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WEST VIRGINIA LEGISLATURE
FIRST REGULAR SESSION, 2013



ENROLLED

COMMITTEE SUBSTITUTE
FOR

House Bill No. 2733

(By Delegate(s) R. Phillips, Staggers, Ferro, Diserio and Reynolds)



Passed April 13, 2013

In effect ninety days from passage.

HB 2733

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CLERK OF COURTS
WEST VIRGINIA
SOUTH OF STATE

E N R O L L E D

COMMITTEE SUBSTITUTE

for

H. B. 2733

(BY DELEGATE(S) R. PHILLIPS, STAGGERS, FERRO,
DISERIO AND REYNOLDS)

[Passed April 13, 2013; in effect ninety days from passage.]

AN ACT to amend and reenact §17C-5A-2 of the Code of West Virginia, 1931, as amended, relating to hearings before the Office of Administrative Hearings; specifying methods of service; providing permissible hearing locations; deleting the requirement that the Office of Administrative Hearings shall send hearing notices to certain witnesses; deleting an instance of a duplication of an element for driving under the influence; clarifying that the Office of Administrative Hearings shall rescind or modify the order of the Commissioner of the Division of Motor Vehicles in certain cases; noting that the Office of Administrative Hearings is not a party to an appeal; stating that a party filing an appeal is financially responsible for the transcription of the hearing and

transmission of file copy; and stating that the court shall provide a copy of its final order to the Office of Administrative Hearings.

Be it enacted by the Legislature of West Virginia:

That §17C-5A-2 of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

ARTICLE 5A. ADMINISTRATIVE PROCEDURES FOR SUSPENSION AND REVOCATION OF LICENSES FOR DRIVING UNDER THE INFLUENCE OF ALCOHOL, CONTROLLED SUBSTANCES OR DRUGS.

§17C-5A-2. Hearing; revocation; review.

1 (a) Written objections to an order of revocation or
2 suspension under the provisions of section one of this article or
3 section seven, article five of this chapter shall be filed with the
4 Office of Administrative Hearings. Upon the receipt of an
5 objection, the Office of Administrative Hearings shall notify the
6 Commissioner of the Division of Motor Vehicles, who shall stay
7 the imposition of the period of revocation or suspension and
8 afford the person an opportunity to be heard by the Office of
9 Administrative Hearings. The written objection must be filed
10 with Office of Administrative Hearings in person, by registered
11 or certified mail, return receipt requested, or by facsimile
12 transmission or electronic mail within thirty calendar days after
13 receipt of a copy of the order of revocation or suspension or no
14 hearing will be granted: *Provided*, That a successful transmittal
15 sheet shall be necessary for proof of written objection in the case
16 of filing by fax. The hearing shall be before a hearing examiner
17 employed by the Office of Administrative Hearings who shall
18 rule on evidentiary issues. Upon consideration of the designated
19 record, the hearing examiner shall, based on the determination
20 of the facts of the case and applicable law, render a decision
21 affirming, reversing or modifying the action protested. The
22 decision shall contain findings of fact and conclusions of law
23 and shall be provided to all parties by registered or certified

24 mail, return receipt requested, or with a party's written consent,
25 by facsimile or electronic mail.

26 (b) The hearing shall be held at an office of the Division of
27 Motor Vehicles suitable for hearing purposes located in or near
28 the county in which the arrest was made in this state or at some
29 other suitable place in the county in which the arrest was made
30 if an office of the division is not available. At the discretion of
31 the Office of Administrative Hearings, the hearing may also be
32 held at an office of the Office of Administrative Hearings
33 located in or near the county in which the arrest was made in this
34 state. The Office of Administrative Hearings shall send a notice
35 of hearing to the person whose driving privileges are at issue and
36 the person's legal counsel if the person is represented by legal
37 counsel, by regular mail, or with the written consent of the
38 person whose driving privileges are at issue or their legal
39 counsel, by facsimile or electronic mail. The Office of
40 Administrative Hearings shall also send a notice of hearing by
41 regular mail, facsimile or electronic mail to the Division of
42 Motor Vehicles, and the Attorney General's Office, if the
43 Attorney General has filed a notice of appearance of counsel on
44 behalf of the Division of Motor Vehicles.

