

**WEST VIRGINIA  
SECRETARY OF STATE  
BETTY IRELAND  
ADMINISTRATIVE LAW DIVISION**

Form #7

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2006 JUN 28 A 9:40

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

Effective Date

**NOTICE OF AN EMERGENCY RULE**

AGENCY: West Virginia Regional Jail & Correctional Facility Auth. TITLE NUMBER: 94

CITE AUTHORITY: W. Va. Code § 31-20-10 (h)

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 3

TITLE OF RULE BEING AMENDED: Criteria and Procedures for Determination of Projected Cost Per Day  
for Inmates Incarcerated in Regional Jails Operated By the Authority

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: \_\_\_\_\_

TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

Use additional sheets if necessary

  
Authorized Signature

**EMERGENCY RULE QUESTIONNAIRE**

DATE: June 28, 2006

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: *(Agency Name, Address & Phone No.)* West Virginia Regional Jail and Correctional Facility Auth.

1325 Virginia Street, East Charleston, West Virginia

304-558-2110

EMERGENCY RULE TITLE: 94

1. Date of filing June 28, 2006

2. Statutory authority for promulgating emergency rule:  
  
W. Va. Code § 31-20-10 (h)

3. Date of filing of proposed legislative rule: June 28, 2006

4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule? Yes, the rule amends 94CSR3 to adopt new language.

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.  
  
The previous rule was found invalid by Cabell County Circuit Court, Case Number 05-C-590. The rule is required by W. Va. Code § 31-20-10 (h) to provide the funding mechanism for this states Regional Jail System. The rule is necessary to continue the safe and orderly operations of the West Virginia Regional Jail System.

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.

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No.

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

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The Regional Jail System is financed through the formula found in this section, without a valid funding mechanism the Regional Jail System can not fulfill it's vital public safety mission.

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## **Summary of Proposed Emergency Rule**

The rule establishes the formula for calculating the cost per inmate day billed to entities who incarcerate individuals in the Regional Jail System. The Regional Jail system is financed through the formula found in this section. Without a valid funding mechanism the Regional Jail System cannot to fulfill it's vital pubic safety mission.

The previous rule was found invalid by Cabell County Circuit, Case Number 05-C-590. The rule is required W. Va. Code § 31-20-10 (h) to provide the funding mechanism for this states Regional Jail System. The rule is necessary to continue the safe and orderly operations of the West Virginia Regional Jail system.

## APPENDIX B

**FISCAL NOTE FOR PROPOSED RULES**

Rule Title: Title 94CSR3: Legislative Rule Regional Jail & Correctional Facility Authority

Type of Rule:  Legislative  Interpretive  Procedural

Agency: WV Regional Jail & Correctional Facility Authority

Address: 1325 Virginia St. E.  
Chas., WV 25301

Phone Number: 3-4 558 2110 Email: tdavis@wvrja.state.wv.us

**Fiscal Note Summary**

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The WV Regional Jail and Correctional Facility Authority Board, a body corporate and government instrumentality, approved this rule at the May, 2006 Board meeting to define the formula for determining the projected cost per day for inmates incarcerated in the WV Regional Jail system. The Board voted not to increase the per diem rate prior to July 1, 2007. It is projected that the per diem rate will generate revenue equaling the current anticipated jail expenditures and maintain an operational reserve fund to cover four months of anticipated operational expenditures.

**Fiscal Note Detail**

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: \_\_\_\_\_

Rule Title: Title 94CSR3: Legislative Rule Regional Jail & Correctional Facility Authority

3. **Explanation of above estimates (including long-range effect):**  
Please include any increase or decrease in fees in your estimated total revenues.

Will not increase or decrease fees for Fiscal Year 2006 or Fiscal Year 2007, as approved by the West Virginia Regional Jail and Correctional Facility Authority.

### MEMORANDUM

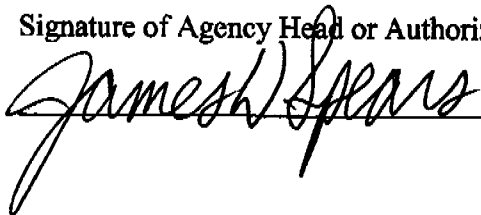
Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

This rule will not increase or decrease fees for Fiscal year 2006 or Fiscal Year 2007, as approved by the WV Regional Jail and Correctional Facility Board in the May 2006 meeting.

The WV Regional Jail and Correctional Facility Authority had promulgated a procedural rule to determine the per diem rate. The rule had not been brought up to date since 1995. Legislation changed and new facilities were brought on line that were not in the previous rule.

Date: June 28, 2006

Signature of Agency Head or Authorized Representative

  
\_\_\_\_\_

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TITLE 94  
PROCEDURAL LEGISLATIVE RULE  
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY

WEST VIRGINIA  
SECRETARY OF STATE

SERIES 3  
CRITERIA AND PROCEDURES  
FOR DETERMINATION OF PROJECTED COST PER DAY FOR INMATES  
INCARCERATED IN REGIONAL JAILS OPERATED BY THE AUTHORITY

**§'94-3-1. General.**

1.1. Scope. -- W. Va. Code §'31-20-10(h) requires the West Virginia Regional Jail and Correctional Facility Authority to develop an operational cost per day for inmates incarcerated in regional jails. The Authority is required to develop criteria and procedures for the development of these operational per diem costs through the mechanism of regulations pursuant to W. Va. Code §'29A-3-1 et. seq. Counties, the West Virginia Division of Corrections, and are Municipalities are required by the statute to make payments to the regional jail and correctional facility development fund fund in an amount sufficient to cover the costs of operating such regional jail facilities and to maintain inmates incarcerated therein.

1.2. Authority. -- W. Va. Code §'31-20-10(h).

1.3. Filing Date. -- ~~May 16, 1995.~~

1.4. Effective Date. -- ~~July 1, 1995.~~

1.5. Repeal of former rule. ~~B~~ This filing represents an amendment of the procedural rule formerly filed on ~~April 8, 1994~~ May 16, 1995 and effective on July 1, ~~1994~~ 1995.

**§'94-3-2. Application And Enforcement.**

2.1. These ~~procedural legislative~~ rules apply to the Regional Jail and Correctional Facility Authority, and to counties, municipalities, the West Virginia Division of Corrections, ~~the United States Marshals Service, the United States Bureau of Prisons and any other entity by whose authority inmates are incarcerated and maintained in regional jails operated by the West Virginia Regional Jail and Correctional Facility Authority.~~

2.1.1 Nothing in these rules shall limit the Authorities ability and the authorization to enter into contracts with Federal Authorities or surrounding states for the housing of inmates within the Regional Jail System.

2.2. The enforcement of these regulations rests with the Executive Director of the Regional Jail and Correctional Facility Authority.

**§'94-3-3. Annual Schedule of Operating Expenditures.**

3.1. The Regional Jail and Correctional Facility Authority shall develop and approve a schedule of anticipated operational expenditures both direct and indirect. ~~for each regional jail.~~ Such schedules shall include ~~all costs for personal services, and fringe benefits for personnel necessary to the operation of the facility~~ Regional Jail Authority including centralized operations expenses, as well as allocations of funds for food, clothing, utilities, supplies, transportation, medical, maintenance, and technology. The schedule and shall include a reserve funds maintained in a manner consistent with § 9 et seq herein and shall include all other costs necessary to operate and maintain the facility the Regional Jail Authority.

~~3.2. The operational expenditure schedule shall include all costs, both direct and indirect, for operating and maintaining the regional jails.~~

~~3.2 3.32.~~ The operational expenditure schedule shall not include any costs, either direct or indirect, for the construction, renovation or acquisition of a regional jail.

~~3.3 3.43.~~ The Authority shall develop and approve an operational expenditure schedule for each regional jail on an annual basis, consistent with the state fiscal year.

**§94-3-4. Annual Statement of Projected Cost Per Inmate Day~~Cost Per Inmate Day~~.**

4.1. The Authority shall, on an annual basis, prepare an estimate of the cost of operating each regional jail~~the Regional Jail system~~ and maintaining inmates therein. This estimate of cost will be expressed as the cost of maintaining one (1) inmate for one (1) day. This estimate shall include all costs of operating each regional jail~~and maintaining the Regional Jail System~~.

4.2. ~~In October of each year, The the~~ an annual statement of projected cost per inmate day will be forwarded to both the Sheriff and the county commission of each county, the Commissioner of the Division of Corrections, the United States Marshals Service, the United States Bureau of Prisons and the mayor of each municipality served by the Regional Jail Authority to provide notice of per diem costs and for their use in preparing their own budgets.

4.3. The annual statement of cost per inmate day for each regional jail may be provided, upon request, to any other entity on whose behalf an inmate may be incarcerated in a regional jail.

**§94-3-5. Calculation Of Projected Cost Per Inmate Day.**

5.1. - ~~Beginning July 1, 2007, The operational expenditure schedule as defined in § 3 herein shall be divided by The Authority shall sum the operational costs of each regional jail and shall divide the total of such anticipated operational expenditures by the total anticipated number of inmate days in each of the regional jails~~ jail system to yield the projected cost per inmate day as the quotient.

5.1.1. ~~If the Authority has revenue available for use as operational funds, the Authority may apply such revenue to the total of the schedule of operational expenditures before calculating the cost per inmate day. In such case, the net operational costs shall become the dividend.~~

5.1.1 The anticipated number of inmate days to be provided in a fiscal year shall be calculated as the billed average daily inmate population.

~~5.1.2. The anticipated number of inmate days to be provided in a fiscal year shall be the product of the bed capacity of the regional jail multiplied by a capacity factor of ninety percent (90%), multiplied by the number of days in the fiscal year. Provided, that, the design bed capacity of the regional jails shall be defined as follows:~~

Eastern Regional Jail	288120;
Central Regional Jail	192;
South Central Regional Jail	288;
Northern Regional Jail & - Correctional Facility	192; and,
Southern Regional Jail	288;
Southwestern Regional Jail	288
Potomac Highlands Regional Jail	192;
North Central Regional Jail	384;
Western Regional Jail	384; and,
Tygart Valley Regional Jail	288.

5.1.2 If the daily inmate population fluctuates by ten percent (10%) or more in any two fiscal quarters the Executive Ddirector shall, after consultation with the Board, adjust the cost per inmate day to allow operations at the current level.

~~5.1.3. The Authority may, when operational history is available on any regional jail for more than two years, increase the capacity factor described in §5.1.2. to reflect the actual population levels documented for that particular regional jail; provided, that, in no event shall the population factor be greater than one hundred per cent (100%) of the bed capacity for the regional jail.~~

5.2 The Authority shall collect the cost per inmate day from each entity committing jurisdiction or appropriate entity for which an inmate is maintained in the regional jail system ~~a regional jail.~~

**§94-3-6. Preparation And Distribution Of Monthly Billing Statements Of Costs Incurred.**

6.1. The Authority shall prepare a monthly billing statement. This statement, at minimum, will include ~~of charges for each entity committing jurisdiction for which an inmate is maintained in a regional jail.~~ Each monthly statement of charges will include the name of theany inmate, maintained in the regional jail, the number of days during the billing month the inmate was maintained, and the total charges for inmate maintenance during the billing month.

6.2. The monthly billing statements of costs incurred shall be due and payable upon receipt, by the responsible entity jurisdiction.

6.3. The Executive Director, on behalf of the Authority, may initiate legal action to collect any debts resulting from the failure of a responsible entity to make prompt payment of billed charges.

**§94-3-7. Allocation Of Costs For Inmates Sentenced To The Division Of Corrections.**

7.1. The county shall be responsible for costs incurred by regional jails for housing and maintaining inmates in regional jails who have not been lawfully sentenced and committed to the custody of the Commissioner of Corrections.

7.2. The county shall be responsible for the costs incurred by the regional jails for housing and maintaining inmates who, prior to sentencing, are waiting transportation to a state correctional facility for a sixty day evaluation period as provided in W. Va. Code, § 62-12-7.

7.3. The Division of Corrections is responsible for the costs incurred by the regional jails for housing and maintaining inmates who have been sentenced to the custody of the Division of Corrections beginning the calendar day following the day the commitment order has been Entered: Provided, that the Circuit Clerk of the county from which the commitment order has been entered shall immediately transmit by facsimile machine an advance copy of the certified commitment order to the Division of Corrections and to the Regional Jail to which the inmate was confined.

7.4. The Division of Corrections is responsible for the costs incurred by the regional jails for housing and maintaining inmates who have been held on a parole violation warrant.

7.5. The Division of Corrections is responsible for the costs incurred by the regional jails for housing and maintaining inmates who have been returned to the regional jail under court order: Provided, however, that the county from which the inmate was charged shall be responsible for the per diem costs in the event that a court of competent jurisdiction shall set aside or vacate the order of commitment to the Division of Corrections, from the date of said order or the return of the inmate to the regional jail, whichever is later. The Regional Jail may provide transportation of such inmates from the correctional facility to the regional jail when such transportation can be provided without undue hardship upon the regional jail, its staff or operating budget: Provided, that the order from the court of competent jurisdiction has stipulated that the regional jail is responsible for the transportation of the inmate.

~~7.6.~~ ~~7.6.~~ The costs incurred by the regional jails for housing and maintaining inmates who are being held as a fugitive from justice from another jurisdiction shall be billed to the fugitive's original jurisdiction from the date of the extradition hearing in Circuit Court: Provided, that the costs incurred by the regional jails for housing and maintaining any person who is arrested and confined on the basis of the commission of a new crime shall be billed to the arresting county until such time as the pending West Virginia charges have been properly resolved.

