# WEST VIRGINIA
# SECRETARY OF STATE
## NATALIE E. TENNANT
# ADMINISTRATIVE LAW DIVISION

Form #3

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OFFICE WEST VIRGINIA SECRETARY OF STATE

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

AGENCY: Office of Administrative Hearings TITLE NUMBER: 105

CITE AUTHORITY: West Virginia Code § 17C-5C-4a

AMENDMENT TO AN EXISTING RULE: YES____ NO__x__

IF YES, SERIES NUMBER OF RULE BEING AMENDED:_____

TITLE OF RULE BEING AMENDED:_____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 1

TITLE OF RULE BEING PROPOSED: Appeal Procedures

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Paul D. Mattox, J

Authorized Signature

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
**Office of Administrative Hearings**
300 Capitol Street, 10th Floor, Charleston, West Virginia 25301
(304) 356-2233 • Fax: (304) 558-1316

Earl Ray Tomblin
Governor

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

**105 CSR 1**
**Appeal Procedures**
**Legislative Rule - New**

**Brief Summary of Rule**

This legislative rule provides procedures regarding the initiation and administration of appeals that are heard and determined by the Office of Administrative Hearings 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, orders, 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.

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## Circumstances Requiring Filing of Rule

The Office of Administrative Hearings (OAH) was created in 2010 after the West Virginia Legislature passed Senate Bill 186 during the 2010 Regular Session. The purpose of the OAH is to determine appeals from orders and decisions issued by the West Virginia Division of Motor Vehicles (DMV). The jurisdiction of the OAH is set forth in W. Va. Code §17C-5C-3. Prior to Senate Bill 186 becoming effective on June 11, 2010, the DMV determined all of its own appeals from DMV orders and decisions pursuant to procedures for the exercise of administrative due process set forth in 91 SCR 1.

The passage of Senate Bill 186 (2010) created the need to establish OAH appeal procedures, including procedures for the submission of written objections from DMV orders and decisions, the submission and service of documents, the scheduling and administration of hearings, and the issuance of final orders. This rule is needed to inform the public and the DMV of OAH appeal procedures and expectations.

## QUESTIONNAIRE

*(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)*

DATE: August 30, 2012

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM:(*Agency Name, Address & Phone No.*) Office of Administrative Hearings
300 Capitol Street, 10th Floor
Charleston, WV 25301

(304) 356-2233

LEGISLATIVE RULE TITLE: ~~APPEAL PROCEDURES (Title 105, Series 1)~~

1. Authorizing statute(s) citation ~~W. Va. Code §17C-5C-4a~~

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

   July 23, 2012

   b. What other notice, including advertising, did you give of the hearing?

   N/A

   c. Date of Public Hearing(s) ***or*** Public Comment Period ended:

   August 22, 2012

   d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

   Attached _____ No comments received x

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

August 30, 2012

f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Office of Administrative Hearings
ATTN: Legislative Rule
c/o John G. Hackney, Jr., Chief Hearing Examiner
300 Capitol Street, 10th Floor
Charleston, WV 25301
Phone: (304) 356-2233
Fax: (304) 558-1316
E-mail: john.g.hackney@wv.gov

g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

N/A

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

_____

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

_____

d. Attach findings and determinations and reasons:

Attached _____

APPENDIX B

# *FISCAL NOTE FOR PROPOSED RULES*

Rule Title: 105 CSR 1 - Appeal Procedures

Type of Rule: [X] Legislative [ ] Interpretive [ ] Procedural

Agency: Office of Administrative Hearings

Address: 300 Capitol Street, 10th Floor
Charleston, WV 25301

Phone Number: (304) 356-2233 Email: oah@wv.gov

## Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

This rule will have no fiscal impact upon state government.

## Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

| FISCAL YEAR | | | |
|---|---|---|---|
| Effect of Proposal | Current Increase/Decrease (use "-") | Next Increase/Decrease (use "-") | Fiscal Year (Upon Full Implementation) |
| 1. Estimated Total Cost | 0.00 | 0.00 | 0.00 |
| Personal Services | 0.00 | 0.00 | 0.00 |
| Current Expenses | 0.00 | 0.00 | 0.00 |
| Repairs & Alterations | 0.00 | 0.00 | 0.00 |
| Assets | 0.00 | 0.00 | 0.00 |
| Other | 0.00 | 0.00 | 0.00 |
| 2. Estimated Total Revenues | 0.00 | 0.00 | 0.00 |

105 CSR 1 - Appeal Procedures

Rule Title:

Rule Title: _____

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

Not applicable.

## MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Fees were previously charged by the Division of Motor Vehicles (DMV). Fees have not been formally established since hearing duties and responsibilities were transferred from the DMV to the Office of Administrative Hearings. The fees set by the rule are designed to recapture only actual expenses. Fees that the DMV may incur will have no fiscal impact because funding for the DMV and Office of Administrative Hearings are derived from the same state fund.

Date: August 30, 2012

Signature of Agency Head or Authorized Representative

Paul A. Mattox, Jr.

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
Office of Administrative Hearings
300 Capitol Street, 10th Floor, Charleston, West Virginia 25301
(304) 356-2233 • Fax: (304) 558-1316

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**105 CSR 1**
**Appeal Procedures**
**Legislative Rule - New**

**Comments and Amendments**

1. **If a public hearing was held, a transcript of the hearing and names of all who attended:**

   Not applicable.

2. **Comments received, both written and oral with a response to the comments:**

   The Office of Administrative Hearings received no comments during the public comment period.

3. **Amendments made to the proposed rule as a result of comments or other information received:**

   After further review of the rule, the Office of Administrative Hearings (OAH) amended the rule as follows:

   OAH made spacing adjustments. OAH amended §105-1-2.3. on page one to clarify that if any provision of proposed OAH rule 105 CSR 1 conflicts with any other rule, the OAH rule governs. The OAH also amended §105-1-10.1. on page seven to remove the requirement that the respondent verify *within twelve days* of the receipt of a copy of written objections if such objections are timely pursuant to subsection 7.1 of the proposed rule.

4. **Reasons for the amendments:**

   §105-1-2.3. was amended to clarify that other rules, such as Division of Motor Vehicle rules, do not undermine or trump OAH's rule. OAH rule provisions shall govern OAH hearings.

   The twelve-day requirement in §105-1-10.1. was deleted over concerns that the requirement is too onerous and the fact that jurisdictional problems cannot be waived.

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

# TITLE 105
# LEGISLATIVE RULE
# OFFICE OF ADMINISTRATIVE HEARINGS

## SERIES 1
## APPEAL PROCEDURES

### § 105-1-1. General.

1.1. Scope. -- This legislative rule shall govern the initiation and administration of appeals that are heard and determined by the Office of Administrative Hearings from orders and decisions of the Commissioner of the Division of Motor Vehicles.

1.2. Authority. -- W. Va. Code § 17C-5C-4a.

1.3. Filing Date. -- _____.

1.4. Effective Date. -- _____.

### § 105-1-2. Application and Index.

2.1. Application. -- This rule applies to persons contesting an order or decision of the Commissioner of Motor Vehicles which is subject to review by the Office of Administrative Hearings.

2.2. Enforcement. -- Enforcement of this rule is vested with the Chief Hearing Examiner of the Office of Administrative Hearings or his or her lawful designee.

2.3. Conflict. -- The provisions of this rule apply to all administrative proceedings before the Office of Administrative Hearings. If any provision of this legislative rule conflicts with any other rule, this legislative rule shall govern.

