

WEST VIRGINIA  
SECRETARY OF STATE  
KEN HECHLER  
ADMINISTRATIVE LAW DIVISION

Form #2

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OFFICE OF THE WEST VIRGINIA  
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia Lottery Commission TITLE NUMBER: 179

RULE TYPE: Procedural; CITE AUTHORITY W. Va. Code §§ 29-22-14(b)  
and 29-22A-15

AMENDMENT TO AN EXISTING RULE: YES X NO         

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 2

TITLE OF RULE BEING AMENDED: Administrative Appeals Procedure

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED:         

TITLE OF RULE BEING PROPOSED:         

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON NOVEMBER 23, 1998 AT 4:00 p.m.

ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

West Virginia Lottery Commission  
P.O. Box 2067  
Charleston, WV 25327-2067

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.

  
Robin C. Capehart, Cabinet Secretary

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

\$4.20

**PROPOSED  
ADMINISTRATIVE APPEALS PROCEDURES  
WEST VIRGINIA LOTTERY  
TITLE 179  
SERIES 2  
1998**

**A BRIEF SUMMARY of the PROPOSED PROCEDURAL RULE:**

This is the first amendment to the original Lottery Administrative Appeals Procedures.

This revised procedural rule incorporates the provisions of W.Va. Code §29-22A-15 and of case law citing W.Va. Code §29A-5-1 et seq. into a appeals process that can be used for appeals arising from both the State Lottery Act and the Racetrack Video Lottery Act.

**A STATEMENT of CIRCUMSTANCES which require the PROPOSED PROCEDURAL RULE:**

Within the Racetrack Video Lottery Act of 1994, section fifteen [W.Va. Code §29-22A-15] sets forth detailed administrative hearing procedures for entities appealing the West Virginia Lottery Commission's refusal to grant a video lottery license or permit, or the suspension or revocation of an existing license or permit. Administrative hearings are required in the original State Lottery Act [W.Va. Code §29-22-14(b)], but are much less detailed. And, finally, recent case law under the Administrative Procedures Act, W.Va. Code §29A-5-1 et seq., need to be incorporated in any revised procedural rule.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: ADMINISTRATIVE APPEAL PROCEDURES

Type of Rule:  Legislative  Interpretive  Procedural

Agency WEST VIRGINIA LOTTERY

Address P.O. BOX 2067  
Charleston, West Virginia 25327-2067

1. Effect of Proposed Rule

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	\$ - 0 -	\$ - 0 -	\$ - 0 -	\$ - 0 -	\$ - 0 -
PERSONAL SERVICES					
CURRENT EXPENSES					
REPAIRS & ALTERATIONS					
EQUIPMENT					
OTHER					

2. Explanation of above estimates :

This procedural rule requires no new costs.

3. Objectives of these rules :

After the West Virginia Lottery Commission adopted procedural rules in 1986 for administrative hearings, the Legislature enacted the Racetrack Video Lottery Act which included codified administrative hearing procedures. Those procedures form the basis of this rule's uniform procedural rule for all administrative hearings and replaces the original Series 2 procedural rule.

Rule Title : ADMINISTRATIVE APPEAL PROCEDURES

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

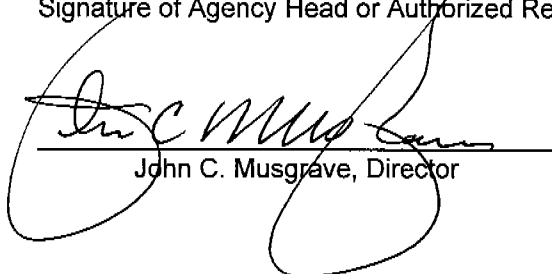
None.

C. Economic Impact on Citizens / Public at Large.

None.

