

1 **H. B. 4427**

2 (By Delegates R. Phillips, Boggs,  
3 Marcum, Tomblin Sponaugle, Lynch, Skinner,  
4 Skaff, Eldridge, Campbell and Hartman)

5  
6 (Requested by Dept. of Transportation --  
7 Office of Administrative Hearings)

8 [Introduced February 6, 2014; referred to the

9 Committee on Government Organization then the Judiciary.]

10 A BILL 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; and requiring parties appealing a  
13 decision of the Office of Administrative Hearings to serve the  
14 petition for appeal on the Office of Administrative Hearings.

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

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

18 **ARTICLE 5A. ADMINISTRATIVE PROCEDURES FOR SUSPENSION AND**  
19 **REVOCAION OF LICENSES FOR DRIVING UNDER THE**  
20 **INFLUENCE OF ALCOHOL, CONTROLLED SUBSTANCES OR**  
21 **DRUGS.**

22 **§17C-5A-2. Hearing; revocation; review.**

23 (a) Written objections to an order of revocation or suspension  
24 under the provisions of section one of this article or section  
25 seven, article five of this chapter shall be filed with the Office  
26 of Administrative Hearings. Upon the receipt of an objection, the

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

21 (b) The hearing shall be held at an office of the Division of  
22 Motor Vehicles suitable for hearing purposes located in or near the  
23 county in which the arrest was made in this state or at some other  
24 suitable place in the county in which the arrest was made if an

1 office of the division is not available. At the discretion of the  
2 Office of Administrative Hearings, the hearing may also be held at  
3 an office of the Office of Administrative Hearings located in or  
4 near the county in which the arrest was made in this state. The  
5 Office of Administrative Hearings shall send a notice of hearing to  
6 the person whose driving privileges are at issue and the person's  
7 legal counsel if the person is represented by legal counsel, by  
8 regular mail, or with the written consent of the person whose  
9 driving privileges are at issue or their legal counsel, by  
10 facsimile or electronic mail. The Office of Administrative  
11 Hearings shall also send a notice of hearing by regular mail,  
12 facsimile or electronic mail to the Division of Motor Vehicles, and  
13 the Attorney General's Office, if the Attorney General has filed a  
14 notice of appearance of counsel on behalf of the Division of Motor  
15 Vehicles.

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

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

24 (3) The Office of Administrative Hearings may issue subpoenas

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

20 (d) Law-enforcement officers shall be compensated for the time  
21 expended in their travel and appearance before the Office of  
22 Administrative Hearings by the law-enforcement agency by whom they  
23 are employed at their regular rate if they are scheduled to be on  
24 duty during said time or at their regular overtime rate if they are

1 scheduled to be off duty during said time.

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

12 (f) In the case of a hearing in which a person is accused of  
13 driving a motor vehicle while under the influence of alcohol,  
14 controlled substances or drugs, or accused of driving a motor  
15 vehicle while having an alcohol concentration in the person's blood  
16 of eight hundredths of one percent or more, by weight, or accused  
17 of driving a motor vehicle while under the age of twenty-one years  
18 with an alcohol concentration in his or her blood of two hundredths  
19 of one percent or more, by weight, but less than eight hundredths  
20 of one percent, by weight, the Office of Administrative Hearings  
21 shall make specific findings as to: (1) Whether the investigating  
22 law-enforcement officer had reasonable grounds to believe the  
23 person to have been driving while under the influence of alcohol,  
24 controlled substances or drugs, or while having an alcohol

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

16 (g) 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, or did drive a motor vehicle while  
21 under the age of twenty-one years with an alcohol concentration in  
22 his or her blood of two hundredths of one percent or more, by  
23 weight, but less than eight hundredths of one percent, by weight,  
24 the Office of Administrative Hearings also finds by a preponderance

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

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



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

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

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

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

19       (1) If, in addition to a finding that the person did drive a  
20 motor vehicle while under the age of twenty-one years with an  
21 alcohol concentration in his or her blood of two hundredths of one  
22 percent or more, by weight, but less than eight hundredths of one  
23 percent, by weight, the Office of Administrative Hearings also  
24 finds by a preponderance of the evidence that the person when

1 driving did an act forbidden by law or failed to perform a duty  
2 imposed by law, which act or failure proximately caused the death  
3 of a person, and if the Office of Administrative Hearings further  
4 finds that the alcohol concentration in the blood was a  
5 contributing cause to the death, the commissioner shall revoke the  
6 person's license for a period of five years: *Provided*, That if the  
7 person's license has previously been suspended or revoked under the  
8 provisions of this section or section one of this article within  
9 the ten years immediately preceding the date of arrest, the period  
10 of revocation shall be for the life of the person.

