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## STATE OF WEST VIRGINIA

### SECRETARY OF STATE

Building 1, Suite 157-K  
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Charleston, WV 25305-0770

(Plus all the volunteer  
help we can get)

January 26, 1996

### NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Division of Health

RULE: Amendments, Series 65, Residential Board and Care Homes

DATE FILED AS AN EMERGENCY RULE: December 15, 1996

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

JAN 26 11 09 AM '96

FILED

DECISION NO. 2-96

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

  
\_\_\_\_\_  
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### EMERGENCY RULE DECISION (ERD 2-96)

AGENCY: Division of Health

RULE: Amendments, Series 65, Residential Board and Care Homes

FILED AS AN EMERGENCY RULE: December 15, 1995

- par. 1 The Division of Health (Division) has filed the above amendments to an existing rule as an emergency rule.
- par. 2 West Virginia 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(b))].
- par. 4 (A) Procedural Compliance: WV 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 thirty-five day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The Division filed this emergency rule with supporting documents with the Secretary of State December 15, 1996 and with the LRMRC December 15, 1996.

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

par. 8 (B) Statutory Authority -- WV Code §16-5C-5 reads in part:

*(a) All rules and regulations shall be approved by the board of health and promulgated in the manner provided by the provisions of §29A-3-1 et seq. of this code. The board of health shall adopt amend or repeal such rules and regulations as may be necessary or proper to carry out the purposes and intent of this article and to enable the director to exercise the powers and perform the duties conferred upon the director by this article.*

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

par. 10 (C) Emergency -- WV 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 Division are as follows:

The Division of Health of the Department of Health and Human Resources hereby submits the amended Residential Board and Care Home Licensure Rule, 64 CSR 65, for emergency filing as authorized under W. Va. Code §29A-3-15a(f)(3). The present proposed amended rule has been filed for a public comment period ending December 22, 1995. The Division plans to file the rule with the Legislative Rule-Making Review Committee on December 12, 1995. An earlier version of this rule was intended for review by the 1995 Legislature. However, the scope and substance of the comments received indicated the need for a major rewrite and additional opportunity for public comment. The present rule is, then, the end result of the second round of public comment. Although

the Division intends to allow additional time past the effective date of the rule to come into full compliance and intends to conduct training to assist homes, the Division contends that the earlier the rule becomes effective, the earlier the new improved standards will be available for the protection of residents. Additionally, the Division agreed in the West Virginia Comprehensive Long-Term Care Plan filed in response to a Memorandum Order filed under Wolford v. Lewis 860 F. Supp. 1123 (S.D. W. Va. 1994), to implement amended personal care home licensure standards by June, 1995.

Thus, the rule is the subject of a court order, and the court and the Department believe that implementation of the provisions of the revised rule are long overdue, from the point of view of improved and clarified protection of residents, for compliance with State and federal law, and to provide providers with a regulatory situation that is more stable and as responsive to their concerns as possible under the current law. The Department believes that implementation of this rule is needed to prevent substantial harm to the public interest, and therefore requests approval to put the rule into effect on an emergency basis.

par. 13 The Wolford v. Lewis, 860 F. Supp. 1123 (S.D. W. Va. 1994) states that "the parties are accordingly ordered to confer and develop a remedial plan for correcting and implementing proposed changes to existing residential board and care and personal care regulations and enforcement procedures which will incorporate the court's findings herein and submit the plan to the court within ninety days, together with a proposed timetable for implementing the changes.

par. 14 The West Virginia Comprehensive Long-term care plan, Section 2.07.09 states:  
Standards required by this subsection 2.07 ((2.07.01-2.07.08) for Adult Family Care Homes shall be developed and implemented by December 1, 1994. The standards required by this subsection 2.07 for residential board and care homes and personal care homes shall be implemented before June 1, 1995.

par. 15 It is the determination of the Secretary of State that this proposal **does not qualify** under the definition of an emergency as defined in §29A-3-15(f), Wolford v. Lewis, 860 F. Supp. 1123 (S.D. W. Va. 1994) mandates that rules be filed to bring this State up-to-date and time schedules be set between the parties; however, it does not assert that the rules should be filed on an emergency basis. Without any evidence of Court approval or Court direction, the Secretary of State cannot approve this rule as an emergency.

par. 16

This decision shall be cited as Emergency Rule Decision 2-96 or ERD 2-96 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Division of Health, the Attorney General and the Legislative Rule Making Review Commission.

  
\_\_\_\_\_  
KEN HECHLER  
Secretary of State

Entered \_\_\_\_\_

**FILED**  
JAN 26 11 20 AM '96  
OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

Do not mark in this box  
Filing Date



WEST VIRGINIA  
SECRETARY OF STATE  
KEN HECHLER  
ADMINISTRATIVE LAW DIVISION

FILED

DEC 15 2 22 PM '95

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

Form #7

Effective Date

NOTICE OF AN EMERGENCY RULE

AGENCY: Division of Health TITLE NUMBER: 64

CITE AUTHORITY: W. Va. Code §16-5C-5

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 65

TITLE OF RULE BEING AMENDED: Residential Board and Care Homes

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: \_\_\_\_\_

TITLE OF RULE BEING FILED AS AN EMERGENCY: \_\_\_\_\_

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

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

See attached.

RECEIVED

DEC 15 1995

Legislative Rule Making  
Review Committee

*[Signature]*  
Signature

Use additional sheets if necessary

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

ENTERED

OCT - 4 1994

ORDER BOOK

NO. \_\_\_\_\_ PAGE \_\_\_\_\_

PAUL WOLFORD, et al.,

Plaintiffs,

v.

CIVIL ACTION NO. : 2:92-1151

GRETCHEN O. LEWIS, et al.,

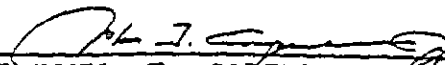
Defendants.

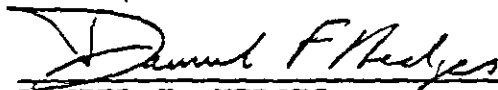
O R D E R

This day came the parties in the above-styled action, pursuant to the Court's directive that the parties confer and develop a remedial plan for correcting and implementing proposed changes, regulatory and enforcement procedures, incorporating the Court's orders and findings, together with a timetable for implementing the changes, and submitted their comprehensive plan for long-term care. The Court has reviewed the plan and to the extent of those portions required by the Court's Order hereby approves it, and thereupon

It is hereby ORDERED and DECREED that the following portions of the attached Plan are required by this Court's Order or necessarily flow therefrom: Sections 1.02.01; 1.02.04; 1.02.05; 2.01.01; 2.01.02; 2.02.01; 2.02.02; 2.04 (all); 2.05.05; all of 2.07 except 2.07.02(b), 2.07.08(a) (first sentence) and 2.07.09 (first sentence); and all of 2.08 except 2.08.01(c) and 2.08.02(d), and are hereby approved and shall be implemented, except to the extent that modifications are submitted to and approved by this Court.

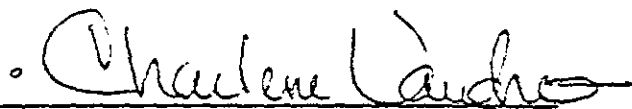
ENTERED this 4<sup>th</sup> day of October, 1994.

  
JUDGE JOHN T. COPENHAVER, JR.

  
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