

1 **ENROLLED**

2 COMMITTEE SUBSTITUTE

3 FOR

4 **Senate Bill No. 512**

5 (SENATORS PALUMBO AND BEACH, *original sponsors*)

6 _____
7 [Passed March 8, 2012; in effect ninety days from passage.]
8 _____

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10
11 AN ACT to amend and reenact §17C-5A-2 of the Code of West Virginia,
12 1931, as amended; and to amend said code by adding thereto two
13 new sections, designated §17C-5C-4a and §17C-5C-4b, all
14 relating to updating statutory provisions relating to
15 procedures of the Office of Administrative Hearings; providing
16 written objections to revocation notices may be filed by
17 facsimile or e-mail; providing notices of hearing are sent to
18 the parties and their legal counsel; providing that the Office
19 of Administrative Hearings has subpoena authority; providing
20 that parties may enforce Office of Administrative Hearings
21 subpoenas in circuit court; providing that the Division of
22 Motor Vehicles may serve subpoenas to law-enforcement officers
23 by electronic mail; deleting language indicating that a notice
24 of hearing sent by certified or registered mail to a

1 law-enforcement officer constitutes a subpoena to appear;
2 authorizing the Office of Administrative Hearings to propose
3 legislative rules to implement the provisions of this article
4 and to carry out the duties prescribed therein; and requiring
5 persons with pending contested matters to provide notice of
6 change of address.

7 *Be it enacted by the Legislature of West Virginia:*

8 That §17C-5A-2 of the Code of West Virginia, 1931, as amended,
9 be amended and reenacted; and that said code be amended by adding
10 thereto two new sections, designated §17C-5C-4a and §17C-5C-4b, all
11 to read as follows:

12 **ARTICLE 5A. ADMINISTRATIVE PROCEDURES FOR SUSPENSION AND**
13 **REVOCAION OF LICENSES FOR DRIVING UNDER THE**
14 **INFLUENCE OF ALCOHOL, CONTROLLED SUBSTANCES OR**
15 **DRUGS.**

16 **§17C-5A-2. Hearing; revocation; review.**

17 (a) Written objections to an order of revocation or suspension
18 under the provisions of section one of this article or section
19 seven, article five of this chapter shall be filed with the Office
20 of Administrative Hearings. Upon the receipt of an objection, the
21 Office of Administrative Hearings shall notify the Commissioner of
22 the Division of Motor Vehicles, who shall stay the imposition of
23 the period of revocation or suspension and afford the person an
24 opportunity to be heard by the Office of Administrative Hearings.

1 The written objection must be filed with Office of Administrative
2 Hearings in person, by registered or certified mail, return receipt
3 requested, or by facsimile transmission or electronic mail within
4 thirty calendar days after receipt of a copy of the order of
5 revocation or suspension or no hearing will be granted: *Provided,*
6 That a successful transmittal sheet shall be necessary for proof of
7 written objection in the case of filing by fax. The hearing shall
8 be before a hearing examiner employed by the Office of
9 Administrative Hearings who shall rule on evidentiary issues.
10 Upon consideration of the designated record, the hearing examiner
11 shall, based on the determination of the facts of the case and
12 applicable law, render a decision affirming, reversing or
13 modifying the action protested. The decision shall contain
14 findings of fact and conclusions of law and shall be provided to all
15 parties by registered or certified mail, return receipt requested.

16 (b) The hearing shall be held at an office of the Division of
17 Motor Vehicles located in or near the county in which the arrest was
18 made in this state or at some other suitable place in the county in
19 which the arrest was made if an office of the division is not
20 available. The Office of Administrative Hearings shall send a notice
21 of hearing to the person whose driving privileges are at issue and
22 the person's legal counsel if the person is represented by legal
23 counsel, the investigating or arresting law-enforcement officers, the
24 Division of Motor Vehicles, and the Attorney General's Office, if the
25 Attorney General has filed a notice of appearance of counsel on

1 behalf of the Division of Motor Vehicles.

