

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

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**FILED**

2003 NOV 19 A 9:59

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

Form #3

**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

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 91 CSR 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



**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

October 1, 2003

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 emergency and 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

Roger Pritt  
Commissioner

**Summary of Content**

**91 CSR 1**

**Administrative Due Process**

This rule establishes the procedures for persons and businesses to appeal suspension or revocation of various licenses and permits issued by the Division of Motor Vehicles.

The first amendment to this rule reconciles provisions in 91 CSR 5.14.4 and this rule relating to the ramifications for the appellant when the appellant fails to appear at an administrative hearing. The amendment clarifies that the original Order of Revocation is affirmed when an appellant fails to appear at an administrative hearing regardless of whether or not the arresting officer appears at the hearing.

A second amendment to this rule clarifies that actions by the Public Service Commission under the provisions of Senate Bill 583, Coal Resource Transportation System (West Virginia Code §17C-17A-9) may not be appealed to the Division of Motor Vehicles. The above referenced provisions require any appeal of actions by the Public Service Commission against a person's driver's license to be adjudicated by the Public Service Commission.

Additional amendments to this rule provide that issues/suspensions arising from the same incident may be consolidated into one hearing, and provide additional procedural guidelines for the actual management of the hearing.

A handwritten signature in black ink that reads "Roger Pritt".

Roger Pritt  
Commissioner



**WEST VIRGINIA DEPARTMENT OF TRANSPORTATION**  
**Division of Motor Vehicles**

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

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Statement of Circumstances

91 CSR 1

Administrative Due Process

The circumstances that require amendments to 91 CSR 1, Administrative Due Process deal with two different subject areas both related to appeals of driver's license suspension or revocation under DMV's administrative hearing process.

The Supreme Court, in Nichols v. Roger Pritt, Commissioner [584 S.E.2d 220, (2003)] ruled that that the provisions of two DMV rules dealing with DUI hearings; 91 CSR 5.14.4 and 91 CSR 1.3.7.2 "... present a significant disparity in the legal effect of the arresting officer's failure to appear at appellant's DUI hearing." (Pg. 224). The provisions of 91 CSR 5 clearly provide that the failure of the arresting officer to appear at the hearing does not relieve the licensee from his or her obligation to appear. The Court ruled that 91 CSR 1.3.7 could be interpreted as requiring the dismissal of the DUI revocation if the arresting officer did not appear, regardless of the presence or absence of the appellant. The Court remanded the case back to Circuit Court for DMV to conduct another hearing.

This rulemaking will amend 91 CSR 1 to make it clear that the Agency's intent in both rules was that the failure of the appellant to appear at the hearing would result in the upholding of the original DUI revocation. This amendment is necessary to alleviate the current legal uncertainty that will foster an estimated 20% increase in Circuit Court challenges of DMV final orders based on hearings conducted under similar circumstances when both appellant and arresting officer fail to appear. The amendment will also alleviate the corresponding additional hearings and the additional delay getting the DUI offender off of the road.

The second amendment to the rule pertains to the provisions of Senate Bill 583, the Coal Resources Transportation System (W. Va. Code §17C-17A-9) which authorizes the Public Service Commission to administer and adjudicate administrative penalties for truck owners and drivers. The legislation designates PSC not DMV as the venue for appeals of driver's license suspension action. This amendment clarifies that persons whose driver's licenses are suspended under the provisions of W.Va. Code §17C-17A-9 are not entitled to a second layer of administrative due process by DMV prior to the suspension action.

A handwritten signature in black ink that reads "Roger Pritt".

Roger Pritt  
Commissioner

□  
APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 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
<b>ESTIMATED TOTAL COST</b>	NA				
<b>PERSONAL SERVICES</b>					
<b>CURRENT EXPENSE</b>					
<b>REPAIRS &amp; ALTERATIONS</b>					
<b>EQUIPMENT</b>					
<b>OTHER</b>					

2. Explanation of Above Estimates:

The net effect of this rule will be to prevent additional administrative DUI hearings and appeals to Circuit Court consequently preventing additional expenses.

3. Objectives of These Rules:

The objective of this rule is to correct an inconsistency between two DMV rules pertaining to administrative DUI hearings and the consequences of either party to the hearing failing to appear. The rule also clarifies that the proper forum for appeal of certain Coal Hauler driver's license suspension actions is PSC not DMV.

Rule Title: Administrative Due Process

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

Promulgation of this rule will prevent the unplanned expenditure of funds to conduct additional DUI administrative hearings and Circuit Court appeals

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

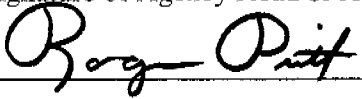
None

C. Economic Impact on Citizens/Public at Large.

None

Date: October 1, 2003

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: November 19, 2003

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: *(Agency Name, Address & Phone No.)* Division of Motor Vehicles  
Building 3, Capitol Complex  
Charleston, WV 25317

LEGISLATIVE RULE TITLE: 91 CSR 1 Administrative Due Process

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

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:  
October 8, 2003

b. What other notice, including advertising, did you give of the hearing?  
Mailing comment notice and copy of rule to persons on attached list

c. Date of Public Hearing(s) *or* Public Comment Period ended:  
November 10, 2003

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)

November 19, 2003

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

Steven O. Dale

Executive Assistant to the Commissioner

Division of Motor Vehicles

Building 3, Capitol Complex

Charleston, WV 25317

Phone: 304 558-2723

Fax: 304 558-1987

E-Mail: sdale@dot.state.wv.us

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- 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/ Adam Holley Asst. General Counsel)

Division of Motor Vehicles

Building 3, Capitol Complex

Charleston WV 25317

Phone: 304 558-3611

Fax: 304 558-4285

E-Mail: jdunn@dot.state.wv.us

E-Mail: aholley@dot.state.wv.us

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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.

