

**WEST VIRGINIA  
SECRETARY OF STATE  
NATALIE E. TENNANT  
ADMINISTRATIVE LAW DIVISION**

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OFFICE OF WEST VIRGINIA  
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Form #5

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE  
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: West Virginia Racing Commission TITLE NUMBER: 178

CITE AUTHORITY: WV Code 19-23-6(3)

RULE TYPE: PROCEDURAL  INTERPRETIVE

EXEMPT LEGISLATIVE RULE

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 6

TITLE OF RULE BEING PROPOSED: Due Process and Hearings

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE  
EFFECTIVE DATE OF THIS RULE IS May 7, 2011

  
\_\_\_\_\_  
Authorized Signature

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TITLE 178  
PROCEDURAL RULE  
RACING COMMISSION

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

SERIES 6  
DUE PROCESS AND HEARINGS

§ 178-6-1. General.

1.1. Scope. --This rule specifies the procedure for hearings conducted before the Boards of Stewards, the Boards of Judges, and the West Virginia Racing Commission.

1.2. Authority. -- West Virginia Code §§ 19-23-6(3).

1.3. Filing Date. – April 7, 2011

1.4. Effective Date. – May 7, 2011

§ 178-6-2. Definitions.

As used in this rule and unless the context clearly requires a different meaning, the following terms have the meaning ascribed in this section.

2.1. “Appeal” means a request for the Racing Commission or its designee to consider and review any decisions or ruling of the stewards/judges of a meeting.

2.2. “Clear and convincing evidence” means evidence which results in a reasonable certainty of the truth of the ultimate fact in controversy.

2.3. “Complaint” means a written allegation of a violation of the rules of racing and/or West Virginia Code §§ 19-23-1 *et seq.*

2.4. “Day” means a calendar day.

2.5. “De novo” means a new hearing or a hearing for a second time conducted in the same or a similar manner in which the matter was originally heard and with a review of the previous hearing.

2.6. “Judge” means a duly appointed greyhound racing official with powers and duties specified by West Virginia Code §§ 19-23-1 *et seq.* and/or 178 W. Va. C.S.R. 2.

2.7. “Licensee” means any racing association holding a license required by West Virginia Code §§ 19-23-1 *et seq.*

2.8. “Permit holder” means any person holding a permit required by West Virginia Code §§ 19-23-1 *et seq.*

2.9. “Preponderance of the evidence” means evidence which is of a greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.

2.10. “Steward” means a duly appointed thoroughbred racing official with powers and duties specified by West Virginia Code §§ 19-23-1 *et seq.* and/or 178 W. Va. C.S.R. 1.

§ 178-6-3. Proceedings by the Stewards/Judges.

3.1. Rights of Permit Holder. A permit holder who is the subject of a disciplinary

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hearing conducted by the stewards/judges is entitled to:

3.1.a. Proper notice of all charges;

3.1.b. Confront the evidence presented;

3.1.c. The right to counsel at the permit holder's expense;

3.1.d. The right to examine all evidence presented against him/her;

3.1.e. The right to present a defense;

3.1.f. The right to call witnesses;

3.1.g. The right to cross-examine witnesses; and,

3.1.h. The right to waive any of the above rights.

**3.2. Complaints.**

3.2.a. On their own motion or on receipt of a written complaint regarding the actions of a permit holder, the stewards/judges may conduct an investigation and, if warranted, a disciplinary hearing regarding the permit holder's actions.

**3.3. Summary Suspension.**

3.3.a. If the stewards/judges determine that a permit holder's actions constitute an immediate danger to the public health, safety or welfare, they may summarily suspend a permit pending a hearing.

3.3.b. A permit holder whose permit has been summarily suspended is entitled

to a hearing not later than ten (10) days after the permit was summarily suspended. The permit holder may waive his/her right to a hearing on the summary suspension within the ten (10) day limit.

3.3.c. The stewards/judges shall conduct a hearing after imposing a summary suspension in the same manner as other disciplinary hearings.

**3.4. Notice.**

3.4.a. Except as provided by this rule regarding summary suspensions, the stewards/judges shall provide written notice at least twenty-four (24) hours before the hearing to the permit holder who is the subject of the disciplinary hearing. A permit holder may waive his/her right to such notice by executing a written waiver. In cases involving a disqualification during the running of a greyhound race or a thoroughbred race, or in cases involving a riding infraction during the running of a thoroughbred race, neither notice nor a hearing is required under this rule.

3.4.b. Notice given under this section shall include:

3.4.b.1. A statement of the time, place and nature of the hearing;

3.4.b.2. A statement of the legal authority and jurisdiction under which the hearing is to be held;

3.4.b.3. A reference to the particular sections of the statutes or rules involved;

3.4.b.5. A short, plain description of the alleged conduct that has given rise to the disciplinary hearing; and

3.4.b.6. A statement summarizing the rights of the permit holder as outlined in this rule.

3.4.c. If possible, the stewards/judges or their designee shall hand deliver the written notice of disciplinary hearing to the permit holder who is the subject of the hearing. If hand delivery is not possible, the stewards/judges shall mail the notice to the permit holder's last known address, as found in the Racing Commission's permit files, by certified mail, return receipt requested. If the disciplinary hearing involves an alleged medication violation that could result in the disqualification of a thoroughbred, the stewards shall provide notice of the hearing to the thoroughbred owner, managing owner, or lessee of the thoroughbred in the manner provided in this subsection. If the disciplinary hearing involves an alleged medication violation that could result in the disqualification of a greyhound, the judges shall provide notice of the hearing to the greyhound owner, greyhound kennel owner, or the trainer of the greyhound in the manner provided in this subsection.

3.4.d. Nonappearance of a summoned permit holder after adequate notice shall be deemed as an admission of the charges set forth in the notice of hearing and a waiver of the right to a hearing before the stewards/judges.

**3.5. Continuances.**

3.5.a. Upon receipt of a notice, a permit holder may request a continuance of the hearing.

3.5.b. The stewards/judges may grant a continuance of any hearing for good cause shown.

3.5.c. The stewards/judges may at any time order a continuance on their own motion.

**3.6. Evidence.**

3.6.a. All hearings shall be conducted by no less than a majority of the stewards/judges.

3.6.b. Each witness at a hearing conducted by the stewards/judges shall be sworn by the stewards/judges.

3.6.c. The stewards/judges shall allow a full presentation of evidence and are not bound by the technical rules of evidence. However, they may disallow evidence that is irrelevant or unduly repetitive of other evidence. The stewards/judges shall have the authority to determine, in their sole discretion, the weight and credibility of any evidence and/or testimony. The stewards/judges may admit hearsay evidence if the stewards/judges determine the evidence is of a type that is commonly relied on by reasonably prudent people. The rules of privilege recognized by West Virginia law apply in hearings before the stewards/judges.

3.6.d. The burden of proof is on the stewards/judges to show, by a preponderance of the evidence, that the permit holder has violated or is responsible for a violation of a statute or a Racing Commission rule. However, the burden is on the permit holder to prove by a preponderance of the evidence any defense that he or she may present.

