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(Plus all the volunteer
help we can get)

August 9, 1999

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: W. Va. Health Care Authority

RULE: Amendments, Series 17, Health Services Offered by Health Professionals

DATE FILED AS AN EMERGENCY RULE: June 30, 1999

DECISION NO. 12-99

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



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Secretary of State

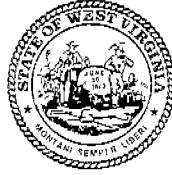
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EMERGENCY RULE DECISION
(ERD 12-99)

AGENCY: W. Va. Health Care Authority
RULE: Amendments, Series 17, Health Services Offered by Health Professionals

FILED AS AN EMERGENCY RULE: June 30, 1999

- par. 1 The W. Va. Health Care Authority (HCA) 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: 1) whether the emergency rule was promulgated in compliance with W.Va. Code § 29A-3-15; 2) whether the emergency rule exceeds the scope of the law authorizing or directing the promulgating thereof, and 3) whether an emergency exists justifying promulgation of the 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 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 HCA filed this emergency rule with supporting documents with the Secretary of State June 30, 1999 and with the LRMRC June 30, 1999.

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

par. 8 Statutory Authority -- W. Va. Code §16-2D-4(a)(1) reads:

Private office practice of any one or more health professionals licensed to practice in this state pursuant to the provisions of chapter thirty of this code: Provided, That such exemption from review of private office practice shall not be construed to include such practices where major medical equipment otherwise subject to review under the provisions of this article is acquired, offered or developed: Provided, however, That such exemption from review of private office practice shall not be construed to include the acquisition, offering or development of one or more health services, including ambulatory surgical facilities or centers, lithotripsy, magnetic resonance imaging and radiation therapy by one or more health professionals. The state agency shall adopt rules pursuant to section eight of this article which specify the health services acquired, offered or developed by health professionals which are subject to certificate of need review;

par. 9 §16-2D-8(c) of the W. Va. Code states:

Subsequent amendments and modifications to any rule promulgated pursuant to this article may be implemented by emergency rule.

par. 10 It is the determination of the Secretary of State that the HCA has not exceeded its statutory authority in promulgating this proposed emergency rule.

par. 11 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. 12 There are three classes of emergency set forth in W.Va. Code § 29A-3-15(f), and an agency must show, 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. 13 The facts and circumstances as presented by the HCA are as follows:

The 1999 Legislature passed SB 492 which directs the Health Care Authority to file emergency rules to implement certain changes within the certificate of need law. W. Va. Code §§16-2D-4(a)(1) and 8(c) give the agency the authority to file this as an emergency rule.

The purpose of the certificate of need law is to contain or reduce increases in the cost of delivering health services. Furthermore, the agency is directed to protect the health and general welfare of the citizens of this state by ensuring that appropriate

and needed institutional health services are made available for all citizens. See W. Va. Code §16-2D-1.

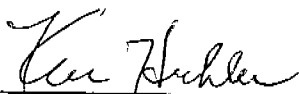
SB 492 requires major changes to the CON law. This rule implements some of these changes. The purpose of the CON law is to reduce increases in health service costs and to promote the health and general welfare of the public by ensuring that appropriate and needed health services are made available.

In addition, the HCA asserted W.Va. Code §§ 16-2D-3(b)(5) as a basis for filing this legislative rule as an emergency rule.

par. 14 W.Va. Code § 16-2D-4(a)(1) directs the HCA to promulgate legislative rules pursuant to W.Va. Code § 16-2D-8 specifying which health services acquired, offered or developed by health professionals are subject to certificate of need review. W. Va. Code §§ 16-2D-3(b)(5) requires the HCA to promulgate emergency rules specifying those health services which are subject to certificate of need review. W.Va. Code § 16-2D-8(c) grants the HCA discretionary authority to amend or modify its legislative rules by emergency rule; however, it does not exempt the HCA from the requirements of W.Va. Code § 29A-3-15 relating to the issue of whether an emergency exists. W.Va. Code § 16-2D-3(b)(5), which contains a specific legislative directive, relates to health services other than health services acquired, offered or developed by health professionals, and the HCA has failed to adequately advance any other grounds for an emergency, including, but not necessarily limited to, how the changes to CON law as reflected by SB 492 require the proposed amendments to this rule on an emergency basis. Accordingly, It is the determination of the Secretary of State that this proposal fails to qualify under the definition of an emergency as defined in §29A-3-15(f).

par. 14 In rendering this decision, it is important to note that the Secretary of State has not disapproved this proposed emergency rule on the basis that he disagrees with the underlying public policy established by the Legislature in enacting the supporting legislation or that he otherwise disagrees with the substance of the proposed emergency rule or the HCA's authority to advance the same.

par. 16 This decision shall be cited as Emergency Rule Decision 12-99 or ERD 12-99 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the W. Va. Health Care Authority, the Attorney General and the Legislative Rule Making Review Commission.



KEN HECHLER
Secretary of State

OFFICE OF THE SECRETARY OF STATE

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