

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

Form #3

Do Not Mark In This Box

FILED

2004 AUG 24 P 2:51

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: Division of Motor Vehicles TITLE NUMBER: 91

CITE AUTHORITY: WV Code §17A-2-9, 17C-5A-2

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

TITLE OF RULE BEING AMENDED: Administrative Due Process

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.



Authorized Signature

Authorized Signature



WEST VIRGINIA
DEPARTMENT OF TRANSPORTATION
1900 Kanawha Boulevard East • Building Five • Room 109
Charleston, West Virginia 25305-0440 • 304/558-0444

Bob Wise
Governor

Fred VanKirk, P. E.
Secretary

July 19, 2004

The Honorable Joe Manchin III
Secretary of State
State Capitol Building
Charleston, WV 25305

Dear Mr. Secretary:

The Commissioner of Motor Vehicles is hereby authorized to promulgate proposed amendments to 91 CSR 1, Administrative Due Process.

Very truly yours,

A handwritten signature in cursive script that reads "Fred Van Kirk".

Fred VanKirk, P.E.
Secretary/Highways Commissioner

FV:sd
Enclosure



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
Division of Motor Vehicles
1800 Kanawha Boulevard East • Building Three
Charleston, West Virginia 25317

Bob Wise
Governor

Fred VanKirk, P. E.
Secretary

F. Douglas Stump
Commissioner

91 CSR 1

Administrative Due Process

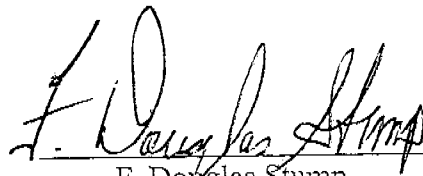
2004-2005 Proposed Amendments

Circumstances Requiring Filing of Rule

The Division of Motor Vehicles is the state agency responsible for revoking the driver's licenses of persons who have violated the laws regarding driving under the influence. These revocation procedures are initiated both by the arresting officer's affidavit as well as convictions in court. Each year the Division conducts about 4000 hearing from persons who appeal the revocation of their driving privileges.

The Division is proposing to reduce the number of continuances granted in these hearings from two to one for each party (the licensee and the arresting officer). Continuances are being used to delay the driver's license revocation process resulting in drunk drivers being allowed to continue to drive. The purpose of the laws that require the Division of Motor Vehicles to revoke the driver's licenses of drunk drivers is to remove these drivers from the road and protect the majority of law abiding motorists.

Last year, of the 4115 hearings held, 2712 were continued at least twice, each continuance resulting in the drunk driving offender being allowed to drive for on average, an additional three months. The proposed policy will be applied equally to both defense attorneys and to law enforcement officers.


F. Douglas Stump
Commissioner



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
Division of Motor Vehicles
1800 Kanawha Boulevard East • Building Three
Charleston, West Virginia 25317

Bob Wise
Governor

Fred VanKirk, P.E.
Secretary

F. Douglas Stump
Commissioner

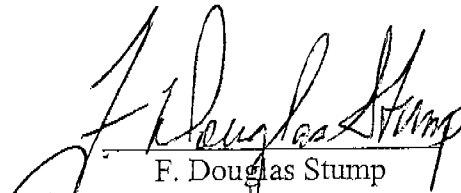
91 CSR 4

Administrative Due Process

2004 -2005 Proposed Amendments

Summary of Rule

This rule pertains to administrative hearings conducted to hear appeals of driver's license revocation and suspension actions. The proposed change to this rule reduces the number of continuances allowed for each party from two to one. The changes to this rule will mainly apply to appeals by persons whose driver's licenses have been revoked for driving under the influences offenses.


F. Douglas Stump
Commissioner

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 91 CSR 1 Administrative Due Process

Type of Rule: Legislative Interpretive Procedural

Agency: Division of Motor Vehicles

Address: Building 3, Capitol Complex
Charleston WV, 25317

1. Effect of Proposed rule:

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST		\$25,000	\$25,000	\$25,000	\$25,000
PERSONAL SERVICES					
CURRENT EXPENSE		\$25,000	\$25,000	\$25,000	\$25,000
REPAIRS & ALTERATIONS					
EQUIPMENT					
OTHER					

2. Explanation of Above Estimates:

Under this proposed rule the Division would send out 5400 less certified letters to hearing parties because of the reduction of hearing rescheduling.

