



OFFICE OF THE SECRETARY OF STATE
STATE OF WEST VIRGINIA

Betty Ireland
Secretary of State

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SECRETARY OF STATE

September 19, 2008

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: West Virginia Board of Medicine

RULE: New Rule, 11CSR2, Establishment of Restricted License Issued to an Applicant in Extraordinary Circumstances

DATE FILED AS AN EMERGENCY RULE: September 10, 2008

DECISION NO. 10-08

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.


BETTY IRELAND
Secretary of State

Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, West Virginia 25305

EMERGENCY RULE DECISION
(ERD 10-08)

AGENCY: West Virginia Board of Medicine
RULE: New Rule, 11CSR2, Establishment and Regulation of Restricted License Issued to an Applicant to Extraordinary Circumstances
FILED AS AN EMERGENCY RULE: September 10, 2008

- par. 1 The West Virginia Board of Medicine (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 September 10, 2008 and with the LRMRC September 10, 2008.
- 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 30-3-10(e) and (f) reads:
- (e) Notwithstanding any of the provisions of this article, the board may issue a restricted license to an applicant in extraordinary circumstances under the following conditions:*
- (1) Upon a finding by the board that based on the applicant's exceptional education, training and practice credentials, the applicant's practice in the state would be beneficial to the public welfare;*
- (2) Upon a finding by the board that the applicant's education, training and practice*

credentials are substantially equivalent to the requirements of licensure established in this article;

(3) Upon a finding by the board that the applicant received his or her post-graduate medical training outside of the US and its territories;

(4) That the restricted license issued under extraordinary circumstances is approved by a vote of 3/4 of the members of the board;

(5) That orders denying applications for a restricted license under this subsection are not appealable; and

(6) That board report to the President of the Senate and the Speaker of the House of Delegates all decisions made pursuant to this subsection and the reasons for those decisions.

(f) The board shall propose rules for legislative approval in accordance with the provisions of §29A-3 of this code that establish and regulate the restricted license issued to an applicant in extraordinary circumstances pursuant to the provisions of this section.

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:

In 2008, during the Regular Legislative Session, SB 317 was passed which updated the licensing requirements in the Medical Practice Act for physicians and podiatrists. The bill, as passed, included an amendment allowing restricted licensure for certain physicians and podiatrists in extraordinary circumstances who do not meet the standard requirements for licensure. The amendment requires the Board to propose rules that establish and regulate the restricted license issued in extraordinary circumstances.

The proposed rule defines "extraordinary circumstances" and "restricted license" and repeats and elaborates upon the statutory provisions under girding the provisions here. The proposed rule does not allow for an applicant to be issued a restricted license in extraordinary circumstances if the applicant has been the subject of disciplinary action or has been convicted of various crimes. The proposed rule provides that a licensee is subject to all the provisions of the Medical

Practice Act and rules, and specifies that whatever restrictions are imposed by the Board may be altered if appropriate, necessary and in the public interest. The Board of Medicine has unanimously determined at its regular meeting on September 8, 2008, that the proposed rule should be filed on an emergency basis. The possibility exists that the only kidney transplant program in West Virginia may be lost unless the proposed rule is enacted now on an emergency basis, rather than nine months from now as the rule makes its way through the standard legislative process. Providing the option for licensure in extraordinary circumstances now is essential, as it means that an otherwise unqualified candidate for licensure may apply now and the Board of Medicine will have the opportunity to determine if he or she is qualified under the extraordinary circumstances definition. This is an effort to prevent substantial harm to the public interest and is for the immediate preservation of the public health and welfare.

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 "prevent substantial harm to the public interest"

par. 14 This decision shall be cited as Emergency Rule Decision 10-08 or ERD 10-08 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the West Virginia Board of Medicine, the Attorney General and the Legislative Rule Making Review Committee.


BETTY IRELAND
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