

SUBJECT: Polygraph examiners sunset and abolition of Polygraph Examiners Board

COMMITTEE: Public Safety — favorable, without amendment

VOTE: 8 ayes — Merritt, Frost, Driver, P. King, Lewis, Mallory Caraway,
Rodriguez, Vo

1 present not voting — Burnam

0 nays

WITNESSES: For — None

Against — None

On — Amy Trost, Sunset Advisory Commission; (*Registered, but did not testify*: Frank DiTucci, Gory Loveday, Texas Polygraph Examiners Board; William Kuntz, Texas Department of Licensing and Regulation)

BACKGROUND: In 1965, the 59th Legislature enacted the Polygraph Examiners Act to regulate polygraph examiners in the state. The Polygraph Examiners Board (PEB) was created as distinct agency in 1981. In 2001, the 77th Legislature incorporated PEB appropriations into the Department of Public Safety (DPS) budget structure and directed DPS to provide administrative support for the agency. The PEB consists of seven members, appointed by the governor with advice and consent of the Senate. The board must include two law enforcement polygraph examiners, two commercial examiners, and three public representatives.

The PEB employs an executive director and an administrative assistant. The House-passed version of SB 1, the general appropriations bill, would appropriate \$212,081 to the PEB for fiscal 2010-11 from licensing fees paid by polygraph operators.

The PEB recognizes 13 polygraph schools in the United States whose curriculum meets its standards. Two are located in Texas — the DPS Law Enforcement Polygraph School in Austin and a privately owned school in Corpus Christi. In 2007, the board issued 16 new licenses and renewed

227 licenses for polygraph examiners. PEB administers four polygraph licensing examinations per year in conjunction with its board meetings.

Originally, the PEB was scheduled for review by the Sunset Advisory Board in 2003. In 2001, the 77th Legislature enacted SB 309 by Harris, which delayed the PEB's sunset review until 2009.

DIGEST:

HB 2033 would abolish the PEB as of September 1, 2009, and would transfer its staff from the DPS to the Texas Department of Licensing and Regulation (TDLR).

The bill would create a polygraph advisory committee as part of the Commission on Licensing and Regulation to provide input on educational curricula, licensing examination content, and other technical issues related to the polygraph industry.

The Commission on Licensing and Regulation's presiding officer would appoint five members to the advisory committee for six-year staggered terms and would designate one as the presiding officer of the committee. The committee would include two law enforcement polygraph examiners, two commercial examiners, and one public member.

The advisory committee also would be required to make recommendations on the types of criminal offenses that would require disciplinary action or denial of a license. The bill would amend Occupations Code, sec. 1703.351 (13) to provide that a license could be denied or other disciplinary action taken if an applicant or license holder was convicted of an offense that directly related to the duties and responsibilities of a polygraph examiner. The bill would establish the substantial evidence rule as the standard of review in any judicial appeal of a disciplinary action or license denial by TDRL.

HB 2033 would repeal several sections of Occupations Code ch. 1703, including the requirement of a separate sunset review of the new polygraph examiners department, restrictions on membership on the PEB, grounds for removal, rules for administering the separate board, including the fee structure, notification of examination results, and license renewal procedures, and the PEB administrative hearings process.

HB 2033 would make various conforming changes to make reference to the Polygraph Examiners Department rather than to PEB and would amend the Government Code to delete references to the PEB.

The bill would require that the Commission on Licensing and Regulation's presiding officer appoint the members of the Polygraph Advisory Committee as soon as possible after the bill took effect on September 1, 2009. For the initial appointments, two advisory board members would have terms that would expire February 1, 2011; two would have terms that would expire February 1, 2013; and one would serve until February 1, 2015.

The PEB would continue to exist until January 1, 2010, so that it could transfer its personnel, property, and budget from DPS to TDLR. All PEB rules would remain in effect until superseded by TDLR rules. The DPS and TDLR would be required to reach a memorandum of understanding on the transfer of the PEB and to provide a timetable and deadlines on the transition.

**SUPPORTERS
SAY:**

HB 2033 would improve regulation of the polygraph examiners industry and protection of the public by incorporating the PEB into TDLR. An advisory committee to provide guidance on rulemaking and technical issues would ensure that both the licensees and the public had a voice in the process. With only two employees, the current PEB has difficulty keeping up with even a small number of licensees. The PEB would benefit from TDLR's expertise and experience.

Moving the PEB away from DPS would help eliminate potential conflicts of interest and sources of complaints. Over 70 percent of those licensed by the PEB work for law enforcement agencies, and an overwhelming majority of those become qualified through the DPS Law Enforcement Polygraph School. In 2007, the PEB refused DPS' request for information about the licensing examination for the last five years after a change in administration of the test led to 11 of 13 applicants being failed. At one point, the PEB submitted a bill to DPS to produce the documents, essentially charging its administering agency for the records. An April 2008 Attorney General's Open Records Opinion held that the PEB had to release the requested material, except for personal information on the applicants. HB 2033 could avoid a repeat of this type of awkward situation.

HB 2033 could lead to a reduction in fees charged to polygraph examiners by taking advantage of the economies of scale provided by the TDRL. Currently, applicants pay \$500 for initial licensing and \$450 for renewals. These fees are among the highest for any regulated profession in Texas, including physicians, podiatrists, dentists, and attorneys. The small number of licensees does not generate sufficient revenue, even with the high fees, to allow the PEB to operate efficiently. An umbrella organization would merge the licensing and enforcement functions with other occupations and provide better service to licensees and the public.

Reducing the authority of the polygraph examiners board would remedy complaints that policies and rules are promulgated to benefit certain segments of the industry. The TDLR's governing commission consists of seven public members appointed by the governor with the advice and consent of the Senate. The commission receives technical assistance from 15 advisory committees from the various regulated occupations. There is a well-established process for drafting and developing regulations and providing for full public review and comment. Regulation of polygraph examiners could be incorporated easily into this structure.

**OPPONENTS
SAY:**

The PEB performs essentially a law enforcement function and should remain with the DPS. Any perceived conflicts of interest should be resolved between the board and DPS.

**OTHER
OPPONENTS
SAY:**

Converting the PEB into an advisory committee would dilute the influence of those with the expertise and experience needed to regulate this occupation. The board still should be appointed by the governor. Polygraph examination is as much an art as it is a science, and its practitioners should not be put into an agency that oversees tow truck drivers, barbers, mixed martial arts combatants, and boiler inspectors.

NOTES:

The fiscal note estimates that HB 2033 would save \$45,000 in fiscal 2010 and in subsequent fiscal years by eliminating one full-time equivalent position.

The companion bill, SB 1005 by Hinojosa, passed the Senate by 31-0 on April 2 on the Local and Uncontested Calendar and has been referred to the House Public Safety Committee.