2.4. Index. --

105-1-1. General.
105-1-2. Application and Index.
105-1-3. Definitions.
105-1-4. Addresses.
105-1-5. Calculation of Time; Service and Filing Deadlines.
105-1-6. Service and Certificates of Service.
105-1-7. Written Objections.
105-1-8. Hearing Notices and Location.
105-1-9. Continuances and Postponement of Hearings; Rehearing.
105-1-10. Pre-Hearing Notifications.
105-1-11. Subpoenas and Discovery.
105-1-12. Motions and Orders.
105-1-13. Stipulations and Exhibits.
105-1-14. Failure to Appear.
105-1-15. Hearing and Evidence.
105-1-16. Official Record; Fees.
105-1-17. Final Order.
105-1-18. Motion to Reconsider.

### § 105-1-3. Definitions.

The following definitions shall apply in the interpretation of this rule.

3.1. "Appealable order" means the order or decision of the Commissioner that the petitioner is appealing to the OAH pursuant to OAH's jurisdiction under W. Va. Code § 17C-5C-3.

3.2. "Commissioner" means the executive officer of the Division of Motor Vehicles appointed by the Governor pursuant to W. Va. Code § 17A-2-2 or the Commissioner's lawful designee.

3.3. "Chief Hearing Examiner" means the chief administrator of the Office of Administrative Hearings appointed by the Governor pursuant to W.Va. Code § 17C-5C-1(b).

3.4. "DUI case" means an administrative proceeding conducted by the OAH pursuant to chapters seventeen-b, seventeen-c, and twenty-nine-a of the West Virginia Code as applied to contested cases arising out of the enforcement of administrative revocations and disqualifications imposed under the provisions of W. Va. Code § 17C-5A-2 for driving under the influence of alcohol, controlled substances or drugs, driving while having a blood alcohol concentration above the legal limit, or refusing to submit to a designated secondary test.

3.5. "Hearing" means a hearing in a DUI case or other contested case conducted by the OAH.

3.6. "Investigating officer" means a law-enforcement officer or officers as described in W. Va. Code § 17C-5-4 or § 17E-1-24, including an arresting officer, secondary chemical test administrator, or any other law enforcement officer who may be needed to meet the Commissioner's burden of proof in a matter before the OAH.

3.7. "Office of Administrative Hearings" and "OAH" means the separate operating agency within the Department of Transportation with jurisdiction to hear and determine all appeals pursuant to W. Va. Code § 17C-5C-3, including the Chief Hearing Examiner and all OAH employees designated to act on his or her behalf.

3.8. "Other contested case" means an administrative proceeding conducted by the OAH pursuant to its jurisdiction other than a DUI case.

3.9. "Party" and "parties" means the petitioner and the respondent.

3.10. "Petitioner" means the person contesting an order or decision of the Commissioner.

3.11. "Respondent" means the Commissioner.

**§ 105-1-4. Addresses.**

4.1. OAH Address. Whenever a party is required to file documents or other information with the OAH, such submission shall be made as specified in this rule using the following address information:
Office of Administrative Hearings
300 Capitol Street, 10th Floor
Charleston, WV 25301-1794
Phone: (304) 356-2233
Fax: (304) 558-1316
E-mail: oah@wv.gov

4.2. Addresses of Parties. The OAH may address notices, orders, and other correspondence to a party using an address previously provided by such party on a submission to the OAH. Any person who has a pending contested matter before the OAH is required to provide written notice of a change in address at least ten (10) days prior to a scheduled hearing in which they are a party. If the person's final hearing is held prior to the person's change in address, then the person is required to provide the written notice prior to the issuance of the final order in their case. Written notice must be provided to the OAH by certified mail, return receipt requested, facsimile, or by e-mail.

4.3. Addresses of Attorneys. Any attorney who is representing a party in a

matter before the OAH shall inform the OAH and the opposing party in writing of the attorney's name, mailing and e-mail addresses, telephone and facsimile numbers, and West Virginia State Bar identification number. Such information may be provided in a submission made by such an attorney or in a separate notice of appearance of counsel. The attorney shall inform the OAH promptly in writing of any change of attorney address information.

