

**DEPARTMENT OF TRANSPORTATION**



**OFFICE OF ADMINISTRATIVE  
HEARINGS**

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INTRODUCTION BY THE CHIEF HEARING EXAMINER

## **INTRODUCTION BY THE CHIEF HEARING EXAMINER**

The Office of Administrative Hearings (OAH) has as its primary mission the duty to provide a neutral forum for the fair and impartial resolution of contested cases involving the revocation, denial or disqualification of, or refusal to issue, a driver's license by the Commissioner of the West Virginia Division of Motor Vehicles. The Agency operates under the authority of the WV Department of Transportation and has been in existence operationally since October 2010. The Agency was created as the result of a legislative decision to transfer authority for making determinations in these contested cases from the Division of Motor Vehicles to the OAH. This decision was taken for the sake of strengthening adherence to principles of fundamental fairness in the hearing and adjudicatory process involving the deprivation of licensing privileges.

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 fourth year of existence, OAH has made great strides in implementing changes that emphasize the application of fundamental fairness in the hearing and adjudicatory process. Further, docketing and scheduling procedures have evolved from a rudimentary beginning to a current point of significant improvement and efficiency.

At its inception, OAH operated without legislative rules in place to govern hearing procedures and the other matters that attended the agency's primary business of conducting fair and impartial hearings in a neutral forum. It was forced to borrow the old DMV rules and used them as guidelines. However, OAH has since successfully proposed legislative rules that were enacted in the past legislative session. These rules should greatly enhance the process related to the conduct of hearings by the agency, and have provided needed guidelines to the parties that appear before the Agency.

Most of the hearing examiners conduct hearings in DMV regional offices dispersed throughout the State, but otherwise work in their residences. Hearings are also conducted in the agency's central office located in Charleston in Kanawha County. An anomaly that exists under current procedures concerns the relative positions of the Hearing Examiners, who act in many respects like ALJs, to the Assistant Attorneys General who appear before them. In more cases than not, the Hearing Examiners earn less than half the salaries of the Assistant Attorneys General who represent the interests of the DMV.

The vast majority of cases the agency handles involve contested revocations for driving under the influence. The legislation that created the new agency requires that the hearings be conducted with adherence to the State Rules of Evidence, which had constituted a significant departure from the procedures employed when the DMV was responsible for conducting

hearings. However, a recent State Supreme Court of Appeals decision<sup>1</sup> suggests that the OAH's interpretation of the extent of the application of the rules of evidence was erroneous and that the DMV's evidence may be admissible under the provisions of West Virginia Code §29A-5-2(b) as it had been when the Division of Motor Vehicles conducted the administrative hearings.

One of the most challenging aspects of building the agency within statutory requirements has been in providing effective training to the hearing examiners intended to provide them with a sufficient understanding of legal concepts. These hearing examiners, for the most part, prior to assuming their positions with OAH, worked under the DMV as hearing examiners. When OAH was created, they were grandfathered into their respective positions when the responsibility for conducting hearings was transferred from DMV to OAH. Most are not lawyers. As hearing examiners retire or resign, OAH management prefers replacing them with licensed attorneys in good standing with the State Bar. Since the inception of OAH, three hearing examiners have been replaced, two by licensed attorneys.

Significant achievements to date include the enactment of Legislative Rules, the implementation of electronic docketing and filing systems that have substantially reduced paper requirements while dramatically reducing costs associated with physical delivery requirements related to delivering files to hearing examiners. Rather than having to incur the significant costs associated with delivery of case files through UPS or similar providers, the capability has arrived to electronically transfer the files.

Other cost saving achievements made possible through legislation that was enacted into law in a recent legislative session, 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 parties who contest the DMV order and/or their legal counsel. Further, OAH is in the beginning process of collecting fees for the provision of audios of administrative hearings, transcripts and file documents to requesting parties.

Further, in an effort to reduce costs without loss of quality or production, the OAH is in the process of downgrading an Attorney II position, whose primary responsibility is supervision of the paralegals, to a lead paralegal position. The Office, when fully staffed, will employ twelve Hearing Examiners, an Attorney II Supervisor over the Hearing Examiners and Paralegals, a Lead Paralegal, three Paralegals, a Supervisor II over the docketing section, six Office Assistant IIIs, an Office Assistant II, the Administrative Service Manager I, an Administrative Services Assistant II, an Attorney II Deputy Director, an Administrative Secretary to the Director, and the Director of the Agency, for the total of 30 employees.

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<sup>1</sup> Steven O. Dale, Acting Commissioner of the West Virginia Division of Motor Vehicles v. Odum, No. 12-1403, (WV Supreme Court of Appeals, February 11, 2014)

## CREATION OF THE OFFICE OF ADMINISTRATIVE HEARINGS

## **CREATION 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.<sup>2</sup>

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 Chief Hearing Examiner from engaging in the practice of law by representing

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<sup>2</sup> 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.

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

## **DESCRIPTION OF THE OFFICE OF ADMINISTRATIVE HEARINGS**

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

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.

PURPOSE AND MISSION OF THE OFFICE OF ADMINISTRATIVE  
HEARINGS

**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.

**MISSION OF THE OFFICE OF ADMINISTRATIVE HEARINGS:**

The Mission of the OAH is to provide a neutral forum for the fair and impartial resolution of license revocations or suspensions initiated by the West Virginia Division of Motor Vehicles.

## JURISDICTION OF THE OFFICE OF ADMINISTRATIVE HEARINGS

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

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 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:

- (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 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.
- (b) The hearing shall be held at an office of the Division of Motor Vehicles 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. 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, the investigating or arresting law-enforcement officers, 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, or was lawfully taken into custody for the purpose of administering a secondary test; and (4) whether the tests, if any, were administered in accordance with the provisions of this article and article five of this chapter.

- (g) If, in addition to a finding that 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 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, the Office of Administrative Hearings also finds by a preponderance of the evidence that the person when driving did an act forbidden by law or failed to perform a duty imposed by law, which act or failure proximately caused the death of a person and was committed in reckless disregard of the safety of others and if the Office of Administrative Hearings further finds that the influence of alcohol, controlled substances or drugs or the alcohol concentration in the blood was a contributing cause to the death, the commissioner shall revoke the person's license for a period of ten years: Provided, That if the person's license has previously been suspended or revoked under the provisions of this section or section one of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be for the life of the person.
- (h) If, in addition to a finding that 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, the Office of Administrative Hearings also finds by a preponderance of the evidence that the person when driving did an act forbidden by law or failed to perform a duty imposed by law, which act or failure proximately caused the death of a person, the commissioner shall revoke the person's license for a period of five years: Provided, That if the person's license has previously been suspended or revoked under the provisions of this section or section one of this

article within the ten years immediately preceding the date of arrest, the period of revocation shall be for the life of the person.

