

# DEPARTMENT OF TRANSPORTATION



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**The Office of Administrative Hearings**

**Annual Report**

**Fiscal Year 2019 Thru February 7, 2020**

**TERESA D. MAYNARD**

**Chief Hearing Examiner**

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## INTRODUCTION BY THE CHIEF HEARING EXAMINER

The Office of Administrative Hearings (OAH) is tasked with the responsibility of providing fair and impartial hearings to litigants involved in contested driver's license revocation proceedings. OAH is bound by the law as interpreted by the Supreme Court of Appeals of West Virginia. The federal constitution as well as the West Virginia Constitution provide that no person shall be deprived of property without due process of law. Due process of law entitles an individual to a notice of the action the Division of Motor Vehicles (DMV) intends to take against the individual's driving privilege as well as an opportunity to be heard. OAH is the administrative tribunal that fulfills this requirement.

Currently, forty-two (42) states have adopted administrative license revocation (ALR) laws similar to those established in West Virginia. The National Highway Traffic Safety Administration (NHTSA) continues to encourage every state to implement an ALR system by providing incentives, such as grants that can be used to sponsor impaired driver prevention programs, to states that are ALR compliant. NHTSA studies have shown that driving under the influence (DUI) related fatalities have been reduced in State's that have separated the administrative revocation process from the criminal proceeding. The Center for Disease Prevention has also identified the ALR system as a viable means of DUI prevention.

The administrative hearing differs from the criminal proceeding in several ways - most significantly in the standard of proof. Because the administrative process is considered a civil remedy, DMV does not have to establish guilt beyond a reasonable doubt. Instead, the Hearing Examiner applies a preponderance of the evidence standard to determine whether the driver more likely than not drove his or her vehicle while under the influence of alcohol, drugs, and/or controlled substances or failed to submit to the designated secondary chemical test. The burden of proof rests upon DMV; however, the Petitioner has the opportunity to produce evidence and testimony to rebut that offered by DMV. Because the criminal proceeding focuses on a violation of criminal law, while the administrative proceeding focuses on an individual's driving behavior, a driver's license can be administratively revoked even when a criminal charge has been dropped or reduced to a non-revocable offense such as reckless driving or speeding.

Although criminal and administrative proceedings are treated very differently, it is common for certain conduct to have both criminal and administrative ramifications. For instance, an attorney who embezzles money from a client may face criminal charges for theft at which time he or she may be found "not guilty" under the "beyond a reasonable doubt" standard; however, that same evidence may be sufficient to establish "by a preponderance of the evidence" that the attorney's administrative license to practice law should be revoked or suspended. NHTSA recognizes the nuances of administrative versus criminal proceedings and recommends that the administrative sanction "be handled separately from the criminal proceeding. Due to differing procedural aspects, the findings and outcome of an ALR action normally should not affect a criminal proceeding, and vice versa."

## **CREATION OF THE OFFICE OF ADMINSTRATIVE HEARINGS**

OAH originated through Senate Bill 186, which passed during the 2010 Regular Legislative Session and became effective on June 11, 2010. West Virginia Code § 17C-5C-1 provides that OAH is created as a separate operating agency within the West Virginia Department of Transportation, and the transition of authority from the DMV to OAH was completed by October 1, 2010, as mandated. However, the Hearing Examiners employed by OAH continued to conduct hearings on behalf of DMV regarding alleged offenses, which occurred prior to the effective date of the statute.<sup>1</sup>

## **MISSION OF THE OFFICE OF ADMINISTRATIVE HEARINGS**

The Mission of OAH is to provide a neutral forum for the fair and impartial resolution of contested driver's license revocations or suspensions initiated by DMV.

## **PURPOSE OF THE OFFICE OF ADMINISTRATIVE HEARINGS**

The purpose of OAH is to issue decisions which uphold, reverse, or modify the revocation or suspension of citizens' driving privileges by DMV. To fulfil this mandate, OAH conducts administrative hearings and, based on the determination of the facts of the case and applicable law, renders decisions affirming, reversing or modifying the actions taken by DMV.

OAH functions include, but are not limited to, the following:

- Conducting administrative hearings in contested cases involving license revocations issued by DMV.
- Issuing final orders, either resulting from administrative hearings or other circumstances that result from activities or omissions not involving the holding of an administrative hearing.
- Statistically tracking cases to conclusion within the framework of each fiscal year.

## **JURISDICTION OF THE OFFICE OF ADMINISTRATIVE HEARINGS**

OAH has jurisdiction over most matters involving contested motor vehicle license revocations. However, the Legislature did not transfer jurisdiction of revocation orders issued to persons who fail to carry automotive insurance nor in matters involving punitive actions taken by DMV against motor vehicle dealerships.