**§ 105-1-5. Calculation of Time; Service and Filing Deadlines.**

5.1. In computing any period of time prescribed or allowed by this rule, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. When the period of time prescribed or allowed is fewer than eleven (11) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. "Legal holiday" includes New Year's Day, Martin Luther King's Birthday, Lincoln's Birthday, Washington's Birthday, Memorial Day, West Virginia Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, Christmas Day, any day on which a general, special or primary election is held in the state, in the county in which the case is pending, or Kanawha County, and any other day appointed as a holiday by the Governor or by the President of the United States as a day of special observance or thanksgiving, or a day for the general cessation of business.

5.2. Unless a different period is set by this rule or by the OAH, a written motion, notice of hearing on the motion, and any supporting brief or affidavits shall be served at least nine (9) days before the time set for the hearing if served by mail or at least seven (7) days before the time set for the hearing if served by hand delivery, by fax, or by e-mail to the opposing party.

5.3. Unless a different period is set by this rule or by the OAH, any response to a written motion, including any supporting brief or affidavits, shall be served at least four (4) days before the time set for the hearing if served by mail or at least two (2) days before the time set for the hearing if served by hand delivery, by fax, or by e-mail to the opposing party.

5.4. Unless a different period is set by this rule or by the OAH, a written motion, notice of hearing on the motion, and any supporting briefs or affidavits shall be filed with the OAH at least seven (7) days before the hearing, and any response to a motion and supporting briefs or affidavits shall be filed at least two (2) days before the hearing.

5.5. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, the OAH may add three (3) days to the prescribed period.

5.6. In cases in which registered or certified mail is not signed for, the provisions of W. Va. Code § 17A-2-19 apply, which provide that the giving of notice is complete after the expiration of four (4) days after deposit of the notice in the United States mail.

5.7. Nothing in this section 5 extends the deadline for filing written objections as stated in subsection 7.1. beyond the

jurisdictional time limit.

**§ 105-1-6. Service and Certificates of Service.**

6.1. A party filing with the OAH a pleading, notice, motion, proposed order, proposed evidentiary submission, or other document shall also serve such document on the opposing party. Unless otherwise specified in this rule or by law, service may be made in person, by regular, certified, or registered mail, by fax, or by e-mail. Unless otherwise specified in this rule or by law, whenever service is required to be made on a party represented by an attorney, service shall be made on the attorney.

6.2. Every pleading, notice, motion, proposed order, proposed evidentiary submission, and other document filed with or otherwise submitted to the OAH shall have attached to it a certificate of service that states the petitioner's name and file number, the method of service, whether in person, by regular, certified, or registered mail, by fax, or by e-mail, the name and address of the party being served, the date of such service, and the name and signature of the party executing such service.

6.3. A pleading, notice, motion, proposed order, proposed evidentiary submission, and other document filed with the OAH may not be considered by the OAH if it was not served in accordance with this rule.

6.4. The party filing or serving a pleading, notice, motion, proposed order, proposed evidentiary submission, and other document shall be responsible for retaining any proof of such filing or service, including copies of successful transmittal sheets in the case of filing or service by fax and copies of e-mails showing relevant e-mail addresses in the case of filing or service by e-mail. Any such proof shall be brought to each hearing and a party shall make such proof available after request by the OAH or an opposing party.

**§ 105-1-7. Written Objections.**

7.1. In a DUI case, a petitioner must file written objections to an appealable order with the OAH in person, by registered or certified mail, return receipt requested, or by fax transmission or electronic mail within thirty (30) days after receipt of a copy of the appealable order. In any other contested case, unless otherwise specified by law, a petitioner must file written objections to an appealable order with the OAH in person, by registered or certified mail, return receipt requested, or by fax transmission or electronic mail within ten (10) days after receipt of a copy of the appealable order. A successful transmittal sheet shall be necessary for proof of written objections in the case of filing by fax.

