



**WEST VIRGINIA
SECRETARY OF STATE**

NATALIE E. TENNANT

ADMINISTRATIVE LAW DIVISION

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OFFICE OF
WEST VIRGINIA SECRETARY OF STATE

**FORM 1 -- NOTICE OF A PUBLIC HEARING OR COMMENT PERIOD ON A PROPOSED RULE
(Page 1)**

AGENCY **Racing Commission**
RULE TYPE **Procedural** AMENDMENT TO EXISTING RULE **Yes** TITLE-SERIES **178-
06**
RULE NAME **Due Process and Hearings**

CITE AUTHORITY **WV Code 19-23-6(3)**

COMMENTS LIMITED TO
Written

DATE OF PUBLIC HEARING

LOCATION OF PUBLIC HEARING

DATE WRITTEN COMMENT PERIOD ENDS
Monday, November 28, 2016 5:00 PM

WRITTEN COMMENTS MAY BE MAILED TO
**West Virginia Racing Commission
900 Pennsylvania Avenue, Suite 533
Charleston, WV 25302**

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENTS ARE TRUE AND CORRECT.

Yes
**Douglas P Buffington -- By my signature, I certify that I am the person authorized to file legislative rules,
in accordance with West Virginia Code §29A-3-11 and §39A-3-2.**



Title-Series: 178-06



Rule Id: 10318



Document: 32060



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**FORM 1 -- NOTICE OF A PUBLIC HEARING OR COMMENT PERIOD ON A PROPOSED RULE
(Page 2)**

AGENCY	Racing Commission		
RULE TYPE	Procedural	AMENDMENT TO EXISTING RULE	Yes
RULE NAME	Due Process and Hearings	TITLE-SERIES	178-06

CITE AUTHORITY WV Code 19-23-6(3)

PROVIDE A BRIEF SUMMARY OF YOUR PROPOSAL

The Racing Commission seeks to amend its Due Process and Hearings Procedural Rule to raise its security fee to be paid by permit holders who request appeal hearings before the Commission to contest rulings issued against them by the stewards/judges at the racetracks. The fee is currently \$100.00 and has not changed in several years. The proposal is to raise the fee to \$500.00. The Commission hopes that a raise in the fee may deter frivolous appeals and appeals over small fines. In the long-term, if the raise proves to be a deterrent, it may reduce the overall costs incurred by the Commission for holding such appeal hearings.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENTS ARE TRUE AND CORRECT.

Yes

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FORM 11 -- FISCAL NOTE FOR PROPOSED RULES (Page 1)

AGENCY	Racing Commission				
RULE TYPE	Procedural	AMENDMENT TO EXISTING RULE	Yes	TITLE-SERIES	178-
RULE NAME	Due Process and Hearings				06

CITE AUTHORITY WV Code 19-23-6(3)

PRIMARY CONTACT

Kelli D. Talbott
812 Quarrier Street, Second Floor

Charleston, STATE ZIP

SECONDARY CONTACT

Joe Moore
900 Pennsylvania Avenue, Suite 533

Charleston, STATE SECONDARY ZIP SECONDARY

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FORM 11 -- FISCAL NOTE FOR PROPOSED RULES (Page 1)

AGENCY	Racing Commission		
RULE TYPE	Procedural	AMENDMENT TO EXISTING RULE	Yes
RULE NAME	Due Process and Hearings	TITLE-SERIES	178-06

CITE AUTHORITY WV Code 19-23-6(3)

SUMMARIZE IN A CLEAR AND CONCISE MANNER WHAT IMPACT THIS MEASURE WILL HAVE ON COSTS AND REVENUES OF STATE GOVERNMENT.

The Racing Commission does not anticipate that this will have any measurable impact upon the costs and revenues of state government. While the fee is proposed to be increased, it will not necessarily increase the revenues to the Racing Commission inasmuch as West Virginia Code § 19-23-16(c) allows the Commission to assess the costs of appeal hearings in excess of the established security fee if a permit holder does not substantially prevail in his/her appeal. Raising the fee will increase the amount that the Commission collects in advance of hearings, which is still considerably less than the total cost of the average appeal hearing which ranges from \$3,000.00 to \$5,000.00. The Commission hopes that a raise in the fee may deter frivolous appeals and appeals over small fines. In the long-term, if the raise proves to be a deterrent, it may reduce the overall costs incurred by the Commission for holding such appeal hearings.

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FORM 11 -- FISCAL NOTE FOR PROPOSED RULES (Page 2)

AGENCY **Racing Commission**
RULE TYPE **Procedural** AMENDMENT TO EXISTING RULE **Yes** TITLE-SERIES **178-**
RULE NAME **Due Process and Hearings** **06**

CITE AUTHORITY **WV Code 19-23-6(3)**

FISCAL NOTE DETAIL -- SHOW OVER-ALL EFFECT IN ITEM 1 AND 2 AND, IN ITEM 3, GIVE AN EXPLANATION OF BREAKDOWN BY FISCAL YEAR, INCLUDING LONG-RANGE EFFECT.

