

COMMITTEE SUBSTITUTE

for

**H. B. 2733**

---

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

---

(Originating in the Committee on the Judiciary.)

[March 21, 2013]

A BILL 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, ~~the investigating or arresting law-enforcement officers,~~  
38 by regular mail, or with the written consent of the person whose  
39 driving privileges are at issue or their legal counsel, by facsimile  
40 or electronic mail. The Office of Administrative Hearings shall  
41 also send a notice of hearing by regular mail, facsimile or  
42 electronic mail to the Division of Motor Vehicles, and the  
43 Attorney General's Office, if the Attorney General has filed a  
44 notice of appearance of counsel on behalf of the Division of  
45 Motor Vehicles.

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

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

54 (3) The Office of Administrative Hearings may issue  
55 subpoenas commanding the appearance of witnesses and  
56 subpoenas duces tecum commanding the submission of  
57 documents, items or other things. Subpoenas duces tecum shall  
58 be returnable on the date of the next scheduled hearing unless  
59 otherwise specified. The Office of Administrative hearings shall  
60 issue subpoenas and subpoenas duces tecum at the request of a  
61 party or the party's legal representative. The party requesting the  
62 subpoena shall be responsible for service of the subpoena upon  
63 the appropriate individual. Every subpoena or subpoena duces  
64 tecum shall be served at least five days before the return date  
65 thereof, either by personal service made by a person over  
66 eighteen years of age or by registered or certified mail, return  
67 receipt requested, and received by the party responsible for  
68 serving the subpoena or subpoena duces tecum: *Provided*, That  
69 the Division of Motor Vehicles may serve subpoenas to

70 law-enforcement officers through electronic mail to the  
71 department of his or her employer. If a person does not obey the  
72 subpoena or fails to appear, the party who issued the subpoena  
73 to the person may petition the circuit court wherein the action  
74 lies for enforcement of the subpoena.

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

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

90 hundredths of one percent or more, by weight, but less than eight  
91 hundredths of one percent, by weight.

92 (f) In the case of a hearing in which a person is accused of  
93 driving a motor vehicle while under the influence of alcohol,  
94 controlled substances or drugs, or accused of driving a motor  
95 vehicle while having an alcohol concentration in the person's  
96 blood of eight hundredths of one percent or more, by weight, or  
97 accused of driving a motor vehicle while under the age of  
98 twenty-one years with an alcohol concentration in his or her  
99 blood of two hundredths of one percent or more, by weight, but  
100 less than eight hundredths of one percent, by weight, the Office  
101 of Administrative Hearings shall make specific findings as to:  
102 (1) Whether the investigating law-enforcement officer had  
103 reasonable grounds to believe the person to have been driving  
104 while under the influence of alcohol, controlled substances or  
105 drugs, or while having an alcohol concentration in the person's  
106 blood of eight hundredths of one percent or more, by weight, or  
107 to have been driving a motor vehicle while under the age of  
108 twenty-one years with an alcohol concentration in his or her  
109 blood of two hundredths of one percent or more, by weight, but

110 less than eight hundredths of one percent, by weight; (2) whether  
111 the person was lawfully placed under arrest for an offense  
112 involving driving under the influence of alcohol, controlled  
113 substances or drugs, or was lawfully taken into custody for the  
114 purpose of administering a secondary test: *Provided*, That this  
115 element shall be waived in cases where no arrest occurred due to  
116 driver incapacitation; (3) whether the person committed an  
117 offense involving driving under the influence of alcohol,  
118 controlled substances or drugs ~~or was lawfully taken into~~  
119 ~~custody for the purpose of administering a secondary test~~; and  
120 (4) whether the tests, if any, were administered in accordance  
121 with the provisions of this article and article five of this chapter.

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

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

144 (h) If, in addition to a finding that the person did drive a  
145 motor vehicle while under the influence of alcohol, controlled  
146 substances or drugs, or did drive a motor vehicle while having an  
147 alcohol concentration in the person's blood of eight hundredths  
148 of one percent or more, by weight, the Office of Administrative  
149 Hearings also finds by a preponderance of the evidence that the

150 person when driving did an act forbidden by law or failed to  
151 perform a duty imposed by law, which act or failure proximately  
152 caused the death of a person, the commissioner shall revoke the  
153 person's license for a period of five years: *Provided*, That if the  
154 person's license has previously been suspended or revoked under  
155 the provisions of this section or section one of this article within  
156 the ten years immediately preceding the date of arrest, the period  
157 of revocation shall be for the life of the person.