Date : 16 October, 1998

Signature of Agency Head or Authorized Representative

  
\_\_\_\_\_  
John C. Musgrave, Director

*PROPOSED AMENDED*  
**TITLE 179**  
**PROCEDURAL RULE**  
**WEST VIRGINIA STATE LOTTERY COMMISSION**

**SERIES 2**  
**ADMINISTRATIVE APPEAL PROCEDURES**

**§179-2-1. General**

1.1. Scope and purpose. The following procedural rule sets forth the practice and procedure established by the West Virginia State Lottery Commission to govern administrative appeal hearings before the commission. The purpose of this rule is to adopt a single procedural rule that provides a fair and orderly administration and effectuation of the statutory purpose of the appeal under both the State Lottery Act, W.Va. Code §29-22-1 et seq. as well as the Racetrack Video Lottery Act, W.Va. Code §29-22A-1 et seq.

1.2. Authority - W. Va. Code §29-22-14(b) and §29-22A-15.

1.3. Filing Date -

1.4. Effective Date -

1.5. Repealer - Proposed amended procedural rule 179 CSR 2 completely rewrites present procedural rule 179 CSR 2 which was filed and effective November 14, 1986; therefore, upon final filing of this procedural rule, former procedural rule 179 CSR 2 is repealed.

**§179-2-2. Petition for appeal; form and content.**

2.1. If the West Virginia State Lottery Commission [hereafter "the commission"] or the director of the West Virginia State Lottery [hereafter "the Director"] refuses to issue a license or permit, or suspends or revokes a license or permit, an order will be made and entered to that effect including a statement of the reasons for that action and a copy of that order will be mailed to the applicant, or the license or permit holder, by certified mail, return receipt requested, or in the alternative, the order will be served in the same in the manner provided for the service of legal process.

2.2. Any applicant or license or permit holder adversely affected by such an order has the right to a hearing before the commission or before a person designated by the commission as hearing examiner.

2.3. Any person aggrieved by any action of the commission acting under the provisions of W.Va. Code article 29-22 also has the right to a hearing before the commission or before a person designated by the commission as hearing examiner.

2.4 A petition in writing requesting a hearing must be served upon the director within ten days, either following the receipt of the order by the applicant, or license or permit holder or following the action of the commission or director giving rise to the petition.

2.5. The petition for a hearing must be in writing and include an original and one copy. The petition must contain the following:

2.5.a. A clear and concise statement of each error which the petitioner alleges to have been committed by the commission or the director in refusing to issue a license or permit, or suspending or revoking a license or permit, with each assignment of error being shown in separately numbered paragraphs.

2.5.b. A clear and concise statement of fact upon which the petitioner relies as sustaining each assignment of error.

2.5.c. A prayer [request] setting forth the relief sought.

2.5.d. The signature of the petitioner.

2.5.e. A statement by the petitioner under penalty of perjury that his or her statements are true.

2.6. Any person not initially a party to the proceeding who can demonstrate that he or she is the real party in interest concerning the issue in dispute, or that he or she may be adversely affected by a possible decision of the commission, will be permitted to petition the commission or hearing examiner for intervention if such petition is received before the conclusion of the hearing.

#### **§179-2-3. Costs; security deposit.**

9.1. If the hearing is held under provisions of the Racetrack Video Lottery Act, W.Va. Code §29-22A-15(d) requires the person demanding a hearing to give security for the cost of the hearing in the amount of three hundred dollars in the form of certified check, cashier's check or money order, which must accompany the petition demanding a hearing. No security for costs is required for any other hearing.

#### **§ 179-2-4. Discovery.**

3.1. Subsequent to the receipt of an appeal petition by the director, the parties may employ pre-hearing discovery measures. The hearing examiner will recognize an informal set of guidelines based on the West Virginia Rules of Civil Procedure as a model.

**§179-2-5. Subpoenas and subpoenas duces tecum [Art. 22A appeals, only].**

5.1 In all hearings held under this rule, oral and documentary evidence may be required through the use of *subpoenas* and *subpoenas duces tecum*. *Subpoenas* or *subpoenas duces tecum* may be issued by either the commission or its duly appointed hearing examiner and the following provisions shall govern and control:

5.1.a. Every *subpoena* or *subpoena duces tecum* must be served at least five days before its return date, either by personal service made by any person eighteen years of age or older, or by registered or certified mail, but a return acknowledgment signed by the person to whom the *subpoena* or *subpoena duces tecum* is directed is required to prove service by registered or certified mail.

