

Senate Bill No. 512

(By Senators Palumbo and Beach)

[Introduced February 3, 2012; referred to the Committee on
Transportation and Infrastructure; and then to the Committee on
the Judiciary.]

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

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

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

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

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

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

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

1 the period of revocation or suspension and afford the person an
2 opportunity to be heard by the Office of Administrative Hearings. The
3 written objection must be filed with Office of Administrative
4 Hearings in person, ~~or~~ by registered or certified mail, return
5 receipt requested, or by facsimile transmission or electronic mail
6 within thirty calendar days after receipt of a copy of the order of
7 revocation or suspension or no hearing will be granted. The hearing
8 shall be before a hearing examiner employed by the Office of
9 Administrative Hearings who shall rule on evidentiary issues. Upon
10 consideration of the designated record, the hearing examiner shall,
11 based on the determination of the facts of the case and applicable
12 law, render a decision affirming, reversing or modifying the
13 action protested. The decision shall contain findings of fact and
14 conclusions of law and shall be provided to all parties by registered
15 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 license is at issue and the person's
22 legal counsel if the person is represented by legal counsel, the
23 appropriate law-enforcement officers, the Division of Motor Vehicles,
24 ~~the prosecuting attorney~~ and the Attorney General's Office, if the

1 Attorney General has filed a notice of appearance of counsel on
2 behalf of the Division of Motor Vehicles.

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

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

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

1 Motor Vehicles may serve subpoenas to law-enforcement officers
2 through electronic mail. If a person does not obey the subpoena or
3 fails to appear, the party who issued the subpoena to the person may
4 petition the circuit court wherein the action lies for enforcement of
5 the subpoena.

6 ~~(3) A notice of hearing to the appropriate law-enforcement~~
7 ~~officers by registered or certified mail, return receipt requested,~~
8 ~~constitutes a subpoena to appear at the hearing without the necessity~~
9 ~~of payment of fees by the Division of Motor Vehicles.~~

10 (d) Law-enforcement officers shall be compensated for the time
11 expended in their travel and appearance before the Office of
12 Administrative Hearings by the law-enforcement agency by whom they
13 are employed at their regular rate if they are scheduled to be on
14 duty during said time or at their regular overtime rate if they are
15 scheduled to be off duty during said time.

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

1 weight.

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

1 the person committed an offense involving driving under the influence
2 of alcohol, controlled substances or drugs, or was lawfully taken
3 into custody for the purpose of administering a secondary test; and
4 (4) whether the tests, if any, were administered in accordance with
5 the provisions of this article and article five of this chapter.

6 (g) If, in addition to a finding that the person did drive a
7 motor vehicle while under the influence of alcohol, controlled
8 substances or drugs, or did drive a motor vehicle while having an
9 alcohol concentration in the person's blood of eight hundredths of
10 one percent or more, by weight, or did drive a motor vehicle while
11 under the age of twenty-one years with an alcohol concentration in
12 his or her blood of two hundredths of one percent or more, by weight,
13 but less than eight hundredths of one percent, by weight, the Office
14 of Administrative Hearings also finds by a preponderance of the
15 evidence that the person when driving did an act forbidden by law or
16 failed to perform a duty imposed by law, which act or failure
17 proximately caused the death of a person and was committed in
18 reckless disregard of the safety of others and if the Office of
19 Administrative Hearings further finds that the influence of alcohol,
20 controlled substances or drugs or the alcohol concentration in the
21 blood was a contributing cause to the death, the commissioner shall
22 revoke the person's license for a period of ten years: *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

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

3 (h) If, in addition to a finding that the person did drive a
4 motor vehicle while under the influence of alcohol, controlled
5 substances or drugs, or did drive a motor vehicle while having an
6 alcohol concentration in the person's blood of eight hundredths of
7 one percent or more, by weight, the Office of Administrative Hearings
8 also finds by a preponderance of the evidence that the person when
9 driving did an act forbidden by law or failed to perform a duty
10 imposed by law, which act or failure proximately caused the death of
11 a person, the commissioner shall revoke the person's license for a
12 period of five years: *Provided*, That if the person's license has
13 previously been suspended or revoked under the provisions of this
14 section or section one of this article within the ten years
15 immediately preceding the date of arrest, the period of revocation
16 shall be for the life of the person.

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

1 to a person other than himself or herself, the commissioner shall
2 revoke the person's license for a period of two years: *Provided, That*
3 if the license has previously been suspended or revoked under the
4 provisions of this section or section one of this article within the
5 ten years immediately preceding the date of arrest, the period of
6 revocation shall be ten years: *Provided, however, That* if the
7 person's license has previously been suspended or revoked more than
8 once under the provisions of this section or section one of this
9 article within the ten years immediately preceding the date of
10 arrest, the period of revocation shall be for the life of the person.