158 (i) If, in addition to a finding that the person did drive a  
159 motor vehicle while under the influence of alcohol, controlled  
160 substances or drugs, or did drive a motor vehicle while having an  
161 alcohol concentration in the person's blood of eight hundredths  
162 of one percent or more, by weight, the Office of Administrative  
163 Hearings also finds by a preponderance of the evidence that the  
164 person when driving did an act forbidden by law or failed to  
165 perform a duty imposed by law, which act or failure proximately  
166 caused bodily injury to a person other than himself or herself, the  
167 commissioner shall revoke the person's license for a period of  
168 two years: *Provided*, That if the license has previously been  
169 suspended or revoked under the provisions of this section or

170 section one of this article within the ten years immediately  
171 preceding the date of arrest, the period of revocation shall be ten  
172 years: *Provided, however,* That if the person's license has  
173 previously been suspended or revoked more than once under the  
174 provisions of this section or section one of this article within the  
175 ten years immediately preceding the date of arrest, the period of  
176 revocation shall be for the life of the person.

177 (j) If the Office of Administrative Hearings finds by a  
178 preponderance of the evidence that the person did drive a motor  
179 vehicle while under the influence of alcohol, controlled  
180 substances or drugs, or did drive a motor vehicle while having an  
181 alcohol concentration in the person's blood of eight hundredths  
182 of one percent or more, by weight, but less than fifteen  
183 hundredths of one percent or more, by weight, or finds that the  
184 person knowingly permitted the persons vehicle to be driven by  
185 another person who was under the influence of alcohol,  
186 controlled substances or drugs, or knowingly permitted the  
187 person's vehicle to be driven by another person who had an  
188 alcohol concentration in his or her blood of eight hundredths of  
189 one percent or more, by weight, the commissioner shall revoke

190 the person's license for a period of six months or a period of  
191 fifteen days with an additional one hundred and twenty days of  
192 participation in the Motor Vehicle Alcohol Test and Lock  
193 Program in accordance with the provisions of section three-a of  
194 this article: *Provided*, That any period of participation in the  
195 Motor Vehicle Alcohol Test and Lock Program that has been  
196 imposed by a court pursuant to section two-b, article five of this  
197 chapter shall be credited against any period of participation  
198 imposed by the commissioner: *Provided, however*, That a person  
199 whose license is revoked for driving while under the influence  
200 of drugs is not eligible to participate in the Motor Vehicle  
201 Alcohol Test and Lock Program: *Provided further*, That if the  
202 person's license has previously been suspended or revoked under  
203 the provisions of this section or section one of this article within  
204 the ten years immediately preceding the date of arrest, the period  
205 of revocation shall be ten years: *And provided further*, That if the  
206 person's license has previously been suspended or revoked more  
207 than once under the provisions of this section or section one of  
208 this article within the ten years immediately preceding the date  
209 of arrest, the period of revocation shall be for the life of the  
210 person.

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

232 (2) If a person whose license is revoked pursuant to  
233 subdivision (1) of this subsection proves by clear and convincing  
234 evidence that they do not own a motor vehicle upon which the  
235 alcohol test and lock device may be installed or is otherwise  
236 incapable of participating in the Motor Vehicle Alcohol Test and  
237 Lock Program, the period of revocation shall be one hundred  
238 eighty days: *Provided*, That if the person's license has  
239 previously been suspended or revoked under the provisions of  
240 this section or section one of this article within the ten years  
241 immediately preceding the date of arrest, the period of  
242 revocation shall be ten years: *Provided, however*, That if the  
243 person's license has previously been suspended or revoked more  
244 than once under the provisions of this section or section one of  
245 this article within the ten years immediately preceding the date  
246 of arrest, the period of revocation shall be for the life of the  
247 person.

248 (1) If, in addition to a finding that the person did drive a  
249 motor vehicle while under the age of twenty-one years with an  
250 alcohol concentration in his or her blood of two hundredths of  
251 one percent or more, by weight, but less than eight hundredths of

252 one percent, by weight, the Office of Administrative Hearings  
253 also finds by a preponderance of the evidence that the person  
254 when driving did an act forbidden by law or failed to perform a  
255 duty imposed by law, which act or failure proximately caused  
256 the death of a person, and if the Office of Administrative  
257 Hearings further finds that the alcohol concentration in the blood  
258 was a contributing cause to the death, the commissioner shall  
259 revoke the person's license for a period of five years: *Provided,*  
260 That if the person's license has previously been suspended or  
261 revoked under the provisions of this section or section one of this  
262 article within the ten years immediately preceding the date of  
263 arrest, the period of revocation shall be for the life of the person.

264 (m) If, in addition to a finding that the person did drive a  
265 motor vehicle while under the age of twenty-one years with an  
266 alcohol concentration in his or her blood of two hundredths of  
267 one percent or more, by weight, but less than eight hundredths of  
268 one percent, by weight, the Office of Administrative Hearings  
269 also finds by a preponderance of the evidence that the person  
270 when driving did an act forbidden by law or failed to perform a  
271 duty imposed by law, which act or failure proximately caused

272 bodily injury to a person other than himself or herself, and if the  
273 Office of Administrative Hearings further finds that the alcohol  
274 concentration in the blood was a contributing cause to the bodily  
275 injury, the commissioner shall revoke the person's license for a  
276 period of two years: *Provided*, That if the person's license has  
277 previously been suspended or revoked under the provisions of  
278 this section or section one of this article within the ten years  
279 immediately preceding the date of arrest, the period of  
280 revocation shall be ten years: *Provided, however*, That if the  
281 person's license has previously been suspended or revoked more  
282 than once under the provisions of this section or section one of  
283 this article within the ten years immediately preceding the date  
284 of arrest, the period of revocation shall be for the life of the  
285 person.