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b. Date of hearing or comment period:

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

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d. Attach findings and determinations and reasons:

Attached 

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**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

**Roger Pritt**  
 Commissioner

91 CSR 1  
 Administrative Due Process  
 Notification of Public Comment Period

Col. Howard E. Hill Jr., Superintendent  
 WV State Police  
 725 Jefferson Road  
 South Charleston, WV 25309

Capitol Press Service  
 MB 46  
 State Capitol Complex

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

WV Advocates  
 1207 Quarrier Street  
 Charleston, WV 25301

Commission on Drunk Driving  
 Attn: 1<sup>st</sup> Lt Chuck Zerkle  
 WV State Police  
 725 Jefferson Road  
 South Charleston, WV 25309

WV Public Defender Services  
 Building 3, Room 330  
 Capitol Complex

Prosecuting Attorneys Institute  
~~1206 Kanawha Blvd E Suite 207~~  
 Charleston, WV 25301

WV Police Chiefs Association  
 Attn: Tim Stover  
 P.O. Box 548  
 Lewisburg, WV 25901

WV Troopers Association  
 210 Chesapeake Avenue  
 Charleston WV, 25311

American Civil Liberties Union  
 P.O.Box 3952  
 Charleston, WV 25339

WV Sheriffs Association  
 P.O. Box 3031  
 Charleston, WV 25331

WV Deputy Sheriffs Association  
 Terry Miller  
 P.O. Box 286  
 Parkersburg, WV 26102

WV Bar Association  
 P.O. Box 2162  
 Huntington, WV 25722

WV Natural Resources Transporters  
 Corky DeMarco  
 1620 Kanawha Blvd. East Suite 4A  
 Charleston, WV 25311

WV Public Service Commission  
 Transportation Division  
 P.O. Box 812  
 Charleston, WV 25323-0300

*90 MacCorkle Ave SW  
 S. Charleston WV  
 25303*

WV Fraternal Order of Police  
 Thomas P. Cooper  
 200 Municipal Plaza  
 Weirton, WV 24901



**WEST VIRGINIA STATE POLICE**  
725 Jefferson Road  
South Charleston, West Virginia 25309-1698  
wvstatapolice.com

**Bob Wise**  
Governor

November 5, 2003

**Colonel H. E. Hill, Jr.**  
Superintendent

Mr. Steven O. Dale  
Division of Motor Vehicles  
Building 3, Room 319  
Capitol Complex  
Charleston, West Virginia 25317

Dear Mr. Dale:

I am writing this correspondence in reference to the proposed rule change to 91 CSR 5.14.4 as it relates to the ramifications for the appellant when the appellant fails to appear at an administrative hearing. The amendment clarifies the original Order of Revocation is affirmed when the appellant fails to appear at an administrative hearing regardless of whether or not the arresting officer appears at the hearing.

The State Police is in full support of the proposed rule change. It would eliminate additional hearings for officers and save all agencies overtime money; and, it would allow the officer to work a normal shift and not be held up in court.

If I can be of further assistance in this matter, please do not hesitate to contact me.

Sincerely,

BY DIRECTION OF THE SUPERINTENDENT

A handwritten signature in cursive script, appearing to read "C. N. Zerkle, Jr.".

C. N. Zerkle, Jr., First Lieutenant  
Director  
Traffic Records

CNZJR/bp



## West Virginia Sheriffs' Association

P.O. Box 3031  
Charleston, WV 25331  
Telephone: (304) 345-2232  
Fax: (304) 345-2231

*"Serving West Virginia's  
Sheriffs and citizens for  
over 50 years"*

October 14, 2003

Division of Motor Vehicles  
Office of the Commissioner  
Attention: Steven O. Dale  
Building 3, Room 319  
Capitol Complex  
Charleston, WV 25317

Re: Docket #2004-91CSR1

Dear Mr. Dale:

On behalf of the WV Sheriffs' Association, please be advised that I have had the opportunity to review the proposed administrative rules relating to the procedures for the appeal of suspensions and revocations of licenses and permits issued by the Division of Motor Vehicles. In furtherance of this review and comment, I have asked several sheriffs to review and consider these proposed amendments as they may impact on the operation of their offices.