- (i) If, in addition to a finding that 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, the Office of Administrative Hearings also finds by a preponderance of the evidence that the person when driving did an act forbidden by law or failed to perform a duty imposed by law, which act or failure proximately caused bodily injury to a person other than himself or herself, the commissioner shall revoke the person's license for a period of two years: Provided, That if the license has previously been suspended or revoked under the provisions of this section or section one of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be ten years: Provided, however, That if the person's license has previously been suspended or revoked more than once under the provisions of this section or section one of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be for the life of the person.
  
- (j) If the Office of Administrative Hearings finds by a preponderance of the evidence that 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, but less than fifteen hundredths of one percent or more, by weight, or finds that the person knowingly permitted the persons vehicle to be driven by another person who was under the influence of alcohol, controlled substances or drugs, or knowingly permitted the person's vehicle to be driven by another person who had an alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight the commissioner shall revoke the person's license for a period of six months or a period of fifteen days with an additional one hundred and twenty days of participation in the Motor Vehicle Alcohol Test and Lock Program in accordance with the provisions of section three-a of this article: Provided, That any period of participation in the Motor Vehicle Alcohol Test and Lock Program that has been imposed by a court pursuant to section two-b, article five of this chapter shall be credited against any period of participation imposed by the commissioner: Provided, however, That a person whose license is revoked for driving while under the influence of drugs is not eligible to participate in the Motor Vehicle Alcohol Test and Lock Program: Provided further, That if the person's license has previously been suspended or revoked under the provisions of this section or section one of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be ten years: And provided further, That if the person's license has previously been suspended or revoked more than once under the provisions of this section or section one of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be for the life of the person.

(k) (1) If in addition to finding by a preponderance of the evidence that the person did drive a motor vehicle while under the influence of alcohol, controlled substance or drugs, the Office of Administrative Hearings also finds by a preponderance of the evidence that the person did drive a motor vehicle while having an alcohol concentration in the person's blood of fifteen hundredths of one percent or more, by weight, the commissioner shall revoke the person's license for a period of forty-five days with an additional two hundred and seventy days of participation in the Motor Vehicle Alcohol Test and Lock Program in accordance with the provisions of section three-a, article five-a, chapter seventeen-c of this code: Provided, That if the person's license has previously been suspended or revoked under the provisions of this section or section one of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be ten years: Provided, however, That if the person's license has previously been suspended or revoked the person's license more than once under the provisions of this section or section one of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be for the life of the person.

(2) If a person whose license is revoked pursuant to subdivision (1) of this subsection proves by clear and convincing evidence that they do not own a motor vehicle upon which the alcohol test and lock device may be installed or is otherwise incapable of participating in the Motor Vehicle Alcohol Test and Lock Program, the period of revocation shall be one hundred eighty days: Provided, That if the person's license has previously been suspended or revoked under the provisions of this section or section one of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be ten years: Provided, however, That if the person's license has previously been suspended or revoked more than once under the provisions of this section or section one of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be for the life of the person.

(l) If, in addition to a finding that the person 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, the Office of Administrative Hearings also finds by a preponderance of the evidence that the person when driving did an act forbidden by law or failed to perform a duty imposed by law, which act or failure proximately caused the death of a person, and if the Office of Administrative Hearings further finds that the alcohol concentration in the blood was a contributing cause to the death, the commissioner shall revoke the person's license for a period of five years: Provided, That if the person's license has previously been suspended or revoked under the provisions of this section or section one of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be for the life of the person.

(m) If, in addition to a finding that the person 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, the Office of Administrative Hearings also finds by a preponderance of the evidence that the person when driving did an act forbidden by law or failed to perform a duty imposed by law, which act or failure proximately caused bodily injury to a person other than himself or herself, and if the Office of Administrative Hearings further finds that the alcohol concentration in the blood was a contributing cause to the bodily injury, the commissioner shall revoke the person's license for a period of two years: Provided, That if the person's license has previously been suspended or revoked under the provisions of this section or section one of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be ten years: Provided, however, That if the person's license has previously been suspended or revoked more than once under the provisions of this section or section one of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be for the life of the person.

- (n) If the Office of Administrative Hearings finds by a preponderance of the evidence that the person 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, the commissioner shall suspend the person's license for a period of sixty days: Provided, That if the person's license has previously been suspended or revoked under the provisions of this section or section one of this article, the period of revocation shall be for one year, or until the person's twenty-first birthday, whichever period is longer.
- (o) If, in addition to a finding that 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, the Office of Administrative Hearings also finds by a preponderance of the evidence that the person when driving did have on or within the Motor vehicle another person who has not reached his or her sixteenth birthday, the commissioner shall revoke the person's license for a period of one year: Provided, That if the person's license has previously been suspended or revoked under the provisions of this section or section one of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be ten years: Provided, however, That if the person's license has previously been suspended or revoked more than once under the provisions of this section or section one of this article within the ten years immediately preceding the date of arrest, the period of revocation shall be for the life of the person.
- (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 Administration finds to the contrary with respect to the above issues the commissioner shall rescind his or her earlier order of revocation or 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 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 OAH 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. 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.

- (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.

Note: WV Code updated with legislation passed through the 2012 1st Special Session





## WRITTEN OBJECTIONS TO REVOCATION ORDERS

## **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.

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 2013, the Docketing Department received and processed 2612 new Written Objections.<sup>3</sup>

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.

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 2013, the OAH Docketing Department scheduled 4699 administrative hearings and currently there are 1247 pending a scheduled hearing.

