

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 form 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.