3.6.e. All hearings shall be recorded. A copy of the recording or a transcript of the recording shall be provided to the permit holder or any interested person upon request. The cost of providing a copy of the recording or a transcript of the recording may be assessed against the requesting party in the discretion of the stewards/judges.

**3.7. Representation.**

3.7.a. A permit holder who is the subject of a disciplinary hearing before the stewards/judges may represent himself or herself; may be represented by a lay representative of any racing trade organization to which he or she is a member; or, may be represented by legal counsel licensed to practice law in the State of West Virginia. Attorneys who are not licensed to practice law in the State of West Virginia must comply with Rule 8.0, Admission Pro Hac Vice, of the West Virginia Rules for Admission to the Practice of Law, before representing any permit holder in disciplinary matters pending before the stewards/judges. Representation of a permit holder includes any communication with the stewards/judges on behalf of the permit holder; the filing or making of motions or any other written or oral requests on behalf of a permit holder; and, appearing before the stewards/judges on behalf of a permit holder.

**3.8. Rulings.**

3.8.a. The issues at a disciplinary hearing shall be decided by a majority vote of the stewards/judges. If the vote is not unanimous, the dissenting steward/judge shall include with the record of the hearing a written statement of the reason(s) for the dissent.

3.8.b. A ruling by the stewards/judges shall, at a minimum, include:

3.8.b.1. The full name, date of birth, last record address, permit type and permit number of the person who is the subject of the hearing;

3.8.b.2. A statement of the substantiated charges against the permit holder, including a reference to the specific section of the statutes or rules that the permit holder is found to have violated;

3.8.b.3. The date of the hearing and the date the ruling was issued;

3.8.b.4. The penalty imposed;

3.8.b.5. Any changes in the order of finish or purse distribution;

3.8.b.6. Information on the permit holder's right to appeal the ruling to the Racing Commission; and

3.8.b.7. Other information required by the Racing Commission.

3.8.c. A ruling shall be signed by all three stewards/judges. However, in the event that the ruling is not unanimous, the ruling shall be signed by a majority of the stewards/judges with the dissenting steward/judge noting the reasons for his or her dissent.

3.8.d. If possible, the stewards/judges or their designee shall hand deliver a copy of the ruling to the permit holder who is the subject of the ruling. If hand delivery is not possible, the stewards/judges shall mail the ruling to the permit holder's last known address, as found in the Racing Commission's permit files, by certified mail, return receipt requested. A copy of the ruling shall be submitted to the NAPRA or RCI Ruling Database. If the ruling includes the disqualification of a greyhound, the judges shall provide a copy of the ruling to the owner of the greyhound. If the ruling includes a disqualification of a thoroughbred, the stewards shall provide a copy of the ruling to the owner of the horse, the horsemen's bookkeeper and the appropriate past performance service(s).

3.8.e. All fines imposed by the stewards/judges shall be paid to the Racing

Commission within seven (7) calendar days after the ruling is issued, unless otherwise ordered by the stewards/judges.

**3.9. Effect of Rulings.**

3.9.a. Rulings against a permit holder apply to another person if continued participation in an activity by the other person would circumvent the intent of the ruling by permitting the person to serve, in essence, as a substitute for the ineligible permit holder.

3.9.b. The transfer of a thoroughbred or greyhound to avoid application of a Racing Commission rule or ruling by the stewards/judges is prohibited.

**3.10. Appeals.**

3.10.a. A permit holder aggrieved by a ruling of the stewards/judges may appeal to the Commission, except as provided in subdivision 3.10.g. of this subsection. A person who fails to file an appeal by the deadline set forth in this rule waives the right to appeal.

3.10.b. An appeal under this subsection must be filed with the Commission's racing secretary at the Racing Commission's principal office no later than twenty (20) days after the stewards/judges ruling is received by the permit holder.

3.10.c. An appeal shall be in writing on a form prescribed by the Racing Commission. The appeal shall include:

3.10.c.1. The name, address, telephone number and signature of the person making the appeal;

3.10.c.2. A statement of the basis of the appeal; and,

3.10.c.3. A sworn, notarized statement that the appealing party has a good faith belief that the appeal is meritorious and is not taken merely to delay the penalty imposed the stewards/judges.

3.10.d. A permit holder who appeals shall pay security for hearing costs in the amount of one-hundred dollars (\$100.00). This security fee shall be paid to the Racing Commission at the same time the appeal is filed. In the event that the Racing Commission determines that the fee is insufficient to cover the anticipated costs of holding the appeal hearing, the appealing permit holder may be required to pay an additional security for costs as specified by the Racing Commission. Such additional security fees shall be deposited with the Racing Commission within ten (10) days after notification. If the permit holder substantially prevails in an appeal hearing before the Racing Commission, the Commission may order a refund of all or part of any security fee paid by the permit holder. If a permit holder does not substantially prevail in an appeal hearing before the Racing Commission, the Commission may assess the costs of the appeal hearing incurred in excess of the security fee.

3.10.e. On notification by the Racing Commission that an appeal has been filed, the stewards/judges shall forward to the Racing Commission the record of the stewards'/judges' proceeding on which the appeal is based.

3.10.f. If a person against whom a fine has been assessed files an appeal of the ruling that assesses the fine, the person shall pay the fine in accordance with this rule, unless the ruling is stayed in accordance with this rule. If the fine is paid before disposition of the appeal and the appeal is resolved in favor of the permit holder, the Racing Commission shall refund the amount of the fine.

3.10.g. A decision by the judges regarding a disqualification of a greyhound during the running of the race is final and may not be appealed to the Racing Commission. However, any permit holder fined or suspended as a result of circumstances giving rise to a disqualification of a greyhound is entitled to appeal a ruling on the suspension or fine only. The Racing Commission's decision on such an appeal shall not affect the disqualification.

**3.11. Stays.**

3.11.a. A person who has been disciplined by a ruling of the stewards/judges may apply for a stay to the Racing Commission or to the member of the Racing Commission designated to rule upon stay requests.

3.11.b. An application for a stay must be filed with the Commission's racing secretary at the Racing Commission's principal office no later than the deadline for filing an appeal.

3.11.c. An application for a stay must be in writing on a form prescribed by the Racing Commission and shall include:

3.11.c.1. The name, address, telephone number and signature of the person requesting the stay;

3.11.c.2. A statement of the justification for the stay; and,

3.11.c.3. A sworn, notarized statement that party requesting the stay has a good faith belief that the stay request is meritorious and is not taken merely to delay the penalty imposed the stewards/judges.

3.11.d. The Racing Commission or the member of the Racing Commission designated to rule upon stay

requests may grant a stay for cause. Rulings on stay requests shall be issued in writing to the person requesting the stay. The Racing Commission or the member of the Racing Commission designated to rule upon stay requests may rescind a stay granted under this section for reasonable cause.

3.11.e. The fact that a stay is granted is not a presumption that the ruling issued by the stewards/judges is invalid.