7.7. The municipalities shall be responsible for the costs incurred by the regional jails for housing and maintaining inmates committed through their respective municipal courts.

**§94-3-8. Extraordinary Costs.**

8.1. \_\_\_\_\_ If the actual operational costs ~~exceed~~ deviate from the approved schedule of operational expenditures by more than ten percent ~~centum~~ (10%) during two fiscal quarters in a line item, a the Executive Ddirector, after consultation with the board shall adjust temporary surcharge will be added to the cost per inmate day in an amount sufficient to cover the actual expenditures.

**§94-3-9. Settlement Statement.**

9.1. At the end of each fiscal year, a settlement statement may be prepared by the Authority.

9.2. Pursuant to WV Code 31-20-10(c), whenever the Authority determines that the balance in these funds is in excess of the requirements for the WV Regional Jail Authority, it may request that the excess be invested until needed. This fund shall be an Operational Reserve Fund. In this case the excess shall be invested in a manner consistent with the investment of temporary state funds.

~~9.39.1.1. In the event that the Operational Reserve Fund reaches an amount consistent with four months of anticipated operational expenditures, the Executive Director may credit any remaining balance to the responsible entity on the same basis as payments were received. If collected revenues exceeded the total operational expenditures, during two fiscal quarters the Executive director may after consultation with the board, credit any remaining balance may be credited to the responsible entity on the same basis as payments were received. The Authority may apply any such remaining excess to the anticipated operational expenditures for the succeeding fiscal year, in such case, the Authority shall treat such revenue as revenue available for use as operational funds before calculating the projected cost per inmate day.~~

~~9.49.1.2. If collected revenues are less than total operational expenditures, the settlement statement may reflect a balance due and payable to the Authority from the responsible entity. t may reflect a balance due and payable to the Authority from the responsible entity.~~

~~— The Authority may, if collected revenues exceed the six months expenditures in a fiscal year, apply any such excess revenues to the anticipated operational expenditures for the succeeding fiscal year; in such case, the Authority shall treat such revenue as revenue available for use as operational funds as described in '5.1.1. and shall reduce the net amount of the anticipated operational expenditures thereby before calculating the cost per inmate day to be collected from entities which incarcerate inmates in any regional jail. — Provided however that such funds shall not exceed the anticipated operational expenditures for four months.~~

July 18, 2006

**BY MAIL AND E-MAIL**

The Honorable Betty Ireland  
Secretary of State  
Bldg. 1, Suite 157-K  
1900 Kanawha Blvd., East  
Charleston, WV 25305-0770  
Email wvsos@wvsos.com

Re: Emergency Rule Title 94

Dear Secretary Ireland:

I represent the Cabell County Commission and object to approval of Emergency Rule Title 94 filed in your office on June 28, 2006, for the following reasons:

1. W. Va. Code § 29A-3-15(f) provides, "For the purposes of this section, an emergency exists when the promulgation of an emergency rule is necessary (1) for the immediate preservation of the public peace, health, safety or welfare, (2) to comply with a time limitation established by this code or by a federal statute or regulation, or (3) to prevent substantial harm to the public interest." Judge Pancake's order invalidated one rule, W. Va. C.S.R. § 94-3-5, which governs the method of calculating the regional jail per diem, because it had not been promulgated as a legislative rule, as required by statute. Consequently, he lowered from \$45.00 per day<sup>1</sup> to \$40.42 per day, the per diem the Authority could charge to the Cabell County Commission, but made his ruling retroactive only to July 1, 2004, and subject to increase "if, after the entry of this Order, the 'actual operational costs' per inmate day of the Western Regional Jail exceed \$40.42 by 'more than ten percent,' the Jail may 'add a temporary surcharge to the cost per inmate day in an amount sufficient to cover the actual expenditures' at the Western Regional Jail." Ex. A. Moreover, by agreement of the parties, Judge Pancake's order has been stayed pending appeal, which will not be resolved before the next legislative session. Thus, there is no emergency. If the Authority's "actual

<sup>1</sup>Judge Pancake also lowered the per diem from \$48.50 to \$45.00 not because of any rule, but because there was no quorum and one of the members voted by proxy in violation of the Authority's own procedural rules at the meeting in which an increase in the per diem from \$45.00 to \$48.50 was approved. Ex. A.

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operational costs” per inmate day at the Western Regional jail “exceed \$40.42 by ‘more than ten percent,’” the Authority can simply meet and, if it has a quorum and none of its members vote by proxy, it can “add a temporary surcharge to the cost per inmate day in an amount sufficient to cover actual expenditures.” Moreover, with respect to the methodology for calculating the per diem, such issue can be addressed by the Legislature and/or the Legislative Rule-Making Review Committee.

2. W. Va. Code § 29A-3-15(a) provides, “Any agency with authority to propose legislative rules may, without hearing, find that an emergency exists requiring that emergency rules be promulgated and promulgate the same in accordance with this section. Such emergency rules, together with a statement of the facts and circumstances constituting the emergency, shall be filed with the secretary of state, and a notice of such filing shall be published in the state register. Such emergency rules shall become effective upon the approval of the secretary of state in accordance with section fifteen-a of this article or upon the approval of the attorney general in accordance with section fifteen-b or upon the forty-second day following such filing, whichever occurs first. Such emergency rules may adopt, amend or repeal any legislative rule, but the circumstances constituting the emergency requiring such adoption, amendment or repeal shall be stated with particularity and be subject to de novo review by any court having original jurisdiction of an action challenging their validity.” [Emphasis supplied]. *See also* W. Va. Code § 29A-3-15(a)(1)(A) (“The emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof”) (emphasis supplied). As can be seen from the face of the rules themselves, they were originally promulgated as “procedural rules,” not “legislative rules;”<sup>2</sup> thus, they cannot be amended under W. Va. § 29A-3-

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<sup>2</sup>“A regulation that is proposed by an agency and approved by the Legislature is a ‘legislative rule’ as defined by the State Administrative Procedures Act, W. Va. Code, 29A-1-2(d) [1982], and such a legislative rule has the force and effect of law.” Syl. Pt. 5, *Smith v. West Virginia Human Rights Comm’n.*, 216 W. Va. 2, 602 S.E.2d 445 (2004). Certainly, if Rule 94 had originally been adopted as a legislative rule, it would have the “force and effect of law” and, in an emergency situation, could be amended under W. Va. Code § 29A-3-15, subject to subsequent legislative approval. Because it was originally promulgated as a “procedural rule,” however, it cannot be “amended” into a “legislative rule.” One of the reasons the Honorable David M. Pancake, Judge of the Circuit Court of Cabell County, invalidated Rule 94, *see* Ex. A, was because W. Va. Code § 31-20-10(h) provides, “When inmates are placed in a regional jail facility pursuant to subsection (g) of this section, the county shall pay into the regional jail and correctional facility authority fund a cost per day for each incarcerated inmate to be determined by the regional jail and correctional facility

- 15(a). The only way for the Regional Jail and Correctional Facility Authority to promulgate emergency legislative rules would be to promulgate an entirely new set of legislative rules, not amend old procedural rules.
3. W. Va. Code § 29A-3-15(a)(1) provides, “The secretary of state, acting under the authority provided for in section fifteen-a of this article, or the attorney general, acting under the authority provided for in section fifteen-b of this article, disapproves the emergency rule because: (A) The emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof; (B) an emergency does not exist justifying the promulgation of the emergency rule; or (C) the emergency rule was not promulgated in compliance with the provisions of this section.” [Emphasis supplied]. *See also* W. Va. Code § 29A-3-15a(b)(same).
  4. As previously noted, the Authority simply cannot amend a “procedural rule” into a “legislative rule” and, therefore, you should disapprove Emergency Rule Title 94 under W. Va. Code § 29A-3-15(a)(1)(C).
  5. Moreover, as the “emergency rule . . . exceeds the scope of the law authorizing or directing the promulgation thereof,” for reasons to be discussed below, you should disapprove Emergency Rule Title 94 under W. Va. Code § 29A-3-15(1)(A). *See also* Syl. pt. 4, *State ex rel. Callaghan v. Civil Service Comm’n*, 166 W. Va. 117, 273 S.E.2d 72 (1980) (“Procedures and rules properly promulgated by an administrative agency with authority to enforce a law will be upheld so long as they are reasonable and do not enlarge, amend or repeal substantive rights created by statute.”); *Chico Dairy, supra* at 247, 382 S.E.2d at 84 (“the rule of the West Virginia Human Rights Commission, 6 W. Va. Code of State Rules § 77-1-2.7 (1982), defining a ‘handicapped person’ to include a person who does not in fact have a ‘handicap,’ as defined by W. Va. Code, 5-11-3(t), as amended, but who ‘is regarded as having such a handicap,’ is invalid because that rule clearly conflicts with the legislative intent by expressly enlarging

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authority according to criteria and by procedures established by legislative rules proposed for promulgation pursuant to article three, chapter twenty-nine-a of this code,” which the Authority admits that it did not do. Thus, such Rule is of no force and effect. *See Chico Dairy Store No. 22 v. Human Rights Comm’n*, 181 W. Va. 238, 244, 382 S.E.2d 75, 81 (1989) (“This ‘legislative rule’ was not, however, submitted to, reviewed by and approved by the legislative rule-making review committee and the legislature, as required by W. Va. Code, 29A-3-9 to 29A-3-14, as amended. It is, therefore, of no effect under the State Administrative Procedures Act.”)(emphasis supplied).

upon the substantive rights created by the statute.”);<sup>3</sup> W. Va. Code § 29A-3-15(d)(“The provision of this section shall not be used to avoid or evade any provision of this article or any other provisions of this code, including any provisions for legislative review and approval of proposed rules. Any emergency rule promulgated for any such purpose may be contested in a judicial proceeding before a court of competent jurisdiction.”)(emphasis supplied).

6. First, Emergency Rule 94 creates a new “fund” that is not authorized by law. The existing procedural rule referenced the “regional jail and correctional facility fund,” which is expressly authorized by law. See W. Va. Code § 31-20-4(e) (“All costs incidental to the administration of the authority, including office expense, personal services expense and current expense, shall be paid from the regional jail and correctional facility development fund in accordance with guidelines issued by the board of the authority.”)(emphasis supplied). The Legislature has not authorized a “regional jail and correctional facility fund” and it is improper for the Authority, through amendment to a procedural rule, to create a “fund” not authorized by statute. Moreover, the Authority sets forth no “emergency” that requires the creation of a new “fund” not authorized by statute.
7. Second, Emergency Rule 94 exempts the “United States marshal service” and the “United States bureau of prisons” from its application<sup>4</sup> in a manner completely contrary to statute. See W. Va.

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<sup>3</sup>Even a “legislative rule” approved by the Legislature is invalid if it is “contrary to the legislative enactment that triggered its promulgation.” *Appalachian Power Co. v. State Tax Dept.*, 195 W. Va. 573, 586, 466 S.E.2d 424, 437 (1995).

<sup>4</sup>Rather than providing that the United States Marshal Service and the United States Bureau of Prisons be subject to the same rules as other entities housing prisoners in regional jails, as the Legislature clearly intended, Emergency Rule Title 94 provides, “Nothing in these rules shall limit the Authorities [sic] ability and the authorization to enter into contracts with Federal Authorities and surrounding states for the housing of inmates within the Regional Jail System.” Although W. Va. Code § 31-20-5(k) grants the Authority the power to “make contracts of every kind and nature and to execute all instruments necessary or convenient for carrying on its business, including contracts with any other governmental agency of this state or of the federal government or with any person, individual, partnership or corporation to effect any or all of the purposes of this article,” nowhere did the Legislature authorize the Authority to enter into contracts with “surrounding states” to house their prisoners. It is beyond belief that the Authority would dare, through emergency rule, to expand its authority to begin taking in prisoners, without limitation, from Ohio, Kentucky, Virginia, Pennsylvania, and Maryland.

Code § 31-20-10a(a) (“This section applies to the regional jail and correctional facility authority, counties, municipalities, the division of corrections, the United States marshal service, the United States bureau of prisons and any other entity by whose authority inmates are incarcerated and maintained in facilities operated by the authority.”)(emphasis supplied). How can the Authority possibly exempt from its Rules two entities that the Legislature has expressly determined should be subject to its Rules? Moreover, the Authority sets forth no “emergency” that requires exemption of the “United States marshal service” and the “United States bureau of prisons” from its Rules.

8. Third, Emergency Rule Title 94 extends operational expenses to include “both direct and indirect costs . . . including centralized operations expenses” which means that counties will pay not only for the operation of regional jails, but for the operation of the administrative office. This is unprecedented and completely contrary to statute, which limits the per diem to the operating costs of the regional jails. W. Va. Code § 31-20-10a(b)(1) provides, “The authority shall develop and approve a schedule of anticipated operational expenditures for each regional jail. The schedules shall include funds for personal services and fringe benefits for personnel necessary to the operation of the facilities, as well as allocations of funds for food, clothing, utilities, supplies, transportation and all other costs necessary to operate and maintain the facilities. The operational expenditure schedule shall include all costs, both direct and indirect, for operating and maintaining the regional jail. The authority shall develop and approve an operational expenditure schedule for each regional jail on an annual basis, consistent with the state fiscal year.” [Emphasis supplied]. The Legislature has spoken as to the source of the funding for the Authority’s central office expenses: “All costs incidental to the administration of the authority, including office expense, personal services expense and current expense, shall be paid from the regional jail and correctional facility development fund in accordance with guidelines issued by the board of the authority.” W. Va. Code § 31-20-4(e). The source of revenue for such “fund” is not the payment of the users of regional jails, but from the “sale of bonds or other borrowing authorized by this article.” W. Va. Code § 31-20-10(f)(1). Indeed, W. Va. Code § 31-20-10(f)(3) specifically states: “After any requirements of debt service have been satisfied, the authority shall requisition from these funds the amounts that are
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necessary to provide for payment of the administrative expenses of this article.” It cannot be clearer that foisting the Authority’s central office expenses on the counties is completely contrary to the Legislature’s intent that their obligations be limited to the “costs . . . for operating and maintaining the regional jail” serving those counties.