5.1.b. All *subpoenas* and *subpoenas duces tecum* must be issued in the name of the West Virginia Lottery commission. Service of *subpoenas* and *subpoenas duces tecum* issued at the insistence of the commission are the responsibility of the commission, but any party requesting issuance of a *subpoena* or *subpoena duces tecum* is responsible for service of any such *subpoena*. Any person who serves a *subpoena* or *subpoena duces tecum* is entitled to the same fee as sheriffs who serve witness subpoenas for the circuit courts of this state and fees for the attendance and travel of witnesses shall be the same as for witnesses before the circuit courts of this state.

5.1.c. All fees shall be paid by the Director if the *subpoena* or *subpoena duces tecum* is issued, without the request of an interested party, at the insistence of the director.

5.1.d. All fees related to any *subpoenas* or *subpoena duces tecum* issued at the insistence of an interested party will be paid by the interested party.

5.1.e. All requests by an interested party for a *subpoena* and *subpoena duces tecum* must be in writing and contain a statement acknowledging that the requesting party agrees to pay such fees.

5.1.f. Any person receiving a *subpoena* or *subpoena duces tecum* issued hereunder must honor the same as though it were issued by a circuit court of this state and must appear as a witness or produce such books, records or papers as are requested in response to a *subpoena* or *subpoena duces tecum*. In case of disobedience or neglect of any subpoena or subpoena duces tecum served on any person or the refusal of any witness to testify to any matter regarding which he or she may be lawfully interrogated, the circuit court of the county in which the hearing is being held, or the judge thereof in vacation, will, upon application by the commission, compel obedience by contempt proceedings as in the case of disobedience of the requirements of a subpoena or subpoena duces tecum issued from the circuit court or a refusal to testify therein.

**§179-2-6. Appearance and practice before the commission or hearing examiner.**

6.1. A quorum of the West Virginia Lottery Commission or a hearing examiner or lesser group of commission members designated by it may conduct any hearing.

6.2. The service of a petition for hearing upon the director does not operate to suspend the execution of any suspension or revocation of a lottery license or of a video lottery license or permit with respect to which a hearing is being demanded.

6.3. The commission, or the hearing examiner whom it appoints, shall set a date for any hearing demanded and will notify the person demanding a hearing not later than seven days before the hearing date of the date and time of the hearing.

6.4. The hearing will be held within thirty days after receipt of the petition.

6.5. Hearings may not be delayed by a motion for continuance made less than ten days before the date set for the hearing unless both parties agree to the continuance.

6.6. The petitioner may appear individually, or by legal counsel. If the petitioner is a corporation, partnership, limited partnership, limited liability company or other recognized form of doing business that is not a sole proprietorship, an officer of a corporation, a partner of a partnership or member of a limited liability company may represent the petitioner.

6.7. All persons appearing before the hearing examiner in the capacity of legal counsel are to conform to the standards of ethical conduct required of attorneys before the courts of the State of West Virginia. If any person does not conform to the standards, the hearing examiner may decline to permit the person to continue to appear in a representative capacity in the proceeding.

6.8. The hearing examiner may require the parties to file briefs and reply briefs, to present oral argument or both.

6.9. The commission encourages oral argument in lieu of the filing of briefs.

6.10. The time schedule for filing of briefs and reply briefs will be established by the commission or the hearing examiner prior to the conclusion of the hearing.

**§179-2-7. Submission on briefs and record.**

7.1. With the approval of the commission or the hearing examiner, the petitioner or the petitioner's duly authorized representative may waive the right to a hearing and agree to submit the case for decision upon the petition and record, with or without a written brief. Waivers and agreements must be in writing or upon the record.

