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April 23, 2012

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Health and Human Resources

RULE: Amendments, 64CSR18, General Sanitation (Section §64-18-6 Only)

DATE FILED AS AN EMERGENCY RULE: April 5, 2012

DECISION NO. 3-12

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the **Section 64-18-6** of the above emergency rule is **approved**. A copy of the complete decision with required findings is available from this office.

A handwritten signature in cursive script, reading "Natalie E. Tennant".

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 3-12)

AGENCY: Health and Human Resources
RULE: Amendment, 64CSR18 General Sanitation (Section §64-18-6 only)
FILED AS AN EMERGENCY RULE: April 5, 2012

- par. 1 The Division of Health and Human Resources (DHHR) has filed the above amendments to an existing rule an emergency rule.
- par. 2 W. Va. Code §29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The DHHR filed this emergency rule with supporting documents with the Secretary of State April 5, 2012 and with the LRMRC April 5, 2012.
- par. 7 It is the determination of the Secretary of State that the DHHR has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority -- W. Va. Code §16-1-6(b) and (m) reads:
- (b) To enforce all laws of this state concerning public health; to that end, the commissioner shall make, or cause to be made, investigations and inquiries respecting the cause of disease, especially of epidemics and endemic conditions, and the means of prevention, suppression or control of those conditions; the source of sickness and mortality, and the effects of environment, employment, habits and circumstances of life on the public health.*
- (m) To inspect and enforce rules to control the sanitary conditions of and license all*

institutions and health care facilities as set forth in this chapter, including, but not limited to, schools, whether public or private, public conveyances, dairies, slaughterhouses, workshops, factories, labor camps, places of entertainment, hotels, motels, tourist camps, all other places open to the general public and inviting public patronage or public assembly, or tendering to the public any item for human consumption and places where trades or industries are conducted

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

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

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

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

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

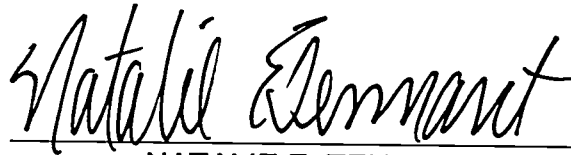
The State of West Virginia, Bureau for Public Health has been inspecting institutions for public health purposes for many years. Recently, it has come to our attention that the Department of Corrections has or may have difficulty meeting the minimum square foot requirements of the section on multi-person bedding and sleeping areas. In an effort to work with our colleagues at the Department of Corrections we are proposing this Emergency rule.

The Department Of Corrections (DOC) has a significant backlog of prisoners in jails. Every prisoner being kept in jails but committed to DOC represents an ongoing violation of the provisions of several Supreme Court decisions starting with SER Dodrill v. Scott, SER Smith v. Skaff, SER Stull v. Davis, Sams v. Kirby and Sams v. Commissioner. Similarly, there are over 1700 inmates in jails awaiting placement. The number of inmates is creating potential operations problems within the jails. Likewise there is a cost of \$48.00 per day per inmate to house an inmate in a jail and over \$60.00 a day in other contracted settings. As a result, any impediment to increasing the number of beds exacerbates not only the overcrowding in the jails but also the operations of the prisons. DOC has several facilities that are either on line and limited by the General Sanitation rule or will come on line before a regular rule could be finalized that will help reduce some of these situations, even if it is only by a small number of beds.

With no relief the conditions in the jails will create potential 8th amendment violations opening the state up to civil liability, attorney fee shifts and potential prospective relief. Likewise, prisoners kept in jails awaiting a bed have potential delays in their ultimate release on parole. Therefore, even given the small impact of the solution to the overall problem, the individual results will be significant for each individual who can be moved from a jail to a prison as a result of increased beds that may be available through an exception from section 6.5. of the General Sanitation rule, 64CSR18.

par. 13 It is the determination of the Secretary of State that **Section §64-18-6** only of this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "immediate preservation of public peace, health, safety or welfare"

par. 14 This decision shall be cited as Emergency Rule Decision 3-12 or ERD 3-12 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Health and Human Resources, the Attorney General and the Legislative Rule Making Review Committee.



NATALIE E. TENNANT
Secretary of State

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