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<sup>1</sup> NOTE: A decision issued on July 20, 2012, by the Supreme Court of Appeals established that the DMV retained jurisdiction over cases involving offenses occurring prior to June 11, 2010. This decision marked the end of the hearing examiners dual role as they were no longer required to conduct DMV hearings or draft DMV Orders, a practice which had significantly contributed to the creation of the OAH backlog.

West Virginia Code §17C-5C-3 establishes that OAH has jurisdiction to hear and determine:

- (1) Appeals from an order of the Commissioner of the Division of Motor Vehicles suspending a license pursuant to section eight, article two-b, chapter seventeen-b of this code;
- (2) Appeals from decisions or orders of the Commissioner of the Division of Motor Vehicles suspending or revoking a license pursuant to sections three-c, six and twelve, article three, chapter seventeen-b of this code;
- (3) Appeals from orders of the Commissioner of the Division of Motor Vehicles pursuant to section two, article five-a of this chapter, revoking or suspending a license under the provisions of section one of this article or section seven, article five of chapter;
- (4) Appeals from decisions or orders of the Commissioner of the Division of Motor Vehicles denying, suspending, revoking, refusing to renew any license or imposing any civil money penalty for violating the provisions of any licensing law contained in chapters seventeen-b and seventeen-c that are administered by the Commissioner of the Division of Motor Vehicles; and
- (5) Other matters which may be conferred on the office by statute or legislatively approved rules.

However, the vast majority of the appeals adjudicated by OAH are filed in response to revocation orders issued by DMV for various offenses relating to driving under the influence of alcohol, controlled substances, or drugs (DUI). These offenses include DUI; DUI causing bodily injury; DUI causing death; DUI with a minor passenger; DUI when under the age of twenty-one (21); DUI with a blood alcohol content of fifteen hundredths of one percent (.15%) or more; refusal to submit to the secondary chemical test to determine the alcohol concentration level of the blood, and knowingly permitting an impaired person to operate your motor vehicle.

Also, Title 105, *Code of State Rules*, Series 1 provides procedures regarding the initiation and administration of appeals that are heard and determined by OAH from orders and decisions of the Commissioner of the DMV. It states definitions, provides service and filing deadlines, sets forth required information and data for written objections, informs regarding hearing notices and locations, and addresses hearing continuances and postponements. The rules set forth pre-hearing notification requirements, cover the issuance of subpoenas, discovery, motions, stipulations and exhibits, and informs of the consequences for failing to appear at a hearing. In addition to setting a filing fee, it also addresses hearings and evidence, hearing transcripts, the official record, transcript requests, final orders, and motions to reconsider.

## **WRITTEN OBJECTIONS TO REVOCATION ORDERS**

Any person (hereinafter “the Petitioner”) whose driving privilege has been revoked or suspended pursuant to an Order of Revocation or Suspension issued by DMV for a DUI offense may file a Written Objection with OAH. The Written Objection must be filed with OAH within thirty (30) days of the person’s receipt of the Revocation or Suspension Order.

The OAH Docketing Department is comprised of seven (7) full-time positions (currently two positions are vacant) whose function is to process the Written Objections and schedule all administrative hearings. The Docketing Department reviews all Written Objections to confirm that the appeal was timely filed by the Petitioner and enters all pertinent information into the Agency’s database. During Fiscal Year 2019, the OAH Docketing Department received and processed one thousand eight (1008) new Written Objections.

Once it is verified that the Written Objection was timely filed, the Docketing Department notifies DMV of the appeal of the revocation order, and a stay of the imposition of the revocation period is entered and remains in effect during the pendency of the appeal.

The OAH Docketing Department schedules the administrative hearing to be conducted within one hundred eighty (180) days of the receipt of the Written Objection and is responsible for issuing a hearing notice advising the parties of the date, time and location of the administrative hearing. Currently, there are three hundred seventy-nine (379) written objections scheduled for hearing and ten (10) additional matters that need to be scheduled.

Finally, at the request of the person whose license is at issue, the OAH Docketing Department generates subpoenas commanding the appearance of witnesses and subpoenas duces tecum commanding the submission of documents at the administrative hearing.

## **CONTESTED CASES**

Any person whose license has been revoked for a DUI offense is afforded the opportunity to contest the revocation of his or driving privileges by requesting an administrative hearing. The entry of a guilty plea to the parallel criminal offense constitutes a waiver of a person’s right to an administrative hearing; however, the complete dismissal of the criminal charge or the entry of a plea to a non-DUI offense, such as reckless driving or speeding, does not result in the automatic revocation of the individual’s license. Therefore, OAH retains jurisdiction of these matters and does not have the authority to afford a Petitioner the opportunity to plead to a lesser included offense in order to retain his or her drivers’ license.