3. Objectives of These Rules:

The purpose of this proposed rule is to reduce the number of allowed continuances of hearings from 2 to 1 per party to a hearing.

Rule Title: 91 CSR 1, Administrative Due Process

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

Slight reduction in state government expenses

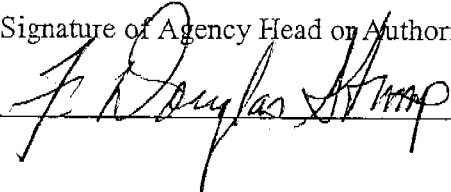
B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens: Unsuccessful DUI offender appellants would see quicker imposition of driver's license revocations with the reduction in continuences due to less delay in rendering final orders. Appellants continue to drive during the pendency of their challenge of the initial driver's license revocation order.

C. Economic Impact on Citizens/Public at Large.

None

Date: July 19, 2004

Signature of Agency Head or Authorized Representative:



QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: August 24, 2004

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: *(Agency Name, Address & Phone No)* Division of Motor Vehicles
Building 3, Room 319 Capitol Complex
Capitol Complex
Charleston, WV 25317
304 558-2723

LEGISLATIVE RULE TITLE: Administrative Due Process

1. Authorizing statute(s) citation WV Code §17A-2-9, 17C-5A-2

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
July 19, 2004

b. What other notice, including advertising, did you give of the hearing?
Please see attached

c. Date of Public Hearing(s) *or* Public Comment Period ended:
August 23, 2004

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X No comments received

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

August 24, 2004

- f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

E. Douglas Stump, Commissioner
Steven O. Dale, Executive Assistant
Building 3, Room 319
Capitol Complex
Charleston, WV 25317
Phone: 304 558-2723
Fax: 304 558-1987
e-mail: sdale@dot.state.wv.us

- g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

Jill Dunn, General Counsel - 558-3611 jdunn@dot.state.wv.us
Steven O. Dale, Executive Assistant
Building 3, Room 319
Capitol Complex
Charleston, WV 25317
Phone: 304 558-2723
Fax: 304 558-1987
e-mail: sdale@dot.state.wv.us

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

d. Attach findings and determinations and reasons:

Attached N/A



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION

Division of Motor Vehicles

1900 Kanawha Boulevard East • State Capitol Building Three
Charleston, West Virginia 25317-0010

Bob Wise
Governor

Fred VanKirk, P. E.
Secretary/Commissioner

91 CSR 1

F. Douglas Stump
Commissioner

ADMINISTRATIVE DUE PROCESS

NOTIFICATION OF PUBLIC COMMENT PERIOD

Colonel E. Hill, Jr., Superintendent
West Virginia State Police
725 Jefferson Road
South Charleston, WV 25309

American Automobile Association
Executive Vice President
3920 MacCorkle Avenue, SE
Charleston, WV 25311

Capitol Press Service
Building 1, MB 46
State Capitol Complex

West Virginia Sheriff's Association
Post Office Box 3031
Charleston, WV 25331

West Virginia Police Chiefs Association
ATTN: Tim Stover
Post Office Box 548
Lewisburg, WV 24901

Thomas P. Cooper
West Virginia Fraternal Order of Police
200 Municipal Plaza
Weirton, WV 26062

WV Trial Lawyers Association
1018 Kanawha Blvd., East
Charleston, WV 25311

Commission on Drunk Driving
ATTN: 1st Lt. Chuck Zerkle
WV State Police
725 Jefferson Road
Charleston, WV 25309

West Virginia Troopers Association
210 Chesapeake Avenue
Charleston, WV 25311

American Civil Liberties Union
Post Office Box 3952
Charleston, WV 25339

Human Rights Commission
1321 Plaza East, Room 108
Charleston, WV 25301-1400

Terry Miller, President
West Virginia Deputy Sheriff's Association
Post Office Box 286
Parkersburg, WV 26101