Effect Of Proposal	Current Increase/Decrease (use ' - ')	Next Increase/Decrease (use ' - ')	Fiscal Year (Upon Full Implementation)
ESTIMATED TOTAL COST	0	0	0
PERSONAL SERVICES	0	0	0
CURRENT EXPENSES	0	0	0
REPAIRS AND ALTERATIONS	0	0	0
ASSETS	0	0	0
OTHER	0	0	0
ESTIMATED TOTAL REVENUES	0	0	0

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FORM 11 -- FISCAL NOTE FOR PROPOSED RULES (Page 3)

AGENCY	Racing Commission		
RULE TYPE	Procedural	AMENDMENT TO EXISTING RULE	Yes
RULE NAME	Due Process and Hearings	TITLE-SERIES	178-06

CITE AUTHORITY WV Code 19-23-6(3)

3. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT). PLEASE INCLUDE ANY INCREASE OR DECREASE IN FEES IN YOUR ESTIMATED TOTAL REVENUES.

While the amendment proposes to increase a security fee for certain appeal hearings, it will not necessarily increase the revenues to the Racing Commission overall. West Virginia Code § 19-23-16(c) allows the Commission to assess the costs of appeal hearings in excess of the established security fee if a permit holder does not substantially prevail in his/her appeal. Raising the fee will increase the amount that the Commission collects in advance of hearings, which is still considerably less than the total cost of the average appeal hearing which ranges from \$3,000.00 to \$5,000.00. The Commission hopes that a raise in the fee may deter frivolous appeals and appeals over small fines. In the long-term, if the raise proves to be a deterrent, it may reduce the overall costs incurred by the Commission for holding such appeal hearings.

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Title-Series: 178-06



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FORM 11 -- FISCAL NOTE FOR PROPOSED RULES (Page 4)

AGENCY	Racing Commission		
RULE TYPE	Procedural	AMENDMENT TO EXISTING RULE	Yes
RULE NAME	Due Process and Hearings	TITLE-SERIES	178-06

CITE AUTHORITY WV Code 19-23-6(3)

PLEASE IDENTIFY ANY AREAS OF VAGUENESS, TECHNICAL DEFECTS, REASONS THE PROPOSED RULE WOULD NOT HAVE A FISCAL IMPACT, AND OR ANY SPECIAL ISSUES NOT CAPTURED ELSEWHERE ON THIS FORM.

All issues have been addressed in other parts on this form.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENTS ARE TRUE AND CORRECT.

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Title-Series: 178-06



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FORM 12 -- BRIEF SUMMARY AND STATEMENT OF CIRCUMSTANCES (Page 1)

AGENCY	Racing Commission		
RULE TYPE	Procedural	AMENDMENT TO EXISTING RULE	Yes TITLE-SERIES 178-06
RULE NAME	Due Process and Hearings		

CITE AUTHORITY WV Code 19-23-6(3)

SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN RULE AND STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE.

The Racing Commission seeks to amend its Due Process and Hearings Procedural Rule to raise its security fee to be paid by permit holders who request appeal hearings before the Commission to contest rulings issued against them by the stewards/judges at the racetracks. The fee is currently \$100.00 and has not changed in several years. The proposal is to raise the fee to \$500.00. While the fee is proposed to be increased, it will not necessarily increase the overall revenues to the Commission inasmuch as West Virginia Code § 19-23-16(c) allows the Commission to assess the costs of appeal hearings in excess of the established security fee if a permit holder does not substantially prevail in his/her appeal. Raising the fee will increase the amount that the Commission collects in advance of hearings, which is still considerably less than the total cost of the average appeal hearing which ranges from \$3,000.00 to \$5,000.00. The Commission hopes that a raise in the fee may deter frivolous appeals and appeals over small fines. In the long-term, if the fee increase proves to be a deterrent, it may reduce the overall costs incurred by the Commission for holding such appeal hearings.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENTS ARE TRUE AND CORRECT.

Yes
Douglas P Buffington -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.



Title-Series: 178-06



Rule Id: 10318



Document: 32060

178CSR6

TITLE 178
PROCEDURAL RULE
RACING COMMISSION

SERIES 6
DUE PROCESS AND HEARINGS

§178-6-1. General.

1.1. Scope. -- This rule specifies the procedure for hearings conducted before the Boards of Stewards, the Boards of Judges and the West Virginia Racing Commission.

1.2. Authority. -- W. Va. Code §19-23-6(3).

1.3. Filing Date. -- ~~March 22, 2012.~~

1.4. Effective Date. -- ~~April 21, 2012.~~

§178-6-2. Definitions.

As used in this rule and unless the context clearly requires a different meaning, the following terms have the meaning ascribed in this section.

2.1. "Appeal" means a request for the Racing Commission or its designee to consider and review any decisions or rulings of the stewards/judges of a meeting or to consider and review the ejection of an occupational permit holder by an association as authorized by 178CSR1, §6.1. and 178CSR2, §6.1.

