West Virginia

Office of Administrative Hearings

FY 2014

Annual Report

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INTRODUCTION BY THE DIRECTOR/CHIEF HEARING EXAMINER

THE OFFICE OF ADMINISTRATIVE HEARINGS, ITS ORIGIN, MISSION & EVOLUTION TO DATE

The Office of Administrative Hearings (OAH) is prescribed the primary mission of providing a neutral forum for the fair and impartial resolution of contested cases involving the revocation, denial, disqualification or suspension of - a driver's license by the West Virginia Division of Motor Vehicles (DMV). OAH serves the DMV and the public at large in conducting the hearing process. OAH operates under the authority of the WV Department of Transportation and has been in existence operationally since October 2010.

OAH was created as the result of a legislative enactment in 2010 that transferred jurisdiction for the hearing and adjudicatory processes from DMV to OAH, effective June 11, 2010 - in cases contested by persons whose licensing privileges are at stake. This transfer of jurisdiction was made with the principal purpose of strengthening and preserving adherence to principles of fundamental fairness in these cases. The vast majority of these cases involve contested revocations for driving under the influence of alcohol, controlled substances or drugs.

Since the Office has been in operation, it has literally been required to build an agency of government from the ground level. Now in its fifth year of existence, OAH has accomplished a wide range of goals designed to strengthen and preserve application of fundamental principles of due process in the hearing and adjudicatory processes. Further, docketing and scheduling procedures have evolved from a rudimentary beginning to the current stage of substantial sophistication and efficiency.

At its inception, OAH operated without the existence of legislative rules to govern hearing procedures and other matters that attended the agency's primary business of conducting fair and impartial hearings. It, therefore, borrowed existing DMV rules as guidelines. Since that time, OAH proposed legislative rules that were enacted into law. The implementation of these rules has significantly enhanced the OAH hearing process – while providing needed guidelines to the parties that appear before OAH.

OAH FRONT LINERS – THE HEARING EXAMINERS

The hearing examiners of OAH are essentially the face of the Agency. They are the employees charged with the responsibility for conducting the hearings in compliance with OAH's primary mission to be fair and impartial. They are, without exception, dedicated individuals who are substantially underpaid for the work they are required to perform.

Most of the hearing examiners conduct hearings in DMV regional offices dispersed throughout the State, but otherwise work from their residences when not in hearing status.

Hearings are also conducted in the agency's central office located in Charleston, the State Capitol.

OAH management firmly believes improved time standards related to issuing final orders, post hearing, could be achieved in the event suitable office space was available for hearing examiners to report to, rather than continuing the existing practice, inherited from DMV, of hearing examiners having to work out of their places of residence when not in hearing status. In accordance with this belief, OAH explored the prospect of securing suitable office space for hearing examiners located in various regions around the State with Department of Transportation Officials. It appears, however, due to current and projected fiscal constraints, this proposal may not be achievable in the foreseeable future.

One of the major challenges OAH initially was forced to face – and continues to face, though to a much lesser degree than before – relates to Management's efforts in making sure all hearing examiners meet threshold standards in relation to statutory requirements, concerned primarily with OAH's final work product; that is, the final orders it issues after full evidentiary hearings have been conducted. The need for well-designed and more frequently held training sessions - designed to effectively equip hearing examiners with a better understanding of legal concepts and better writing skills - cannot be over-emphasized. This problem permeates into a need for the Chief Hearing Examiner, Deputy Chief Hearing Examiner and Manager of the Hearing Examiners, all of whom are attorneys - and the paralegals as well – to spend disproportionate amounts of time reviewing hearing examiners' draft decisions - not only to ensure proper application of legal principles, but also to correct basic mistakes involving grammar, spelling and syntax.

On a positive note, all of the currently employed hearing examiners, without exception, capably conduct the hearings they hold. Where room for improvement lies, as aforesaid, is in the draft orders they submit after conducting full evidentiary hearings.

When OAH was created, all of the hearing examiners who were employed by DMV were grandfathered into their positions as hearing examiners – i.e., when the responsibility for conducting hearings was transferred from DMV to OAH. Most were not attorneys. In accordance with OAH's mission to provide a fair and impartial hearing process, it made a very conscious decision to require the hearing examiners to be significantly more responsible for their work than what they had been accustomed to previously. This decision required them to exercise significantly more discretion than they had previously - as employees for DMV. Without exception, the hearing examiners that transferred to OAH from DMV and still remain with OAH, would (if asked) honestly express that their work requirements have exponentially grown. Regrettably, their pay has remained stagnant.

All of the current OAH hearing examiners are passionate about their work and always strive to reach the right result in accordance with applicable legal standards. Further, though some of the original hearing examiners, previously employed by DMV, were reluctant to be burdened with greater discretion and authority, particularly without a commensurate

increase in pay, all that currently remain, without exception, have demonstrated a remarkable acclimation and resilience in accepting the added weight of greater responsibility and discretion.

Since the inception of the Agency, it has been OAH's preference - when hearing examiners retire or resign, to replace them with licensed attorneys. Since the inception of OAH, five of the original hearing examiners who transferred from DMV have been replaced, two by licensed attorneys. However, because OAH cannot offer salaries commensurate with pay scales normally associated with positions that require licensed attorneys, OAH has been only modestly successful in achieving its preference.

As a result of the foregoing, OAH has experienced some difficulty in finding and retaining competent hearing examiners. This difficulty in recruitment and retention is undoubtedly tied to the inability to offer pay commensurate with the high responsibility that accompanies the job of a hearing examiner -as that responsibility has been defined since OAH took-over the hearing process.

The gist of the situation is best exemplified by an anomaly that exists when comparing pay of the hearing examiners - who essentially act as judges – to the pay of those who appear before them as advocates. Under the current institutional framework - salaries of hearing examiners compared to salaries of assistant attorneys general who represent DMV - reveal a gross disparity; particularly when considering the role of one who judges cases - relative to one who merely advocates. This disparity in pay almost certainly also exists relative to income levels of most private attorneys who appear in front of the hearing examiners.

In the overwhelming majority of cases, OAH Hearing Examiners earn less than half the salaries of the assistant attorneys general who represent the interests of DMV. Until this disparity is sufficiently addressed, it will remain significantly challenging to attract and retain competent hearing examiners.

In spite of these demanding challenges, OAH has been successful in filling vacancies for hearing examiners that arise – with licensed attorneys and others who are sufficiently competent. Another positive note is that the drafting of final orders has significantly improved from OAH's earlier times. While an occasional draft order received from a hearing examiner falls below a minimal threshold of acceptability, requiring someone in the central office to make more corrections than should otherwise be the case, significant improvement from the early days of OAH is noted.

To Strictly Apply the Rules of Evidence or Not & the State Supreme Court of Appeals

From the inception of OAH, portions of provisions contained in the Statute that created OAH – and remain in the Statute - were interpreted by OAH as requiring stricter adherence to the State Rules of Evidence than had been the case prior to OAH's inception.

(*See* West Virginia Code § 17C-5C-4(a) & (c)).[1] Additionally, OAH's understanding of the "Legislative Intent" that surrounded the creation of the Statute also seemed to bolster this interpretation - given the circumstances existing at the time - that appeared to be part and parcel of the motivation of the Legislature to divest DMV of jurisdiction, while prescribing that OAH's primary mission was to be fair and impartial.

This interpretation constituted a significant departure from hearing procedures previously employed by DMV. However, a State Supreme Court of Appeals decision[2] published in February 2014, substantially implied that OAH's original interpretation was erroneous and that evidentiary submissions are not subject to strict adherence to the rules of evidence – as required in the courts. Rather, this Supreme Court holding stands for the proposition that DMV's documentary evidence is admissible under the provisions of West Virginia Code §29A-5-2(b) - as had been the case when DMV conducted the administrative hearing process. However, this holding, derived from the consolidated cases of *Odum* and *Doyle*, referenced in footnote 2 below, did not squarely address the exact issue regarding OAH's interpretation that strict adherence to the Rules of Evidence is required. OAH has, however, become aware of a case, now pending before the State Supreme Court of Appeals that seems to squarely frame the issue.

OAH ACHIEVEMENTS AND COST SAVINGS TO DATE

Significant achievements by OAH to date - include the enactment of Legislative Rules governing the hearing process and the implementation of electronic docketing and filing systems that have substantially reduced costs associated with paper requirements. Additionally, these electronic systems have dramatically reduced costs associated with the physical delivery of paper files - which, in the past, were required to be incurred in order to physically deliver files to hearing examiners assigned to various regions throughout the State. Rather than having to continue to incur these costs to pay UPS or similar providers, the capability has arrived to electronically transfer files.

Other cost saving achievements made possible through past OAH legislative initiatives enacted into law - include the use of email, fax and regular mail in place of what in the past had required certified mail - to provide notices, orders and final orders to the DMV and, when available, to the opposing parties who contest DMV orders. Further, OAH is now authorized to collect fees for the provision of audios of administrative hearings, transcripts and file documents from requesting parties. This had not been the case at OAH's inception.