45 (c) (1) Any hearing shall be held within one hundred eighty
46 days after the date upon which the Office of Administrative
47 Hearings received the timely written objection unless there is a
48 postponement or continuance.

49 (2) The Office of Administrative Hearings may postpone or
50 continue any hearing on its own motion or upon application by
51 the party whose license is at issue in that hearing or by the
52 commissioner for good cause shown.

53 (3) The Office of Administrative Hearings may issue
54 subpoenas commanding the appearance of witnesses and
55 subpoenas duces tecum commanding the submission of
56 documents, items or other things. Subpoenas duces tecum shall

57 be returnable on the date of the next scheduled hearing unless
58 otherwise specified. The Office of Administrative hearings shall
59 issue subpoenas and subpoenas duces tecum at the request of a
60 party or the party's legal representative. The party requesting the
61 subpoena shall be responsible for service of the subpoena upon
62 the appropriate individual. Every subpoena or subpoena duces
63 tecum shall be served at least five days before the return date
64 thereof, either by personal service made by a person over
65 eighteen years of age or by registered or certified mail, return
66 receipt requested, and received by the party responsible for
67 serving the subpoena or subpoena duces tecum: *Provided*, That
68 the Division of Motor Vehicles may serve subpoenas to
69 law-enforcement officers through electronic mail to the
70 department of his or her employer. If a person does not obey the
71 subpoena or fails to appear, the party who issued the subpoena
72 to the person may petition the circuit court wherein the action
73 lies for enforcement of the subpoena.

74 (d) Law-enforcement officers shall be compensated for the
75 time expended in their travel and appearance before the Office
76 of Administrative Hearings by the law-enforcement agency by
77 whom they are employed at their regular rate if they are
78 scheduled to be on duty during said time or at their regular
79 overtime rate if they are scheduled to be off duty during said
80 time.

81 (e) The principal question at the hearing shall be whether the
82 person did drive a motor vehicle while under the influence of
83 alcohol, controlled substances or drugs, or did drive a motor
84 vehicle while having an alcohol concentration in the person's
85 blood of eight hundredths of one percent or more, by weight, or
86 did refuse to submit to the designated secondary chemical test,
87 or did drive a motor vehicle while under the age of twenty-one
88 years with an alcohol concentration in his or her blood of two
89 hundredths of one percent or more, by weight, but less than eight
90 hundredths of one percent, by weight.

91 (f) In the case of a hearing in which a person is accused of
92 driving a motor vehicle while under the influence of alcohol,
93 controlled substances or drugs, or accused of driving a motor
94 vehicle while having an alcohol concentration in the person's
95 blood of eight hundredths of one percent or more, by weight, or
96 accused of driving a motor vehicle while under the age of
97 twenty-one years with an alcohol concentration in his or her
98 blood of two hundredths of one percent or more, by weight, but
99 less than eight hundredths of one percent, by weight, the Office
100 of Administrative Hearings shall make specific findings as to:
101 (1) Whether the investigating law-enforcement officer had
102 reasonable grounds to believe the person to have been driving
103 while under the influence of alcohol, controlled substances or
104 drugs, or while having an alcohol concentration in the person's
105 blood of eight hundredths of one percent or more, by weight, or
106 to have been driving a motor vehicle while under the age of
107 twenty-one years with an alcohol concentration in his or her
108 blood of two hundredths of one percent or more, by weight, but
109 less than eight hundredths of one percent, by weight; (2) whether
110 the person was lawfully placed under arrest for an offense
111 involving driving under the influence of alcohol, controlled
112 substances or drugs, or was lawfully taken into custody for the
113 purpose of administering a secondary test: *Provided*, That this
114 element shall be waived in cases where no arrest occurred due to
115 driver incapacitation; (3) whether the person committed an
116 offense involving driving under the influence of alcohol,
117 controlled substances or drugs and (4) whether the tests, if any,
118 were administered in accordance with the provisions of this
119 article and article five of this chapter.

