



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
Office of Administrative Hearings
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OFFICE OF ADMINISTRATIVE HEARINGS

JOHN G. HACKNEY, JR.
CHIEF HEARING EXAMINER

FISCAL YEAR 2011

ANNUAL REPORT

And

STATISTICAL ANALYSIS

West Virginia Department of Transportation

Paul A. Mattox, Jr., P.E., Cabinet Secretary

Office of Administrative Hearings

John G. Hackney, Jr., Chief Hearing Examiner

Fiscal Year 2011 Annual Report

And

Statistical Analysis

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1. Introduction



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION

Office of Administrative Hearings

300 Capitol Street, 10th Floor, Charleston, West Virginia 25305
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Earl Ray Tomblin
Governor

Paul A. Mattox, Jr., P. E.
Cabinet Secretary

Harry L. Bergstrom
Deputy Secretary

PRELUDE TO STATISTICAL REPORT

The impetus that led to the creation of OAH was substantially related to a final order entered by the Circuit Court of Lincoln County that was never appealed. The Court held after receiving testimony and exhibits relative to allegations of unfair hearing procedures conducted under the authority of DMV,

. . . that the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are: "(1) In violation of constitutional or statutory provisions; (3) Made upon unlawful procedures; and (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion", . . . (See enclosed copy).

A newspaper article with the heading "DMV chief acknowledges DUI case abuse" in the Register-Herald (See enclosed copy), quoted the Commissioner indicating that he was ". . . appalled" after verifying some of those allegations upon taking his post.¹ At the time, according to the newspaper article, two options to address the violations consisted of turning the license revocation hearings over to the Magistrate Courts so that they would hear both the criminal and civil aspects of the contested cases - or creating an administrative law judge unit to DMV to be staffed by a chief judge who would choose other ALJs. The Commissioner of DMV, according to the enclosed article, stated -at the time- the better solution was to give the cases to the Magistrates. Ultimately, a compromise resulted that led to the creation of the Office of Administrative Hearings.

The Office of Administrative Hearings was enacted into law as a State Governmental Entity, effective June 11, 2010. It initially was comprised of existing DMV employees and an interim Director who oversaw the functions of the Office until the current Director arrived to take over on January 20, 2011.

¹ The current DMV Commissioner, Joe Miller, was not employed as the Commissioner for the Division of Motor Vehicles during the time period that the unfair hearing practices by the DMV were found to have occurred by the Lincoln County Circuit Court. Commissioner Miller has emphasized his support of the mission of the OAH.

The Statute that created OAH mandated that a smooth transition should occur no later than October 1, 2010 in which "all equipment and records necessary to effectuate the purposes of this article" were to "be transferred from the Division of Motor Vehicle (sic) to the Office of Administrative Hearings[.]" See W.Va. Code §17C-5C-5 (b). When the current Director arrived in January 2011, OAH and DMV offices and employees were intermingled in the current DMV office located in the Kanawha City Mall in Charleston. OAH moved to its current location in February 2011.

Initially, OAH had eighteen employees, including the Director. The Hearing Examiners formerly employed by the DMV were grandfathered in as employees of the OAH. However, the total allocation of positions for the office also included 12 additional positions that needed to be filled. That additional allocation included 2 transcriptionists, 3 paralegals, 1 Human Resource employee, a Deputy Director, a supervisor for the paralegals, a supervisor for the Hearing Examiners and 3 additional clerical positions.

Currently, OAH is still moderately understaffed as the result of retirement and resignation of employees. A supervisor of the Hearing Examiners has recently been hired and will assume the position by April 2, 2012. OAH has also recently hired a new hearing examiner to replace one who retired in January 2012. Additional postings have closed for additional clerical staff and the position of supervisor over the paralegals.

When the current Director arrived, the OAH was an understaffed Agency which had to essentially be constructed from scratch. During the first several months on the job, the current Director was compelled to focus on developing new templates for various items such as orders and final orders, notices, hearing request forms and the like, rather than simply reincorporating the templates that were customarily in use by DMV. In addition, the OAH is continuing to conduct training seminars for the hearing examiners regarding the imposition of different legal principles to be applied, as mandated by the statute creating OAH.

The first final order resulting from a full evidentiary hearing was issued by OAH in April 2011, and the total number of final orders entered by OAH since its inception (i.e., final orders resulting from full evidentiary hearings) through January 2012 is 308. Although a statistical analysis regarding the disposition of these cases is provided in the following report, it must be emphasized that the mission of the OAH is to provide a neutral forum for the fair and impartial adjudication of license revocations initiated by the DMV. Therefore, it must be understood that the statistical results are viewed by the OAH as having very little relationship to the invaluable, yet intangible, benefit of a fair and impartial hearing process. To state it succinctly, it is not the end result that is important, it is the process leading to the end result that is of paramount importance.

It is important to note that according to Division of Motor Vehicles' personnel, the Governor directed that DMV retain jurisdiction over all pending contested revocation cases with incident dates prior to June 11, 2010. As a result, 12 OAH employees (from the inception of OAH) conduct DMV hearings on behalf of DMV, employing distinctly different hearing procedures from those employed on behalf of OAH. This obviously impacts the statistical data presented herein relative to numbers of hearings held and final orders issued on behalf of OAH. It is also noteworthy, that these OAH employees have conducted this work entirely out of OAH's budget – without reimbursement to the OAH.

THE REGISTER-HERALD

The Fayette Tribune | The Montgomery Herald

DMV chief acknowledges DUI case abuse

By Lawrence Messina
Associated Press Writer

March 27, 2009 07:30 am

— CHARLESTON — West Virginia's motor vehicles chief told the Senate Judiciary Committee on Thursday that he believes prior allegations of abusive practices by his agency in drunken driving administrative cases.

Evidence suggests Division of Motor Vehicles lawyers have violated the rights of people accused of DUI while seeking to revoke or suspend their licenses.

Commissioner Joe Miller said he was "appalled" after verifying some of those allegations upon taking his post. Miller headed DMV from 1997 to 2001, and Gov. Joe Manchin chose him again for that job in January.

"We had allegations, and to a certain extent we've found them true," Miller told The Associated Press before Thursday's committee meeting.

Miller says he supports a committee proposal that would have county magistrates decide these administrative petitions, at the same time they preside over the criminal charge. West Virginia separated the criminal and civil sides of DUI cases in 1981.

While holding a single hearing for both, a magistrate would use different standards to weigh the evidence: beyond a reasonable doubt for the criminal charge, and by a preponderance of the evidence for whether to revoke or suspend the license.

Miller said he far prefers that approach to a separate committee proposal, which would create a new hearing process within his agency. The governor would appoint its chief judge, who would then pick its other judges. All would require law licenses, which are not required either of the current hearing examiners or county magistrates.

These new judges would be independent of DMV officials.

"That brings about an organizational problem of, who reports to whom with the DMV," Miller told AP. "It would be something within DMV that doesn't actually work for DMV."

Both committee proposals have been spurred by allegations that the current hearing system is too heavily influenced by the DMV.

A Lincoln County Circuit Court judge who heard a DUI administrative appeal last year cited evidence that DMV trains its hearing examiners to consistently rule against defendants and allow contested evidence.