2.2. "Association" or "racing association" means any individual, partnership, firm, association, corporation or other entity or organization of whatever character or description licensed by the Racing Commission to conduct horse or dog racing and pari-mutuel wagering.

2.3. "Clear and convincing evidence" means evidence which results in a reasonable certainty of the truth of the ultimate fact in controversy.

2.4. "Complaint" means a written allegation of a violation of the rules of racing and/or W. Va. Code §19-23-1 *et seq.*

2.5. "Day" means a calendar day.

2.6. "De novo" means a new hearing or a hearing for a second time conducted in the same or a similar manner in which the matter was originally heard and with a review of the previous hearing.

2.7. "Ejection" or "ejection by an association" and "exclusion" or "exclusion by an association" mean the refusal of an association to admit onto or to allow a permit holder to remain on its grounds, either of which is subject to appeal to the Racing Commission pursuant to 178CSR1, §6.1. and 178CSR2, §6.1.

2.8. "Judge" means a duly appointed greyhound racing official with powers and duties specified by W. Va. Code §19-23-1 *et seq.* and/or 178CSR2.

2.9. "Licensee" means any racing association holding a license required by W. Va. Code §19-23-1 *et seq.*

2.10. "Permit holder" means any person holding a permit required by W. Va. Code §19-23-1 *et seq.*

2.11. "Preponderance of the evidence" means evidence which is of a greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.

2.12. "Steward" means a duly appointed thoroughbred racing official with powers and duties specified by W. Va. Code §19-23-1 *et seq.* and/or 178CSR1.

§178-6-3. Proceedings by the Stewards/Judges.

3.1. Rights of Permit Holder. A permit holder who is the subject of a disciplinary hearing conducted by the stewards/judges is entitled to:

- 3.1.a. Proper notice of all charges;
- 3.1.b. Confront the evidence presented;
- 3.1.c. The right to counsel at the permit holder's expense;
- 3.1.d. The right to examine all evidence presented against him/her;
- 3.1.e. The right to present a defense;
- 3.1.f. The right to call witnesses;
- 3.1.g. The right to cross-examine witnesses; and,
- 3.1.h. The right to waive any of the above rights.

3.2. Complaints.

3.2.a. On their own motion or on receipt of a written complaint regarding the actions of a permit holder, the stewards/judges may conduct an investigation and, if warranted, a disciplinary hearing regarding the permit holder's actions.

3.3. Summary Suspension.

3.3.a. If the stewards/judges determine that a permit holder's actions constitute an immediate danger to the public health, safety or welfare, they may summarily suspend a permit pending a hearing.

3.3.b. A permit holder whose permit has been summarily suspended is entitled to a hearing not later than ten (10) days after the permit was summarily suspended. The permit holder may waive his/her right to a hearing on the summary suspension within the ten (10) day limit.

3.3.c. The stewards/judges shall conduct a hearing after imposing a summary suspension in the same manner as other disciplinary hearings.

3.4. Notice.

3.4.a. Except as provided by this rule regarding summary suspensions, the stewards/judges shall provide written notice at least twenty-four (24) hours before the hearing to the permit holder who is the subject of the disciplinary hearing. A permit holder may waive his/her right to such notice by executing a written waiver. In cases involving a disqualification during the running of a greyhound race or a thoroughbred race, or in cases involving a riding infraction during the running of a thoroughbred race, neither notice nor a hearing is required under this rule.

3.4.b. Notice given under this subsection shall include:

- 3.4.b.1. A statement of the time, place and nature of the hearing;
- 3.4.b.2. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- 3.4.b.3. A reference to the particular sections of the statutes or rules involved;
- 3.4.b.4. A short, plain description of the alleged conduct that has given rise to the disciplinary hearing; and
- 3.4.b.5. A statement summarizing the rights of the permit holder as outlined in this rule.

3.4.c. If possible, the stewards/judges or their designee shall hand deliver the written notice of disciplinary hearing to the permit holder who is the subject of the hearing. If hand delivery is not possible, the stewards/judges shall mail the notice to the permit holder's last known address, as found in the Racing Commission's permit files, by certified mail, return receipt requested. If the disciplinary hearing involves an alleged medication violation that could result in the disqualification of a thoroughbred, the stewards shall provide notice of the hearing to the thoroughbred owner, managing owner, or lessee of the thoroughbred in the manner provided in this subsection. If the disciplinary hearing involves an alleged medication violation that could result in the disqualification of a greyhound, the judges shall provide notice of the hearing to the greyhound owner, greyhound kennel owner, or the trainer of the greyhound in the manner provided in this subsection.

3.4.d. Nonappearance of a summoned permit holder after adequate notice shall be deemed as an admission of the charges set forth in the notice of hearing and a waiver of the right to a hearing before the stewards/judges.

3.5. Continuances.

3.5.a. Upon receipt of a notice, a permit holder may request a continuance of the hearing.

3.5.b. The stewards/judges may grant a continuance of any hearing for good cause shown.

