

1 **Senate Bill No. 602**

2 (By Senators Laird, Miller and Klempa)

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4 [Introduced February 15, 2012; referred to the Committee on the
5 Judiciary; and then to the Committee on Finance.]

6 _____
7 **FISCAL**
8 **NOTE**

9
10 A BILL to amend and reenact §29A-5-1 of the Code of West Virginia,
11 1931, as amended, relating to providing that hearing examiners
12 conducting state agency administrative hearings be selected
13 from a panel of five hearing examiners by a process in which
14 the state agency first strikes two hearing examiners and the
15 respondent subsequently strikes two hearing examiners.

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

17 That §29A-5-1 of the Code of West Virginia, 1931, as amended,
18 be amended and reenacted to read as follows:

19 **ARTICLE 5. CONTESTED CASES.**

20 **§29A-5-1. Notice required; hearing; subpoenas; witness fees, etc. ;**
21 **depositions; records.**

22 (a) In any contested case all parties shall be afforded an
23 opportunity for hearing after at least ten days' written notice.

1 The notice shall contain the date, time and place of the hearing
2 and a short and plain statement of the matters asserted. If the
3 agency is unable to state the matters in detail at the time the
4 notice is served, the initial notice may be limited to a statement
5 of the issues involved. Thereafter, upon application a more
6 definite and detailed statement shall be furnished. An opportunity
7 shall be afforded all parties to present evidence and argument with
8 respect to the matters and issues involved. The required notice
9 must be given as specified in section two, article seven of this
10 chapter. All of the testimony and evidence at any such hearing
11 shall be reported by stenographic notes and characters or by
12 mechanical means. All rulings on the admissibility of testimony
13 and evidence shall also be reported. The agency shall prepare an
14 official record, which shall include reported testimony and
15 exhibits in each contested case, and all agency staff memoranda and
16 data used in consideration of the case, but it ~~shall not be~~ is not
17 necessary to transcribe the reported testimony unless required for
18 purposes of rehearing or judicial review. Informal disposition may
19 also be made of any contested case by stipulation, agreed
20 settlement, consent order or default. Each agency shall adopt
21 appropriate rules of procedure for hearing in contested cases.

22 (b) For the purpose of conducting a hearing in any contested
23 case, any agency which now has or may be hereafter expressly granted

1 by statute the power to issue subpoenas or subpoenas duces tecum or
2 any member of the body which comprises such agency may exercise such
3 power in the name of the agency. Any such agency or any member of
4 the body which comprises any such agency may exercise such power in
5 the name of the agency for any party upon request. Under no
6 circumstances ~~shall~~ does this chapter ~~be construed as granting~~
7 grant the power to issue subpoenas or subpoenas duces tecum to any
8 agency or to any member of the body of any agency which does not now
9 by statute expressly have such power. When such power exists, the
10 provisions of this section ~~shall~~ apply. Every such subpoena and
11 subpoena duces tecum shall be served at least five days before the
12 return date thereof, either by personal service made by any person
13 over eighteen years of age or by registered or certified mail, but
14 a return acknowledgment signed by the person to whom the subpoena
15 or subpoena duces tecum is directed ~~shall be~~ is required to prove
16 service by registered or certified mail. All subpoenas and subpoenas
17 duces tecum shall be issued in the name of the agency, as aforesaid,
18 but any party requesting their issuance must see that they are
19 properly served. Service of subpoenas and subpoenas duces tecum
20 issued at the instance of the agency ~~shall be~~ is the responsibility
21 of the agency. Any person who serves any such subpoena or subpoena
22 duces tecum ~~shall be~~ is entitled to the same fee as sheriffs who
23 serve witness subpoenas for the circuit courts of this state; and

1 fees for the attendance and travel of witnesses shall be the same
2 as for witnesses before the circuit courts of this state. All such
3 fees shall be paid by the agency if the subpoena or subpoena duces
4 tecum were issued, without the request of an interested party, at
5 the instance of the agency. All such fees related to any subpoena
6 or subpoena duces tecum issued at the instance of an interested
7 party shall be paid by the party who asks that such subpoena or
8 subpoena duces tecum be issued. All requests by interested parties
9 for subpoenas and subpoenas duces tecum shall be in writing and
10 shall contain a statement acknowledging that the requesting party
11 agrees to pay such fees. Any such agency may compel the attendance
12 of witnesses and the production of books, records or papers in
13 response to such subpoenas and subpoenas duces tecum. Upon motion
14 made promptly and in any event before the time specified in a
15 subpoena duces tecum for compliance therewith, the circuit court of
16 the county in which the hearing is to be held, or the circuit court
17 in which the subpoena duces tecum was served, or the judge of either
18 such court in vacation, may grant any relief with respect to such
19 subpoena duces tecum which either such court, under the West
20 Virginia Rules of Civil Procedure for Trial Courts of Record, could
21 grant, and for any of the same reasons, with respect to a subpoena
22 duces tecum issued from either such court. In case of disobedience
23 or neglect of any subpoena or subpoena duces tecum served on any

1 person, or the refusal of any witness to testify to any matter
2 regarding which he or she may be lawfully interrogated, the circuit
3 court of the county in which the hearing is being held, or the judge
4 thereof in vacation, upon application by such agency or any member
5 of the body which comprises such agency, shall compel obedience by
6 attachment proceedings for contempt as in the case of disobedience
7 of the requirements of a subpoena or subpoena duces tecum issued
8 from such circuit court or a refusal to testify therein. Witnesses
9 at such hearings shall testify under oath or affirmation.

10 (c) Evidentiary depositions may be taken and read as in civil
11 actions in the circuit courts of this state.

12 (d) All hearings shall be conducted in an impartial manner.
13 The agency, any member of the body which comprises the agency, or
14 any hearing examiner or other person permitted by statute to hold
15 any such hearing for such agency, and duly authorized by such
16 agency so to do, shall have the power to: (1) Administer oaths and
17 affirmations; (2) rule upon offers of proof and receive relevant
18 evidence; (3) regulate the course of the hearing; (4) hold conferences
19 for the settlement or simplification of the issues by consent of
20 the parties; (5) dispose of procedural requests or similar matters;
21 and (6) take any other action authorized by a rule adopted by the
22 agency in accordance with the provisions of article three of this
23 chapter. Notwithstanding any provision in this code to the

1 contrary, in any such hearing to be conducted by a hearing
2 examiner, the hearing examiner shall be selected from a panel of
3 five hearing examiners by a process in which the agency first
4 strikes two hearing examiners from the panel and the respondent
5 subsequently strikes two hearing examiners from the panel.

6 (e) Except where otherwise provided by statute, the hearing in
7 any contested case shall be held in the county selected by the
8 agency.

9 (f) Notwithstanding the provisions of subparagraph (a) of this
10 section, upon request to the agency from any party to the hearing,
11 all reported testimony and evidence at such hearing shall be
12 transcribed, and a copy thereof furnished to such party at his or
13 her expense. The agency shall have the responsibility for making
14 arrangements for the transcription of the reported testimony and
15 evidence, and such transcription shall be accomplished with all
16 dispatch.

NOTE: The purpose of this bill is to provide that hearing examiners conducting state agency administrative hearings be selected from a panel of five hearing examiners by a process in which the state agency first strikes two hearing examiners and the respondent subsequently strikes two hearing examiners.

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