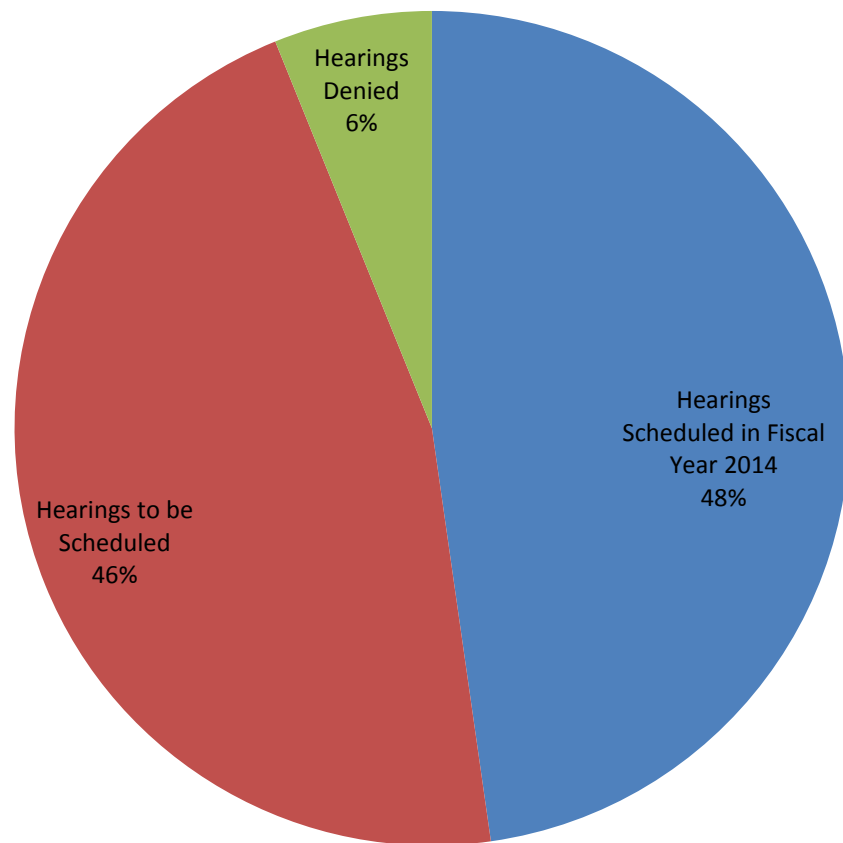
Finally, at the request of the person whose license is at issue, the OAH Docketing Department shall generate subpoenas commanding the appearance of witnesses and subpoenas duces tecum commanding the submission of documents at the administrative hearing.

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<sup>3</sup> One hundred sixty (160) Written Objections were denied.

FISCAL YEAR 2013 New Written Objections Filed	
New Written Objections Filed	<b>2612</b>
Hearings Scheduled in Fiscal Year 2014	1247
Hearings to be Scheduled	1205
Denied	160

## NEW WRITTEN OBJECTIONS FILED 2612



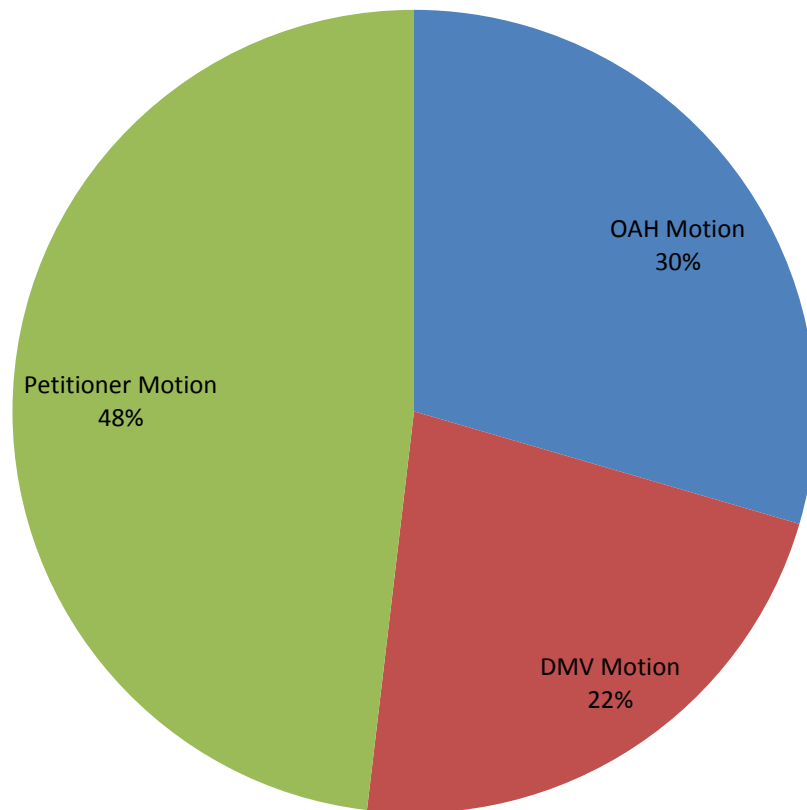
## CONTINUANCES

## **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 2013, the OAH issued 2676 continuances and there are currently 1205 administrative hearings to be rescheduled as a result of these continuances.

Fiscal Year 2013 Hearing Continuances	
OAH Continuances	<b>2676</b>
OAH Motion	790
DMV Motion	598
Petitioner Motion	1288

### OAH HEARING CONTINUANCES 2676



## ADMINISTRATIVE HEARINGS

## **ADMINISTRATIVE HEARINGS:**

The OAH employs twelve (12) Hearing Examiners<sup>4</sup> 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 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 2013 the Hearing Examiners logged 65035 miles traveling to the various hearing locations.<sup>5</sup>

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 2013 there were 4699 administrative hearings scheduled on the OAH docket. The Hearing Examiners conducted 1464 administrative hearings<sup>6</sup> and 559 hearings were cancelled. The remaining 2676 administrative hearings were continued<sup>7</sup>.

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 2013, the OAH received and processed 120 requests for audios. The Office of Administrative Hearings contracted with an outside vendor transcription company to produce thirty-five (35) 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 2013, the Hearing Examiners submitted 537 Final Orders to the OAH Legal Department for review.

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<sup>4</sup> During Fiscal Year 2013 there were two vacant Hearing Examiner positions.

<sup>5</sup> Equates to approximately 27 weeks of travel time.

<sup>6</sup> The substantial increase of the number of OAH hearings conducted is a result of the discontinuation of OAH Hearing Examiners conducting administrative hearings on behalf of the DMV.