3.5.c. The stewards/judges may at any time order a continuance on their own motion.

3.6. Evidence.

3.6.a. All hearings shall be conducted by no less than a majority of the stewards/judges.

3.6.b. Each witness at a hearing conducted by the stewards/judges shall be sworn by the stewards/judges.

3.6.c. The stewards/judges shall allow a full presentation of evidence and are not bound by the technical rules of evidence. However, they may disallow evidence that is irrelevant or unduly repetitive of other evidence. The stewards/judges shall have the authority to determine, in their sole discretion, the weight and credibility of any evidence and/or testimony. The stewards/judges may admit hearsay evidence if the stewards/judges determine the evidence is of a type that is commonly relied on by reasonably prudent people. The rules of privilege recognized by West Virginia law apply in hearings before the stewards/judges.

3.6.d. The burden of proof is on the stewards/judges to show, by a preponderance of the evidence, that the permit holder has violated or is responsible for a violation of a statute or a Racing Commission rule. However, the burden is on the permit holder to prove by a preponderance of the evidence any defense that he or she may present.

3.6.e. All hearings shall be recorded. A copy of the recording or a transcript of the recording shall be provided to the permit holder or any interested person upon request. The cost of providing a copy of the recording or a transcript of the recording may be assessed against the requesting party in the discretion of the stewards/judges.

3.7. Representation.

3.7.a. A permit holder who is the subject of a disciplinary hearing before the stewards/judges may represent himself or herself; may be represented by a lay representative of any racing trade organization to which he or she is a member; or, may be represented by legal counsel licensed to practice law in the State of West Virginia. Attorneys who are not licensed to practice law in the State of West Virginia must comply with Rule 8.0, Admission Pro Hac Vice, of the West Virginia Rules for Admission to the Practice of Law, before representing any permit holder in disciplinary matters pending before the stewards/judges. Representation of a permit holder includes any communication with the stewards/judges on behalf of the permit holder; the filing or making of motions or any other written or oral requests on behalf of a permit holder; and, appearing before the stewards/judges on behalf of a permit holder.

3.8. Rulings.

3.8.a. The issues at a disciplinary hearing shall be decided by a majority vote of the stewards/judges. If the vote is not unanimous, the dissenting steward/judge shall include with the record of the hearing a written statement of the reason(s) for the dissent.

3.8.b. A ruling by the stewards/judges shall, at a minimum, include:

3.8.b.1. The full name, date of birth, last record address, permit type and permit number of the person who is the subject of the hearing;

3.8.b.2. A statement of the substantiated charges against the permit holder, including a reference to the specific section of the statutes or rules that the permit holder is found to have violated;

3.8.b.3. The date of the hearing and the date the ruling was issued;

3.8.b.4. The penalty imposed;

3.8.b.5. Any changes in the order of finish or purse distribution;

3.8.b.6. Information on the permit holder's right to appeal the ruling to the Racing Commission; and,

3.8.b.7. Other information required by the Racing Commission.

3.8.c. A ruling shall be signed by all three stewards/judges. However, in the event that the ruling is not unanimous, the ruling shall be signed by a majority of the stewards/judges with the dissenting steward/judge noting the reasons for his or her dissent.

3.8.d. If possible, the stewards/judges or their designee shall hand deliver a copy of the ruling to the permit holder who is the subject of the ruling. If hand delivery is not possible, the stewards/judges shall mail the ruling to the permit holder's last known address, as found in the Racing Commission's permit files, by certified mail, return receipt requested. A copy of the ruling shall be submitted to the NAPRA or RCI Ruling Database. If the ruling includes the disqualification of a greyhound, the judges shall provide a copy of the ruling to the owner of the greyhound. If the ruling includes a disqualification of a thoroughbred, the stewards shall provide a copy of the ruling to the owner of the horse, the horsemen's bookkeeper and the appropriate past performance service(s).

3.8.e. All fines imposed by the stewards/judges shall be paid to the Racing Commission within seven (7) calendar days after the ruling is issued, unless otherwise ordered by the stewards/judges.

3.9. Effect of Rulings.

3.9.a. Rulings against a permit holder apply to another person if continued participation in an activity by the other person would circumvent the intent of the ruling by permitting the person to serve, in essence, as a substitute for the ineligible permit holder.

3.9.b. The transfer of a thoroughbred or greyhound to avoid application of a Racing Commission rule or ruling by the stewards/judges is prohibited.

3.10. Appeals.

3.10.a. A permit holder aggrieved by a ruling of the stewards/judges may appeal to the Commission, except as provided in subdivision 3.10.g. of this subsection. A person who fails to file an appeal by the deadline set forth in this rule waives the right to appeal.

3.10.b. An appeal under this subsection must be filed with the Commission's executive director at the Racing Commission's principal office no later than twenty (20) days after the stewards'/judges' ruling is received by the permit holder.