120 (g) If, in addition to a finding that the person did drive a
121 motor vehicle while under the influence of alcohol, controlled
122 substances or drugs, or did drive a motor vehicle while having an
123 alcohol concentration in the person's blood of eight hundredths
124 of one percent or more, by weight, or did drive a motor vehicle
125 while under the age of twenty-one years with an alcohol
126 concentration in his or her blood of two hundredths of one

127 percent or more, by weight, but less than eight hundredths of one
128 percent, by weight, the Office of Administrative Hearings also
129 finds by a preponderance of the evidence that the person when
130 driving did an act forbidden by law or failed to perform a duty
131 imposed by law, which act or failure proximately caused the
132 death of a person and was committed in reckless disregard of the
133 safety of others and if the Office of Administrative Hearings
134 further finds that the influence of alcohol, controlled substances
135 or drugs or the alcohol concentration in the blood was a
136 contributing cause to the death, the commissioner shall revoke
137 the person's license for a period of ten years: *Provided*, That if
138 the person's license has previously been suspended or revoked
139 under the provisions of this section or section one of this article
140 within the ten years immediately preceding the date of arrest, the
141 period of revocation shall be for the life of the person.

142 (h) If, in addition to a finding that the person did drive a
143 motor vehicle while under the influence of alcohol, controlled
144 substances or drugs, or did drive a motor vehicle while having an
145 alcohol concentration in the person's blood of eight hundredths
146 of one percent or more, by weight, the Office of Administrative
147 Hearings also finds by a preponderance of the evidence that the
148 person when driving did an act forbidden by law or failed to
149 perform a duty imposed by law, which act or failure proximately
150 caused the death of a person, the commissioner shall revoke the
151 person's license for a period of five years: *Provided*, That if the
152 person's license has previously been suspended or revoked under
153 the provisions of this section or section one of this article within
154 the ten years immediately preceding the date of arrest, the period
155 of revocation shall be for the life of the person.

156 (i) If, in addition to a finding that the person did drive a
157 motor vehicle while under the influence of alcohol, controlled
158 substances or drugs, or did drive a motor vehicle while having an
159 alcohol concentration in the person's blood of eight hundredths
160 of one percent or more, by weight, the Office of Administrative
161 Hearings also finds by a preponderance of the evidence that the

162 person when driving did an act forbidden by law or failed to
163 perform a duty imposed by law, which act or failure proximately
164 caused bodily injury to a person other than himself or herself, the
165 commissioner shall revoke the person's license for a period of
166 two years: *Provided*, That if the license has previously been
167 suspended or revoked under the provisions of this section or
168 section one of this article within the ten years immediately
169 preceding the date of arrest, the period of revocation shall be ten
170 years: *Provided, however*, That if the person's license has
171 previously been suspended or revoked more than once under the
172 provisions of this section or section one of this article within the
173 ten years immediately preceding the date of arrest, the period of
174 revocation shall be for the life of the person.

175 (j) If the Office of Administrative Hearings finds by a
176 preponderance of the evidence that the person did drive a motor
177 vehicle while under the influence of alcohol, controlled
178 substances or drugs, or did drive a motor vehicle while having an
179 alcohol concentration in the person's blood of eight hundredths
180 of one percent or more, by weight, but less than fifteen
181 hundredths of one percent or more, by weight, or finds that the
182 person knowingly permitted the persons vehicle to be driven by
183 another person who was under the influence of alcohol,
184 controlled substances or drugs, or knowingly permitted the
185 person's vehicle to be driven by another person who had an
186 alcohol concentration in his or her blood of eight hundredths of
187 one percent or more, by weight, the commissioner shall revoke
188 the person's license for a period of six months or a period of
189 fifteen days with an additional one hundred and twenty days of
190 participation in the Motor Vehicle Alcohol Test and Lock
191 Program in accordance with the provisions of section three-a of
192 this article: *Provided*, That any period of participation in the
193 Motor Vehicle Alcohol Test and Lock Program that has been
194 imposed by a court pursuant to section two-b, article five of this
195 chapter shall be credited against any period of participation
196 imposed by the commissioner: *Provided, however*, That a person
197 whose license is revoked for driving while under the influence

198 of drugs is not eligible to participate in the Motor Vehicle
199 Alcohol Test and Lock Program: *Provided further*, That if the
200 person's license has previously been suspended or revoked under
201 the provisions of this section or section one of this article within
202 the ten years immediately preceding the date of arrest, the period
203 of revocation shall be ten years: *And provided further*, That if the
204 person's license has previously been suspended or revoked more
205 than once under the provisions of this section or section one of
206 this article within the ten years immediately preceding the date
207 of arrest, the period of revocation shall be for the life of the
208 person.

