

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

Do Not Mark In This Box

FILED

2004 APR 13 P 1:40

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Form #6

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED
BY THE WEST VIRGINIA LEGISLATURE**

AGENCY: Division of Motor Vehicles TITLE NUMBER: 91

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: _____

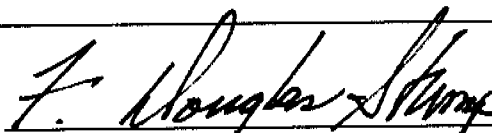
TITLE OF RULE BEING PROPOSED: _____

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) House Bill 4211

SECTION WV Code §64-8-2, PASSED ON March 12, 2004

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE
FOLLOWING DATE: April 26, 2004


Authorized Signature

54.00



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,

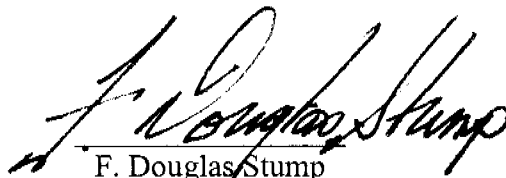
A handwritten signature in cursive script that reads "Fred Van Kirk".

Fred VanKirk, P.E.
Secretary/Highways Commissioner

FV:sd
Enclosure

Promulgation History
91 CSR 1
Administrative Due Process

Rule Cite: 91 CSR
Rule Type: Legislative
Initial Filing: October 8, 2003
Public Comment Period Expiration: November 10, 2003
Filing Agency Approved Rule: November 19, 2003
Rule Authorized as Agency Modified: Not Applicable
Authorization by Legislature: HB 4211, WV Code §64-8-2
Final Filing: April 13, 2004
Effective Date: April 26, 2004


F. Douglas Stump
Commissioner

FILED

TITLE 91
LEGISLATIVE RULES
DIVISION OF MOTOR VEHICLES

2004 APR 13 P 1:40

OFFICE WEST VIRGINIA
SECRETARY OF STATE

SERIES 1
ADMINISTRATIVE DUE PROCESS

§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. – April 13, 2004

1.4. Effective Date. – April 26, 2004

§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 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 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.