



**WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION**

Form #7

Do not mark in this box
Filing Date

FILED

SEP 2 11 44 AM '93

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Effective Date

Disapproved
10/7/93 21-93

NOTICE OF AN EMERGENCY RULE

AGENCY: Division of Motor Vehicles TITLE NUMBER: 91CSR9

CITE AUTHORITY: §17A-2-9, §17C-5a-3a(a)

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: 91CSR9

TITLE OF RULE BEING FILED AS AN EMERGENCY: Motor Vehicle Alcohol Test and
Lock Program

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 35TH DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:
Please see attached letter.

540
Use additional sheets if necessary

Signature



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
Division of Motor Vehicles

1800 Kanawha Boulevard East • Building Three
Charleston, West Virginia 25317-0010

Gaston Caperton
Governor

Charles L. Miller, P.E.
Secretary

Jane L. Cline
Commissioner

September 2, 1993

The Honorable Ken Hechler
Secretary of State
State Capitol
Charleston, WV 25305

Dear Mr. Secretary:

In accordance with the provisions of West Virginia Code §29A-3-15, please find attached fourteen (14) copies of an emergency legislative rule being filed by the Division of Motor Vehicles for your review and approval.

This rule, entitled 91CSR9, Motor Vehicle Alcohol Test and Lock Program, has also been filed as a proposed rule. Public comment has been solicited, and this rule, as a proposed rule has been approved as modified by the division for submission to the Legislature by the Legislative Rule-Making Committee.

Summary of Rule

This rule, in accordance with the provisions of WV Code §17-5A-3a(a) prescribes the eligibility requirements for participation in the Alcohol Test and Lock Program. This program, mandated by statute, provides for early reinstatement of driving privileges for persons whose driver's licenses have been revoked for driving under the influence infractions, and who install alcohol testing equipment in their motor vehicles.

Statement of Circumstances Requiring an Emergency Filing

This rule is being promulgated on an emergency basis in order to prevent substantial harm to the public interest for the following reasons. This rule is essential to the implementation of the program. Enforcement of the eligibility criteria and administrative penalty provisions for violations of the terms of the program are vested in this rule.

This rule specifically deals with a category of persons who have already shown a reckless disregard for the safety of others by driving while under the influence of alcohol or drugs. Failure to immediately promulgate this rule on an emergency basis jeopardizes the enforcement of eligibility criteria and restrictions determined by the division to be necessary to protect the

Secretary of State
September 2, 1993
Page 2

general public against those persons who operate motor vehicles while under the influence of alcohol or drugs.

Thank you for your careful review of this emergency rule. Please do not hesitate to contact me if you have any questions.

Very truly yours,


Jane L. Cline
Commissioner

JLC/alc

Attachment



WEST VIRGINIA
DEPARTMENT OF TRANSPORTATION

1900 Kanawha Boulevard East • Building Five • Room 109
Charleston, West Virginia 25305-0440 • 304/558-0444

Gaston Caperton
Governor

Charles L. Miller, P.E.
Secretary

May 11, 1993

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

MAY 19 11 39 AM '93

FILED

The Honorable Ken Hechler
Secretary of State
State Capitol
Charleston, WV 25305

Dear Mr. Secretary:

The Commissioner of Motor Vehicles is hereby authorized to promulgate proposed and emergency rules related to 91CSR9: Motor Vehicle Alcohol Test and Lock Program.


Charles L. Miller, Secretary

5-10-93
Date

DATE: September 2, 1993

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: *John L. Cline*
John L. Cline, Commissioner of Motor Vehicles

EMERGENCY RULE TITLE: Motor Vehicle Alcohol Test and Lock Program

1. Date of filing: September 2, 1993

2. Statutory authority for promulgating the emergency rule: _____

WV Code §17A-2-9 and WV Code §17C-5A-3a(a)

3. Date of filing of proposed legislative rule: May 19, 1993

4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?

This rule, 91CSR9 is a new rule.

5. Has the same or similar emergency rule previously been filed and expired?

No

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.

Please see attached letter to the Secretary of State.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

Please see attached letter to the Secretary of State.

FILED

SEP 2 11 44 AM '93

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

EMERGENCY
WEST VIRGINIA LEGISLATIVE RULES
DIVISION OF MOTOR VEHICLES
91CSR9

Title: Motor Vehicle Alcohol Test and Lock Program

§91-9-1 General

1.1 Scope - This legislative rule establishes a motor vehicle alcohol test and lock program in accordance with the provisions of West Virginia Code §17C-5A-3a.

1.2 Authority - West Virginia Code §17A-2-9 and West Virginia Code §17C-5A-3a(a).

1.3 Filing Date - September 2, 1993

1.4 Effective Date -

1.5 Application and Enforcement - This legislative rule applies to persons applying for early reinstatement of restricted driving privileges revoked for a driving under the influence offense under the provisions of West Virginia Code §17C-5A-3a and to providers and manufactures of alcohol test and lock equipment.

§91-9-2 Definitions

2.1 Applicant - Means the person applying for enrollment in the motor vehicle test and lock program as established in accordance with West Virginia Code §17C-5A-3a.

2.2 Commissioner - Means the executive officer of the Division of Motor Vehicles appointed by the Governor pursuant to West Virginia Code §17A-2-2 or his or her lawful designee.

2.3 Commercial Vehicle - Means any motor vehicle designed or used to transport passengers or property;

2.3.1 If the vehicle has a gross vehicle weight rating of 26,001 pounds or more.

2.3.2 If the vehicle is designed to transport sixteen (16) or more passengers, including the driver.

2.3.3 If the vehicle is transporting hazardous materials and is required to be placarded in accordance with Federal Rule 49 C.F.R. part 172, sup-part F.

2.4 Equipment - Means a mechanical or computerized system which prevents the operation of a motor vehicle when, through the system's assessment of the blood alcohol content of the person operating or attempting to operate the vehicle, that person is determined to be under the influence of alcohol.

2.5 Final Revocation - Means a license suspension or revocation which has run the full course of administrative and or judicial review. In the context of this rule, a person may not participate in the program if the person has any action pending on the offense either criminally or administratively. The revocation must be final.

2.6 Law Enforcement Officer - Means a law enforcement officer as defined in West Virginia Code §17C-5-4.

2.7 License - Means any camera card, permit or license issued by this State which authorizes a person to drive a motor vehicle, or the privilege to operate a motor vehicle.

2.8 Participant - Means the person accepted for enrollment in the motor vehicle test and lock program as established in accordance with West Virginia Code §17C-5A-3a.

2.9 Passenger Vehicle - Means a Class A vehicle weighing 8,000 pounds or less which is used for private, noncommercial use.

2.10 Program - Means the motor vehicle alcohol test and lock program established in accordance with West Virginia Code §17C-5A-3a.

2.11 Safety and Treatment Program - Means the Safety and Treatment Program established in accordance with West Virginia Code §17C-5A-3.

2.12 Service Provider - Means the vendor authorized by Division of Motor Vehicles to provide services related to the program.

2.13 Service Center - Means the physical location of the vendor where services related to the program are provided.

§91-9-3 Eligibility For Program Participation

3.1 An applicant must be a resident of West Virginia.

3.2 An applicant must be eighteen (18) years of age or older.

3.3 An applicant's license must be revoked for an offense in violation of West Virginia Code §17C-5-1 et. seq. or §17C-5A-1 et. seq. A person whose license is revoked for driving under the influence of controlled substances is not eligible.

3.4 An applicant must have served the minimum license revocation period as prescribed by West Virginia Code §17C-5A-3a, and this rule calculated from the date that all licenses are received by the Commissioner.

3.4.1 If the applicant's license has been revoked for a first offense described in West Virginia Code §17C-5A-2(i), the applicant must serve a minimum revocation period of thirty (30) days before he or she is eligible to participate in the program.

3.4.2 If an applicant's license has been revoked for a first offense described in West Virginia Code §17C-5-7, refusal to submit to designated secondary chemical test, the applicant must serve a minimum revocation period of ninety (90) days before he or she is eligible to participate in the program.

3.4.3 If an applicant's license has been revoked for a second offense described in West Virginia Code §17C-5A-1 et seq. or 17C-5-1 et. seq., the applicant must serve a minimum revocation period of one (1) year before he or she is eligible to participate in the program.

3.4.4 If an applicant's license has been revoked for a third or subsequent offense described in West Virginia Code §17C-5A-1 et seq. or §17C-5-1 et seq., the applicant must serve a minimum revocation period of two (2) years before he or she is eligible to participate in the program.

3.4.5 If an applicant is under the age of twenty-one (21), the applicant must serve a minimum revocation period of one (1) year before he or she is eligible to participate in the program.

3.5 An applicant must be enrolled in or have completed the Safety and Treatment Program. Applicants who have completed the Safety and Treatment program will have priority for enrollment in the program.

3.6 An applicant's license must not have been revoked for an offense described in West Virginia Code §17C-5-1 et seq. or §17C-5A-1 et seq. more than three (3) times in the ten (10) year period preceding the date of application.

3.7 An applicant's license must not have been revoked for an offense described in West Virginia Code §17C-5A-2(f) or (g) where the applicant caused the death or injury of a person.

3.8 An applicant's license must not be currently revoked or suspended for any other reason, or have any other suspensions or revocations pending final resolution.

3.9 An applicant must not have been previously enrolled in the program.

3.10 An applicant must not have been convicted of any violation of West Virginia Code §17B-4-3, for driving while the applicant's driver's license was suspended or revoked, within the five (5) year period preceding the date of application.

3.11 An applicant who holds a Class A, B, C or D driver's license must not have his or her driver's license revoked for an offense related to West Virginia Code §17C-5-1 et seq., §17C-5A-1 et seq., West Virginia Code §17E-1-14 or §17E-1-15 while driving a commercial vehicle.

3.12 An applicant who holds a Class A, B, C or D driver's license, whose driver's license has been revoked for an offense related to West Virginia Code § 17C-5-1 et seq. or West Virginia Code §17C-5A-1 et seq. while driving a passenger vehicle is not eligible for participating in the program by installing the equipment in a commercial vehicle. The applicant is however, eligible for participating in the program by installing the equipment in a passenger vehicle.

§91-9-4 Application Procedures.

4.1 An applicant shall complete a program application, agree in writing to the conditions of participation and completion and submit a non-refundable fee of twenty-five (\$25.00) dollars in the form of a certified check or money order.

4.2 The payment of the application fee shall cause the application to remain valid for a period of six (6) months.

4.3 The Commissioner shall either approve the application for participation, subject to the availability of equipment for installation, or shall rule the applicant ineligible for participation based on the criteria prescribed in this rule.

4.4 An applicant may reapply no more than two (2) times in a six (6) month period. An applicant initially ruled ineligible and subsequently found to be eligible within six (6) months of the initial application is not required to pay the application fee again.

§91-9-5 Applicant Requirements

5.1 The applicant, upon receipt of program entry approval is responsible for completing, signing and returning to the Commissioner, the agreement of conditions of participation and completion, and contacting an approved service provider for installation of the equipment.

5.2 A licensed driver shall drive the applicant to the service center in the vehicle in which the equipment is to be installed. The vehicle shall be a Class A passenger type vehicle registered in the State of West Virginia. No vehicle of any other vehicle class may be used in the program.

5.3 The applicant shall complete the orientation and training program provided by the service provider to the satisfaction of the service provider. Any other person who will operate the vehicle while the equipment is installed shall also complete the orientation and training program to the satisfaction of the service provider.

5.4 If the vehicle owner is not present at the time of the installation, the applicant shall provide the service provider with a notarized statement of authorization by the vehicle owner allowing the installation of the equipment.

5.5 The service provider shall notify the Commissioner of the applicant's successful completion of the orientation and training program, and that the equipment was installed in accordance with the criteria established by the Commissioner.