209 (k) (1) If in addition to finding by a preponderance of the
210 evidence that the person did drive a motor vehicle while under
211 the influence of alcohol, controlled substance or drugs, the
212 Office of Administrative Hearings also finds by a preponderance
213 of the evidence that the person did drive a motor vehicle while
214 having an alcohol concentration in the person's blood of fifteen
215 hundredths of one percent or more, by weight, the commissioner
216 shall revoke the person's license for a period of forty-five days
217 with an additional two hundred and seventy days of participation
218 in the Motor Vehicle Alcohol Test and Lock Program in
219 accordance with the provisions of section three-a, article five-a,
220 chapter seventeen-c of this code: *Provided*, That if the person's
221 license has previously been suspended or revoked under the
222 provisions of this section or section one of this article within the
223 ten years immediately preceding the date of arrest, the period of
224 revocation shall be ten years: *Provided, however*, That if the
225 person's license has previously been suspended or revoked the
226 person's license more than once under the provisions of this
227 section or section one of this article within the ten years
228 immediately preceding the date of arrest, the period of
229 revocation shall be for the life of the person.

230 (2) If a person whose license is revoked pursuant to
231 subdivision (1) of this subsection proves by clear and convincing
232 evidence that they do not own a motor vehicle upon which the

233 alcohol test and lock device may be installed or is otherwise
234 incapable of participating in the Motor Vehicle Alcohol Test and
235 Lock Program, the period of revocation shall be one hundred
236 eighty days: *Provided*, That if the person's license has
237 previously been suspended or revoked under the provisions of
238 this section or section one of this article within the ten years
239 immediately preceding the date of arrest, the period of
240 revocation shall be ten years: *Provided, however*, That if the
241 person's license has previously been suspended or revoked more
242 than once under the provisions of this section or section one of
243 this article within the ten years immediately preceding the date
244 of arrest, the period of revocation shall be for the life of the
245 person.

246 (l) If, in addition to a finding that the person did drive a
247 motor vehicle while under the age of twenty-one years with an
248 alcohol concentration in his or her blood of two hundredths of
249 one percent or more, by weight, but less than eight hundredths of
250 one percent, by weight, the Office of Administrative Hearings
251 also finds by a preponderance of the evidence that the person
252 when driving did an act forbidden by law or failed to perform a
253 duty imposed by law, which act or failure proximately caused
254 the death of a person, and if the Office of Administrative
255 Hearings further finds that the alcohol concentration in the blood
256 was a contributing cause to the death, the commissioner shall
257 revoke the person's license for a period of five years: *Provided*,
258 That if the person's license has previously been suspended or
259 revoked under the provisions of this section or section one of this
260 article within the ten years immediately preceding the date of
261 arrest, the period of revocation shall be for the life of the person.

262 (m) If, in addition to a finding that the person did drive a
263 motor vehicle while under the age of twenty-one years with an
264 alcohol concentration in his or her blood of two hundredths of
265 one percent or more, by weight, but less than eight hundredths of
266 one percent, by weight, the Office of Administrative Hearings
267 also finds by a preponderance of the evidence that the person

268 when driving did an act forbidden by law or failed to perform a
269 duty imposed by law, which act or failure proximately caused
270 bodily injury to a person other than himself or herself, and if the
271 Office of Administrative Hearings further finds that the alcohol
272 concentration in the blood was a contributing cause to the bodily
273 injury, the commissioner shall revoke the person's license for a
274 period of two years: *Provided*, That if the person's license has
275 previously been suspended or revoked under the provisions of
276 this section or section one of this article within the ten years
277 immediately preceding the date of arrest, the period of
278 revocation shall be ten years: *Provided, however*, That if the
279 person's license has previously been suspended or revoked more
280 than once under the provisions of this section or section one of
281 this article within the ten years immediately preceding the date
282 of arrest, the period of revocation shall be for the life of the
283 person.