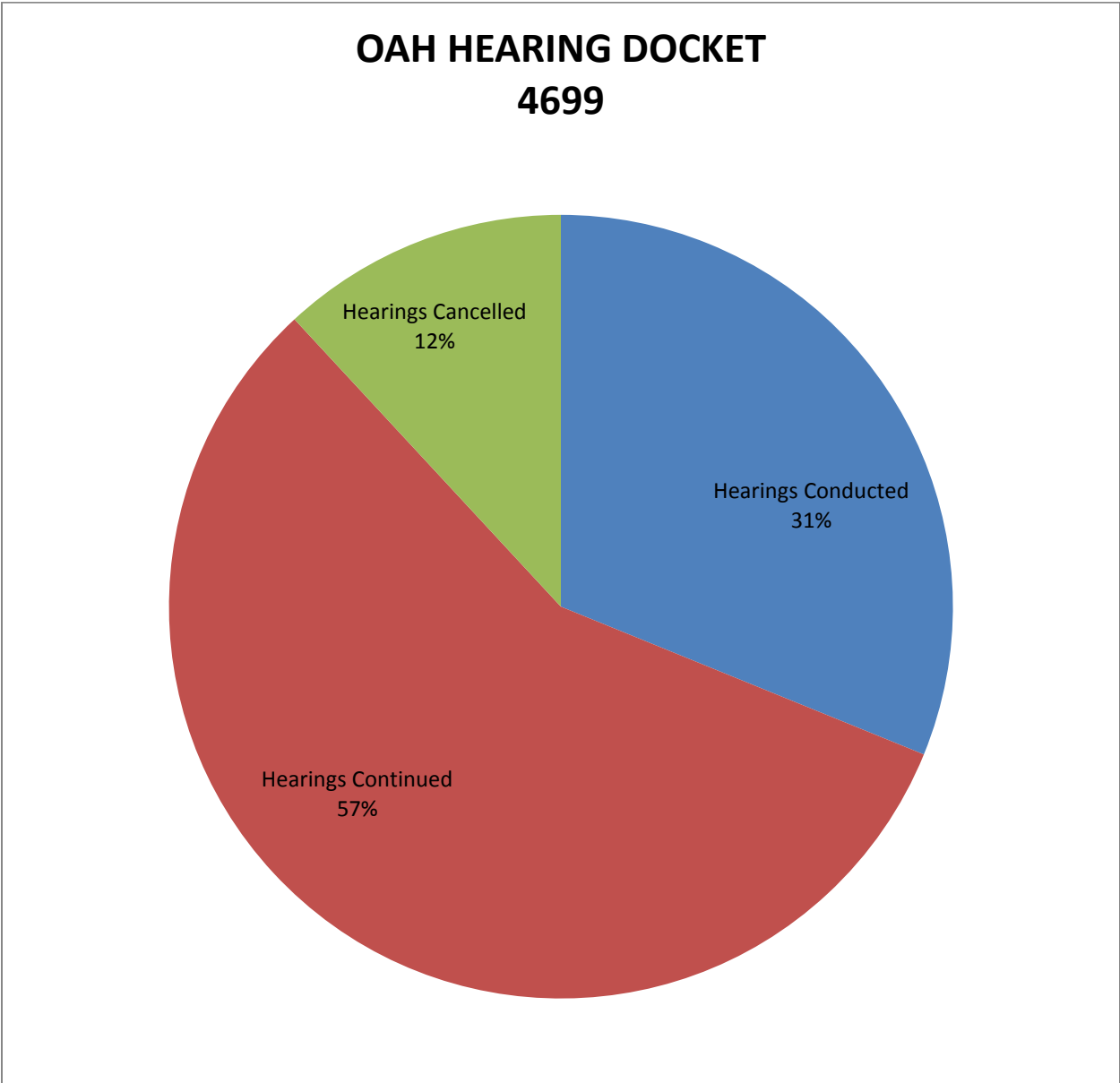
<sup>7</sup> The OAH continued 790 hearings on its own motion, 598 hearings were continued upon motion of the Division of Motor Vehicles, and the remaining 1288 hearings were continued upon motion of the Petitioner.



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FISCAL YEAR 2013 OAH HEARING DOCKET	
OAH Hearings Scheduled	<b>4699</b>
Hearings Conducted	1464
Hearings Continued	2676
Cancelled	559

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## FINAL ORDERS

### **FINAL ORDERS:**

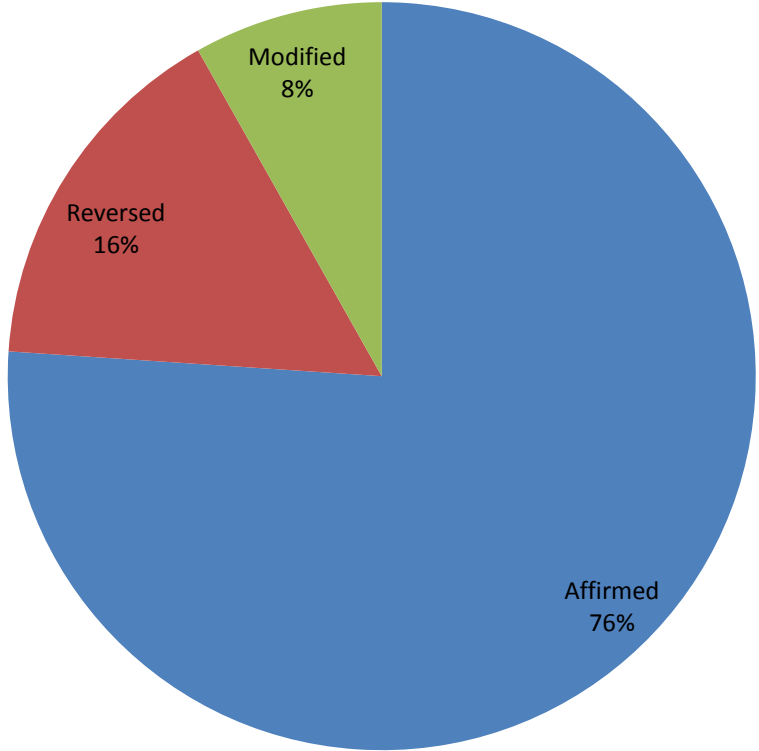
Once the Hearing Examiner completes the decision, the file is returned to the OAH Legal Department. Three paralegals review each Order for legal accuracy, clarity and other requirements. The Legal Department processes and disseminates approved final orders; maintains detailed databases including pertinent information regarding the final orders issued by the Agency; and enter proper codes in the database to reflect current status of driver's licenses

During Fiscal year 2013, the OAH issued 355 Final Orders after the administrative hearing was conducted. As a result, 270 Revocation Orders where upheld, 56 Revocation Orders were reversed, and 29 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.