Since its creation in 2010, OAH has processed over fifteen thousand (15,000) written objections. As of February 7, 2020, there are five hundred thirty-eight (538) cases pending before the Office of administrative hearings. Consequently, OAH has accumulatively resolved fourteen thousand four hundred (14,400) or 96.5% of all written objections filed with the Agency.

Over the past reporting period, OAH has encountered a significant increase in the number of contested cases involving the alleged offense of Driving Under the Influence of Controlled Substances and/or Drugs. The process for addressing these cases can be lengthy because of the time required to obtain the results of the chemical analysis of a person's blood.

The Supreme Court of Appeals of West Virginia has consistently held that, under the provisions of West Virginia Code § 17C-5-9, an individual, who has been arrested for driving a motor vehicle in this state while under the influence of alcohol, a controlled substance, or other drug, has the right to request and to receive an independent test of his or her blood or breath which can be analyzed to determine the presence of impairing substances in the individual. *Reed v. Divita*, No. 14-1018, 2015 WL 5514209 at \*3 (W.Va. September 18, 2015) (Memorandum Decision); Syllabus Point 5, *Reed v. Hall*, 235 W.Va. 322, 773 S.E.2d 666 (2015); Syllabus Point 2, *In Re Burks*, 206 W.Va. 429, 525 S.E.2d 210 (1999) Syllabus Point 1, in part, *Moczek v. Bechtold*, 178 W.Va. 553, 363 S.E.2d 238 (1987); Syllabus Point 1, *State ex rel. King v. MacQueen*, 182 W.Va. 162, 386 S.E.2d 819 (1986); Syllabus Point 1, *State v. York*, 175 W.Va. 740, 338 S.E.2d 219 (1985).

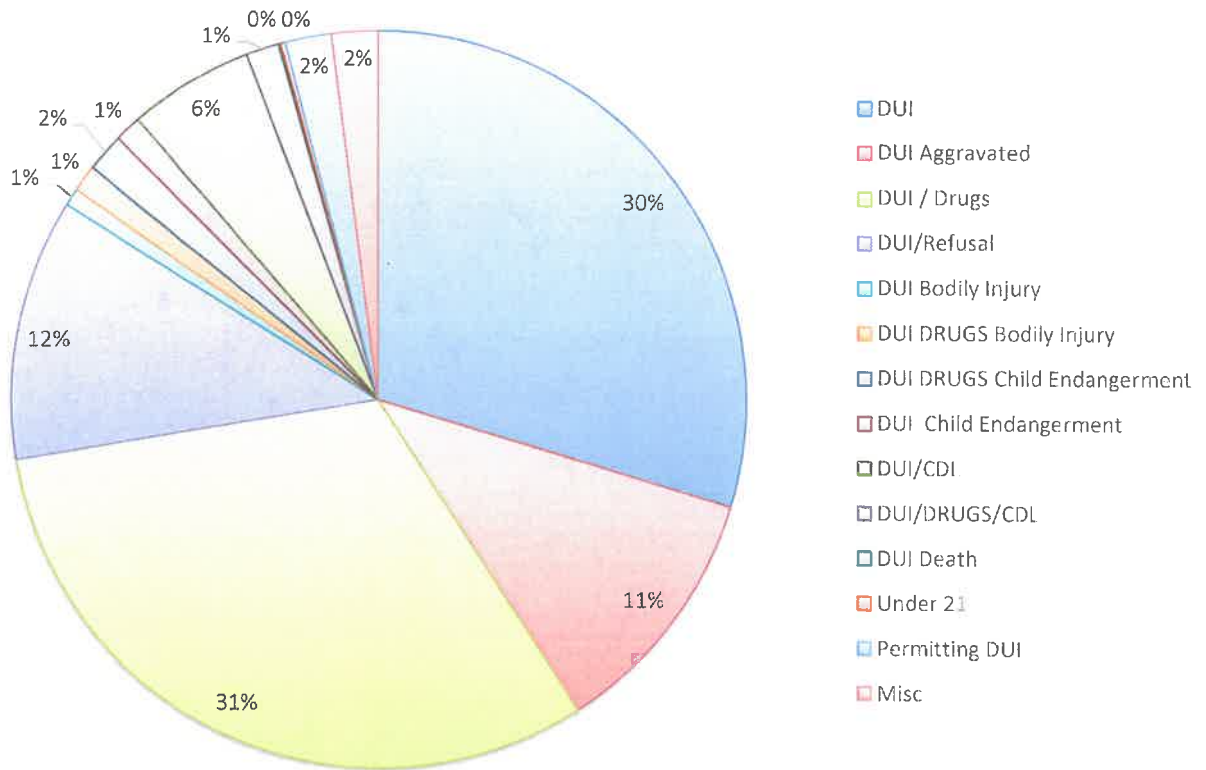
Therefore, unless the Petitioner waives the admission of the chemical analysis of his or her blood, OAH holds a final decision in abeyance until the test results are available. OAH does not reverse an Order of Revocation simply because the blood analysis results are not available at the time of the scheduled administrative hearing. It is noted, however, that the Supreme Court of Appeals, in *Reed v. Hall*, 235 W.Va. 322, 773 S.E.2d. 666 (2015), held that failure of an officer to obtain a blood test analysis after said test was "demanded" by the driver was a denial of the driver's due process rights under West Virginia Code §17C-5-9. Further, pursuant to *Reed v. Divita*, No. 14-1018 (Kanawha County 14-AA-45) (September 2015)(memorandum decision), the denial of the driver's due process rights under West Virginia Code §17C-5-9 is grounds for reversal of DMV's Order of Revocation.