284 (n) If the Office of Administrative Hearings finds by a
285 preponderance of the evidence that the person did drive a motor
286 vehicle while under the age of twenty-one years with an alcohol
287 concentration in his or her blood of two hundredths of one
288 percent or more, by weight, but less than eight hundredths of one
289 percent, by weight, the commissioner shall suspend the person's
290 license for a period of sixty days: *Provided*, That if the person's
291 license has previously been suspended or revoked under the
292 provisions of this section or section one of this article, the period
293 of revocation shall be for one year, or until the person's
294 twenty-first birthday, whichever period is longer.

295 (o) If, in addition to a finding that the person did drive a
296 motor vehicle while under the influence of alcohol, controlled
297 substances or drugs, or did drive a motor vehicle while having an
298 alcohol concentration in the person's blood of eight hundredths
299 of one percent or more, by weight, the Office of Administrative
300 Hearings also finds by a preponderance of the evidence that the
301 person when driving did have on or within the Motor vehicle
302 another person who has not reached his or her sixteenth birthday,

303 the commissioner shall revoke the person's license for a period
304 of one year: *Provided*, That if the person's license has previously
305 been suspended or revoked under the provisions of this section
306 or section one of this article within the ten years immediately
307 preceding the date of arrest, the period of revocation shall be ten
308 years: *Provided, however*, That if the person's license has
309 previously been suspended or revoked more than once under the
310 provisions of this section or section one of this article within the
311 ten years immediately preceding the date of arrest, the period of
312 revocation shall be for the life of the person.

313 (p) For purposes of this section, where reference is made to
314 previous suspensions or revocations under this section, the
315 following types of criminal convictions or administrative
316 suspensions or revocations shall also be regarded as suspensions
317 or revocations under this section or section one of this article:

318 (1) Any administrative revocation under the provisions of
319 the prior enactment of this section for conduct which occurred
320 within the ten years immediately preceding the date of arrest;

321 (2) Any suspension or revocation on the basis of a
322 conviction under a municipal ordinance of another state or a
323 statute of the United States or of any other state of an offense
324 which has the same elements as an offense described in section
325 two, article five of this chapter for conduct which occurred
326 within the ten years immediately preceding the date of arrest; or

327 (3) Any revocation under the provisions of section seven,
328 article five of this chapter for conduct which occurred within the
329 ten years immediately preceding the date of arrest.

330 (q) In the case of a hearing in which a person is accused of
331 refusing to submit to a designated secondary test, the Office of
332 Administrative Hearings shall make specific findings as to: (1)
333 Whether the arresting law-enforcement officer had reasonable
334 grounds to believe the person had been driving a motor vehicle

335 in this state while under the influence of alcohol, controlled
336 substances or drugs; (2) whether the person was lawfully placed
337 under arrest for an offense involving driving under the influence
338 of alcohol, controlled substances or drugs, or was lawfully taken
339 into custody for the purpose of administering a secondary test:
340 *Provided*, That this element shall be waived in cases where no
341 arrest occurred due to driver incapacitation; (3) whether the
342 person committed an offense relating to driving a motor vehicle
343 in this state while under the influence of alcohol, controlled
344 substances or drugs; (4) whether the person refused to submit to
345 the secondary test finally designated in the manner provided in
346 section four, article five of this chapter; and (5) whether the
347 person had been given a written statement advising the person
348 that the person's license to operate a motor vehicle in this state
349 would be revoked for at least forty-five days and up to life if the
350 person refused to submit to the test finally designated in the
351 manner provided in said section.