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[1] Subsection (a) states: "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 [§§ 29A-5-1 et seq.], chapter twenty-nine-a of this code to ***to the extent not inconsistent with the provisions of chapters seventeen-B [§§ 17B-1-1 et seq.] and seventeen-c [§§ 17C-1-1 et seq.] of this code. In case of conflict, the provisions of chapters seventeen-B and seventeen-c of this code shall govern.***" (Emphasis added). Subsection (c) states in pertinent part: "***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.***"

[2] Steven O. Dale, Acting Commissioner of the West Virginia Division of Motor Vehicles v. Odum, 233 W.Va.601, 760 S.E.2d. 415 (2014) .

In further initiatives, designed to reduce costs without loss of quality of work product or production, the OAH downgraded an Attorney II position, whose primary responsibility was supervision of the paralegals, to a lead paralegal position. It has also downgraded a Customer Service Representative position to an Office Assistant 3, and two Office Assistant 3 positions to Office Assistant 2 positions.

CURRENTLY PENDING LEGISLATIVE PROPOSALS TO REDUCE COSTS AND RELIEVE TAXPAYERS FROM TOTALLY SUBSIDIZING THE HEARING PROCESS

To defray the costs of the Hearing process, OAH is currently proposing legislation that would authorize the collection of a fifty dollar filing fee from persons petitioning for a hearing – the vast majority of whom are charged with DUI offenses. This proposed fee, if authorized, would significantly defray OAH operational costs, while consequently, lessening the cost to the tax payers, who currently subsidize the entire cost of hearings for persons whose licenses are sought to be revoked or suspended as the result of being charged with DUI offenses. As an aside to this situation, DMV is still statutorily authorized to collect a "docketing fee" in spite of the fact it is no longer responsible for providing hearings for persons charged with offenses that affect their driving privileges and that OAH must shoulder all such costs related to providing hearings.

PERSONNEL EMPLOYED BY OAH

OAH employs twelve Hearing Examiners, an Attorney II who supervises the Hearing Examiners and Paralegals, a Lead Paralegal, three Paralegals, a Supervisor II over the docketing section, five Office Assistant IIIs, two Office Assistant IIs, an Administrative Service Manager I, an Administrative Services Assistant II, an Attorney III Deputy Director, an Administrative Secretary to the Director, and the Director of the Agency, for a total of 30 employees.

FISCAL YEAR 2014 STATISTICS

Fiscal Year 2014 ended with some disappointing statistics in relation to past years. Final orders issued and the number of full evidentiary hearings scheduled and conducted did not reflect the more robust numbers of previous years. These numbers were down as a result of OAH experiencing extended absences of a significant number of key employees who suffered from serious health problems or who had a close family member who faced grim prognosis. Further, a number of Hearing Examiners resigned or retired, leaving large backlogs of unfinished cases, many in which no final order draft had been completed or even partially drafted. This situation, in turn, resulted in over-extending the remaining employees relative to the workload they faced.

However, a comparison of the preliminary statistics compiled for the first six months of fiscal year 2015, to the total number of final orders issued during the entire fiscal year 2014, reveals that the total number of all final orders issued by OAH has increased by approximately 73%. More significantly, during the same time frame, the total number of final

orders issued by OAH after the holding of a full-evidentiary hearing has increased by approximately 84%. This is, undoubtedly, a reflection of a sustained and fully-staffed work force that has remained substantially healthier than was the case in Fiscal Year 2014.

OAH'S TRACK RECORD OF OPERATING WELL UNDER BUDGETARY APPROPRIATIONS

Since the inception of OAH, it has operated under all fiscal year budget appropriations. In Fiscal Year 2011, the fiscal year of OAH's inception, an unexpended balance of $614,785.88 remained which equated to 38% of OAH's total annual budget that year. In Fiscal Year 2012 an unexpended balance of 251,741.29 remained which accounted for 13% of its total budget. In Fiscal Year 2013 an unexpended balance of $153,056.98 remained representing 8% of its total budget; and, in Fiscal Year 2014 an unexpended balance of $408,554.00 remained which accounted for 21% of its total budget appropriation. In the current fiscal year - this trend continues.

COST VS. BENEFIT

In conclusion, the benefit in providing fairness and impartiality in the hearing process, in accordance with due process requirements, though perhaps not amenable to precise quantification, is of preeminent value to the citizens of West Virginia, particularly to those who become involved in the hearing process and who hold an important property interest[3] embodied in the drivers' licenses they possess.

Respectfully Submitted this February 15, 2015
John G. Hackney, Jr., Director of OAH

[3]As recognized by the West Virginia State Supreme Court of Appeals. "A driver's license is a property interest which requires the protection of this State's Due Process Clause before its suspension can be obtained under the implied consent law." W.Va. Code § 17C-5A-1 et seq. Syl. Pt. 1, *Jordan v. Roberts*, 161 W.Va. 750, 246 S.E.2d 259 (1978). "A driver's license is a property interest and such interest is entitled to protection under the Due Process Clause of the West Virginia Constitution." Syl. Pt. 1, *Abshire v. Cline*, 193 W.Va. 180, 455 S.E.2d 549 (1995).

HISTORY OF THE OFFICE OF ADMINISTRATIVE HEARINGS

The 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 the OAH is created as separate operating agency within the West Virginia Department of Transportation, and the transition of authority from the Division of Motor Vehicles to the OAH was completed by October 1, 2010, as mandated. However, the Hearing Examiners employed by the OAH continued to conduct hearings on behalf of the Division of Motor Vehicles regarding alleged offenses which occurred prior to the effective date of the statute.[4]

Specifically, the creation of the Office of Administrative Hearings and the organization of the office are addressed in West Virginia Code §17C-5C-1 and §17C-5C-2. Those sections state:

§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.

(b) The Governor, with the advice and consent of the senate, shall appoint a director of the office who shall serve as the administrative head of the office and as chief hearing examiner.

(c) Prior to appointment, the Chief Hearing Examiner shall be a citizen of the United States and a resident of this state who is admitted to the practice of law in this state.

(d) The salary of the Chief Hearing Examiner shall be set by the Secretary of the Department of Transportation. The salary shall be within the salary range for comparable administrators as determined by the State Personnel Board created by section six, article six, chapter twenty-nine of this code.

(e) The Chief Hearing Examiner during his or her term shall:
   (1) Devote his or her full time to the duties of the position;
   (2) Not otherwise engage in the active practice of law or be associated with any group or entity which is itself engaged in the active practice of law: Provided, That nothing in this paragraph may be construed to prohibit the Chief Hearing Examiner from being a member of a national, state or local bar association or committee, or of any other similar group or organization, or to prohibit the

[4] NOTE: A decision issued on July 20, 2012, by the Supreme Court of Appeals establishes THAT THE DMV RETAINS JURISDICTION OVER CASES involving offenses occurring PRIOR TO JUNE 11, 2010 – and the OAH hearing examiners no longer conduct DMV hearings or draft DMV Orders.

Chief Hearing Examiner from engaging in the practice of law by representing himself, herself or his or her immediate family in their personal affairs in matters not subject to this article.

(3) Not engage directly or indirectly in any activity, occupation or business interfering or inconsistent with his or her duties as Chief Hearing Examiner;

(4) Not hold any other appointed public office or any elected public office or any other position of public trust; and

(5) Not be a candidate for any elected public office, or serve on or under any committee of any political party.

(f) The Governor may remove the Chief Hearing Examiner only for incompetence, neglect of duty, official misconduct or violation of subsection (e) of this section, and removal shall be in the same manner as that specified for removal of elected state officials in section six, article six, chapter six of this code.

(g) The term of the Chief Hearing Examiner shall be six years. A person holding the position of Chief Hearing Examiner may be reappointed to that position subject to the provisions of subsection (b).

§17C-5C-2. Organization of office.

(a) The Chief Hearing Examiner is the chief administrator of the Office of Administrative Hearings and he or she may employ hearing examiners and other clerical personnel necessary for the proper administration of this article.

(1) The Chief Hearing Examiner may delegate administrative duties to other employees, but the Chief Hearing Examiner shall be responsible for all official delegated acts.

(2) All employees of the Office of Administrative Hearings, except the Chief Hearing Examiner, shall be in the classified service and shall be governed by the provisions of the statutes, rules and policies of the classified service in accordance with the provisions of article six, chapter twenty-nine of this code.

(3) Notwithstanding any provision of this code to the contrary, those persons serving as hearing examiners within the Division of Motor Vehicles on the effective date of this article as enacted during the Regular Session of the 2010 Legislature, shall be eligible and given first preference in hiring as hearing examiners pursuant to this article.