The chart on the following page provides an overview of the total number of cases, by alleged offense, which have been filed with or resolved by OAH during Fiscal Year 2019 thru February 7, 2020.

Fiscal Year 2019 Thru February 7, 2020 Contested Cases by offense

Total Contested Cases	3051
DUI	905
DUI Aggravated	343
DUI Drugs	959
DUI w/Refusal	350
DUI Bodily Injury	24
DUI DRUGS Bodily Injury	36
DUI DRUGS / Child Endangerment	52
DUI / Child Endangerment	36
DUI CDL	168
DUI DRUGS CDL	44
DUI Death	02
Under 21	06
Knowingly Permitting DUI	62
Misc.	64

Contested Cases by Offense





## ADMINISTRATIVE HEARINGS

OAH employs twelve (12) Hearing Examiners to preside over and to conduct administrative hearings regarding the revocation and suspension of an individual's driving privilege for alleged violations of the Motor Vehicle Code. Currently, all Hearing Examiner positions are filled.

These administrative hearings are held at the DMV regional offices located in or near the county in which the arrest was made or at some other suitable place within the county in which the arrest was made if an office of the division is not available. Hearing Examiners are assigned to specific geographical regions throughout the State and travel from their home office to conduct these hearings. The Agency currently has five (5) motor vehicles permanently assigned to Agency personnel and one pool vehicle housed at the Agency headquarters.

During the administrative hearing, the Hearing Examiner is required to issue rulings on evidentiary issues, take testimony, and admit exhibits in order to create a designated record of the proceedings.

After the conclusion of the administrative hearing, the parties are afforded the opportunity to submit proposed Findings of Fact and Conclusions of Law for consideration by the Hearing Examiner. Prior to submitting these proposed findings, the parties may request a copy of the audio of the administrative hearing and/or a transcript of the proceedings.

After considering the designated record, the Hearing Examiner, based upon the determination of the facts of the case and applicable law, drafts a recommended decision containing Findings of Fact and Conclusions of Law, which affirms, reverses, or modifies the Order of Revocation issued by the Commissioner of the DMV against the individual's driving privilege. The recommended decision is submitted to the Chief Hearing Examiner for review and approval.

## FINAL ORDERS

Once the Hearing Examiner completes the recommended decision, the file is returned to the OAH Legal Department where four (4) paralegals review each Order for legal accuracy, clarity and other requirements. The draft Order is then submitted to the Chief Hearing Examiner for final approval. The OAH Legal Department processes and disseminates approved final orders, maintains detailed databases including pertinent information regarding the final orders issued by the Agency and enters proper codes in the database to reflect the current status of licenses.

During the current reporting period, OAH issued one thousand nine hundred seven (1,907) Final Orders after the administrative hearing was conducted. This constitutes a fifty-five percent (55%) increase over the number of Final Orders issued after an administrative hearing during Fiscal Year 2018. During this reporting period, one thousand six hundred twelve (1,612) Revocation Orders were upheld, and two hundred ninety-five (295) Revocation Orders were reversed or modified.

## RESOLUTION OF ALL WRITTEN OBJECTIONS

In addition to the Final Orders entered after an administrative hearing, the OAH Legal Department is also responsible for generating Orders issued as a result of withdrawals of the written objection, failure of the Petitioner to appear at the administrative hearing, the Petitioner's entry into the deferral program, convictions or guilty pleas to the parallel criminal charge, death of the Petitioner, and the withdrawal of the revocation order by the DMV. During the current reporting period, OAH issued six hundred six (606) additional Orders and as a result a total of two thousand five hundred thirteen (2,513) Written Objections were resolved.