David Finnerin, Attorney at Law
Post Office Box 2024
Parkersburg, WV 26102-2024

WV Advocates
1207 Quarrier Street
Charleston, WV 25301

WV Public Defender Services
Building 3, Room 330
Capitol Complex

WV Bar Association
Post Office Box 2162
Huntington, WV 25722

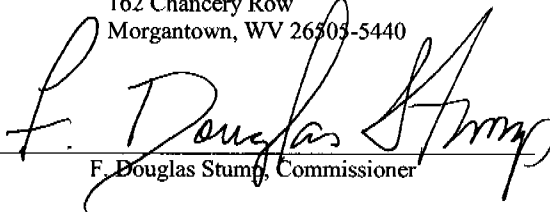
Raymond H. Yackel
Attorney at Law
162 Chancery Row
Morgantown, WV 26505-5440

John D. Wooton
Attorney at Law
Post Office Drawer 2600
Beckley, WV 25802

John R. Mitchell, Jr.
Attorney at Law
205 Capitol Street, Suite 301
Charleston, WV 25301-2227

William E. Kiger
Attorney at Law
1327 Market Street
Parkersburg, WV 26101

Robert C. Stone, Jr.
Attorney at Law
Post Office Box 2270
Martinsburg, WV 25402-2270


F. Douglas Stump, Commissioner

RECEIVED
D.M.V. COMMISSIONER
2004 AUG 12 PM 3: 12

GEORGE F. FORDHAM

Attorney at Law

Suite 500, Goff Building
321 West Main Street
Clarksburg, West Virginia 26301
Phone (304) 623-9511 Fax (304) 623-3300
Email: Fordhamwv@aol.com

August 11, 2004

Division of Motor Vehicles
Office of the Commissioner
Attn.: Steven O. Dale
Docket No. 200591CSR1
1900 Kanawha Blvd., East
Bldg. 3, Room 319, Capital Complex
Charleston, WV 25317

Re: Proposed Amendment to 91C.S.R. §91-3.8.1

Dear Mr. Dale:

I have received notice that, in lieu of a public hearing, a comment period has been established during which any interested person may send comments concerning a proposed change in the above styled administrative rule.

As a practicing attorney who is involved in many administrative DUI hearings, I believe that the proposed change from the granting of two continuances down to one continuance per party is a bad and unworkable proposal. Such a change would work to the detriment of both parties in these hearings.

It is not uncommon for attorneys to have scheduling conflicts. In the past, when I have been notified of a DMV hearing and have noticed a scheduling conflict, I will immediately notify the DMV office of this conflict and an alternate date is then scheduled. Because these DMV hearing are often scheduled months in advance, it sometimes happens that a second conflict arises. To only permit one continuance for court hearings would be extremely prejudicial to me as well as my clients. I can say from a number of personal experiences that Circuit judges do not look kindly upon being told that the DMV will not reschedule a hearing that conflicts that judge's trial date, especially if a jury is involved.

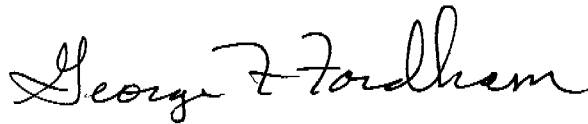
Steven O. Dale, DMV
August 11, 2004
Page 2

There are numerous examples of potential problems with such a rule change. For example, a hearing may be scheduled on a religious holiday. If a continuance is granted, it would be impossible to get another continuance for a scheduling conflict, or for any other reason. This opens up the potential for many problems which are easily avoided by not changing the rule to only allow one continuance.

A better idea, in my opinion, would be to change the rule to allow for unlimited continuances for good cause. This would be fair to both parties. The proposed rule change might make the work of the DMV employees a little easier, but as a practical matter, it is unworkable and unfair.

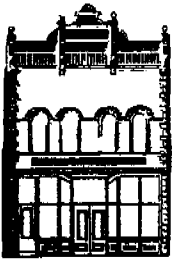
Thank you for the opportunity to comment on this proposed rule change. I hope that this proposed change will be rejected.