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

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

10 (3) The Office of Administrative Hearings may issue subpoenas
11 commanding the appearance of witnesses and subpoenas duces tecum
12 commanding the submission of documents, items or other things.
13 Subpoenas duces tecum shall be returnable on the date of the next
14 scheduled hearing unless otherwise specified. The Office of
15 Administrative hearings shall issue subpoenas and subpoenas duces
16 tecum at the request of a party or the party's legal representative.
17 The party requesting the subpoena shall be responsible for service of
18 the subpoena upon the appropriate individual. Every subpoena or
19 subpoena duces tecum shall be served at least five days before the
20 return date thereof, either by personal service made by a person over
21 eighteen years of age or by registered or certified mail, return
22 receipt requested, and received by the party responsible for serving
23 the subpoena or subpoena duces tecum: *Provided*, That the Division of
24 Motor Vehicles may serve subpoenas to law-enforcement officers
25 through electronic mail to the department of his or her employer. If

1 a person does not obey the subpoena or fails to appear, the party who
2 issued the subpoena to the person may petition the circuit court
3 wherein the action lies for enforcement of the subpoena.

4 (d) Law-enforcement officers shall be compensated for the time
5 expended in their travel and appearance before the Office of
6 Administrative Hearings by the law-enforcement agency by whom they
7 are employed at their regular rate if they are scheduled to be on
8 duty during said time or at their regular overtime rate if they are
9 scheduled to be off duty during said time.

10 (e) The principal question at the hearing shall be whether the
11 person did drive a motor vehicle while under the influence of
12 alcohol, controlled substances or drugs, or did drive a motor vehicle
13 while having an alcohol concentration in the person's blood of eight
14 hundredths of one percent or more, by weight, or did refuse to submit
15 to the designated secondary chemical test, or did drive a motor
16 vehicle while under the age of twenty-one years with an alcohol
17 concentration in his or her blood of two hundredths of one percent or
18 more, by weight, but less than eight hundredths of one percent, by
19 weight.

20 (f) In the case of a hearing in which a person is accused of
21 driving a motor vehicle while under the influence of alcohol,
22 controlled substances or drugs, or accused of driving a motor vehicle
23 while having an alcohol concentration in the person's blood of eight
24 hundredths of one percent or more, by weight, or accused of driving
25 a motor vehicle while under the age of twenty-one years with an

1 alcohol concentration in his or her blood of two hundredths of one
2 percent or more, by weight, but less than eight hundredths of one
3 percent, by weight, the Office of Administrative Hearings shall make
4 specific findings as to: (1) Whether the investigating law-
5 enforcement officer had reasonable grounds to believe the person to
6 have been driving while under the influence of alcohol, controlled
7 substances or drugs, or while having an alcohol concentration in the
8 person's blood of eight hundredths of one percent or more, by weight,
9 or to have been driving a motor vehicle while under the age of
10 twenty-one years with an alcohol concentration in his or her blood of
11 two hundredths of one percent or more, by weight, but less than eight
12 hundredths of one percent, by weight; (2) whether the person was
13 lawfully placed under arrest for an offense involving driving under
14 the influence of alcohol, controlled substances or drugs, or was
15 lawfully taken into custody for the purpose of administering a
16 secondary test: *Provided*, That this element shall be waived in cases
17 where no arrest occurred due to driver incapacitation; (3) whether
18 the person committed an offense involving driving under the influence
19 of alcohol, controlled substances or drugs, or was lawfully taken
20 into custody for the purpose of administering a secondary test; and
21 (4) whether the tests, if any, were administered in accordance with
22 the provisions of this article and article five of this chapter.