5.6 The Commissioner shall issue the applicant a restricted license upon the Commissioner's receipt of the service provider's notification of equipment installation and successful orientation and training. The license shall restrict the applicant to operating only the vehicle in which the equipment is installed, and only for the purposes of:

5.6.1 Driving to and from work;

5.6.2 Incidental driving as a part of employment duties provided that the duties do not include transporting persons for hire;

5.6.3 Driving to and from school;

5.6.4 Driving to and from participation in the Safety and Treatment Program;

5.6.5 Driving to and from the service provider for monitoring and servicing of the equipment; and

5.6.6 Driving associated with a bona fide medical emergency.

5.7 Under no circumstances shall the applicant operate any motor vehicle until the equipment is installed and the applicant has received the specially marked restricted license.

5.8 The applicant is responsible for any consequences of operation of the vehicle by persons who have not been trained by the service provider, or who fail to operate the equipment in the manner prescribed by the service provider.

§91-9-6 Participant Requirements For Continued Eligibility

6.1 The Commissioner shall immediately revoke the restricted driving privileges of any participant who:

6.1.1 Fails to meet the attendance and participation requirements of the Safety and Treatment Program in which the participant is enrolled, if the participant has not already successfully completed the program;

6.1.2 Has his or her license suspended or revoked for any other offense;

6.1.3 Upon written notice from any law enforcement officer or service provider that the participant was operating a motor vehicle not containing the required equipment, or was operating a vehicle in violation of any restriction imposed by this rule or the program participation agreement;

6.1.4 Upon written notice from any service provider or law enforcement officer that the equipment in the vehicle has been altered, tampered with, bypassed or removed without the prior approval of the Commissioner;

6.1.5 Upon written notice from any law enforcement officer or service provider that the participant has allowed or caused another person to bypass, or attempt to bypass the equipment or to circumvent the device in any manner;

6.1.6 Upon written notice from any law enforcement officer, service provider or Safety and Treatment Program Coordinator that the participant operated or attempted to operate a motor vehicle under the influence of alcohol or controlled substances;

6.1.7 Is convicted of any motor vehicle offense contained in West Virginia Code §17B-3-5; or

6.1.8 Fails to abide by the terms and conditions of the lease agreement with the service provider. A service provider shall not remove a participant from the program without prior approval of the Commissioner.

§91-9-7 Eligibility For Reinstatement Of License

7.1 A participant whose license has been revoked for a first offense as described in West Virginia Code §17C-5A-1 et seq. is required to have the equipment in the participant's vehicle for a minimum period of five (5) months, complete the Safety and Treatment Program, and pay all required fees before his or her license may be reinstated.

7.2 A participant whose license has been revoked for more than one (1) offense as described in West Virginia Code §17C-5A-1 et seq. is required to have the equipment in his or her vehicle for a minimum period of one (1) year, complete the Safety and Treatment Program, and pay all required fees before his or her license may be reinstated.

7.3 A participant whose license has been revoked for a refusal to submit to a secondary chemical test is required to have the equipment in his or her vehicle for a minimum period of nine (9) months, and pay all required fees before his or her license may be reinstated.

7.4 A participant who is under the age of twenty-one (21) at the time of the offense is required to have the equipment in his or her vehicle until the participant reaches the age of twenty-(21) or for one (1) year, which ever is longer, complete the

Safety and Treatment Program and pay all required fees before his or her license may be reinstated.

7.5 For purposes of this rule eligibility for reinstatement of driving privileges means, completion of the Safety and Treatment Program, expiration of the required period of time in which equipment is required to be installed and payment of all fees including any fees owed to the service provider.

7.6 A participant who withdraws or is removed from the program shall serve out the remainder of his or her original license revocation period pursuant to West Virginia Code §17C-5A-2. The period of time the participant had the equipment in use with restricted driving privileges shall not count towards fulfilling the requirements of the original revocation period.

7.7 If a participant has failed to complete the Safety and Treatment Program and pay all required fees by the end of the mandatory equipment usage time period, the participant shall either:

7.7.1 Continue to use the equipment while actively enrolled in and completing the Safety and Treatment Program or,

7.7.2 Return all equipment to the service provider and return all licenses to the Division and shall not operate any motor vehicle until all requirements are met for license reinstatement.

§91-9-8 Service Provider Standards

8.1 The service provider shall have a minimum of one (1) year experience providing similar service in another jurisdiction.

8.2 The service provider shall install only equipment which has been approved for use in the program by the Commissioner. No equipment shall be approved unless:

8.2.1 The equipment has been in actual field use for at least six (6) months; and,

8.2.2 The equipment has met minimum specifications established by the Commissioner by submission of test data from an independent alcohol testing laboratory.

8.3 The service provider shall initially establish at least one (1) service center to be located in the Charleston, West Virginia area. However, the service provider shall establish additional locations if the Commissioner determines the participation in the program justifies additional locations.

8.4 The Commissioner shall prescribe the hours of operation in consultation with the service provider based on the needs of the applicants in the service area, and the needs of the service provider.

§91-9-9 Program Cost

9.1 The program shall operate on a user fee basis with the cost of the program assumed by the applicant.

9.2 The fees for instruction or leasing, monitoring, servicing and deinstallation of equipment shall be set by the Commissioner and can not be changed without prior review and approval of the Commissioner, and can only be changed a maximum of one (1) time per year.

9.3 The established fees shall be based on average costs and shall not vary according to participant or make of vehicle. Fees shall be uniform at each service center. The service provider shall establish a fee schedule to be applied to indigent participants to be approved by the commissioner.

9.4 The manufacturer, service provider and or installer through the contract shall indemnify and hold harmless the State of West Virginia and or its employees and agents from any and all claims, demands, actions and costs whatsoever that may arise out of an act or omission by the manufacturer, service provider, installer, and employee or subcontractor of the service provider in the performance of the agreement.

9.5 The manufacturer, service provider and or subcontractor shall maintain comprehensive general liability insurance in the amount of at least one million dollars (\$1,000,000) per occurrence with a three million dollar \$3,000,000 aggregate total. The liability insurance shall cover defects or problems in or with product design, materials, and workmanship during the manufacture, calibration and installation of the equipment. The insurance shall be obtained through an insurer licensed to do business in the State of West Virginia and the policy shall be designed to provide the Commissioner with at least forty-five (45) days prior to written notice of any cancellation, material change or intent to allow coverage to lapse.

§91-9-10 SEVERABILITY

In the event any portion of this legislative rule is held invalid or unconstitutional, the invalidity or unconstitutionality shall not affect the validity or constitutionality of the remaining portions of this legislative rule.



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
Division of Motor Vehicles

1800 Kanawha Boulevard East • Building Three
Charleston, West Virginia 25317-0010

Gaston Caperton
Governor

Charles L. Miller, P.E.
Secretary

Jane L. Cline
Commissioner

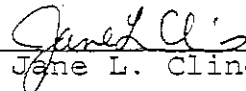
91CSR9
Motor Vehicle Alcohol Test and Lock Program
Proposed Legislative Rule (1993-94)

Summary of Content
Statement of Circumstances Requiring Filing

The purpose of this rule is to establish a motor vehicle alcohol test and lock program as required and established under the provisions of West Virginia Code §17C-5A-3a.

This program will allow restricted driving privileges for persons whose licenses are revoked for a driving under the influence offense. Program participants will contract with a DMV authorized service provider to have special ignition interlock equipment installed in his or her vehicle. The equipment will prevent the operation of the vehicle if the equipment detects alcohol in the system of the vehicle operator.

The rule establishes eligibility for participation in the program, time period required for equipment installation, and criteria for full reinstatement of driving privileges.



Jane L. Cline, Commissioner

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Motor Vehicle Alcohol Test and Lock Program 91CSR9

Type of Rule: X Legislative Interpretive Procedural

Agency Division of Motor Vehicles

Address Building 3, Capitol Complex
Charleston, WV 25317

1. Effect of Proposed Rule

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<u>ESTIMATED TOTAL COST</u>	\$ 41,568	\$ ---	\$ 41,568	\$ 40,064	\$ 40,064
PERSONAL SERVICES	21,568	---	21,568	20,064	20,064
CURRENT EXPENSE	20,000		20,000	20,000	20,000
REPAIRS & ALTERNATIONS	N/A		N/A		
EQUIPMENT	N/A		N/A		
OTHER	N/A		N/A		

2. Explanation of above estimates: These estimates are based on the need for 1 full time clerk (\$20,068) and a portion of 1 programmer's time (\$1,500) to reprogram the computer programs to determine eligibility, track compliance, and issue a specially marked restricted license. The costs for installation and use of equipment is borne by the user/participant and paid to the service provider. The current expense estimate refers to costs generating a restricted drivers license and computer fees related to entry and storage of such information.

3. Objectives of these rules: The objective of this rule is to implement a motor vehicle alcohol and test and lock program as required under the provisions of W. Va. Code §17C-5A-3a. The program will allow restricted driving privileges for persons whose license are revoked for DUI and install special equipment which detects alcohol in the system of the vehicle operator.

Rule Title: 91CSR9 Motor Vehicle Alcohol Test and Lock Program

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

See first page.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.


A person whose license is revoked for a driving under the influence offense may choose to obtain an ignition interlock device for their vehicle for the purpose of obtaining restricted driving privileges. The estimated cost per applicant per month is approximately \$60.

C. Economic Impact on Citizens/Public at Large.

N/A

Date: May 19, 1993

Signature of Agency Head or Authorized Representative



Jane L. Cline, Commissioner

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

A. RENEE COE
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

Telephone: (304) 558-6000
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STATE OF WEST VIRGINIA

SECRETARY OF STATE

Building 1, Suite 157-K
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WILLIAM H. HARRINGTON
Chief of Staff

JUDY COOPER
Director, Administrative Law

DONALD R. WILKES
Director, Corporations

(Plus all the volunteer
help we can get)

FAX: (304) 558-0900

October 7, 1993

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Division of Motor Vehicles

RULE: New Rule, Series 9, Motor Vehicle Alcohol Test and Lock Program

DATE FILED AS AN EMERGENCY RULE: September 2, 1993

DECISION NO. 21-93

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

A handwritten signature in cursive script that reads "Ken Hechler".

KEN HECHLER
Secretary of State

By A.R.C., Deputy

FILED

Oct 7 12 13 PM '93

**OFFICE OF WEST VIRGINIA
SECRETARY OF STATE**

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

A. RENEE COE
Deputy Secretary of State

CATHERINE FREROTTE
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STATE OF WEST VIRGINIA

SECRETARY OF STATE

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(Plus all the volunteer
help we can get)

FAX: (304) 558-0900

DECISION

EMERGENCY RULE DECISION

(ERD 21-93)

AGENCY: Division of Motor Vehicles
RULE: New Rule, Series 9, Motor Vehicle Alcohol Test and Lock Program
FILED AS AN EMERGENCY RULE: September 2, 1993

- par. 1 The Division of Motor Vehicles (Division) has filed the above new rule as an emergency rule.
- par. 2 West Virginia Code 29A-3-a 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-a(a))].
- par. 4 (A) Procedural Compliance: WV 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 thirty-five day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.

par. 6 The Division filed this emergency rule with supporting documents with the Secretary of State September 2, 1993 and with the LRMRC September 2, 1993.

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

par. 8 (B) Statutory Authority -- WV Code §17A-2-9(b) reads:

The commissioner is hereby authorized to adopt and enforce such rules and regulations as may be necessary to carry out the provisions of this chapter and any other laws the enforcement and administration of which are vested in the department.

par. 9 WV Code §17C-5A-3a(a) further states:

On or before the first day of January, 1993, the division of motor vehicles shall establish a motor vehicle alcohol test and lock program for persons whose licenses have been revoked pursuant to this article or the provisions of §17C-5-1 et seq. of this chapter. Such program shall include the establishment of a users fee for persons participating in the program which shall be paid in advance and deposited into the driver's rehabilitation fund. Except where specified otherwise, the use of the term "program" in this section refers to the motor vehicle alcohol test and lock program. The commissioner of the division of motor vehicles shall promulgate legislative rules in accordance with §29A-1-1 et seq. of this code for the purpose of implementing the provisions of this section. Such rules shall also prescribe those requirements which, in addition to the requirements specified by this section for eligibility to participate in the program, the commissioner determines must be met to obtain the commissioner's approval to operate a motor vehicle equipped with a motor vehicle alcohol test and lock system. For purposes of this section, a "motor vehicle alcohol test and lock system" means a mechanical or computerized system which, in the opinion of the commissioner, prevents the operation of a motor vehicle when, through the system's assessment of the blood alcohol content of the person operating or attempting to operate the vehicle, such person is determined to be under the influence of alcohol.

par. 10 It is the determination of the Secretary of State that the Division has not exceeded its statutory authority in promulgating this emergency rule.

par. 11 (C) Emergency -- WV Code 29A-3-15(g) defines "emergency" as follows:

(g) 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. 12 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. 13 The facts and circumstances as presented by the Division are as follows:

This rule is being promulgated on an emergency basis in order to prevent substantial harm to the public interest for the following reasons. This rule is essential to the implementation of the program. Enforcement of the eligibility criteria and administrative penalty provisions for violations of the terms of the program are vested in this rule.