(b) The Chief Hearing Examiner shall:

(1) Direct and supervise the work of the office staff;

(2) Make hearing assignments;

(3) Maintain the records of the office;

(4) Review and approve decisions of hearing examiners as to legal accuracy, clarity and other requirements;

(5) Submit to the Legislature, on or before the fifteenth day of February, an annual report summarizing the office's activities since the end of the last report period, including a statement of the number and type of matters handled by the office during the preceding fiscal year and the number of matters pending at the end of the year; and
(6) Perform the other duties necessary and proper to carry out the purposes of this article.

(c) The administrative expenses of the office shall be included within the annual budget of the Department of Transportation.

DESCRIPTION OF THE OFFICE OF ADMINISTRATIVE HEARINGS

OAH conducts 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.

MISSION OF THE OFFICE OF ADMINISTRATIVE HEARINGS

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

PURPOSE OF THE OFFICE OF ADMINISTRATIVE HEARINGS

The purpose of the OAH is to conduct administrative hearings regarding license revocation or suspension orders issued by the West Virginia Division of Motor Vehicles, and to issue decisions which uphold, reverse, or modify the revocation or suspension of citizens' driving privileges.

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.

West Virginia Code §17C-5C-3 establishes that the 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 the Office of Administrative Hearing are filed in response to revocation orders issued by the West Virginia Division of Motor Vehicles 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.

West Virginia Code §17C-5C-4 sets forth the procedures to be followed during hearings conducted by the OAH. West Virginia Code §17C-5C-4 states:

(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.

West Virginia Code §17C-5A-2[5] sets forth the procedures for notice of hearings, revocations and review of the Final Orders issued by the OAH. West Virginia Code §17C-5A-2 states in relevant part:

(a) Written objections to an order of revocation or suspension under the provisions of section one of this article or section seven, article five of this chapter shall be filed with the Office of Administrative Hearings. Upon the receipt of an objection, the Office of Administrative Hearings shall notify the Commissioner of the Division of Motor Vehicles, who shall stay the imposition of the period of revocation or suspension and afford the person an opportunity to be heard by the Office of Administrative Hearings. The written objection must be filed with Office of Administrative Hearings in person, by registered or certified mail, return receipt requested, or by facsimile transmission or electronic mail within thirty calendar days after receipt of a copy of the order of revocation or suspension or no hearing will be granted: *Provided,* That a successful transmittal sheet shall be necessary for proof of written objection in the case of filing by fax. The hearing shall be before a hearing examiner employed by the Office of Administrative Hearings who shall rule on evidentiary issues. Upon consideration of the designated record, the hearing examiner shall, based on the determination of the facts of the case and

[5] Effective July 12, 2013. Current through the end of the 2014 Second Extraordinary Session.

applicable law, render a decision affirming, reversing or modifying the action protested. The decision shall contain findings of fact and conclusions of law and shall be provided to all parties by registered or certified mail, return receipt requested, or with a party's written consent, by facsimile or electronic mail.

(b) The hearing shall be held at an office of the Division of Motor Vehicles suitable for hearing purposes located in or near the county in which the arrest was made in this state or at some other suitable place in the county in which the arrest was made if an office of the division is not available. At the discretion of the Office of Administrative Hearings, the hearing may also be held at an office of the Office of Administrative Hearings located in or near the county in which the arrest was made in this state. The Office of Administrative Hearings shall send a notice of hearing to the person whose driving privileges are at issue and the person's legal counsel if the person is represented by legal counsel, by regular mail, or with the written consent of the person whose driving privileges are at issue or their legal counsel, by facsimile or electronic mail. The Office of Administrative Hearings shall also send a notice of hearing by regular mail, facsimile or electronic mail to the Division of Motor Vehicles, and the Attorney General's Office, if the Attorney General has filed a notice of appearance of counsel on behalf of the Division of Motor Vehicles.

(c) (1) Any hearing shall be held within one hundred eighty days after the date upon which the Office of Administrative Hearings received the timely written objection unless there is a postponement or continuance.

(2) The Office of Administrative Hearings may postpone or continue any hearing on its own motion or upon application by the party whose license is at issue in that hearing or by the commissioner for good cause shown.

(3) The Office of Administrative Hearings may issue subpoenas commanding the appearance of witnesses and subpoenas duces tecum commanding the submission of documents, items or other things. Subpoenas duces tecum shall be returnable on the date of the next scheduled hearing unless otherwise specified. The Office of Administrative hearings shall issue subpoenas and subpoenas duces tecum at the request of a party or the party's legal representative. The party requesting the subpoena shall be responsible for service of the subpoena upon the appropriate individual. Every subpoena or subpoena duces tecum shall be served at least five days before the return date thereof, either by personal service made by a person over eighteen years of age or by registered or certified mail, return receipt requested, and received by the party responsible for serving the subpoena or subpoena duces tecum: *Provided,* That the Division of Motor Vehicles may serve subpoenas to law-enforcement officers through electronic mail to the department of his or her employer. If a person does not obey the subpoena or fails to appear, the party who issued the subpoena to the person may petition the circuit court wherein the action lies for enforcement of the subpoena.

(d) Law-enforcement officers shall be compensated for the time expended in their travel and appearance before the Office of Administrative Hearings by the law-enforcement agency by whom they are employed at their regular rate if they are scheduled to be on duty during said time or at their regular overtime rate if they are scheduled to be off duty during said time.

(e) The principal question at the hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or did refuse to submit to the designated secondary chemical test, or did drive a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight.

(f) In the case of a hearing in which a person is accused of driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, or accused of driving a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or accused of driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight, the Office of Administrative Hearings shall make specific findings as to: (1) Whether the investigating law-enforcement officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol, controlled substances or drugs, or while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or to have been driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight; (2) whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test: *Provided,* That this element shall be waived in cases where no arrest occurred due to driver incapacitation; (3) whether the person committed an offense involving driving under the influence of alcohol, controlled substances or drugs; and (4) whether the tests, if any, were administered in accordance with the provisions of this article and article five of this chapter.

. . .

(p) For purposes of this section, where reference is made to previous suspensions or revocations under this section, the following types of criminal convictions or

administrative suspensions or revocations shall also be regarded as suspensions or revocations under this section or section one of this article:

(1) Any administrative revocation under the provisions of the prior enactment of this section for conduct which occurred within the ten years immediately preceding the date of arrest;

(2) Any suspension or revocation on the basis of a conviction under a municipal ordinance of another state or a statute of the United States or of any other state of an offense which has the same elements as an offense described in section two, article five of this chapter for conduct which occurred within the ten years immediately preceding the date of arrest; or

(3) Any revocation under the provisions of section seven, article five of this chapter for conduct which occurred within the ten years immediately preceding the date of arrest.

(q) In the case of a hearing in which a person is accused of refusing to submit to a designated secondary test, the Office of Administrative Hearings shall make specific findings as to: (1) Whether the arresting law-enforcement officer had reasonable grounds to believe the person had been driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs; (2) whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test: *Provided,* That this element shall be waived in cases where no arrest occurred due to driver incapacitation; (3) whether the person committed an offense relating to driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs; (4) whether the person refused to submit to the secondary test finally designated in the manner provided in section four, article five of this chapter; and (5) whether the person had been given a written statement advising the person that the person's license to operate a motor vehicle in this state would be revoked for at least forty-five days and up to life if the person refused to submit to the test finally designated in the manner provided in said section.

(r) If the Office of Administrative Hearings finds by a preponderance of the evidence that: (1) The investigating officer had reasonable grounds to believe the person had been driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs; (2) whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test: *Provided,* That this element shall be waived in cases where no arrest occurred due to driver incapacitation; (3) the person

committed an offense relating to driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs; (4) the person refused to submit to the secondary test finally designated in the manner provided in section four, article five of this chapter; and (5) the person had been given a written statement advising the person that the person's license to operate a motor vehicle in this state would be revoked for at least forty-five days and up to life if the person refused to submit to the test finally designated, the commissioner shall revoke the person's license to operate a motor vehicle in this state for the periods specified in section seven, article five of this chapter. The revocation period prescribed in this subsection shall run concurrently with any other revocation period ordered under this section or section one of this article arising out of the same occurrence. The revocation period prescribed in this subsection shall run concurrently with any other revocation period ordered under this section or section one of this article arising out of the same occurrence.

(s) If the Office of Administrative Hearings finds to the contrary with respect to the above issues, it shall rescind or modify the commissioner's order and, in the case of modification, the commissioner shall reduce the order of revocation to the appropriate period of revocation under this section or section seven, article five of this chapter. A copy of the Office of Administrative Hearings' final order containing its findings of fact and conclusions of law made and entered following the hearing shall be served upon the person whose license is at issue or upon the person's legal counsel if the person is represented by legal counsel by registered or certified mail, return receipt requested, or by facsimile or by electronic mail if available. The final order shall be served upon the commissioner by electronic mail. During the pendency of any hearing, the revocation of the person's license to operate a motor vehicle in this state shall be stayed.