23 (g) If, in addition to a finding that the person did drive a
24 motor vehicle while under the influence of alcohol, controlled
25 substances or drugs, or did drive a motor vehicle while having an

1 alcohol concentration in the person's blood of eight hundredths of
2 one percent or more, by weight, or did drive a motor vehicle while
3 under the age of twenty-one years with an alcohol concentration in
4 his or her blood of two hundredths of one percent or more, by weight,
5 but less than eight hundredths of one percent, by weight, the Office
6 of Administrative Hearings also finds by a preponderance of the
7 evidence that the person when driving did an act forbidden by law or
8 failed to perform a duty imposed by law, which act or failure
9 proximately caused the death of a person and was committed in
10 reckless disregard of the safety of others and if the Office of
11 Administrative Hearings further finds that the influence of alcohol,
12 controlled substances or drugs or the alcohol concentration in the
13 blood was a contributing cause to the death, the commissioner shall
14 revoke the person's license for a period of ten years: *Provided*, That
15 if the person's license has previously been suspended or revoked
16 under the provisions of this section or section one of this article
17 within the ten years immediately preceding the date of arrest, the
18 period of revocation shall be for the life of the person.

19 (h) If, in addition to a finding that the person did drive a
20 motor vehicle while under the influence of alcohol, controlled
21 substances or drugs, or did drive a motor vehicle while having an
22 alcohol concentration in the person's blood of eight hundredths of
23 one percent or more, by weight, the Office of Administrative Hearings
24 also finds by a preponderance of the evidence that the person when
25 driving did an act forbidden by law or failed to perform a duty

1 imposed by law, which act or failure proximately caused the death of
2 a person, the commissioner shall revoke the person's license for a
3 period of five years: *Provided*, That if the person's license has
4 previously been suspended or revoked under the provisions of this
5 section or section one of this article within the ten years
6 immediately preceding the date of arrest, the period of revocation
7 shall be for the life of the person.

8 (i) If, in addition to a finding that the person did drive a
9 motor vehicle while under the influence of alcohol, controlled
10 substances or drugs, or did drive a motor vehicle while having an
11 alcohol concentration in the person's blood of eight hundredths of
12 one percent or more, by weight, the Office of Administrative Hearings
13 also finds by a preponderance of the evidence that the person when
14 driving did an act forbidden by law or failed to perform a duty
15 imposed by law, which act or failure proximately caused bodily injury
16 to a person other than himself or herself, the commissioner shall
17 revoke the person's license for a period of two years: *Provided*, That
18 if the license has previously been suspended or revoked under the
19 provisions of this section or section one of this article within the
20 ten years immediately preceding the date of arrest, the period of
21 revocation shall be ten years: *Provided, however*, That if the
22 person's license has previously been suspended or revoked more than
23 once under the provisions of this section or section one of this
24 article within the ten years immediately preceding the date of
25 arrest, the period of revocation shall be for the life of the person.

1 (j) If the Office of Administrative Hearings finds by a
2 preponderance of the evidence that the person did drive a motor
3 vehicle while under the influence of alcohol, controlled substances
4 or drugs, or did drive a motor vehicle while having an alcohol
5 concentration in the person's blood of eight hundredths of one
6 percent or more, by weight, but less than fifteen hundredths of one
7 percent or more, by weight, or finds that the person knowingly
8 permitted the persons vehicle to be driven by another person who was
9 under the influence of alcohol, controlled substances or drugs, or
10 knowingly permitted the person's vehicle to be driven by another
11 person who had an alcohol concentration in his or her blood of eight
12 hundredths of one percent or more, by weight the commissioner shall
13 revoke the person's license for a period of six months or a period of
14 fifteen days with an additional one hundred and twenty days of
15 participation in the Motor Vehicle Alcohol Test and Lock Program in
16 accordance with the provisions of section three-a of this article:
17 *Provided*, That any period of participation in the Motor Vehicle
18 Alcohol Test and Lock Program that has been imposed by a court
19 pursuant to section two-b, article five of this chapter shall be
20 credited against any period of participation imposed by the
21 commissioner: *Provided*, however, That a person whose license is
22 revoked for driving while under the influence of drugs is not
23 eligible to participate in the Motor Vehicle Alcohol Test and Lock
24 Program: *Provided* further, That if the person's license has
25 previously been suspended or revoked under the provisions of this

1 section or section one of this article within the ten years
2 immediately preceding the date of arrest, the period of revocation
3 shall be ten years: *And provided further,* That if the person's
4 license has previously been suspended or revoked more than once under
5 the provisions of this section or section one of this article within
6 the ten years immediately preceding the date of arrest, the period of
7 revocation shall be for the life of the person.