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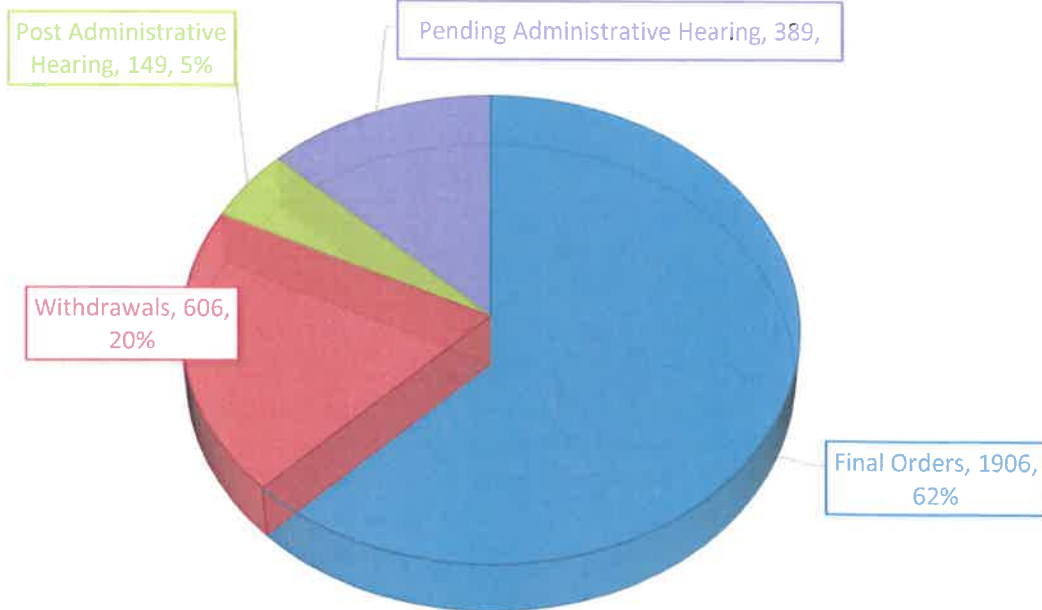
**Fiscal Year 2019 Thru February 7, 2020**  
**Resolution of Written Objections (3051)**

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<b>All Orders Entered</b>	<b>2513</b>
Final Orders	1907
Withdrawals	606
Post Administrative Hearing	149
Pending Administrative Hearing	389

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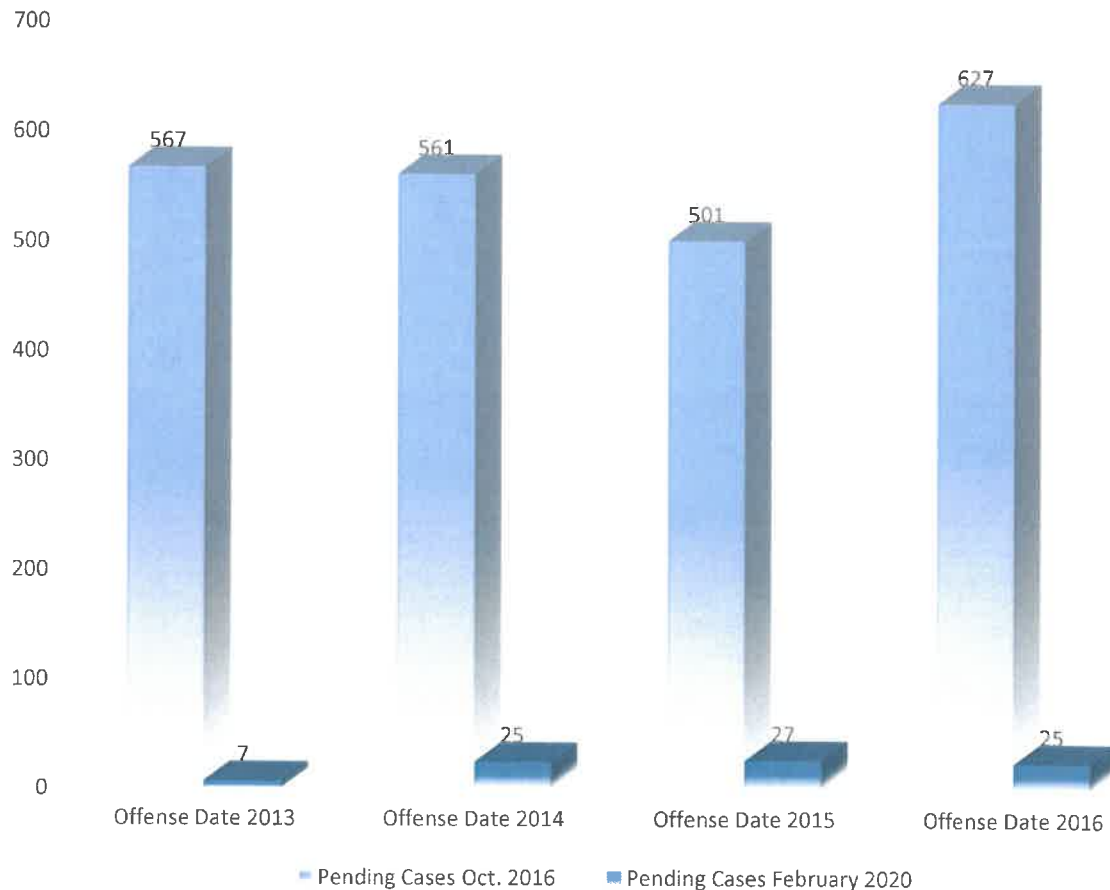
## RESOLUTION OF ALL WRITTEN OBJECTIONS (3051)



