



WEST VIRGINIA LEGISLATURE
Legislative Rule-Making Review Committee

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November 17, 2002

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NOTICE OF ACTION TAKEN BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TO: Joe Manchin, Secretary of State, State Register

TO: Martha Barnitt
Health and Human Resources, Department of
Building 3, Room 201
Capitol Complex

FROM: Legislative Rule-Making Review Committee

Proposed Rule: **Nurse Aide Abuse Registry, 69CSR6**

The Legislative Rule-Making Review Committee recommends that the West Virginia Legislature:

- 1. Authorize the agency to promulgate the Legislative rule
 - (a) as originally filed _____
 - (b) as modified by the agency _____
- 2. Authorize the agency to promulgate part of the Legislative rule; a statement of reasons for such recommendation is attached. _____
- 3. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached. _____
- 4. Authorize the agency to promulgate the Legislative rule as modified with certain amendments; amendments and a statement of reasons for such recommendation is attached. _____
- 5. Recommends that the Legislative rule be withdrawn; a statement of reasons for such recommendation is attached. _____

SCANNED

ANALYSIS OF PROPOSED LEGISLATIVE RULES

Agency: Department of Health and Human Resources

Subject: Nurse Aide Abuse Registry, 69CSR6

PERTINENT DATES

Filed for public comment: May 31, 2002

Public comment period ended: July 1, 2002

Filed following public comment period: July 18, 2002

Filed LRMRC: July 18, 2002

Filed as emergency:

Fiscal Impact: None

OFFICE OF THE
SECRETARY OF STATE
COMMONWEALTH OF VIRGINIA

2002 OCT 10 A 10:29

FILED

ABSTRACT

The proposed rule is new. The following is a section-by-section synopsis of the proposed rule.

Section 1 is the standard general section, setting forth the scope, authority, filing date and effective date of the proposed rule.

Section 2 defines terms.

Section 3 relates to reporting. It requires any employee of a facility or anyone providing services to a facility resident, who suspects that the resident has been abused or neglected or that the resident's property has been misappropriated, to immediately report the incident to the facility's administration and Adult Protective Services. A facility is required to immediately complete and fax a report of the allegations to the Nurse Aide Program within 24 hours and a follow-up report within 5 working days. The proposed rule sets forth specified information to be included in the report. The facility is also required to report the allegations to Adult Protective Services and to a state or regional long-term care ombudsman.

This section requires that when rape or sexual assault of a resident is suspected, the resident is to be taken immediately to the nearest emergency room for examination. The facility is required to report the matter to local law enforcement, if rape or sexual assault is confirmed.

Section 4 relates to investigations. It requires the program manager of the Nurse Aide Program to review the reports of abuse, neglect or misappropriation of property and to assign a surveyor from the Office of Health Facility Licensure and Certification to investigate the allegations when warranted. Elements of the investigation process are listed. The surveyor, upon completion of the investigation, is to submit a report to the Nurse Aide Program which will in turn review the surveyor's report and decide the disposition of the allegations.

Section 5 relates to notification. It requires the Nurse Aide Program to notify a nurse aide of certain specified information once it decides to place the name of that nurse aide on the Nurse Aide Abuse Registry. The nurse aide has 30 days from the date of receipt of the notice to send a waiver or request a hearing.

This section requires that the Nurse Aide Program place the name of a nurse aide on the Registry, when that person's name has been included on the registry of another state. The Nurse Aide Program is also required to notify certain other states when a nurse aide's name has been included in this State's Registry. The Nurse Aide Program must also notify the administrator of the nurse aide's last known facility of employment.

Section 6 relates to hearings. It requires the Office of Health Facility Licensure and Certification to notify the nurse aide of the hearing within 15 days of the nurse aide's request. It states that the Office of Health Facility Licensure and Certification bears the burden of proof by a preponderance of the evidence. Finally, it requires the Secretary to prepare a written decision and forward copies of that decision to certain specified persons within 10 days. The nurse aide may appeal the Secretary's decision to the Circuit Court of the county in which the hearing was held.

Section 7 relates to court determination. It requires the name of a nurse aide to be placed on the registry, if any court of

law has made a determination of abuse, neglect or misappropriation of property by the nurse aide in any case involving a minor or incapacitated adult.

Section 8 relates to facility notice and recordkeeping. This section requires facilities to provide a copy of the rule to each nurse aide on their staff and each nurse aide at the time of hiring.

Section 9 relates to enforcement. It sets forth code sections under which this rule is enforced.

AUTHORITY

Statutory authority: W.Va. Code, §9-6-2 and §16-1-4, which provide, in part, as follows:

§9-6-2.

... (b) The secretary shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code regarding the organization and duties of the adult protective services system and the procedures to be used by the department to effectuate the purposes of this article. The rules may be amended and supplemented from time to time...

§16-1-4.

The secretary may propose rules, in accordance with the provisions of article three, chapter twenty-nine-a of the code, that are necessary and proper to effectuate the purposes of this chapter. The secretary may appoint or designate advisory councils of professionals in the areas of hospitals, nursing homes, barbers and beauticians, postmortem examinations, mental health and

mental retardation centers and any other areas
necessary to advise the secretary on rules...

ANALYSIS

- I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

No.

- II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

Yes.

- III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

Yes. Under Federal Regulations, the name of a nurse aide must be placed on the Registry within 10 days. The proposed rule provides a 30 day notice to the nurse aide of the intent to place his or her name on the Registry.

- IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

Yes.

- V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

Yes.

- VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

No.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISIONS OF THE CODE?

Yes.

VIII. OTHER

As a point of interest, Subsection 6.8 states that the Office of Health Facility Licensure and Certification bears the burden of proof by a preponderance of the evidence. The Circuit Court of Harrison County, in an order for certification to the Supreme Court of Appeals, found that the standard of proof is clear and convincing evidence.

Counsel has technical modifications to suggest.