"While the DMV's witnesses appeared to deflect such evidence as misunderstandings or mis-recollections, the exhibits received into the evidence of this proceeding clearly and unambiguously demonstrate the contrary," Judge Jay Hoke wrote in November.

Other evidence suggested that DMV lawyers pressured and even threatened examiners with firings if they failed to alter rulings that went against the agency. Miller said he personally intervened in the Lincoln County case after he took over DMV, and has since worked to stamp out such abuses.

"I have directed our hearing examiners to address these issues up front," he said. "I want them to conduct these hearings in a firm but fair manner."

Miller addressed the committee after several lawyers who represent people accused of DUI. They included Michael Simms of Morgantown, who reminded lawmakers that they don't have to condone drunken driving to support everyone's constitutional rights.

"There's no fundamental fairness," he said of the hearing process. "There's no due process."

IN THE CIRCUIT COURT
OF LINCOLN COUNTY
WEST VIRGINIA:

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Donna McCormick,

PETITIONER/APPELLANT

V.

Civil Action No. 08-AA-01

West Virginia Department of Transportation,
Division of Motor Vehicles, Joseph J. Cicchirillo,
Commissioner,

RESPONDENT/APPELLEE.

CIRCUIT COURT ORDER
ON ADMINISTRATIVE APPEAL

Reversing and Remanding to the DMV for Further Proceedings

Procedural Posture:

On this the 3rd day of November, 2008, this matter came on *sua sponte* following the Court's conduct of recent hearings involving the said parties named herein, and the subsequent failure or refusal of the West Virginia Department of Transportation's Division of Motor Vehicles (e. g. DMV) to comply with the Court's directives from the bench held October 17, 2008, regarding the scheduling necessary for the submission of **proposed** Circuit Court Orders on the issues presented in this matter, particularly in light of the upcoming expiration of the Circuit Court's Stay of Commissioner's Final Order entered on June 16, 2008; in accordance with the controlling provisions of West Virginia Code §17C-5A-2, as amended {see also Adkins v. Cline, 216 W. Va. 504 (2004)}.

WHEREUPON, the Court noted that subsequent to the Court's issuance of its Procedural Order of August 23, 2008 (with the Court's procedural and substantive determinations set out therein once again approved and adopted herein), there were established and held at the convenience of the parties in Charleston, West Virginia, three (3) evidentiary hearings on the issues directly related to the Appellant's allegations of "irregularities in procedure before the agency, not shown on the record, (at which) testimony may be taken before the Court", as authorized and directed by the controlling provisions of West Virginia Code §29A-5-4(f), as well as acknowledged by the DMV. During the evidentiary hearings before the Court, on August 29, 2008, the Appellant/Movant put on its witnesses, subject to the cross-examination of the DMV. Having heard the Appellant/Movant's evidence, on September 25, 2008, and again on October 17, 2008, the Appellee DMV put on its witnesses' testimony in response to that adduced from the Appellant. At the conclusion of the Respondent/Appellee's case, which took up two (2) of the three (3) days of hearings, the Court directed counsel for the parties to confer with the Court by telephone conference regarding the necessary time for submission of **proposed** Circuit Court Orders. In regard to which, the Appellant/Movant called in, but the DMV failed or refused to call in on the telephone conference. Therefore, no scheduling of such occurred.

THEREUPON, the Court notes that the procedural posture of this administrative appeal is that the Appellant and the Appellee have made their appeal arguments, in opposition of the DMV Commissioner's Final Order and in support of said Final Order, respectively, and most recently both parties have respectively adduced evidence upon the allegations of procedural irregularities. Thus, since the DMV has chosen not to comply with the Circuit Court directives regarding the submission of a **proposed** Circuit Court Order, the Court has determined that the interests of justice as well as judicial economy are best served by the Circuit Court's issuance of

this Circuit Court Appeal Order, with the relief granted as directed hereinafter.

Discussion of Facts and Law

As the Court has noted in its prior orders in this matter, the standard of review to be applied by the Circuit Court in its review of the final orders of administrative agencies governed by statute is that one based upon the "West Virginia Administrative Procedures Act", codified here in the applicable provisions of West Virginia Code 29A-5-4, which states at sub-section (g) as follows:

- (g) The court may affirm the order or decision of the agency or remand the case for further proceedings. **It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:**
- (1) In violation of constitutional or statutory provisions; or
 - (2) In excess of the statutory authority or jurisdiction of the agency; or
 - (3) **Made upon unlawful procedures; or**
 - (4) Affected by other error of law; or
 - (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
 - (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The basis articulated by the Appellant in this matter was that the DMV had in its Final Order violated the element(s) of that statutory standard of review by issuing a Final Order that was in violation of the Appellant's due process rights and, as a result violated the appeal standard of review (see the Appellant's original (submitted April 9, 2008) and Amended Petition for Administrative Appeal (submitted August 18, 2008, and giving more particularized grounds). As requested immediate relief, the Appellant in addition to the ultimate relief of reversing the DMV Commissioner's Final Order requested a Stay of the effectiveness of the Final Order. During the Circuit Court's consideration of the Appellant's Motion for a Stay, as authorized by the applicable provisions of West Virginia Code §17C-5A-2(g) for up to one hundred fifty (150) days, the Appellant argued that there was, in fact and in law: (1) irreparable harm to the Appellant, should the Stay not be granted; and, (2) there was a likelihood of success on the merits. In supplement to the usual arguments made by DMV Appellants, the Appellant further alleged that there were certain "procedural irregularities" that existed during the processing of this case toward a Commissioner's Final Order at the DMV that adversely affected the rendering fair and impartial decision by the DMV, and that were not contained in the record. In response, counsel for the DMV vehemently denied that any such procedural irregularities existed, and that their non-existence was the reason that no such matters appeared in the record. Further, counsel for the DMV demanded an apology from the Appellant, and that sanctions be imposed by the Court for the allegations.

Since this was an issue of first impression by this Court, the Court reviewed the governing provisions of the administrative appeal statute. Thus, the Court noted that as a predicate to the operable provisions of the standard for appellate review by a Circuit Court, the applicable provisions of sub-section (f) are also clearly relevant and applicable to the issues before the

Circuit Court on this appellate review, with said provisions being set out as follows:

- (f) The review shall be conducted by the court **without a jury** and shall be upon the record made before the agency, **except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken before the court.** The court may hear oral arguments and require written briefs (emphasis supplied).