9. Fourth, Emergency Rule Title 94 completely eliminates “renovation” from the operational expenditure schedule in a manner directly contrary to statute: “The per diem costs for incarcerating inmates may not include the cost of construction, acquisition or renovation of the regional jail facilities.” W. Va. Code § 31-20-10(h)(emphasis supplied). If the Secretary approves this emergency rule, it will clearly be done in direct and utter disregard for statute, and will result in the imposition of renovation costs on the counties and other users of the regional jail system. Certainly, if the Legislature wants to amend the statute to require counties and other uses to pay for regional jail renovations, which might bankrupt some counties, such might be the Legislature’s prerogative, but to allow the Authority to do so is completely contrary to the applicable law.
  
10. Fifth, Emergency Rule Title 94 blatantly disregards the statute and effectively alters the entire regional jail concept by centralizing the budgeting process: “The Authority shall, on an annual basis, prepare an estimate of the cost of operating ~~each regional jail~~ the regional jail system and maintaining inmates therein. This estimate of cost will be expressed as the cost of maintaining one (1) inmate for (1) day. The estimate shall include all costs of operating ~~each regional jail~~ and maintaining the Regional Jail System.” Emergency Rule 4.1. Again, it cannot be clearer that this is directly contrary to statute: “The authority shall develop and approve a schedule of anticipated operational expenditures for each regional jail. The schedules shall include funds for personal services and fringe benefits for personnel necessary to the operation of the facilities, as well as allocations of funds for food, clothing, utilities, supplies, transportation and all other costs necessary to operate and maintain the facilities. The operational expenditure schedule shall include all costs, both direct and indirect, for operating and maintaining the regional jail. The authority shall develop and approve an operational expenditure schedule for each regional jail on an annual basis, consistent with the state fiscal year.” W. Va. Code § 31-20-10a(b)(2)(emphasis supplied). An agency’s ability to promulgate emergency legislative rules is not a license to get out an Etch-A-Sketch®, turn the Code upside down, shake it a little, and re-write the law. Approval of this Rule could not be more contrary

to statute as the Rule takes verbiage directly from W. Va. Code § 31-20-10a(b)(2) and simply re-writes it.

11. Sixth, Emergency Rule Title 94's amendments to W. Va. C.S.R. § 94-3-5 is also obviously contrary to statute by creating a new fund, expanding the obligations of users to include central office expenses, expanding the obligations of users to include renovations, and otherwise completely ignoring the statute regarding how the regional jail per diem is to be calculated and charged. W. Va. Code § 31-20-10a(c) provides, "The county is responsible for costs incurred by the authority for housing and maintaining inmates in its facilities who have not been committed to the custody of the commissioner of corrections." It does not impose upon counties the cost of maintaining the Authority's central office. It does not impose upon counties the cost of renovating regional jails. It is brilliant in its simplicity – it requires counties to pay the per diem cost of operating and maintaining the regional jails served by those counties. All of the other expenses of the "regional jail system," under the existing statutes, are to be paid through the sale of bonds, borrowing, investments, and legislative appropriations. Again, if the Legislature wants to amend the statute to alter the funding structure for the regional jail system, such is likely a legislative prerogative, but the Authority cannot amend the statutes upon which it relies for its existence through the promulgation of emergency legislative rules.
12. Seventh, Emergency Rule Title 94 blatantly disregards the existing statute by extending the financial obligations of counties to include the "costs incurred by the regional jails for housing and maintaining inmates who are being held as a fugitive" until "the date of the extradition hearing in Circuit Court." Emergency Rule 7.6. W. Va. Code § 31-20-10a(h) plainly provides, "The costs incurred by the authority for housing and maintaining inmates who are being held as fugitives from justice from another jurisdiction shall be billed to the fugitive's demanding jurisdiction, except the costs incurred by the authority for housing and maintaining any person who is arrested and confined in one of the authority's facilities on the basis of the commission of a new crime shall be billed to the arresting county until the pending West Virginia charges have been properly resolved." It is well-known that the Authority has difficulty in collecting the costs of maintaining fugitives from other states. The Legislature has provided, however, that those costs are to be collected only from those states unless the prisoner was arrested for a new crime, under which circumstances the "arresting county" is responsible for the incarceration "until the pending West Virginia charges have been

properly resolved.” The Authority may not expand the scope of a county’s obligations in such regard through the promulgation of an emergency legislative rule.

13. Eighth, Emergency Rule Title 94 ignores the existing statutory language for the assessment of surcharges. W. Va. Code § 31-20-10a(b)(2) provides, “If the actual operational costs exceed the approved schedule of operational expenditures by more than ten percent in a line item, the authority’s executive director shall add a temporary surcharge to the cost per inmate day in an amount sufficient to cover the actual expenditures.” The Emergency Rule simply disregards this statute and new “two fiscal quarters” formula.
14. Finally, Emergency Rule Title 94 creates a new “Operational Reserve Fund,” which is not authorized by statute, into which the Authority may accumulate “an amount consistent with four months of anticipated operational expenditures.” In other words, the Authority, without any statutory provision, will be allowed to carry over, from year-to-year, as much as 25 percent of its total annual budget.
15. W. Va. Code § 29A-3-15a(a) provides, “Upon the filing of an emergency rule or filing of an amendment to an emergency rule by an agency, under the provisions of section fifteen of this article, by any agency, except for the secretary of state, the secretary of state shall review such rule or such amendment and, within forty-two days of such filing, shall issue a decision as to whether or not such emergency rule or such amendment to an emergency rule should be disapproved.” Respectfully, these emergency rules, for the foregoing reasons, should be disapproved.
16. Alternatively, “If . . . the secretary of state concludes that the information submitted by the agency is insufficient to allow a proper determination to be made as to whether the emergency rule should be disapproved, he may make further investigation, including, but not limited to, requiring the agency or other interested parties to submit additional information or comment or fixing a date, time and place for the taking of evidence on the issues involved in making a determination under the provisions of this section.” W. Va. Code § 29A-3-15a(c).

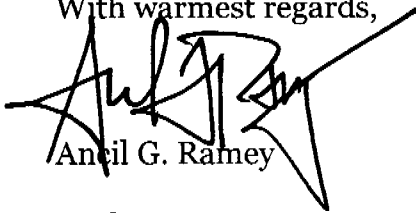
Obviously, these emergency rules are of grave concern to the Cabell County Commission and every county commission and county officer in the State. What the Authority has done is use Judge Pancake’s ruling as an opportunity to re-write the statute, under the guise of an “emergency” that does not exist, in a manner more satisfactory to the Authority. This,

The Honorable Betty Ireland  
Emergency Rule Title 94  
July 17, 2006  
Page 9

respectfully, the Authority cannot do and the Cabell County Commission requests that you either (1) disapprove the rules or (2) make a further investigation including allowing other interested parties to submit additional information or comment and/or scheduling the matter for an evidentiary hearing.

Thank you for considering the Cabell County Commission's comments to these emergency rules. If I can be of any further assistance, please let me know.

With warmest regards,



Ancil G. Ramey

Enclosure

cc: Hon. David M. Pancake, Judge (w/encl.)  
Rules Comm., Regional Jail and Correctional Facility Authority (w/encl.)  
Chad M. Cardinal, Esq. (w/encl.)  
Gary E. Pullin, Esq. (w/encl.)  
Jack C. McClung, Esq. (w/encl.)  
William T. Watson, Esq. (w/encl.)  
Stephen J. Zoeller, Administrator (w/encl.)

**IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA**

**STATE ex rel. West Virginia  
Regional Jail and Correctional  
Facility Authority,**

**Petitioner,**

**v.**

**CIVIL ACTION NO. 05-C-0590  
Judge David M. Pancake**

**COUNTY COMMISSION OF CABELL  
COUNTY, WEST VIRGINIA; BOB BAILEY,  
as President; W. SCOTT BIAS, as  
Commissioner; and NANCY CARTMILL,  
as Commissioner,**

**Respondents.**

**FINAL ORDER**

On a former day, to-wit, April 20, 2006, came the parties, by their respective attorneys, for purposes of a hearing on cross-motions for summary judgment. Upon consideration of the motions, memoranda, and argument of counsel, the Court is of opinion to and doth hereby make the following findings of fact and conclusions of law:

**Findings of Fact**

1. The Court hereby adopts the stipulations of facts submitted by the parties, with the exceptions of clarifying that the Supreme Court of Appeals did not remand the case to this Court, but issued a rule in mandamus returnable to this Court, and that although the Cabell County jail was placed into receivership by the United States District Court for the Southern District of West Virginia in 1981, such placement was not opposed by the Cabell County Commission, and other public entities that opposed federal receivership of their jails throughout the country during this period were generally successful.

2. The Court finds that Jail Authority member Dan Huck participated and voted by telephone in a meeting conducted on February 10, 2004.

3. The Court has been presented with no evidence that the Jail Authority had adopted any rules or regulations permitting members to attend Jail Authority meetings by telephone.

4. The Court finds that Jail Authority member Tom Susman did not attend a meeting conducted on February 10, 2004, but voted by proxy.

5. The Court finds that the letter dated July 12, 2004, from John Poffenbarger, Acting Secretary of the Department of Administration, Mr. Susman's successor, appointing Donna Lipscomb, as his Jail Authority designee, is insufficient to establish Ms. Lipscomb's appointment by Mr. Susman five months earlier.

6. The Court finds that no evidence has been presented that Mr. Susman had officially appointed Ms. Lipscomb as his Jail Authority designee prior to the meeting of February 10, 2004.<sup>1</sup>

7. The Court finds that Ms. Lipscomb voted "by proxy," as indicated in official Jail Authority minutes, which is contrary to the Jail Authority's own procedural rules.

8. The Court finds that the only voting members of the Jail Authority who attended the meeting of February 10, 2004, were Christy Morris and Glen Stotler as (i) Dan Huck participated by telephone; (ii) Tom Susman did not attend and voted by proxy; (iii) Willie Akers was absent; (iv) Tennis Hatfield was absent; and (vii) John Walden was absent.

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<sup>1</sup>The Jail Authority's request at the hearing to supplement the record with any such evidence was rejected as the time for discovery had closed, as the parties had agreed to proceed by stipulations, and it would have been unfair to the Commission to allow the record to be supplemented following the hearing and the filing of stipulations.

9. The Court finds that the two non-voting members, Manfred Holland and Jim Rubenstein, attended the meeting on February 10, 2004.

10. The Court finds that only two of the seven voting members of the Jail Authority were "present" at the meeting on February 10, 2004, and only four of the nine total members of the Jail Authority were "present" at the meeting on February 10, 2004.

11. The Court finds that W. Va. C.S.R. § 94-3-5 is a "procedural rule."

12. The Court finds that W. Va. C.S.R. § 94-3-5 has not been amended since 1995 and does not make reference to the Western Regional Jail.

#### **Conclusions of Law**

1. W. Va. Code § 31-20-1(b)(1) provides, "The purposes of this article are as follows: To provide a cost-efficient system within this state for the construction, maintenance and operation of adult jails and correctional facilities."

2. W. Va. Code § 31-20-3 provides, "The authority shall be governed by a board of nine members, seven of whom are entitled to vote on matters coming before the authority. The complete governing board shall consist of the commissioner of the division of corrections; the director of the division of juvenile services; the secretary of the department of military affairs and public safety; the secretary of the department of administration, or his or her designated representative; three county officials appointed by the governor, no more than two of which may be of the same political party; and two citizens appointed by the governor to represent the areas of law and medicine. The commissioner of the division of corrections and the director of the division of juvenile services shall serve in an advisory capacity and are not entitled to vote on matters coming before the authority."

3. W. Va. Code § 31-20-4(b) provides, "A majority of the members of the board constitute a quorum, and a quorum must be present for the board to conduct business. Unless the bylaws require a larger number, action may be taken by majority vote of the members present."

4. W. Va. C.S.R. § 94-1-8.1 provides, "A majority of the members of the Board shall constitute a quorum. The affirmative vote of a majority of all members present at any meeting shall be sufficient to approve any action. Proxy voting is hereby prohibited; duly qualified members of the Board, or their designee as provided by W. Va. Code § 31-20-3, are permitted to vote."

5. Any action taken by a public body in the absence of a quorum is void. *See, e.g. In re Tax Assessments Against Pocahontas Land Co.*, 172 W. Va. 53, 303 S.E.2d 691 (1983)(lack of quorum rendered void action taken at meeting of county board of equalization and review).

6. The Court concludes that the Jail Authority lacked a quorum at its meeting on February 10, 2004; that the Jail Authority's action in increasing the per diem from \$45.00 to \$48.50 is void; and that the Jail Authority must reduce the amount allegedly owed by the Commission from and after July 1, 2004, by \$3.50 for every inmate day charged to the Commission.

7. Since 1998, W. Va. Code § 31-20-10(h) has provided, "When inmates are placed in a regional jail facility pursuant to subsection (g) of this section, the county shall pay into the regional jail and correctional facility authority fund a cost per day for each incarcerated inmate to be determined by the regional jail and correctional facility authority according to criteria and by procedures established by legislative rules proposed for promulgation pursuant to article three, chapter twenty-nine-a of this code and as established in section ten-a of this article to cover the costs of operating the regional jail facilities of this state to maintain each inmate. The per diem costs for

incarcerating inmates may not include the cost of construction, acquisition or renovation of the regional jail facilities . . . .”