A person whose license is at issue and the commissioner shall be entitled to judicial review as set forth in chapter twenty-nine-a of this code. Neither the commissioner nor the Office of Administrative Hearings may stay enforcement of the order. The court may grant a stay or supersede as of the order only upon motion and hearing, and a finding by the court upon the evidence presented, that there is a substantial probability that the appellant shall prevail upon the merits and the appellant will suffer irreparable harm if the order is not stayed: *Provided,* That in no event shall the stay or supersede as of the order exceed one hundred fifty days. The Office of Administrative Hearings may not be made a party to an appeal. The party filing the appeal shall pay the Office of Administrative Hearings for the production and transmission of the certified file copy and the hearing transcript to the court. Notwithstanding the provisions of section four, article five of said chapter, the Office of Administrative Hearings may not be compelled to transmit a certified copy of the file or the transcript of the hearing to the circuit court in less than sixty days. Circuit clerk shall provide a copy of the circuit court's final order on the appeal to the Office of Administrative Hearings by regular mail, by facsimile, or by electronic mail if available.

(t) In any revocation or suspension pursuant to this section, if the driver whose license is revoked or suspended had not reached the driver's eighteenth birthday at the time of the conduct for which the license is revoked or suspended, the driver's license shall be revoked or suspended until the driver's eighteenth birthday or the applicable statutory period of revocation or suspension prescribed by this section, whichever is longer.

(u) Funds for this section's hearing and appeal process may be provided from the Drunk Driving Prevention Fund, as created by section forty-one, article two, chapter fifteen of this code, upon application for the funds to the Commission on Drunk Driving Prevention.

WORK OF THE OFFICE OF ADMINISTRATIVE HEARINGS

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 the Division of Motor Vehicles for a DUI offense may file a Written Objection with the OAH. The Written Objection must be filed with the OAH within thirty days of the person's receipt of the Revocation or Suspension Order.

Once it is verified that the Written Objection was timely filed, the Docketing Department notifies the West Virginia Division of Motor Vehicles 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.

OFFICE OF ADMINISTRATIVE HEARINGS DOCKETING DEPARTMENT

The OAH Docketing Department is comprised of six (6) full-time positions (currently one position is vacant) whose function is to process the Written Objection and schedule all administrative hearings. The Docketing Department reviews all Written Objections to confirm that the appeal was timely filed by the Petitioner and then all pertinent information is entered into the Agency database. During Fiscal Year 2014, the Docketing Department received and processed 2395 new Written Objections.[6]

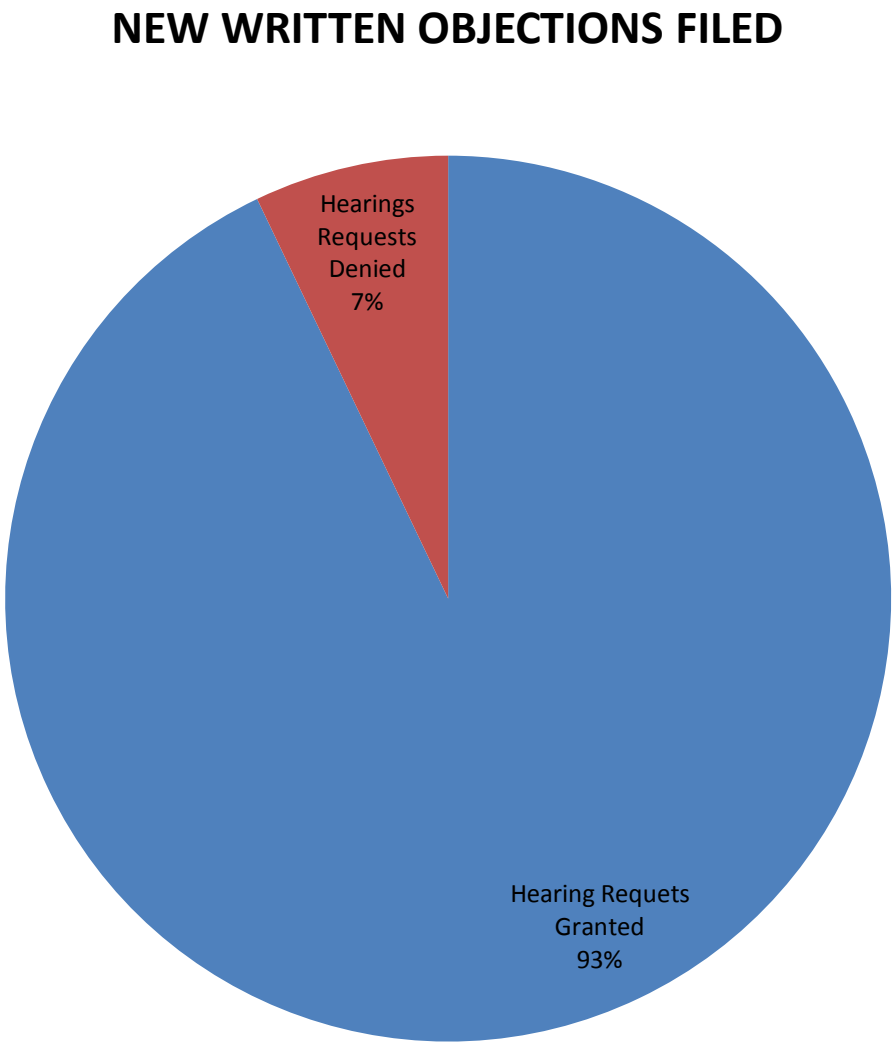
The Docketing Department schedules the administrative hearing to be conducted within one hundred eighty (180) days of the receipt of the Written Objection and is responsible to issue a hearing notice advising the parties of the date, time and location of the administrative hearing. During fiscal year 2014, the OAH Docketing Department scheduled 3771 administrative hearings. Currently there are 64 initial hearings to be scheduled and 1314 hearings to be rescheduled

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

[6] One hundred seventy (170) Written Objections were denied.

NEW WRITTEN OBJECTIONS FILED

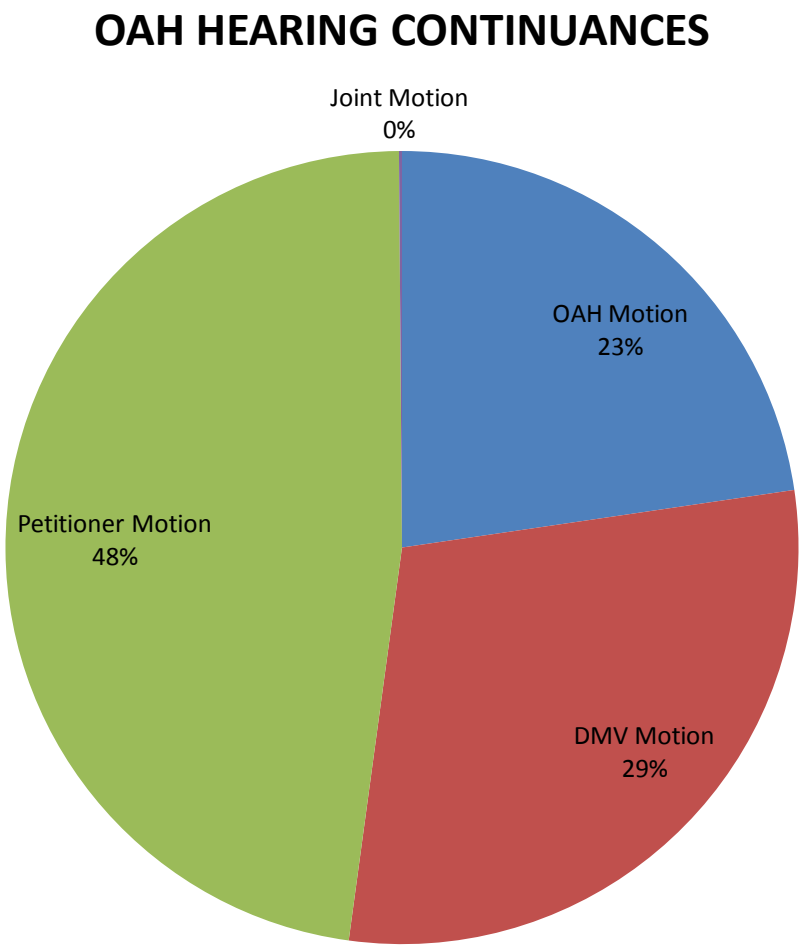
FISCAL YEAR 2014	New Written Objections Filed
New Written Objections Filed	**2395**
Hearing Requests Granted	2225
Hearing Requests Denied	170



CONTINUANCES

The OAH may continue or postpone any hearing on its own motion, upon application by the party whose license is at issue, or by the Commissioner of the Division of Motor Vehicles for good cause shown. During fiscal year 2014, the OAH issued 3285 continuances and there are currently 1255 administrative hearings to be rescheduled as a result of these continuances.

