

1 **ENROLLED**

2 **COMMITTEE SUBSTITUTE**

3 **for**

4 **H. B. 2733**

5
6 (By Delegates R. Phillips, Staggers, Ferro,
7 Diserio and Reynolds)

8 [Passed April 13, 2013; in effect ninety days from passage.]
9

10 AN ACT to amend and reenact §17C-5A-2 of the Code of West Virginia,
11 1931, as amended, relating to hearings before the Office of
12 Administrative Hearings; specifying methods of service;
13 providing permissible hearing locations; deleting the
14 requirement that the Office of Administrative Hearings shall
15 send hearing notices to certain witnesses; deleting an
16 instance of a duplication of an element for driving under the
17 influence; clarifying that the Office of Administrative
18 Hearings shall rescind or modify the order of the Commissioner
19 of the Division of Motor Vehicles in certain cases; noting
20 that the Office of Administrative Hearings is not a party to
21 an appeal; stating that a party filing an appeal is
22 financially responsible for the transcription of the hearing
23 and transmission of file copy; and stating that the court
24 shall provide a copy of its final order to the Office of
25 Administrative Hearings.

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

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

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

7 **§17C-5A-2. Hearing; revocation; review.**

8 (a) Written objections to an order of revocation or suspension
9 under the provisions of section one of this article or section
10 seven, article five of this chapter shall be filed with the Office
11 of Administrative Hearings. Upon the receipt of an objection, the
12 Office of Administrative Hearings shall notify the Commissioner of
13 the Division of Motor Vehicles, who shall stay the imposition of
14 the period of revocation or suspension and afford the person an
15 opportunity to be heard by the Office of Administrative Hearings.
16 The written objection must be filed with Office of Administrative
17 Hearings in person, by registered or certified mail, return receipt
18 requested, or by facsimile transmission or electronic mail within
19 thirty calendar days after receipt of a copy of the order of
20 revocation or suspension or no hearing will be granted: *Provided,*
21 That a successful transmittal sheet shall be necessary for proof of
22 written objection in the case of filing by fax. The hearing shall
23 be before a hearing examiner employed by the Office of
24 Administrative Hearings who shall rule on evidentiary issues. Upon
25 consideration of the designated record, the hearing examiner shall,

1 based on the determination of the facts of the case and applicable
2 law, render a decision affirming, reversing or modifying the action
3 protested. The decision shall contain findings of fact and
4 conclusions of law and shall be provided to all parties by
5 registered or certified mail, return receipt requested, or with a
6 party's written consent, by facsimile or electronic mail.

7 (b) The hearing shall be held at an office of the Division of
8 Motor Vehicles suitable for hearing purposes located in or near the
9 county in which the arrest was made in this state or at some other
10 suitable place in the county in which the arrest was made if an
11 office of the division is not available. At the discretion of the
12 Office of Administrative Hearings, the hearing may also be held at
13 an office of the Office of Administrative Hearings located in or
14 near the county in which the arrest was made in this state. The
15 Office of Administrative Hearings shall send a notice of hearing to
16 the person whose driving privileges are at issue and the person's
17 legal counsel if the person is represented by legal counsel, by
18 regular mail, or with the written consent of the person whose
19 driving privileges are at issue or their legal counsel, by
20 facsimile or electronic mail. The Office of Administrative
21 Hearings shall also send a notice of hearing by regular mail,
22 facsimile or electronic mail to the Division of Motor Vehicles, and
23 the Attorney General's Office, if the Attorney General has filed a
24 notice of appearance of counsel on behalf of the Division of Motor
25 Vehicles.

26 (c) (1) Any hearing shall be held within one hundred eighty

1 days after the date upon which the Office of Administrative
2 Hearings received the timely written objection unless there is a
3 postponement or continuance.

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

8 (3) The Office of Administrative Hearings may issue subpoenas
9 commanding the appearance of witnesses and subpoenas duces tecum
10 commanding the submission of documents, items or other things.
11 Subpoenas duces tecum shall be returnable on the date of the next
12 scheduled hearing unless otherwise specified. The Office of
13 Administrative hearings shall issue subpoenas and subpoenas duces
14 tecum at the request of a party or the party's legal
15 representative. The party requesting the subpoena shall be
16 responsible for service of the subpoena upon the appropriate
17 individual. Every subpoena or subpoena duces tecum shall be served
18 at least five days before the return date thereof, either by
19 personal service made by a person over eighteen years of age or by
20 registered or certified mail, return receipt requested, and
21 received by the party responsible for serving the subpoena or
22 subpoena duces tecum: *Provided*, That the Division of Motor
23 Vehicles may serve subpoenas to law-enforcement officers through
24 electronic mail to the department of his or her employer. If a
25 person does not obey the subpoena or fails to appear, the party who
26 issued the subpoena to the person may petition the circuit court

1 wherein the action lies for enforcement of the subpoena.

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

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

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

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

20 (g) If, in addition to a finding that the person did drive a
21 motor vehicle while under the influence of alcohol, controlled
22 substances or drugs, or did drive a motor vehicle while having an
23 alcohol concentration in the person's blood of eight hundredths of
24 one percent or more, by weight, or did drive a motor vehicle while
25 under the age of twenty-one years with an alcohol concentration in
26 his or her blood of two hundredths of one percent or more, by

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

16 (h) If, in addition to a finding that the person did drive a
17 motor vehicle while under the influence of alcohol, controlled
18 substances or drugs, or did drive a motor vehicle while having an
19 alcohol concentration in the person's blood of eight hundredths of
20 one percent or more, by weight, the Office of Administrative
21 Hearings also finds by a preponderance of the evidence that the
22 person when driving did an act forbidden by law or failed to
23 perform a duty imposed by law, which act or failure proximately
24 caused the death of a person, the commissioner shall revoke the
25 person's license for a period of five years: *Provided*, That if the
26 person's license has previously been suspended or revoked under the

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

4 (I) 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
9 Hearings also finds by a preponderance of the evidence that the
10 person when driving did an act forbidden by law or failed to
11 perform a duty imposed by law, which act or failure proximately
12 caused bodily injury to a person other than himself or herself, the
13 commissioner shall revoke the person's license for a period of two
14 years: *Provided*, That if the license has previously been suspended
15 or revoked under the provisions of this section or section one of
16 this article within the ten years immediately preceding the date of
17 arrest, the period of revocation shall be ten years: *Provided*,
18 *however*, That if the person's license has previously been suspended
19 or revoked more than once under the provisions of this section or
20 section one of this article within the ten years immediately
21 preceding the date of arrest, the period of revocation shall be for
22 the life of the person.

