

Senate Bill No. 376

(By Senator Kirkendoll)

[Introduced February 27, 2013; referred to the Committee on
Government Organization; and then to the Committee on the
Judiciary.]

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

1 shall provide a copy of its final order to the Office of
2 Administrative Hearings.

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

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

6 **ARTICLE 5A. ADMINISTRATIVE PROCEDURES FOR SUSPENSION AND**
7 **REVOCAION OF LICENSES FOR DRIVING UNDER THE**
8 **INFLUENCE OF ALCOHOL, CONTROLLED SUBSTANCES OR**
9 **DRUGS.**

10 **§17C-5A-2. Hearing; revocation; review.**

11 (a) Written objections to an order of revocation or suspension
12 under the provisions of section one of this article or section
13 seven, article five of this chapter shall be filed with the Office
14 of Administrative Hearings. Upon the receipt of an objection, the
15 Office of Administrative Hearings shall notify the Commissioner of
16 the Division of Motor Vehicles, who shall stay the imposition of
17 the period of revocation or suspension and afford the person an
18 opportunity to be heard by the Office of Administrative Hearings.
19 The written objection must be filed with Office of Administrative
20 Hearings in person, by registered or certified mail, return receipt
21 requested, or by facsimile transmission or electronic mail within
22 thirty calendar days after receipt of a copy of the order of
23 revocation or suspension or no hearing will be granted: *Provided,*

1 That a successful transmittal sheet shall be necessary for proof of
2 written objection in the case of filing by fax. The hearing shall
3 be before a hearing examiner employed by the Office of
4 Administrative Hearings who shall rule on evidentiary issues. Upon
5 consideration of the designated record, the hearing examiner shall,
6 based on the determination of the facts of the case and applicable
7 law, render a decision affirming, reversing or modifying the action
8 protested. The decision shall contain findings of fact and
9 conclusions of law and shall be provided to all parties by
10 registered or certified mail, return receipt requested, or by
11 facsimile or by electronic mail if available.

12 (b) The hearing shall be held at an office of the Division of
13 Motor Vehicles suitable for hearing purposes located in or near the
14 county in which the arrest was made in this state or at some other
15 suitable place in the county in which the arrest was made if an
16 office of the division is not available. At the discretion of the
17 Office of Administrative Hearings, the hearing may also be held at
18 an office of the Office of Administrative Hearings located in or
19 near the county in which the arrest was made in this state. The
20 Office of Administrative Hearings shall send a notice of hearing to
21 the person whose driving privileges are at issue and the person's
22 legal counsel if the person is represented by legal counsel, ~~the~~
23 ~~investigating or arresting law-enforcement officers,~~ the Division
24 of Motor Vehicles, 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 by regular mail, by
3 facsimile or by electronic mail if available.

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

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

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

1 received by the party responsible for serving the subpoena or
2 subpoena duces tecum: *Provided*, That the Division of Motor
3 Vehicles may serve subpoenas to law-enforcement officers through
4 electronic mail to the department of his or her employer. If a
5 person does not obey the subpoena or fails to appear, the party who
6 issued the subpoena to the person may petition the circuit court
7 wherein the action lies for enforcement of the subpoena.

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

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

24 (f) In the case of a hearing in which a person is accused of

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

1 controlled substances or drugs ~~or was lawfully taken into custody~~
2 ~~for the purpose of administering a secondary test;~~ and (4) whether
3 the tests, if any, were administered in accordance with the
4 provisions of this article and article five of this chapter.

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

1 preceding the date of arrest, the period of revocation shall be for
2 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
8 Hearings also finds by a preponderance of the evidence that the
9 person when driving did an act forbidden by law or failed to
10 perform a duty imposed by law, which act or failure proximately
11 caused the death of a person, the commissioner shall revoke the
12 person's license for a period of five years: *Provided*, That if the
13 person's license has previously been suspended or revoked under the
14 provisions of this section or section one of this article within
15 the ten years immediately preceding the date of arrest, the period
16 of revocation 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
22 Hearings also finds by a preponderance of the evidence that the
23 person when driving did an act forbidden by law or failed to
24 perform a duty imposed by law, which act or failure proximately

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

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

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

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

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

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

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

8 (l) 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
10 alcohol concentration in his or her blood of two hundredths of one
11 percent or more, by weight, but less than eight hundredths of one
12 percent, by weight, the Office of Administrative Hearings also
13 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 the death
16 of a person, and if the Office of Administrative Hearings further
17 finds that the alcohol concentration in the blood was a
18 contributing cause to the death, the commissioner shall revoke the
19 person's license for a period of five years: *Provided,* That if the
20 person's license has previously been suspended or revoked under the
21 provisions of this section or section one of this article within
22 the ten years immediately preceding the date of arrest, the period
23 of revocation shall be for the life of the person.

