

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

*State of West Virginia*  
*Joe Manchin, III*  
*Secretary of State*

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

May 17, 2002

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Funeral Service Examiners

RULE: Amendments, 6CSR1, General Provisions

DATE FILED AS AN EMERGENCY RULE: April 29, 2002

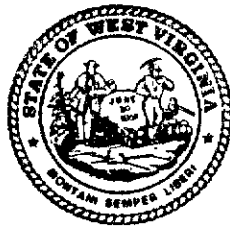
DECISION NO. 9-02

FILED  
2002 MAY 22 A 11:07  
SECRETARY OF STATE  
STATE OF WEST VIRGINIA

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

  
JOE MANCHIN, III  
Secretary of State

SCANNED



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**EMERGENCY RULE DECISION**  
**(ERD 9-02)**

**AGENCY:** West Virginia Board of Funeral Service Examiners  
**RULE:** Amendments, 6CSR1, General Provisions  
**FILED AS AN EMERGENCY RULE:** April 29, 2002

- par. 1 The West Virginia Board of Funeral Service Examiners (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 April 29, 2002 and with the LRMRC April 29, 2002.

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

par. 8 (B) Statutory Authority -- W. Va. Code §30-6-6 reads in part:

*(a) The board shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code to implement the provisions of this article including, but not limited to, the following:*

*9) Setting the fees charged under the provisions of this article.*

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:

SB 742, which becomes effective June 9, 2002, recodified §30-6-1 et seq. relating to funeral & cemetery regulations. Specifically, the bill removed all statutory fees and now requires this agency to promulgate fees by rule. In order to function fiscally, these fees must be in place as soon as possible. Otherwise, this agency will be unable to generate revenue and sustain operations. These fees are scheduled to be collected beginning July 1, 2002. This agency needs to notify its licensees about these fees no later than June 1, 2002. In addition to fees, there are other paramount changes in the rule.

This agency would cease all operation without the licensing fees included in this rule, since SB 742 removed all statutory fees and required this agency to set fees by rule, thus leaving no agency to regulate the funeral industry in our state. In addition, the other proposed changes are necessary to ensure that no additional violations or controversies occur within the funeral industry. This agency believes that the majority of its licensees understand the importance of implementing these

changes, rather than a year from now as we have been promoting such changes for the past two years.

Without revenue set by this rule, this agency cannot exist. Without the oversight of the funeral industry by this agency, the general public is not being protected from the improprieties of unethical funeral licensees. In addition, without our oversight, the general public and employees of funeral homes would be at risk of contracting contagious or infectious disease. In addition, without the other substantive changes, licensees are also at great risk for civil liability because they are being left to their own devices to make major, life-changing decisions for the families of the deceased.

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). . . "immediate preservation of public peace, health, safety or welfare" and "prevent substantial harm to the public interest."

par. 14 This decision shall be cited as Emergency Rule Decision 9-02 or ERD 9-02 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the West Virginia Board of funeral Service Examiners, the Attorney General and the Legislative Rule Making Review Committee.

  
\_\_\_\_\_  
JOE MANCHIN, III  
Secretary of State

Entered \_\_\_\_\_

**FILED**  
2002 MAY 22 A 11:07  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE



**HOUSE OF DELEGATES  
WEST VIRGINIA LEGISLATURE**

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

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

May 17, 2002

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

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

Re: West Virginia Board of Funeral Service Examiners Proposed Emergency Rule

Dear Secretary Manchin:

I write in order to comment on the Board of Funeral Service Examiners rule filed as an emergency rule with your office.

I acknowledge the need for establishment of fees by emergency rule since Senate Bill 742, which passed during the 2002 Regular Session of the Legislature, deleted all fee provisions from the Code. Since most fees charged by the Board of Funeral Service Examiners were not also contained in the Board's rules, the proposed emergency rule is warranted as it relates to fees.