This rule specifically deals with a category of persons who have already shown a reckless disregard for the safety of others by driving while under the influence of alcohol or drugs. Failure to immediately promulgate this rule on an emergency basis jeopardizes the enforcement of eligibility criteria and restrictions determined by the division to be necessary to protect the general public against those persons who operate motor vehicles while under the influence of alcohol or drugs.

par. 14 However, by approving this rule as an emergency and decreasing the total time that a license is suspended could possible cause "harm to the public health, safety or welfare" or even "substantial harm to the public interest" which is totally opposite of what the Code mandates an emergency rule to do.

par. 15 It is the determination of the Secretary of State that this proposal **does not** qualify under the definition of an emergency as defined in §29A-3-15(g).

par. 16 This decision shall be cited as Emergency Rule Decision 21-93 or ERD 21-93 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Division of Motor Vehicles, the Attorney General and the Legislative Rule Making Review Commission.


By *A.P.C., Deputy* KEN HECHLER
Secretary of State

Entered _____

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE



WEST VIRGINIA LEGISLATURE
LEGISLATIVE RULE-MAKING REVIEW COMMITTEE
Room M-152, State Capitol
Charleston, West Virginia 25305
(304) 340-3286

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Senator Joe Manchin III, Co-Chair
Delegate Brian A. Gallagher, Co-Chair

October 28, 1993

Debra A. Graham, Counsel
Marie Nickerson, Admr. Assistant

The Honorable Ken Hechler
Secretary of State
State Capitol
Charleston, WV 25305

Dear Secretary Hechler:

RE: Division of Motor Vehicles Emergency Rule, Motor
Vehicle Alcohol Test and Lock Program (Title 91,
Series 9.)

On October 7, 1993, you issued an Emergency Rule Decision [ERD] disapproving the above captioned emergency rule. The Legislative Rule-Making Review Committee, having reviewed and approved the proposed rule, discussed the ERD disapproval with Renee Coe, your General Counsel, at its meeting on October 19, 1993. It is the Committee's contention that there may be some misunderstanding about the objectives of this proposed emergency rule.

Your stated reasons for disapproval were that the proposed rule would "decrease the total time that a license is suspended..." and thereby "possib[ly] cause 'harm to the public health, safety or welfare' or even 'substantial harm to the public interest' which is totally opposite of what the Code mandates an emergency rule to do." However, the decision to restore a restricted driver's license to individuals who have completed the division's safety and treatment program is a policy decision already made by the Legislature.

The emergency rule at issue was promulgated pursuant to the mandate of section three-a, article five-a, chapter seventeen-c of the West Virginia Code [§17C-5A-3a] which states in part that the commissioner "...shall promulgate legislative rules in accordance with the provisions of chapter twenty-nine-a of this code...for the purpose of implementing the provisions of this section." The division was to develop a program by January 1, 1993, and be prepared to begin accepting participants by July 1, 1993. This program would permit certain individuals, meeting specific criteria, to operate motor vehicles equipped with an alcohol test and lock system.

Under W.V. Code, §29A-3-15a, the secretary of state has the power to disapprove an emergency rule for one of the following reasons:

(1) That the agency has exceeded the scope of its statutory authority in promulgating the emergency rule or in filing an amendment to the emergency rule;

(2) That an emergency does not exist justifying the promulgation of the rule or the filing of an amendment to the rule; or

(3) That the rule or an amendment to the rule was not promulgated in compliance with the provisions of section fifteen of this article.

It does not appear, nor do you contend, that the agency exceeded the scope of its authority in promulgating the above referenced rule or that the rule was not promulgated in compliance with the provisions of section fifteen. However, in paragraph fifteen (15) of the ERD you state that the proposed rule "...does not qualify under the definition of an emergency as defined in §29A-3-15(g).

The division justified the emergency rule on the basis of the need to promulgate the rules defining the eligibility criteria and setting the administrative fees as directed by the Legislature in subsection a, section three-a, article five-a, chapter seventeen-c of the West Virginia Code. The division currently has approximately 100 persons enrolled in the alcohol lock and test program. Although the statute sets out the minimum eligibility criteria for participants, the proposed rule, inter alia, (1) limits those instances in which the participant may operate a vehicle; (2) defines the criteria for continued eligibility; and (3) sets the fees for program participation. Disapproving the proposed emergency rule places the division in the position of continuing the operation of the program without the benefit of these guidelines.

You stated in paragraph twelve (12) of ERD 21-93 that the agency need only document that a nexus exists between the proposal and one of the three emergency categories. Subsection (g), section fifteen, article three, chapter twenty-nine-a of the West Virginia Code defines emergency as a situation in which the promulgation of a rule is necessary for one of the following three reasons: (1) immediate preservation of the public peace, health, safety or welfare; or (2) to comply with a time limitation established by this code; or (3) to prevent substantial harm to the public interest. In their letter of explanation, the division relied on the category of preventing substantial harm to the public interest in justifying promulgation of the emergency rule, stating in part that the rule is needed to enforce the eligibility criteria and restrictions.

The Committee believes that the proper reading of the proposed rule is that it has the effect of protecting the general public, not harming them, because it defines the specific

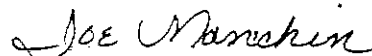
situations in which participants may operate a motor vehicle and provides notice of revocation penalties they may incur for program violations. Although neither of these provisions are contained in the statute, the commissioner was given the power to promulgate eligibility rules specified by the Legislature and such requirements that the commissioner "determines must be met to obtain...approval to operate a motor vehicle...." [WVC § 17C-5A-3a(a).] We believe these rules are needed to properly regulate the program.

Moreover, the Committee believes that the proposed rules were properly promulgated as emergency rules to meet the statutory mandate of establishing the program, including determining users fees and defining eligibility criteria, by January 1, 1993. This nexus alone should justify approval of the proposed emergency rules.

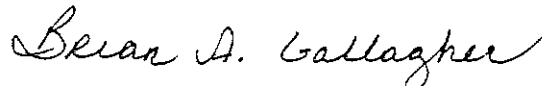
Although the applicable code provisions do not permit the division to resubmit or amend a proposed emergency rule after an ERD has been issued, it does not prohibit your reconsideration of the ERD. We understand that this has not been your practice. Nevertheless, we are requesting that you review the above information and reconsider this emergency rule decision, with the date relating back to the date originally issued. As previously stated, the division's proposed rule has been reviewed and approved by the Committee, however, the proposed emergency rule is needed in the interim period to regulate those persons presently in the program.

We appreciate your diligence in reviewing emergency rules and understand your need to screen for statutory compliance. We submit this letter of explanation and justification for the above referenced emergency rule, asking that you review this information, reconsider your emergency rule decision and help us to resolve this issue without any further action.

Sincerely,



Joe Manchin, III
Senate Co-chair



Brian A. Gallagher
House of Delegates Co-chair

resistance, it will take additional time to get a final ruling and the governor's timetable may be lost.

GETTING A RULING: The frenzy over legislative review of rules and regulations in the various divisions of the executive branch continues to defy logic.

Consider last week's events surrounding the Division of Motor Vehicles' attempt to gain approval of emergency rules to regulate the new "test and lock" program, which allows people charged with drunken driving to regain their driver's license by using a device that allows the car engine to start only after the motorist's breath has been measured.

The Legislature passed a law to permit this program in 1992. The rules were to be filed by Jan. 1, 1993, and the program actually initiated last July 1.

The rules weren't filed by Jan. 1, but the program started July 1 anyway. Then, after Secretary of State Ken Hechler refused to accept emergency rules filed Sept. 2, legislators and DMV officials got upset and Commissioner Jane Cline said she wouldn't let any more people sign up.

But about 100 people are already enrolled without benefit of approved rules, so why the flap now?

Tom D. Miller covers state and local government for The Herald-Dispatch. He may be reached at 526-2789 or 342-1418.

Herald-Dispatch, 10-25-93

Friday night had to be encouraging. Blissard and its partner, the city of Huntington. Game No. 2, scheduled for 4:15 p.m. today -- a Sunday -- might be a better barometer of what's to come.

Red tape has snagged plan

Herald-Dispatch, 10-24-93
A program to permit drunken drivers back on the road under controlled conditions has become needlessly tangled in a bureaucratic mess.

Motor Vehicles Commissioner Jane

WE BELIEVE

It would make sense to let those convicted of drunken driving back on the road, under controlled conditions.

Cline says she is suspending the program because Secretary of State Ken Hechler disapproved emergency rules to regulate it.

A deputy secretary

of state says the rules submitted do not fit the definition of an emergency.

The so-called "test and lock" program uses a device to measure a motorist's blood-alcohol level before permitting the car to start. The device is wired to the car's battery and ignition.

About 100 people are enrolled in the program, but Cline says no more will be added until the regulations are adopted. Now, the issue is likely on its way to court, guaranteed to be a lengthy process.

In the meantime, drunken drivers are needlessly being kept out of the program and the rest of us are threatened by the possibility one of them will get behind the wheel while intoxicated.

It would make sense for somebody somewhere to cut through the red tape and get the program running.

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Chapter 18

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"Inspection of Public Records"

NEW

FAST



BBS Tea Parties

WASHINGTON, D.C.

— Bulletin board services on the Internet dedicated to helping researchers exchange information have become electronic tea parties with more chatter than serious business, according to a recent report by Congress' Office of Technology Assessment.

A Cornell University professor who studied messages on a BBS for cold fusion researchers found that 75 percent of the messages between 1989 and 1992 ranged from personal gossip to insults. He found only one researcher who regularly posted experimental findings.

"Bulletin boards have a tendency to lead to harmless but unproductive rambling," the professor reported. He said that contributors to bulletin boards have to take responsibility for the contents, because most don't have a moderator to screen messages before they are posted.



Georgia Law Restricts Info Resellers

ATLANTA — A new Georgia law could stymie commercial access to public information. The law, signed by the governor in April, reverses an earlier law specifying that the government is required to provide access to public records that are anticipated to be used for commercial purposes.

It is still unclear how the law will affect commercial entities that collect public information and resell it as information products. Information resellers have increasingly been under fire by activists and some lawmakers around the country.



Fund Transfer Pilot Expands

BOSTON — The Mas-

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Monday Citizens

MEC

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In-car Breathalyzer rules headed to court

THE ASSOCIATED PRESS

Legislators voted Tuesday to ask the state Supreme Court to order the secretary of state to approve rules governing the installation of Breathalyzers in drunken drivers' cars.

Secretary of State Ken Hechler rejected the rules Oct. 7 because they were submitted for emergency approval but did not fit the definition of an emergency, said Hechler's counsel, Renee Coe.

She told the Interim Legislative Rule-Making Review Committee there will be no harm to the public if the rules are not approved until the regular legislative session next year.

About 100 people are participating in the program to install Breathalyzers, which began July 1, said Jane Clhe, commissioner of the Division of Motor Vehicles. The devices are mounted below

Rejected

Secretary of State Ken Hechler rejected the rules Oct. 7 because they were submitted for emergency approval but did not fit the definition of an emergency, said Hechler's counsel, Renee Coe.

the dashboard and wired to the car's battery and ignition. Drivers must pass a breath test before starting the car.

