

Secretary of State's Office
Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305-0770

State of West Virginia
Joe Manchin, III
Secretary of State

Telephone: (304) 558-6000
Toll Free: 1-866-SOS-VOTE
Corporations: (304) 558-8000
FAX: (304) 558-0900
www.wvsos.com

May 16, 2002

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: West Virginia Board of Pharmacy

RULE: New Rule, 15CSR11, Board of Pharmacy Fees for Pharmacist Recovery Networks

DATE FILED AS AN EMERGENCY RULE: May 7, 2002

DECISION NO. 8-02

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

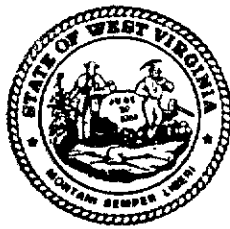

JOE MANCHIN, III
Secretary of State

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

2002 MAY 17 P 2:48

FILED

SCANNED



Secretary of State's Office
Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305-0770

State of West Virginia
Joe Manchin, III
Secretary of State

Telephone: (304) 558-6000
Toll Free: 1-866-SOS-VOTE
Corporations: (304) 558-8000
FAX: (304) 558-0900
www.wvsos.com

EMERGENCY RULE DECISION
(ERD 8-02)

AGENCY: West Virginia Board of Pharmacy
RULE: New Rule, 15CSR11, Board of Pharmacy Fees for Pharmacists
Recovery Networks
FILED AS AN EMERGENCY RULE: May 7, 2002

- par. 1 The West Virginia Board of Pharmacy (Board) has filed the above new rule as an emergency rule.
- par. 2 W. Va. Code 29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.

par. 6 The Board filed this emergency rule with supporting documents with the Secretary of State May 7, 2002 and with the LRMRC May 7, 2002.

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

par. 8 (B) Statutory Authority -- W. Va. Code §30-5-7(c) reads:

§30-5-7c. Authorization for the board of pharmacy to enter into agreements with organizations to form pharmacist recovery networks for treatment of impaired pharmacists, pharmacy interns and pharmacy technicians.

(a) The board may, under legislative rules adopted by the board in accordance with article three, chapter twenty-nine-a of this code, enter into agreements with organizations to form pharmacist recovery networks. Any pharmacist recovery network shall promote the early identification, intervention, treatment, and rehabilitation of pharmacists, pharmacy interns and pharmacy technicians who may be impaired by reason of illness, alcohol or drug abuse, or as a result of any other physical or mental condition. Activities to be covered by the agreements shall include investigation, review and evaluation of records, reports, complaints, litigation and other information about the practices and practice patterns of pharmacists licensed by the board, as such matters may relate to impaired pharmacists, pharmacy interns or pharmacy technicians.

(b) Agreements authorized under this section shall include provisions for the impaired pharmacist recovery network to receive relevant information from the board and other sources, conduct any investigation, review and evaluation in an expeditious manner, provide assurance of confidentiality of nonpublic information, make reports of investigations and evaluations to the board, and to do other related activities for operating and promoting a coordinated and effective peer review process. The agreements shall include provisions assuring basic due process for pharmacists, pharmacy interns or pharmacy technicians as well as provisions for the adequate treatment, supervision and follow through for participants.

(c) Any organization that enters into an agreement with the board to create a pharmacist recovery network shall establish and maintain a program for impaired pharmacists, pharmacy interns and pharmacy technicians for the purpose of identifying, reviewing and evaluating the ability of those individuals to function as pharmacist, pharmacy intern or pharmacy technician, and to provide programs for treatment and rehabilitation, including supervision and follow up for participating persons.

(d) Prior to entering into any agreement with any organization to form a pharmacist recovery network, the board shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code regarding the operation of any pharmacist recovery network, with provisions for:

- (1) Definitions of impairment;***
- (2) Guidelines for program elements;***
- (3) Procedures for receipt and use of information of suspected impairment;***
- (4) Procedures for intervention and referral;***
- (5) Arrangements for mandatory monitoring, treatment, rehabilitation, post-treatment***

support and performance;

(6) Reports of individual cases to the board;

(7) Periodic reporting of statistical information;

*(8) Assurance of confidentiality of nonpublic information and of the peer review process;
and*

(9) Assessment of a fee to be added to each licensure renewal application fee payable to the board and dedication of any revenue generated by the assessment for the operation of pharmacist recovery networks developed under this section.