**§ 178-6-4. Proceedings by the Commission.**

**4.1. Rights of Permit Holder, Licensee or Other Person.**

4.1.a. A permit holder who is the subject of a disciplinary hearing who has filed an appeal to the Racing Commission from a stewards'/judges' ruling; or a licensee who is the subject of a disciplinary hearing before the Racing Commission; or, any other person under the jurisdiction of the Racing Commission who seeks relief from the Racing Commission, is entitled to:

4.1.a.1. Proper notice of all charges;

4.1.a.2. Confront the evidence presented;

4.1.a.3. The right to counsel at the permit holder's, licensee's or person's expense;

4.1.a.4. The right to examine all evidence presented against him/her/it;

4.1.a.5. The right to present a defense;

4.1.a.6. The right to call witnesses;

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4.1.a.7. The right to cross-examine witnesses; and,

4.1.a.8. The right to waive any of the above rights.

**4.2. Notice.**

4.2.a. Upon receipt of a written appeal by a permit holder, the Racing Commission shall set a time and place for the appeal hearing not less than ten (10) nor more than thirty (30) days after receipt of the appeal. The permit holder may waive his/her right to a hearing within the above-referenced time frame by executing a written waiver. The Commission may grant an extension of the above-referenced time frame for hearing for good cause shown.

4.2.b. In any matter instituted by the Racing Commission against a licensee, the Racing Commission shall provide no less than (10) days notice of the hearing.

4.2.c. The Racing Commission shall serve a notice of hearing by certified mail, return receipt requested, to the person's last known address, as found in the Commission's permit or licensing files, or by personal service.

4.2.d. A notice of hearing shall include:

4.2.d.1. Statement of time, place and nature of the hearing;

4.2.d.2. Statement of the legal authority and jurisdiction under which the hearing is to be held;

4.2.d.3. Reference to the particular sections of the statutes and rules involved;

4.2.d.4. Short, plain statement of the matters asserted; and

4.2.d.5. Any other statement required by law.

4.2.e. A party to the proceeding may move to postpone the hearing. The motion must be in writing; must set forth the specific grounds on which it is sought; and, must be filed with the Racing Commission before the date set for the hearing. If the Racing Commission, or a hearing examiner appointed by the Racing Commission, grants the motion for postponement, the Racing Commission shall cause new notice to be issued.

4.2.f. After a hearing has begun, the Racing Commission, or a hearing examiner appointed by the Racing Commission, may grant a continuance on oral or written motion, without issuing new notice, by announcing the date, time and place for reconvening the hearing before recessing the hearing.

4.2.g. If a party to a proceeding before the Racing Commission fails to appear after adequate notice, the Racing Commission may deem the charges set forth in the notice of hearing as admitted by the non-appearing party and may dismiss the proceedings before the Racing Commission.

**4.3. Subpoenas, Subpoenas Duces Tecum and Oaths or Affirmations.**

4.3.a. Any member of the Racing Commission, or a hearing examiner appointed by the Racing Commission, may issue subpoenas to compel the testimony of witnesses and subpoenas duces tecum to compel the production of documents, books, records, papers and other items.

4.3.b. Any party requesting the issuance of subpoenas or subpoenas duces tecum shall be responsible for proper service and payment of fees for the attendance and travel of

witnesses in accordance with the requirements of West Virginia Code § 29A-5-1(b).

4.3.c. Any member of the Racing Commission, or a hearing examiner appointed by the Racing Commission, may administer oaths or affirmations to witnesses appearing before the Racing Commission.

#### **4.4. Reporters and Transcripts.**

4.4.a. The Racing Commission shall engage a court reporter to make a record of the hearing. The Racing Commission may allocate the costs of the reporter and any transcript produced among the parties.

4.4.b. If a person requests a transcript of the record, the Racing Commission may assess the costs of preparing the transcript to the person.

#### **4.5. Nature of Hearings.**

4.5.a. A hearing on an appeal by a permit holder from a decision of the stewards/judges shall be de novo. The Racing Commission shall have the burden of proving by a preponderance of the evidence that the permit holder has violated or is responsible for a violation of a statute or a Racing Commission rule. However, upon appeal by a permit holder of a decision of the stewards regarding a disqualification of a thoroughbred during the running of the race, the appeal hearing before the Racing Commission shall not be de novo and the burden shall be on the permit holder to prove by clear and convincing evidence that the stewards committed plain error in their decision. In the event that a permit holder appeals a stewards' decision regarding a disqualification during the running of the race and does not prevail, he or she shall be assessed interest on any purse which may be held during the pendency of the appeal. Such assessment shall be collected by the Racing Commission and paid

to the owner of the horse who moves up in the finish of the race as a result of the stewards' disqualification decision. The rate of interest shall be three (3) percentage points above the Fifth Federal Reserve District secondary discount rate in effect on the second day of January of the year in which the assessment is entered. Provided, that the rate of interest shall not exceed eleven (11) percent per annum or be less than seven (7) percent per annum. In addition, pursuant to the provisions of subdivision 3.10.d. of this rule, the Commission may assess the costs of the hearing incurred in excess of the one hundred dollar (\$100.00) security fee against the appealing permit holder.

4.5.b. The Racing Commission may reject, affirm, or modify any penalty or disciplinary action imposed by the stewards/judges.

4.5.c. In any hearing on a matter instituted by the Racing Commission against a licensee, the Commission shall have the burden of proving by a preponderance of the evidence that the licensee has violated or is responsible for a violation of a statute or a Commission rule.

4.5.d. All hearings before the Racing Commission are open to the public. However, witnesses may be excluded or sequestered.

#### **4.6. Conducting of Hearings.**

4.6.a. A quorum of the Racing Commission and/or a hearing examiner appointed by the Racing Commission who is licensed to practice law in the State of West Virginia shall conduct and preside over Commission hearings.

4.6.b. The Racing Commission or its appointed hearing examiner may:

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- 4.6.b.1. Issue subpoenas and subpoenas duces tecum;
- 4.6.b.2. Administer oaths or affirmations;
- 4.6.b.3. Receive evidence;
- 4.6.b.4. Rule on the admissibility of evidence;
- 4.6.b.5. Examine witnesses;
- 4.6.b.6. Set reasonable times within which a party may present evidence and within which a witness may testify;
- 4.6.b.7. Permit and limit oral argument;
- 4.6.b.8. Issue orders and findings of fact and conclusions of law;
- 4.6.b.9. Require written arguments to be filed by the parties;
- 4.6.b.10. Take notice of any and all judicially cognizable facts;
- 4.6.b.11. Regulate the course of the hearing; and,
- 4.6.b.12. Perform other duties necessary to a fair and proper hearing.

**4.7. Evidence.**

4.7.a. All testimony of witnesses before the Racing Commission must be given under oath or affirmation. The Racing Commission or its appointed hearing examiner may limit the number of witnesses and may exclude all irrelevant, immaterial or unduly repetitious evidence.

4.7.b. The Racing Commission and/or its appointed hearing examiner shall allow a full presentation of evidence and are not bound by the technical rules of evidence. The Racing Commission and/or its appointed hearing examiner shall have the authority to determine, in their sole discretion, the weight and credibility of any evidence and/or testimony. The Racing Commission and/or its appointed hearing examiner may admit hearsay evidence if it is determined that the evidence is of a type that is commonly relied on by reasonably prudent people. The rules of privilege recognized by West Virginia law apply in hearings before the Racing Commission.