As outlined hereinabove, in light of the authorizing and controlling provisions of this subsection, the Court determined as a matter of law that the Appellant's arguments were plainly and simply supported by law. In response, the Attorney General's Office now on behalf of DMV, while acknowledging the statutory basis for such an evidentiary hearing, strenuously and continually objected to the Court's granting of a "trial", in which testimony might be taken before the Court from "quasi-judicial officers", and the adverse affects that such a procedure might systemically have (see this Court's Procedural Order, issued August 23, 2008, in which the Court addressed the respective arguments with more particularity). Following the Court's consideration and resolution of the respective arguments by the DMV, over the DMV's:

- (a) consistent and strenuous objections to the evidentiary hearing being conducted; and, (b) its consistent and strenuous Motion(s) for Continuance, the Court held three (3) evidentiary hearings at which the both parties addressed by testimonial and documentary evidence the issues related to such alleged "procedural irregularities", which the Court conducted and considered **without a jury**, as required by the applicable and governing statutory provisions. As our Supreme Court has opined summarily and instructed on this issue:

"[I]n cases of alleged irregularities in procedure before the agency, not shown in the

record, testimony thereon may be taken before the court." W. Va. Code § 29A-5-4(f) [1998], in part. This provision is cited in Wheeling-Pittsburgh Steel Corporation v. Rowing, 205 W. Va. 286, 293, 517 S.E.2d 763, 770 (1999), and is cited again and briefly discussed in Footnote 7 of the decision, but the case does not involve such irregularities. While the Court in its research has found no APA case involving subsection 4(f) that provides examples of "irregularities in procedure," to the Court, nonetheless, it seems likely such a circumstance would involve a claim the agency failed to follow required procedures. The Appellant would raise the issue with a procedural flaw allegation, and the circuit court would hear evidence to resolve the issue and having heard evidence, would make findings of fact. For an example of this scenario in a non-APA administrative appeal, the Court has determined that it is instructive to analyze the following case. In *writ of certiorari* proceedings, "the circuit court is authorized to take evidence independent of that contained in the record of the lower tribunal" to determine if "substantial rights have been violated." {See Syllabus Point 4, North v. Board of Regents, 160 W. Va. 248, 233 S.E.2d 411 (1977)}. An expelled medical student appealed expulsion. Various hearings were held at the university level and before the Board of Regents. The student alleged he was denied due process rights in the administrative proceedings that affirmed his expulsion, and our Supreme Court held the circuit court could take evidence to resolve those allegations. The case was *in certiorari* and not under the APA; however, the decision cites W. Va. Code § 29A-5-4(f) as analogous support in the Syllabus Point 4 holding.

From the Circuit Court's review and consideration of the testimony and documentary evidence adduced during the evidentiary hearings on the issue of "procedural irregularities", the Court notes that the DMV record generated in this administrative appeal may, or may not, be the result of some, if not all, of the "off-record" considerations of a Hearing Examiner administrative

relationship with the Hearing Examiner's supervisory staff, some of whom are lawyers and some of whom are not. While the Court granted the DMV's Motion to Exclude any examination of the Hearing Examiner, Mr. Bell, who created the subject record subsequently forwarded to the Circuit Court of Lincoln County within the context of the statutory requirements of this Administrative Appeal proceeding in support of the DMV Commissioner's Final Order, the Court heard very clear evidence from the other Hearing Examiners offered by the Appellant of how they are instructed and supervised, during training and educational conferences as well as during routine administrative dialogue, to overrule all of an opposing counsel's objections, and admit contested evidence into the record. While the DMV's witnesses appeared to deflect such evidence as misunderstandings or mis-recollections, the exhibits received into the evidence of this proceeding clearly and unambiguously demonstrate the contrary. When such evidence is applied and analyzed within the context of the subject DMV Commissioner's Final Order, such a blanket rationale as given by the Hearing Examiner/Commissioner's order becomes very suspect as being in violation of the standard of review.

During the administrative hearing that took place on April 10, 2007 before the Hearing Examiner, Mr. Bell, the Appellant's counsel made a number of objections to the Hearing Examiner's automatic and specific admission of certain forms or medium of evidence (see Transcript pages, 4, 6, 7, 8, 17-18, and 34). In response to each of these objections, the Hearing Examiner, on behalf of the Commissioner, summarily dismissed/overruled them each and every time. However, at the outset of the hearing, and continuing thereafter, the Hearing Examiner stated that he would "...take your objection under advisement, Counsel, and the issue will be addressed in the Final Order. But anyway, you (e. g. Trooper Miller) can continue." (Transcript, pages 6-7). Either this response, or similar responses were made throughout the transcript.

In this DMV Commissioner's Final Order of April 24, 2008, in response to separate and numerous legal objections made by the Appellant's counsel at the administrative hearing, the rationale articulated assumedly by the Hearing Examiner, Mr. Bell, that was adopted by the Commissioner was as follows:

On behalf of the Respondent, her Counsel placed multiple objections and/or motions on the record regarding the admissibility of certain evidence that was presented by the State in this matter. However, the Commissioner must respectfully over/deny any or all such objections and motions that were presented in this particular matter. Such a conclusion can safely be made with the full support of the West Virginia Code, the Code of State Rules in this state, well-established case law, and all other binding legal authorities that apply to these administrative proceedings. Therefore, with respect to the presentation of this Final Order, there is no need to fully entertain or dissect each and every mundane objection, motion, or irrelevant argument that was presented by either the Respondent or her Counsel in the case at bar.

During the Circuit Court's entertainment of the evidentiary hearing on the issue of alleged "procedural irregularities", there was clear evidence that while attending the 2007 training and education seminar, from their supervisors' instruction the Hearing Examiners "...were told (to) overrule all objections, not give an explanation, so that the record can be sorted out later so that when the final order is prepared, no evidence was excluded at the hearing and could possibly be used." This instruction was confirmed in writing by her supervisor (Appellant's Exhibit No. 1). Moreover, it appears from the Hearing Examiner's version of the Commissioner's Final Order of April 24, 2008, that he had complied with such instructions as well.

On review of such a basis for over-ruling the respective objections made by Appellant's counsel, such a ruling clearly seems to contradict the Hearing Examiner's be the result of the influence of the Hearing Examiner's supervisory and dictates of merely "overrule all of the objections and let it all in". Such an approach, if taken, completely ignores the justice due an

individual case's merits, or lack thereof, and defeats any operable due process concept of "fundamental fairness" required by the governing statutes as well as the West Virginia State Constitution (see Article III, Section 10).

Within this context, and as our Supreme Court has already ruled, a driver's license is a property interest and such interest is entitled to protection under Article III, Section 10 (see Abshire v. Cline, 193 W. Va. 180 (1995)). As a corollary, while ruling in the DMV's favor, our Supreme Court has clearly continued to employ a constitutional measure (the due process clause in Article III, Section 10) for reiterating that governmental administrative agencies, such as the DMV, are required to provide due process of law processing through its actions (see State ex rel Baker v. Bolyard, ___ 2007 W. Va. LEXIS 80 (2207)).

When such an approach is taken in the issuance of a decision, even by an administrative agency, the decision appears on its face to be arbitrary and capricious, a result of improper procedures, an unconstitutional denial of due process, etc, in violation of the applicable standard of review set out in West Virginia Code §29A-5-4(g)(1), (3) or (6). On the other hand, the outcome of the Commissioner's Final Order of April 24, 2008, may very well be properly supported by law and fact should there be removed, addressed and resolved these procedural and substantive questions that have arisen in this matter.

As a result of all of the above, the Court has determined that the interests of justice as well as judicial economy are best served by this Court issuing an order which reverses and remands this matter back to the DMV, as authorized by West Virginia Code §29A-5-4 for further proceedings in compliance with this order, in particular by expressly addressing the individual objections made by counsel and not by merely summarily overruling them by vague or inapplicable boiler-plate language.