8. The term “legislative rule” is defined by W. Va. Code § 29A-1-2(d) as “every rule, as defined in subsection (i) of this section, proposed or promulgated by an agency pursuant to this chapter. Legislative rule includes every rule which, when promulgated after or pursuant to authorization of the legislature, has (1) the force of law, or (2) supplies a basis for the imposition of civil or criminal liability, or (3) grants or denies a specific benefit. Every rule which, when effective, is determinative on any issue affecting private rights, privileges or interests is a legislative rule. Unless lawfully promulgated as an emergency rule, a legislative rule is only a proposal by the agency and has no legal force or effect until promulgated by specific authorization of the legislature.”

9. The term “procedural rule” is defined by W. Va. Code § 29-1-2(h) as “every rule, as defined in subsection (i) of this section, which fixes rules of procedure, practice or evidence for dealings with or proceedings before an agency, including forms prescribed by the agency.”

10. W. Va. C.S.R. § 94-3-5 provides:

5.1. The Authority shall sum the operational costs of each regional jail and shall divide the total of such anticipated operational expenditures by the total anticipated number of inmate days in each of the regional jails to yield the cost per inmate day as the quotient.

5.1.1. If the Authority has revenue available for use as operational funds, the Authority may apply such revenue to the total of the schedule of operational expenditures before calculating the cost per inmate day. In such case, the net operational costs shall become the dividend.

5.1.2. The anticipated number of inmate days to be provided in a fiscal year shall be the product of the bed capacity of the regional jail multiplied by a capacity factor of ninety percent (90%), multiplied by the number of days in the fiscal year: Provided, that, the bed capacity of the regional jails shall be defined as follows:

Eastern Regional Jail 120;  
Central Regional Jail 192;  
South Central Regional Jail 288;  
Northern Regional Jail &  
Correctional Facility 192; and,  
Southern Regional Jail 288.

5.1.3. The Authority may, when operational history is available on any regional jail for more than two years, increase the capacity factor described in § 5.1.2. to reflect the actual population levels documented for that particular regional jail: provided, that, in no event shall the population factor be greater than one hundred per cent (100%) of the bed capacity for the regional jail.

5.2. The Authority shall collect the cost per inmate day from each entity for which an inmate is maintained in a regional jail.

W. Va. C.S.R. § 94-3-5, however, was adopted as a “procedural rule,” not a “legislative rule.”

11. Where an administrative agency is directed to promulgate a “legislative rule,” requiring approval by the Legislature in order to have the force and effect of law, but fails to follow the statutory procedures for promulgation of legislative rules, any rule promulgated in violation of the legislative directive is invalid. Syl. pt. 1, *Chico Dairy Co. Store No. 22 v. Human Rights Comm'n*, 181 W. Va. 238, 382 S.E.2d 75 (1989)(“The rule of the West Virginia Human Rights Commission, 6 W. Va. Code of State Rules § 77-1-2.7 (1982), defining a ‘handicapped person,’ for purposes of the West Virginia Human Rights Act, to include a person who does not in fact have a ‘handicap,’ as defined by W. Va. Code, 5-11-3(t), as amended, but who ‘is regarded as having such a handicap,’ is invalid. That rule is a ‘legislative rule’ under W. Va. Code, 29A-1-2(d), as amended, but was not submitted to the legislative rule-making review committee for its approval, as required by W. Va. Code, 29A-3-9 to 29A-3-14, as amended.”).

12. The Court concludes that because W. Va. C.S.R. § 94-3-5 was adopted as a “procedural rule” in 1994 when W. Va. Code § 31-20-10(h) used the term “regulations,” but was

never adopted as a "legislative rule" after W. Va. Code § 31-20-10(h) was amended in 1998 to require the adoption of "legislative rules," W. Va. C.S.R. § 94-3-5 is invalid.

13. W. Va. Code § 31-20-10a(a) provides, "This section applies to the regional jail and correctional facility authority, counties, municipalities, the division of corrections, the United States marshal service, the United States bureau of prisons and any other entity by whose authority inmates are incarcerated and maintained in facilities operated by the authority."

14. W. Va. Code § 31-20-10a(b)(1) provides, "The authority shall develop and approve a schedule of anticipated operational expenditures for each regional jail. The schedules shall include funds for personal services and fringe benefits for personnel necessary to the operation of the facilities, as well as allocations of funds for food, clothing, utilities, supplies, transportation and all other costs necessary to operate and maintain the facilities. The operational expenditure schedule shall include all costs, both direct and indirect, for operating and maintaining the regional jail. The authority shall develop and approve an operational expenditure schedule for each regional jail on an annual basis, consistent with the state fiscal year."

15. W. Va. Code § 31-20-10a(b)(2) provides, "If the actual operational costs exceed the approved schedule of operational expenditures by more than ten percent in a line item, the authority's executive director shall add a temporary surcharge to the cost per inmate day in an amount sufficient to cover the actual expenditures."

16. W. Va. Code § 31-20-10a(c) provides, "The county is responsible for costs incurred by the authority for housing and maintaining inmates in its facilities who have not been committed to the custody of the commissioner of corrections."

17. The Court concludes that, pursuant to statute, a county is responsible only for the actual operational costs per inmate day at the regional jail for which charges are being assessed.

18. The Court concludes that the Jail Authority must reduce the amount allegedly owed by the Commission from and after July 1, 2004, to \$40.42, the amount stipulated by the parties to be the actual operational cost per inmate day for the Western Regional Jail for fiscal year 2005, for every inmate day charged to the Commission from and after July 1, 2004.

19. The Court concludes that if, after the entry of this Order, the "actual operational costs" per inmate day of the Western Regional Jail exceed \$40.42 by "more than ten percent," the Jail may "add a temporary surcharge to the cost per inmate day in an amount sufficient to cover the actual expenditures" at the Western Regional Jail.<sup>2</sup>

20. W. Va. Code § 31-20-10(h) provides, "When inmates are placed in a regional jail facility pursuant to subsection (g) of this section, the county shall pay into the regional jail and correctional facility authority fund a cost per day for each incarcerated inmate to be determined by the regional jail and correctional facility authority according to criteria and by procedures established by legislative rules proposed for promulgation pursuant to article three, chapter twenty-nine-a of this code and as established in section ten-a of this article to cover the costs of operating the regional jail facilities of this state to maintain each inmate."

21. W. Va. Code § 31-20-10(g) provides, "After a regional jail facility becomes available pursuant to this article for the incarceration of inmates, each county within the region shall

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<sup>2</sup>The Court also notes that there is no evidence in the record that W. Va. C.S.R. § 94-3-5 was adopted following notice, public hearing, and comment. Series 5 of the Jail Authority's procedural rules was originally promulgated in 1994. W. Va. C.S.R. § 94-3-5 was originally adopted in 1994. The Jail Authority presented evidence of notice, public hearing, and comment in 1995, but the

incarcerate all persons whom the county would have incarcerated in any jail prior to the availability of the regional jail facility in the regional jail facility except those whose incarceration in a local jail facility used as a local holding facility is specified as appropriate under the standards and procedures developed pursuant to section nine of this article and who the sheriff or the circuit court elects to incarcerate therein.”

22. W. Va. Code § 31-20-10a(a) provides, “This section applies to the regional jail and correctional facility authority, counties, municipalities, the division of corrections, the United States marshal service, the United States bureau of prisons and any other entity by whose authority inmates are incarcerated and maintained in facilities operated by the authority.”

23. W. Va. Code § 31-20-10a(i) provides, “Any other entity or jurisdiction, unless otherwise stipulated in this section, is responsible for any and all costs associated with housing its inmates in a facility operated by the authority.”

24. W. Va. C.S.R. § 94-3-4 provides:

4.1. The Authority shall, on an annual basis, prepare an estimate of the cost of operating each regional jail and maintaining inmates therein. This estimate of cost will be expressed as the cost of maintaining one (1) inmate for one (1) day. This estimate shall include all costs of operating each regional jail.

4.2. The annual statement of cost per inmate day will be forwarded to both the Sheriff and the county commission of each county, the Commissioner of the Division of Corrections, the United States Marshals Service, the United States Bureau of Prisons and the mayor of each municipality served by the regional jail to provide notice of per diem costs and for their use in preparing their own budgets.

4.3. The annual statement of cost per inmate day for each regional jail may be provided, upon request, to any other entity on whose behalf an inmate may be incarcerated in a regional jail.

25. The Commission argues that, reading these statutes and regulations in pari materia, counties should not be responsible for inmates who are incarcerated following arrests by municipal law enforcement authorities, but that municipalities should be responsible for those inmates. The Jail Authority argues that municipalities are responsible for inmates processed through municipal court, but that counties are responsible for inmates processed through magistrate court.

26. W. Va. Code § 31-20-10a(c) provides, "The county is responsible for costs incurred by the authority for housing and maintaining inmates in its facilities who have not been committed to the custody of the commissioner of corrections."

27. The Court notes that efforts have been unsuccessful to amend the statute to place some financial responsibility on municipalities for the cost of incarcerating inmates in regional jails who were arrested by municipal law enforcement authorities, from which an inference can be drawn that proponents of such legislation believe the current statute does not place such responsibility on municipalities.

28. The Court concludes that Cabell County municipalities are not responsible for inmates incarcerated in regional jails where such inmates are incarcerated pursuant to an order of a circuit court or magistrate court, but that the Commission is responsible for the per diem cost of such inmates.

29. In Syllabus Point 1 of *State ex rel. Buxton v. O'Brien*, 97 W. Va. 343, 125 S.E. 154 (1924), the Court held, "Mandamus is a proper remedy to compel tribunals and officers exercising

discretionary and judicial powers to act, when they refuse so to do, in violation of their duty, but it is never employed to prescribe in what manner they shall act, or to correct errors they have made.”<sup>3</sup>

30. In *State ex rel. Canterbury v. County Court*, 151 W. Va. 1013, 158 S.E.2d 151 (1967), the County Clerk of Wayne County sued the Wayne County Court after it reduced the county clerk’s budget when it had incurred a substantial deficit at the close of the preceding fiscal year. Reversing a trial court’s ruling that the county commission was obliged to fund the county clerk’s office to allow its efficient operation, the Court held in Syllabus Point 2 that:

In the absence of arbitrary action on the part of a county court in the exercise of its discretion as to the sum to be allotted to the office of the county clerk for the compensation of deputies and assistants for the ensuing fiscal year, in accordance with the provisions of Code, 7-7-7, as amended, mandamus will not lie.

Thus, in the absence of arbitrary action, this Court lacks authority to order the Commission to exercise its budgetary powers in any particular manner.

31. In *State ex rel. Bd. of Educ. v. Rockefeller*, 167 W. Va. 72, 281 S.E.2d 131 (1981), the State of West Virginia was faced with a budget crisis. In order to address an impending deficit, the Governor ordered an across-the-board reduction in the State budget. The Governor’s action was challenged by a county board of education on the grounds that the cut would impede its ability to

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<sup>3</sup>See also Syl. pt. 6, *State ex rel. Affiliated Const. Trades Foundation v. Vieweg*, 205 W. Va. 687, 520 S.E.2d 854 (1999); *State ex rel. State v. Gustke*, 205 W. Va. 72, 77 n.2, 516 S.E.2d 283, 288 n.2 (1999); Syl. pt. 8, *Nobles v. Duncil*, 202 W. Va. 523, 505 S.E.2d 442 (1998); Syl. pt. 2, *State ex rel. Billy Ray C. v. Skaff*, 191 W. Va. 178, 459 S.E.2d 921 (1995); Syl. pt. 4, *Paxton v. State Dept. of Tax and Revenue*, 192 W. Va. 213, 451 S.E.2d 779 (1994); Syl. pt. 3, *Anderson v. Richardson*, 191 W. Va. 488, 446 S.E.2d 710 (1994); Syl. pt. 3, *Thompson v. W. Va. Bd. of Osteopathy*, 191 W. Va. 15, 442 S.E.2d 712 (1994); Syl. pt. 6, *Lyons v. Richardson*, 189 W. Va. 157, 429 S.E.2d 44 (1993); *State ex rel. Coats v. Means*, 188 W. Va. 233, 235, 423 S.E.2d 636, 638 (1992); Syl., *Ney v. West Virginia Workers' Compensation Fund*, 186 W. Va. 180, 411 S.E.2d 699 (1991); Syl. pt. 2, *State ex rel Lambert v. Cortellessi*, 182 W. Va. 142, 386 S.E.2d 640 (1989).

perform its constitutional obligation to provide a "thorough and efficient" system of public education. The Supreme Court agreed, compelling the Governor to restore the expenditures reduced for public education, holding in Syllabus Points 1 and 2 that:

1. The provisions of Article XII, Section 1 et seq., as well as Article X, Section 5 of the West Virginia Constitution, when construed in the light of our prior cases, gives a constitutionally preferred status to public education in this State.

2. Because of public education's constitutionally preferred status in this State, expenditures for public education cannot be reduced under W. Va. Code, 5A-2-23, in the absence of a compelling factual record to demonstrate the necessity therefor.

Likewise, in the earlier case of *Chiles v. Bailey*, Civil Action No. 05-C-162, the Commission acknowledged the merits of the constitutional officers' arguments that the budget revisions ordered jeopardized their ability to perform their constitutional obligations.