Yours truly,

A handwritten signature in cursive script that reads "George F. Fordham". The signature is written in dark ink and is centered below the "Yours truly," text.

George F. Fordham

GFF/gmb



The Wooton Law Firm

P. O. Box 2600
Beckley, West Virginia 25802-2600

William R. Wooton
John D. Wooton
Michelle L. Johnson
Christopher M. Davis

August 10, 2004

RECEIVED
D.M.V. COMMISSIONER

2004 AUG 12 PM 3:12

Offices of *William R. Wooton*
210 Main Street, Beckley, WV 25801
Phone (304) 253-2222 Fax (304) 255-5041

Offices of *John D. Wooton*
201 N. Kanawha Street, Beckley, WV 25801
Phone (304) 255-2188 Fax (304) 255-2189

Division of Motor Vehicles
Office of the Commissioner
Attn: Steven O. Dale
Docket No. 200591CSR1
Building 3, Room 319
Capitol Complex
Charleston, WV 25317

RE: Hearings for suspension and revocation of driver's license

Dear Mr. Dale:

I do not believe the proposed rule would serve the interest of justice, and would be unfair to all participants in this matter.

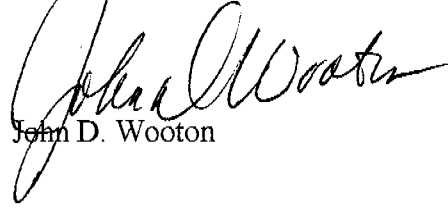
The hearing date and time is selected by the Commissioner, without input from either party. Many times the Commissioner has selected a date wherein the attorney representing the driver has a previous commitment to be in another Court proceeding, or be out of town for various reasons. Likewise the same applies to police officers. Many times the police officers have scheduled their vacation, scheduled to be in Court, or have scheduled to be in training. To grant one continuance without input from either party is a violation of due process rights.

I would propose that the rule be modified to require that the Commissioner conduct a scheduling conference on all hearings to select a date for the hearing, and then allow each party one continuance as a matter of right, should an unforeseen matter develop. The notice should be sent to all parties advising them to call the Commissioner on a conference call on a certain date and time to conduct the scheduling conference and if they fail to do that, they will be considered non-participants of the scheduling, and will have no input as to the date selected.

If that rule is not adopted then I would strictly oppose any limit on the number of continuances, whether it be one, two or more, as the date selected does not take in consideration previous commitments of either party.

Respectfully submitted,

Very Truly Yours,
THE WOOTON LAW FIRM



John D. Wooton

JDW/lmd

RECEIVED
D.M.V. COMMISSIONER
2004 AUG 23 PM 12:19

RANDY D. HOOVER
ATTORNEY AT LAW
P.O. BOX 5521
109 PRINCE STREET
BECKLEY, WEST VIRGINIA 25801

(304) 252-8011
FAX (304) 252-8010

August 23, 2004

STEVEN O. DALE
DIVISION OF MOTOR VEHICLES
OFFICE OF THE COMMISSIONER
BUILDING 3, ROOM 319
CAPITOL COMPLEX
CHARLESTON, WV 25317

RE: DOCKET NO: 200591CSR1

Dear Mr. Dale:

This letter is in response to the Commissioner's proposal to reduce the number of continuances allowed for each party from two to one, pursuant to 91 CSR 1- 3.8.1.

I have practiced law for 28 years and have specialized in DUI defense for the last 15 years and one of the biggest wastes of time and money has been playing post office tennis with the DMV. The Commissioner has always scheduled hearings without contacting my office to determine whether I will have a conflict in my schedule.

The hearing is scheduled by certified mail and the request for a continuance is made by certified mail. Then the Commissioner reschedules a new hearing by certified mail and if I have another conflict, I must again request a continuance by certified mail. The Commissioner, with the cooperation of all parties, should devise a mechanism to bring this time consuming and costly ping pong match to an end.

I have suggested the Commissioner's hearing scheduler call my toll free number to check for a conflict before issuing a written notice of hearing. This suggestion has been ignored. With modern methods of communication this problem could be easily solved.

