the degree is to count towards meeting licensing requirements; however, that body has refused to perform the accrediting function. As a result, there is a need to amend this provision of the law so that it is consistent with current circumstances.