(e) Upon investigation and review of a pharmacist, pharmacy intern or pharmacy technician, or upon receipt of a complaint or other information, an organization that enters into an agreement with the board to operate a pharmacist recovery network shall report immediately to the board detailed information about any pharmacist, pharmacy intern or pharmacy technician, if:

(1) The individual constitutes an imminent danger to the public or himself or herself; or

(2) The individual refuses to cooperate with the program, refuses to submit to treatment, refuses to participate in follow up treatment and monitoring, or is still impaired after treatment; or

(3) It reasonably appears that there are other grounds for disciplinary action.

(f) Any confidential patient information acquired, created or used by a pharmacist recovery network pursuant to this section shall remain confidential and may not be subject to discovery or subpoena in a civil case.

(g) If the board has not instituted any disciplinary proceedings as provided in this article, any information received, maintained or developed by a pharmacist recovery network relating to the alcohol or chemical dependency impairment of any pharmacist, pharmacy intern or pharmacy technician shall be confidential and not available for public information, discovery or court subpoena nor for introduction into evidence in any professional liability action or other action for damages arising out of the provision of or failure to provide health care services.

(h) No person participating in a pharmacist recovery network developed under this section may be required in a civil case to disclose any information, including opinions, recommendations or evaluations, acquired or developed solely in the course of participating in the program.

(i) All persons engaged in activities conducted pursuant to a pharmacist recovery network developed under this section when acting in good faith and without malice enjoy immunity from individual civil liability while acting within the scope of their duties as part of a pharmacist recovery network.

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

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

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

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

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

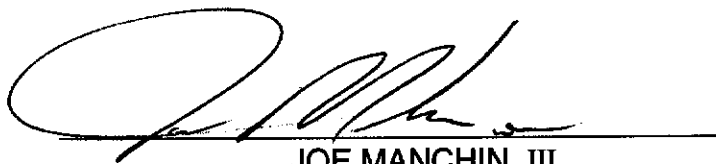
HB 4277 passed the Legislature on February 22, 2002 and authorized the Board of Pharmacy to enter into agreements with organizations to form pharmacist recovery networks for impaired pharmacists, technicians and interns. The Board was authorized to file rules to assess fees with each license renewal dedicated to operation of the networks. Licenses are changing to a 2-year license and are renewed during the summer of 2002, so this rule needs to be in effect so that fees can be added to this renewal to collect funds to pay for the networks. Otherwise it will be 2-years before any fees could again be collected.

Impairment in the profession of pharmacy has become a serious problem and this rule is needed to collect fees from licensees to help fund pharmacist recovery networks.

Substantial harm to the public will result if impaired pharmacists, interns and technicians are allowed to continue practice without receiving treatment for their addictions. The pharmacist recovery network would provide a place for individuals to turn to seek treatment and avoid making a serious mistake while practicing pharmacy. Until this rule is approved, the Board cannot collect fees to help fund the network to intervene in cases of impairment and monitor the continuing treatment and recovery of those that have reported.

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

par. 14 This decision shall be cited as Emergency Rule Decision 8-02 or ERD 8-02 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the West Virginia Board of Pharmacy, the Attorney General and the Legislative Rule Making Review Committee.



JOE MANCHIN, III
Secretary of State

Entered _____

FILED
2002 MAY 17 P 2:48
OFFICE WEST VIRGINIA
SECRETARY OF STATE



**HOUSE OF DELEGATES
WEST VIRGINIA LEGISLATURE**

BUILDING 1, ROOM E-213
1900 KANAWHA BLVD., EAST
CHARLESTON, WV 25305-0470
PHONE (304) 340-3192

FILED
2002 MAY -8 A 10:00
OFFICE WEST VIRGINIA
SECRETARY OF STATE

VICKI V. DOUGLAS, Chair
COMMITTEE ON GOVERNMENT ORGANIZATION
395 CASTANEA DRIVE
MARTINSBURG, WV 25401
PHONE: (304) 263-1070

May 2, 2002

Committees:
House Rules
Joint Committee on
Government Operations
Joint Committee on
Government Organization

The Honorable Joe Manchin
West Virginia Secretary of State
Administrative Law Division
State Capitol Complex, Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305-0770

Re: Board of Pharmacy Rules for Pharmacist Recovery Networks

Dear Secretary Manchin:

I write in order to comment on the Board of Pharmacy Rules for Pharmacist Recovery Networks filed as an emergency rule with your office on the 23rd day of April, 2002.