## SHIFTING AGENCY POLICY REGARDING ISSUANCE OF FINAL ORDERS

Initially, it was the goal of OAH to ensure that the time period existing between the date that the evidentiary hearing is conducted and the subsequent issuance of a final order does not exceed nine (9) months. However, in response to concerns voiced by some members of the Legislature, the current Chief Hearing Examiner changed the policy to prioritizing cases based upon the date of the alleged DUI offense. This reformation of Agency policy resulted in a significant reduction in the number of aged cases pending resolution before this Agency. The chart below illustrates the reduction in the total number of pending cases with an alleged offense date in 2010 through 2016 as of October 2016 (light blue) to the total number of pending cases with an alleged offense date in 2010 through 2016 as of February 2020 (dark blue).

### REDUCTION IN BACKLOG OF AGED CASES



NOTE: While the OAH does have a small number of cases which involve alleged DUI offenses occurring between 2013 and 2018, the administrative hearings for the majority of these cases were more recently conducted as a result of continuances requested by the parties.

## **MATTERS PENDING BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS**

As of July 1, 2019, there were one thousand seven hundred twenty-eight (1,728) cases pending before OAH. Of those, eighty-five (85) were pending scheduling by the OAH Docketing Department; two hundred ninety-one (291) were pending an administrative hearing; three hundred fifty-three (353) were pending the submission of a draft Final Order by a Hearing Examiner and the remaining nine hundred ninety-nine (999) were pending review, approval and issuance by the Agency.

### **FORMATION OF INTER-AGENCY COMMITTEE**

The West Virginia Supreme Court subsequently set forth in *Pat Reed, Commissioner of the West Virginia Division of Motor Vehicles v. Staffileno*, 239 W.Va. 538, 803 S.E.2d. 508 (2017), concerns regarding the length of time that had elapsed between the administrative hearing and the issuance of a Final Order. Such ruling differed significantly from the concerns of the Legislature which, as previously noted, expressed that cases should be addressed and resolved based upon the date of the alleged incident rather than the date of the administrative hearing.

Given these conflicting concerns, the Chief Hearing Examiner created an inter-agency committee comprised of agency employees and a contract employee whose singular focus is to address the backlog of cases<sup>2</sup> which are pending resolution and to expedite the issuance of Final Orders. In addition, the Chief Hearing Examiner has temporarily suspended the review of proposed Final Orders submitted by the Hearing Examiners for stylistic, typographical, clerical, and grammatical errors. Pursuant to West Virginia Code § 17C-5C-2, the Chief Hearing Examiner has limited her review of the Hearing Examiner's recommended decision to ensure legal accuracy and clarity.

As a result of the efforts of this committee and the procedural changes implemented regarding the review and issuance of Final Orders, the Chief Hearing Examiner of OAH has issued two thousand five hundred thirteen (2,513) Final Orders during Fiscal Year 2019 thru February 2020, which has resolved any perceived backlog of cases pending before OAH and effectively addressed the concerns of both the Legislature and the Court.

