



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

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

AGENCY: Motor Vehicles TITLE-SERIES: 91-01
RULE TYPE: Legislative Amendment to Existing Rule: Repeal of existing rule:
RULE NAME: 91-01 Administrative Due Process

PRIMARY CONTACT

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CITE STATUTORY AUTHORITY: 17A-2-9

EXPLANATION OF THE STATUTORY AUTHORITY FOR THE LEGISLATIVE RULE, INCLUDING A DETAILED SUMMARY OF THE EFFECT OF EACH PROVISION OF THE LEGISLATIVE RULE WITH CITATION TO THE SPECIFIC STATUTORY PROVISION WHICH EMPOWERS THE AGENCY TO ENACT SUCH RULE PROVISION:

Administrative due process rule for required administrative hearings.

IS THIS FILING SOLELY FOR THE SUNSET PROVISION REQUIREMENTS IN W. VA. CODE §29A-3-19(e)? #Error

IF YES, DO YOU CERTIFY THAT THE ONLY CHANGES TO THE RULE ARE THE FILING DATE, EFFECTIVE DATE AND AN EXTENSION OF THE SUNSET DATE? No

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD: 6/29/2022

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 7/29/2022

COMMENTS RECEIVED: No

(IF YES, PLEASE UPLOAD IN THE COMMENTS RECEIVED FIELD COMMENTS RECEIVED AND RESPONSES TO COMMENTS)

PUBLIC HEARING: No

(IF YES, PLEASE UPLOAD IN THE PUBLIC HEARING FIELD PERSONS WHO APPEARED AT THE HEARING(S) AND TRANSCRIPTS)

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

WHAT OTHER NOTICE, INCLUDING ADVERTISING, DID YOU GIVE OF THE HEARING?

SUMMARY OF THE CONTENT OF THE LEGISLATIVE RULE, AND A DETAILED DESCRIPTION OF THE RULE'S PURPOSE AND ALL PROPOSED CHANGES TO THE RULE:

Administrative due process rule with proposed changes to reflect DMV no longer holds DUI hearings.

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

Recent changes to statute that eliminated the Office of Administrative Hearings.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

C. ECONOMIC IMPACT OF THE LEGISLATIVE RULE ON THE STATE OR ITS RESIDENTS:

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2022 Increase/Decrease (use "-")	2023 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost			
Personal Services			
Current Expenses			
Repairs and Alterations			
Assets			
Other			
2. Estimated Total Revenues			

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Joseph A Holley -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 91
LEGISLATIVE RULES
DIVISION OF MOTOR VEHICLES

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. -- W. Va. Code §§17A-2-9, 17A-6B-13, 17A-6C-17, 17B-2-15, 17D-2-1, 17E-1-18.

1.3. Filing Date. -- ~~June 1, 2005.~~

1.4. Effective Date. -- ~~July 1, 2005.~~

1.5. Sunset Date. -- This rule shall terminate and have no further force or effect August 1, 2028.

§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~~ the Commissioner's 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 W. Va. 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 W. Va. Code §§17C-5A-1, 17E-1-15 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 W. Va. 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 W. Va. Code §§17C-5-4 or 17E-1-24.~~

3.2. Subpoenas. —The Commissioner may issue subpoenas or subpoenas duces tecum in accordance with W. Va. 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. An attorney licensed to practice law in the State of West Virginia that represents a client before the Division may prepare and issue subpoenas for the purposes of this rule.

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.

3.2.6. All parties shall provide a witness list to the designated hearing examiner at least forty-eight hours (48) prior to the hearing. Failure to disclose a witness is grounds for denial of a continuance request.

3.3. Orders of Revocation, ~~or~~ Suspension or Disqualification.

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)~~fifteen (15) days from the date on which the order's ~~mail receipt was signed~~ was entered 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 W. Va. 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 W. Va. 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.

3.3.4. In cases where the registered or certified mail is not signed for, the provisions of W. Va. 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.

3.4. 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 electronically,~~ in person or by registered or certified mail, return receipt requested. The request must be made within ~~ten (10)~~ fifteen (15) days from the date on which the order's ~~mail receipt was signed was entered~~ unless a different time period is prescribed by statute. ~~In cases where the registered or certified mail is not signed for, the provisions of W. Va. 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 request~~ 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 or the hearing will not be granted.

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 electronic means or 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.~~

3.6.43. 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. At the discretion of the Commissioner, the hearing may be in person, by telephone or video conference.

3.6.54. 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 one continuance per party except as provided in Subdivisions 3.8.32 and 3.8.43.

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

3.8.32. 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.

3.8.43. 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~~ a law enforcement witness 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 W. Va. 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.

f. Exclude any witness not disclosed pursuant to 3.2.6.

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 assess and collect a transcript fee of One Dollar and Fifty Cents for each page transcribed prior to producing the

transcript.

3.11. Assessment of Costs

3.11.1. The Commissioner shall assess a docket fee of ~~Fifty~~ One Hundred Dollars (\$100.00) 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~~ Fifty Dollars (\$50.00) per witness and ~~Fifteen~~ Fifty Cents (\$0.50) 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 W. Va. Code § ~~17C-5A-2a~~ 17A-2-21 except that witness fees shall be paid to the witness(es).

3.12. Final Orders

3.12.1. The Commissioner shall make findings of fact and conclusions of law pursuant to W. Va. 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 W. Va. 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 W. Va. Code §29A-5-1 et seq. and in accordance with the applicable statutory provisions.