Findings and Conclusions

UPON MATURE CONSIDERATION OF ALL OF WHICH, and after taking into consideration the entire administrative record generated in this matter as well as that generated on the administrative appeal, the Court does hereby make the following findings of fact and conclusions of law:

[1] That this Court has statutory and Rule-based jurisdiction and venue over the subject matter as well as the respective parties hereto, in accordance with the applicable provisions of the judicial review section of the "West Virginia Administrative Procedures Act" (e. g. APA), codified at West Virginia Code §29A-5-1, *et seq*, particularly Code §29A-5-4, inclusive, together with the above-cited points and authorities from West Virginia Code §17C-5A-2, *et seq*, and related case law; and,

[2] That the Court hereby approves and adopts the matters set out above in the "Procedural Posture" section, as if they were set forth herein with particularity, including the Circuit Court's Procedural Order previously issued on or about August 23, 2008 ; and,

[3] That the Court hereby approves and adopts the matters set out above in the "Discussion..." section, as if they were set forth herein with particularity as Findings and Conclusions; and,

[4] That given the statutory appeal in this matter by Ms. McCormick, this Court's standard of review may be framed by subsections (f) and (g) from West Virginia Code §29A-5-4, which are outlined as follows:

- (f) The review shall be conducted by the court without a jury and shall be upon the record made before the agency, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken before

the court. The court may hear oral arguments and require written briefs.

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

[5] That in light of the standards of review set out above, the Court has determined that the Appellant in this case has cited the proper authority and has established sufficient grounds from the administrative record, as well as the administrative appeal record, for the Court to conclude **at this time** "...that the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are: "(1) In violation of constitutional or statutory provisions; (3) Made upon unlawful procedures; and (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion"; and,

[6] That as a result of such, the Circuit Court has correspondingly determined that it is just

and reasonable, as well as necessary and equitable given the time-frame in this matter dictated by statute, that this matter should be **REVERSED AND REMANDED** for further proceedings in compliance with this Circuit Court Order; and,

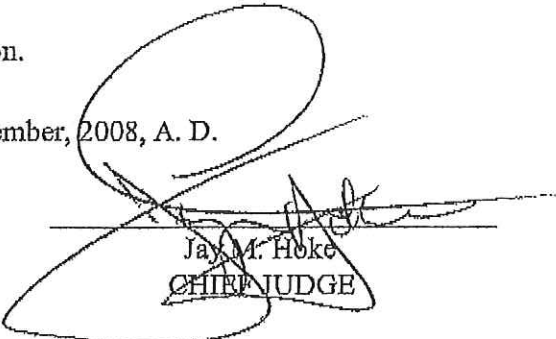
[7] That following the remand of this matter, however, the DMV may very well produce and issue a DMV Commissioner's Final Order from the same pleadings/hearing, etc, that properly supports the DMV's original determination. Nevertheless, whether or not that is the outcome, the previously issued DMV Commissioner's Final Order of April 24, 2008, without revision, at this time is not proper and cannot stand; and,

[8] That given the nature and scope of the Court's determinations made herein, the Court notes the **OBJECTIONS AND EXCEPTIONS** of both the Appellant and the Appellee to the numerous matters addressed by the Court.

All of which is hereby **ORDERED, ADJUDGED AND DECREED**.

It is further hereby **ORDERED, ADJUDGED AND DECREED** that the Clerk of this Court shall provide notice of the issuance of this Circuit Court Order on Administrative Appeal by forwarding a certified copy hereof upon all parties of record, through counsel as appropriate, particularly the DMV's counsel, Ms. Janet James, Assistant Attorney General, and to Appellant's counsel, David Moye, Esq; all in accordance with the applicable provisions of Rules 10.01-12.06, as well as 24.01, of the West Virginia Trial Court Rules, by USPS First Class Mail; by hand delivery; and by facsimile transmission.

ISSUED on this the 3rd day of November, 2008, A. D.



Jay M. Hoke
CHIEF JUDGE

2. Office of Administrative Hearings, General

a. Creation of the Office of Administrative Hearings

b. Mission Statement

OAH Forms

Transportation > Office of Administrative Hearings

Office of Administrative Hearings

The Mission of the Office of Administrative Hearings is to provide a neutral forum for the fair and impartial resolution of the license revocations initiated by the Division of Motor Vehicles.

Creation of OAH

Senate Bill 186 which passed during the 2010 Regular Session creates the Office of Administrative Hearings and becomes effective on June 11, 2010. The purpose of the Office of Administrative Hearings is to hold administrative hearings for all license revocation orders issued by the West Virginia Division of Motor Vehicles. Relevant portions of the Bill that create the Office of Administrative Hearings are below:

§17C-5C-1. Office created; appointment of Chief Hearing Examiner.

- a. The Office of Administrative Hearings is created as a separate operating agency within the Department of Transportation. *Click [here](#) for more details on how OAH is integrated into DOT.*

§17C-5C-2. Organization of Office.

- a. The Chief Hearing Examiner is the chief administrator of the Office of Administrative Hearings.

§17C-5C-3. Jurisdiction of Office of Administrative Hearings.

The Office of Administrative Hearings jurisdiction to hear and determine all:

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

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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.

§17C-5C-4. Hearing Procedures.

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of West Virginia

- a. A hearing before the office shall be heard de novo and conducted pursuant to the provisions of the contested case procedure set forth in article five, chapter twenty-nine-a of this code to the extent not inconsistent with the provisions of chapters seventeen-B and seventeen-c of this code. In case of conflict, the provisions of chapters seventeen-B and seventeen-c of this code shall govern.
- b. Notwithstanding any provision of this code to the contrary, the Commissioner of the Division of Motor Vehicles may be represented at hearings conducted by the Office and evidence submitted by the Commissioner may be considered in such hearings with or without such representation.
- c. The West Virginia Rules of Evidence governing proceedings in the courts of this state shall be given like effect in hearings held before a hearing examiner. All testimony shall be given under oath.
- d. Except as otherwise provided by this code or legislative rules, the Commissioner of Motor Vehicles has the burden of proof.
- e. The hearing examiner may request proposed findings of fact and conclusions of law from the parties prior to the issuance by the office of the decision in the matter.
- f. Hearings shall be exempt from the requirements of article one, chapter twenty-nine-b of this code.

§17C-5C-5. Transition from Division of Motor Vehicles to the Office of Administrative Hearings.

- a. In order to implement an orderly and efficient transition of the administrative hearing process from the Division of Motor Vehicles to the Office of Administrative Hearings, the Secretary of the Department of Transportation may establish interim policies and procedures for the transfer of administrative hearings for 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-A, seventeen-B, seventeen-C, seventeen-D and seventeen-E of this code, currently administered by the Commissioner of the Division of Motor Vehicles, no later than October 1, 2010.

Hearing Requests

All requests for hearings involving incidents or arrests that occurred prior to June 11, 2010 are under the jurisdiction of the West Virginia Division of Motor Vehicles and should be sent to the following address:

West Virginia Division of Motor Vehicles
P.O. Box 17200
Charleston, WV 25317

All requests for hearings involving incidents or arrests that occurred on or after June 11, 2010 are under the jurisdiction of the Office of Administrative Hearings and should be sent to the following address:

Office of Administrative Hearings
P.O. Box 11750
Charleston, WV 25339

or sent by email to oah@wv.gov

OFFICE OF ADMINISTRATIVE HEARINGS

The Mission of the
Office of Administrative Hearings
is to provide a neutral forum
for the fair and impartial resolution
of the license revocations initiated by
the Division of Motor Vehicles.