Before issuing an expensive certified letter, why not contact the defense attorney by fax, email or phone.

Steven O. Dale
Page 2
August 23, 2004

I believe a conference between the Commissioner and participating attorneys would be well received by all involved. This problem will not be solved by making 91 CSR 1-3.8.1 more rigid, as proposed by the Commissioner.

If you have any questions, please feel free to contact me at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Randy D. Hoover". The signature is fluid and cursive, with the first name "Randy" being the most prominent.

RANDY D. HOOVER

RDH/mls



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION

Division of Motor Vehicles

**1800 Kanawha Boulevard East • Building Three
Charleston, West Virginia 25317**

**Bob Wise
Governor**

**Fred VanKirk, P. E.
Secretary**

**F. Douglas Stump
Commissioner**

Public Comment Summary / Agency Response

91 CSR 1

2004-2005 Proposed Amendments

Administrative Due Process

A. Comments Received (Attached)

1. George F. Fordham, Attorney, Clarksburg, WV
2. John D. Wooton, Attorney, Beckley, WV
3. Randy D. Hoover, Attorney, Beckley WV

B. Summary and Response

1. Mr. Fordham's Comments:

a. Reducing administrative hearing continuances from two to one is a bad and unworkable proposal.

b. Suggests that either party be allowed an unlimited number of continuances.

2. Mr. Wooton's Comments:

a. Suggests that rule change reducing the number of continuances from two to one would not serve the interests of justice and would be unfair to all participants of administrative hearings.

b. Recommends amending rule to require the agency to conduct a scheduling conference to select hearing dates.

3. Mr. Hoover's Comments:

a. Suggests contacting parties to hearing before scheduling to resolve conflicts.

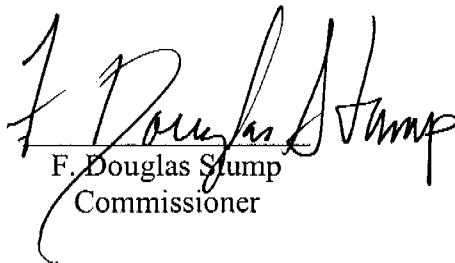
Agency Response

1. Reducing Number of Continuances Issue: The agency stands by its proposal to reduce the number of continuances from two to one for each party to the hearing. Each continuance

granted delays the holding of the hearing. In the majority of cases, this delay allows drivers who have already shown a propensity for driving under the influence to continue to drive. The initial revocation is based on a sworn statement from a law enforcement officer that the driver was operating a motor vehicle under the influence of alcohol. In most case an actual BAC level is recorded for the record. In this case, justice delayed jeopardizes public safety. Some attorneys request continuances only to delay the hearing process long enough to increase the chance that the arresting officer will fail to appear and force the State to rule in favor of the person requesting the hearing. There is no incentive for a driver or his or her attorney to speed up the scheduling of the hearing because the driver is allowed to drive until the hearing determines whether or not there was sufficient cause to order the initial license revocation.

2. Lack of Attorney Contact before Scheduling: The commenters are correct, the Agency currently does not contact either party in advance to determine conflicts before scheduling the hearing date.

The agency will begin a new process of sending a form with each initial order of revocation that will request the driver, if he or she wishes to request a hearing on the driver license's revocation, to indicate the dates that the driver and/ or the driver's attorney would be available in the next three months. This new process can be accomplished without any changes to the rule.



F. Douglas Stump
Commissioner

FILED

PROPOSED
TITLE 91
LEGISLATIVE RULES
DIVISION OF MOTOR VEHICLES

SERIES 1
ADMINISTRATIVE DUE PROCESS

2004 AUG 24 P 2: 51

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§91-1-1. General

1.1. Scope. – This legislative rule establishes procedures for the exercise of administrative due process pursuant to Chapter 29A of the Code of West Virginia of 1931, as amended.

1.2. Authority. – West Virginia Code §17A-2-9, §17A-6B-13, §17A-6C-17, §17B-2-15, §17D-2-1, §17E-1-18.

1.3. Filing Date. –

1.4. Effective Date. –

§91-1-2. Application and Enforcement.