Delegate Brian Gallagher, D-Monongalia, led the criticism of Hechler's decision and asked Coe whether the rules could be reconsidered.

"Our action does not stop the rules from going into effect eventually," she said. "Try to keep in

mind that what you are essentially doing is circumventing the regular rule-making procedure, which includes going before the Legislature."

"We already ratified these rules," said Gallagher, co-chairman of the committee.

"But this is not the end of the process," Coe responded.

Coe said state law prohibits the secretary of state from reconsidering a decision rejecting emergency rules. Gallagher then suggested that the Supreme Court be asked to declare the situation an emergency and order Hechler to approve the rules.

The committee agreed but did not say when it will petition the court.

Sen. Joe Manchin, D-Marion,

committee co-chairman, asked whether the program could operate without rules.

Coe said the Division of Motor Vehicles could continue to administer the program without rules as it has done since July. She said the law does not clearly say the rules should be approved on an emergency basis.

But Delegate Vicki Douglas, D-Berkeley, said the secretary of state's office should have realized the legislative intent because the Legislature approved the program, knowing it would not be in session again before the program was scheduled to start.

"Even the dumbest legislator would know we would not be in regular session again," she said.

Sen. David Grubb, D-Kanawha, said lawmakers want the program to keep drunken drivers off the road.

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Police deny race factor in Oak Hill wounding



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Made to last.

Acme boots not only look good—they



KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

A. RENEE COE
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

Telephone: (304) 558-6000
Corporations: (304) 558-8000

WILLIAM H. HARRINGTON
Chief of Staff

JUDY COOPER
Director, Administrative Law

DONALD R. WILKES
Director, Corporations

(Plus all the volunteer
help we can get)

FAX: (304) 558-0900

STATE OF WEST VIRGINIA

SECRETARY OF STATE

Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305-0770

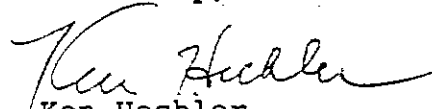
November 10, 1993

The Honorable Darrell V. McGraw, Jr.
Attorney General
Office of the Attorney General
State of West Virginia
Charleston, West Virginia 25305

Dear Darrell:

Please assign Jackie Custer to represent me in an action that will be brought by the Legislative Rule-Making Review Committee. The Committee is challenging my decision to disapprove an emergency rule that was proposed by the Department of Motor Vehicles. I have attached copies of recent correspondence with the Committee to provide you with some background on the issues. I believe that they plan to file suit within the next few days.

Sincerely,


Ken Hechler
Secretary of State

Enclosure

DMV program drives without rules

THE ASSOCIATED PRESS

The state Division of Motor Vehicles will continue its program allowing a limited number of convicted drunken drivers to operate a vehicle despite a rejection of its rules by a state official, agency counsel Lisa Tackett said Sunday.

Tackett told a joint Judiciary subcommittee studying drunken driving that 139 people are enrolled in a program that allows a people convicted of drunken driving to have Breathalyzers attached to their cars. The devices, wired to the battery and ignition, prevent cars from starting if the driver has consumed alcohol.

Secretary of State Ken Hechler refused to approve the rules and regulations designed to make eligibility for the program more specific.

The Legislative Rule-Making Review Commission, a separate panel, is considering filing a lawsuit against Hechler, who said he rejected the rules because they were improperly filed. The rules were filed on an emergency basis.

Delegate Brian Gallagher, D-Monongalia, said the rules are meant to help tighten eligibility standards, so fewer drunken drivers will be operating vehicles.

"We've decided the program can go on," Tackett told legislators.

The law, effective July 1, gives broad guidelines for eligibility, she said. So far, applicants have been turned away only because they do not meet those broad eligibility standards, she said.

For example, an applicant

might not have enrolled in a safety and treatment program or may not meet the time requirements before applying, she said.

"Everything seems to be going well," Tackett said. "I don't think we've seen any problems."

She said none of those in the program have violated any of the standards. "They're happy to have that limited license," Tackett said.

Hechler said Nov. 7 that he refused to reconsider his initial rejection of the rules. The rules were filed a month earlier.

"My decision to disapprove the emergency rule was based on the fact that I was not persuaded by the agency's justification that an emergency as defined by the statute existed," Hechler wrote.

The Charleston Gazette, 11/15/93

Rules challenge should be filed, Chambers

The Associated Press

CHARLESTON — House Speaker Chuck Chambers on Tuesday endorsed proposed legal action over implementing legislative rules to keep convicted drunk drivers off state roads.

Chambers said the case involves critical issues. The Legislature wants to implement the program as rapidly as possible.

Delegate Brian Gallagher, D-Morgantown, said Monday the Legislative Rule-Making Review Committee would sue Secretary of State Ken Hechler in the state Supreme Court after Hechler rejected emergency rules concerning the program.

The committee was justified in funding it is an emergency and

trying to press the secretary of state to approve the rules," Chambers said.

The rules provide the criteria to determine who will be eligible for the program and how it will work in detail, Gallagher said.

Another issue is "the precedent it is setting," Chambers said.

"While it is important for the secretary of state to play the role he is assigned, it is also important for the committee to determine what input it has on the



Chambers

rules," he said. "I think for both of those reasons, if the committee chooses to go to court over it, they would certainly have my support," Chambers said.

The program allows: Breathalizers to be installed in the cars of convicted drunken drivers. The devices, which are wired to the battery and ignition, prevent the driver from starting the car if he has consumed alcohol.

Gallagher's co-chairman on the committee, state Sen. Joe Manchin, D-Martinsburg, opposes the legal action.

"I don't think economically it's prudent to do that," Manchin said Tuesday.

The rules issue can await ac-

tion by the Legislature in regular session, which meets in January. A delay could save unnecessary court costs, Manchin said.

But he also said Gallagher has the votes on the committee to sustain his position to go to court. Since the program began using emergency rules on July 1, about 100 people have met the Division of Motor Vehicles standards to be allowed to drive using the ignition-interlock system.

Hechler said Monday he refused to reconsider his Oct. 7 rejection of the rules.

"I was not persuaded by the agency's justification that an emergency as defined by the statute existed," Hechler wrote.

Tracks want video lottery

CHARLESTON (AP) — Officials from the state's four race tracks will ask for legislation in January to legalize video lottery, their lobbyist said Tuesday.

John Cavacini, lobbyist for the state Racing Association, said the group met in Morgantown on Monday to discuss a recent state Supreme Court decision that found the operation of video lottery machines at Mountaineer Park at Chester to be illegal unless specifically authorized by the Legislature.

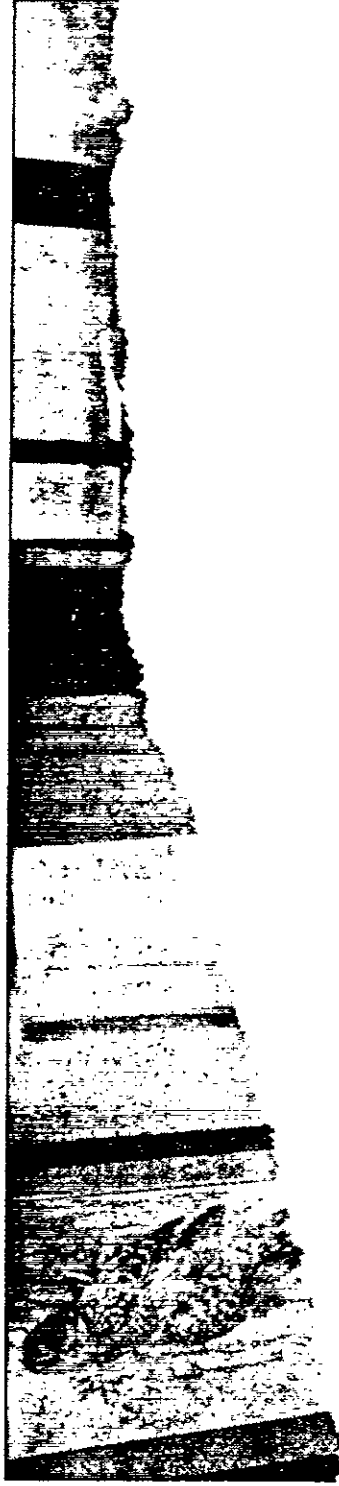
A total of 165 machines had

Recht decision' still reverberates

Equal funding decision has stuck with him

The Associated Press

WHEELING — No one lets Arthur Recht forget that he is still the circuit court ruling 11 years ago that rattled the West Virginia public school system and reverberates even today.



M S C

from a lack of space. Messinger said, "I just wish we had the facilities to prove it." half his 886 students into either a dilapidated annex or portable classrooms. "Our middle school program has had national recognition," Messinger said, "I just wish we had the facilities to prove it."

many area, new facilities provide their students with the quality education they expect. "Right now we're just getting by," Thomasson said.

Charleston Daily Mail, 11-9-93
Delegate says rules issue going to court

THE ASSOCIATED PRESS

A state lawmaker said his committee will appeal to the state Supreme Court a decision by Secretary of State Ken Hechler to reject rules for a program to keep drunken drivers off state highways.

"It's for the health and safety of people," said Delegate Brian Gallagher, D-Monongalia.

Gallagher is co-chairman of the Legislative Rule-Making Review Committee, which said the rules needed to be filed on an emergency basis to run the program under the Division of Motor Vehicles.

The program allows Breathalyzers to be installed in the cars of individuals convicted of drunken driving. The devices,

which are wired to the battery and ignition, prevent the driver from starting the car if he has consumed alcohol.

The committee earlier threatened to take the matter to the Supreme Court if Hechler would not endorse the rules.

Hechler on Monday refused to reconsider his initial rejection of the rules.

"My decision to disapprove the emergency rule was based on the fact that I was not persuaded by the agency's justification that an emergency as defined by the statute existed," Hechler wrote.

"The law states that agencies should not use the emergency rulemaking process to circumvent the regular rulemaking process," Hechler wrote.

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FOR THE RECORD

Lottery numbers

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WEST VIRGINIA LOTTERY:

Property transfers

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KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

A. RENEE COE
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

Telephone: (304) 558-6000
Corporations: (304) 558-8000



STATE OF WEST VIRGINIA

SECRETARY OF STATE

Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305-0770

November 5, 1993

WILLIAM H. HARRINGTON
Chief of Staff

JUDY COOPER
Director, Administrative Law

DONALD R. WILKES
Director, Corporations

(Plus all the volunteer
help we can get)

FAX: (304) 558-0900

The Honorable Joe Manchin, III
Senate Co-Chair
The Honorable Brian A. Gallagher
House of Delegates Co-Chair
W. Va. Legislature
Legislative Rule-Making Review Committee
Room M-152, State Capitol
Charleston, West Virginia 25305

Dear Senator Manchin and Delegate Gallagher:

I am writing in response to your letter dated October 28, 1993 in which you asked me to reconsider my decision to disapprove the Department of Motor Vehicle's (DMV) emergency legislative rule (91 C.S.R. 9) for the Motor Vehicle Alcohol Test and Lock Program (West Virginia Code, §17C-5A-3a).

Because DMV's emergency rule expired when I disapproved it, there is no emergency rule now pending before me for consideration. Nor can the agency resubmit it. The plain meaning of West Virginia Code, §29A-3-15(c) is that an emergency rule expires when the Secretary of State disapproves it. The statute says that once an emergency rule expires "due to the effect of" the Secretary of State disapproving it "the agency may not refile the same or similar rule as an emergency rule." If I could reconsider a rule that I have disapproved, the prohibition that an agency may not refile the same or a similar rule would be somewhat meaningless. No doubt, any agency that could exert sufficient influence would succeed in obtaining review of a disapproval.

Not only is my interpretation supported by the plain meaning of the statute but it is supported by the purpose of the rule-making requirements contained in Article 3 of the Administrative Procedures Act. The purpose of the rulemaking procedures is to protect the due process rights of any person who is affected by a rule. Due process consists of notice and the opportunity to be heard. The problem with the interpretation you suggest is that it does not afford adequate protection for the due process rights of those who have objections to an emergency rule. Under your suggested interpretation, it is unclear how new or additional notice would be given.