8 (k) (1) If in addition to finding by a preponderance of the
9 evidence that the person did drive a motor vehicle while under the
10 influence of alcohol, controlled substance or drugs, the Office of
11 Administrative Hearings also finds by a preponderance of the evidence
12 that the person did drive a motor vehicle while having an alcohol
13 concentration in the person's blood of fifteen hundredths of one
14 percent or more, by weight, the commissioner shall revoke the
15 person's license for a period of forty-five days with an additional
16 two hundred and seventy days of participation in the Motor Vehicle
17 Alcohol Test and Lock Program in accordance with the provisions of
18 section three-a, article five-a, chapter seventeen-c of this code:
19 *Provided,* That if the person's license has previously been suspended
20 or revoked under the provisions of this section or section one of
21 this article within the ten years immediately preceding the date of
22 arrest, the period of revocation shall be ten years: *Provided,*
23 *however,* That if the person's license has previously been suspended
24 or revoked the person's license more than once under the provisions
25 of this section or section one of this article within the ten years

1 immediately preceding the date of arrest, the period of revocation
2 shall be for the life of the person.

3 (2) If a person whose license is revoked pursuant to subdivision
4 (1) of this subsection proves by clear and convincing evidence that
5 they do not own a motor vehicle upon which the alcohol test and lock
6 device may be installed or is otherwise incapable of participating in
7 the Motor Vehicle Alcohol Test and Lock Program, the period of
8 revocation shall be one hundred eighty days: *Provided*, That if the
9 person's license has previously been suspended or revoked under the
10 provisions of this section or section one of this article within the
11 ten years immediately preceding the date of arrest, the period of
12 revocation shall be ten years: *Provided, however*, That if the
13 person's license has previously been suspended or revoked more than
14 once under the provisions of this section or section one of this
15 article within the ten years immediately preceding the date of
16 arrest, the period of revocation shall be for the life of the person.

17 (1) If, in addition to a finding that the person did drive a
18 motor vehicle while under the age of twenty-one years with an alcohol
19 concentration in his or her blood of two hundredths of one percent or
20 more, by weight, but less than eight hundredths of one percent, by
21 weight, the Office of Administrative Hearings also finds by a
22 preponderance of the evidence that the person when driving did an act
23 forbidden by law or failed to perform a duty imposed by law, which
24 act or failure proximately caused the death of a person, and if the
25 Office of Administrative Hearings further finds that the alcohol

1 concentration in the blood was a contributing cause to the death, the
2 commissioner shall revoke the person's license for a period of five
3 years: *Provided*, That if the person's license has previously been
4 suspended or revoked under the provisions of this section or section
5 one of this article within the ten years immediately preceding the
6 date of arrest, the period of revocation shall be for the life of the
7 person.

8 (m) If, in addition to a finding that the person did drive a
9 motor vehicle while under the age of twenty-one years with an alcohol
10 concentration in his or her blood of two hundredths of one percent or
11 more, by weight, but less than eight hundredths of one percent, by
12 weight, the Office of Administrative Hearings also finds by a
13 preponderance of the evidence that the person when driving did an act
14 forbidden by law or failed to perform a duty imposed by law, which
15 act or failure proximately caused bodily injury to a person other
16 than himself or herself, and if the Office of Administrative Hearings
17 further finds that the alcohol concentration in the blood was a
18 contributing cause to the bodily injury, the commissioner shall
19 revoke the person's license for a period of two years: *Provided*, That
20 if the person's license has previously been suspended or revoked
21 under the provisions of this section or section one of this article
22 within the ten years immediately preceding the date of arrest, the
23 period of revocation shall be ten years: *Provided, however*, That if
24 the person's license has previously been suspended or revoked more
25 than once under the provisions of this section or section one of this

1 article within the ten years immediately preceding the date of
2 arrest, the period of revocation shall be for the life of the person.