John G. Hackney, Jr.

Chief Hearing Examiner/Director

3. Types of Revocation Hearings Conducted by the Office of Administrative Hearings

OAH – TYPES OF HEARINGS CONDUCTED

DUI

DUI causing bodily Injury

DUI with passenger under 16

DUI causing death

Aggravated DUI

Aggravated DUI causing bodily injury

Aggravated DUI with passenger under 16

Aggravated DUI causing death

DUI when under 21

DUI with refusal

Knowingly permitting

Limited Scope for Aggravated DUI

Limited Scope for Refusal

Limited Scope for Bodily Injury

Identity

4. Written Objections filed
with the Office of
Administrative Hearings
between **January 2011**
through January 2012

TOTAL WRITTEN REQUESTS RECEIVED AT THE OFFICE OF ADMINISTRATIVE

JANUARY 2011	229
FEBRUARY 2011	251
MARCH 2011	214
APRIL 2011	233
MAY 2011	210
JUNE 2011	104
TOTAL	1241
JULY 2011	232
AUGUST 2011	267
SEPTEMBER 2011	225
OCTOBER 2011	186
NOVEMBER 2011	201
DECEMBER 2011	122
JANUARY 2012	258

JANUARY 2011 TO JUNE 30, 2011 TOTAL: 1241

YEAR TO DATE: 2732 HEARINGS REQUESTED BY DRIVERS

5. Administrative Hearings scheduled between **October 1, 2010, through June 30, 2011**, with the disposition of cases:

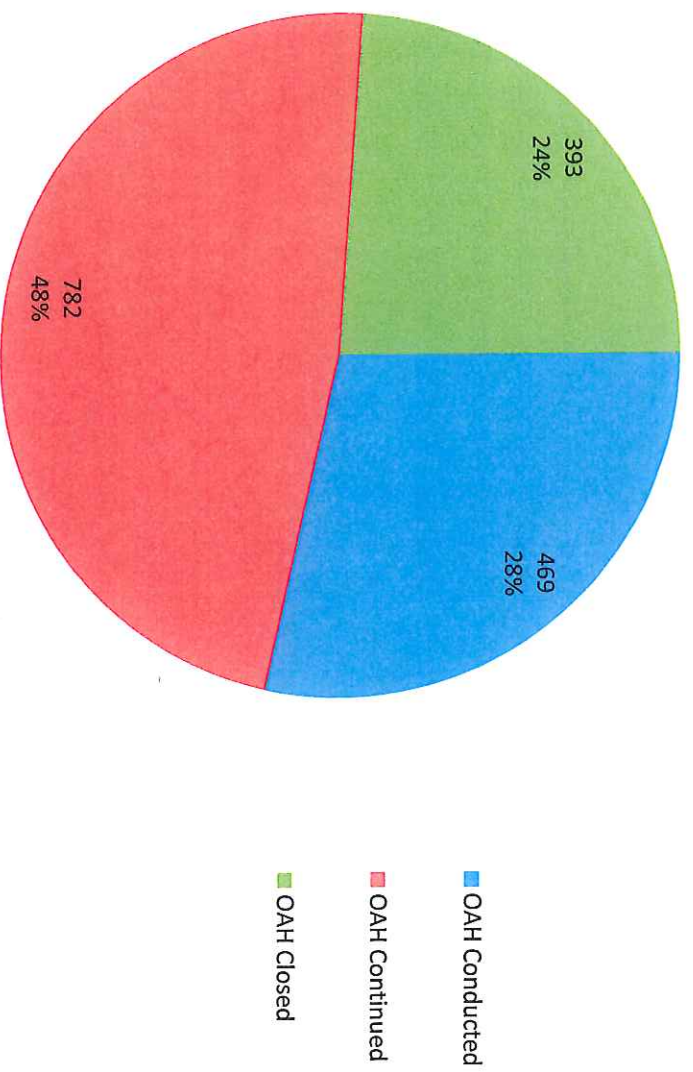
- a. OAH Hearings
- b. DMV Hearings
- c. Overview of Combined

	A	B	C	D	E
1	10/10 to 7/11	OAH Scheduled	OAH Conducted	OAH Continued	OAH Closed
2					
3	TOTALS	1644	469	782	393
4					
5					
6					

The OAH is responsible for conducting the administrative hearing in all license revocation matters issued by the Commissioner of the DMV. The hearing process consists of scheduling the hearing to the appropriate hearing examiner and area assigned. Should the case be "continued", the file is returned to the central office of the OAH and the hearing is placed on the docket for rescheduling. Should the evidentiary hearing be "conducted", the hearing examiner is responsible to prepare a final order and submit same along with the file to the central office for further processing. The "closed" file category listed above reflects only adjudication of cases which have been withdrawn by the driver or a conviction of the parallel criminal offense was received. The statistics regarding the final resolution of cases occurring after a full evidentiary hearing is listed in a separate section of this report.

WV DOT
Hearings Conducted, Continued, and Closed
October 1, 2010 - June 30, 2011

OAH Hearings Conducted, Continued, and Closed
Oct 1, 2010 - June 30, 2011



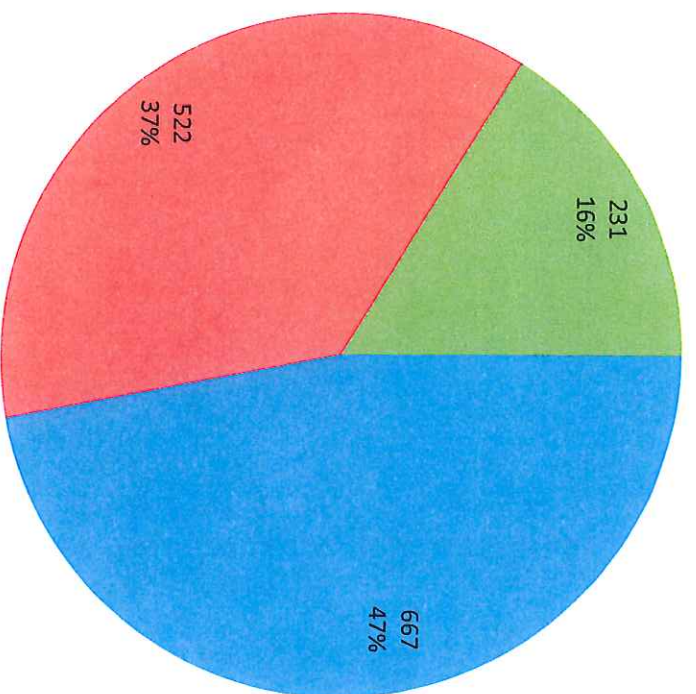
Type	Number
OAH Conducted	469
OAH Continued	782
OAH Closed	393
<i>Total</i>	<i>1644</i>

	A	B	C	D	E
1	10/10 to 7/11	DMV Scheduled	DMV Conducted	DMV Continued	DMV CLOSED
2					
3	TOTALS	1420	667	522	231

The OAH is responsible for conducting the administrative hearings for the DMV which fall within the purview of the previous statute and reflect the cases remaining during the transitional phase from the DMV to the OAH. The DMV schedules the hearings and provides the file directly to the hearing examiner. The hearing process consists of scheduling the hearing to the appropriate hearing examiner and area assigned. Should the case be "continued", the file is returned to the DMV and the hearing is placed on the docket for rescheduling. Should the evidentiary hearing be "conducted", the hearing examiner is responsible to prepare a final order and submit same along with the file to the DMV for further processing. The "closed" file category listed above reflects only adjudication of cases which have been withdrawn by the driver or a conviction of the parallel criminal offense was received. The statistics regarding the final resolution of cases occurring after a full evidentiary hearing is not available to the OAH.