3.10.c. An appeal shall be in writing on a form prescribed by the Racing Commission. The appeal shall include:

3.10.c.1. The name, address, telephone number and signature of the person making the appeal;

3.10.c.2. A statement of the basis of the appeal; and,

3.10.c.3. A sworn, notarized statement that the appealing party has a good faith belief that the appeal is meritorious and is not taken merely to delay the penalty imposed by the stewards/judges.

3.10.d. A permit holder who appeals shall pay security for hearing costs in the amount of ~~one~~ five-hundred dollars (~~\$100.00~~ 500.00). This security fee shall be paid to the Racing Commission at the same time the appeal is filed. In the event that the Racing Commission determines that the fee is insufficient to cover the anticipated costs of holding the appeal hearing, the appealing permit holder may be required to pay an additional security for costs as specified by the Racing Commission. Such additional security fees shall be deposited with the Racing Commission within ten (10) days after notification. If the permit holder substantially prevails in an appeal hearing before the Racing Commission, the Commission may order a refund of all or part of any security fee paid by the permit holder. If a permit holder does not substantially prevail in an appeal hearing before the Racing Commission, the Commission may assess the costs of the appeal hearing incurred in excess of the security fee.

3.10.e. On notification by the Racing Commission that an appeal has been filed, the stewards'/judges shall forward to the Racing Commission the record of the stewards'/judges' proceeding on which the appeal is based.

3.10.f. If a person against whom a fine has been assessed files an appeal of the ruling that assesses the fine, the person shall pay the fine in accordance with this rule, unless the ruling is stayed in accordance with this rule. If the fine is paid before disposition of the appeal and the appeal is resolved in favor of the permit holder, the Racing Commission shall refund the amount of the fine.

3.10.g. A decision by the judges regarding a disqualification of a greyhound during the running of the race is final and may not be appealed to the Racing Commission. However, any permit holder fined or suspended as a result of circumstances giving rise to a disqualification of a greyhound is entitled to appeal a ruling on the suspension or fine only. The Racing Commission's decision on such an appeal shall not affect the disqualification.

3.11. Stays.

3.11.a. A person who has been disciplined by a ruling of the stewards'/judges may apply for a stay to the Racing Commission or to the member of the Racing Commission designated to rule upon stay requests.

3.11.b. An application for a stay must be filed with the Commission's executive director at the Racing Commission's principal office no later than the deadline for filing an appeal.

3.11.c. An application for a stay must be in writing on a form prescribed by the Racing Commission and shall include:

3.11.c.1. The name, address, telephone number and signature of the person requesting the stay;

3.11.c.2. A statement of the justification for the stay; and,

3.11.c.3. A sworn, notarized statement that the party requesting the stay has a good faith belief that the stay request is meritorious and is not taken merely to delay the penalty imposed by the stewards/judges.

3.11.d. The granting of a stay is an extraordinary remedy. The Racing Commission or the member of the Racing Commission designated to rule upon stay requests may grant or deny a stay request after considering and balancing the following factors:

3.11.d.1. The likelihood that the permit holder requesting the stay will prevail upon the merits of his or her appeal.

3.11.d.2. The likelihood of irreparable harm to the permit holder if a stay is denied pending disposition of his or her appeal.

3.11.d.3. The likelihood of irreparable harm to the association if a stay is granted pending disposition of the permit holder's appeal.

3.11.d.4. The public interest.

3.11.d.5. Any other information deemed relevant by the Commission or the member designated to rule upon stay requests.

3.11.e. Rulings on stay requests shall be issued in writing to the person requesting the stay. The Racing Commission or the member of the Racing Commission designated to rule upon stay requests may rescind a stay granted under this subsection taking into account only a change in circumstances or new information not available at the time of the original grant of stay, and reconsideration and rebalancing the factors set forth in subdivision 3.11.d in light of such change or new information.

3.11.f. The fact that a stay is granted is not a presumption that the ruling issued by the stewards/judges is invalid.

§178-6-4. Proceedings by the Commission.

4.1. Rights of Permit Holder, Licensee or Other Person.

4.1.a. A permit holder who is the subject of a disciplinary hearing who has filed an appeal to the Racing Commission from a stewards'/judges' ruling; a permit holder who has filed an appeal to the Racing Commission as a result of an ejection by an association and the association that is the respondent in the appeal; or a licensee who is the subject of a disciplinary hearing before the Racing Commission; or, any other person under the jurisdiction of the Racing Commission who seeks relief from the Racing Commission, is entitled to:

4.1.a.1. Proper notice of all charges alleged by the stewards/judges and/or Racing Commission or, in the case of an ejection by an association, notice of the reason for the ejection, as stated by the association;

4.1.a.2. Confront the evidence presented;

4.1.a.3. The right to counsel at the permit holder's, licensee's or person's expense;

4.1.a.4. The right to examine all evidence presented against him/her/it;

4.1.a.5. The right to present a defense;

4.1.a.6. The right to call witnesses;

4.1.a.7. The right to cross-examine witnesses;

4.1.a.8. The right to request subpoenas and subpoenas duces tecum; and,

4.1.a.9. The right to waive any of the above rights.