32. This Court hereby reaffirms its final order in *Chiles v. Bailey*, Civil Action No. 05-C-162, wherein this Court concluded that under circumstances where a county has exhausted its constitutional and statutory revenue sources, but has insufficient funds to finance all of its constitutional, statutory, and contractual obligations, a county must first fully fund all of its constitutional obligations and, thereafter, if additional funds remain, fund so much of its statutory obligations as possible and, thereafter, if additional funds remain, fund so much of its contractual obligations as possible.

33. This Court also reaffirms its holding in *Chiles v. Bailey*, Civil Action No. 05-C-162, that this Court is without jurisdiction, under W. Va. Const. art. VI, § 1, to order the Respondent Commission to exercise its budgetary authority in any specific manner, but is authorized only to prevent it from exercising such budgetary authority in an unreasonable and arbitrary manner. *State*

*ex rel. Lambert v. Cortellessi*, 182 W. Va. 142, 386 S.E.2d 640 (1989); *Meador v. County Court*, 141 W. Va. 96, 87 S.E.2d 725 (1955); *State v. Tyler County Court*, 112 W. Va. 406, 164 S.E. 515 (1932); 20 C.J.S. Counties § 200 (2004) (“Courts are reluctant to interfere with the budgetary process, and the action of the county commissioners in fixing budgets may be reviewed only for abuse of discretion.”)(footnotes omitted)”

WHEREFORE, for the reasons herein set forth, the Court is of opinion to grant, in part, and deny, in part, the cross-motions for summary judgment; to order that the Commission is liable to the Jail Authority for per diem charges as adjusted in accordance to the foregoing findings of fact and conclusions of law; to order that each side is to bear its own costs; and to order that this case be dismissed from the Docket of this Court.

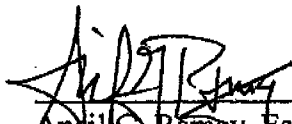
The objections and exceptions to this Final Order by the Petitioner and the Respondents are duly noted and the Clerk of this Court is hereby directed to provide a copy to all counsel of record upon its entry.

Entered this 15 th day of May, 2006.

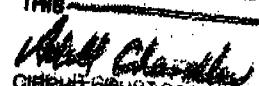


Hon. David M. Pancake, Judge

Prepared by:

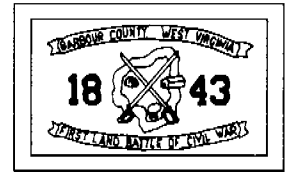


Ancil G. Ramey, Esq.  
WV State Bar No. 3013  
Counsel for Respondents

STATE OF WEST VIRGINIA  
COUNTY OF CABELL  
I, ADELL CHANDLER, CLERK OF THE CIRCUIT  
COURT FOR THE COUNTY AND STATE AFORESAID  
DO HEREBY CERTIFY THAT THE FOREGOING IS  
A TRUE COPY FROM THE RECORDS OF SAID COURT  
ENTERED ON MAY 15 2006  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT  
THIS MAY 15 2006  
 CLERK  
CIRCUIT COURT OF CABELL COUNTY WEST VIRGINIA

*Gary E. Pullin by ACP*

Gary E. Pullin, Esq.  
WV State Bar No. 4528  
*Counsel for Petitioner*



DEPUTIES:

MACEL AUVIL  
PAM FOSTER  
LESA COONTZ  
DEBRA KITTLE

COUNTY ADMINISTRATOR:

CHARLES W. FOLEY  
PHONE 304-457-4339  
FAX 304-457-5472  
E-MAIL: barbour@bcnetmail.org

## County Commission of Barbour County

DEBRA H. TALBOTT  
8 NORTH MAIN ST.  
PHILIPPI, WEST VIRGINIA 26416  
TDD 911

COUNTY COMMISSIONERS:

TIMOTHY L. McDANIEL  
PRESIDENT  
ROUTE 2, BOX 71E  
PHILIPPI, WV 26416  
  
STEVEN H. SINSEL  
ROUTE 1, BOX 48G  
PHILIPPI, WV 26416  
  
PHIL HART  
RR03, 212 SERPELL AVE.  
BELINGTON, WV 26250

July 21, 2006

Betty Ireland - Secretary of State  
Building 1, Suite 157-K  
1900 Kanawha Blvd, East  
Charleston, WV 25305

Re: Comment on Regional Jail Authority Emergency Rule Title 94

Dear Secretary

The Barbour County Commission believes that Emergency Rule Title 94 should be denied with your office should be denied based on the Cabell County Commission claims and the Courts findings in the case with the Regional Jail Authority.

Emergency rule 94 disregards, defies and contradicts existing statute.

The Commission believes the issues involved should be scrutinized and the intent of the Legislature be observed.

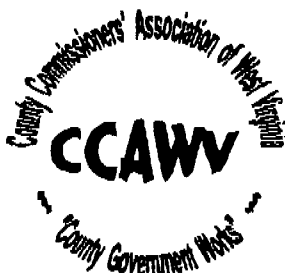
Respectfully submitted,

*Philip Hart*  
Philip Hart, President  
Barbour County Commission

cc

Mary Poling - Delegate  
Sarah Minear - Senator  
Jon Hunter - Senator

FILED  
2006 JUL 24 A 11:06  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE



# County Commissioners' Association of West Virginia

2309 Washington Street, East

Charleston, West Virginia 25311

E-mail [cawv@citynet.net](mailto:cawv@citynet.net) (304) 345-4639 Fax (304) 346-3512

July 24, 2006

The Honorable Betty Ireland  
Secretary of State  
Building 1, Suite 157-K  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305-0770

Re: Emergency Rule Title 94

Dear Secretary Ireland:

FILED  
2006 JUL 25 A 11: 12  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE

The County Commissioners' Association of West Virginia writes to voice our objection to the approval of Emergency Rule Title 94 – West Virginia Regional Jail & Correctional Facility Authority.

While we concede that revision of the existing *"criteria and procedures for determination of projected cost per day for inmates incarcerated in regional jails operated by the authority"* may be necessary, we do not believe that this revision should take place by filing an "emergency legislative rule." First of all we do not believe that a "procedural rule" can be made a "legislative rule" through an emergency filing. As can be seen from the face of the rules themselves, they were originally promulgated as "procedural rules," not "legislative rules;" thus, they cannot be amended under WV Code 29A-3-15(a). The only way for the Regional Jail and Correctional Facility Authority to promulgate emergency legislative rules would be to promulgate an entirely new set of legislative rules, not amend old procedural rules. Legislative rules should go through the legislative process, with full and open debate on the merit of such rules allowing participation of all involved parties.

Secondly, we believe the Authority has failed to establish an "emergency" situation. The emergency filing indicated that Judge Pancake's ruling in Cabell County Circuit Court, Case Number 05-C-590, found the current rule invalid, creating a need for this emergency rule. However, by agreement of the parties involved, Judge Pancake's order has been stayed pending appeal, which will not be resolved before the next legislative session, thus there is no emergency. Again, the issue of a methodology for calculating the regional jail per diem, should be addressed by the Legislature and/or the Legislative Rule-Making Review Committee, allowing ample time and opportunity for active involvement by all affected parties.

The County Commissioners' Association of West Virginia strongly objects to the approval of these emergency rules. Thank you for your consideration of our objections.

Sincerely,

Karen Disibbio, President

cc: Regional Jail Authority, Rules Committee  
CCAWV Board of Directors  
Cabell County Commission

**Vivian Parsons, Executive Director**  
visit our web site [www.ncjrs.org/ccawv](http://www.ncjrs.org/ccawv)

# KANAWHA COUNTY COMMISSION

Post Office Box 3627  
Charleston, West Virginia 25336



Telephone (304) 357-0101  
Fax (304) 357-0788

Henry C. Shores  
Commissioner

W. Kent Carper  
Commissioner

David J. "Dave" Hardy  
Commissioner

July 25, 2006

**Via Facsimile 304.558.0900  
and Regular United States Mail**  
The Honorable Betty S. Ireland  
Secretary of State  
Building 1, Suite 157-K  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305-0770

Re: **Emergency Rule Title 94**

FILED  
2006 JUL 25 P 2:12  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE

Dear Secretary Ireland:

At their meeting on July 20, 2006, the County Commission of Kanawha County, West Virginia, ("Kanawha County Commission") agreed to object to the approval of Emergency Rule Title 94 filed in your office on June 28, 2006. The Kanawha County Commission fully supports and agrees with the objections of the County Commission of Cabell County, West Virginia ("Cabell County Commission").

Just about all counties in the state have been laden with the increased per diem jail costs, which ultimately impacts providing basic services, like water and sewer, to the citizens of their respective counties. Kanawha County has met similar issues in budgeting for the jail costs and funding alternative solutions to the jail, with the agreement of the judicial system.

The Regional Jail Authority has failed to show that there is an emergency in which the rule must be created. West Virginia Code § 29A-3-15a provides that the Secretary of State shall disapprove an emergency rule if an emergency does not exist. West Virginia Code § 31-20-10a(b)(2) already provides "If the actual operational costs exceed the approved schedule of operational expenditures by more than ten percent in a line item, the authority's executive director shall add a temporary surcharge to the cost per inmate day in an amount sufficient to cover the actual expenditures." Therefore, the Legislature has already provided a method in the case of a funding crisis, which would not require the creation of this emergency rule.



**Via Facsimile 304.558.0900  
and Regular United States Mail**  
The Honorable Betty S. Ireland  
Emergency Rule Title 94  
July 25, 2006  
Page 2

For various other reasons, which are well documented in the objections of the Cabell County Commission, dated July 18, 2006, this rule blatantly disregards W. Va. Code § 31-20-10a(a), et. seq., by including various items within the per diem cost that were previously prohibited by statute (i.e. renovation and indirect expenses).

The Regional Jail Authority has blatantly attempted to re-write the statute under which it exists, to the severe detriment of the counties in West Virginia. An "emergency" rule cannot be used for this purpose and any such change should be left to our Legislature during its regular sessions.

For all of the reasons above, as well as those provided in Cabell County Commission's objections, the Kanawha County Commission respectfully requests that you disapprove Emergency Rule Title 94.

The Kanawha County Commission appreciates your consideration in this matter.

Sincerely,

  
W. Kent Carper  
President

cc: Henry C. "Hoppy" Shores, Commissioner  
Dave Hardy, Commissioner  
Marc Slotnick, County Attorney  
Brent Pauley, County Manager  
Ancil Ramey, Esquire

July 25, 2006

**BY MAIL AND E-MAIL**  
The Honorable Betty Ireland  
Secretary of State  
Bldg. 1, Suite 157-K  
1900 Kanawha Blvd., East  
Charleston, WV 25305-0770  
Email wvsos@wvsos.com

FILED  
2006 JUL 25 P 2:48  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE

Re: Emergency Rule Title 94

Dear Secretary Ireland:

This is in response to the Jail Authority's letter dated July 25, 2006.

Nothing could articulate better the absence of an "emergency" as defined in the applicable statute than the Authority's letter:

[T]here is a real danger that counties will simply stop paying the Regional Jail Authority or, as Cabell County has, pay only such amount that the county decides in its discretion to pay.

Apparently, there has not been a single county which has stopped making its payments or has reduced its payments in light of Judge Pancake's order, which has been stayed, but only the Authority's unsubstantiated fear that such might occur. There has been not a single county which has filed suit seeking to reduce its payments in light of Judge Pancake's order, but only the Authority's unsubstantiated fear that such might occur.

W. Va. Code § 29A-3-15(f) provides, "For the purposes of this section, an emergency exists when the promulgation of an emergency rule is necessary (1) for the immediate preservation of the public peace, health, safety or welfare, (2) to comply with a time limitation established by this code or by a federal statute or regulation, or (3) to prevent substantial harm to the public interest."

It was stipulated in the proceedings before Judge Pancake that (1) the Authority ended fiscal year 2005 with a reserve of \$12.3 million and (2) the Authority's revenues exceeded its expenses by over \$15.7 million in fiscal year 2005. [Ex. A].

There is no financial emergency at the Authority, which has operated at a profit for several years and accumulated enormous cash reserves. Even if every county stopped making payments to the Authority, it could continue to operate at the same level of service on its cash reserves for three to four months. The assertion of an "emergency" by the Authority

The Honorable Betty Ireland  
Emergency Rule Title 94  
July 25, 2006  
Page 2

with over \$12 million in cash reserves based upon (1) what might, but has not occurred, and (2) a purported financial exigency, is preposterous.

Counties might stop paying the Authority and West Virginia might be hit with a tsunami, but neither unlikely future catastrophe satisfies the statutory definition of an "emergency," which justifies emergency rules "for the immediate preservation of public peace, health, safety or welfare" or "to prevent substantial harm to the public interest."

If counties stop paying or reduce their payments, and the Authority begins to exhaust its substantial cash reserves, an emergency might arguably exist, but not as circumstances currently exist. What has occurred is that the Authority is using the pretense of an emergency based upon an stayed order to rewrite the statute, but you will notice that the Authority makes no absolutely no effort to address the other problems discussed in my previous letter.

W. Va. Code § 29A-3-15(a)(1) provides, "The secretary of state, acting under the authority provided for in section fifteen-a of this article, or the attorney general, acting under the authority provided for in section fifteen-b of this article, disapproves the emergency rule because: (A) The emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof; (B) an emergency does not exist justifying the promulgation of the emergency rule; or (C) the emergency rule was not promulgated in compliance with the provisions of this section." [Emphasis supplied]. See also W. Va. Code § 29A-3-15a(b)(same).

As noted in my earlier letter, the Authority simply cannot amend a "procedural rule" into a "legislative rule." W. Va. Code § 29A-3-15(a)(1)(C). Nowhere in the Authority's letter is this issue addressed. Thus, the proposed emergency rules "was not promulgated in compliance with the provisions" of W. Va. Code § 29A-3-15(a)(1).

