

**WEST VIRGINIA
SECRETARY OF STATE**

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #4

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NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: Division of Motor Vehicles TITLE NUMBER: 91

CITE AUTHORITY West Virginia Code 17A-2-9

AMENDMENT TO AN EXISTING RULE: YES X NO

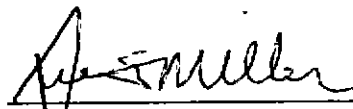
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

TITLE OF RULE BEING AMENDED: Administrative Due Process

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED:

TITLE OF RULE BEING PROPOSED:

THE ABOVE PROPOSED LEGISLATIVE RULE, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.



Joe E. Miller, Commissioner

SEP 23 1 00 PM '99

TITLE 91
LEGISLATIVE RULES
DIVISION OF MOTOR VEHICLES

OFFICE
SECRETARY

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 West Virginia Code.

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 West Virginia Code.

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

2.3. This legislative rule takes precedence over all administrative due process rules or hearing procedures found in Title 91 of the Code of State Rules..

§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 is 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 shall 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 the 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.

3.3. Orders of Revocation or Suspension.

3.3.1. Any order or decision of the Commissioner subject to administrative

review under this rule shall include a:

- a. Statement of the issues involved;
- b. Statement that the interested party'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
- c. Statement of the costs associated with the hearing which the interested party may incur.

3.3.2. In addition to the requirements of Subdivision 3.3.1 of this subsection, any order issued pursuant to West Virginia Code § 17C-5A-2 or §17E-1-13 shall contain a statement that the interested party 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. of this section.

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 shall 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 shall 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. of this section.

3.5.4. The Commissioner shall not grant untimely hearing requests. A request is untimely if it is made after the time specified in Subdivision 3.5.1 of this subsection 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. of this subsection, any hearing notice issued for a DUI hearing shall 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.

3.7. Failure to Appear

3.7.1. The Division shall automatically rescind the stay and restore the revocation or suspension and shall assess the costs as set forth in Subsection 3.11 of this rule if the person fails to appear 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.

3.8. Request for Continuance

3.8.1. The Commissioner may grant the interested party 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 includes reasons such 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 of this subsection.

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

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 shall 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 Commissioner shall apply the provisions of Subsection 3.7 of this section 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 may:

- a. Administer oaths and affirmations;
- b. Rule upon offers of proof and receive relevant evidence; and
- c. Regulate the course of the hearing.

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. All parties have the right to cross examine witnesses unless cross examination is precluded by statute; and
- c. 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 When Appealing Party Fails to Prevail

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. of this subsection. The Commissioner may not complete the reinstatement of the driver' license, vehicle registration or privilege to operate a motor vehicle until the person pays all applicable fees.

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.