4.2. Permit Holder Appeal of Ejection by Association.

4.2.a. A permit holder aggrieved by an ejection of an association may appeal to the Commission pursuant to 178CSR1, §6.1. and 178CSR2, §6.1. The Racing Commission may refuse to hear an appeal from an ejected permit holder who has been ejected in connection with his or her suspension or termination from employment with the association.

4.2.b. An appeal under this subsection must be filed with the Commission's executive director at the Racing Commission's principal office no later than twenty (20) days after the written ejection notice is received by the permit holder, or no later than thirty (30) days after the association receives the permit holder's written request to reenter.

4.2.c. The association must provide an ejected permit holder a written statement of all of the reasons for the ejection no later than twenty-four (24) hours after the permit holder is ejected.

4.2.d. An appeal shall be in writing on a form prescribed by the Racing Commission. The appeal shall include:

4.2.d.1. The name, address, telephone number and signature of the permit holder making the appeal;

4.2.d.2. A statement of the basis of the appeal;

4.2.d.3. A sworn, notarized statement that the appealing permit holder has a good faith belief that the appeal is meritorious; and,

4.2.d.4. A copy of the ejection notice received by the permit holder.

4.2.e. A copy of an appeal of an ejection filed by a permit holder shall be provided by the Racing Commission to a person designated by the association to receive the appeal on its behalf.

4.2.f. A permit holder who appeals an ejection shall pay security for the Commission's hearing costs in the amount of one-hundred dollars (\$100.00). This security fee shall be paid to the Racing Commission at the same time the appeal is filed. In the event that the Racing Commission determines that the fee is insufficient to cover the anticipated costs of holding the appeal hearing, the appealing permit holder may be required to pay an additional security for costs as specified by the Racing Commission. Such additional security fees shall be deposited with the Racing Commission within ten (10) days after notification. If the permit holder substantially prevails in an ejection appeal hearing before the Racing Commission, the Commission may order a refund of all or part of any security fee paid by the permit holder.

4.3. Stays of Ejection of Permit Holder by Association.

4.3.a. A permit holder who has been ejected by an association may apply for a stay to the Racing Commission or to the member of the Racing Commission designated to rule upon stay requests.

4.3.b. An application for a stay must be filed with the Commission's executive director at the Racing Commission's principal office. An application for stay will not be considered or ruled upon unless and until the permit holder has filed an appeal of the ejection in accordance with subsection 4.2 of this rule.

4.3.c. An application for a stay must be in writing on a form prescribed by the Racing Commission and shall include:

4.3.c.1. The name, address, telephone number and signature of the person requesting the stay;

4.3.c.2. A statement of the justification for the stay; and,

4.3.c.3. A sworn, notarized statement that the permit holder requesting the stay has a good faith belief that the stay request is meritorious and is not taken merely to delay the effect of the ejection imposed by the association.

4.3.d. A copy of a stay request filed by an ejected permit holder shall be provided by the Racing Commission to a person designated by the association to receive the stay request on its behalf.

4.3.e. The association may respond in writing to a stay request filed by an ejected permit holder. Such response shall be filed with the Commission's executive director by a deadline established by the

Commission or the member of the Racing Commission designated to rule upon stay requests. A copy of such response shall be served upon the permit holder by the association.

4.3.f. The granting of a stay is an extraordinary remedy. The Racing Commission or the member of the Racing Commission designated to rule upon stay requests may grant or deny a stay request after considering and balancing the following factors:

4.3.f.1. The likelihood that the permit holder requesting the stay will prevail upon the merits of his or her ejection appeal.

4.3.f.2. The likelihood of irreparable harm to the permit holder if a stay is denied pending disposition of his or her ejection appeal.

4.3.f.3. The likelihood of irreparable harm to the association if a stay is granted pending disposition of the permit holder's ejection appeal.

4.3.f.4. The public interest.

4.3.f.5. Any other information deemed relevant by the Commission or the member designated to rule upon stay requests.

4.3.g. Rulings on stay requests shall be issued in writing to the parties. The Racing Commission or the member of the Racing Commission designated to rule upon stay requests may rescind a stay granted under this subsection taking into account only a change in circumstances or new information not available at the time of the original grant of stay, and reconsideration and rebalancing the factors set forth in subdivision 4.3.f. in light of such change or new information.

4.3.h. The fact that a stay is granted is not a presumption that the ejection imposed by the association is invalid.

4.4. Notice.

4.4.a. Upon receipt of a written appeal by a permit holder from a stewards'/judges' ruling or an ejection by an association, the Racing Commission shall set a time and place for the appeal hearing not less than ten (10) nor more than thirty (30) days after receipt of the appeal. The permit holder may waive his/her right to a hearing within the above-referenced time frame by executing a written waiver. The Commission or a hearing examiner appointed by the Racing Commission may grant an extension of the above-referenced time frame for hearing for good cause shown.

4.4.b. In any matter instituted by the Racing Commission against a licensee or upon a permit holder's appeal from an ejection by an association, the Racing Commission shall provide no less than (10) days notice of the hearing.

