

1 Administrative Hearings.

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

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

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

9 **§17C-5A-2. Hearing; revocation; review.**

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

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

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

1 behalf of the Division of Motor Vehicles by regular mail, by
2 facsimile or by electronic mail if available.

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

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

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

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

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

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

23 (f) In the case of a hearing in which a person is accused of
24 driving a motor vehicle while under the influence of alcohol,

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

1 ~~for the purpose of administering a secondary test;~~ and (4) whether
2 the tests, if any, were administered in accordance with the
3 provisions of this article and article five of this chapter.

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

1 the life of the person.

2 (h) If, in addition to a finding that the person did drive a
3 motor vehicle while under the influence of alcohol, controlled
4 substances or drugs, or did drive a motor vehicle while having an
5 alcohol concentration in the person's blood of eight hundredths of
6 one percent or more, by weight, the Office of Administrative
7 Hearings also finds by a preponderance of the evidence that the
8 person when driving did an act forbidden by law or failed to
9 perform a duty imposed by law, which act or failure proximately
10 caused the death of a person, the commissioner shall revoke the
11 person's license for a period of five years: *Provided*, That if the
12 person's license has previously been suspended or revoked under the
13 provisions of this section or section one of this article within
14 the ten years immediately preceding the date of arrest, the period
15 of revocation shall be for the life of the person.

16 (I) 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 bodily injury to a person other than himself or herself, the

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

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

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

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

1 of one percent or more, by weight, the commissioner shall revoke
2 the person's license for a period of forty-five days with an
3 additional two hundred and seventy days of participation in the
4 Motor Vehicle Alcohol Test and Lock Program in accordance with the
5 provisions of section three-a, article five-a, chapter seventeen-c
6 of this code: *Provided*, That if the person's license has
7 previously been suspended or revoked under the provisions of this
8 section or section one of this article within the ten years
9 immediately preceding the date of arrest, the period of revocation
10 shall be ten years: *Provided, however*, That if the person's
11 license has previously been suspended or revoked the person's
12 license more than once 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 (2) If a person whose license is revoked pursuant to
17 subdivision (1) of this subsection proves by clear and convincing
18 evidence that they do not own a motor vehicle upon which the
19 alcohol test and lock device may be installed or is otherwise
20 incapable of participating in the Motor Vehicle Alcohol Test and
21 Lock Program, the period of revocation shall be one hundred eighty
22 days: *Provided*, That if the person's license has previously been
23 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 ten
2 years: *Provided, however,* That if the person's license has
3 previously been suspended or revoked more than once under the
4 provisions of this section or section one of this article within
5 the ten years immediately preceding the date of arrest, the period
6 of revocation shall be for the life of the person.

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

23 (m) If, in addition to a finding that the person did drive a
24 motor vehicle while under the age of twenty-one years with an

1 alcohol concentration in his or her blood of two hundredths of one
2 percent or more, by weight, but less than eight hundredths of one
3 percent, by weight, the Office of Administrative Hearings also
4 finds by a preponderance of the evidence that the person when
5 driving did an act forbidden by law or failed to perform a duty
6 imposed by law, which act or failure proximately caused bodily
7 injury to a person other than himself or herself, and if the Office
8 of Administrative Hearings further finds that the alcohol
9 concentration in the blood was a contributing cause to the bodily
10 injury, the commissioner shall revoke the person's license for a
11 period of two years: *Provided*, 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: *Provided, however*, 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 (n) If the Office of Administrative Hearings finds by a
21 preponderance of the evidence that the person did drive a motor
22 vehicle while under the age of twenty-one years with an alcohol
23 concentration in his or her blood of two hundredths of one percent
24 or more, by weight, but less than eight hundredths of one percent,

1 by weight, the commissioner shall suspend the person's license for
2 a period of sixty days: *Provided*, That if the person's license has
3 previously been suspended or revoked under the provisions of this
4 section or section one of this article, the period of revocation
5 shall be for one year, or until the person's twenty-first birthday,
6 whichever period is longer.

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

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

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

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

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

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

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

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

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

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