**WV DOT Division of Motor Vehicles
Hearings Conducted, Continued, and Closed
October 1, 2010 - June 30, 2011**

**DMV Hearings Conducted, Continued, and Closed
Oct 1, 2010 - June 30, 2011**



- DMV Conducted
- DMV Continued
- DMV Closed

Type	Number
DMV Conducted	667
DMV Continued	522
DMV Closed	231
Total	1420

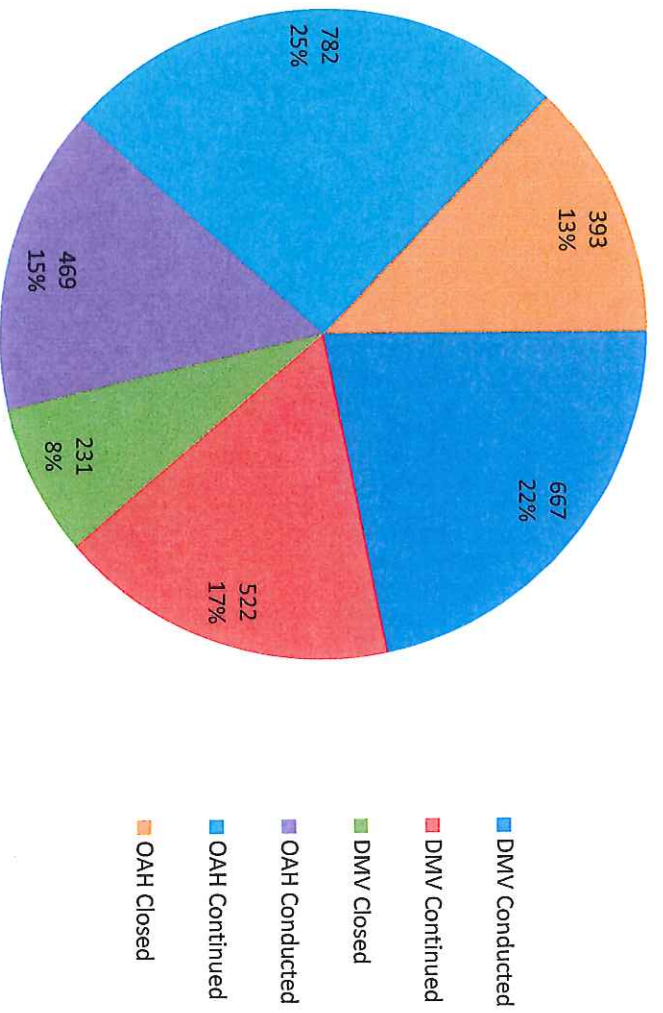
	A	B	C	D	E	F	G	H	I
1	10/10 to 7/11	DMV Scheduled	DMV Conducted	DMV Continued	DMV CLOSED	OAH Scheduled	OAH Conducted	OAH Continued	OAH Closed
2									
3	TOTALS	1420	667	522	231	1644	469	782	393
4									
5									
6									
7									

OVERVIEW OF THE TOTAL NUMBER OF DMV AND OAH HEARINGS SCHEDULED, CONDUCTED,
CONTINUED AND CLOSED

OCTOBER 1, 2010 TO JULY 1, 2011

WVVDOT
Hearings Conducted, Continued, and Closed
October 1, 2010 - June 30, 2011

OAH and DMV Hearings Conducted, Continued, and Closed
Oct 1, 2010 - June 30, 2011



Type	Number
DMV Conducted	667
DMV Continued	522
DMV Closed	231
<i>Subtotal - DMV</i>	<i>1420</i>
OAH Conducted	469
OAH Continued	782
OAH Closed	393
<i>Subtotal - OAH</i>	<i>1644</i>
Total	3064

6. Office of Administrative Hearings -
Orders entered between **October 1,
2010, through June 30, 2011:**

- a. Orders
- b. Final Orders by Disposition

OFFICE OF ADMINISTRATIVE HEARINGS

FINAL ORDERS ENTERED

OCTOBER 1, 2010

THRU

JUNE 30, 2011

Convictions: 55

Deceased: 03

Deferrals: 48

Failure to Appear: 03

Final Order: 89

Guilty Plea: 75

Nolo/CDL: 04

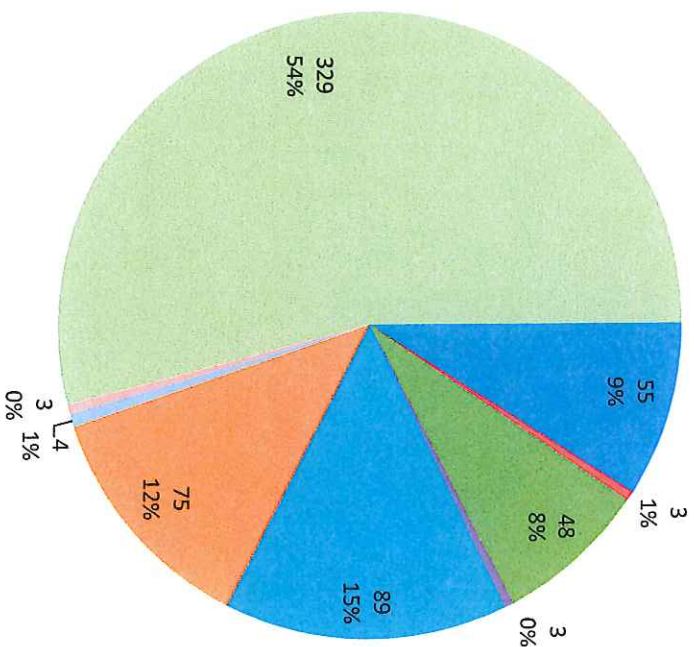
Revocation Rescinded: 03
By the DMV

Withdrawals: 329

TOTAL: 609

**WV DOT Office of Administrative Hearings
Final Orders Entered
October 1, 2010 - June 30, 2011**

**Final Orders Entered
Oct 1, 2010 - June 30, 2011**



- Convictions
- Deceased
- Deferrals
- Failure to Appear
- Final Order
- Guilty Plea
- Nolo/CDL
- Revocation Rescinded
- Withdrawals