Accordingly, I support the approval of the proposed emergency rule in part and specifically support approval of the following provisions of the rule:

Subsection 1.1;  
Subsection 2.4;  
Subsection 3.1;  
Subsection 12.6;  
Subsection 15.1;  
Subdivision 14.1.4;  
Subsection 16.1;  
Subsection 16.11 and all subdivisions contained thereunder;  
Subsection 16.12;  
Subsection 18.4; and  
Section 19 and all subsections and subdivisions contained thereunder.

The remainder of the changes made by the emergency rule, however well intended, are

substantive in nature and are not properly the subject of an emergency rule proposed as a result of the changes made by SB 742. Although the additional rule changes appear, at first blush, to improve regulation and protect the public interest without undue burden to affected businesses, they do not address an emergency situation. In order to protect the integrity of the rule making process, the substantive changes proposed in the emergency rule should be rejected so that they may be more fully examined during the regular rule making review process.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Vicki V. Douglas". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Vicki V. Douglas

VVD/foh

Joseph F. Ford, III  
President

Raymond S. Tomassene  
Secretary



William E. Bowles  
Robert D. Carpenter  
Eugene T. Fahey  
R. Brent Parker  
Robert D. Stevens

(304) 558 0302  
(304) 558 0660 Fax

STATE OF WEST VIRGINIA  
Board of Embalmers and Funeral Directors  
179 Summers Street, Suite 305  
Charleston, WV 25302

bocafd@lycos.com  
www.state.wv.us/funeraldirector

## MEMORANDUM

TO: Secretary of State Joe Manchin, III  
FROM: Sherri Douglass, Executive Director  
DATE: May 20, 2002  
SUBJECT: Proposed Emergency Rule 6CSR1

FILED  
2002 MAY 21 P 3:18  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE

It is my understanding that Delegate Vicki Douglas is opposed to the approval of proposed emergency rule 6CSR1 because she believes the rule needs to be approved through the regular rule-making process. I also understand that she does not necessarily oppose the filing of the proposed fees, nor does she have issues with the content of the rule itself, only that it should go through the regular process.

I respectfully request that the emergency rule be approved for three reasons. First, there is very important content contained in the rule which would greatly benefit the funeral industry and the consumers by clarifying very important legal issues. Secondly, the emergency rule procedure is a valid method for implementing rules which would have an immediate and positive impact on the industry it seeks to regulate. And finally, these rules have been filed as proposed legislative rules, as required, and will therefore go through the regular rule-making process.

Regarding content, it allows the board to take disciplinary action for inspection violations and it permits funeral establishments to construct off-site embalming facilities, both important to preserving public health for consumers and employees of funeral establishments. The rule also provides procedures for ensuring proper identification of bodies and cremated remains. In addition, the rule provides a method for obtaining authorization to embalm and procedures for embalming bodies affected with contagious disease. And most importantly, the rule spells out who has the authority to make funeral arrangements. Currently, funeral establishments are often caught in the middle of a family dispute and rely solely on the family members' abilities to resolve these conflicts. When that doesn't happen, the funeral establishment has no guidance in how to determine who has the legal authority to make funeral arrangements. This is especially critical in cases of cremation. The ramifications of a funeral director making the wrong decision could result in a major civil suit.

Regarding the emergency rule procedure, I understand the process is one designed to address matters that need immediate attention and ones that have statutory deadlines. We believe these issues need such immediate attention and have the support of the industry in this endeavor. I also do not believe that the approval of these rules would supercede the regular rule-making process in any manner. We have filed these same proposed emergency rules as proposed

legislative rules. We have sought the input of our licensees and the West Virginia Funeral Directors Association. We have had several committee meetings with WVFDA representatives present and participating fully as equal partners in this process. And, we have informed our licensees over the last year regarding these necessary changes.

In summary, the funeral industry simply can not afford to ignore these issues any longer. Consumers are more savvy and disconcerted with problems facing this industry since national media attention has brought it to the forefront. We need to address those issues now, not twelve months from now.