11 (j) If the Office of Administrative Hearings finds by a
12 preponderance of the evidence that the person did drive a motor
13 vehicle while under the influence of alcohol, controlled substances
14 or drugs, or did drive a motor vehicle while having an alcohol
15 concentration in the person's blood of eight hundredths of one
16 percent or more, by weight, but less than fifteen hundredths of one
17 percent or more, by weight, or finds that the person knowingly
18 permitted the persons vehicle to be driven by another person who was
19 under the influence of alcohol, controlled substances or drugs, or
20 knowingly permitted the person's vehicle to be driven by another
21 person who had an alcohol concentration in his or her blood of eight
22 hundredths of one percent or more, by weight the commissioner shall
23 revoke the person's license for a period of six months or a period of
24 fifteen days with an additional one hundred and twenty days of

1 participation in the Motor Vehicle Alcohol Test and Lock Program in
2 accordance with the provisions of section three-a of this article:
3 *Provided*, That any period of participation in the Motor Vehicle
4 Alcohol Test and Lock Program that has been imposed by a court
5 pursuant to section two-b, article five of this chapter shall be
6 credited against any period of participation imposed by the
7 commissioner: ~~Provided further~~ however, That a person whose license
8 is revoked for driving while under the influence of drugs is not
9 eligible to participate in the Motor Vehicle Alcohol Test and Lock
10 Program: ~~Provided, however~~ further, That if the person's license has
11 previously been suspended or revoked under the provisions of this
12 section or section one of this article within the ten years
13 immediately preceding the date of arrest, the period of revocation
14 shall be ten years: *And provided further*, That if the person's
15 license has previously been suspended or revoked more than once under
16 the provisions of this section or section one of this article within
17 the ten years immediately preceding the date of arrest, the period of
18 revocation shall be for the life of the person.

19 (k) (1) If in addition to finding by a preponderance of the
20 evidence that the person did drive a motor vehicle while under the
21 influence of alcohol, controlled substance or drugs, the Office of
22 Administrative Hearings also finds by a preponderance of the evidence
23 that the person did drive a motor vehicle while having an alcohol
24 concentration in the person's blood of fifteen hundredths of one

1 percent or more, by weight, the commissioner shall revoke the
2 person's license for a period of forty-five days with an additional
3 two hundred and seventy days of participation in the Motor Vehicle
4 Alcohol Test and Lock Program in accordance with the provisions of
5 article three-a, article five-a, chapter seventeen-c of this code:
6 *Provided*, That if the person's license has previously been suspended
7 or revoked under the provisions of this section or section one of
8 this article within the ten years immediately preceding the date of
9 arrest, the period of revocation shall be ten years: *Provided*,
10 *however*, That if the person's license has previously been suspended
11 or revoked the person's license more than once under the provisions
12 of this section or section one of this article within the ten years
13 immediately preceding the date of arrest, the period of revocation
14 shall be for the life of the person.

15 (2) If a person whose license is revoked pursuant to subdivision
16 (1) of this subsection proves by clear and convincing evidence that
17 they do not own a motor vehicle upon which the alcohol test and lock
18 device may be installed or is otherwise incapable of participating in
19 the Motor Vehicle Alcohol Test and Lock Program, the period of
20 revocation shall be one hundred eighty days: *Provided*, That if the
21 person's license has previously been suspended or revoked under the
22 provisions of this section or section one of this article within the
23 ten years immediately preceding the date of arrest, the period of
24 revocation shall be ten years: *Provided*, *however*, That if the

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

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

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

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

1 section or section one of this article, the period of revocation
2 shall be for one year, or until the person's twenty-first birthday,
3 whichever period is longer.

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

21 (p) For purposes of this section, where reference is made to
22 previous suspensions or revocations under this section, the following
23 types of criminal convictions or administrative suspensions or
24 revocations shall also be regarded as suspensions or revocations

1 under this section or section one of this article:

2 (1) Any administrative revocation under the provisions of the
3 prior enactment of this section for conduct which occurred within.
4 the ten years immediately preceding the date of arrest;

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

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

14 (q) In the case of a hearing in which. a person is accused of
15 refusing to submit to a designated secondary test, the Office of
16 Administrative Hearings shall make specific findings as to: (1)
17 Whether the arresting law-enforcement officer had reasonable grounds
18 to believe the person had been driving a motor vehicle in this state
19 while under the influence of alcohol, controlled substances or drugs;
20 (2) whether the person was lawfully placed under arrest for an
21 offense involving driving under the influence of alcohol, controlled
22 substances or drugs, or was lawfully taken into custody for the
23 purpose of administering a secondary test: *Provided*, That this
24 element shall be waived in cases where no arrest occurred due to

1 driver incapacitation; (3) whether the person committed an offense
2 relating to driving a motor vehicle in this state while under the
3 influence of alcohol, controlled substances or drugs; (4) whether the
4 person refused to submit to the secondary test finally designated in
5 the manner provided in section four, article five of this chapter;
6 and (5) whether the person had been given a written statement
7 advising the person that the person's license to operate a motor
8 vehicle in this state would be revoked for at least forty-five days
9 and up to life if the person refused to submit to the test finally
10 designated in the manner provided in said section.