2.1. Application. –This legislative rule applies to persons contesting any order or decision of the Commissioner of Motor Vehicles pursuant to Chapter 29A of the Code.

2.2. Enforcement. –Enforcement of this legislative rule is vested with the Commissioner of Motor Vehicles or his lawful designee.

2.3. This legislative rule takes precedence over all administrative due process rules or hearing procedures found in this Title.

§91-1-3. Hearings.

3.1. Definitions – The following definitions apply in the interpretation and enforcement of this legislative rule.

3.1.1. Commissioner – Means the executive officer of the Division of Motor Vehicles appointed by the Governor pursuant to West Virginia Code §17A-2-2, or the Commissioner's lawful designee.

3.1.2. DUI Hearing – Means the administrative procedures conducted by the Commissioner pursuant to West Virginia Code §§17C-5A-1 et seq. and 29A-5-1 et seq. as applied to contested cases arising out of the enforcement of administrative revocations and disqualifications imposed under the provisions of West Virginia Code §§17C-5A-2 and 17E-1-13 for driving under the influence of alcohol, controlled substances or drugs, driving while having a blood alcohol concentration above the legal limit or refusing to submit to a chemical test.

3.1.3. Arresting Officer – Means any law enforcement officer as described in West Virginia Code §§17C-5-4 or 17E-1-24.

3.2. Subpoenas. --The Commissioner may issue subpoenas or subpoenas duces tecum in accordance with West Virginia Code §29A-5-1(b).

3.2.1. Every subpoena and subpoena duces tecum shall be served at least five days before the return date thereof, either by personal service made by any person over eighteen years of age or by registered or certified mail. A return acknowledgment signed by the person to whom the subpoena or subpoena duces tecum is directed shall be required to prove service by registered or certified mail.

3.2.2. All subpoenas and subpoenas duces tecum shall be issued in the name of the Division of Motor Vehicles. Any party requesting the issuance of a subpoena or subpoena duces tecum must see that they are properly served.

3.2.3. 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. An arresting officer in a DUI hearing is not entitled to a fee for serving a subpoena or subpoena duces tecum.

3.2.4. All fees related to any subpoena or subpoena duces tecum issued at the instance of an interested party shall be paid by the party who asks that such subpoena or subpoena duces tecum be issued.

3.2.5. All requests by interested parties for subpoenas and subpoenas duces tecum shall be in writing and shall contain a statement acknowledging that the requesting party agrees to pay the fees except as provided in Subdivision 3.2.4.

3.3. Orders of Revocation or Suspension.

3.3.1. Any order or decision of the Commissioner subject to administrative review under these rules shall include a:

- a. Statement of the issues involved,
- b. Statement that the person's request for a hearing must be made in writing within

ten (10) days from the date on which the order's mail receipt was signed unless a different time period is prescribed by statute or the right to a hearing is waived, and a

c. Statement of the costs associated with the hearing which the person may incur.

3.3.2. In addition to the requirements of Subdivision 3.3.1, any order issued pursuant to West Virginia Code §17C-5A-2 or §17E-1-13 must contain a statement that the person shall notify the Commissioner if there is an intent to challenge the results or operation of the secondary chemical test or the legality of a sobriety checkpoint as prescribed in Subsection 3.4.

3.3.3. Orders of Revocation or Suspension issued pursuant to West Virginia Code §17C-17A-1 et seq, concerning the Public Service Commission's regulation of the commercial transportation of coal are not subject to administrative review with the Division of Motor Vehicles.

3.4. Challenge of Secondary Chemical Test and Sobriety Checkpoint

3.4.1. Notification – Any person requesting a DUI hearing who intends to challenge the results of any secondary chemical test of the blood, breath or urine, or intends to cross-examine the individual or individuals who administered the test or performed the chemical analysis, shall notify the Commissioner of his or her intent. The person shall submit the notification in writing, either in person or by mail to the Commissioner in Charleston, West Virginia, at least ten (10) days prior to the hearing date. Any person who intends to challenge official compliance with and adherence to sobriety checkpoint operational guidelines shall notify the Commissioner of his or her intent in writing, either in person or by mail to the Commissioner in Charleston, West Virginia, at least ten (10) days prior to the hearing date or those matters cannot be challenged.