Moreover, nowhere in the Authority's letter does it address the nine separate ways the Authority's proposed emergency rules exceed "the scope of the law authorizing or directing the promulgation thereof."<sup>1</sup>

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<sup>1</sup>See also Syl. pt. 4, *State ex rel. Callaghan v. Civil Service Comm'n*, 166 W. Va. 117, 273 S.E.2d 72 (1980) ("Procedures and rules properly promulgated by an administrative agency with authority to enforce a law will be upheld so long as they are reasonable and do not enlarge, amend or repeal substantive rights created by statute."); *Chico Dairy, supra* at 247, 382 S.E.2d at 84 ("the rule of the West Virginia Human Rights Commission, 6 W. Va. Code of State Rules § 77-1-2.7 (1982), defining a 'handicapped person' to include a person who does not in fact have a 'handicap,' as defined by W. Va. Code, 5-11-3(t), as amended, but who 'is regarded as having such a handicap,' is invalid because that rule clearly conflicts with the legislative intent by expressly enlarging upon the substantive rights created by the statute."); W. Va. Code § 29A-3-15(d) ("The provision of this section shall not be used to avoid or evade any provision of this article or any other provisions of this code, including any provisions for legislative review and approval of proposed rules. Any

The Honorable Betty Ireland  
Emergency Rule Title 94  
July 25, 2006  
Page 3

The Authority's silence on these issues, I submit, speaks volumes.

Thus, the Cabell County Commission requests that you either (1) disapprove the rules or (2) make a further investigation including allowing other interested parties to submit additional information or comment and/or scheduling the matter for an evidentiary hearing.

Thank you for considering the Cabell County Commission's comments to these emergency rules. If I can be of any further assistance, please let me know.

With warmest regards,

Ancil G. Ramey

Enclosure

cc: Hon. David M. Pancake, Judge (w/encl.)  
Rules Comm., Regional Jail and Correctional Facility Authority (w/encl.)  
Chad M. Cardinal, Esq. (w/encl.)  
Gary E. Pullin, Esq. (w/encl.)  
Jack C. McClung, Esq. (w/encl.)  
William T. Watson, Esq. (w/encl.)  
Stephen J. Zoeller, Administrator (w/encl.)

---

emergency rule promulgated for any such purpose may be contested in a judicial proceeding before a court of competent jurisdiction."(emphasis supplied).

# Lewis County Commission

**Commissioners:**

**Robert J. Conley, President**  
**Samuel U. Hicks**  
**Robert A. Rinehart**

**P.O. Box 466**  
**Weston, WV 26452**

**County Administrators:**  
**Sheila K. Lewis**  
**Phyllis L. Corathers**

**(304) 269-8200**  
**Fax (304) 269-2416**  
**TDD 911/269-8241**

July 25, 2006

The Honorable Betty Ireland  
Secretary of State  
Building 1, Suite 157-K  
1900 Kanawha Boulevard, East  
Charleston, WV 25305-0770

FILED  
2006 JUL 26 A 9:50  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE

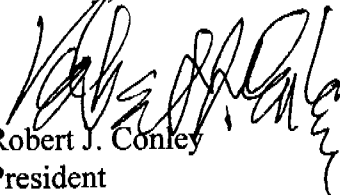
Re: Emergency Rule Title 94

Dear Secretary Ireland:

The Lewis County Commission respectfully requests that you follow West Virginia Code §29A-3-15a and disapprove Emergency Rule Title 94 which will have a negative impact on our county. We do not believe that an emergency exists in view of the Regional Jail Authority's Reserve Fund having an excess of twelve million dollars and question the legality of the Authority filing for an Emergency Rule.

We have attached a copy of the letter forwarded to the West Virginia Jail and Correctional Facility Authority to be considered during the comment period for your review. We appreciate your kind consideration of our attached comments to the Regional Jail Authority urge disapproval of Emergency Rule Title 94.

Sincerely,



Robert J. Conley  
President

RJC/skl

attachment

# Lewis County Commission

**Commissioners:**

**Robert J. Conley, President**  
**Samuel U. Hicks**  
**Robert A. Rinehart**

**P.O. Box 466**  
**Weston, WV 26452**

**County Administrators:**  
**Sheila K. Lewis**  
**Phyllis L. Corathers**

**(304) 269-8200**  
**Fax (304) 269-2416**  
**TDD 911/269-8241**

July 25, 2006

West Virginia Regional Jail and Correctional Facility Authority  
Attn: Rule Committee  
1325 Virginia Street, East  
Charleston, WV 25301

Re: Emergency Rule Title 94

Dear Committee Members:

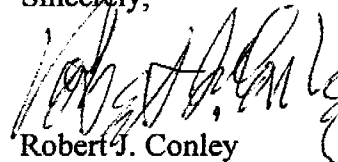
Please accept this correspondence from the Lewis County Commission opposing the approval of Emergency Rule Title 94. This rule will have a negative effect and will add to the financial burden of our county. This Commission opposes the past per diem rate increase of \$3.50 in view of the Regional Jail Authority's Reserve Fund having an excess of twelve million dollars that should have been used to offset any per diem increase. With such a Reserve Fund, we do not believe that the Regional Jail System has a funding crisis and certainly not be in an "emergency" situation.

The West Virginia Code §29A-3-15a provides a solution to this problem and will provide relief for counties as the Secretary of State, through this code section, can disapprove Emergency Rule Title 94 and any amendment to that rule.

We, the Lewis County Commission, through this comment, is urging the disapproval of the above mentioned rule and any amendment to the emergency rule and questions if the Regional Jail Authority has the legal ability to even file emergency rules.

Therefore, we respectfully urge the Secretary of State, the Honorable Betty Ireland, to consider our comments and act in accordance with the West Virginia Code by disapproving Emergency Rule Title 94.

Sincerely,



Robert J. Conley  
President

RJC/skl

COMMISSIONERS  
STEPHEN A. ANDES  
JAMES H. CARUTHERS, JR.  
R. JOSEPH HAYNES

**Putnam Commission**

33 ROAD  
WV 25213

PHONE: 586-0201  
FAX: 586-0211

July 25, 2006

The Honorable Betty Ireland  
WV Secretary of State  
Building 1  
1900 Kanawha Boulevard, East  
Charleston, WV 25305

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

2006 JUL 26 A 9:51

FILED

**RE: Proposed Emergency Amendment to Rule Title 94**

Dear Secretary Ireland:

Thank you for this opportunity to comment on the proposed emergency rule submitted by the West Virginia Regional Jail and Correctional Facility Authority ("Authority") seeking to amend 94 CSR 3 "Criteria and Procedures for Determination of Projected Cost Per Day for Inmates Incarcerated in Regional Jails Operated by the Authority". For the reasons explained below, we object to the proposal and respectfully request that you deny approval for the emergency rule.

We fail to understand why it would be necessary to amend a rule when the essential portion of the amendment will not take effect before July 1, 2007. Essentially, the amendment would alter the method by which the Authority calculates the payment counties must pay for housing inmates but provides that no increase in rates would occur before the beginning of Fiscal Year 2007. Hence, the amendment would not appear to be an emergency and for this reason, your office should not grant approval of the emergency rule.

Further, there are other changes in the proposed rule with which we disagree. We do not believe an increase in the number of inmates will necessarily increase the overall cost of operation to the point that the Authority should be authorized to inflate the bill to counties when the counties already pay for each and every inmate per each and every day. Currently, if there is an increase in the number of inmates, then there will be an increase in payments from the counties. Consequently, there would be no need for the Authority to "adjust the cost per inmate day" simply because there is a fluctuation in the number of inmates as the proposed Section 5.1.2 provides in 94 CSR 3.

The proposed change to Section 7.6 which proposes billing a county for the cost of a fugitive who was picked up in that county "from the date of the extradition hearing" would conflict with W.Va. Code Section 31-20-10a(h) which provides that the cost for fugitives be billed to the "demanding" jurisdiction and not the jurisdiction wherein the fugitive was located. This change would be contrary to law.

We also do not agree with the broad proposal of having counties pay for all expenses of the Authority, "including centralized operations expenses." Although it is reasonable for counties to pay operational expenditures of the regional jails they use, the cost of the bureaucratic office of the Authority should be born by the State of whom it is an agency – not the counties who have no say in how the state agency spends its money.

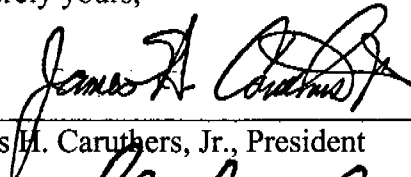
We strongly oppose the suggested change to Section 8.1 which would essentially remove the word "temporary" from the surcharge that the Authority may add onto counties' bills. Again, we believe this is another backdoor means of increasing fees to counties when there is already a measure in place in case of emergencies, to wit: the section as currently written.

Additionally, we oppose setting a minimum on the amount of excess funds the Authority would first have to accumulate before considering returning payments to counties. The proposed Section 9.3 would require the Authority to first build a "nest egg" large enough to cover four months of operational expenditures before counties could expect the possibility of having any of the excess payments returned or credited to them. We have received information that the Authority had an excess of Twelve Million Dollars in reserve funds when it increased the per diem rate for counties an additional \$3.50 per inmate per day. A county must constantly watch its budget and revenue to ensure checks will be covered for daily expenditures, including jail costs, and could never fathom having \$12,000,000 in reserves. It is shocking to learn that a state agency has such a large reserve while some less fortunate counties must scrape together money to pay utilities, much less jail fees. Thus, although we do not expect to ever see the Authority vote to "credit" counties when revenues increase, we would at least like to know that there is no minimum amount of excess funds required before the Authority may even consider the issue.

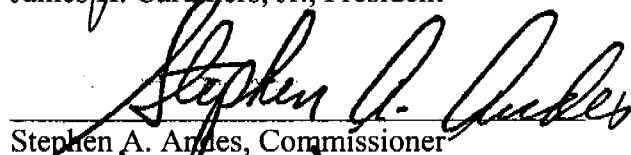
Lastly, we would like to express our support for the proposed Section 7.7 whereby municipalities would be responsible for the costs of their inmates. This would at least lessen the burden on counties who pay for the incarceration of individuals committed through municipal courts.

Again, we appreciate the opportunity to comment on the proposed emergency rule. Thank you for your attention to this matter.

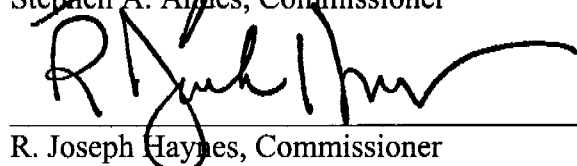
Sincerely yours,



James H. Caruthers, Jr., President



Stephen A. Ames, Commissioner



R. Joseph Haynes, Commissioner

# Wyoming County Commission

Drawer 309  
Pineville, West Virginia 24874  
Telephone 304/732-8000  
FAX 304/732-9659

D. Michael Goode, Clerk

Members of County Commission

Dr. Samuel Muscari, Sr.

H. R. Davis

Harold Hayden

The Honorable Betty Ireland  
Secretary of State  
Building 1 Suite 157 K  
1900 Kanawha Blvd, East  
Charleston, WV 35303

July 24, 2006

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

2006 JUL 26 A 9 50

FILED

Re: Emergency Rule Title 94  
Regional Jail Authority Emergency Rules

Dear Sec. Ireland:

Please be advised that on behalf of Wyoming County, West Virginia, I write to comment and protest the proposed Emergency Rule to Title 94. As proposed, there exist several amendments that are contrary to West Virginia Statute. Likewise, WV Code §29A-3-15(a) does not permit an agency to adopt, amend or repeal a procedural rule as the Regional Jail Authority is attempting.

Wyoming County Protests to the following amendments sought by Emergency Rule 94:

1. Rule 94 seeks to create a "regional jail and correctional facility fund" this new fund has never been authorized by the Legislature; therefore, it cannot be amended by an emergency procedural rule.

2. Rule 94 seeks to exempt the United States Bureau of Prisons and Marshall Service from its application. The Legislature expressly intended that these two entities be subject to the rules.

3. Rule 94 seeks to expand expenses counties are responsible for, including: operations expenses; administrative expenses; central office expenses; and, renovation expenses. These expenses are currently State expenses and any amendment regarding same would be in direct contravention to the current statute. . .which provides in-part: "the per diem costs for incarcerating inmates may not include the cost of construction, acquisition, or renovation of a regional jail."

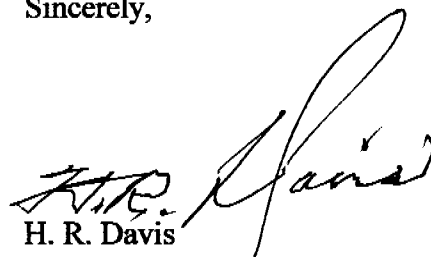
4. Rule 94 seeks to centralize the authority's budget process. The statute requires the Authority to budget operational expenses for each regional jail.

5. Rule 94 seeks to create an "Operational Reserve Fund" this would allow the Authority to reserve up to 25% of its budget. This is not authorized by statute.

6. Rule 94 seeks to extend the financial obligations of counties for housing fugitive inmates. Again, this is not authorized by current statute.

Thank you for your consideration of Wyoming County's comment to the proposed Emergency Rule 94 being offered by the Regional Jail Authority. It is our County's opinion that these emergency proposals are outside the ambit of the Regional Jail Authority. Any amendments, especially those contemplated herein, should be left to the judgement of our Executive and Legislative branches of government.