If I took the position that I could reconsider an emergency rule decision, how would parties who oppose an emergency rule receive notice of my decision to reconsider? How many times could I reconsider a rule? What would be the extent of my discretion to reconsider? Would an agency have a right to demand reconsideration? What would be the standard for reconsideration? How long after disapproval could I reconsider? Would I have authority to reverse a decision of approval? At what point would the opponent of a rule be able to stop maintaining vigilant watch to make sure a rule was not going to be reconsidered? I think that it would be unwise for me to take the approach that I may elaborate on the procedures set forth in Article 3, which are already lengthy and somewhat complex.

The legislature wisely foresaw that there is a very limited need for discretion in administering the rulemaking procedures. Consequently, Article 3 does not give the Secretary of State explicit rulemaking authority. I intend to consistently and objectively apply the law. Unlike a judge, the Secretary of State does not have the discretion to suspend or alter the procedural requirements for rulemaking, except in reviewing the content of emergency rules on a very narrowly defined basis. The law provides an adequate remedy for those who disagree with my emergency rule decisions by authorizing review by the State Supreme Court.

My responsibility in reviewing emergency rules is to determine whether there is an emergency, as defined by the statute, that justifies setting aside the regular rulemaking requirements to put a rule into effect immediately. Some due process is afforded to the public because notice that an emergency rule has been filed is published in the State Register and there is a 35 day time period for the Secretary of State to consider the emergency rule and accept public comment. However, in comparison to the process for promulgating a regular legislative rule, the emergency rule review period provides less due process because legislative consideration is bypassed. Also, from a practical standpoint, once an emergency rule takes effect as law, the opportunity to be heard on the regular legislative rule often has less significance, and at times is rendered meaningless, because it is difficult to change a policy that is already in effect.

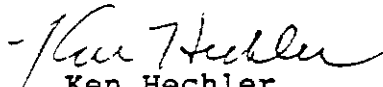
I would like to emphasize as strongly as I can that my decision to disapprove DMV's emergency rule was not based on the fact that I disagree with the legislature's policy. My decision to disapprove the emergency rule was based on the fact that I was not persuaded by the agency's justification that an emergency as defined by the statute existed. The law states that agencies shall not use the emergency rulemaking process to circumvent the regular rulemaking process. This is the legislative policy that I have responsibility for enforcing.

At the time of filing and during the 35 day review period, DMV did not state that its justification for the emergency rule was that it had to be promulgated in time to meet a deadline established by the statute, although we did review the statute's deadlines. On one hand, there is a requirement that the program must go into effect on January 1, 1993 and, on the other hand, no one may participate in the program before July 1, 1993. DMV's actual filing dates do not coincide with either of those dates: the regular legislative rule was filed in May and the emergency rule was filed in September. Generally speaking, effective dates in statutes do not satisfy the emergency justification because that interpretation would mean that every rule could be promulgated on an emergency basis. I have often approved emergency rules on the basis that the language in the statute that authorizes an agency to promulgate rules also explicitly states that the rules must be promulgated by a certain date. There is no such deadline in the statute that is at issue here.

Finally, at the time I reached my decision, I was not aware that DMV had accepted program participants prior to filing the proposed emergency rule. While not commenting on this matter with regard to the DMV rule since it was not presented as an issue for my consideration at the time that I made my decision, I would generally caution against allowing agencies to justify emergency rules on the basis that they have already begun operating programs. Such a precedent would create a large loophole so that agencies could circumvent the regular rulemaking procedures, in effect by creating their own "emergencies."

The interpretation we have taken with the emergency provision in this situation is in keeping with the historical guidance we have received from members of the Legislative Rulemaking Review Committee. I believe that to apply a different standard in a specific situation would make us vulnerable to legitimate and successful law suits on the application of this law.

Sincerely,


Ken Hechler
Secretary of State



WEST VIRGINIA LEGISLATURE
LEGISLATIVE RULE-MAKING REVIEW COMMITTEE
Room M-152, State Capitol
Charleston, West Virginia 25305
(304) 340-3286

FILED

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Senator Joe Manchin III, Co-Chair
Delegate Brian A. Gallagher, Co-Chair

October 28, 1993

Debra A. Graham, Counsel
Marie Nickerson, Admr. Assistant

The Honorable Ken Hechler
Secretary of State
State Capitol
Charleston, WV 25305

Dear Secretary Hechler:

RE: Division of Motor Vehicles Emergency Rule, Motor
Vehicle Alcohol Test and Lock Program (Title 91,
Series 9.)

On October 7, 1993, you issued an Emergency Rule Decision [ERD] disapproving the above captioned emergency rule. The Legislative Rule-Making Review Committee, having reviewed and approved the proposed rule, discussed the ERD disapproval with Renee Coe, your General Counsel, at its meeting on October 19, 1993. It is the Committee's contention that there may be some misunderstanding about the objectives of this proposed emergency rule.

Your stated reasons for disapproval were that the proposed rule would "decrease the total time that a license is suspended..." and thereby "possib[ly] cause 'harm to the public health, safety or welfare' or even 'substantial harm to the public interest' which is totally opposite of what the Code mandates an emergency rule to do." However, the decision to restore a restricted driver's license to individuals who have completed the division's safety and treatment program is a policy decision already made by the Legislature.

The emergency rule at issue was promulgated pursuant to the mandate of section three-a, article five-a, chapter seventeen-c of the West Virginia Code [§17C-5A-3a] which states in part that the commissioner "...shall promulgate legislative rules in accordance with the provisions of chapter twenty-nine-a of this code...for the purpose of implementing the provisions of this section." The division was to develop a program by January 1, 1993, and be prepared to begin accepting participants by July 1, 1993. This program would permit certain individuals, meeting specific criteria, to operate motor vehicles equipped with an alcohol test and lock system.

Under W.V. Code, §29A-3-15a, the secretary of state has the power to disapprove an emergency rule for one of the following reasons:

(1) That the agency has exceeded the scope of its statutory authority in promulgating the emergency rule or in filing an amendment to the emergency rule;

(2) That an emergency does not exist justifying the promulgation of the rule or the filing of an amendment to the rule; or

(3) That the rule or an amendment to the rule was not promulgated in compliance with the provisions of section fifteen of this article.

~~It does not appear, nor do you contend, that the agency exceeded the scope of its authority in promulgating the above referenced rule or that the rule was not promulgated in compliance with the provisions of section fifteen. However, in paragraph fifteen (15) of the ERD you state that the proposed rule "...does not qualify under the definition of an emergency as defined in §29A-3-15(g).~~

The division justified the emergency rule on the basis of the need to promulgate the rules defining the eligibility criteria and setting the administrative fees as directed by the Legislature in subsection a, section three-a, article five-a, chapter seventeen-c of the West Virginia Code. The division currently has approximately 100 persons enrolled in the alcohol lock and test program. Although the statute sets out the minimum eligibility criteria for participants, the proposed rule, inter alia, (1) limits those instances in which the participant may operate a vehicle; (2) defines the criteria for continued eligibility; and (3) sets the fees for program participation. Disapproving the proposed emergency rule places the division in the position of continuing the operation of the program without the benefit of these guidelines.

You stated in paragraph twelve (12) of ERD 21-93 that the agency need only document that a nexus exists between the proposal and one of the three emergency categories. Subsection (g), section fifteen, article three, chapter twenty-nine-a of the West Virginia Code defines emergency as a situation in which the promulgation of a rule is necessary for one of the following three reasons: (1) immediate preservation of the public peace, health, safety or welfare; or (2) to comply with a time limitation established by this code; or (3) to prevent substantial harm to the public interest. In their letter of explanation, the division relied on the category of preventing substantial harm to the public interest in justifying promulgation of the emergency rule, stating in part that the rule is needed to enforce the eligibility criteria and restrictions.

The Committee believes that the proper reading of the proposed rule is that it has the effect of protecting the general public, not harming them, because it defines the specific

situations in which participants may operate a motor vehicle and provides notice of revocation penalties they may incur for program violations. Although neither of these provisions are contained in the statute, the commissioner was given the power to promulgate eligibility rules specified by the Legislature and such requirements that the commissioner "determines must be met to obtain...approval to operate a motor vehicle...." [WVC § 17C-5A-3a(a).] We believe these rules are needed to properly regulate the program.

Moreover, the Committee believes that the proposed rules were properly promulgated as emergency rules to meet the statutory mandate of establishing the program, including determining users fees and defining eligibility criteria, by January 1, 1993. This nexus alone should justify approval of the proposed emergency rules.

Although the applicable code provisions do not permit the division to resubmit or amend a proposed emergency rule after an ERD has been issued, it does not prohibit your reconsideration of the ERD. We understand that this has not been your practice. Nevertheless, we are requesting that you review the above information and reconsider this emergency rule decision, with the date relating back to the date originally issued. As previously stated, the division's proposed rule has been reviewed and approved by the Committee, however, the proposed emergency rule is needed in the interim period to regulate those persons presently in the program.

We appreciate your diligence in reviewing emergency rules and understand your need to screen for statutory compliance. We submit this letter of explanation and justification for the above referenced emergency rule, asking that you review this information, reconsider your emergency rule decision and help us to resolve this issue without any further action.

Sincerely,

Joe Manchin

Joe Manchin, III
Senate Co-chair

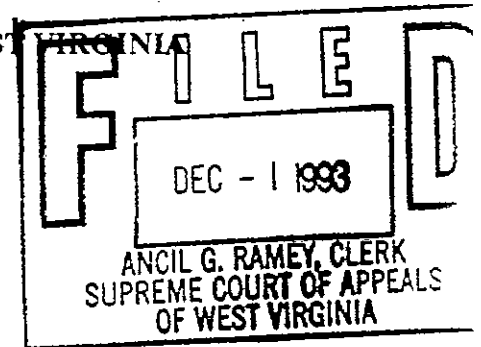
Brian A. Gallagher

Brian A. Gallagher
House of Delegates Co-chair

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



STATE OF WEST VIRGINIA, EX REL.
DELEGATE BRIAN GALLAGHER, DELEGATE NANCY KESSEL,
DELEGATE MARY PEARL COMPTON, DELEGATE VICKI DOUGLAS,
DELEGATE ROBERT BURK, and, JANÉ L. CLINE,
COMMISSIONER OF THE DIVISION OF
MOTOR VEHICLES

Petitioners,

v.

IN MANDAMUS
ORIGINAL JURISDICTION

KEN HECHLER, SECRETARY OF STATE

Respondent.

PETITION FOR WRIT OF MANDAMUS

Now come the petitioners herein, by counsel, and invoking the jurisdiction of this Court pursuant to Article VIII, § 3 of the *West Virginia Constitution* and *W.Va. Code*, § 53-1-2 and *W.Va. Code*, § 29A-3-15a, respectfully represent to the Court as follows:

1. Petitioners Brian Gallagher, Nancy Kessel, Mary Pearl Compton, Vicki Douglas and Robert Burk are duly elected members of the West Virginia Legislature.
2. Petitioner Jane L. Cline is the commissioner of the Division of Motor Vehicles.
3. Respondent The Honorable Ken Hechler is the duly elected Secretary of State of the State of West Virginia.

Statement of Facts

4. On March 7, 1992, during the Regular Legislative Session, the Legislature passed Committee Substitute for House Bill 4131, now codified as *W. Va. Code*, § 17C-5A-3a, authorizing the motor vehicle alcohol test and lock program.

5. *W.Va. Code*, 17C-5A-3a, mandates that the Division of Motor Vehicles establish the program on or before the first day of January one thousand nine hundred ninety-three and that the Division take applicants for the program on or after the first day of July, 1993.

6. On the 19th day of May, 1993, the Division filed a proposed rule for public comment as recommended by the Secretary of State in the step-procedure for Legislative rulemaking. The step-procedure for Legislative rulemaking is attached hereto and made a part hereof. See Exhibit 1, p.12.