3 (n) If the Office of Administrative Hearings finds by a
4 preponderance of the evidence that the person did drive a motor
5 vehicle while under the age of twenty-one years with an alcohol
6 concentration in his or her blood of two hundredths of one percent or
7 more, by weight, but less than eight hundredths of one percent, by
8 weight, the commissioner shall suspend the person's license for a
9 period of sixty days: *Provided*, That if the person's license has
10 previously been suspended or revoked under the provisions of this
11 section or section one of this article, the period of revocation
12 shall be for one year, or until the person's twenty-first birthday,
13 whichever period is longer.

14 (o) If, in addition to a finding that the person did drive a
15 motor vehicle while under the influence of alcohol, controlled
16 substances or drugs, or did drive a motor vehicle while having an
17 alcohol concentration in the person's blood of eight hundredths of
18 one percent or more, by weight, the Office of Administrative Hearings
19 also finds by a preponderance of the evidence that the person when
20 driving did have on or within the Motor vehicle another person who
21 has not reached his or her sixteenth birthday, the commissioner shall
22 revoke the person's license for a period of one year: *Provided*, That
23 if the person's license has previously been suspended or revoked
24 under the provisions of this section or section one of this article
25 within the ten years immediately preceding the date of arrest, the

1 period of revocation shall be ten years: *Provided, however,* That if
2 the person's license has previously been suspended or revoked more
3 than once under the provisions of this section or section one of this
4 article within the ten years immediately preceding the date of
5 arrest, the period of revocation shall be for the life of the person.

6 (p) For purposes of this section, where reference is made to
7 previous suspensions or revocations under this section, the following
8 types of criminal convictions or administrative suspensions or
9 revocations shall also be regarded as suspensions or revocations
10 under this section or section one of this article:

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

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

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

23 (q) In the case of a hearing in which a person is accused of
24 refusing to submit to a designated secondary test, the Office of
25 Administrative Hearings shall make specific findings as to: (1)

1 Whether the arresting law-enforcement officer had reasonable grounds
2 to believe the person had been driving a motor vehicle in this state
3 while under the influence of alcohol, controlled substances or drugs;
4 (2) whether the person was lawfully placed under arrest for an
5 offense involving driving under the influence of alcohol, controlled
6 substances or drugs, or was lawfully taken into custody for the
7 purpose of administering a secondary test: *Provided*, That this
8 element shall be waived in cases where no arrest occurred due to
9 driver incapacitation; (3) whether the person committed an offense
10 relating to driving a motor vehicle in this state while under the
11 influence of alcohol, controlled substances or drugs; (4) whether the
12 person refused to submit to the secondary test finally designated in
13 the manner provided in section four, article five of this chapter;
14 and (5) whether the person had been given a written statement
15 advising the person that the person's license to operate a motor
16 vehicle in this state would be revoked for at least forty-five days
17 and up to life if the person refused to submit to the test finally
18 designated in the manner provided in said section.