3.4.2. Admissibility – If a person fails to comply with the notice requirements of Subdivision 3.4.1 of this rule pertaining to the secondary chemical test, the results of the test, if any, will be admissible as though the person and the Commissioner had stipulated the admissibility.

3.4.3. Exceptions – The Commissioner shall not invoke the provisions of Subdivision 3.4.2 of this rule in the case of a person who is not represented by counsel unless the communication from the Commissioner to the person establishing a time and place for the hearing also informed the person of the consequences of his or her failure to timely notify the Commissioner pursuant to Subdivision 3.4.1 of this rule.

3.5. Request for a Hearing

3.5.1. A person must submit a request for hearing in writing to the Commissioner in Charleston, West Virginia, either in person or by registered or certified mail, return receipt requested. The request must be made within ten (10) days from the date on which the order's mail receipt was signed unless a different time period is prescribed by statute. In cases where the registered or certified mail is not signed for, the provisions of West Virginia Code § 17A-2-19 apply

which provides that the giving of notice is complete upon the expiration of four (4) days after deposit of the notice in the United States mail.

3.5.2. The notice requesting a hearing must contain a description of the order upon which a hearing is requested and the grounds upon which it is asserted that the order should be vacated or modified.

3.5.3. If a person wishes to challenge the results or operation of a secondary chemical test or the legality of a sobriety checkpoint, the person shall notify the Commissioner of that action as prescribed in Subsection 3.4.

3.5.4. Untimely hearing requests shall not be granted. A request is untimely if it is made after the time specified in Subdivision 3.5.1 or prior to the issuance of the Order of Revocation, Suspension or Disqualification.

3.6. Notice of Hearing

3.6.1. The Commissioner shall send the notice of hearing to the person requesting the hearing by registered mail or certified mail, return receipt requested.

3.6.2. The notice shall contain a:

- a. Statement of the date, time, and location of the hearing;
- b. Statement of the issues involved; and
- c. Statement as to the consequences of failing to appear at the prescribed date, time and place of the hearing.

3.6.3. In addition to the requirements of Subdivision 3.6.2, any hearing notice issued for a DUI hearing must contain a statement as to the consequences of failing to timely notify the Commissioner of the person's intention to challenge the results or operation of the secondary chemical test pursuant to the notice requirements of Subsection 3.4 of this rule.

3.6.4. The hearing shall be held at the Division of Motor Vehicles office in Charleston, a regional office or some other hearing location as determined by the Division of Motor Vehicles with due regard for the convenience of the person requesting the hearing and in accordance with any applicable statute.

3.6.5. The Commissioner may consolidate issues from multiple suspension, revocation or disqualification orders arising from the same incident or occurrence into one administrative hearing.

3.7. Failure to Appear

3.7.1. The Division shall automatically reinstate the revocation or suspension and the assessment of costs outlined in Subsection 3.11 of this rule if the person fails to appear either in person or by counsel, at the hearing without obtaining a continuance pursuant to Subsection 3.8 of this rule.

3.7.2. The failure of an arresting officer to appear at a DUI hearing does not relieve the licensee from the obligation to appear at the hearing or from the provisions of Subsection 3.7.1 of this rule. *Provided*, That, where the arresting officer fails to appear at the hearing, but the licensee appears, the revocation or suspension of license may not be based solely on the arresting officer's affidavit or other documentary evidence submitted by the arresting officer.

3.8. Request for Continuance

3.8.1. The Commissioner may grant the person requesting a hearing a continuance of the scheduled hearing. The person shall make the request for continuance in writing, and it must be received by the Commissioner at least five (5) days prior to the scheduled hearing date. The Commissioner shall grant the request if good cause is shown. Good cause shall include such reasons as serious illness, medical appointments, court appearances, or religious holidays. In no case may the Commissioner grant more than ~~two~~ one continuances continuance per party except as provided in Subdivisions 3.8.3 and 3.8.4.