As a preliminary matter, I must object to the filing of this rule as an emergency rule. In my opinion, the facts and circumstances cited in support of the emergency filing do not constitute sufficient grounds for approval of this rule as an emergency rule. Although the formation of a pharmacist recovery network would be beneficial, the need to form one does not constitute an emergency. The Board of Pharmacy has developed procedures which are currently in place to deal with pharmacists, pharmacist interns and pharmacist technicians who may be impaired and those procedures will continue to serve us well until such time as this rule is developed and authorized through the regular rule making review process.

Secondly, it is my belief, as Chairman of the House Committee which passed the authorizing legislation for this program, that the Legislature never intended that an emergency rule be proposed to expedite formation of a pharmacist recovery network. Rather, the authorizing legislation was drafted in a manner to require the Board of Pharmacy to carefully develop thorough, detailed rules which would benefit from the regular rule making review process.

Unfortunately, the proposed rule falls short of this mark. First and foremost, it is clearly lacking in detail. The statutory authorization sets forth that the rule governing pharmacist recovery networks shall provide: (1) definitions of impairment; (2) guidelines for program elements; (3) procedures for the receipt and use of information; (4) intervention and referral procedures; (5) monitoring, treatment, rehabilitation and performance monitoring; (6) reporting to the Board; (7) reporting of statistical information; (8) assurance of confidentiality; and (9) assessment of a fee.

Although all of the items are addressed in the rule, items 1-5 are done so only in a cursory way, leaving an unacceptable degree of discretion and ambiguity in administration of the program.

Secondly, although it is implied, the rule does not expressly set forth any requirements with regard to the content of agreements between the Board and another organization(s) to form a pharmacist recovery network. The basic requirements for any such agreement were articulated by the Legislature in W.Va. Code §30-5-7c(b), but no similar requirement has been incorporated in the rule.

Additionally, the proposed emergency rule deviates from the express requirements of its statutory authority in that it fails to incorporate the statutory requirement that investigations, reviews and evaluations be conducted in an expeditious manner, as provided in W.Va. Code §30-5-7c(b).

Finally, I believe the rule should address what action is to be taken by a pharmacist recovery network should it discover evidence of criminal activity on the part of pharmacists, pharmacist interns or pharmacist technicians, in light of the confidentiality protections set forth in the authorizing legislation. Certainly, W.Va. Code §30-5-7c(e) mandates reporting to the Board in certain instances, but I can envision other instances in which reporting to criminal authorities would be justified. Accordingly, I believe guidelines for reporting criminal activity should be developed further in this rule.

Likewise, I believe the scope of the confidentiality protections provided in the authorizing legislation should be more clearly defined by the rule. The rule should identify what information will be considered to be "relating to the alcohol or chemical dependency impairment" of a participant and, therefore, given a higher degree of confidentiality protection. Additionally, terms such as "confidential patient information", mentioned in W.Va. Code §30-5-7c(f), "person participating" in a pharmacist recovery network, mentioned in W.Va. Code §30-5-7c(h) and "persons engaged in activities conducted pursuant to a pharmacist recovery network" should be more clearly defined.

For the foregoing reasons, I urge the rejection of the proposed emergency rule. Should you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Vicki V. Douglas". The signature is written in black ink and is positioned above the printed name.

Vicki V. Douglas

VVD/foh

	Date Called	FOR PASSAGE OF PHARMACY EMERGENCY RULES BY PHONE	AGAINST PASSAGE OF PHARMACY EMERGENCY RULES
1	5/14/02	Richard Stevens Executive Director WV Pharmacist Assoc	Vicki Douglas
2	5/14/02	Laddie Burdette Fruth Pharmacy	
3	5/15/02	Steve Judy Judy's Drugstore Petersburg WV	
4	5/15/02	Carl Malanger President WV Pharmacist Assoc. Without these rules becoming effect there will be a 2-year delay in putting this in place.	
5	5/15/02	Robert Lowe Shepherdstown	
6	5/15/02	Mayor Lydia Main Mason County	
7	5/15/02	Roger Cole WV is either last or next to last state to have this program in place	
8	5/15/02	Zack Phillips CVS – also Bd of Directors Pharmacist Assoc.	
9	5/15/02	Joe McGlothlin 304 429-6716 Supports the rule	
10	5/16/02	Clark Ridgeway 304 293-7806 WV Ass't Dean of Pharmacy	