7. On the 23rd day of June, 1993, the proposed rule was filed with the Secretary of State's Office following public comment.

8. On the 9th day of August, 1993, the Legislative Rulemaking Review Committee voted to recommend the proposed rule, with modifications, to the Legislature for authorization.

9. On the 10th day of August, 1993, the Division filed the proposed rule with the Secretary of State's Office with technical modifications as suggested by the Legislative Rulemaking Review Committee.

10. On the 2nd day of September, 1993, the Division of Motor Vehicles, under the authority of the Commissioner, filed a new legislative rule entitled, Series 9, Motor Vehicle Alcohol Test and Lock Program as an emergency legislative rule. A copy of the rule is attached hereto and made a part hereof. See Exhibits 2, 2-A and 2-B.

11. In a letter dated September 2, 1993, the Commissioner stated the circumstances requiring an emergency filing as follows:

"This rule is being promulgated on an emergency basis in order to prevent substantial harm to the public interest for the following reasons. This rule is essential to the implementation of the program. Enforcement of eligibility criteria and administrative penalty provisions for violations of the terms of the program are vested in this rule.

This rule specifically deals with a category of persons who have already shown a reckless disregard for the safety of others by driving while under the influence of alcohol or drugs. Failure to immediately promulgate this rule on an emergency basis jeopardizes the enforcement of eligibility criteria and restrictions determined by the division to be necessary to protect the general public against those persons who operate motor vehicles while under the influence of alcohol or drugs." A copy of said letter is attached hereto and made a part hereof.

12. On or about the 7th day of October, 1993, the Secretary of State issued Emergency Rule Decision 21-93, which disallowed emergency status to the rule entitled Series 9, Motor Vehicle Alcohol Test and Lock Program. See Exhibit 3.

13. Emergency Rule Decision 21-93, paragraph 14 states that "by approving this rule as an emergency and decreasing the total time that a license is suspended could possible [sic] cause 'harm to the public health, safety or welfare' or even 'substantial harm to the public interest' which is totally opposite of what the Code mandates an emergency rule to do." A copy of said decision is attached hereto and made a part hereof. See Exhibit 3, para. 14.

14. Respondent has a clear non-discretionary duty to approve emergency rules filed by an agency unless he makes a valid determination under the provisions of *W. Va. Code*, § 29A-3-15a that an emergency does not exist.

15. In disapproving the Division of Motor Vehicles rule relating to the Motor Vehicle Alcohol Test and Lock Program, the respondent exceeded the statutory authority granted in *W.Va. Code*, § 29A-3-15a and *W.Va. Code*, § 29A-3-15b.

16. As individual members of the Legislature and the Agency attempting to promulgate the rule as an emergency, the petitioners have a clear right pursuant to *W.Va.*

Code, § 29A-3-15a, to bring a mandamus proceeding to compel the respondent to perform a non-discretionary duty in conformity with the applicable statutes.

17. Emergency Rule Decision 21-93 is based upon public policy considerations which are not properly within the purview of the respondent when determining whether an emergency exists.

18. The respondent's determination that the proposed rule does not qualify under the definition of an emergency as defined in *W.Va. Code*, § 29A-3-15(g) is clearly erroneous.

19. Emergency Rule Decision 21-93 is a final determination of the issue of whether an emergency situation exists.

FIRST CLAIM FOR RELIEF

20. In making the determination that the proposed rule does not qualify under the definition of an emergency as defined in *W. Va. Code*, § 29A-3-15(g) the respondent exceeded the scope of his statutory authority.

SECOND CLAIM FOR RELIEF

21. The determination that the proposed rule did not qualify under the definition of an emergency as defined in *W. Va. Code*, § 29A-3-15(g) was clearly erroneous.

THIRD CLAIM FOR RELIEF

22. The determination by the respondent that approving the rule as an emergency could cause harm to the public health, safety or welfare or even substantial harm to the public interest usurped the power of the Legislature and violated the mandate established by *W. Va. Const.*, Article V, § 1 that the three departments of government remain separate and distinct.

PRAYER

WHEREFORE, petitioners respectfully pray that this Court issue a Writ of Mandamus directing the respondent to show cause, if any, why the following relief should not be granted:

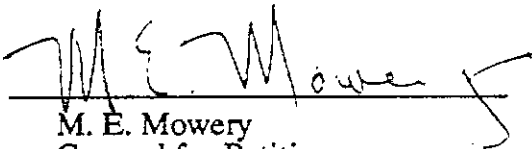
(1) That respondent be mandated to approve the new rule, Series 9, Motor Vehicle Alcohol Test and Lock Program as an emergency rule or in the alternative that the decision of the respondent disapproving the filing of the rule as an emergency be reversed.

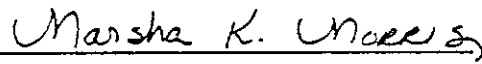
(2) That respondents be mandated to cease and desist from disapproving emergency rule filings for reasons other than those set forth in *W. Va. Code*, § 29A-3-15a.


(3) That the respondents be mandated to cease and desist from imposing requirements other than those set forth in *W. Va. Code*, § 29A-3-15(g) in the determination of when an emergency exists.

(4) For such other relief as the Court may deem appropriate.

Respectfully submitted,


M. E. Mowery
Counsel for Petitioners


Marsha K. Morris
Counsel for Petitioners


Paul E. Jordan
Counsel for Petitioners

M. E. Mowery
Marsha K. Morris
Counsel for Petitioners Brian Gallagher, Nancy Kessel,
Mary Pearl Compton, Vicki Douglas, and Robert Burk
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Charleston, West Virginia 25305

Paul E. Jordan
Senior Assistant Attorney General
Counsel for Petitioner Jane L. Cline
Room W-435, Building 1
Charleston, West Virginia 25305

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

STATE OF WEST VIRGINIA, EX REL.
DELEGATE BRIAN GALLAGHER, DELEGATE NANCY KESSEL,
DELEGATE MARY PEARL COMPTON, DELEGATE VICKI
DOUGLAS,
DELEGATE ROBERT BURK, and, JANE L. CLINE,
COMMISSIONER OF THE DIVISION OF
MOTOR VEHICLES

Petitioners,

v.

IN MANDAMUS
ORIGINAL JURISDICTION

KEN HECHLER, SECRETARY OF STATE

Respondent.

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

This case presents to the Court two issues of first impression. First, whether the provisions of *W. Va. Code*, § 29A-3-15 and § 29A-3-15a permit the respondent to review proposed emergency rules and impose requirements other than those specifically set forth in statute for approval of emergency status. Second, whether the decision set forth in Emergency Rule Decision 21-93 violates the mandates set forth in *W. Va. Const.*, Article V, § 1.

STATEMENT OF FACTS

On March 7, 1992, the Legislature passed Committee Substitute for House Bill 4131. As a part of that legislation, the Legislature authorized the Division of Motor Vehicles to establish an alcohol test and lock program by January 1, 1993, with the Commissioner to promulgate the legislative rules necessary to implement the program. The legislation specifically authorized the Commissioner to promulgate rules containing any eligibility requirements she deemed necessary, in addition to those specified in the statute.

During the subsequent months, the Division prepared several drafts of the proposed legislative rules and, following the step procedures outlined by the Secretary of State, obtained information from various national agencies, other states, interest groups and the selected vendor. See Exhibit 4.

The Division's proposed rule was filed with the Secretary of State's office on June 23, 1993. On August 9, 1993, the Legislative Rule Making Review Committee approved the proposed rule with technical modifications, which the Division filed with the Secretary of State on August 10, 1993.

To effect the provisions of the legislation, which required establishment of the program by January 1, 1993, and permitted implementation by July 1, 1993, the Division filed the proposed rule as an emergency rule in accordance with the provisions of *W. Va. Code*, § 29A-3-15. To facilitate approval of this rule, the Division followed the step procedure recommendations issued by the Secretary and held a public comment period prior to filing the proposed rule. See Exhibits 1 and 2-A. Furthermore, the division took the additional step of having the proposed rule reviewed by the Legislative Rule Making Review Committee before filing it as an emergency rule. The rule and supporting documentation were filed with the Secretary of State on September 2, 1993. The Commissioner's letter explained that the program was mandated by statute and provided for early reinstatement of driving privileges for persons whose driver's licenses had been revoked for driving under the influence. The justification for filing the rule on an emergency basis was that the eligibility criteria and administrative penalty provisions for program violations were vested in the rule.

On October 7, 1993, the Secretary of State issued Emergency Rule Decision 21-93, disapproving the emergency rule. The reason for the Secretary's decision was that "...approving this rule as an emergency and decreasing the total time that a license is suspended could possible [sic] cause 'harm to the public health, safety or welfare' or even 'substantial harm to the public interest' which is totally opposite of what the Code mandates an emergency rule to do."

ARGUMENT

I. THE SECRETARY OF STATE HAS A NONDISCRETIONARY DUTY TO REVIEW EMERGENCY RULES IN ACCORDANCE WITH THE CRITERIA LISTED IN W. Va. Code, §§ 29A-3-15 and 29A-3-15a.

The office of the Secretary of State, as part of the Executive Department, is charged with the "...nondiscretionary, nondelegable duty...to establish and maintain the state register...." *W. Va. Code*, § 29A-2-1. All proposed agency rules or amendments are filed in the state register following the format prescribed by the Secretary of State's rule Standard Size and Format for Rules and Related Documents Filed in the Secretary of State's Office 153 C.S.R. 6.

The rule making procedure is the same for interpretative, procedural and legislative rules up to final adoption. Notice of agency *adoption* of interpretative and procedural rules must be filed in the state register with a copy of the final rule. Notice of agency *approval* of a proposed legislative rule must be filed in the state register with copies submitted to the legislative rule-making review committee. The committee acts in an advisory capacity, reviewing and recommending changes to the agency prior to submitting the rule and authorizing legislation to the Legislature. The Legislature has the authority to amend the rule prior to authorizing, by act, the agency's adoption of the legislative rule.

The Secretary's duties in the legislative rule making process are limited to maintaining the state register and prescribing the format for the rules filed for publication in that register. His duties in the emergency rule making process differ in that review of the

proposed rule is required. However, that review is limited to the specific areas enumerated in the State Administrative Procedures Act.

Emergency rules may be proposed by any agency with authority to promulgate legislative rules and must be filed in the state register with a "... statement of the facts and circumstances constituting the emergency..." *W. Va. Code*, § 29A-3-15. These rules are effective on the thirty-fifth day after filing or upon approval of the Secretary of State, whichever occurs first. The Secretary of State has the authority to disapprove an emergency rule if he makes one of the following determinations:

- (1) That the agency has exceeded the scope of its statutory authority in promulgating the emergency rule or in filing an amendment to the emergency rule;
- (2) That an emergency does not exist justifying the promulgation of the rule or the filing of an amendment to the rule; or
- (3) That the rule or an amendment to the rule was not promulgated in compliance with the provision of section fifteen of this article.

W. Va. Code, § 29A-3-15a.

Although the Secretary of State is required to review emergency rules and has statutory authority to disapprove them, the scope of that review is limited. Making accurate determinations within the statutory guidelines is imperative since agencies are not permitted to refile emergency rules once they are disapproved for any of the above reasons or if the agency failed to comply with the rule making procedures set forth in article three, chapter twenty-nine-a of the Code of West Virginia. The purpose of this framework is to prevent agencies from circumventing the legislative rule making process. The purpose of limiting the criteria used in emergency rule review is to prevent subversion of legislative policy.

II. THE SECRETARY OF STATE EXCEEDED THE SCOPE OF HIS AUTHORITY IN DISAPPROVING THE EMERGENCY RULE FILED AS 91 C.S.R. 9 MOTOR VEHICLE ALCOHOL TEST AND LOCK PROGRAM.

From the outset, it must be noted that the Secretary of State only has those powers granted to him which "may be prescribed by law." *W. Va. Const.*, Art. VII, § 1. While the Secretary does have the power to disapprove emergency rules, the power to do so is very

limited given the above stated statutory language. *See, W. Va. Code, § 29A-3-15(a)(1-3)* cited above.

