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Natalie E. Tennant
Secretary of State
State of West Virginia

March 31, 2010

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Family Protection Services Board

RULE: Amendment, 191CSR2, Family Protection Programs Outreach Service and Shelter Licensure

DATE FILED AS AN EMERGENCY RULE: March 17, 2010

DECISION NO. 3-10

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

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

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 3-10)

AGENCY: Family Protection Services Board
RULE: Amendment, 191CSR2, Family Protection Programs, Outreach Service and Shelter Licensure
FILED AS AN EMERGENCY RULE: March 17, 2010

- par. 1 The Family Protection Services Board (Board) has filed the above amendments to an existing rule as an emergency rule.
- par. 2 W. Va. Code §29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The Board filed this emergency rule with supporting documents with the Secretary of State March 17, 2010 and with the LRMRC March 17, 2010.
- par. 7 It is the determination of the Secretary of State that the Board has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority – W. Va. Code §48-26-401(4) reads:

(4) Promulgate rules to implement the provisions of this article and any applicable federal guidelines;
- par. 9 It is the determination of the Secretary of State that the Board has not exceeded its statutory authority in promulgating this emergency rule.

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

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

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

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

Men and Women Against Discrimination (hereafter, MAWAD) filed an a civil action against the Family Protection Service Board (hereafter, FPSB) in Kanawha County Circuit Court seeking injunctive relief. MAWAD asserted that the FPSB exceeded its authority by promulgating certain legislative rules that exceeded and conflicted with the intent of the Legislature and that the application of the rules violated the First Amendment rights of MAWAD and its constituent members in their ability to advocate for gender-neutral domestic violence programs in the state of West Virginia.

On October 2, 2009, Judge James C. Stucky issued an order that held current provisions of certain rules exceeded the expressed intent of the Legislature and that the continued application of these rules had a real chilling effect on MAWAD and its constituent members' exercise of their First Amendment rights to advocate the gender-neutral nature of domestic violence programs. Hence, the Court held the rules to be null and void.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f).

par. 14

This decision shall be cited as Emergency Rule Decision 3-10 or ERD 3-10 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Family Protection Services Board, the Attorney General and the Legislative Rule Making Review Committee.



NATALIE E. TENNANT
Secretary of State

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