286 (n) If the Office of Administrative Hearings finds by a  
287 preponderance of the evidence that the person did drive a motor  
288 vehicle while under the age of twenty-one years with an alcohol  
289 concentration in his or her blood of two hundredths of one  
290 percent or more, by weight, but less than eight hundredths of one  
291 percent, by weight, the commissioner shall suspend the person's

292 license for a period of sixty days: *Provided*, That if the person's  
293 license has previously been suspended or revoked under the  
294 provisions of this section or section one of this article, the period  
295 of revocation shall be for one year, or until the person's  
296 twenty-first birthday, whichever period is longer.

297 (o) If, in addition to a finding that the person did drive a  
298 motor vehicle while under the influence of alcohol, controlled  
299 substances or drugs, or did drive a motor vehicle while having an  
300 alcohol concentration in the person's blood of eight hundredths  
301 of one percent or more, by weight, the Office of Administrative  
302 Hearings also finds by a preponderance of the evidence that the  
303 person when driving did have on or within the Motor vehicle  
304 another person who has not reached his or her sixteenth birthday,  
305 the commissioner shall revoke the person's license for a period  
306 of one year: *Provided*, That if the person's license has previously  
307 been suspended or revoked under the provisions of this section  
308 or section one of this article within the ten years immediately  
309 preceding the date of arrest, the period of revocation shall be ten  
310 years: *Provided, however*, That if the person's license has  
311 previously been suspended or revoked more than once under the

312 provisions of this section or section one of this article within the  
313 ten years immediately preceding the date of arrest, the period of  
314 revocation shall be for the life of the person.

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

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

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

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

332 (q) In the case of a hearing in which a person is accused of  
333 refusing to submit to a designated secondary test, the Office of  
334 Administrative Hearings shall make specific findings as to: (1)  
335 Whether the arresting law-enforcement officer had reasonable  
336 grounds to believe the person had been driving a motor vehicle  
337 in this state while under the influence of alcohol, controlled  
338 substances or drugs; (2) whether the person was lawfully placed  
339 under arrest for an offense involving driving under the influence  
340 of alcohol, controlled substances or drugs, or was lawfully taken  
341 into custody for the purpose of administering a secondary test:  
342 *Provided*, That this element shall be waived in cases where no  
343 arrest occurred due to driver incapacitation; (3) whether the  
344 person committed an offense relating to driving a motor vehicle  
345 in this state while under the influence of alcohol, controlled  
346 substances or drugs; (4) whether the person refused to submit to  
347 the secondary test finally designated in the manner provided in  
348 section four, article five of this chapter; and (5) whether the  
349 person had been given a written statement advising the person  
350 that the person's license to operate a motor vehicle in this state  
351 would be revoked for at least forty-five days and up to life if the

352 person refused to submit to the test finally designated in the  
353 manner provided in said section.

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

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

382 (s) If the Office of Administrative Hearings finds to the  
383 contrary with respect to the above issues, it shall rescind or  
384 modify the commissioner's order and, in the case of  
385 modification, the commissioner ~~shall rescind his or her earlier~~  
386 ~~order of revocation~~ or shall reduce the order of revocation to the  
387 appropriate period of revocation under this section or section  
388 seven, article five of this chapter. A copy of the Office of  
389 Administrative Hearings' final order containing its findings of  
390 fact and conclusions of law made and entered following the  
391 hearing shall be served upon the person whose license is at issue

392 or upon the person's legal counsel if the person is represented by  
393 legal counsel by registered or certified mail, return receipt  
394 requested, or by facsimile or by electronic mail if available. The  
395 final order shall be served upon the commissioner by electronic  
396 mail. During the pendency of any hearing, the revocation of the  
397 person's license to operate a motor vehicle in this state shall be  
398 stayed.

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

412 production and transmission of the certified file copy and the  
413 hearing transcript to the court. Notwithstanding the provisions of  
414 section four, article five of said chapter, the Office of  
415 Administrative Hearings may not be compelled to transmit a  
416 certified copy of the file or the transcript of the hearing to the  
417 circuit court in less than sixty days. The court shall provide a  
418 copy of its final order on the appeal to the Office of  
419 Administrative Hearings by regular mail, by facsimile, or by  
420 electronic mail if available.

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

429 (u) Funds for this section's hearing and appeal process may  
430 be provided from the Drunk Driving Prevention Fund, as created  
431 by section forty-one, article two, chapter fifteen of this code,

Com. Sub. For H. B. No. 2733] 24

432 upon application for the funds to the Commission on Drunk

433 Driving Prevention.