### **RESULTS:**

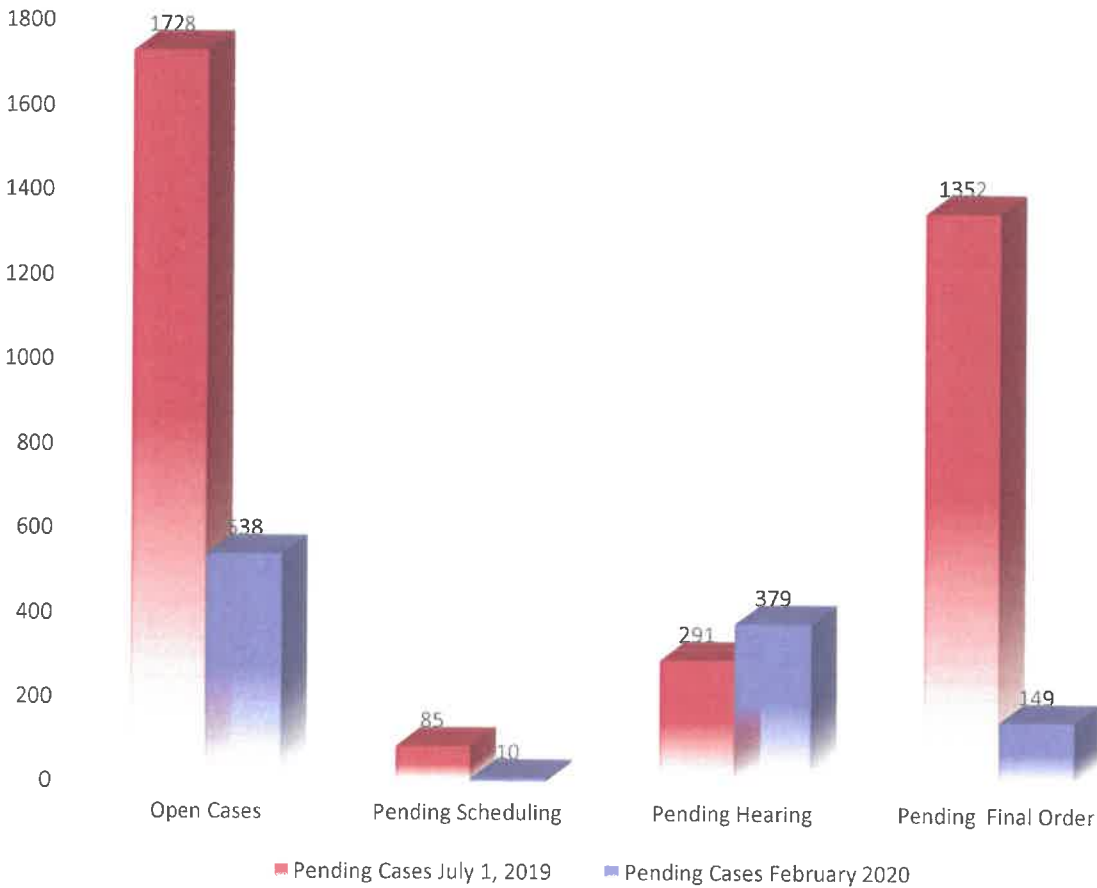
As of February 7, 2020<sup>3</sup>, there are five hundred thirty-eight (538) cases pending before OAH. This number includes the 339 new written objections filed after July 1, 2019 to date. Of those, ten (10) are pending scheduling by the OAH Docketing Department; three hundred seventy-nine (379) are pending an administrative hearing, and one hundred forty-nine are pending a Final Order.

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<sup>2</sup> The backlog of cases resulted in large part from various events and circumstances in existence prior to the current Chief Hearing Examiner's appointment to OAH as well as critical staffing issues.

<sup>3</sup> As of January 1, 2020, there were seven hundred five (705) cases pending before the OAH. Of those four hundred thirty-eight (438) were pending an administrative hearing and the remaining two hundred sixty-seven (267) were pending a Final Order.

## REDUCTION IN PENDING CASES



Finally, the committee will assist the Chief Hearing Examiner to craft and implement internal policies and procedures, which will ensure that there is minimal delay in the issuance of Final Orders after the administrative hearing, while still maintaining the integrity of the decisions reached in these matters. The Chief Hearing Examiner is also considering changes to the Agency's current procedural rules to address issues which contributed to the backlog of pending cases.

## **APPEALS OF OFFICE OF ADMINISTRATIVE HEARINGS ORDERS**

After the issuance of the “Decision of the Hearing Examiner and Final Order of the Chief Hearing Examiner”, either party aggrieved by the Final Order may petition for appeal in Circuit Court in accordance with the provisions of West Virginia Code §29A-5-4.<sup>4</sup> Once OAH is notified that an appeal of the administrative order has been filed, the OAH Legal Department is responsible for preparing a certified copy of the record of the case, including a transcript of the administrative hearing, and filing the same along with a Statement of Matters with the appropriate Circuit Clerk within ninety (90) days.