3.8.2. In DUI hearings, the Commissioner may also grant a continuance to the arresting officer as prescribed in Subdivision 3.8.1.

3.8.3. The Commissioner may postpone or continue a hearing on his or her own motion. The motion shall be for good cause including, but not limited to, docket management, availability of hearing examiners or other essential personnel, Division error in scheduling or notice, or mechanical failure of essential equipment, i.e. recording equipment, file storage equipment, etc.

3.8.4. The Commissioner may grant an emergency continuance on less than five days notice to the person requesting the hearing and also the arresting officer in a DUI hearing for unexpected personal emergencies of the person, attorney, arresting officer, or subpoenaed witnesses. An emergency situation requiring the services of an arresting officer en route to a hearing qualifies as an unexpected personal emergency. Any emergency continuance request may be made by telephone but also must be submitted in writing. The written request must be received by the Division no later than five (5) days after the date the hearing was scheduled or the provisions of Subsection 3.7 will be applied as if the party requesting the continuance failed to appear.

3.9. Hearing Procedures

3.9.1. A person requesting a hearing may be represented by an attorney licensed to practice law in West Virginia. An arresting officer in a DUI hearing may also be represented by an attorney licensed to practice law in West Virginia. The Division may be represented by a person designated by the Commissioner.

3.9.2. The provisions of West Virginia Code §29A-5-2 apply to questions concerning evidence.

3.9.3. All hearings shall be conducted by employees designated as hearing examiners by Memorandum Order of the Commissioner. Hearing examiners have the power to:

- a. Administer oaths and affirmations,
- b. Rule upon offers of proof and receive relevant evidence, and
- c. Regulate the course of the hearing,
- d. Question witnesses, and,
- e. Exclude any person who engages in conduct intended to disrupt the hearing or willfully violates instructions issued by the hearing examiner.

3.9.4. Presentation of Evidence and Cross Examination:

- a. The party carrying the burden of proof has the initial opportunity to present evidence.
- b. The hearing examiner shall offer and accept as part of the record all documents in the Commissioner's file.
- c. All parties have the right to cross examine witnesses unless cross examination is precluded by statute.
- d. Following the presentation of all evidence, each party has the right to offer closing arguments.

3.9.5. The hearing examiner may continue a hearing in progress from one day to another or adjourn to a later date.

3.10. Transcription of Reported Testimony and Evidence

3.10.1. All testimony, evidence, arguments and rulings on the admissibility of testimony and evidence shall be reported by stenographic notes and characters or by mechanized

means.

3.10.2. Upon written request, the Commissioner shall have all materials transcribed and a copy furnished to the person requesting the hearing at his or her own expense. The Commissioner shall collect a fee of One Dollar and Fifty Cents for each page transcribed.

3.11. Assessment of Costs

3.11.1. The Commissioner shall assess a docket fee of Fifty Dollars against the person requesting a hearing unless a different fee is prescribed by statute.

3.11.2. The Commissioner shall assess a fee of Fifteen Dollars per witness and Fifteen Cents per mile for each mile necessarily traveled to and from the place of the hearing against the person requesting the hearing.

3.11.3. The Commissioner shall assess any person filing a request for a hearing who fails to have the Commissioner's order rescinded or modified to a lesser period of revocation the fees prescribed in Subdivisions 3.11.1 and 3.11.2. The person shall pay all applicable fees before the Commissioner may complete reinstatement of the license, vehicle registration or privilege to operate a motor vehicle.

3.11.4. All fees collected under this subsection and Subdivision 3.10.2 shall be deposited, transferred, and paid out in accordance with West Virginia Code § 17C-5A-2a.

3.12. Final Orders

3.12.1. The Commissioner shall make findings of fact and conclusions of law pursuant to West Virginia Code §29A-5-1 et seq. and the applicable statutory provisions.

3.12.2. The Commissioner shall make and enter every final order pursuant to West Virginia Code §29A-5-1 et seq. and the applicable statutory provisions .

3.12.3. The person is entitled to judicial review as set forth in West Virginia Code §29A-5-1 et seq. and in accordance with the applicable statutory provisions.