**4.8. Representation.**

4.8.a. A person who is the subject of a hearing before the Racing Commission may represent himself or herself or may be represented by legal counsel licensed to practice law in the State of West Virginia. Attorneys who are not licensed to practice law in the State of West Virginia must comply with Rule 8.0, Admission Pro Hac Vice, of the West Virginia Rules for Admission to the Practice of Law, before representing any party involved in a matter before the Racing Commission. Representation of a party includes any communication with the Racing Commission or its agents on behalf of the permit holder, the filing or making of motions or any other written or oral requests on behalf of a party, and, appearing before the Racing Commission or its appointed hearing examiner on behalf of a party.

**4.9. Decisions.**

4.9.a. If a hearing is conducted by a hearing examiner appointed by the Racing Commission, he/she shall issue a written recommended decision containing proposed findings of fact and conclusions of law to the Racing Commission. The hearing examiner

shall mail a copy of his recommended decision to all parties to the proceeding.

4.9.b. Upon receipt of a recommended decision from an appointed hearing examiner, the Racing Commission shall consider the recommendation in a meeting noticed in accordance with the West Virginia Open Governmental Proceedings Act, West Virginia Code §§ 6-9A-1 *et seq.* The Racing Commission may:

4.9.b.1. Adopt or modify the recommended decision, in whole or in part;

4.9.b.2. Decline to adopt the recommended decision, in whole or in part;

4.9.b.3. Remand the proceeding for further examination by the hearing examiner; or

4.9.b.4. Direct the hearing examiner to give further consideration to the proceeding with or without reopening the hearing.

4.9.c. If the Racing Commission modifies or declines to adopt a recommended decision of an appointed hearing examiner, either in whole or in part, it shall issue a reasoned, articulate explanation and a recitation of the underlying evidence or other matters upon which it bases its decision and particularized findings of fact and conclusions of law that support its decision.

4.9.d. If a hearing is conducted by a quorum of the Racing Commission it shall issue a written decision containing findings of fact and conclusions of law.

#### **4.10. Orders.**

4.10.a. The Racing Commission shall issue a final order in all matters heard before it. The Racing Commission's order shall be in writing and shall be signed by the Chairman.

4.10.b. The Racing Commission shall serve a copy of a final order upon all parties to the proceeding by certified mail, return receipt requested, or by personal service.

4.10.c. A final order of the Racing Commission takes effect on the date the order is entered, unless otherwise stated in the order.

4.10.d. The Racing Commission shall submit copies of all final orders to the NAPRA or RCI Ruling Database.

#### **§ 178-6-5. Rulings In Other Jurisdictions.**

##### **5.1. Reciprocity.**

5.1.a. The Racing Commission and the stewards/judges shall honor rulings, decisions and final orders from other racing jurisdictions regarding permit or license suspensions, revocations, and eligibility.

##### **5.2. Appeals of Reciprocal Rulings.**

5.2.a. Persons subject to rulings, decisions and final orders in other racing jurisdictions shall have the right to request a hearing before the Racing Commission or a hearing examiner appointed by the Racing Commission to show cause why such ruling should not be enforced in West Virginia.

5.2.b. Any request for such hearing must clearly set forth in writing the reasons for the appeal.

## **RESPONSE TO THE COMMENTS**

### **WEST VIRGINIA RACING COMMISSION/DUE PROCESS AND HEARINGS 178 CSR 6**

The Commission received one public comment on its Due Process and Hearings procedural rule, 178 CSR 6, that was out for public comment during the period January 21, 2011 to February 22, 2011. As a result of this comment, which was made by the Racing Commission's counsel in the Attorney General's office, several amendments were made to the rule. The amendments and the reasons for the amendments are fully described in a document entitled "Amendments Made to Rule as a Result of Comments" included with the filing of this agency adopted procedural rule.

Several of the amendments made to the rule as a result of the public comment by the Commission's counsel, are technical in nature and are intended to make the rule clearer and more accurate. Amendments made to the rule sections pertaining to summary suspensions of permits streamline this process to make it easier for the Commission's stewards/judges to administer and less complicated for permit holders who are subject to summary suspensions. An amendment made to the rule section pertaining to the application of reciprocal rulings against permit holders adds wording to allow the Commission to appoint a hearing examiner to preside over such cases.

The public comment made by counsel in the Attorney General's Office was well-taken and counsel's proposed amendments are reflected in the rule that the agency adopts.

## AMENDMENTS MADE TO THE RULE AS A RESULT OF COMMENTS

### WEST VIRGINIA RACING COMMISSION/DUE PROCESS AND HEARINGS 178 CSR 6

The following amendments were made to the rule as a result of comments received:

A comment from the Commission's counsel in the Attorney General's Office caused the Commission to vote to make the following technical changes that are stricken through and underlined:

2.8. "Permit holder" means any person holding a permit required by ~~the Racing Commission~~ West Virginia Code §§ 19-23-1 et seq.

3.4.a. Except as provided by this rule regarding summary suspensions, ~~and except in cases involving a disqualification during the running of a greyhound race or a riding infraction during the running of a thoroughbred race,~~ the stewards/judges shall provide written notice at least twenty-four (24) hours before the hearing to the permit holder who is the subject of the disciplinary hearing. A permit holder may waive his/her right to such notice by executing a written waiver. In cases involving a disqualification during the running of a greyhound race or a thoroughbred race, or in cases involving a riding infraction during the running of a thoroughbred race, neither notice nor a hearing is required under this rule.

3.6.e. ~~Except for hearings involving disqualifications during the running of a greyhound race or alleged riding infractions during the running of a thoroughbred race,~~ aAll hearings shall be recorded. A copy of the recording or a transcript of the recording shall be provided to the permit holder or any interested person upon request. The cost of providing a copy of the recording or a transcript of the recording may be assessed against the requesting party in the discretion of the stewards/judges.

The amendment to 2.8 merely inserts a reference to the section of the West Virginia Code that pertains to the requirement for persons to hold permits to engage in professions and occupations on greyhound and thoroughbred racetracks licensed by the Commission. This makes the definition of "permit holder" more accurate.

The amendments to 3.4.a. and 3.6.e. are intended to dispose of confusing wording in the procedural rule. It is the Commission's intent that pre-decisional hearings shall not be held on "referee calls" made by its stewards at the thoroughbred tracks and its judges at the greyhound tracks with regard to disqualifications during the running of the race. Because permit holders do not have a property interest in finishing a race in a particular order, there is no entitlement to a pre-decisional hearing in front of the stewards or judges before a disqualification call is made. It is also the Commission's intent to recognize and adopt the custom of the stewards to make routine decisions on riding infractions involving jockeys during the running of the race without a pre-decisional formal hearing. Routine riding infraction cases are typically handled by the stewards with an

informal review of race footage with the jockeys involved and the subsequent issuance of a ruling. The amendments reflected above make these sections clearer and more accurate with regard to the intent of the Commission.

A comment from the Commission's counsel in the Attorney General's Office caused the Commission to vote to make the following more substantive changes that are stricken through and underlined:

3.3.b. A permit holder whose permit has been summarily suspended is entitled to a hearing ~~on the summary suspension~~ not later than ten (10) days after the permit was summarily suspended. The permit holder may waive his/her right to a hearing ~~on the summary suspension~~ within the ten (10) day limit.