Sincerely,



H. R. Davis  
President, Wyoming County  
Commission

OFFICE OF THE  
PROSECUTING ATTORNEY  
GRANT COUNTY  
P.O. BOX 515  
PETERSBURG, WEST VIRGINIA 26847  
TELEPHONE 304-257-2323



DENNIS V. DIBENEDETTO  
PROSECUTING ATTORNEY

July 26, 2006

The Honorable Betty Ireland  
Secretary of State  
Building 1, Suite 157-K  
1900 Kanawha Blvd., East  
Charleston, WV 25305-0770

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

2006 JUL 26 P 1:24

FILED

Re: Emergency Rule Title 94  
Regional Jail and Correctional  
Facility Authority

Dear Secretary Ireland:

At a meeting of the Grant County Commission held on July 25, 2006, the Commission unanimously voted and authorized me to file this objection to approval of the above listed Emergency Rule. The Commissioners have reviewed the objections filed on behalf of the Cabell County Commission and the West Virginia Association of Counties. The Commission fully concurs with the positions and points of law relied upon in those objections.

The Commission is greatly concerned by the Regional Jail Authority's attempt to circumvent the law and by illegal and improper action foist upon the Counties rules, regulations and excessive financial burdens not specifically authorized by the Legislature. Therefore, the Commission would request that you not approve said Emergency Rule and prevent this attempt to bypass proper legislative debate and action on the issues raised.

Yours truly,

Dennis V. DiBenedetto

cc: Wyetta Fredericks, Executive Director  
Chad M. Cardinal, Esq.  
Ancil G. Ramey, Esq.  
Jack C. McClung, Esq.  
Grant County Commission

# STATE OF WEST VIRGINIA



## WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY

1325 VIRGINIA STREET, EAST  
CHARLESTON, WV 25301-3011  
(304) 558-2110  
FAX: (304) 558-2115

**JOE MANCHIN III**  
Governor

**WYETTA FREDERICKS**  
Executive Director

July 26, 2006

Secretary Betty Ireland  
Secretary of State  
1900 Kanawha Blvd, East  
Charleston, WV 25305

### **Re: Emergency Rule Title 94**

Dear Secretary Ireland,

Please accept this addendum to the statement justifying emergency filed as part of 94-CSR-3 by the West Virginia Regional Jail and Correctional Facility Authority.

The Proposed Rule contains a catastrophic contingency item. After hearing concerns the WV Regional Jail Authority researched budget preparation for business operations. It was recommended that, due to the vast majority of the WV Regional Jail and Correctional Facility expenses being for personal services, that we should maintain 6 months reserve for emergency, unfunded mandates (by courts or legislature) and/or unanticipated expenses. Therefore, based upon sound business practices, the Authority must plan for and anticipate catastrophic unforeseeable expenditures requiring immediate response, while maintaining the ability to meet reasonably anticipated operational costs. The Proposed Rule permits a four month reserve which may be maintained to cover catastrophic contingencies such as inmates who require heroic, or chronic health care, unanticipated physical plant repairs, unfunded court mandates, and other unforeseeable but probable exigent expenditures. Without this contingency built into the budget the West Virginia Regional Jail and Correctional Facility Authority would not be able to make payroll, therefore it would not be able to fulfill statutory or court requirements, other contractual and necessary obligations. The result will be catastrophic. Jails would be forced to close, the public safety of the citizens of this state would be in jeopardy.

Very Truly Yours



Chad M. Cardinal Esq  
General Counsel

**Judy Cooper**

---

**From:** sparkslaw@charter.net  
**Sent:** Wednesday, July 26, 2006 4:37 PM  
**To:** WV Secretary of State  
**Subject:** Regional Jail Authority Emergency Rule Title 94

Please be advised that Emergency Rule Title 94 appears to be inconsistent with West Virginia statutory and case law. I hereby adopt and incorporate the comments of Ancil Ramey, Esq., by reference as if fully set forth verbatim herein. Accordingly, I respectfully request that the West Virginia Secretary of State disapprove the emergency rules under authority granted by statute.

C. Michael Sparks, Esq.  
Mingo County Prosecuting Attorney

FILED  
2006 JUL 26 P 5:01  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE

OFFICE OF THE  
PROSECUTING ATTORNEY  
GRANT COUNTY  
P.O. BOX 515  
PETERSBURG, WEST VIRGINIA 26847  
TELEPHONE 304-257-2323



DENNIS V. DiBENEDETTO  
PROSECUTING ATTORNEY

July 26, 2006

The Honorable Betty Ireland  
Secretary of State  
Building 1, Suite 157-K  
1900 Kanawha Blvd., East  
Charleston, WV 25305-0770

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

2006 JUL 27 A 9:55

FILED

Re: Emergency Rule Title 94  
Regional Jail and Correctional  
Facility Authority

Dear Secretary Ireland:

At a meeting of the Grant County Commission held on July 25, 2006, the Commission unanimously voted and authorized me to file this objection to approval of the above listed Emergency Rule. The Commissioners have reviewed the objections filed on behalf of the Cabell County Commission and the West Virginia Association of Counties. The Commission fully concurs with the positions and points of law relied upon in those objections.

The Commission is greatly concerned by the Regional Jail Authority's attempt to circumvent the law and by illegal and improper action foisted upon the Counties rules, regulations and excessive financial burdens not specifically authorized by the Legislature. Therefore, the Commission would request that you not approve said Emergency Rule and prevent this attempt to bypass proper legislative debate and action on the issues raised.

Yours truly,

A handwritten signature in cursive script that reads "Dennis V. DiBenedetto".

Dennis V. DiBenedetto

cc: Wyetta Fredericks, Executive Director  
Chad M. Cardinal, Esq.  
Ancil G. Ramey, Esq.  
Jack C. McClung, Esq.  
Grant County Commission

# Mercer County Commission

Courthouse Square  
1501 West Main S-210  
Princeton, West Virginia 24740

(304) 487-8306  
Fax (304) 487-8370

VICKY REED  
Administrative Assistant



JOHN P. ANDERSON  
1426 Main Street  
PRINCETON, WV 24740

JOE COBURN  
P.O. Box 337  
ATHENS, WV 24712

KAREN S. DISIBBIO  
525 Albemarle  
BLUEFIELD, WV 24701

July 26, 2006

The Honorable Betty Ireland  
Secretary of State  
Building 1, Suite 157-K  
1900 Kanawha Boulevard, East  
Charleston, WV 25305

FILED  
2006 JUL 27 A 9:5  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**Re: Comment on Emergency Rule Proposed by the West Virginia Regional Jail & Correctional Authority (Title § 94-3-1 et seq.)**

Dear Secretary Ireland:

Please be advised that the Mercer County Commission and the other undersigned public officials of Mercer County, West Virginia, respectfully request that you disapprove the Emergency Rule Title 94 filed by the Regional Jail & Correctional Authority. In the alternative, we request that your office make further investigation, including allowing additional information or comment be made and scheduling the matter for an evidentiary hearing.

The emergency rule can be disapproved by the Secretary of State because it exceeds the scope of the authorizing statute and an emergency does not exist. Furthermore, the rules that the Regional Jail Authority seek to amend were originally promulgated as "procedural rules," not "legislative rules." West Virginia Code § 29A-3-15(a) provides that agencies may adopt, amend or repeal legislative rules but not procedural rules cannot be amended as legislative rules. Under this statutory provision, it would appear that in order for the Regional Jail Authority to promulgate emergency legislative rules the Authority would first have to promulgate an entirely new set of legislative rules rather than amend old procedural rules.

We would like to specifically comment on the proposed rule as follows:

1. Emergency Rule 94 creates a new "fund" that is not authorized by law. The Legislature has never authorized a "regional jail and correctional facility fund" and it is not proper procedure to create a fund through amended procedural rules that is not authorized by statute.
2. Emergency Rule 94 exempts the "United States marshal service" and the "United States bureau of prisons" from its application. The Authority has exempted through rules two entities that the Legislature, through statutory provision, has expressly determined should be subject to its rules. *West Virginia Code 31-20-10a(a)*.

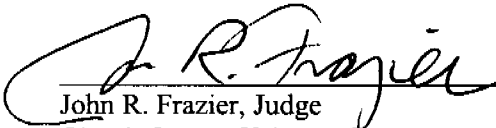
3. Emergency Rule 94 extends operational expenses to include "both direct and indirect costs ... including centralized operations expenses." This means that counties will pay for operation of the administrative office (currently a state expense) in addition to the operation of the jails. This is completely contrary to statute and Legislature's intent that counties' obligations be limited to the "costs ... for operating and maintaining the regional jail" serving those counties. *West Virginia Code 31-20-10a(b)(1)*. See also *West Virginia Code 31-20-4(e)*.
4. Emergency Rule 94 would result in counties being responsible for renovation costs, once again, in direct contradiction to statute which states: "The per diem costs for incarcerating inmates may not include the cost of construction, acquisition or renovation of the regional jail facilities." *West Virginia Code 31-20-10(h)*.
5. Emergency Rule 94 further defies statute by creating a new fund, expanding the obligations of counties to include central office expenses, expanding the obligations of counties to include renovations, and completely revising how the regional jail per diem is to be calculated. See *Comment 3, infra*.
6. Emergency Rule 94 creates a new "Operational Reserve Fund" which is not authorized by statute. The rule would allow the Authority to accumulate four months of anticipated expenditures. In other words, 25% of its budget could be held in reserve from year to year.
7. Finally, there is no emergency. The Authority already has the ability to meet and "add a temporary surcharge to the cost per inmate day in an amount sufficient to cover actual expenditures."

For these reasons, the Mercer County Commission and the other undersigned public officials of Mercer County, West Virginia, respectfully request that you disapprove the Emergency Rule Title 94 filed by the Regional Jail & Authority.

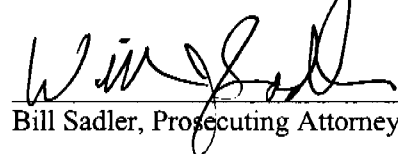
Very truly yours,

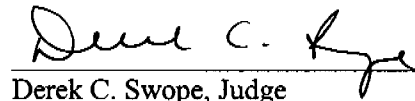
  
\_\_\_\_\_  
Joe Coburn, Commissioner

  
\_\_\_\_\_  
Danny Wills, Sheriff

  
\_\_\_\_\_  
John R. Frazier, Judge  
Circuit Court of Mercer County

  
\_\_\_\_\_  
Karen S. Disibbio, Commissioner

  
\_\_\_\_\_  
Bill Sadler, Prosecuting Attorney

  
\_\_\_\_\_  
Derek C. Swope, Judge  
Circuit Court of Mercer County



# CABELL COUNTY COMMISSION

JUL 27 2006

247

SUITE 300 - 750 5<sup>TH</sup> AVENUE  
CABELL COUNTY COURTHOUSE  
HUNTINGTON, WEST VIRGINIA 25701-2072

#### COMMISSIONERS

BOB BAILEY 304-526-8637  
W. SCOTT BIAS 304-526-8635  
NANCY CARTMILL 304-526-8636

#### TELEPHONE

EXECUTIVE OFFICE 304-526-8634  
FAX 304-526-8646  
TDD 304-526-8682

July 27, 2006

The Honorable Betty Ireland  
West Virginia Secretary of State  
Charleston, WV 25301

Dear Secretary Ireland:

The Cabell County Commission would like to go on record as taking strong objection to the Emergency Rules that have been filed by the Regional Jail Authority. (Emergency Rule Title 94). You have previously received comments regarding this filing from Ancil Ramey, of Steptoe and Johnson, on behalf of the Cabell County Commission.

First, this filing does not justify an emergency. It was established in court filings that the Authority had, at a minimum, \$12,000,000 in "reserve" at the close of fiscal year 2005. Because the Authority has been using the same per diem rate in fiscal 2006, it is likely that the reserve is much larger at this time. In addition, there is currently a mechanism in place for the Authority to utilize if emergency funds are needed.

Secondly, these rules are a dramatic departure from current statute. Clearly, the changes contemplated are so sweeping and far reaching, that the legislature should have an opportunity to review them.

And, finally, these rules would create more charges to the per diem rate which will have a significant impact on future county budgets. The new rules not only incorporate those items in the per diem rate that Judge Pancake's ruling stated were not appropriate, but add additional charges that are not authorized by statute. For any county that is following Judge Pancake's ruling, the impact will be felt in this fiscal year, which would unfairly necessitate changes to the current year's budget. Every county budget would be negatively impacted in the future if these rules are adopted.

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2006 JUL 27 P 1:50  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE

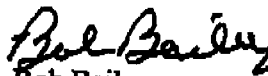
The Honorable Betty Ireland  
July 27, 2006  
Page -2-

Please take these concerns into account when contemplating approval of these rules.  
Thank you for your consideration.

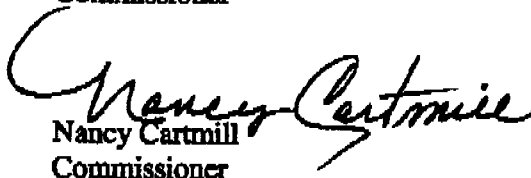
Sincerely,



W. Scott Bias  
President



Bob Bailey  
Commissioner



Nancy Cartmill  
Commissioner

rla

cc: Honorable David M. Pancake, Judge  
Rules Committee, Regional Jail and Correctional Facility Authority  
Jack C. McClung, Esquire  
County Commissioner's Association



# Wetzel Bennett Sheriff Of Nicholas County



Nicholas County Court House  
700 Main Street - Suite 3 • Summersville, West Virginia 26651  
Phone (304) 872-7880 • Fax (304) 872-7869  
Web Page [www.wvnscsd.com](http://www.wvnscsd.com)

July 28, 2006

Sheriff Wetzel Bennett  
Nicholas County Sheriff's Department  
700 Main Street, Suite 3  
Summersville, WV 26651

The Honorable Betty Ireland  
Secretary of State  
Building 1, Suite 157-K  
1900 Kanawha Blvd., East  
Charleston, WV 25305-0770

FILED  
2006 JUL 28 A 11: 09  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE

Re: Emergency Rule Title 94

Dear Secretary Ireland,

I believe that the Regional Jail Authority has given every County in the State a slap in the face by attempting to use Emergency Rule Title 94. The counties already have to carry the blunt share of the cost for the operation of the Regional Jail which has turned out to be a "Money Eating Monster." I think this is outrageous and ridiculous.