The Secretary in his emergency rule decision stated specifically that the agency did not exceed its statutory authority and that they had complied with the necessary procedural requirements. Emergency Rules Decision No.21-93, para. 7, 10.

However, in paragraph fifteen (15) of the ERD he states that the proposed rule "...does not qualify under the definition of an emergency as defined in § 29A-3-15(g)."

For purposes of rule making, the statute defines emergency as follows:

...[A]n 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.

W.Va. Code § 29A-3-15(g).

In the Commissioner's statement of the facts and circumstances constituting the emergency, she stated that the rule was promulgated "...on an emergency basis in order to prevent substantial harm to the public interest...." The Commissioner explained that those eligible for participation were individuals whose driver's licenses had previously been revoked for driving under the influence infractions and that the rule was needed to enforce the eligibility criteria and restrictions.

The Commissioner was authorized to promulgate the eligibility rules specified by the Legislature and such requirements that the commissioner "determines must be met to obtain...approval to operate a motor vehicle...." *W. Va. Code, § 17C-5A-3a(a)*. The statute authorizing the establishment of the alcohol test and lock program sets out the minimum eligibility criteria for participants, however, the proposed rule (1) limits those instances in which the participant may operate a vehicle; (2) defines the criteria for continued eligibility; and (3) sets the criteria for establishing the rates for program participation.

The program's participants are, without exception, individuals whose driving privileges have been revoked for infractions involving driving under the influence of alcohol. A rule that limits their driving privileges and permits revocation of their restricted licenses for program violations is necessary to prevent substantial harm to the public interest.

The Legislature mandated the establishment of the program by January 1, 1993, with participation beginning after July 1, 1993. Although not stated in the Commissioner's letter of justification, the emergency rule is necessary to meet the statutory time limitations. This nexus alone should have justified approval of the proposed emergency rule.

A closer look at the rationale of the decision made by the secretary indicates that he has improperly injected policy considerations into this definition by virtue of that section of his decision which states that:

[B]y approving this rule as an emergency and decreasing the total time that a license is suspended could possible [sic] cause "harm to the public health, safety or welfare" or even "substantial harm to the public interest" which is totally opposite of what the code mandates an emergency rule to do.

Emergency Rule Decision 21-93, para. 14.

It is true that the proposed rule contains provisions providing for a shorter period of revocation. *See, e.g.* Proposed Rule 91 C.S.R. 9, paras 3.4.1 - 3.4.5. However, the enabling statute also calls for such a decrease in revocation periods, when it states that:

(c) For purposes of this section, "minimum revocation period" means the portion which has actually expired of the period of revocation imposed by the commissioner pursuant to this article or the provisions of article five of this chapter upon a person eligible for participation in the program as follows:

- (1) For a person whose license has been revoked for six months pursuant to subsection (i), section two of this article, the minimum period of revocation is thirty days;
- (2) For a person whose license has been revoked for one year pursuant to section seven, article five of this chapter, the minimum period of revocation is ninety days;
- (3) For a person whose license has been revoked for any other period of time pursuant to section two of this article or pursuant to section seven, article five of this chapter, the minimum period of revocation is one year.

W. Va. Code, § 17C-5A-3a.

The correct reading of the proposed rule is that it has the effect of protecting the general public, not harming them, because it defines the specific situations in which participants may operate a motor vehicle and provides for revocation penalties when program violations occur.

The proposed rule meets the statutory criteria for promulgation as an emergency rule. The Secretary's determination that the rule does not qualify under the definition of an

emergency is clearly erroneous. Furthermore, his decision to disapprove the proposed emergency rule in an effort to prevent persons meeting the eligibility criteria from receiving a restricted drivers license prior to the end of their scheduled suspension was clearly a decision that exceeded the scope of his statutory authority. This obviously is an area where the Secretary has improperly entered into policy considerations which are not within his authority.

While this Court has not had an opportunity to specifically review the powers of the Secretary of State, it has reviewed the powers of other members of the executive department and, in the case of the attorney general, has held that:

The powers and duties of the attorney general are specified by the Constitution and by rules of law prescribed pursuant thereto.

Syl. pt. 1, *Manchin v. Browning*, 170 W. Va. 779, 296 S.E.2d 909 (1982).

By analogy, the Secretary of State, as a member of the executive department as described at Article VII, Section 1 of the West Virginia Constitution should be held to exactly the same standard. In this case, the Secretary has improperly changed the definition of emergency to justify his actions. This is an abuse of his authority and clearly falls outside of his prescribed powers.

At a minimum however, the Secretary has interjected discretion into this process where none has existed before. This action has violated both *W. Va. Code*, §§ 29A-3-15 and 29A-3-15A and has assumed powers not given to him in the law.

III. THE SECRETARY OF STATE VIOLATED THE SEPARATION OF POWERS DOCTRINE SET FORTH IN W. Va. Const., Article V, § 1, BY USURPING THE POWERS OF THE LEGISLATURE.

Article V, § 1, of the West Virginia Constitution provides in part that:

The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others;....

This Court has held that the separation of powers provision "...is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed." *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 630, citing *State ex rel. State*

Building Comm. v. Bailey, 151 W.Va. 79, 150 S.E.2d 449 (1966); *State v. Huber*, 129 W.Va.198, 40 S.E.2d 11 (1946); *Sims v. Fisher*, 125 W.Va. 512, 25 S.E.2d 216 (1943).

The separation of powers doctrine is violated when "...there is a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government...." *O'Connor v. Margolin*, 296 S.E.2d 892, 897 (1982), citing *Appalachian Power Company v. Public Service Commission of West Virginia*, 296 S.E.2d 897 (1982).

The decision to issue a restricted licenses to individuals whose driving privileges had previously been revoked is a public policy decision, properly made by the Legislature. See, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 747, 143 S.E.2d 351, 357. The Legislature delegated the power to promulgate the rules necessary to implement the Alcohol Test and Lock Program the Commissioner of the Division of Motor Vehicles.

The Court has stated that "...the Legislature has plenary power to act unless prohibited from doing so by the constitution itself." *Barker, supra*, at 631 (W.Va. 1981). In delegating the power to enact rules to an Executive agency, the Legislature "...must provide the Executive with sufficient standards or policy for guidance." *Id.*

In this instance the Legislature directed the Commissioner to promulgate legislative rules for the purpose of implementing the alcohol test and lock program. *W. Va. Code*, § 17C-5A-3a(a). Moreover, the rules were to contain the eligibility requirements specified by the Legislature and those requirements "...the commissioner determines must be met to obtain the commissioner's approval to operate a motor vehicle equipped with a motor vehicle alcohol test and lock system." *Id.*

The enactment of the alcohol test and lock program and the delegation of rule making authority to the agency were properly within the purview of the Legislature. The Secretary's disapproval of the rule has the effect of preempting legislative decisions, thereby violating the separation of powers doctrine.

IV. THIS CASE IS APPROPRIATE FOR APPELLATE REVIEW AND ISSUANCE OF A WRIT OF MANDAMUS.

Three elements are necessary for the issuance of a writ of mandamus: (1) A clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of the respondent to perform the act sought; and (3) the absence of another adequate legal remedy. *See, e.g. West Virginia Bd. of Educ. v. Hechler*, 376 S.E.2d 839 (W.Va. 1988).

In the present case the Petitioners have a clear legal right to have the emergency rule, properly promulgated as 93 C.S.R. 9, filed in the state register and effective for the proper implementation of the Alcohol Test and Lock Program. The Legislature directed the establishment of this program by January 1, 1993, and delegated rule making authority to the Commissioner. The respondent's failure to file 93 C.S.R. 9 places the agency in the position of either violating a clear legislative mandate to begin the program in 1993, or implementing the program without adequate guidelines pertaining to eligibility and enforcement requirements.

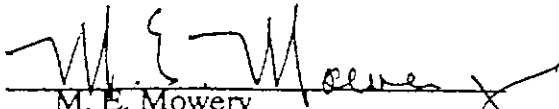
The respondent has a legal duty to perform this action. He has a nondiscretionary duty to maintain the state register, filing rules in accordance with the State Administrative Procedures Act. Although he has a duty to review emergency rules, that scope of review is limited and disapproval must be based on the criteria specified by statute.

CONCLUSION

For the above stated reasons, this Court should issue a writ of mandamus requiring the respondent to file the above referenced emergency rule accordingly.


Respectfully submitted,

DELEGATE BRIAN
GALLAGHER, DELEGATE
NANCY KESSEL, DELEGATE
MARY PEARL COMPTON,
DELEGATE VICKI DOUGLAS,
DELEGATE ROBERT BURK, and,
JANE L. CLINE, COMMISSIONER
OF THE DIVISION OF MOTOR
VEHICLES
Petitioners.


M. E. Mowery
Counsel for Petitioners


Marsha K. Morris

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WEST VIRGINIA LEGISLATURE
LEGISLATIVE RULE-MAKING REVIEW COMMITTEE
Room M-152, State Capitol
Charleston, West Virginia 25305
(304) 340-3286

Senator Joe Manchin III, Co-Chair
Delegate Brian A. Gallagher, Co-Chair

October 28, 1993

Debra A. Graham, Counsel
Marie Nickerson, Admr. Assistant

The Honorable Ken Hechler
Secretary of State
State Capitol
Charleston, WV 25305

Dear Secretary Hechler:

RE: Division of Motor Vehicles Emergency Rule, Motor
Vehicle Alcohol Test and Lock Program (Title 91,
Series 9.)

On October 7, 1993, you issued an Emergency Rule Decision [ERD] disapproving the above captioned emergency rule. The Legislative Rule-Making Review Committee, having reviewed and approved the proposed rule, discussed the ERD disapproval with Renee Coe, your General Counsel, at its meeting on October 19, 1993. It is the Committee's contention that there may be some misunderstanding about the objectives of this proposed emergency rule.

Your stated reasons for disapproval were that the proposed rule would "decrease the total time that a license is suspended..." and thereby "possib[ly] cause 'harm to the public health, safety or welfare' or even 'substantial harm to the public interest' which is totally opposite of what the Code mandates an emergency rule to do." However, the decision to restore a restricted driver's license to individuals who have completed the division's safety and treatment program is a policy decision already made by the Legislature.

The emergency rule at issue was promulgated pursuant to the mandate of section three-a, article five-a, chapter seventeen-c of the West Virginia Code [§17C-5A-3a] which states in part that the commissioner "...shall promulgate legislative rules in accordance with the provisions of chapter twenty-nine-a of this code...for the purpose of implementing the provisions of this section." The division was to develop a program by January 1, 1993, and be prepared to begin accepting participants by July 1, 1993. This program would permit certain individuals, meeting specific criteria, to operate motor vehicles equipped with an alcohol test and lock system.

Under W.V. Code, §29A-3-15a, the secretary of state has the power to disapprove an emergency rule for one of the following reasons:

- (1) That the agency has exceeded the scope of its statutory authority in promulgating the emergency rule or in filing an amendment to the emergency rule;
- (2) That an emergency does not exist justifying the promulgation of the rule or the filing of an amendment to the rule; or
- (3) That the rule or an amendment to the rule was not promulgated in compliance with the provisions of section fifteen of this article.

It does not appear, nor do you contend, that the agency exceeded the scope of its authority in promulgating the above referenced rule or that the rule was not promulgated in compliance with the provisions of section fifteen. However, in paragraph fifteen (15) of the ERD you state that the proposed rule "...does not qualify under the definition of an emergency as defined in §29A-3-15(g).

The division justified the emergency rule on the basis of the need to promulgate the rules defining the eligibility criteria and setting the administrative fees as directed by the Legislature in subsection a, section three-a, article five-a, chapter seventeen-c of the West Virginia Code. The division currently has approximately 100 persons enrolled in the alcohol lock and test program. Although the statute sets out the minimum eligibility criteria for participants, the proposed rule, inter alia, (1) limits those instances in which the participant may operate a vehicle; (2) defines the criteria for continued eligibility; and (3) sets the fees for program participation. Disapproving the proposed emergency rule places the division in the position of continuing the operation of the program without the benefit of these guidelines.