3.3.c. The stewards/judges shall conduct a hearing ~~on the~~ after imposing a summary suspension in the same manner as other disciplinary hearings. ~~At a hearing on the summary suspension, the sole issue is whether the permit holder's permit should remain suspended pending a final disciplinary hearing and a ruling on the merits of the alleged misconduct. However, the hearing on the summary suspension and the hearing on the merits of the alleged misconduct may be consolidated in the discretion of the stewards/judges.~~

3.3.d. ~~A disciplinary hearing on the merits of the alleged misconduct giving rise to a summary suspension shall be conducted in accordance with this rule.~~

5.2.a. Persons subject to rulings, decisions and final orders in other racing jurisdictions shall have the right to request a hearing before the Racing Commission or a hearing examiner appointed by the Racing Commission to show cause why such ruling should not be enforced in West Virginia.

The amendments to 3.3.b., 3.3.c. and 3.3.d. are intended to streamline the summary suspension process to make it easier for the stewards and judges to administer and more expeditious for involved permit holders. The rule as it was filed for public comment contemplated a two-tier hearing process wherein the stewards/judges would hold an initial hearing shortly after a summary suspension to establish whether a person's permit should continue to be suspended pending a full hearing. The amendments to this rule provide for one hearing to be held no later than ten days after a summary suspension. The Commission believes that requiring one hearing instead of two makes the process easier to navigate, but still provides the required due process to affected permit holders.

The amendment to 5.2.a. allows the Commission to elect to appoint a hearing examiner to preside over reciprocal ruling cases. Other portions of the rule already reflect the Commission's authority to appoint hearing examiners to preside over other types of case. This addition to the reciprocal ruling section is consistent with the remainder of the rule.



STATE OF WEST VIRGINIA  
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(304) 558-2021  
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February 18, 2011

West Virginia Racing Commission  
106 Dee Drive  
Charleston, West Virginia 25311

Re: Public comment on Procedural Rule

Dear Commissioners:

As you know, we drafted and prepared the Procedural Rule on Due Process and Hearings on your behalf. This Rule is now out for public comment. After reviewing the Rule again and making certain as your counsel that the Rule is clear, enforceable, streamlined and understandable to the public, your permit holders and licensees, and your employees, we provide the attached proposed revisions that we wish to suggest that the Commission make to the Rule. We have provided the proposed revisions in strike through and underline format for ease of identification.

The revision to the definition of "Permit holder" in section 2.8 is merely technical in nature and provides a more accurate definition.

The revisions to the "Summary Suspension" sections, 3.3. and following, are intended to streamline the summary suspension process and make it easier for the stewards/judges to administer and less complicated for the permit holders who are subject to summary suspensions. Our proposed changes make the hearing process for summary suspensions less onerous and complicated.

The revisions to 3.4.a., regarding "Notice," make the intent of this rule clearer. In cases involving the disqualification of a dog or horse during the running of the race and in cases involving routine riding infractions in a horse race, it was the intent of the rule to forgo the notice/hearing requirement that is required in other matters. The manner in which this section was worded was awkward. In order to make the rule clearer and more concise, we propose the changes reflected in the attached document.

The revisions to 3.6.e., remove unnecessary and confusing wording. There are no hearings in cases involving disqualifications/riding infractions. Therefore, the wording that we struck was superfluous and confusing.

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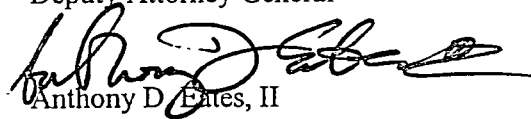
The revision to section 5.2.a. adds wording to allow the Commission to use appointed hearing examiners in cases wherein a person is contesting the application of a reciprocal ruling from another state.

Please accept this letter and the attached document as a public comment on the Commission's Procedural Rule. Thank you for your attention to this matter.

Sincerely,



Kelli D. Talbott  
Deputy Attorney General



Anthony D. Eates, II  
Assistant Attorney General

Enclosure

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TITLE 178  
PROCEDURAL RULE  
RACING COMMISSION

SERIES 6  
DUE PROCESS AND HEARINGS

§ 178-6-1. General.

1.1. Scope. --This rule specifies the procedure for hearings conducted before the Boards of Stewards, the Boards of Judges, and the West Virginia Racing Commission.

1.2. Authority. -- West Virginia Code §§ 19-23-6(3).

1.3. Filing Date. --

1.4. Effective Date. --

§ 178-6-2. Definitions.

As used in this rule and unless the context clearly requires a different meaning, the following terms have the meaning ascribed in this section.

2.1. "Appeal" means a request for the Racing Commission or its designee to consider and review any decisions or ruling of the stewards/judges of a meeting.

2.2. "Clear and convincing evidence" means evidence which results in a reasonable certainty of the truth of the ultimate fact in controversy.

2.3. "Complaint" means a written allegation of a violation of the rules of racing and/or West Virginia Code §§ 19-23-1 *et seq.*

2.4. "Day" means a calendar day.

2.5. "De novo" means a new hearing or a hearing for a second time conducted in the same or a similar manner in which the matter was originally heard and with a review of the previous hearing.

2.6. "Judge" means a duly appointed greyhound racing official with powers and duties specified by West Virginia Code §§ 19-23-1 *et seq.* and/or 178 W. Va. C.S.R. 2.

2.7. "Licensee" means any racing association holding a license required by West Virginia Code §§ 19-23-1 *et seq.*

2.8. "Permit holder" means any person holding a permit required by the Racing Commission West Virginia Code §§ 19-23-1 *et seq.*

2.9. "Preponderance of the evidence" means evidence which is of a greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.

2.10. "Steward" means a duly appointed thoroughbred racing official with powers and duties specified by West Virginia Code §§ 19-23-1 *et seq.* and/or 178 W. Va. C.S.R. 1.

§ 178-6-3. Proceedings by the Stewards/Judges.

3.1. Rights of Permit Holder. A permit holder who is the subject of a disciplinary

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hearing conducted by the stewards/judges is entitled to:

- 3.1.a. Proper notice of all charges;
- 3.1.b. Confront the evidence presented;
- 3.1.c. The right to counsel at the permit holder's expense;
- 3.1.d. The right to examine all evidence presented against him/her;
- 3.1.e. The right to present a defense;
- 3.1.f. The right to call witnesses;
- 3.1.g. The right to cross-examine witnesses; and,
- 3.1.h. The right to waive any of the above rights.

**3.2. Complaints.**

3.2.a. On their own motion or on receipt of a written complaint regarding the actions of a permit holder, the stewards/judges may conduct an investigation and, if warranted, a disciplinary hearing regarding the permit holder's actions.

**3.3. Summary Suspension.**

3.3.a. If the stewards/judges determine that a permit holder's actions constitute an immediate danger to the public health, safety or welfare, they may summarily suspend a permit pending a hearing.

3.3.b. A permit holder whose permit has been summarily suspended is entitled

to a hearing ~~on the summary suspension~~ not later than ten (10) days after the permit was summarily suspended. The permit holder may waive his/her right to a hearing ~~on the summary suspension~~ within the ten (10) day limit.