Fiscal Year 2014 Hearing Continuances	
Continuances	**3285**
OAH Motion	745
DMV Motion	968
Petitioner Motion	1568
Joint Motion	04



ADMINISTRATIVE HEARINGS

The OAH employs twelve (12) Hearing Examiners[7] 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.

These Administrative Hearings are held at the Regional Offices of the Division of Motor Vehicles located in or near the County in which the arrest was made or at some other suitable place in 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 during Fiscal Year 2014 the Hearing Examiners logged 65,584 miles traveling to the various hearing locations.[8]

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. During fiscal year 2014 there were 5,123 administrative hearings scheduled on the OAH docket. The Hearing Examiners conducted 1039 administrative hearings and 799 hearings were cancelled. The remaining 3285 administrative hearings were continued[9].

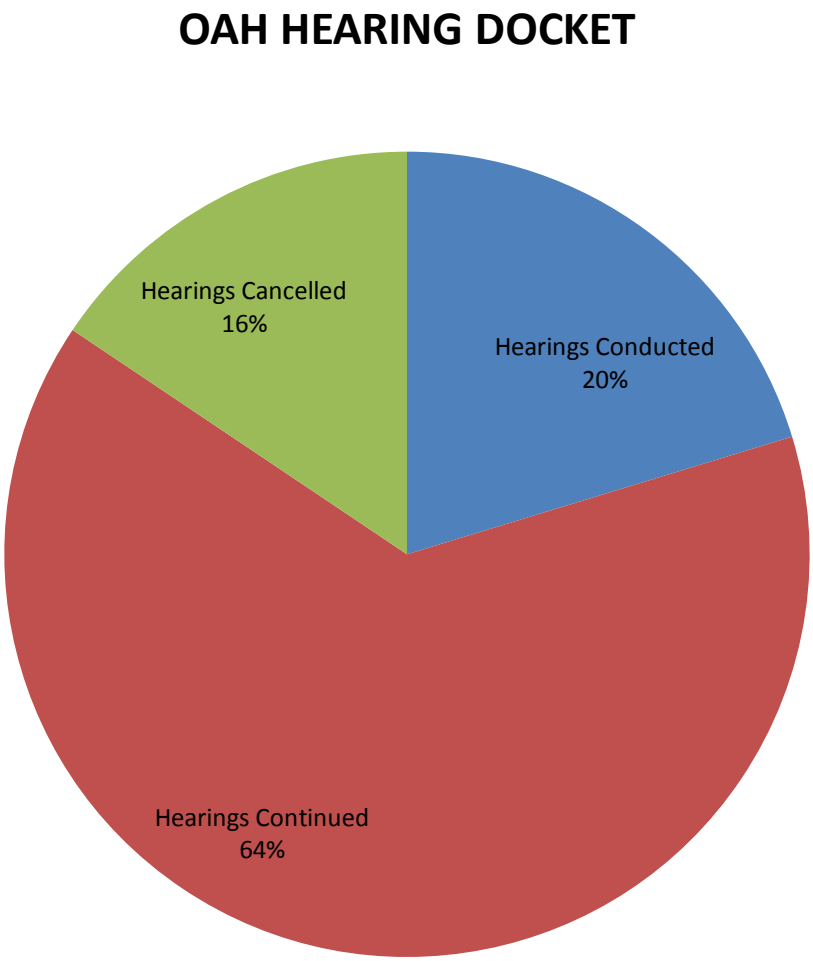
After the conclusion of the administrative hearing, the parties are afforded the opportunity to submit proposed Findings of Fact and Conclusions of Law for consideration by the Hearing Examiner. Prior to submitting these proposed findings, the parties may request a copy of the audio of the administrative hearing and or a transcript of the proceedings. During fiscal year 2014, the OAH received and processed 106 requests for audios. The Office of Administrative Hearings contracted with an outside vendor transcription company to produce forty-five (45) hearing transcripts.

After considering the designated record, the Hearing Examiner, based upon the determination of the facts of the case and applicable law, renders a recommended decision which affirms, reverses, or modifies the Order of Revocation issued by the Commissioner of the West Virginia Division of Motor Vehicles against the individual's driving privilege. The decision contains Findings of Fact and Conclusions of Law and is provided to the parties. During fiscal year 2014, the Hearing Examiners submitted 619 Final Orders to the OAH Legal Department for review.

[7] During Fiscal Year 2013 there were two vacant Hearing Examiner positions.
[8] Equates to approximately 27 weeks of travel time.
[9] The OAH continued 745 hearings on its own motion, 968 hearings were continued upon motion of the Division of Motor Vehicles, and the remaining 1568 hearings were continued upon motion of the Petitioner.

OFFICE OF ADMINISTRATIVE HEARINGS HEARING DOCKET

FISCAL YEAR 2014 OAH HEARING DOCKET	
OAH Hearings Scheduled	**5123**
Hearings Conducted	1039
Hearings Continued	3285
Cancelled	799



FINAL ORDERS ISSUED BY OFFICE OF ADMINISTRATIVE HEARINGS

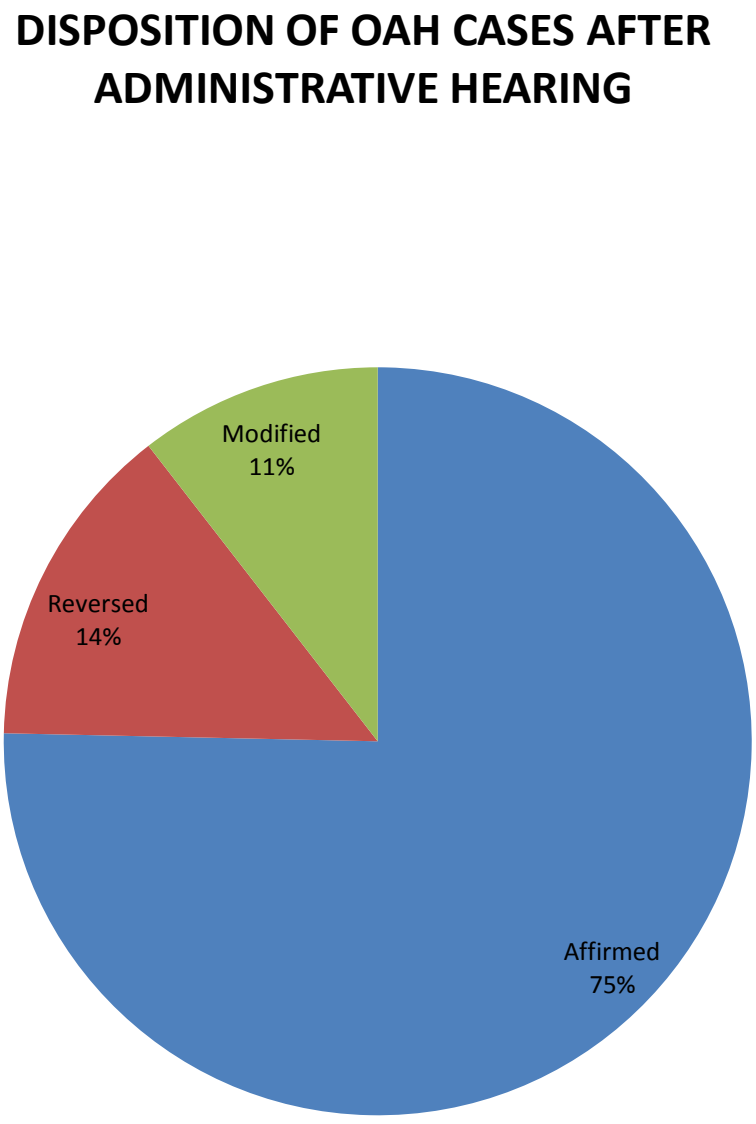
Upon completion by the Hearing Examiner of the proposed Final Order, the file is returned to the OAH Legal Department. The Legal Department processes and disseminates approved final orders; maintains detailed databases including pertinent information regarding the final orders issued by the Agency; and enters proper codes in the database to reflect current status of driver's licenses

During Fiscal year 2014, the OAH issued 219 Final Orders after the administrative hearing was conducted. As a result, 165 Revocation Orders where upheld, 31 Revocation Orders were reversed, and 23 Revocation Orders were modified.

It is noted that any person who has entered a guilty plea or who has been convicted of the parallel criminal charge arising from the same DUI offense is entitled only to a limited scope hearing to adjudicate the remaining enhancement, such as refusing to submit to the secondary chemical test to determine the alcohol concentration of the blood.