**§179-2-8. The hearing.**

8.1. The petitioner will be given an opportunity for argument within the time limits fixed by the commission or the hearing examiner whom it appoints following submission of evidence. The commission or hearing examiner, upon request of the petitioner, will accept briefs in addition to or in lieu of argument. Briefs must be filed according to the schedule established by the commission or the hearing examiner prior to the conclusion of the hearing.

8.2. The commission or the hearing examiner may admit any relevant evidence, except that it will observe the rules of privilege recognized by law. A finding is to be supported by the kind of evidence commonly relied upon by reasonably prudent men in the conduct of their affairs, whether or not the evidence would be admissible before a jury. The commission or the hearing examiner may exclude any evidence which is irrelevant, unduly repetitious or lacking in substantial probative effect.

8.3. An audio recording will be made of all hearings held pursuant to this article. Any party may request a duplicate set of audio cassette tapes and must pay a per-tape cost for the tape(s). Any party may request that a typewritten transcript be made. Parties requesting and/or receiving typewritten transcripts will share the pro rata costs of preparing the transcript.

8.4. After the conclusion of the hearing and within ten days of receipt of the transcript (if one was prepared) and the due date(s) set for any briefs, the hearing examiner will prepare a recommended decision, supported by findings of fact and conclusions of law, affirming, modifying or vacating the earlier order of the commission or director.

8.5. The commission, within ten days of receipt of the recommended decision will, by a majority of those commissioners voting, either accept or reject the recommended decision.

8.6. If the commission accepts the recommended decision, it will order the Director to sign and acknowledge the recommended decision as its own, after having reviewed the transcript and all attached exhibits.

8.7. If the commission rejects the recommended decision, it will within ten days or receipt of the recommended decision prepare a decision setting forth its own findings of fact and conclusions of law.

8.8. If the commission has not elected to appoint a hearing examiner, then after the conclusion of the hearing and within ten days of receipt of the transcript (if one was prepared) and receipt of any briefs, it will prepare a decision setting forth its own findings of fact and conclusions of law.

8.9. The decision of the commission is final unless vacated or modified upon judicial review.

8.10. A copy of the decision will be served upon each party to the hearing and each attorney of record, if any, in person or by registered or certified mail.

**§179-2-9. Appeal.**

9.1. Petition for appeal may be filed with the circuit court of Kanawha County, West Virginia or in the circuit court of the West Virginia county in which the petitioner resides or does business.

9.2. An appeal to circuit court must be filed no later than thirty days after the date upon which the petitioner receives notice of the final decision of the commission.

**§179-2-10. Filing and service of documents and orders**

10.1. All documents required to be filed in an appeal under these rules must be filed with the director of the West Virginia Lottery. Delivery may be made by one of the following means:

10.1.a. Personal delivery to the West Virginia Lottery offices at 312 MacCorkle Avenue, S.E., Charleston, West Virginia during regular business hours and excluding Saturdays, Sundays and legal holidays.

10.1.b. United States mail addressed to P.O. Box 2067, Charleston, West Virginia 25327-2067.

10.1.c. Private delivery companies such as Airborne, DHL, Federal Express and United Parcel Service.

10.1.d. Facsimile transmission to either 304-558-3321 or 304-558-0129.

10.2. Filing of the petition and subsequent documents is in each case effective upon delivery and not upon mailing as determined by postmark.

10.3. Copies of all documents filed in an appeal under these rules must be served upon all other parties.

10.4. Service of documents will be accomplished by personal delivery or by registered or certified mail, return receipt requested. Whenever a party is represented by an attorney who has signed any document filed on behalf of such party or otherwise entered an appearance on behalf of such party, service thereafter must be made upon the attorney.

10.5. All documents required to be served will be accompanied by proof of service in the form of a certificate of service. The certificate of service must include a statement of how service was accomplished. Among those documents required to be served are: Petition for an administrative hearing, notice of appeal to circuit court, the final order and any

motions made. Also included are any documents the commission or hearing examiner adopts as being necessary for procedural purposes.