3.3.c. The stewards/judges shall conduct a hearing ~~on the~~ after imposing a summary suspension in the same manner as other disciplinary hearings. ~~At a hearing on the summary suspension, the sole issue is whether the permit holder's permit should remain suspended pending a final disciplinary hearing and a ruling on the merits of the alleged misconduct. However, the hearing on the summary suspension and the hearing on the merits of the alleged misconduct may be consolidated in the discretion of the stewards/judges.~~

~~3.3.d. A disciplinary hearing on the merits of the alleged misconduct giving rise to a summary suspension shall be conducted in accordance with this rule.~~

**3.4. Notice.**

3.4.a. Except as provided by this rule regarding summary suspensions, ~~and except in cases involving a disqualification during the running of a greyhound race or a riding infraction during the running of a thoroughbred race,~~ the stewards/judges shall provide written notice at least twenty-four (24) hours before the hearing to the permit holder who is the subject of the disciplinary hearing. A permit holder may waive his/her right to such notice by executing a written waiver. In cases involving a disqualification during the running of a greyhound race or a thoroughbred race, or in cases involving a riding infraction during the running of a thoroughbred race, neither notice nor a hearing is required under this rule.

3.4.b. Notice given under this section shall include:

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3.4.b.1. A statement of the time, place and nature of the hearing;

3.4.b.2. A statement of the legal authority and jurisdiction under which the hearing is to be held;

3.4.b.3. A reference to the particular sections of the statutes or rules involved;

3.4.b.5. A short, plain description of the alleged conduct that has given rise to the disciplinary hearing; and

3.4.b.6. A statement summarizing the rights of the permit holder as outlined in this rule.

3.4.c. If possible, the stewards/judges or their designee shall hand deliver the written notice of disciplinary hearing to the permit holder who is the subject of the hearing. If hand delivery is not possible, the stewards/judges shall mail the notice to the permit holder's last known address, as found in the Racing Commission's permit files, by certified mail, return receipt requested. If the disciplinary hearing involves an alleged medication violation that could result in the disqualification of a thoroughbred, the stewards shall provide notice of the hearing to the thoroughbred owner, managing owner, or lessee of the thoroughbred in the manner provided in this subsection. If the disciplinary hearing involves an alleged medication violation that could result in the disqualification of a greyhound, the judges shall provide notice of the hearing to the greyhound owner, greyhound kennel owner, or the trainer of the greyhound in the manner provided in this subsection.

3.4.d. Nonappearance of a summoned permit holder after adequate notice shall be deemed as an admission of the charges

set forth in the notice of hearing and a waiver of the right to a hearing before the stewards/judges.

### 3.5. Continuances.

3.5.a. Upon receipt of a notice, a permit holder may request a continuance of the hearing.

3.5.b. The stewards/judges may grant a continuance of any hearing for good cause shown.

3.5.c. The stewards/judges may at any time order a continuance on their own motion.

### 3.6. Evidence.

3.6.a. All hearings shall be conducted by no less than a majority of the stewards/judges.

3.6.b. Each witness at a hearing conducted by the stewards/judges shall be sworn by the stewards/judges.

3.6.c. The stewards/judges shall allow a full presentation of evidence and are not bound by the technical rules of evidence. However, they may disallow evidence that is irrelevant or unduly repetitive of other evidence. The stewards/judges shall have the authority to determine, in their sole discretion, the weight and credibility of any evidence and/or testimony. The stewards/judges may admit hearsay evidence if the stewards/judges determine the evidence is of a type that is commonly relied on by reasonably prudent people. The rules of privilege recognized by West Virginia law apply in hearings before the stewards/judges.

3.6.d. The burden of proof is on the stewards/judges to show, by a preponderance of the evidence, that the permit holder has

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violated or is responsible for a violation of a statute or a Racing Commission rule. However, the burden is on the permit holder to prove by a preponderance of the evidence any defense that he or she may present.

3.6.e. ~~Except for hearings involving disqualifications during the running of a greyhound race or alleged riding infractions during the running of a thoroughbred race, a~~All hearings shall be recorded. A copy of the recording or a transcript of the recording shall be provided to the permit holder or any interested person upon request. The cost of providing a copy of the recording or a transcript of the recording may be assessed against the requesting party in the discretion of the stewards/judges.

### 3.7. Representation.

3.7.a. A permit holder who is the subject of a disciplinary hearing before the stewards/judges may represent himself or herself; may be represented by a lay representative of any racing trade organization to which he or she is a member; or, may be represented by legal counsel licensed to practice law in the State of West Virginia. Attorneys who are not licensed to practice law in the State of West Virginia must comply with Rule 8.0, Admission Pro Hac Vice, of the West Virginia Rules for Admission to the Practice of Law, before representing any permit holder in disciplinary matters pending before the stewards/judges. Representation of a permit holder includes any communication with the stewards/judges on behalf of the permit holder; the filing or making of motions or any other written or oral requests on behalf of a permit holder; and, appearing before the stewards/judges on behalf of a permit holder.

### 3.8. Rulings.

3.8.a. The issues at a disciplinary hearing shall be decided by a majority vote of the stewards/judges. If the vote is not unanimous, the dissenting steward/judge shall include with the record of the hearing a written statement of the reason(s) for the dissent.

3.8.b. A ruling by the stewards/judges shall, at a minimum, include:

3.8.b.1. The full name, date of birth, last record address, permit type and permit number of the person who is the subject of the hearing;

3.8.b.2. A statement of the substantiated charges against the permit holder, including a reference to the specific section of the statutes or rules that the permit holder is found to have violated;

3.8.b.3. The date of the hearing and the date the ruling was issued;

3.8.b.4. The penalty imposed;

3.8.b.5. Any changes in the order of finish or purse distribution;

3.8.b.6. Information on the permit holder's right to appeal the ruling to the Racing Commission; and

3.8.b.7. Other information required by the Racing Commission.

3.8.c. A ruling shall be signed by all three stewards/judges. However, in the event that the ruling is not unanimous, the ruling shall be signed by a majority of the

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stewards/judges with the dissenting steward/judge noting the reasons for his or her dissent.

3.8.d. If possible, the stewards/judges or their designee shall hand deliver a copy of the ruling to the permit holder who is the subject of the ruling. If hand delivery is not possible, the stewards/judges shall mail the ruling to the permit holder's last known address, as found in the Racing Commission's permit files, by certified mail, return receipt requested. A copy of the ruling shall be submitted to the NAPRA or RCI Ruling Database. If the ruling includes the disqualification of a greyhound, the judges shall provide a copy of the ruling to the owner of the greyhound. If the ruling includes a disqualification of a thoroughbred, the stewards shall provide a copy of the ruling to the owner of the horse, the horsemen's bookkeeper and the appropriate past performance service(s).

3.8.e. All fines imposed by the stewards/judges shall be paid to the Racing Commission within seven (7) calendar days after the ruling is issued, unless otherwise ordered by the stewards/judges.

### 3.9. Effect of Rulings.

3.9.a. Rulings against a permit holder apply to another person if continued participation in an activity by the other person would circumvent the intent of the ruling by permitting the person to serve, in essence, as a substitute for the ineligible permit holder.