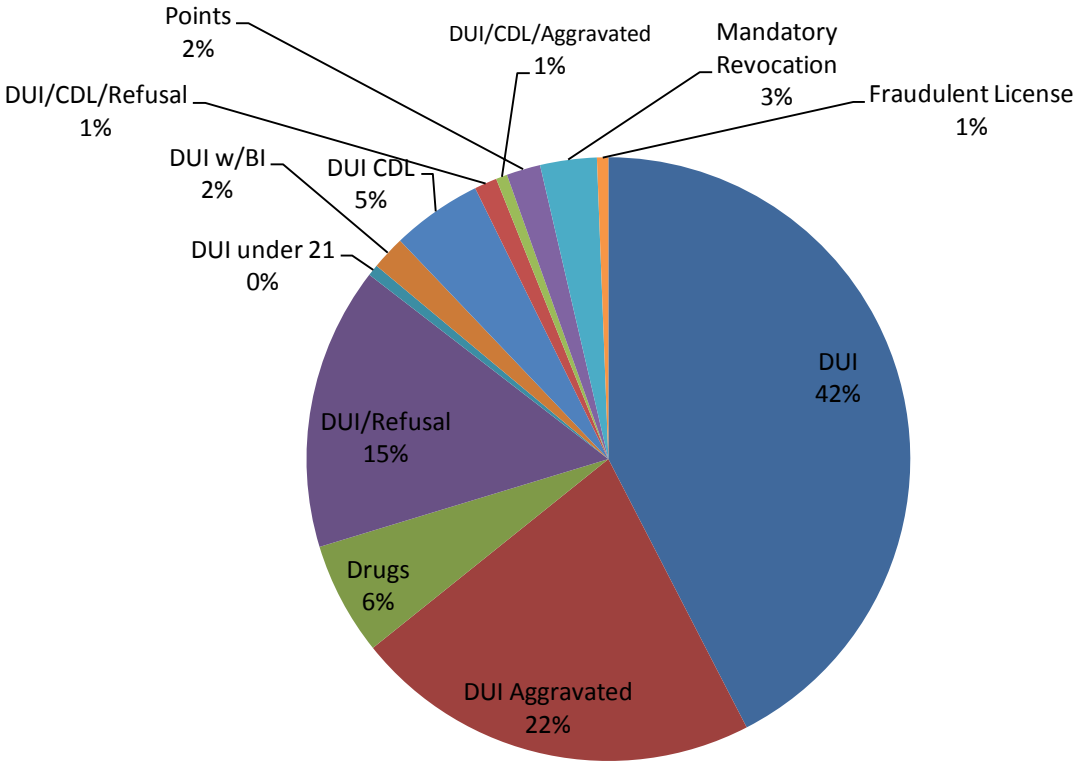
DISPOSITION OF CASES AFTER ADMINISTRATIVE HEARING

Fiscal Year 2014 Total Orders Entered After Hearing	
Total Orders Entered	**219**
Affirmed	165
Reversed	31
Modified	23



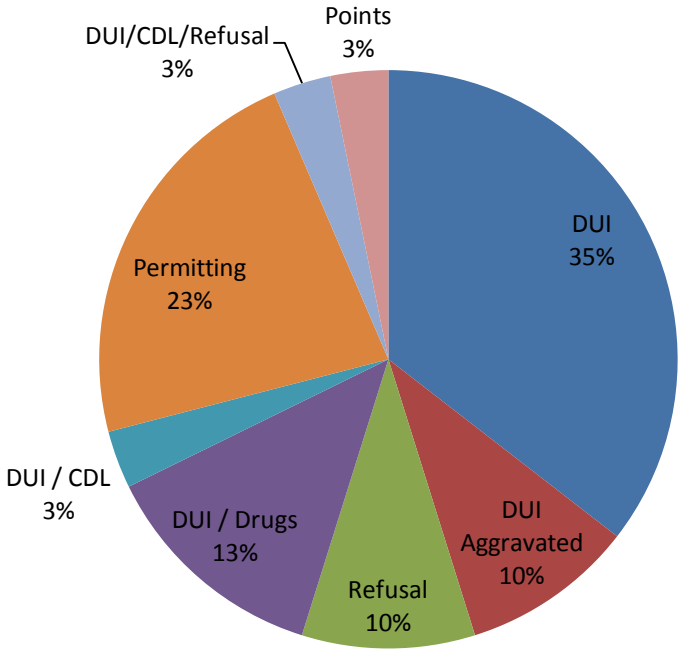
ORDERS AFFIRMING REVOCATION ORDERS BY ALLEGED OFFENSE

Fiscal Year 2014 Orders Affirming Order of Revocation by Alleged Offense	
Total Orders Entered	**165**
DUI	70
DUI Aggravated	36
Drugs	10
DUI w/Refusal	25
DUI Under 21 years of age	01
DUI Causing Bodily Injury	03
DUI CDL	08
DUI CDL w/ Refusal	02
DUI CDL Aggravated	01
Points	03
Mandatory Revocation	05
Fraudulent License	01



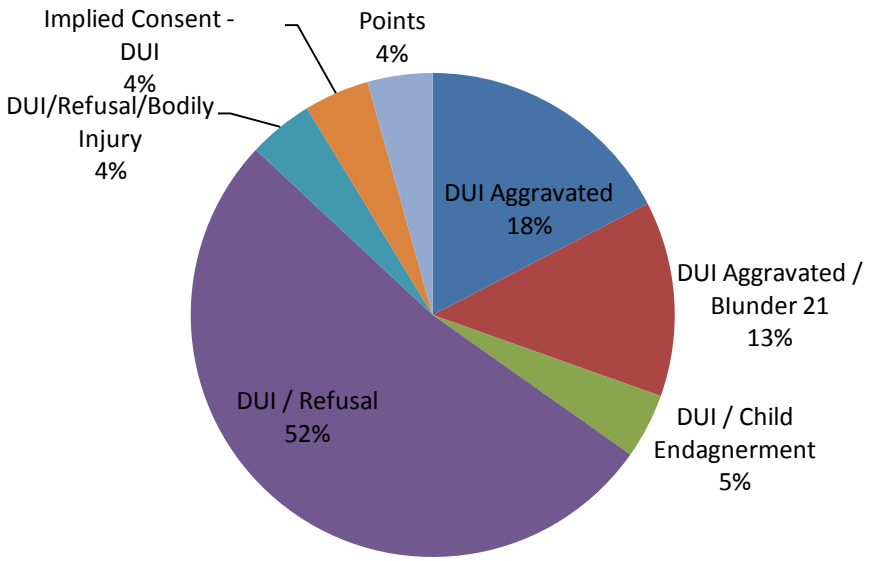
ORDERS REVERSING REVOCATION ORDERS BY ALLEGED OFFENSE

Fiscal Year 2014 Orders Reversing Order of Revocation by Alleged Offense	
Total Orders Entered	**31**
DUI	11
DUI Aggravated	03
Refusal	03
DUI / Drugs	04
DUI with CDL	01
Knowingly Permitting	07
DUI/CDL/Refusal	01
Points	01



ORDERS MODIFYING REVOCATION ORDERS BY ALLEGED OFFENSE

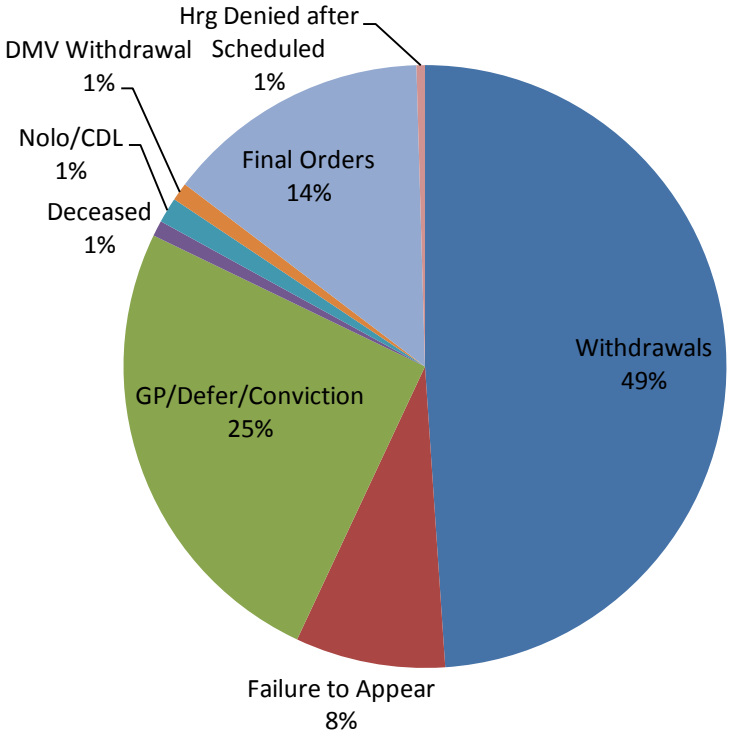
Fiscal Year 2014 Orders Modifying Order of Revocation by Alleged Offense	
Total Orders Entered	**23**
DUI Aggravated	04
DUI Aggravated with Bodily Injury	03
DUI w/ Child Endangerment	01
DUI / Refusal	12
DUI/Refusal/Bodily Injury	01
Points	01
Refusal / DUI	01