4.4.c. The Racing Commission shall serve a notice of hearing by certified mail, return receipt requested, to the parties' last known address, as found in the Commission's permit or licensing files, or by personal service.

4.4.d. A notice of hearing shall include:

- 4.4.d.1. Statement of time, place and nature of the hearing;
- 4.4.d.2. Statement of the legal authority and jurisdiction under which the hearing is to be held;
- 4.4.d.3. Reference to the particular sections of the statutes and rules involved;
- 4.4.d.4. Short, plain statement of the matters asserted; and,
- 4.4.d.5. Any other statement required by law.

4.4.e. A party to the proceeding may move to postpone the hearing. The motion must be in writing; must set forth the specific grounds on which it is sought; and, must be filed with the Racing Commission before the date set for the hearing. If the Racing Commission, or a hearing examiner appointed by the Racing Commission, grants the motion for postponement, the Racing Commission shall cause new notice to be issued.

4.4.f. After a hearing has begun, the Racing Commission, or a hearing examiner appointed by the Racing Commission, may grant a continuance on oral or written motion, without issuing new notice, by announcing the date, time and place for reconvening the hearing before recessing the hearing.

4.4.g. If a party to a proceeding before the Racing Commission fails to appear after adequate notice, the Racing Commission may deem the charges alleged by the stewards/judges and/or Racing Commission set forth in the notice of hearing as admitted by the non-appearing party and may dismiss the proceedings before the Racing Commission. If a party to a proceeding before the Racing Commission pertaining to an association ejection fails to appear after adequate notice, the Racing Commission may grant a default ruling against the non-appearing party and may dismiss the proceedings before the Racing Commission.

4.5. Subpoenas, Subpoenas Duces Tecum and Oaths or Affirmations.

4.5.a. Any member of the Racing Commission, or a hearing examiner appointed by the Racing Commission, may issue subpoenas to compel the testimony of witnesses and subpoenas duces tecum to compel the production of documents, books, records, papers and other items.

4.5.b. Any party requesting the issuance of subpoenas or subpoenas duces tecum shall be responsible for proper service and payment of fees for the attendance and travel of witnesses in accordance with the requirements of W. Va. Code §29A-5-1(b).

4.5.c. Any member of the Racing Commission, or a hearing examiner appointed by the Racing Commission, may administer oaths or affirmations to witnesses appearing before the Racing Commission.

4.6. Reporters and Transcripts.

4.6.a. The Racing Commission shall engage a court reporter to make a record of the hearing. The Racing Commission may allocate the costs of the reporter and any transcript produced among the parties.

4.6.b. If a person requests a transcript of the record, the Racing Commission may assess the costs of preparing the transcript to the person.

4.7. Nature of Hearings.

4.7.a. A hearing on an appeal by a permit holder from a decision of the stewards/judges shall be de novo. The Racing Commission shall have the burden of proving by a preponderance of the evidence that the permit holder has violated or is responsible for a violation of a statute or a Racing Commission rule. However, upon appeal by a permit holder of a decision of the stewards regarding a disqualification of a thoroughbred during the running of the race, the appeal hearing before the Racing Commission shall not be de novo and the burden shall be on the permit holder to prove by clear and convincing evidence that the stewards committed plain error in their decision. In the event that a permit holder appeals a stewards' decision regarding a disqualification during the running of the race and does not prevail, he or she shall be assessed interest on any purse which may be held during the pendency of the appeal. Such assessment shall be collected by the Racing Commission and paid to the owner of the horse who moves up in the finish of the race as a result of the stewards' disqualification decision. The rate of interest shall be three (3) percentage points above the Fifth Federal Reserve District secondary discount rate in effect on the second day of January of the year in which the assessment is entered. Provided, that the rate of interest shall not exceed eleven (11) percent per annum or be less than seven (7) percent per annum. In addition, pursuant to the provisions of subdivision 3.10.d of this rule, the Commission may assess the costs of the hearing incurred in excess of the one hundred dollar (\$100.00) security fee against the appealing permit holder.

4.7.b. The Racing Commission may reject, affirm, or modify any penalty or disciplinary action imposed by the stewards/judges.

4.7.c. In any hearing on a matter instituted by the Racing Commission against a licensee, the Commission shall have the burden of proving by a preponderance of the evidence that the licensee has violated or is responsible for a violation of a statute or a Commission rule.

4.7.d. In any hearing on an appeal by a permit holder of an ejection by an association, the association shall have the burden of proving by a preponderance of the evidence that the permit holder acted improperly or engaged in behavior that is otherwise objectionable pursuant to 178CSR1, §6.2. or 178CSR2, §6.2.

4.7.e. The Racing Commission may reject, affirm, or modify any ejection imposed by the association on a permit holder, and the association and the permit holder shall abide by any orders, restrictions or conditions issued by the Commission in connection with its decision on the ejection appeal.

4.7.f. All hearings before the Racing Commission are open to the public. However, witnesses may be excluded or sequestered.