3.9.b. The transfer of a thoroughbred or greyhound to avoid application of a Racing Commission rule or ruling by the stewards/judges is prohibited.

### 3.10. Appeals.

3.10.a. A permit holder aggrieved by a ruling of the stewards/judges may appeal to the Commission, except as provided in subdivision 3.10.g. of this subsection. A person who fails to file an appeal by the deadline set forth in this rule waives the right to appeal.

3.10.b. An appeal under this subsection must be filed with the Commission's racing secretary at the Racing Commission's principal office no later than twenty (20) days after the stewards/judges ruling is received by the permit holder.

3.10.c. An appeal shall be in writing on a form prescribed by the Racing Commission. The appeal shall include:

3.10.c.1. The name, address, telephone number and signature of the person making the appeal;

3.10.c.2. A statement of the basis of the appeal; and,

3.10.c.3. A sworn, notarized statement that the appealing party has a good faith belief that the appeal is meritorious and is not taken merely to delay the penalty imposed the stewards/judges.

3.10.d. A permit holder who appeals shall pay security for hearing costs in the amount of one-hundred dollars (\$100.00). This security fee shall be paid to the Racing Commission at the same time the appeal is filed. In the event that the Racing Commission determines that the fee is insufficient to cover the anticipated costs of holding the appeal hearing, the appealing permit holder may be required to pay an additional security for costs as specified by the Racing Commission. Such additional security fees shall be deposited with the Racing Commission within ten (10) days after notification. If the permit holder

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substantially prevails in an appeal hearing before the Racing Commission, the Commission may order a refund of all or part of any security fee paid by the permit holder. If a permit holder does not substantially prevail in an appeal hearing before the Racing Commission, the Commission may assess the costs of the appeal hearing incurred in excess of the security fee.

3.10.e. On notification by the Racing Commission that an appeal has been filed, the stewards/judges shall forward to the Racing Commission the record of the stewards'/judges' proceeding on which the appeal is based.

3.10.f. If a person against whom a fine has been assessed files an appeal of the ruling that assesses the fine, the person shall pay the fine in accordance with this rule, unless the ruling is stayed in accordance with this rule. If the fine is paid before disposition of the appeal and the appeal is resolved in favor of the permit holder, the Racing Commission shall refund the amount of the fine.

3.10.g. A decision by the judges regarding a disqualification of a greyhound during the running of the race is final and may not be appealed to the Racing Commission. However, any permit holder fined or suspended as a result of circumstances giving rise to a disqualification of a greyhound is entitled to appeal a ruling on the suspension or fine only. The Racing Commission's decision on such an appeal shall not affect the disqualification.

### 3.11. Stays.

3.11.a. A person who has been disciplined by a ruling of the stewards/judges may apply for a stay to the Racing Commission or to the member of the Racing Commission designated to rule upon stay requests.

3.11.b. An application for a stay must be filed with the Commission's racing secretary at the Racing Commission's principal office no later than the deadline for filing an appeal.

3.11.c. An application for a stay must be in writing on a form prescribed by the Racing Commission and shall include:

3.11.c.1. The name, address, telephone number and signature of the person requesting the stay;

3.11.c.2. A statement of the justification for the stay; and,

3.11.c.3. A sworn, notarized statement that party requesting the stay has a good faith belief that the stay request is meritorious and is not taken merely to delay the penalty imposed the stewards/judges.

3.11.d. The Racing Commission or the member of the Racing Commission designated to rule upon stay requests may grant a stay for cause. Rulings on stay requests shall be issued in writing to the person requesting the stay. The Racing Commission or the member of the Racing Commission designated to rule upon stay requests may rescind a stay granted under this section for reasonable cause.

3.11.e. The fact that a stay is granted is not a presumption that the ruling issued by the stewards/judges is invalid.

### § 178-6-4. Proceedings by the Commission.

#### 4.1. Rights of Permit Holder, Licensee or Other Person.

4.1.a. A permit holder who is the subject of a disciplinary hearing who has filed an appeal to the Racing Commission from

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a stewards'/judges' ruling; or a licensee who is the subject of a disciplinary hearing before the Racing Commission; or, any other person under the jurisdiction of the Racing Commission who seeks relief from the Racing Commission, is entitled to:

- of all charges; 4.1.a.1. Proper notice
- evidence presented; 4.1.a.2. Confront the
- counsel at the permit holder's, licensee's or person's expense; 4.1.a.3. The right to
- examine all evidence presented against him/her/it; 4.1.a.4. The right to
- present a defense; 4.1.a.5. The right to
- call witnesses; 4.1.a.6. The right to
- cross-examine witnesses; and, 4.1.a.7. The right to
- waive any of the above rights. 4.1.a.8. The right to

**4.2. Notice.**

4.2.a. Upon receipt of a written appeal by a permit holder, the Racing Commission shall set a time and place for the appeal hearing not less than ten (10) nor more than thirty (30) days after receipt of the appeal. The permit holder may waive his/her right to a hearing within the above-referenced time frame by executing a written waiver. The Commission may grant an extension of the above-referenced time frame for hearing for good cause shown.

4.2.b. In any matter instituted by the Racing Commission against a licensee, the Racing Commission shall provide no less than (10) days notice of the hearing.

4.2.c. The Racing Commission shall serve a notice of hearing by certified mail, return receipt requested, to the person's last known address, as found in the Commission's permit or licensing files, or by personal service.

4.2.d. A notice of hearing shall include:

4.2.d.1. Statement of time, place and nature of the hearing;

4.2.d.2. Statement of the legal authority and jurisdiction under which the hearing is to be held;

4.2.d.3. Reference to the particular sections of the statutes and rules involved;

4.2.d.4. Short, plain statement of the matters asserted; and

4.2.d.5. Any other statement required by law.

4.2.e. A party to the proceeding may move to postpone the hearing. The motion must be in writing; must set forth the specific grounds on which it is sought; and, must be filed with the Racing Commission before the date set for the hearing. If the Racing Commission, or a hearing examiner appointed by the Racing Commission, grants the motion for postponement, the Racing Commission shall cause new notice to be issued.

4.2.f. After a hearing has begun, the Racing Commission, or a hearing examiner appointed by the Racing Commission, may grant a continuance on oral or written

motion, without issuing new notice, by announcing the date, time and place for reconvening the hearing before recessing the hearing.

4.2.g. If a party to a proceeding before the Racing Commission fails to appear after adequate notice, the Racing Commission may deem the charges set forth in the notice of hearing as admitted by the non-appearing party and may dismiss the proceedings before the Racing Commission.

**4.3. Subpoenas, Subpoenas Duces Tecum and Oaths or Affirmations.**

4.3.a. Any member of the Racing Commission, or a hearing examiner appointed by the Racing Commission, may issue subpoenas to compel the testimony of witnesses and subpoenas duces tecum to compel the production of documents, books, records, papers and other items.

4.3.b. Any party requesting the issuance of subpoenas or subpoenas duces tecum shall be responsible for proper service and payment of fees for the attendance and travel of witnesses in accordance with the requirements of West Virginia Code § 29A-5-1(b).