OFFICE OF ADMINISTRATIVE HEARINGS

FINAL ORDERS ENTERED

OCTOBER 1, 2010 thru JUNE 30, 2011

Affirmed: 78

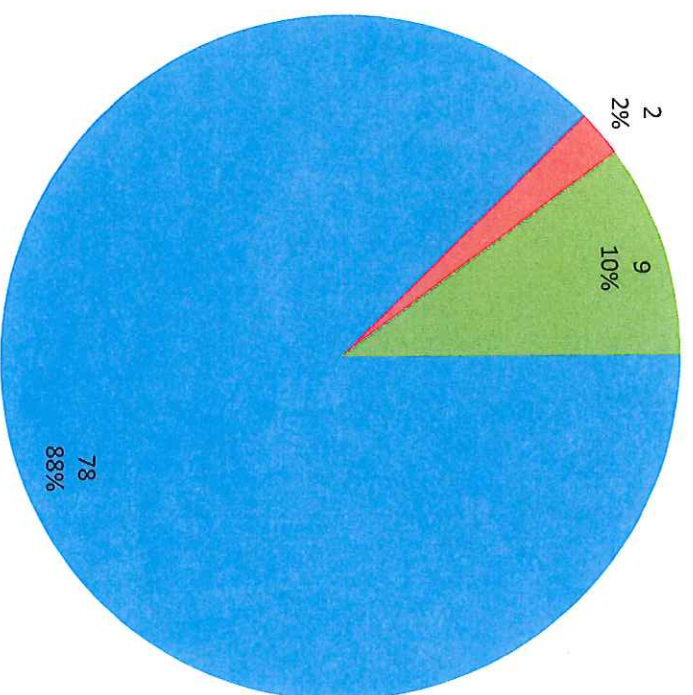
Modified: 02

Reversed: 09

TOTAL: 89

WVDDOT Office of Administrative Hearings
Final Orders Entered
October 1, 2010 - June 30, 2011

Final Orders Entered
Oct 1, 2010 - June 30, 2011



■ Affirmed
■ Modified
■ Reversed

Type	Number
Affirmed	78
Modified	2
Reversed	9
Total	89

7. Office of Administrative Hearings
– Orders entered between **July 1, 2011, through January 31, 2011:**

- a. Orders
- b. Final Orders by Disposition

OAH ORDERS ENTERED FROM: July 1, 2011 Thru January 31, 2012

Convictions: 30

Deceased: 08

Deferrals: 22

Failure to Appear: 31

Final Orders: 219

Guilty Plea: 154

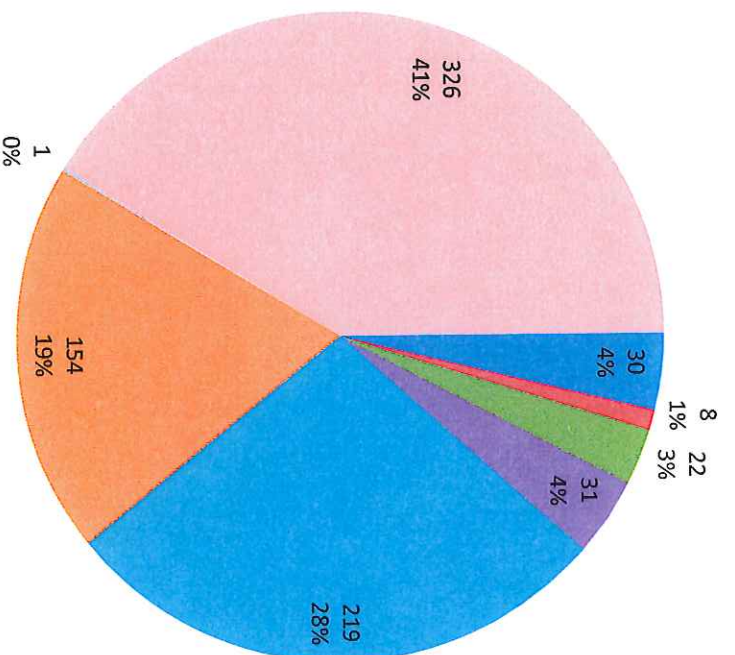
Revocation Rescinded: 01
By the DMV

Withdrawals: 326

Total: 791

WVDDOT Office of Administrative Hearings
Final Orders Entered
July 1, 2011 - January 31, 2012

Final Orders Entered
July 1, 2011 - Jan 31, 2012



- Convictions
- Deceased
- Deferrals
- Failure to Appear
- Final Order
- Guilty Plea
- Revocation Rescinded
- Withdrawals

Type	Number
Convictions	30
Deceased	8
Deferrals	22
Failure to Appear	31
Final Order	219
Guilty Plea	154
Revocation Rescinded	1
Withdrawals	326
Total	791

OFFICE OF ADMINISTRATIVE HEARINGS

FINAL ORDERS ENTERED

JULY 1, 2011 thru January 2012

Affirmed: 173

Modified: 17

Reversed: 29*

TOTAL: 219

*Includes Limited Scope after Guilty Plea

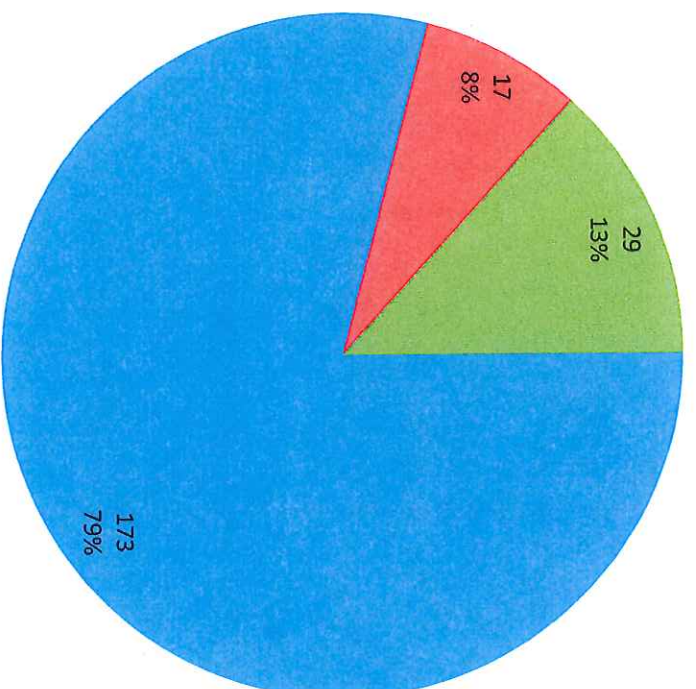
WVDDOT Office of Administrative Hearings

Final Orders Entered

July 1, 2011 - January 31, 2012

Final Orders Entered

July 1, 2011 - Jan 31, 2012



■ Affirmed
■ Modified
■ Reversed

Type	Number
Affirmed	173
Modified	17
Reversed	29 *
<i>Total</i>	<i>219</i>

* Includes Limited Scope after Guilty Plea

8. Office of Administrative Hearings
– Orders entered by the Office of
Administrative Hearings between
**October 1, 2010 through January
31, 2012:**