### **FEES COLLECTED**

On December 1, 2016, and in accordance with the Agency’s Legislative Rules, OAH implemented the assessment of a fifty-dollar (\$50.00) filing fee for each written objection filed. During Fiscal Year 2019, the Agency collected \$30,300 from these filing fees.

OAH also assesses fees for providing audios and transcripts of administrative hearings and for the preparation of a Certified File/Statement of Matters when appeals are filed. During Fiscal Year 2019, the Agency collected \$5,981.25 from these fees.

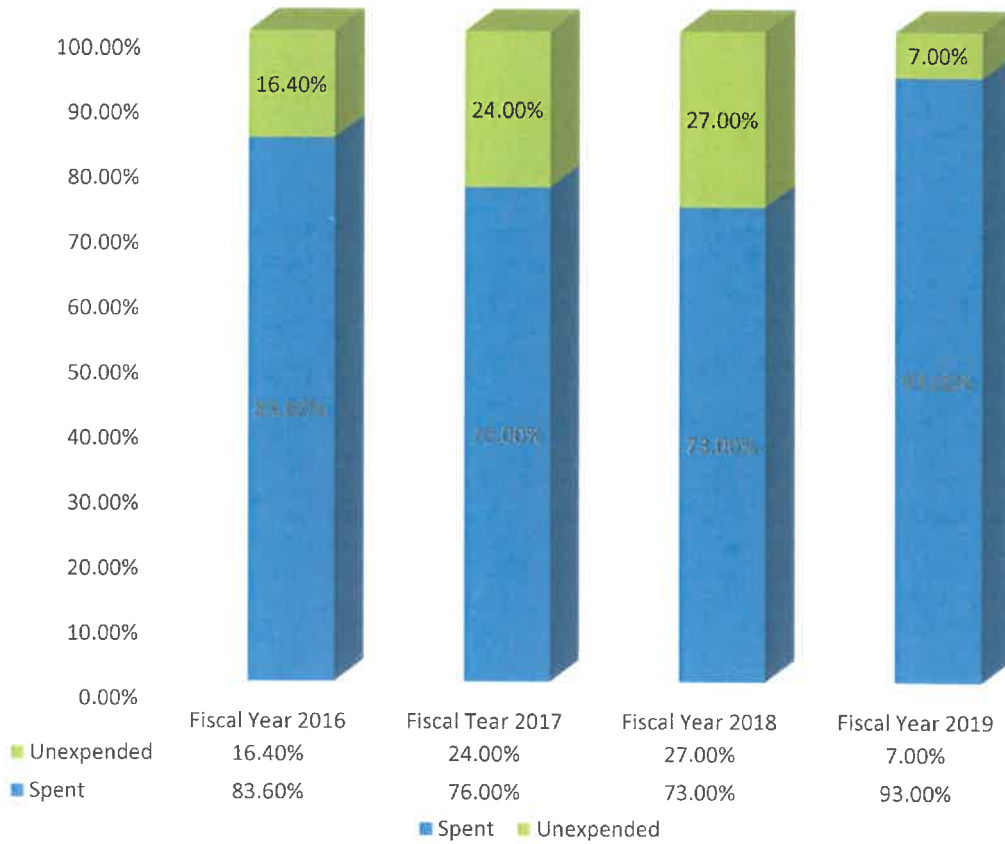
### **BUDGET ANALYSIS**

Since its inception, OAH, which is funded entirely from the State Road Fund, has consistently operated with a surplus. For example, during Fiscal Year 2016, the agency expended less than eighty-four percent (84%) of its budget, which left a surplus of more than sixteen percent (16%). At the end of Fiscal Year 2017, the Agency had expended seventy-six percent (76%) of its annual budget, leaving a surplus of \$462,456.52 or twenty-four percent (24%), and in 2018, the Agency was left with a surplus of twenty-seven percent (27%). Due to continued good financial management, this trend continued in Fiscal Year 2019 as the Agency expended only ninety-three percent (93%) of its annual budget leaving a surplus of \$108,782.20 or seven percent (7%).

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<sup>4</sup> Orders issued by the Circuit Court may be appealed to the West Virginia Supreme Court.

## GENERAL BUDGET ANALYSIS



The increase in operating costs is associated primarily with the Agency’s physical move from privately owned real estate to the Summers Building, which is owned and operated by the West Virginia Department of Administration. Although the costs associated with the initial move significantly impacted the Agency’s budget in Fiscal Year 2019, the annual costs to the Agency moving forward will not substantially increase but will ensure a long-term economic benefit to the State of West Virginia.