4.3.c. Any member of the Racing Commission, or a hearing examiner appointed by the Racing Commission, may administer oaths or affirmations to witnesses appearing before the Racing Commission.

**4.4. Reporters and Transcripts.**

4.4.a. The Racing Commission shall engage a court reporter to make a record of the hearing. The Racing Commission may allocate the costs of the reporter and any transcript produced among the parties.

4.4.b. If a person requests a transcript of the record, the Racing Commission may assess the costs of preparing the transcript to the person.

**4.5. Nature of Hearings.**

4.5.a. A hearing on an appeal by a permit holder from a decision of the stewards/judges shall be de novo. The Racing Commission shall have the burden of proving by a preponderance of the evidence that the permit holder has violated or is responsible for a violation of a statute or a Racing Commission rule. However, upon appeal by a permit holder of a decision of the stewards regarding a disqualification of a thoroughbred during the running of the race, the appeal hearing before the Racing Commission shall not be de novo and the burden shall be on the permit holder to prove by clear and convincing evidence that the stewards committed plain error in their decision. In the event that a permit holder appeals a stewards' decision regarding a disqualification during the running of the race and does not prevail, he or she shall be assessed interest on any purse which may be held during the pendency of the appeal. Such assessment shall be collected by the Racing Commission and paid to the owner of the horse who moves up in the finish of the race as a result of the stewards' disqualification decision. The rate of interest shall be three (3) percentage points above the Fifth Federal Reserve District secondary discount rate in effect on the second day of January of the year in which the assessment is entered. Provided, that the rate of interest shall not exceed eleven (11) percent per annum or be less than seven (7) percent per annum. In addition, pursuant to the provisions of subdivision 3.10.d. of this rule, the Commission may assess the costs of the hearing incurred in excess of the one hundred dollar (\$100.00) security fee against the appealing permit holder.

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4.5.b. The Racing Commission may reject, affirm, or modify any penalty or disciplinary action imposed by the stewards/judges.

4.5.c. In any hearing on a matter instituted by the Racing Commission against a licensee, the Commission shall have the burden of proving by a preponderance of the evidence that the licensee has violated or is responsible for a violation of a statute or a Commission rule.

4.5.d. All hearings before the Racing Commission are open to the public. However, witnesses may be excluded or sequestered.

4.6. Conducting of Hearings.

4.6.a. A quorum of the Racing Commission and/or a hearing examiner appointed by the Racing Commission who is licensed to practice law in the State of West Virginia shall conduct and preside over Commission hearings.

4.6.b. The Racing Commission or its appointed hearing examiner may:

- 4.6.b.1. Issue subpoenas and subpoenas duces tecum;
- 4.6.b.2. Administer oaths or affirmations;
- 4.6.b.3. Receive evidence;
- 4.6.b.4. Rule on the admissibility of evidence;
- 4.6.b.5. Examine witnesses;

4.6.b.6. Set reasonable times within which a party may present evidence and within which a witness may testify;

4.6.b.7. Permit and limit oral argument;

4.6.b.8. Issue orders and findings of fact and conclusions of law;

4.6.b.9. Require written arguments to be filed by the parties;

4.6.b.10. Take notice of any and all judicially cognizable facts;

4.6.b.11. Regulate the course of the hearing; and,

4.6.b.12. Perform other duties necessary to a fair and proper hearing.

4.7. Evidence.

4.7.a. All testimony of witnesses before the Racing Commission must be given under oath or affirmation. The Racing Commission or its appointed hearing examiner may limit the number of witnesses and may exclude all irrelevant, immaterial or unduly repetitious evidence.

4.7.b. The Racing Commission and/or its appointed hearing examiner shall allow a full presentation of evidence and are not bound by the technical rules of evidence. The Racing Commission and/or its appointed hearing examiner shall have the authority to determine, in their sole discretion, the weight and credibility of any evidence and/or testimony. The Racing Commission and/or its appointed hearing examiner may admit hearsay evidence if it is determined that the evidence is of a type that is commonly relied on by reasonably prudent people. The rules of privilege

recognized by West Virginia law apply in hearings before the Racing Commission.

**4.8. Representation.**

4.8.a. A person who is the subject of a hearing before the Racing Commission may represent himself or herself or may be represented by legal counsel licensed to practice law in the State of West Virginia. Attorneys who are not licensed to practice law in the State of West Virginia must comply with Rule 8.0, Admission Pro Hac Vice, of the West Virginia Rules for Admission to the Practice of Law, before representing any party involved in a matter before the Racing Commission. Representation of a party includes any communication with the Racing Commission or its agents on behalf of the permit holder, the filing or making of motions or any other written or oral requests on behalf of a party, and, appearing before the Racing Commission or its appointed hearing examiner on behalf of a party.

**4.9. Decisions.**

4.9.a. If a hearing is conducted by a hearing examiner appointed by the Racing Commission, he/she shall issue a written recommended decision containing proposed findings of fact and conclusions of law to the Racing Commission. The hearing examiner shall mail a copy of his recommended decision to all parties to the proceeding.

4.9.b. Upon receipt of a recommended decision from an appointed hearing examiner, the Racing Commission shall consider the recommendation in a meeting noticed in accordance with the West Virginia Open Governmental Proceedings Act, West Virginia Code §§ 6-9A-1 *et seq.* The Racing Commission may:

4.9.b.1. Adopt or modify the recommended decision, in whole or in part;

4.9.b.2. Decline to adopt the recommended decision, in whole or in part;

4.9.b.3. Remand the proceeding for further examination by the hearing examiner; or

4.9.b.4. Direct the hearing examiner to give further consideration to the proceeding with or without reopening the hearing.

4.9.c. If the Racing Commission modifies or declines to adopt a recommended decision of an appointed hearing examiner, either in whole or in part, it shall issue a reasoned, articulate explanation and a recitation of the underlying evidence or other matters upon which it bases its decision and particularized findings of fact and conclusions of law that support its decision.

4.9.d. If a hearing is conducted by a quorum of the Racing Commission it shall issue a written decision containing findings of fact and conclusions of law.

**4.10. Orders.**

4.10.a. The Racing Commission shall issue a final order in all matters heard before it. The Racing Commission's order shall be in writing and shall be signed by the Chairman.

4.10.b. The Racing Commission shall serve a copy of a final order upon all parties to the proceeding by certified mail, return receipt requested, or by personal service.

4.10.c. A final order of the Racing Commission takes effect on the date the order is entered, unless otherwise stated in the order.

4.10.d. The Racing Commission shall submit copies of all final orders to the NAPRA or RCI Ruling Database.

**§ 178-6-5. Rulings In Other Jurisdictions.**

**5.1. Reciprocity.**

5.1.a. The Racing Commission and the stewards/judges shall honor rulings, decisions and final orders from other racing jurisdictions regarding permit or license suspensions, revocations, and eligibility.

**5.2. Appeals of Reciprocal Rulings.**

5.2.a. Persons subject to rulings, decisions and final orders in other racing jurisdictions shall have the right to request a hearing before the Racing Commission or a hearing examiner appointed by the Racing Commission to show cause why such ruling should not be enforced in West Virginia.

5.2.b. Any request for such hearing must clearly set forth in writing the reasons for the appeal.