4.8. Conducting of Hearings.

4.8.a. A quorum of the Racing Commission and/or a hearing examiner appointed by the Racing Commission who is licensed to practice law in the State of West Virginia shall conduct and preside over Commission hearings.

4.8.b. The Racing Commission or its appointed hearing examiner may:

- 4.8.b.1. Issue subpoenas and subpoenas duces tecum;
- 4.8.b.2. Administer oaths or affirmations;
- 4.8.b.3. Receive evidence;
- 4.8.b.4. Rule on the admissibility of evidence;
- 4.8.b.5. Examine witnesses;
- 4.8.b.6. Set reasonable times within which a party may present evidence and within which a witness may testify;
- 4.8.b.7. Permit and limit oral argument;
- 4.8.b.8. Issue orders and findings of fact and conclusions of law;
- 4.8.b.9. Require written arguments to be filed by the parties;
- 4.8.b.10. Take notice of any and all judicially cognizable facts;
- 4.8.b.11. Regulate the course of the hearing; and,
- 4.8.b.12. Perform other duties necessary to a fair and proper hearing.

4.9. Evidence.

4.9.a. All testimony of witnesses before the Racing Commission must be given under oath or affirmation. The Racing Commission or its appointed hearing examiner may limit the number of witnesses and may exclude all irrelevant, immaterial or unduly repetitious evidence.

4.9.b. The Racing Commission and/or its appointed hearing examiner shall allow a full presentation of evidence and are not bound by the technical rules of evidence. The Racing Commission and/or its appointed hearing examiner shall have the authority to determine, in their sole discretion, the weight and credibility of any evidence and/or testimony. The Racing Commission and/or its appointed hearing examiner may admit hearsay evidence if it is determined that the evidence is of a type that is commonly relied on by reasonably prudent people. The rules of privilege recognized by West Virginia law apply in hearings before the Racing Commission.

4.10. Representation.

4.10.a. A person who is the subject of a hearing before the Racing Commission may represent himself or herself or may be represented by legal counsel licensed to practice law in the State of West Virginia. Attorneys who are not licensed to practice law in the State of West Virginia must comply with Rule 8.0, Admission Pro Hac Vice, of the West Virginia Rules for Admission to the Practice of Law, before representing any party involved in a matter before the Racing Commission. Representation of a party includes any communication with the Racing Commission or its agents on behalf of the party, the filing or making of motions or any other written or oral requests on behalf of a party, and, appearing before the Racing Commission or its appointed hearing examiner on behalf of a party.

4.11. Decisions.

4.11.a. If a hearing is conducted by a hearing examiner appointed by the Racing Commission, he/she shall issue a written recommended decision containing proposed findings of fact and conclusions of law to the Racing Commission. The hearing examiner shall mail a copy of his recommended decision to all parties to the proceeding.

4.11.b. Upon receipt of a recommended decision from an appointed hearing examiner, the Racing Commission shall consider the recommendation in a meeting noticed in accordance with the West Virginia Open Governmental Proceedings Act, W. Va. Code §6-9A-1 *et seq.* The Racing Commission may:

4.11.b.1. Adopt or modify the recommended decision, in whole or in part;

4.11.b.2. Decline to adopt the recommended decision, in whole or in part;

4.11.b.3. Remand the proceeding for further examination by the hearing examiner; or,

4.11.b.4. Direct the hearing examiner to give further consideration to the proceeding with or without reopening the hearing.

4.11.c. If the Racing Commission modifies or declines to adopt a recommended decision of an appointed hearing examiner, either in whole or in part, it shall issue a reasoned, articulate explanation and a recitation of the underlying evidence or other matters upon which it bases its decision and particularized findings of fact and conclusions of law that support its decision.

4.11.d. If a hearing is conducted by a quorum of the Racing Commission it shall issue a written decision containing findings of fact and conclusions of law.

4.12. Orders.

4.12.a. The Racing Commission shall issue a final order in all matters heard before it. The Racing Commission's order shall be in writing and shall be signed by the Chairman.

4.12.b. The Racing Commission shall serve a copy of a final order upon all parties to the proceeding by certified mail, return receipt requested, or by personal service.

4.12.c. A final order of the Racing Commission takes effect on the date the order is entered, unless otherwise stated in the order.

4.12.d. The Racing Commission shall submit copies of all final orders to the NAPRA or RCI Ruling Database.

§178-6-5. Rulings In Other Jurisdictions.

5.1. Reciprocity.

5.1.a. The Racing Commission and the stewards/judges shall honor rulings, decisions and final orders from other racing jurisdictions regarding permit or license suspensions, revocations, and eligibility.

5.2. Appeals of Reciprocal Rulings.

5.2.a. Persons subject to rulings, decisions and final orders in other racing jurisdictions shall have the right to request a hearing before the Racing Commission or a hearing examiner appointed by the Racing Commission to show cause why such ruling should not be enforced in West Virginia.

5.2.b. Any request for such hearing must clearly set forth in writing the reasons for the appeal.