11 (r) If the Office of Administrative Hearings finds by a
12 preponderance of the evidence that: (1) The investigating officer had
13 reasonable grounds to believe the person had been driving a motor
14 vehicle in this state while under the influence of alcohol,
15 controlled substances or drugs; (2) whether the person was lawfully
16 placed under arrest for an offense involving driving under the
17 influence of alcohol, controlled substances or drugs, or was lawfully
18 taken into custody for the purpose of administering a secondary test:
19 *Provided*, That this element shall be waived in cases where no arrest
20 occurred due to driver incapacitation; (3) the person committed an
21 offense relating to driving a motor vehicle in this state while under
22 the influence of alcohol, controlled substances or drugs; (4) the
23 person refused to submit to the secondary test finally designated in
24 the manner provided in section four, article five of this chapter;

1 and (5) the person had been given a written statement advising the
2 person that the person's license to operate a motor vehicle in this
3 state would be revoked for at least forty-five days and up to life if
4 the person refused to submit to the test finally designated, the
5 commissioner shall revoke the person's license to operate a motor
6 vehicle in this state for the periods specified in section seven,
7 article five of this chapter. The revocation period prescribed in
8 this subsection shall run concurrently with any other revocation
9 period ordered under this section or section one of this article
10 arising out of the same occurrence. The revocation period prescribed
11 in this subsection shall run concurrently with any other revocation
12 period ordered under this section or section one of this article
13 arising out of the same occurrence.

14 (s) If the Office of Administrative Hearings finds to the
15 contrary with respect to the above issues the commissioner shall
16 rescind his or her earlier order of revocation or shall reduce the
17 order of revocation to the appropriate period of revocation under
18 this section or section seven, article five of this chapter. A copy
19 of the Office of Administrative Hearings' final order containing its
20 findings of fact and conclusions of law made and entered following
21 the hearing shall be served upon the person whose license is at issue
22 or upon the person's legal counsel if the person is represented by
23 legal counsel ~~and the commissioner~~ by registered or certified mail,
24 return receipt requested or by electronic mail if available. The

1 final order shall be served upon the commissioner by electronic mail.

2 During the pendency of any hearing, the revocation of the person's
3 license to operate a motor vehicle in this state shall be stayed.

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

18 In any revocation or suspension pursuant to this section, if the
19 driver whose license is revoked or suspended had not reached the
20 driver's eighteenth birthday at the time of the conduct for which the
21 license is revoked or suspended, the driver's license shall be
22 revoked or suspended until the driver's eighteenth birthday or the
23 applicable statutory period of revocation or suspension prescribed by
24 this section, whichever is longer.

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

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

7 **§17C-5C-4a. Rule-making authority.**

8 The Office of Administrative Hearings may propose legislative
9 and procedural rules in accordance with the provisions of article
10 three, chapter twenty-nine-a, of this code in order to implement the
11 provisions of this article and to carry out the duties prescribed
12 therein.

13 **§17C-5C-4b. Duty to provide notice of change of address.**

14 Any person who has any pending contested matter before the
15 Office of Administrative Hearings is required to provide written
16 notice of a change in address by written notice at least ten days
17 prior to any scheduled hearing in which they are a party. If the
18 person's final hearing is held prior to the person's change in
19 address, then the person is required to provide the written notice
20 prior to the issuance of the final order in their case. Written
21 notice must be provided by certified mail, return receipt requested,
22 facsimile, or by electronic mail, to the Office of Administrative
23 Hearings.

NOTE: The purpose of this bill is to update statutory provisions relating to procedures of the Office of Administrative Hearings. The bill provides that written objections to revocation notices may be filed by facsimile or e-mail. It requires notices of hearing to be sent to the parties and their legal counsel. The bill provides that the Office of Administrative Hearings has subpoena authority and that parties may enforce subpoenas in circuit court. The bill deletes language indicating that a notice of hearing sent by certified or registered mail to a law-enforcement officer constitutes a subpoena to appear. It authorizes the Office of Administrative Hearings to propose legislative rules "to implement the provisions of this article and to carry out the duties prescribed therein." And the bill requires persons with pending cases to provide written notice of change of address.

§17C-5C-4a and §17C-5C-4b are new; therefore, strike-throughs and underscoring have been omitted.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.