352 (r) If the Office of Administrative Hearings finds by a
353 preponderance of the evidence that: (1) The investigating officer
354 had reasonable grounds to believe the person had been driving
355 a motor vehicle in this state while under the influence of alcohol,
356 controlled substances or drugs; (2) whether the person was
357 lawfully placed under arrest for an offense involving driving
358 under the influence of alcohol, controlled substances or drugs, or
359 was lawfully taken into custody for the purpose of administering
360 a secondary test: *Provided*, That this element shall be waived in
361 cases where no arrest occurred due to driver incapacitation; (3)
362 the person committed an offense relating to driving a motor
363 vehicle in this state while under the influence of alcohol,
364 controlled substances or drugs; (4) the person refused to submit
365 to the secondary test finally designated in the manner provided
366 in section four, article five of this chapter; and (5) the person had
367 been given a written statement advising the person that the
368 person's license to operate a motor vehicle in this state would be
369 revoked for at least forty-five days and up to life if the person
370 refused to submit to the test finally designated, the commissioner

371 shall revoke the person's license to operate a motor vehicle in
372 this state for the periods specified in section seven, article five
373 of this chapter. The revocation period prescribed in this
374 subsection shall run concurrently with any other revocation
375 period ordered under this section or section one of this article
376 arising out of the same occurrence. The revocation period
377 prescribed in this subsection shall run concurrently with any
378 other revocation period ordered under this section or section one
379 of this article arising out of the same occurrence.

380 (s) If the Office of Administrative Hearings finds to the
381 contrary with respect to the above issues, it shall rescind or
382 modify the commissioner's order and, in the case of
383 modification, the commissioner shall reduce the order of
384 revocation to the appropriate period of revocation under this
385 section or section seven, article five of this chapter. A copy of
386 the Office of Administrative Hearings' final order containing its
387 findings of fact and conclusions of law made and entered
388 following the hearing shall be served upon the person whose
389 license is at issue or upon the person's legal counsel if the person
390 is represented by legal counsel by registered or certified mail,
391 return receipt requested, or by facsimile or by electronic mail if
392 available. The final order shall be served upon the commissioner
393 by electronic mail. During the pendency of any hearing, the
394 revocation of the person's license to operate a motor vehicle in
395 this state shall be stayed.

396 A person whose license is at issue and the commissioner
397 shall be entitled to judicial review as set forth in chapter
398 twenty-nine-a of this code. Neither the commissioner nor the
399 Office of Administrative Hearings may stay enforcement of the
400 order. The court may grant a stay or supersede as of the order
401 only upon motion and hearing, and a finding by the court upon
402 the evidence presented, that there is a substantial probability that
403 the appellant shall prevail upon the merits and the appellant will
404 suffer irreparable harm if the order is not stayed: *Provided*, That
405 in no event shall the stay or supersede as of the order exceed one

406 hundred fifty days. The Office of Administrative Hearings may
407 not be made a party to an appeal. The party filing the appeal
408 shall pay the Office of Administrative Hearings for the
409 production and transmission of the certified file copy and the
410 hearing transcript to the court. Notwithstanding the provisions of
411 section four, article five of said chapter, the Office of
412 Administrative Hearings may not be compelled to transmit a
413 certified copy of the file or the transcript of the hearing to the
414 circuit court in less than sixty days. Circuit Clerk shall provide
415 a copy of the circuit court's final order on the appeal to the
416 Office of Administrative Hearings by regular mail, by facsimile,
417 or by electronic mail if available.

418 (t) In any revocation or suspension pursuant to this section,
419 if the driver whose license is revoked or suspended had not
420 reached the driver's eighteenth birthday at the time of the
421 conduct for which the license is revoked or suspended, the
422 driver's license shall be revoked or suspended until the driver's
423 eighteenth birthday or the applicable statutory period of
424 revocation or suspension prescribed by this section, whichever
425 is longer.

426 (u) Funds for this section's hearing and appeal process may
427 be provided from the Drunk Driving Prevention Fund, as created
428 by section forty-one, article two, chapter fifteen of this code,
429 upon application for the funds to the Commission on Drunk
430 Driving Prevention.

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Danny Wells

Chairman, House Committee

~~Member~~ *Rocky Fulmer*
Chairman, Senate Committee

Originating in the House.

In effect ninety days from passage.

Suzanne M. Snow
Clerk of the House of Delegates

Joseph M. Minard
Clerk of the Senate

[Signature]
Speaker of the House of Delegates

[Signature]
President of the Senate

The within is approved this the 3rd
day of May, 2013.

Earl Ray Tomblin
Governor

2013 MAY -3 PM 2:32
SECRETARY OF STATE

FILED

PRESENTED TO THE GOVERNOR

APR 29 2013

Time 2:10 pm