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

8 (n) If the Office of Administrative Hearings finds by a  
9 preponderance of the evidence that the person did drive a motor  
10 vehicle while under the age of twenty-one years with an alcohol  
11 concentration in his or her blood of two hundredths of one percent  
12 or more, by weight, but less than eight hundredths of one percent,  
13 by weight, the commissioner shall suspend the person's license for  
14 a period of sixty days: *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, the period of revocation  
17 shall be for one year, or until the person's twenty-first birthday,  
18 whichever period is longer.

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

1 person when driving did have on or within the Motor vehicle another  
2 person who has not reached his or her sixteenth birthday, the  
3 commissioner shall revoke the person's license for a period of one  
4 year: *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 (p) For purposes of this section, where reference is made to  
14 previous suspensions or revocations under this section, the  
15 following types of criminal convictions or administrative  
16 suspensions or revocations shall also be regarded as suspensions or  
17 revocations under this section or section one of this article:

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

21 (2) Any suspension or revocation on the basis of a conviction  
22 under a municipal ordinance of another state or a statute of the  
23 United States or of any other state of an offense which has the  
24 same elements as an offense described in section two, article five

1 of this chapter for conduct which occurred within the ten years  
2 immediately preceding the date of arrest; or

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

6 (q) In the case of a hearing in which a person is accused of  
7 refusing to submit to a designated secondary test, the Office of  
8 Administrative Hearings shall make specific findings as to: (1)  
9 Whether the arresting law-enforcement officer had reasonable  
10 grounds to believe the person had been driving a motor vehicle in  
11 this state while under the influence of alcohol, controlled  
12 substances or drugs; (2) whether the person was lawfully placed  
13 under arrest for an offense involving driving under the influence  
14 of alcohol, controlled substances or drugs, or was lawfully taken  
15 into custody for the purpose of administering a secondary test:  
16 *Provided*, That this element shall be waived in cases where no  
17 arrest occurred due to driver incapacitation; (3) whether the  
18 person committed an offense relating to driving a motor vehicle in  
19 this state while under the influence of alcohol, controlled  
20 substances or drugs; (4) whether the person refused to submit to  
21 the secondary test finally designated in the manner provided in  
22 section four, article five of this chapter; and (5) whether the  
23 person had been given a written statement advising the person that  
24 the person's license to operate a motor vehicle in this state would

1 be revoked for at least forty-five days and up to life if the  
2 person refused to submit to the test finally designated in the  
3 manner provided in said section.

4 (r) If the Office of Administrative Hearings finds by a  
5 preponderance of the evidence that: (1) The investigating officer  
6 had reasonable grounds to believe the person had been driving a  
7 motor vehicle in this state while under the influence of alcohol,  
8 controlled substances or drugs; (2) whether the person was lawfully  
9 placed under arrest for an offense involving driving under the  
10 influence of alcohol, controlled substances or drugs, or was  
11 lawfully taken into custody for the purpose of administering a  
12 secondary test: *Provided*, That this element shall be waived in  
13 cases where no arrest occurred due to driver incapacitation; (3)  
14 the person committed an offense relating to driving a motor vehicle  
15 in this state while under the influence of alcohol, controlled  
16 substances or drugs; (4) the person refused to submit to the  
17 secondary test finally designated in the manner provided in section  
18 four, article five of this chapter; and (5) the person had been  
19 given a written statement advising the person that the person's  
20 license to operate a motor vehicle in this state would be revoked  
21 for at least forty-five days and up to life if the person refused  
22 to submit to the test finally designated, the commissioner shall  
23 revoke the person's license to operate a motor vehicle in this  
24 state for the periods specified in section seven, article five of



1 this chapter. The revocation period prescribed in this subsection  
2 shall run concurrently with any other revocation period ordered  
3 under this section or section one of this article arising out of  
4 the same occurrence. The revocation period prescribed in this  
5 subsection shall run concurrently with any other revocation period  
6 ordered under this section or section one of this article arising  
7 out of the same occurrence.

8 (s) If the Office of Administrative Hearings finds to the  
9 contrary with respect to the above issues, it shall rescind or  
10 modify the commissioner's order and, in the case of modification,  
11 the commissioner shall reduce the order of revocation to the  
12 appropriate period of revocation under this section or section  
13 seven, article five of this chapter. A copy of the Office of  
14 Administrative Hearings' final order containing its findings of  
15 fact and conclusions of law made and entered following the hearing  
16 shall be served upon the person whose license is at issue or upon  
17 the person's legal counsel if the person is represented by legal  
18 counsel by registered or certified mail, return receipt requested,  
19 or by facsimile or by electronic mail if available. The final  
20 order shall be served upon the commissioner by electronic mail.  
21 During the pendency of any hearing, the revocation of the person's  
22 license to operate a motor vehicle in this state shall be stayed.

23 A person whose license is at issue and the commissioner shall  
24 be entitled to judicial review as set forth in chapter

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

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

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

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

NOTE: The purpose of this bill is to require parties appealing  
a decision of the Office of Administrative Hearings to serve the  
Petition for Appeal on the Office of Administrative Hearings.

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