Fiscal Year 2013 Total Orders Entered After Hearing	
Total Orders Entered	<b>355</b>
Affirmed	270
Reversed	56
Modified	29

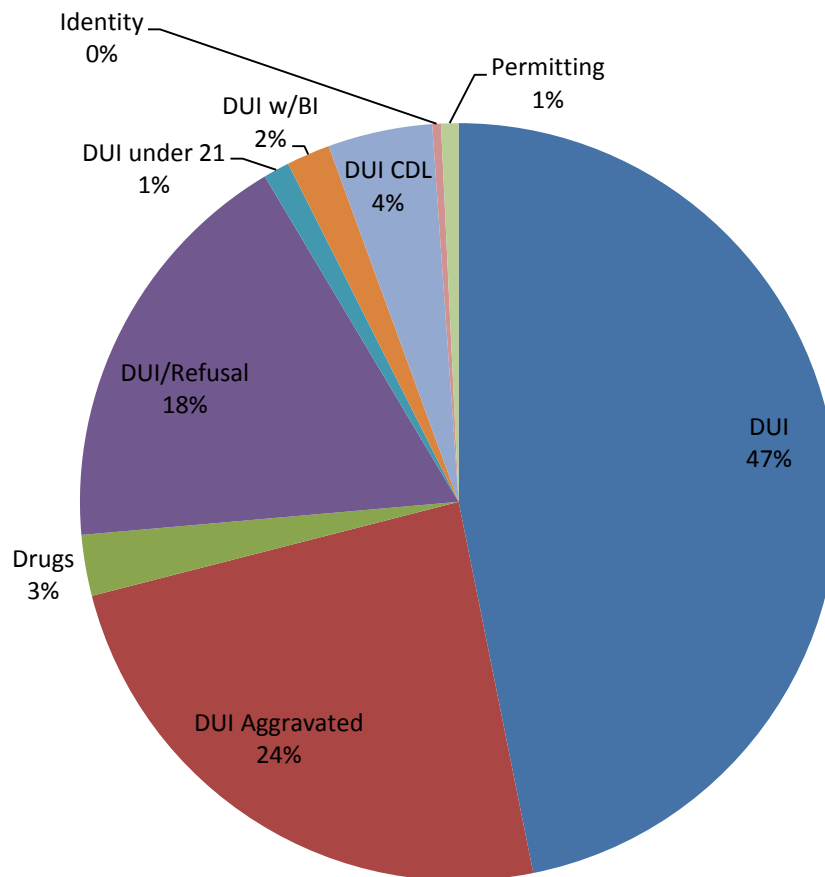
**DISPOSITION OF OAH CASES AFTER  
ADMINISTRATIVE HEARING**  
**355**



**Fiscal Year 2013 Orders Affirming Order of Revocation  
by Alleged Offense**

Total Orders Entered	<b>270</b>
DUI	126
DUI Aggravated	65
Drugs	07
DUI w/Refusal	48
DUI Under 21 years of age	03
DUI Causing Bodily Injury	05
DUI CDL	12
Identity	01
Knowingly Permitting	03

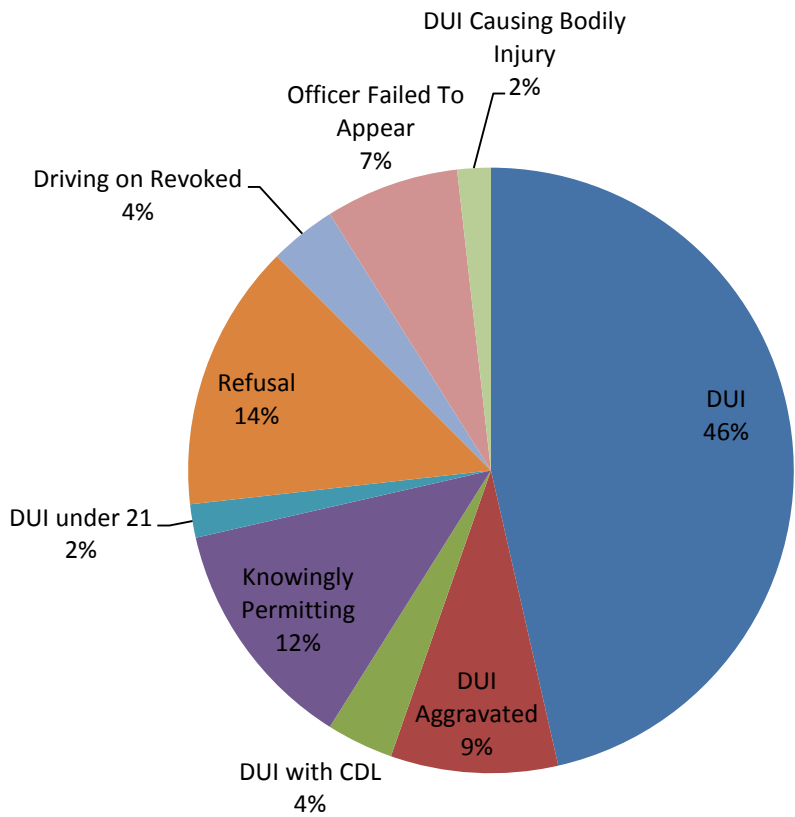
**ORDERS AFFIRMING REVOCATION ORDERS  
270**



**Fiscal Year 2013 Orders Reversing Order of Revocation  
by Alleged Offense**

Total Orders Entered	56
DUI	26
DUI Aggravated	05
Refusal	08
DUI with CDL	02
Knowingly Permitting	07
DUI Under 21 years of age	01
DUI Causing Bodily Injury	01
Officer Failed to Appear	04
Driving on Revoked	02