19 (r) If the Office of Administrative Hearings finds by a
20 preponderance of the evidence that: (1) The investigating officer had
21 reasonable grounds to believe the person had been driving a motor
22 vehicle in this state while under the influence of alcohol,
23 controlled substances or drugs; (2) whether the person was lawfully
24 placed under arrest for an offense involving driving under the
25 influence of alcohol, controlled substances or drugs, or was lawfully

1 taken into custody for the purpose of administering a secondary test:
2 *Provided*, That this element shall be waived in cases where no arrest
3 occurred due to driver incapacitation; (3) the person committed an
4 offense relating to driving a motor vehicle in this state while under
5 the influence of alcohol, controlled substances or drugs; (4) the
6 person refused to submit to the secondary test finally designated in
7 the manner provided in section four, article five of this chapter;
8 and (5) the person had been given a written statement advising the
9 person that the person's license to operate a motor vehicle in this
10 state would be revoked for at least forty-five days and up to life if
11 the person refused to submit to the test finally designated, the
12 commissioner shall revoke the person's license to operate a motor
13 vehicle in this state for the periods specified in section seven,
14 article five of this chapter. The revocation period prescribed in
15 this subsection shall run concurrently with any other revocation
16 period ordered under this section or section one of this article
17 arising out of the same occurrence. The revocation period prescribed
18 in this subsection shall run concurrently with any other revocation
19 period ordered under this section or section one of this article
20 arising out of the same occurrence.

21 (s) If the Office of Administrative Hearings finds to the
22 contrary with respect to the above issues the commissioner shall
23 rescind his or her earlier order of revocation or shall reduce the
24 order of revocation to the appropriate period of revocation under
25 this section or section seven, article five of this chapter. A copy

1 of the Office of Administrative Hearings' final order containing its
2 findings of fact and conclusions of law made and entered following
3 the hearing shall be served upon the person whose license is at issue
4 or upon the person's legal counsel if the person is represented by
5 legal counsel by registered or certified mail, return receipt
6 requested or by electronic mail if available. The final order shall
7 be served upon the commissioner by electronic mail. During the
8 pendency of any hearing, the revocation of the person's license to
9 operate a motor vehicle in this state shall be stayed.

10 A person whose license is at issue and the commissioner shall be
11 entitled to judicial review as set forth in chapter twenty-nine-a of
12 this code. Neither the Commissioner nor the Office of Administrative
13 Hearings may stay enforcement of the order. The court may grant a
14 stay or supersede as of the order only upon motion and hearing, and
15 a finding by the court upon the evidence presented, that there is a
16 substantial probability that the appellant shall prevail upon the
17 merits and the appellant will suffer irreparable harm if the order is
18 not stayed: *Provided*, That in no event shall the stay or supersede as
19 of the order exceed one hundred fifty days. Notwithstanding the
20 provisions of section four, article five of said chapter, the Office
21 of Administrative Hearings may not be compelled to transmit a
22 certified copy of the file or the transcript of the hearing to the
23 circuit court in less than sixty days.

24 (t) In any revocation or suspension pursuant to this section, if
25 the driver whose license is revoked or suspended had not reached the

1 driver's eighteenth birthday at the time of the conduct for which the
2 license is revoked or suspended, the driver's license shall be
3 revoked or suspended until the driver's eighteenth birthday or the
4 applicable statutory period of revocation or suspension prescribed by
5 this section, whichever is longer.

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

11 **ARTICLE 5C. OFFICE OF ADMINISTRATIVE HEARINGS.**

12 **§17C-5C-4a. Rule-making authority.**

13 The Office of Administrative Hearings may propose legislative
14 and procedural rules in accordance with the provisions of article
15 three, chapter twenty-nine-a of this code in order to implement the
16 provisions of this article and to carry out the duties prescribed
17 therein.

18 **§17C-5C-4b. Duty to provide notice of change of address.**

19 Any person who has any pending contested matter before the
20 Office of Administrative Hearings is required to provide written
21 notice of a change in address by written notice at least ten days
22 prior to any scheduled hearing in which they are a party. If the
23 person's final hearing is held prior to the person's change in
24 address, then the person is required to provide the written notice
25 prior to the issuance of the final order in their case. Written

1 notice must be provided by certified mail, return receipt requested,
2 facsimile, or by electronic mail, to the Office of Administrative
3 Hearings.