

Senate Bill No. 505

(By Senators Kirkendoll, Cann, Facemire, Green, D. Hall and
Barnes)

[Introduced February 6, 2014; referred to the Committee on
Government Organization; and then to the Committee on the
Judiciary.]

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

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

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

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

23 **§17C-5A-2. Hearing; revocation; review.**

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

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

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

23 (2) The Office of Administrative Hearings may postpone or
24 continue any hearing on its own motion or upon application by the

1 party whose license is at issue in that hearing or by the
2 commissioner for good cause shown.

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

23 (d) Law-enforcement officers shall be compensated for the time
24 expended in their travel and appearance before the Office of

1 Administrative Hearings by the law-enforcement agency by whom they
2 are employed at their regular rate if they are scheduled to be on
3 duty during said time or at their regular overtime rate if they are
4 scheduled to be off duty during said time.

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

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

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

19 (g) 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, or did drive a motor vehicle while
24 under the age of twenty-one years with an alcohol concentration in

1 his or her blood of two hundredths of one percent or more, by
2 weight, but less than eight hundredths of one percent, by weight,
3 the Office of Administrative Hearings also finds by a preponderance
4 of the evidence that the person when driving did an act forbidden
5 by law or failed to perform a duty imposed by law, which act or
6 failure proximately caused the death of a person and was committed
7 in reckless disregard of the safety of others and if the Office of
8 Administrative Hearings further finds that the influence of
9 alcohol, controlled substances or drugs or the alcohol
10 concentration in the blood was a contributing cause to the death,
11 the commissioner shall revoke the person's license for a period of
12 ten years: *Provided*, That if the person's license has previously
13 been suspended or revoked 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 (h) 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 the death of a person, the commissioner shall revoke the
2 person's license for a period of five years: *Provided*, That if the
3 person's license has previously been suspended or revoked 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 (I) 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 an act forbidden by law or failed to
14 perform a duty imposed by law, which act or failure proximately
15 caused bodily injury to a person other than himself or herself, the
16 commissioner shall revoke the person's license for a period of two
17 years: *Provided*, That if the license has previously been suspended
18 or revoked under the provisions of this section or section one of
19 this article within the ten years immediately preceding the date of
20 arrest, the period of revocation shall be ten years: *Provided*,
21 *however*, That if the person's license has previously been suspended
22 or revoked more than once 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 (j) If the Office of Administrative Hearings finds by a
3 preponderance of the evidence that the person did drive a motor
4 vehicle while under the influence of alcohol, controlled substances
5 or drugs, or did drive a motor vehicle while having an alcohol
6 concentration in the person's blood of eight hundredths of one
7 percent or more, by weight, but less than fifteen hundredths of one
8 percent or more, by weight, or finds that the person knowingly
9 permitted the persons vehicle to be driven by another person who
10 was under the influence of alcohol, controlled substances or drugs,
11 or knowingly permitted the person's vehicle to be driven by another
12 person who had an alcohol concentration in his or her blood of
13 eight hundredths of one percent or more, by weight the commissioner
14 shall revoke the person's license for a period of six months or a
15 period of fifteen days with an additional one hundred and twenty
16 days of participation in the Motor Vehicle Alcohol Test and Lock
17 Program in accordance with the provisions of section three-a of
18 this article: *Provided*, That any period of participation in the
19 Motor Vehicle Alcohol Test and Lock Program that has been imposed
20 by a court pursuant to section two-b, article five of this chapter
21 shall be credited against any period of participation imposed by
22 the commissioner: *Provided*, however, That a person whose license
23 is revoked for driving while under the influence of drugs is not
24 eligible to participate in the Motor Vehicle Alcohol Test and Lock

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

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

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

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

22 (1) If, in addition to a finding that the person did drive a
23 motor vehicle while under the age of twenty-one years with an
24 alcohol concentration in his or her blood of two hundredths of one

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

14 (m) If, in addition to a finding that the person did drive a
15 motor vehicle while under the age of twenty-one years with an
16 alcohol concentration in his or her blood of two hundredths of one
17 percent or more, by weight, but less than eight hundredths of one
18 percent, by weight, the Office of Administrative Hearings also
19 finds by a preponderance of the evidence that the person when
20 driving did an act forbidden by law or failed to perform a duty
21 imposed by law, which act or failure proximately caused bodily
22 injury to a person other than himself or herself, and if the Office
23 of Administrative Hearings further finds that the alcohol
24 concentration in the blood was a contributing cause to the bodily

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

11 (n) 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 age of twenty-one years with an alcohol
14 concentration in his or her blood of two hundredths of one percent
15 or more, by weight, but less than eight hundredths of one percent,
16 by weight, the commissioner shall suspend the person's license for
17 a period of sixty days: *Provided*, That if the person's license has
18 previously been suspended or revoked under the provisions of this
19 section or section one of this article, the period of revocation
20 shall be for one year, or until the person's twenty-first birthday,
21 whichever period is longer.

22 (o) If, in addition to a finding that the person did drive a
23 motor vehicle while under the influence of alcohol, controlled
24 substances or drugs, or did drive a motor vehicle while having an

1 alcohol concentration in the person's blood of eight hundredths of
2 one percent or more, by weight, the Office of Administrative
3 Hearings also finds by a preponderance of the evidence that the
4 person when driving did have on or within the Motor vehicle another
5 person who has not reached his or her sixteenth birthday, the
6 commissioner shall revoke the person's license for a period of one
7 year: *Provided*, That if the person's license has previously been
8 suspended or revoked 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 ten
11 years: *Provided, however*, That if the person's license has
12 previously been suspended or revoked more than once 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 (p) For purposes of this section, where reference is made to
17 previous suspensions or revocations under this section, the
18 following types of criminal convictions or administrative
19 suspensions or revocations shall also be regarded as suspensions or
20 revocations under this section or section one of this article:

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

24 (2) Any suspension or revocation on the basis of a conviction

1 under a municipal ordinance of another state or a statute of the
2 United States or of any other state of an offense which has the
3 same elements as an offense described in section two, article five
4 of this chapter for conduct which occurred within the ten years
5 immediately preceding the date of arrest; or

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

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

1 section four, article five of this chapter; and (5) whether the
2 person had been given a written statement advising the person that
3 the person's license to operate a motor vehicle in this state would
4 be revoked for at least forty-five days and up to life if the
5 person refused to submit to the test finally designated in the
6 manner provided in said section.

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

1 to submit to the test finally designated, the commissioner shall
2 revoke the person's license to operate a motor vehicle in this
3 state for the periods specified in section seven, article five of
4 this chapter. The revocation period prescribed in this subsection
5 shall run concurrently with any other revocation period ordered
6 under this section or section one of this article arising out of
7 the same occurrence. The revocation period prescribed in this
8 subsection shall run concurrently with any other revocation period
9 ordered under this section or section one of this article arising
10 out of the same occurrence.

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

1 license to operate a motor vehicle in this state shall be stayed.

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

1 facsimile, or by electronic mail if available.

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

9 (u) Funds for this section's hearing and appeal process may be
10 provided from the Drunk Driving Prevention Fund, as created by
11 section forty-one, article two, chapter fifteen of this code, upon
12 application for the funds to the Commission on Drunk Driving
13 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.