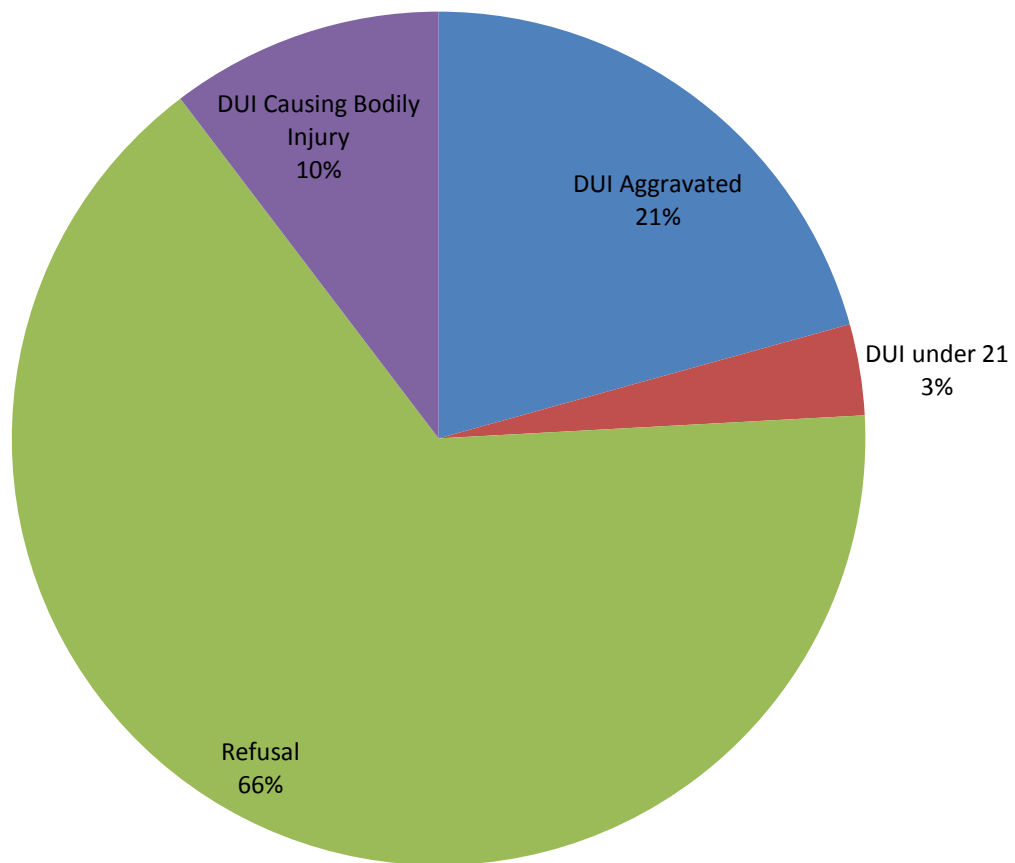
**ORDERS REVERSING REVOCATION ORDERS  
56**



**Fiscal Year 2013 Orders Modifying Order of Revocation  
by Alleged Offense**

Total Orders Entered	29
DUI Aggravated	06
Refusal	19
DUI Under 21 years of age	01
DUI Causing Bodily Injury	03

**ORDERS MODIFYING REVOCATION ORDERS  
29**



## RESOLUTION OF WRITTEN OBJECTIONS

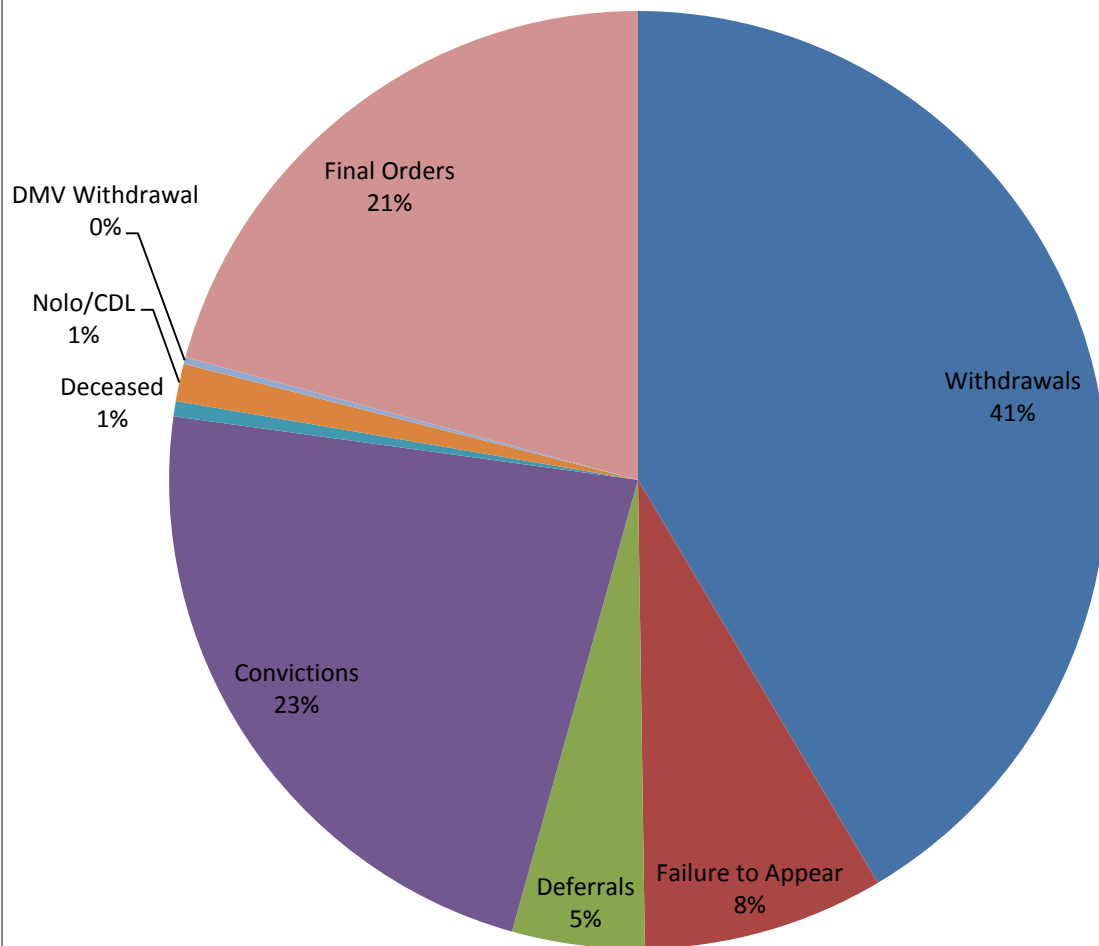


### **RESOLUTION OF WRITTEN OBJECTIONS:**

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 2013, the OAH issued Orders which resolved 1708 Written Objections.