24 (m) If, in addition to a finding that the person did drive a

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

21 (n) If the Office of Administrative Hearings finds by a
22 preponderance of the evidence that the person did drive a motor
23 vehicle while under the age of twenty-one years with an alcohol
24 concentration in his or her blood of two hundredths of one percent

1 or more, by weight, but less than eight hundredths of one percent,
2 by weight, the commissioner shall suspend the person's license for
3 a period of sixty days: *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, the period of revocation
6 shall be for one year, or until the person's twenty-first birthday,
7 whichever period is longer.

8 (o) 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
13 Hearings also finds by a preponderance of the evidence that the
14 person when driving did have on or within the Motor vehicle another
15 person who has not reached his or her sixteenth birthday, the
16 commissioner shall revoke the person's license for a period of one
17 year: *Provided*, That if the person's license has previously been
18 suspended or revoked under the provisions of this section or
19 section one of this article within the ten years immediately
20 preceding the date of arrest, the period of revocation shall be ten
21 years: *Provided, however*, That if the person's license has
22 previously been suspended or revoked more than once under the
23 provisions of this section or section one of this article within
24 the ten years immediately preceding the date of arrest, the period

1 of revocation shall be for the life of the person.

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

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

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

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

19 (q) In the case of a hearing in which a person is accused of
20 refusing to submit to a designated secondary test, the Office of
21 Administrative Hearings shall make specific findings as to: (1)
22 Whether the arresting law-enforcement officer had reasonable
23 grounds to believe the person had been driving a motor vehicle in
24 this state while under the influence of alcohol, controlled

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

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

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

21 (s) If the Office of Administrative Hearings finds to the
22 contrary with respect to the above issues, it shall rescind or
23 modify the commissioner's order and, in the case of modification,
24 the commissioner ~~shall rescind his or her earlier order of~~

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

13 A person whose license is at issue and the commissioner shall
14 be entitled to judicial review as set forth in chapter
15 twenty-nine-a of this code. Neither the commissioner nor the
16 Office of Administrative Hearings may stay enforcement of the
17 order. The court may grant a stay or supersede as of the order
18 only upon motion and hearing, and a finding by the court upon the
19 evidence presented, that there is a substantial probability that
20 the appellant shall prevail upon the merits and the appellant will
21 suffer irreparable harm if the order is not stayed: *Provided*, That
22 in no event shall the stay or supersede as of the order exceed one
23 hundred fifty days. The Office of Administrative Hearings may not
24 be made a party to an appeal. The party filing the appeal shall pay

1 the Office of Administrative Hearings for the production and
2 transmission of the certified file copy and the hearing transcript
3 to the court. Notwithstanding the provisions of section four,
4 article five of said chapter, the Office of Administrative Hearings
5 may not be compelled to transmit a certified copy of the file or
6 the transcript of the hearing to the circuit court in less than
7 sixty days. The court shall provide a copy of its final order on
8 the appeal to the Office of Administrative Hearings.

9 (t) In any revocation or suspension pursuant to this section,
10 if the driver whose license is revoked or suspended had not reached
11 the driver's eighteenth birthday at the time of the conduct for
12 which the license is revoked or suspended, the driver's license
13 shall be revoked or suspended until the driver's eighteenth
14 birthday or the applicable statutory period of revocation or
15 suspension prescribed by this section, whichever is longer.

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

NOTE: The purpose of this bill is to add facsimile transmissions and electronic mail as a permissible service option; to clarify that it is permissible for hearings to take place at an

office of the Office of Administrative Hearings (OAH); to delete the requirement that the OAH provide hearing notices to certain witnesses; to delete an instance of a duplication of an element for driving under the influence; to clarify that the OAH, not the Commissioner of the Division of Motor Vehicles, shall rescind or modify the commissioner's order in certain circumstances; to explain that the OAH is not a party to an appeal in case an order of the OAH is appealed; to clarify that a party filing an appeal is financially responsible for the transcription of the hearing and the OAH's transmission of a file copy to the circuit court; and to require a court to provide a copy of its final order ruling on an OAH order to the OAH.

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