From the comments that I have reviewed, the amendment that clarifies that the Order of Revocation is affirmed when an appellant fails to appear at an administrative hearing regardless of whether or not the arresting officer appears is viewed as being most appropriate to the interests of sheriffs. Concerning the appeal of actions to the Public Service Commission under the provision of WV Code 17C-17A-9, please be advised that we have no real opinion on this matter since it would appear to relate more to questions concerning the statutory jurisdiction for the adjudication of such matters under the Coal Resource Transportation System legislation.

Of continuing interest to sheriffs would be a regulation requiring the holding of administrative hearings for the appeal of suspensions and revocations of licenses at locations within the county wherein the enforcement action was undertaken. The travel time and expenses required for appearances at administrative hearings held at locations outside of the county of jurisdiction remains as a topic of major concern for many sheriffs.

Should you have any questions concerning these comments, please feel free to contact me by phone at 345-2232 or by email at [wvsa@ntelos.net](mailto:wvsa@ntelos.net). Thank you for the opportunity to comment on this matter.

Respectfully,

*Melissa McClung*  
Melissa McClung, Executive Director

DAVID M. FINNERIN

ATTORNEY AT LAW

POST OFFICE BOX 2024

PARKERSBURG, WEST VIRGINIA 26102-2024

TELEPHONE (304) 485-6652

FAX (304) 422-1933

November 5, 2003

West Virginia Division of Motor Vehicles  
Office of the Commission  
Attention: Steven O. Dale  
Docket No: 2004-91CSR1 Building #3, Room #319  
Capitol Complex  
Charleston, West Virginia 25317

In Re: Comments on Proposed Rule

**ADMINISTRATIVE DUE PROCESS**

1. There should be a fax number for submitting comments rather than requiring them to be mailed.
2. Proposed 3.9.4 (a) combined with proposed 3.7.2 would appear to have the unconstitutional, burden-shifting effect of requiring the driver to "prove a negative." and provide no consequence if the arresting officer fails to appear at the hearing. Rather than fixing the problem raised in the Nicholas Case, the proposed changes would throw the baby out with the bath water.
3. Rule 3.9.1 continues to provide that an individual may be represented by an attorney but Rule 3.7.1 leaves room for confusion concerning any personal appearance of the individual being required at the hearing. It has been the accepted practice, for at least thirty years, that an individual may appear by counsel at these hearings. In order to avoid future confusion on the matter, suggest that 3.7.1 be amended as follows:

"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."

Respectfully yours,



David M. Finnerin

DMF:bj



**WEST VIRGINIA DEPARTMENT OF TRANSPORTATION  
Division of Motor Vehicles**

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

Bob Wise  
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Secretary

Roger Pritt  
Commissioner

**91 CSR 1  
Administrative Due Process  
2003 Rulemaking Public Comments**

**1. WV State Police:**

Supports DUI hearing rule change.

**2. WV Sheriffs Association:**

- a. Supports DUI hearing rule change.
- b. No opinion on PSC adjudication of Coal Road Program infractions.

**3. David M. Finnerin, Attorney at Law:**

- a. Suggests proposed rule changes shift the burden of proof, thus appear unconstitutional.

*Agency Response: Agency disagrees that the proposed rule changes current burden of proof. The rule changes do not change the current burden of proof, which now resides with the licensee, however, the language in 3.9.4.a is modified to remove any question. The burden of proof remains with the Commissioner to support his finding by a preponderance of the evidence.*

- b. Suggest proposed rule changes provide no consequence if the arresting officer fails to appear.

*Agency Response: The Agency disagrees; The arresting officer who fails to appear is unable to rebut any evidence offered by the licensee.*

- c. Suggests changes to 3.7.1 to clarify that an attorney may appear at a hearing on behalf of the licensee requesting the hearing.

*Agency Response: The Agency agrees with the suggestion and will modify the rule as suggested by Mr. Finnerin.*

- d. Suggests that Agency allow comments to be submitted by fax machine.

*Agency Response: The reason that public comments are not accepted by fax is because the print quality of faxes does not lend itself to the duplication necessary for multiple filings with different agencies in the promulgation process.*

A handwritten signature in black ink that reads "Roger Pritt".

Roger Pritt  
Commissioner

2004rule.01 Admin Hearings Agency Approved D3  
TITLE 91  
LEGISLATIVE RULES  
DIVISION OF MOTOR VEHICLES  
  
SERIES 1  
ADMINISTRATIVE DUE PROCESS

**FILED**  
2003 NOV 19 A 9:59  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**PROPOSED**

**§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. –

~~1.5. Repeal of Former Rule. – This legislative rule repeals and replaces West Virginia Legislative Rules, Division of Motor Vehicles, 91-CSR-1, Administrative Due Process as filed May 19, 1965 and effective June 19, 1965.~~

**§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. In a DUI hearing, the Division shall dismiss the revocation or suspension if the arresting officer fails to appear without obtaining a continuance pursuant to Subsection 3.8 of this rule. 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.~~

### 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 continuances 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~~ requesting the hearing ~~the burden of proof~~ has the initial opportunity to present evidence
- b. The hearing examiner shall offer and accept as evidence all documents in the Commissioner's file.
- ~~b. c.~~ All parties have the right to cross examine witnesses unless cross examination is precluded by statute.
- ~~e. 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.