RESOLUTION OF WRITTEN OBJECTIONS

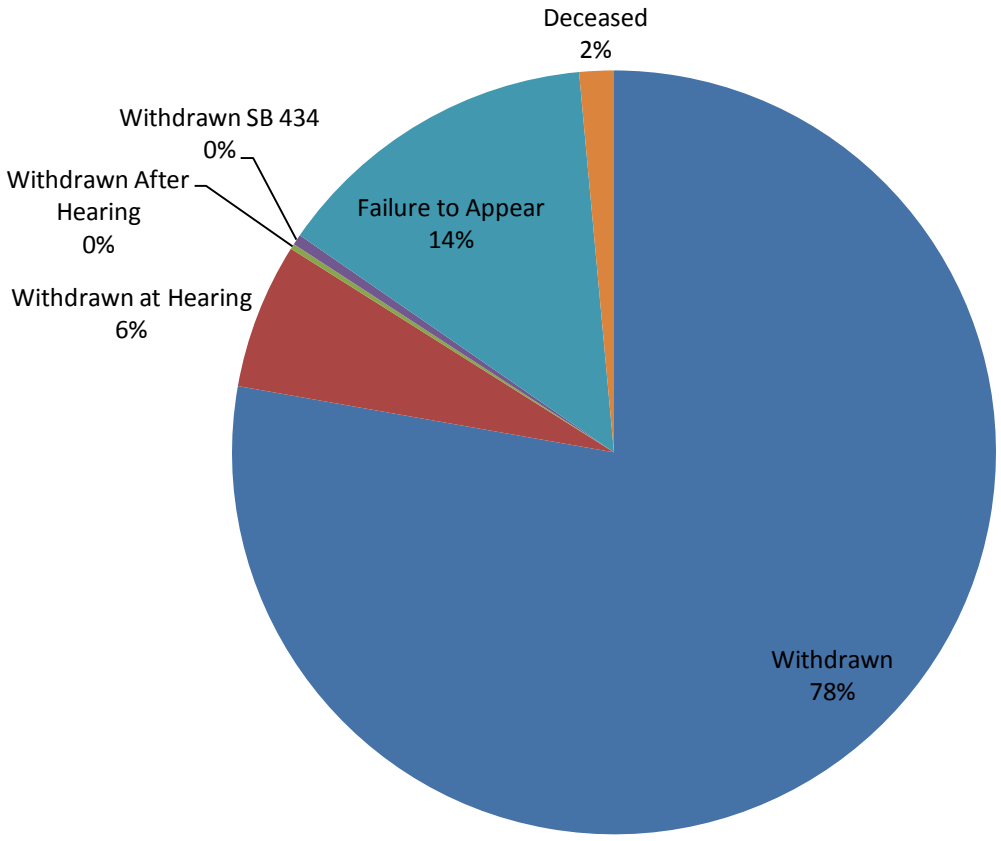
In addition to the Final Orders entered after an administrative hearing previously discussed, the Legal Department is also responsible to generate Orders issued as a result of withdrawals of the written objection, failure of the Petitioner to appear at the administrative hearing, the Petitioner's entry 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 Division of Motor Vehicles. During Fiscal year 2014, the OAH issued Orders which resolved 1541 Written Objections.

Fiscal Year 2014 Resolution of Written Objections	
Total Orders Entered	**1541**
Withdrawals	754
Failure to Appear	124
Deferrals	54
Guilty Pleas	311
Convictions	23
Deceased	13
Nolo/CDL	21
DMV Withdrawal	15
Final Orders	219
Hearing Denied After Scheduled	07



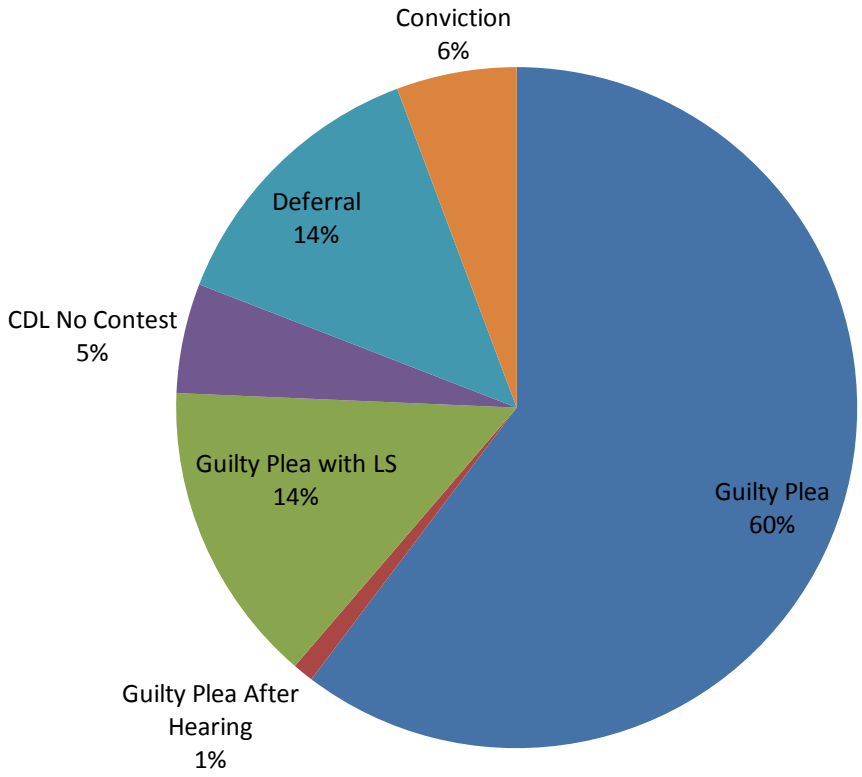
WITHDRAWALS OF WRITTEN OBJECTIONS

Fiscal Year 2014 Withdrawals	891
Withdrawn	693
Withdrawn At Hearing	55
Withdrawn After Hearing	2
Withdrawn SB 434	4
Failure to Appear	124
Deceased	12



GUILTY PLEAS, CONVICTION, DEFERRAL ORDERS

Fiscal Year 2014: Guilty Plea, Conviction, Deferral	243
Guilty Plea After Hearing	4
*Guilty Plea with LS	58
CDL No Contest	21
Deferral	54
Conviction	23



TIME FRAME FOR ISSUANCE OF FINAL ORDER

Initially it was the goal of the OAH to ensure by the end of FY 2012 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 six months. However, while preparing statistics for fiscal year 2012, it became apparent with current staffing limitations, that such goal was overly ambitious. Further review of the statistics indicated, assuming current staffing levels remain static, that a nine month time-frame for the issuance of Final Orders entered after the conclusion of an evidentiary hearing was more realistic. For Fiscal year 2014, the OAH entered 219 Orders after the conclusion of the administrative hearing. Of those, 67 (31%) were issued within nine months after the conclusion of the evidentiary hearing.

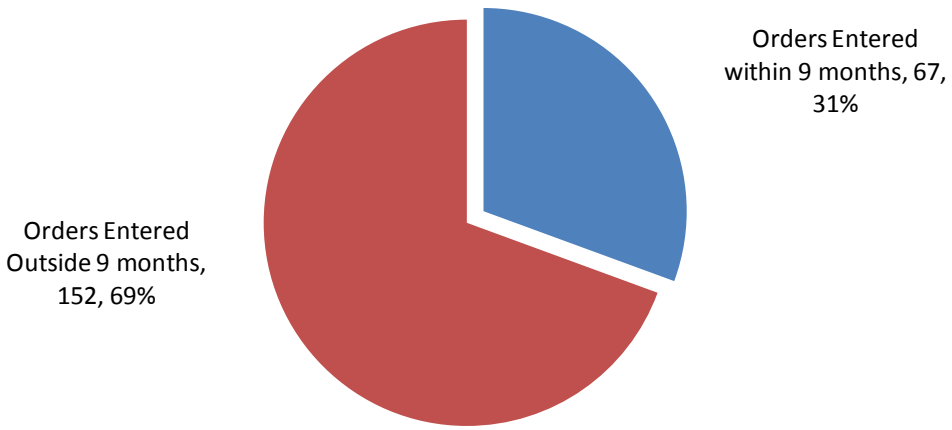
The performance measure regarding Final Orders issued within nine (9) months reflects all cases that were finally adjudicated by the OAH, regardless of whether an evidentiary hearing was conducted. In addition to the orders entered after an evidentiary hearing, these Final Orders also include those which were entered by the OAH as a result of the Petitioner's entry of a guilty plea to the parallel criminal charge, the Petitioner's decision to participate in the Deferral Program, or to withdraw his or her Written Objections to the Order of Revocation entered by the Commissioner of the WVDMV. It should be noted that the OAH processes the Final Orders entered as a result of a withdrawal, deferral or guilty plea as expeditiously as possible and that the time-frame for the issuance of these Final Orders is calculated based upon the date that the Written Objection was initially filed by the Petitioner.

