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Natalie E. Tennant
Secretary of State
State of West Virginia

Office of the Secretary of State
Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, West Virginia 25305

Telephone: (304) 558-6000
Toll Free: 1-866-SOS-VOTE
Fax: (304) 558-0900
www.wvsos.com

July 22, 2011

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: West Virginia Massage Therapy Licensure Board

RULE: New Rule, 194CSR1 General Provisions

DATE FILED AS AN EMERGENCY RULE: June 17, 2011

DECISION NO. 10-11

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

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 10-11)

AGENCY: West Virginia Massage Therapy Licensure Board
RULE: New Rule, 194CSR1 General Provisions
FILED AS AN EMERGENCY RULE: June 17, 2011

par. 1 The West Virginia Massage Therapy Licensure Board (Board) has filed the above new rule as an emergency rule.

par. 2 W. Va. Code §29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State 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.

par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].

par. 4 (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).

par. 5 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 Secretary of State shall rule in favor of procedural compliance.

par. 6 The Board filed this emergency rule with supporting documents with the Secretary of State June 17, 2011 and with the LRMRC June 17, 2011.

par. 7 It is the determination of the Secretary of State that the Board has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.

par. 8 (B) Statutory Authority -- W. Va. Code §30-36-7 reads:

30-37-6. Duties of board; authorization to propose rules and fees.

The board shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code as are necessary to implement the provisions of this article, which shall include provisions regarding:

(a) Licensure and continuing education requirements, standards of practice, professional ethics, disciplinary actions, and other issues of concern;

(b) Personal cleanliness of massage therapists and the sanitary conditions of towels,

linens, creams, lotions and other materials, facilities, and equipment used in the practice of massage therapy; and
(c) All fees for licensure, renewal of licensure, and all other related matters.

par. 9 It is the determination of the Secretary of State that the Board has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- W. Va. Code §29A-3-15(f) defines "emergency" as follows:

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

par. 11 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 Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the Board are as follows:

This series is being submitted to increase the schedule of fees. Due to a significant increase in expenses related to the investigation and disposition of complaints as well as legal fees; this has created an urgent need for additional funds. This will require the board to increase fees in order to operate. The board does not receive any general revenue funds and is required to be self-sufficient.

If the regulatory board could not fully operate, protection of the public would be greatly jeopardized and consumers and clients would not have an avenue to report any unlicensed practice or improper misconduct. Businesses that provide these services would not be able to operate lawfully without the board. Throughout the history of the board, there has not been any legal proceedings that have been as lengthy and exhausted the amount of funds that has occurred this year.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "immediate preservation of public peace, health, safety or welfare" and "to prevent substantial harm to the public interest"

par. 14

This decision shall be cited as Emergency Rule Decision 10-11 or ERD 10-11 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the West Virginia Massage Therapy Licensure Board, the Attorney General and the Legislative Rule Making Review Committee.



NATALIE E. TENNANT
Secretary of State

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