Fiscal Year 2013 Resolution of Written Objections	
Total Orders Entered	<b>1708</b>
Withdrawals	708
Failure to Appear	142
Deferrals	78
Convictions	390
Deceased	09
Nolo/CDL	22
DMV Withdrawal	04
Final Orders	355

## Resolution of All Written Objections 1708



## TIME FRAME FOR ISSUANCE OF FINAL ORDERS

### **TIME FRAME FOR ISSUANCE OF FINAL ORDERS:**

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 2013, the OAH entered 355 Orders after the conclusion of the administrative hearing. Of those, 209 (59%) 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.

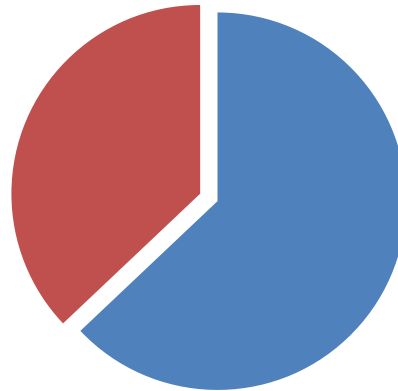
For Fiscal year 2013, the OAH entered 1708 Orders which resolved Written Objections filed regarding Orders of Revocation or Suspension issued by the Commissioner of the WVDMV. Of those, 1562 (91%) Orders were issued within the nine month time-frame.

**Fiscal Year 2013 Time Frame for Entry of Final Orders  
After Administrative Hearing**

<b>Total Orders Entered</b>	<b>355</b>
<b>Entered within 9 Month Period</b>	<b>209</b>
<b>Entered outside of 9 Month Period</b>	<b>146</b>