For Fiscal year 2014, the OAH entered 1541 Orders which resolved Written Objections filed regarding Orders of Revocation or Suspension issued by the Commissioner of the WVDMV. Of those, 1389 (90%) Orders were issued within the nine month time-frame.

***During the first six months of fiscal year 2015, the OAH has issued 1275 Orders – 200 after a full evidentiary hearing.**

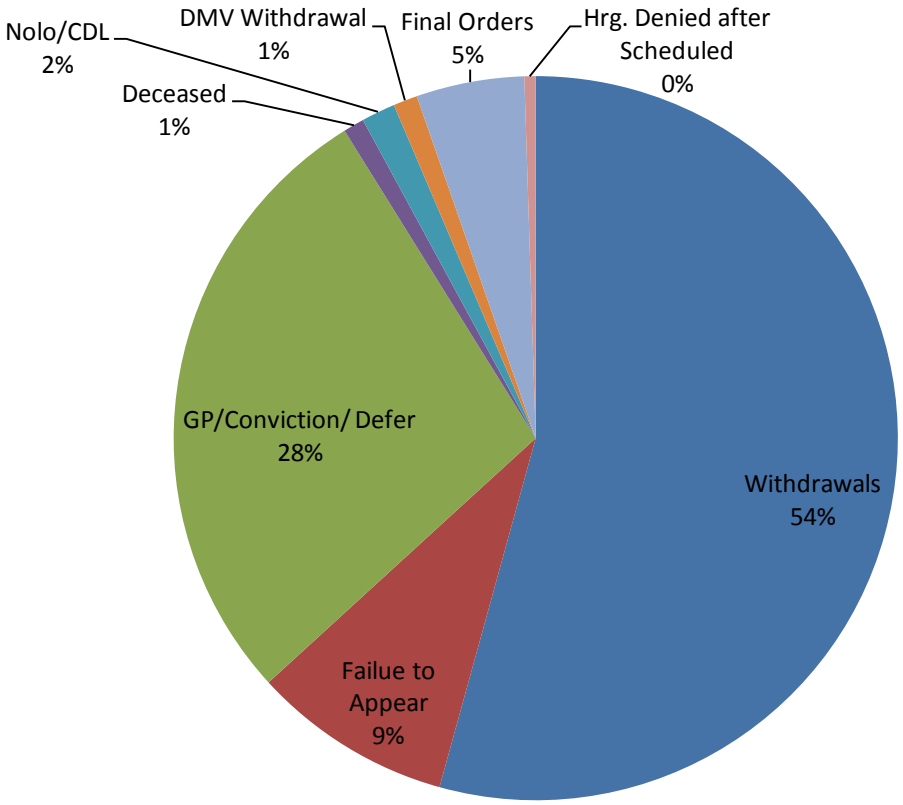
TIME FRAME FOR ENTRY OF ORDERS AFTER ADMINISTRATIVE HEARING

Fiscal Year 2014 Time Frame for Entry of Final Orders After Administrative Hearing	
Total Orders Entered	**219**
Entered within 9 Month Period	67
Entered outside of 9 Month Period	152



TIME FRAME FOR ENTRY OF ALL FINAL ORDERS

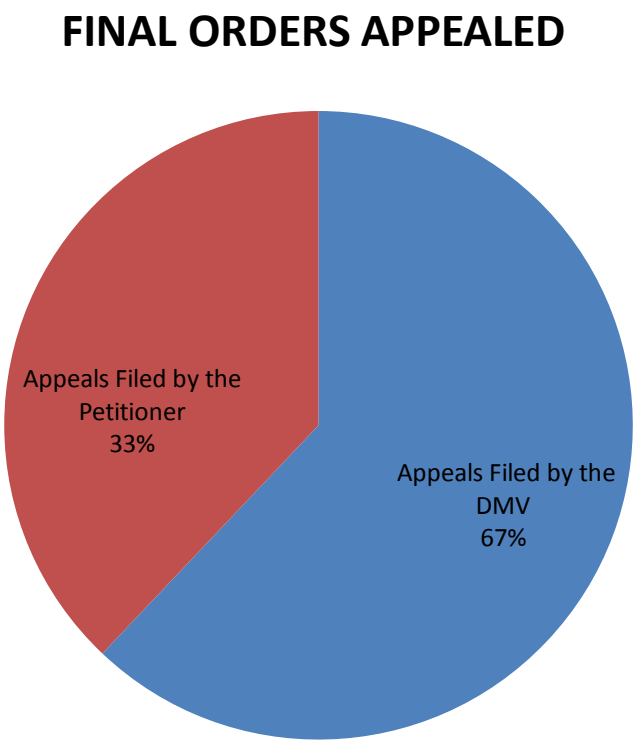
Fiscal Year 2014 Time Frame for Entry of All Final Orders	
Total Orders Entered	**1541**
Orders Entered within 9 Months	**1389**
BREAKDOWN	
Withdrawals	754
Failure to Appear	124
Conviction/ Guilty Plea/Deferral	388
Deceased	13
Nolo/CDL	21
DMV Withdrawal	15
Final Orders after Hearing	67
Hrg. Denied after Scheduled	07



APPEALS OF ORDERS ISSUED BY OFFICE OF ADMINISTRATIVE HEARINGS

Once a Final Order has been reviewed by the Legal Department and approved by the Hearing Examiner, the Final Order is entered by Chief Hearing Examiner and subsequently distributed to the parties. Either party aggrieved by the Final Order may petition for appeal in Circuit Court accordance with the provisions of West Virginia Code §29A-5-4. During Fiscal Year 2014, 29 appeals of Final Orders entered by the OAH have been filed in various Circuit Courts throughout the State. Eighteen appeals were filed by the Division of Motor Vehicles and of those three were appeals of Modified Revocation Orders. Eleven appeals were filed by the Petitioner.

Fiscal Year 2014 Appeals of OAH Final Orders	
Final Orders Entered After Hearing	219
TOTAL Appeals Filed	29
Appeals Filed by the DMV	18
Appeals Filed by the Petitioner	11



ACCOMPLISHMENTS OF THE OFFICE OF ADMINISTRATIVE HEARINGS

West Virginia Code §17C-5C-4a provides the OAH with the authority to propose legislative and procedural rules in order to implement the required provisions and carry out the duties described therein. After public comment, the West Virginia Legislature Legislative Rule-Making Review Committee recommended that the West Virginia Legislature authorize the agency to promulgate the Legislative rule as originally filed.

Title 105, Code of State Rules, Series 1, provides procedures regarding the initiation and administration of appeals that are heard and determined by the OAH from orders and decisions of the Commissioner of the Division of Motor Vehicles. 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 rule sets forth pre-hearing notification requirements, covers subpoenas, discovery, motions, stipulations and exhibits, and informs regarding the consequences of a failure to appear at a hearing. It also addresses hearings and evidence, hearing transcripts, the official record, transcript requests, final orders, and motions to reconsider, and it sets fees.

Since the close of Fiscal Year 2011, OAH has been granted subpoena power and legislative rule-making authority pursuant to the successful enactment of legislation proposed by OAH. This legislation also gave OAH the ability to reduce the costs related to the service of Final Orders and Hearing Notices as the legislation permits service via email for Final Orders and service via First Class Mail for Hearing Notices whereas under previous legislation OAH was required to serve all Orders and Hearing Notices via Certified Mail. OAH, in a past Legislative session, successfully proposed Legislative Rules, which are currently in effect and which govern all aspects of the hearing and adjudicatory processes. OAH, in the current Legislative Session has proposed amendments to its Legislative Rules. These amendments are intended to enhance the hearing process by allowing OAH to correct errors and omissions that may adversely affect persons who are involved in the hearing process, and to defray the costs of the hearing and adjudicatory processes in order to lessen the burden on the taxpayers of this State whose taxpayer dollars essentially provide a free hearing process for persons who contest revocations for DUI related offenses. The intent in proposing the filing fee is to make those who contest revocations that issue for DUI offenses, pay a modest filing fee of $50.00 in order to lessen the burden on the taxpayers. It is noteworthy that a significant majority of persons who contest DUI offenses do not prevail and are ultimately found to have driven while impaired by alcohol, controlled substances or drugs.

OAH has successfully implemented policies and procedures which require the parties to provide copies of all documentary evidence to the opposing party prior to an administrative hearing which helps to further ensure that all parties receive the due process

they are entitled to under WV State law. Further, OAH has moved forward with the implementation of an electronic filing and storage system and as of this writing all orders entered by OAH are saved in electronic form on the agency's shared drive. Finally, OAH has held successful training sessions with OAH Hearing Examiners regarding the importance of ensuring that due process is preserved for all parties.