23 (j) If the Office of Administrative Hearings finds by a
24 preponderance of the evidence that the person did drive a motor
25 vehicle while under the influence of alcohol, controlled substances
26 or drugs, or did drive a motor vehicle while having an alcohol

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

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

1 alcohol test and lock device may be installed or is otherwise
2 incapable of participating in the Motor Vehicle Alcohol Test and
3 Lock Program, the period of revocation shall be one hundred eighty
4 days: *Provided*, That if the person's license has previously been
5 suspended or revoked under the provisions of this section or
6 section one of this article within the ten years immediately
7 preceding the date of arrest, the period of revocation shall be ten
8 years: *Provided, however*, That if the person's license has
9 previously been suspended or revoked more than once under the
10 provisions of this section or section one of this article within
11 the ten years immediately preceding the date of arrest, the period
12 of revocation shall be for the life of the person.

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

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

3 (m) If, in addition to a finding that the person did drive a
4 motor vehicle while under the age of twenty-one years with an
5 alcohol concentration in his or her blood of two hundredths of one
6 percent or more, by weight, but less than eight hundredths of one
7 percent, by weight, the Office of Administrative Hearings also
8 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 bodily
11 injury to a person other than himself or herself, and if the Office
12 of Administrative Hearings further finds that the alcohol
13 concentration in the blood was a contributing cause to the bodily
14 injury, the commissioner shall revoke the person's license for a
15 period of two years: *Provided*, That if the person's license has
16 previously been suspended or revoked under the provisions of this
17 section or section one of this article within the ten years
18 immediately preceding the date of arrest, the period of revocation
19 shall be ten years: *Provided, however*, That if the person's
20 license has previously been suspended or revoked more than once
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 for the life of the person.

24 (n) If the Office of Administrative Hearings finds by a
25 preponderance of the evidence that the person did drive a motor
26 vehicle while under the age of twenty-one years with an alcohol

1 concentration in his or her blood of two hundredths of one percent
2 or more, by weight, but less than eight hundredths of one percent,
3 by weight, the commissioner shall suspend the person's license for
4 a period of sixty days: *Provided*, That if the person's license has
5 previously been suspended or revoked under the provisions of this
6 section or section one of this article, the period of revocation
7 shall be for one year, or until the person's twenty-first birthday,
8 whichever period is longer.

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

1 (p) For purposes of this section, where reference is made to
2 previous suspensions or revocations under this section, the
3 following types of criminal convictions or administrative
4 suspensions or revocations shall also be regarded as suspensions or
5 revocations under this section or section one of this article:

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

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

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

18 (q) In the case of a hearing in which a person is accused of
19 refusing to submit to a designated secondary test, the Office of
20 Administrative Hearings shall make specific findings as to: (1)
21 Whether the arresting law-enforcement officer had reasonable
22 grounds to believe the person had been driving a motor vehicle in
23 this state while under the influence of alcohol, controlled
24 substances or drugs; (2) whether the person was lawfully placed
25 under arrest for an offense involving driving under the influence
26 of alcohol, controlled substances or drugs, or was lawfully taken

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

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

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

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

1 or by facsimile or by electronic mail if available. The final
2 order shall be served upon the commissioner by electronic mail.
3 During the pendency of any hearing, the revocation of the person's
4 license to operate a motor vehicle in this state shall be stayed.

5 A person whose license is at issue and the commissioner shall
6 be entitled to judicial review as set forth in chapter
7 twenty-nine-a of this code. Neither the commissioner nor the
8 Office of Administrative Hearings may stay enforcement of the
9 order. The court may grant a stay or supersede as of the order
10 only upon motion and hearing, and a finding by the court upon the
11 evidence presented, that there is a substantial probability that
12 the appellant shall prevail upon the merits and the appellant will
13 suffer irreparable harm if the order is not stayed: *Provided, That*
14 in no event shall the stay or supersede as of the order exceed one
15 hundred fifty days. The Office of Administrative Hearings may not
16 be made a party to an appeal. The party filing the appeal shall pay
17 the Office of Administrative Hearings for the production and
18 transmission of the certified file copy and the hearing transcript
19 to the court. Notwithstanding the provisions of section four,
20 article five of said chapter, the Office of Administrative Hearings
21 may not be compelled to transmit a certified copy of the file or
22 the transcript of the hearing to the circuit court in less than
23 sixty days. Circuit clerk shall provide a copy of the circuit
24 court's final order on the appeal to the Office of Administrative
25 Hearings by regular mail, by facsimile, or by electronic mail if
26 available.

1 (t) In any revocation or suspension pursuant to this section,
2 if the driver whose license is revoked or suspended had not reached
3 the driver's eighteenth birthday at the time of the conduct for
4 which the license is revoked or suspended, the driver's license
5 shall be revoked or suspended until the driver's eighteenth
6 birthday or the applicable statutory period of revocation or
7 suspension prescribed by this section, whichever is longer.

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