Anything you could do to help in this situation would be greatly appreciated.

Sincerely,

Sheriff Wetzel Bennett

WB/ct

# STATE OF WEST VIRGINIA



## WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY

**JOE MANCHIN III**  
Governor

1325 VIRGINIA STREET, EAST  
CHARLESTON, WV 25301-3011  
(304) 558-2110  
FAX: (304) 558-2115

**WYETTA FREDERICKS**  
Executive Director

July 25, 2006

Secretary Betty Ireland  
Secretary of State  
1900 Kanawha Blvd., East  
Building 1, Suite 157 K  
Charleston, West Virginia 25305

### Re: Emergency Rule Title 94

Dear Ms. Ireland:

I am writing in response to the public comments filed by Ancil Ramey on behalf of the Cabell County Commission. Comments one through four, and the emergency nature of this situation are addressed in letter provided by Gary Pullin, of Pullin, Fowler, and Flanagan.

Comments five contains a statement of law, thus no response is necessary. However, the Proposed Rule does not enlarge or expand the substantive rights created by statute. Indeed, the Proposed Rule simply provides a workable formula by which the Legislative directives maybe achieved.

Comment six is an inaccurate statement of both law and the Proposed Rule. The Proposed Rule creates no new funds or accounts. Assuming, for the sake of argument, that the proposed rule did create a new special fund. This is authorized. W. Va. Code § 31-20-10(a) states in pertinent part: "The regional jail and correctional facility authority may create special funds in the state treasury to identify various revenue sources and payment of specific obligations. These funds may be used for purposes that include, but are not limited to, the construction, renovation or repair of specific facilities, cash control, facility maintenance and the individual operations accounts of facilities operated by the authority. The authority may create other separate accounts within these funds that it determines are necessary for the efficient operation of the authority." Thus, the creation of special funds in the state treasury is statutorily authorized.

Comment seven ignores the reality that the Marshall service and Federal Bureau of Prisons are charged a rate determined by federal contracts. These contracts

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

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are authorized by W. Va. Code § 31-20-24 and W. Va. Code § 31-20-5. The Proposed Rule has no impact on the Authorities federal obligations or contracts.

Comment eight does not accurately paraphrase the Proposed Rule. The Proposed Rule does no change the funding mechanism for administrative expenses. The Proposed Rule will benefit the taxpayers by realizing the cost savings realized by centralized services necessary for the operation of a jail. Services such as information technology, human resources, legal services and internal affairs are more economically provided through one centralized office rather than by duplicating the services ten times throughout the state. The Proposed Rule lowers the facilities operational costs by pooling limited resources, and thereby will lower per diem rates.

The Authority concedes in part with comment number nine. The word "renovation" can be added to the proposed rule.

Comment ten disregards the Authorities specific statutory responsibilities to, "(v) To assume the responsibility for operation and management of regional jail facilities under the jurisdiction of the state regional jail and correctional facility authority. The authority shall provide for the transportation of inmates between the regional jails and local holding facilities for court appearances.(w) To exercise all power and authority provided in this article necessary and convenient to plan, finance, construct, renovate, maintain and operate or oversee the operation of regional jails and correctional facilities." W. Va. Code § 31-20-5 The Proposed Rule combines the estimated costs of or each individual jail to derive a cost for all facilities under the Authorities jurisdiction. The comment suggests that each of the ten separate Regional Jails should be independently budgeted and operated. This is not consistent with the concept of Regional Jails, and the specific statutory responsibility of the agency to operate the jail system.

Comment eleven is not consistent with W. Va. code § 31-20-10 9(a) which states: "(a) The regional jail and correctional facility authority may create special funds in the state treasury to identify various revenue sources and payment of specific obligations. These funds may be used for purposes that include, but are not limited to, the construction, renovation or repair of specific facilities, cash control, facility maintenance and the individual operations accounts of facilities operated by the authority. The authority may create other separate accounts within these funds that it determines are necessary for the efficient operation of the authority." Further, the comment does not accurately reflect the Rule. The Rule does not create a new fund for the Administrative expenses of the article.

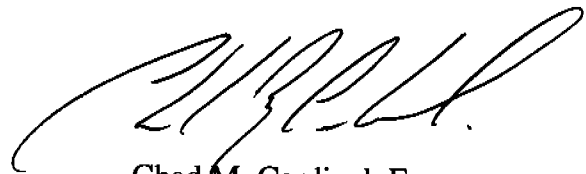
The Authority concurs in part with comment 12 and will strike the proposed language concerning billing for fugitives from justice.

Comment thirteen is a misstatement of the Proposed Rule. The Proposed Rule implements a procedure by which the requirements of W. Va. Code § 31-20-10a(b)(2) may be implemented in a fiscally predictable manner. The Proposed Rule provides two fiscal quarters basis upon which to base the need to adjust the per diem rate. Without this Proposed Rule per diem rates for the counties are subject to monthly fluctuations, and cannot be accurately adjusted to reflect actual expenses.

Comment fourteen is a misstatement of law. W. Va. Code § 31-20-10(c) specifically authorizes this reserve, "(c) Whenever the authority determines that the balance in these funds is in excess of the immediate requirements of this article, it may request that the excess be invested until needed. In this case, the excess shall be invested in a manner consistent with the investment of temporary state funds. Interest earned on any money invested pursuant to this section shall be credited to these funds." As was noted earlier W. Va. Code § 31-20-10(a) specifically permits the creation of special funds within the state treasury for the purpose of the effective, efficient operation of the Authority. Thus, the code specifically authorizes the investment of excessive funds to for the purpose of carrying out the directives of the article.

The remaining comments concern statements of law involving the Security of State's Authority in the rule making procedure. The Authority need not respond.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Chad M. Cardinal". The signature is fluid and cursive, with a large initial "C" and "M".

Chad M. Cardinal, Esq.  
General Counsel

CC:  
Gary E. Pullin, Esquire  
Ancil G. Ramey, Esquire

STATE OF WEST VIRGINIA

94-07



WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY

1325 VIRGINIA STREET, EAST  
CHARLESTON, WV 25301-3011  
(304) 558-2110  
FAX: (304) 558-2115

**JOE MANCHIN III**  
Governor

**WYETTA FREDERICKS**  
Executive Director

**MEMORANDUM**

To: Secretary of State/  
Legislative Rule Making Committee

From: West Virginia Regional Jail and Correctional Facility Authority *clw*

Date: October 19, 2006

Re: **Emergency Rule Title 94**

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Attached please find a Public Comment from the West Virginia Association of Counties, which was not included in the submission filed with your office on July 28, 2006. Each of the comments addressed in the letter was specifically addressed by the agencies responses to comments received. Please include this letter as a public comment received.

CC:  
Cabinet Secretary Spears  
File

RECEIVED  
06 NOV -3 AM 9:36  
OFFICE OF THE SECRETARY  
SECRETARY'S OFFICE

RECEIVED  
06 NOV -3 AM 9:36  
OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

July 19, 2006

The Honorable Betty Ireland  
Secretary of State  
Building 1, Suite 157-K  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305-0770

Re: Emergency Rule Title 94

Dear Secretary Ireland:

Section 2: Purposes, subsection (j) of the Constitution of the West Virginia Association of Counties reads as follows, "To ever be on alert to prevent the alienation of fundamental County rights and the removing of such rights as are inherent with the County government to invest in other branches of government." It is our belief that the above-referenced Emergency Rule Title 94 severely impacts on the foregoing subsection (j) of our constitution and therefore we feel compelled to strongly voice our objections to the approval of such rule.

While this rule purportedly is a required reaction to the decision of the Cabell County Circuit Court case styled State ex rel. West Virginia Regional Jail and Correctional Facility Authority v. County Commission of Cabell County et.al. decided May 15, 2006, its effect will be to add to the financial burden of every county in the State of West Virginia. First of all, the Regional Jail Authority has failed to show any "emergency" whatsoever. In the discovery phase of the Cabell County case, John King II, Chief of Operations for the Regional Jail Authority, testified that the Regional Jail Authority had a Reserve Fund in excess of twelve million dollars which they had accumulated. However, they still saw fit to raise the per diem rate for counties an additional \$3.50 instead of using the surplus money to reduce counties' jail costs.

Secondly, WV Code §31-20-10a(b)(2) provides that, "If the actual operational costs exceed the approved schedule of operational expenditures by more than ten percent in a line item, the authority's executive director shall add a temporary surcharge to the cost per inmate day in an amount sufficient to cover the actual expenditures." Therefore, there can't be any funding crisis for the Regional Jail System as set forth in their Emergency Rule Questionnaire and, therefore, no "Emergency."

Practically every county in this state is now having a tremendous struggle to pay their per diem jail costs. Some are on payments plans and if this rule is approved it will result in an even

greater hardship for counties. WV Code §29A-3-15a provides in pertinent part that, "(b) The secretary of state shall disapprove an emergency rule or an amendment to an emergency rule if he determines.....

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

As hereinbefore stated, no such emergency exists justifying the promulgation of such rule and therefore it should be disapproved. The West Virginia Association of Counties has reviewed the excellent Objections filed by the Cabell County Commission and is in total agreement with such objections and incorporates such objections by reference as if fully set forth herein.

Your consideration of the West Virginia Association of Counties' comments relative to these rules is very much appreciated.

Very Truly Yours,

Jack C. McClung, Legal Counsel  
West Virginia Association of Counties

cc: WVACo Board of Directors  
Ancil Ramey, Esq.,



# UPSHUR COUNTY COMMISSION

Upshur County Courthouse Annex  
38 West Main Street, Room 302 • Buckhannon, West Virginia 26201

Telephone: (304) 472-0535  
Telecopier: (304) 472-2399

TDD Numbers  
Business: 472-9550  
Emergency: 911

July 27, 2006

Ms. Betty Ireland, Secretary of State  
Office of the Secretary of State  
Building 1, Suite 157-K  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305-0770

FILED  
2007 JUL 28 A 8:50  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE

Subject: Emergency Rule Title 94

Please be advised that the Upshur County Commission does hereby object to the adoption of these emergency rules as set forth by the West Virginia Regional Jail & Correctional Facility Authority. Enclosed you will find a listing that would outline the objections of the Upshur County Commission. We are requesting these emergency rules be disallowed and disapproved.

Donnie R. Tenney, President

Stephen P. Abel, Commissioner

Eugene C. Suder, Commissioner

- The rules that are being amended were originally promulgated as "procedural rules," not "legislative rules." WV Code §29A-3-15(a) provides that agencies may adopt, amend or repeal *any legislative rule* but procedural rules cannot be amended as legislative rules. It would appear that in order for the Regional Jail Authority to promulgate *emergency* legislative rules they would first have to promulgate an entirely new set of legislative rules rather than amend old procedural rules.
- The emergency rule can be disapproved by the Secretary of State because it exceeds the scope of the authorizing statute and an emergency does not exist.
- Emergency Rule 94 creates a new "fund" that is not authorized by law. The Legislature has never authorized a "regional jail and correctional facility fund" and it is not proper procedure to create a fund through amended procedural rules that is not authorized by statute.
- Emergency Rule 94 exempts the "United States marshal service" and the "United States bureau of prisons" from its application. The Authority has exempted through rules two entities that the Legislature has expressly determined should be subject to its rules.
- Emergency Rule 94 extends operational expenses to include "both direct and indirect costs...including centralized operations expenses." This means that counties will pay for the operation of the administrative office (currently a state expense) in addition to the operation of the jails. This is completely contrary to statute and the Legislature's intent that counties' obligations be limited to the "costs.....for operating and maintaining the regional jail" serving those counties.
- Emergency Rule 94 would result in counties being responsible for renovation costs, in direct contradiction to statute which states: "The per diem costs for incarcerating inmates may not include the cost of construction, acquisition or renovation of the regional jail facilities.
- Emergency Rule 94 further disregards statute and alters the entire regional jail concept by centralizing the budget process. Currently, the Authority is required by statute to look at operational expenses *for each regional jail* but the rule is revised to state and maintaining the regional jail system.
- Emergency Rule 94 defies statute by creating a new fund, expanding the obligations of counties to include central office expenses, expanding the obligations of counties to include renovations, and completely revising how the regional jail per diem is to be calculated and charged.
- Emergency Rule 94 disregards existing statute by extending the financial obligations of counties to include the "costs incurred by the regional jails for housing and maintaining inmates who are being held as a fugitive."
- Emergency Rule 94 creates a new "Operational Reserve Fund" which is not authorized by statute. The rule would allow the Authority to accumulate four months of anticipated expenditures. In other words, 25% of its budget could be held in reserve from year to year.
- There is no emergency. The Authority already has the ability to meet and "add a temporary surcharge to the cost per inmate day in an amount sufficient to cover actual expenditures."
- These emergency rules appear to be an attempt to use Cabell County Judge Pancake's ruling as an opportunity to rewrite statute.