You stated in paragraph twelve (12) of ERD 21-93 that the agency need only document that a nexus exists between the proposal and one of the three emergency categories. Subsection (g), section fifteen, article three, chapter twenty-nine-a of the West Virginia Code defines emergency as a situation in which the promulgation of a rule is necessary for one of the following three reasons: (1) immediate preservation of the public peace, health, safety or welfare; or (2) to comply with a time limitation established by this code; or (3) to prevent substantial harm to the public interest. In their letter of explanation, the division relied on the category of preventing substantial harm to the public interest in justifying promulgation of the emergency rule, stating in part that the rule is needed to enforce the eligibility criteria and restrictions.

The Committee believes that the proper reading of the proposed rule is that it has the effect of protecting the general public, not harming them, because it defines the specific

situations in which participants may operate a motor vehicle and provides notice of revocation penalties they may incur for program violations. Although neither of these provisions are contained in the statute, the commissioner was given the power to promulgate eligibility rules specified by the Legislature and such requirements that the commissioner "determines must be met to obtain...approval to operate a motor vehicle...." [WVC § 17C-5A-3a(a).] We believe these rules are needed to properly regulate the program.

Moreover, the Committee believes that the proposed rules were properly promulgated as emergency rules to meet the statutory mandate of establishing the program, including determining users fees and defining eligibility criteria, by January 1, 1993. This nexus alone should justify approval of the proposed emergency rules.

Although the applicable code provisions do not permit the division to resubmit or amend a proposed emergency rule after an ERD has been issued, it does not prohibit your reconsideration of the ERD. We understand that this has not been your practice. Nevertheless, we are requesting that you review the above information and reconsider this emergency rule decision, with the date relating back to the date originally issued. As previously stated, the division's proposed rule has been reviewed and approved by the Committee, however, the proposed emergency rule is needed in the interim period to regulate those persons presently in the program.

We appreciate your diligence in reviewing emergency rules and understand your need to screen for statutory compliance. We submit this letter of explanation and justification for the above referenced emergency rule, asking that you review this information, reconsider your emergency rule decision and help us to resolve this issue without any further action.

Sincerely,

Joe Manchin

Joe Manchin, III
Senate Co-chair

Brian A. Gallagher

Brian A. Gallagher
House of Delegates Co-chair

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

A. RENEE COE
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

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STATE OF WEST VIRGINIA

SECRETARY OF STATE

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November 5, 1993

WILLIAM H. HARRINGTON
Chief of Staff

JUDY COOPER
Director, Administrative Law

DONALD R. WILKES
Director, Corporations

(Plus all the volunteer
help we can get)

FAX: (304) 558-0900

The Honorable Joe Manchin, III
Senate Co-Chair
The Honorable Brian A. Gallagher
House of Delegates Co-Chair
W. Va. Legislature
Legislative Rule-Making Review Committee
Room M-152, State Capitol
Charleston, West Virginia 25305

Dear Senator Manchin and Delegate Gallagher:

I am writing in response to your letter dated October 28, 1993 in which you asked me to reconsider my decision to disapprove the Department of Motor Vehicle's (DMV) emergency legislative rule (91 C.S.R. 9) for the Motor Vehicle Alcohol Test and Lock Program (West Virginia Code, §17C-5A-3a).

Because DMV's emergency rule expired when I disapproved it, there is no emergency rule now pending before me for consideration. Nor can the agency resubmit it. The plain meaning of West Virginia Code, §29A-3-15(c) is that an emergency rule expires when the Secretary of State disapproves it. The statute says that once an emergency rule expires "due to the effect of" the Secretary of State disapproving it "the agency may not refile the same or similar rule as an emergency rule." If I could reconsider a rule that I have disapproved, the prohibition that an agency may not refile the same or a similar rule would be somewhat meaningless. No doubt, any agency that could exert sufficient influence would succeed in obtaining review of a disapproval.

Not only is my interpretation supported by the plain meaning of the statute but it is supported by the purpose of the rule-making requirements contained in Article 3 of the Administrative Procedures Act. The purpose of the rulemaking procedures is to protect the due process rights of any person who is affected by a rule. Due process consists of notice and the opportunity to be heard. The problem with the interpretation you suggest is that it does not afford adequate protection for the due process rights of those who have objections to an emergency rule. Under your suggested interpretation, it is unclear how new or additional notice would be given.

If I took the position that I could reconsider an emergency rule decision, how would parties who oppose an emergency rule receive notice of my decision to reconsider? How many times could I reconsider a rule? What would be the extent of my discretion to reconsider? Would an agency have a right to demand reconsideration? What would be the standard for reconsideration? How long after disapproval could I reconsider? Would I have authority to reverse a decision of approval? At what point would the opponent of a rule be able to stop maintaining vigilant watch to make sure a rule was not going to be reconsidered? I think that it would be unwise for me to take the approach that I may elaborate on the procedures set forth in Article 3, which are already lengthy and somewhat complex.

The legislature wisely foresaw that there is a very limited need for discretion in administering the rulemaking procedures. Consequently, Article 3 does not give the Secretary of State explicit rulemaking authority. I intend to consistently and objectively apply the law. Unlike a judge, the Secretary of State does not have the discretion to suspend or alter the procedural requirements for rulemaking, except in reviewing the content of emergency rules on a very narrowly defined basis. The law provides an adequate remedy for those who disagree with my emergency rule decisions by authorizing review by the State Supreme Court.

My responsibility in reviewing emergency rules is to determine whether there is an emergency, as defined by the statute, that justifies setting aside the regular rulemaking requirements to put a rule into effect immediately. Some due process is afforded to the public because notice that an emergency rule has been filed is published in the State Register and there is a 35 day time period for the Secretary of State to consider the emergency rule and accept public comment. However, in comparison to the process for promulgating a regular legislative rule, the emergency rule review period provides less due process because legislative consideration is bypassed. Also, from a practical standpoint, once an emergency rule takes effect as law, the opportunity to be heard on the regular legislative rule often has less significance, and at times is rendered meaningless, because it is difficult to change a policy that is already in effect.


I would like to emphasize as strongly as I can that my decision to disapprove DMV's emergency rule was not based on the fact that I disagree with the legislature's policy. My decision to disapprove the emergency rule was based on the fact that I was not persuaded by the agency's justification that an emergency as defined by the statute existed. The law states that agencies shall not use the emergency rulemaking process to circumvent the regular rulemaking process. This is the legislative policy that I have responsibility for enforcing.

At the time of filing and during the 35 day review period, DMV did not state that its justification for the emergency rule was that it had to be promulgated in time to meet a deadline established by the statute, although we did review the statute's deadlines. On one hand, there is a requirement that the program must go into effect on January 1, 1993 and, on the other hand, no one may participate in the program before July 1, 1993. DMV's actual filing dates do not coincide with either of those dates: the regular legislative rule was filed in May and the emergency rule was filed in September. Generally speaking, effective dates in statutes do not satisfy the emergency justification because that interpretation would mean that every rule could be promulgated on an emergency basis. I have often approved emergency rules on the basis that the language in the statute that authorizes an agency to promulgate rules also explicitly states that the rules must be promulgated by a certain date. There is no such deadline in the statute that is at issue here.

Finally, at the time I reached my decision, I was not aware that DMV had accepted program participants prior to filing the proposed emergency rule. While not commenting on this matter with regard to the DMV rule since it was not presented as an issue for my consideration at the time that I made my decision, I would generally caution against allowing agencies to justify emergency rules on the basis that they have already begun operating programs. Such a precedent would create a large loophole so that agencies could circumvent the regular rulemaking procedures, in effect by creating their own "emergencies."

The interpretation we have taken with the emergency provision in this situation is in keeping with the historical guidance we have received from members of the Legislative Rulemaking Review Committee. I believe that to apply a different standard in a specific situation would make us vulnerable to legitimate and successful law suits on the application of this law.

Sincerely,


Ken Hechler
Secretary of State

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

A. RENEE COE
Deputy Secretary of State

CATHERINE FREROTTE
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SECRETARY OF STATE

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November 5, 1993

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(Plus all the volunteer
help we can get)

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Senate Co-Chair
The Honorable Brian A. Gallagher
House of Delegates Co-Chair
W. Va. Legislature
Legislative Rule-Making Review Committee
Room M-152, State Capitol
Charleston, West Virginia 25305

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Nov 5 11 35 AM '93

FILED

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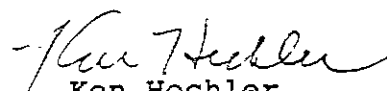
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The interpretation we have taken with the emergency provision in this situation is in keeping with the historical guidance we have received from members of the Legislative Rulemaking Review Committee. I believe that to apply a different standard in a specific situation would make us vulnerable to legitimate and successful law suits on the application of this law.

Sincerely,


Ken Hechler
Secretary of State

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 2nd day of December, 1993, the following order was made and entered:

State of West Virginia ex rel. Brian
Gallagher, Delegate Nancy Kessel, Delegate
Mary Pearl Compton, Delegates Vicki
Douglas, Delegate Robert Burk, and Jane L.
Cline, Commissioner of the Division of
Motor Vehicles, Petitioners

vs.) No. 931932

Ken Hechler, Secretary of State,
Respondent

On a former day, to-wit, December 1, 1993, came the petitioners, Brian Gallagher, Delegate Nancy Kessel, Delegate Mary Pearl Compton, Delegate Vicki Douglas, Delegate Robert Burk, by M. E. Mowery and Marsha K. Morris, their attorneys, and Jane L. Cline, Commissioner of the Division of Motor Vehicles, by Darrell V. McGraw, Jr., Attorney General, and Paul E. Jordan, Senior Assistant Attorney General, her attorneys, and presented to the Court their joint petition praying for a peremptory writ of mandamus to be directed against the respondent, Ken Hechler, Secretary of State, as therein set forth. Upon consideration whereof, the Court is of opinion that a rule should not be awarded and the writ prayed for by the petitioners is hereby refused.

A True Copy

Attest: 
Clerk, Supreme Court of Appeals

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

A. RENEE COE
Deputy Secretary of State

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help we can get)

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December 1, 1993

The Honorable Joe Manchin, III
Senate Co-Chair
The Honorable Brian A. Gallagher
House of Delegates Co-Chair
W. Va. Legislature
Legislative Rule-Making Review Committee
Room M-152, State Capitol
Charleston, West Virginia 25305

Dear Senator Manchin and Delegate Gallagher:

I am writing in response to your letter dated November 18, 1993 in which you asked me to reconsider my interpretation of West Virginia Code, §29A-3-15(c) and to accept instead one you described in your letter. Since I explained the interpretation that has always been the policy of the Secretary of State at some length in my letter to you dated November 5, 1993, I will not reiterate it here.

I believe that I would be inconsistent and lack objectivity if I were to accept your interpretation. Following your approach, there are other interpretations besides the one you recommend, including ones that would support our past interpretation. For example, maybe the legislature really intended to include subdivision five, rather than, as you suggest, exclude subdivision one. I think it would be dangerous for me to conclude on the basis of an editor's footnote that there is a clerical error in statutory language.


Without a more compelling legal basis to justify it, changing our interpretation would introduce a capricious element into the emergency rulemaking process. It would be fundamentally unfair to those in the past who were not able to avail themselves of this new interpretation.

I also think that the policy reasons I set forth in my earlier letter strongly argue in favor of our past interpretation. I sincerely warn the members of the legislature not to change the statute to allow agencies to refile emergency rules or

to allow the Secretary of State to reconsider a rule that has been disapproved because that would make the emergency rulemaking process vulnerable to abuse by agencies. I am concerned that such a change would result in the process becoming administratively unmanageable.

There are many instances in which I wish the decisions were much easier to make. If my staff could sit down with yours to discuss the complexities of these decisions so that more specific statutory criteria could be developed for reviewing emergency rules, I would be very happy to have them work with you.

Sincerely,


Ken Hechler
Secretary of State