



STATE OF WEST VIRGINIA
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August 20, 2012

**NOTICE OF EMERGENCY RULE DECISION
BY THE OFFICE OF THE ATTORNEY GENERAL**

AGENCY: Secretary of State

RULE: Title 153 CSR, Series 44
Regulation of Late Voter Registration

DATE FILED AS AN EMERGENCY RULE: August 3, 2012

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
SECRETARY OF STATE

2012 AUG 20 PM 3:16

FILED

DECISION NO. 14-12

Following review under W. Va. Code § 29A-3-15b, it is the decision of the Attorney General that the above emergency rule is approved. A copy of the complete decision with required findings is available from this office or from the Secretary of State's office.

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

By *Dawn E. Warfield*
DAWN E. WARFIELD
DEPUTY ATTORNEY GENERAL

**EMERGENCY RULE DECISION
(ERD 14-12)**

AGENCY: Secretary of State

RULE: Title 153 CSR, Series 44
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DATE FILED AS AN EMERGENCY RULE: August 3, 2012

The Secretary of State has filed a new Series 44 as an emergency rule.

W. Va. Code § 29A-3-15b requires the Attorney General to review all emergency rules filed by the Secretary of State after March 8, 1986. This review requires the Attorney General to determine if the agency filing such emergency rule: (1) has complied with the procedures for adopting an emergency rule; (2) exceeded the scope of its statutory authority in promulgating the emergency rule; or (3) can show that an emergency exists justifying the promulgation of an emergency rule.

Following said review, the Attorney General shall issue a decision as to whether or not such an emergency rule should be disapproved [§ 29A-3-15b(a)].

- (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).

If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Attorney General shall rule in favor of procedural compliance.

The Secretary of State filed this emergency rule with supporting documents with the Secretary of State and with the LRMRC on August 3, 2012.

It is the determination of the Attorney General that the Secretary of State has complied with the procedural requirements of W. Va. Code § 29A-3-15 for adoption of an emergency rule.

- (B) Statutory Authority -- W. Va. Code § 3-2-6a (2012) provides:

(a) Notwithstanding the provisions of section six of this article, the following persons are entitled to register to vote, in person, at the office of the clerk of the county commission up to, but not including, the day of the election:

(1) Any member of a uniformed service of the United States, as defined in 42 U. S. C. § 1973ff-6 (7), who is on active duty;

(2) Any member of a uniformed service of the United States, as defined in 42 U. S. C. § 1973ff-6 (7), who is discharged from active duty during the sixty days immediately preceding the election;

(3) Any member of the Merchant Marine of the United States;

(4) Any person residing outside the country by virtue of his or her employment in support of national security functions or purposes and presents appropriate documentation of such employment as prescribed by the Secretary of State; and

(5) Any spouse or dependent residing with a person listed in subdivisions (1), (2), (3) or (4) of this subsection.

(b) The provisions of subsection (a) apply only to those persons who are otherwise qualified to register and who, by reason of such active duty or temporary overseas residency:

(1) Are normally absent from the county in which they reside; or

(2) Have been absent from such county and returned to reside there during the twenty-one days immediately preceding the election.

(c) A person qualifying and registering to vote pursuant to this section, after the close of voter registration set forth in section six, article two of this chapter, shall be required to cast a provisional ballot and that provisional ballot shall be counted during the canvass of the election, unless the voter is determined by the Clerk of the County Commission to otherwise fail to meet the eligibility requirements for voter registration.

(d) The Secretary of State shall prescribe procedures for the addition of persons registered under this section to the lists of registered voters.

It is the determination of the Attorney General that the Secretary of State has not exceeded its statutory authority in promulgating this emergency rule.

(C) Emergency -- W. Va. Code § 29A-3-15(f) defines "emergency" as follows:

For the purposes of this section, an emergency exists when the promulgation of an emergency rule is necessary (1) for the immediate preservation of the public peace, health, safety or welfare, (2) to comply with a time limitation established by this code or by a federal statute or regulation, or (3) to prevent substantial harm to the public interest.

There are essentially three classes of emergency broadly presented with the above provision: (1) immediate preservation; (2) time limitation; and (3) substantial harm. An agency need only

document to the satisfaction of the Attorney General that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

The facts and circumstances as presented by the Secretary of State are as follows:

HB 4257 was passed during the 2012 Legislative session. This law creates section §3-2-6a of the Code that allows members of the military, military families, and overseas citizens who work out of the country for national security purposes, the opportunity to register to vote when they come home to West Virginia after the close of voter registration. The Legislation requires the Secretary of State to prescribe procedures to implement this law. The Secretary of State filed a legislative rule on August 1, 2012.

Currently, there are no procedures in place to verify that the individual wanting to register to vote actually meets the eligibility criteria of the new law. The law omits important documents that the applicant would need to present to the clerk of the county commission at the time of registration. The law is silent on how the clerk of the county commission will verify the applicant's address in this particular situation.

The rule filed August 1, 2012 in our office addresses the procedures which the law required the Secretary of State to prescribe. The Secretary of State and the clerks of the county commission worked together to create a rule that not only makes the process efficient on the administrative side, but also makes sense for the voter. The issue is the rule making process takes a little over 15 months to complete. That would take us well beyond the 2012 General Election and therefore these voters could be potentially disenfranchised for this upcoming presidential election. In that the law became effective on June 8, 2012, the procedures must be approved and in place before the November 2012 General Election.

Without procedures, it is impossible to implement this new law. The Secretary of State's office and the clerks of the county commission always strive to ensure that every legally qualified person has the right to vote. As the election officials of the State we always look for new ways to assist our uniformed servicemen and women in the voting process. It is the Secretary of State's highest priority to ensure uniformed servicemen and women have the opportunity to vote. These men and women have sacrificed so much defending our freedom at the very least we can defend their freedom at the ballot box. Without this rule in place, we would be doing a great injustice not only to the men and women who are currently serving but also to those people that came before them. We are asking that you grant us this emergency rule request so that this group of citizens will not be denied their right to vote.

It is the determination of the Attorney General that this proposal qualifies under the definition of an emergency as defined in § 29A-3-15(f), because it is necessary for the immediate preservation of the public welfare, and to prevent substantial harm to the public interest.

This decision shall be cited as Emergency Rule Decision 14-12 or ERD 14-12 and may be cited as precedent. This decision is available from the Secretary of State or the Attorney General's Office, and has been filed with the Secretary of State and the Legislative Rule Making Review Committee.

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

By 
DAWN E. WARFIELD
DEPUTY ATTORNEY GENERAL

Entered this 20th day of August, 2012.

FILED
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OFFICE OF THE ATTORNEY GENERAL
SECRETARY OF STATE




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MEMORANDUM

TO: Legislative Rule-Making Review Committee

FROM: Dawn E. Warfield 
Deputy Attorney General

DATE: August 20, 2012

RE: Emergency Rule Decision No. 14-12

Enclosed for filing with the Committee is a copy of an Emergency Rule Decision by the Attorney General pursuant to W. Va. Code § 29A-3-15b, regarding the proposed emergency rules, Title 153 CSR, Series 44, filed by the Secretary of State's office on August 3, 2012. The decision has been filed with the Secretary of State for publication in the State Register and for service upon members of the Committee.

Additional copies of the decision are available from this office or from the Secretary of State's office.

Enclosure