**TIMEFRAME FOR ENTRY OF ORDERS  
AFTER ADMINISTRATIVE HEARING**

**355**

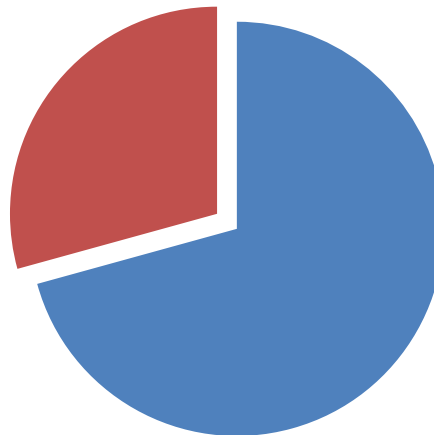


Orders Entered  
within 9 Months  
59%

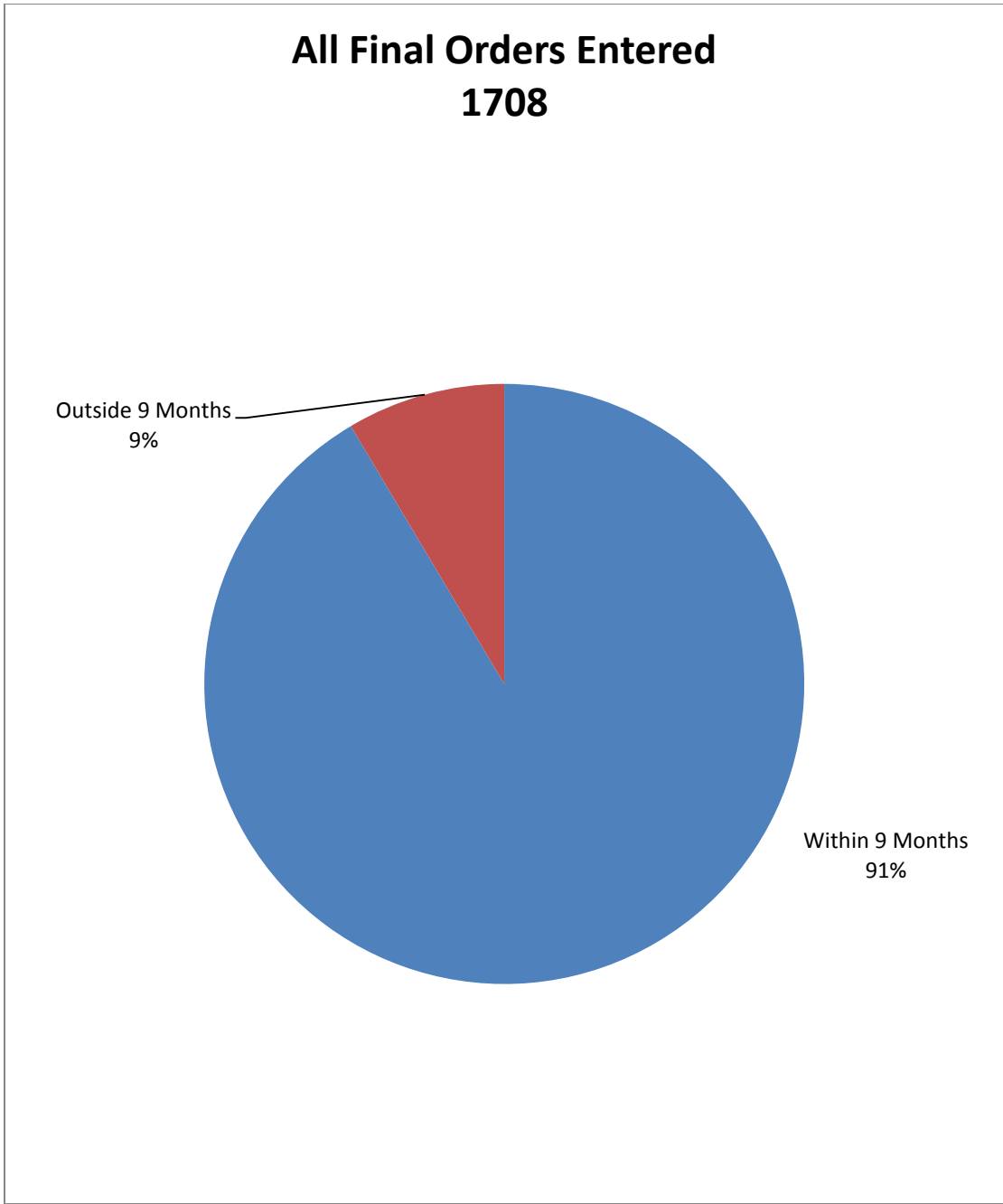
**TIME FRAME FOR ENTRY OF ORDERS  
AFTER ADMINISTRATIVE HEARING**

**355**

Orders Entered  
Outside 9 months  
41%

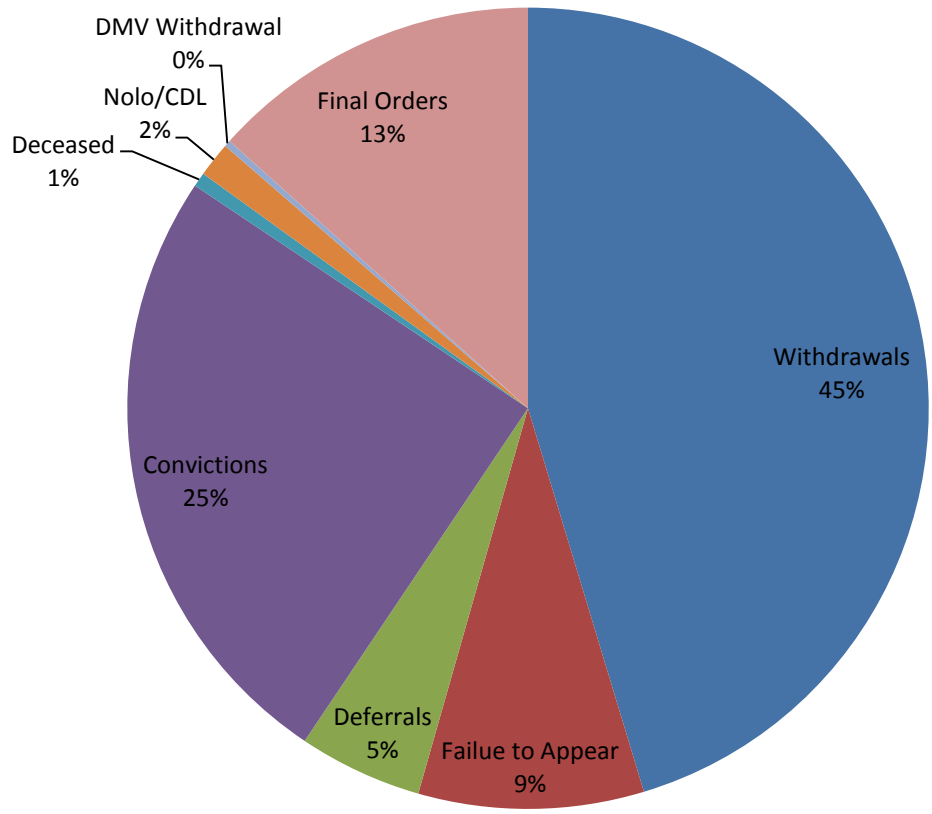


Fiscal Year 2013 Time Frame for Entry of All Final Orders	
Total Orders Entered	1708
Within 9 Months	1562
Outside 9 Months	146
Fiscal Year 2013 Time Frame for Entry of All Final Orders	



<b>Total Orders Entered</b>	<b>1708</b>
Orders Entered within 9 Months	<b>1562</b>
<b>BREAKDOWN</b>	
Withdrawals	708
Failure to Appear	142
Deferrals	78
Convictions or Guilty Pleas	390
Deceased	09
Nolo/CDL	22
DMV Withdrawal	04
Final Orders after Hearing	209

### Resolution of Final Orders within 9 Months 1562



**APPEALS OF OFFICE OF ADMINISTRATIVE HEARINGS ORDERS**



**APPEALS OF OFFICE OF ADMINISTRATIVE HEARINGS ORDERS:**

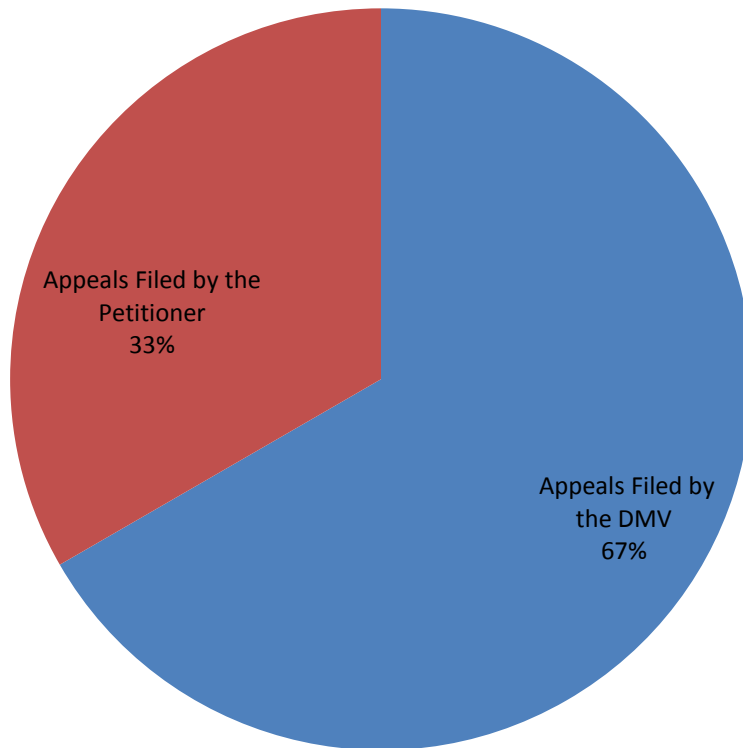
Once a Final Order has been reviewed by the Legal Department and approved by the Hearing Examiner, the Final Order is entered by Chief Hearing Examiner and subsequently distributed to the parties. Either party aggrieved by the Final Order may petition for appeal in Circuit Court accordance with the provisions of West Virginia Code §29A-5-4. During Fiscal Year 2013, 33 appeals of Final Orders entered by the OAH have been filed in various Circuit Courts throughout the State.

Fiscal Year 2013 Appeals of OAH Final Orders

<b>Final Orders Entered After Hearing</b>	355
TOTAL Appeals Filed	33
Appeals Filed by the DMV	22
Appeals Filed by the Petitioner	11

### FINAL ORDERS APPEALED

33



## ACCOMPLISHMENTS OF THE OFFICE OF ADMINISTRATIVE HEARINGS

## **ACCOMPLISHMENTS OF THE OFFICE OF ADMINISTRATIVE HEARINGS:**

As of June 1, 2012, the administration team consisting of the Agency Director, Deputy Director, and Supervisor of the Hearing Examiners and Paralegals (all of whom are licensed attorneys) is in place.

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 powers 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 has also successfully filed its first set of Legislative Rules which are currently awaiting approval by the full Legislature following the receipt of committee approval in October 2012.

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.