- a. Orders
- b. Final Orders by Disposition

TOTAL OAH ORDERS ENTERED THRU 1/31/12

Convictions: 85

Deceased: 11

Deferrals: 70

Failure to Appear: 34

Final Order: 308

Guilty Pleas: 229

Nolo/CDL: 04

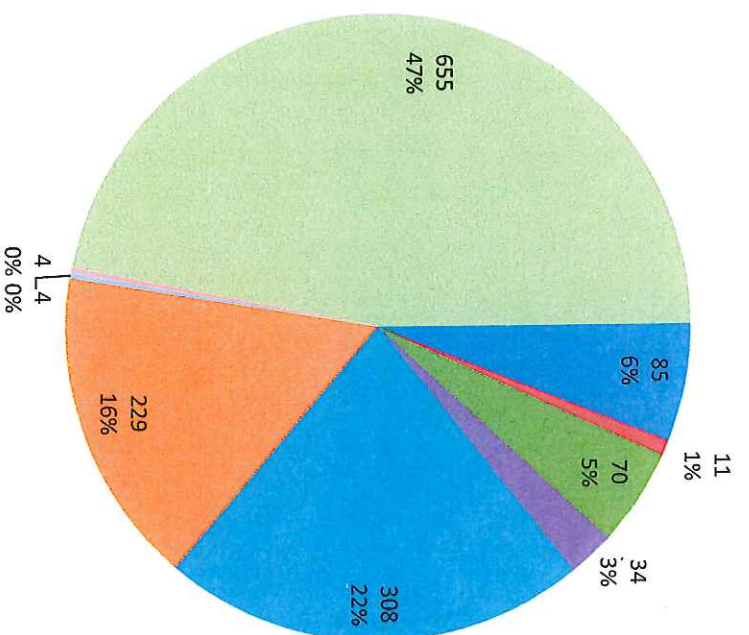
Revocation Rescinded:
By the DMV 04

Withdrawals: 655

TOTAL: 1400

**WV DOT Office of Administrative Hearings
Total Orders Entered
through January 31, 2012**

**Total OAH Orders Entered
through Jan 31, 2012**



Type	Number
Convictions	85
Deceased	11
Deferrals	70
Failure to Appear	34
Final Order	308
Guilty Plea	229
Nolo/CDL	4
Revocation Rescinded	4
Withdrawals	655
Total	1400

- Convictions
- Deceased
- Deferrals
- Failure to Appear
- Final Order
- Guilty Plea
- Nolo/CDL
- Revocation Rescinded
- Withdrawals

OFFICE OF ADMINISTRATIVE HEARINGS

FINAL ORDERS ENTERED

October 1, 2010 thru January 2012

Affirmed: 251

Modified: 19

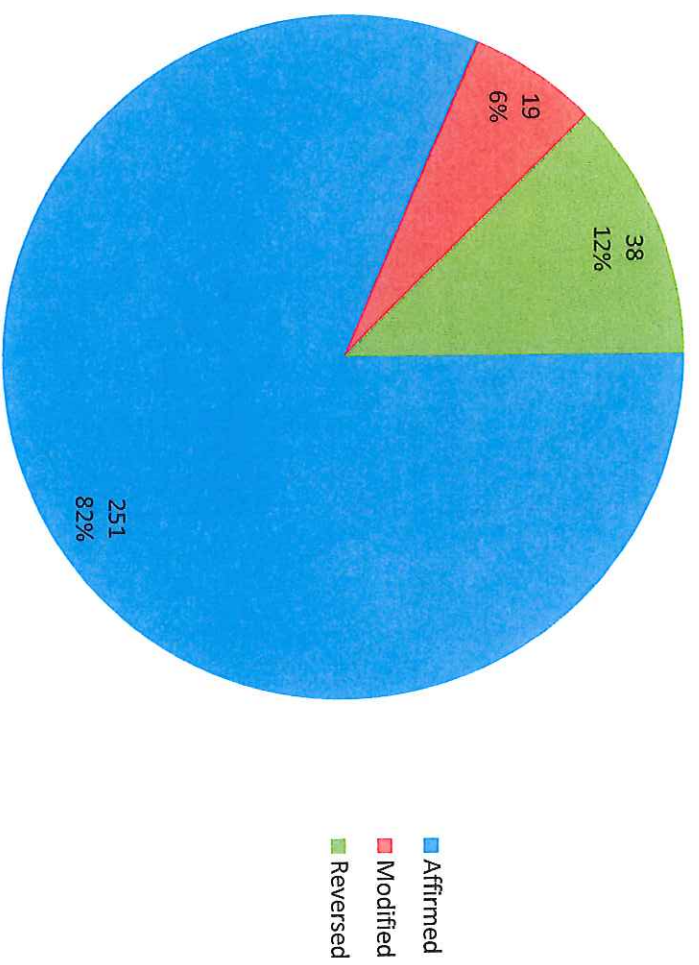
Reversed: 38*

TOTAL: 308

*Includes Limited Scope after Guilty Plea

**WV DOT Office of Administrative Hearings
Final Orders Entered
October 1, 2010 - January 31, 2012**

**Final Orders Entered
October 1, 2010 - Jan 31, 2012**



Type	Number
Affirmed	251
Modified	19
Reversed	38 *
<i>Total</i>	<i>308</i>

251
19
38
308

* Includes Limited Scope after Guilty Plea

(

(

(



9. Office of Administrative
Hearings Final Orders
pending adjudication as of
February 1, 2012

PENDING ADJUDICATION OF FINAL ORDERS AS OF FEBRUARY 2012

Name/Position	OAH # of Final Orders Pending	DMV # of Final Orders Pending
James McClain, Deputy Director	2	
Ed Janco, Contract Employee	36	
Melissa Carte, Paralegal	40	
Karla Huff, Paralegal	22	
Lori Blaney, Paralegal	65	
Robert DeLong, Hearing Examiner	16	8
William Cox, Hearing Examiner	3	
Lou Ann Proctor, Hearing Examiner	10	4
Ron See, Hearing Examiner	7	0
John Rundle, Hearing Examiner	24	23
Amy Humen, Hearing Examiner	5	3
William Freeman, Hearing Examiner	19	5
Carolyn Higginbotham, Hearing Examiner	15	13
Laura Martin, Hearing Examiner	0	0
Erica Tamburin, Hearing Examiner	20	12
TOTAL	284	** 68

** Any pending final order adjudication noted in the second column for the Division of Motor Vehicles denotes cases which have been conducted by an OAH hearing examiner, however the actual final order once completed will be submitted to the Division of Motor Vehicles by the hearing examiner and issued by the Division of Motor Vehicles.

** Currently the Division of Motor Vehicles is in possession of files that have not been heard by an OAH hearing examiner. The OAH conducts those hearings on behalf of the Division of Motor Vehicles. As of this date, the OAH has expended numerous man hours completing the Division of Motor Vehicle's backlog of cases.

10. Transcript Requests,
Requests for Audio of
Administrative Hearings,
and Certified Copy of OAH
Court File pertaining to
Circuit Court Appeals
between **January 1, 2011**
through January 31, 2012

2011	Jan	Feb	March	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Total 2011
<i>Completed</i>													
Audio requests						8	14	8	4		2	3	39
Transcripts					1			1				1	3
Transcripts-Certified					1	1		8		2	2	5	19
TOTAL 2011					2	9	14	17	4	2	4	9	61

2012	Jan	Feb	March	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Total 2012
<i>Completed</i>													
Audio requests	4												4
Transcripts	1												1
Transcripts-Certified	9	3											12
<i>To Be Completed</i>													
Audio requests		5											5
Transcripts		4											4
Transcripts-Certified		5											5
Audio requests		1	<<<< Dowd-needs reheld										1
Audio requests		2	<<<<Fall, Tina - one hearings need reheld										2
Audio requests		1	<<<<Karrasch - needs reheld										1
TOTAL 2012	14	21											35

Transcript Requests, Requests for Audio of Administrative Hearings

And

Certified Copy of OAH Court Files Pertaining to Circuit Court Appeals