7.2. Untimely written objections may not be considered by the OAH. Written objections are untimely if they are made prior to the issuance of the appealable order or are made beyond the deadline set forth in subsection 7.1.

7.3. Information provided on written objections shall include the petitioner's name, mailing and e-mail addresses, telephone number, driver's license number, file number, and date of birth. Written objections shall provide the date of the appealable order and the date the petitioner received a copy of the appealable order. If the petitioner was arrested, written objections shall also include the county of arrest, the name of the arresting agency, and the arresting officer's name. If the petitioner is represented by an attorney, written

objections shall include the attorney's name, mailing and e-mail addresses, telephone and facsimile numbers, and West Virginia State Bar identification number. Written objections may be made in a current form approved by the Chief Hearing Examiner and posted on the OAH's website, at http://www.transportation.wv.gov/oah/.

7.4. All written objections shall be signed by the petitioner or petitioner's attorney. All written objections shall have a copy of the appealable order attached.

7.5. At the discretion of the OAH, incomplete written objections may not be considered by the OAH. Written objections are incomplete if they do not include the information and data required by subsections 7.3. and 7.4.

7.6. If a petitioner wishes to challenge the results of a secondary chemical test or wishes to challenge the legality of a sobriety checkpoint in a DUI case, the written objections should indicate if the results of a secondary chemical test or the legality of a sobriety checkpoint or both is being challenged. Such disclosure must be made by the deadline set forth in subdivision 10.2.a.

7.7. Upon receipt of written objections, the OAH will notify the Commissioner, who will stay the imposition of the applicable period of revocation or suspension and afford the person an opportunity to be heard by the OAH in a DUI case.

7.8. Written objections constitute a written motion by the petitioner for a hearing and for a final order.

**§ 105-1-8. Hearing Notices and Location.**

8.1. A hearing shall be held within one hundred eighty (180) days after the date on which the OAH received the timely written objections unless there is a hearing continuance.

8.2. The OAH will send the notice of hearing to the petitioner, to the petitioner's attorney, if any, to the investigating officers, to the Commissioner, and to the Attorney General's Office if the Attorney General has filed a notice of appearance. The OAH will send the hearing notice by depositing it in the United States mail, postage prepaid, in an envelope addressed to the person's last known address or, with written consent of a person, to such person's last known e-mail address.

8.3. The hearing notice will contain the date, time, and location of the hearing, the case name and file number, and a statement as to the consequences of failing to appear at the prescribed date, time and place of the hearing.

8.4. In a DUI case, the hearing notice will contain a statement as to the consequences of failing to timely notify the OAH of the petitioner's intention to challenge the results of a secondary chemical test or to challenge the legality of a sobriety checkpoint.

8.5. Upon notice on the parties, the OAH may consolidate issues from appealable orders arising from the same incident or occurrence into one administrative hearing.

8.6. The hearing shall be held at an office of the Division of Motor Vehicles or the OAH 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 of Motor Vehicles or the OAH is not available.

**§ 105-1-9. Continuances and Postponement of Hearings; Rehearing.**

9.1. The OAH may on its own or after receipt of a motion by a party for good cause shown postpone or continue any hearing. Only parties may request a hearing continuance.

9.2. The OAH may on its own motion postpone, reconvene, or continue a hearing for good cause including, but not limited to, docket management, availability of hearing examiners or other essential personnel, error in scheduling or notice, or mechanical failure of essential equipment such as recording equipment or file storage equipment.

9.3. A party wishing to request a hearing continuance shall file a motion for a continuance with the OAH, with service to the opposing party, within the time frames set forth by subsections 5.2. and 5.4. of this rule.

9.4. The OAH may grant a party's motion for a continuance if it finds that good cause is shown to grant such request. Good cause may include serious illness, previously scheduled conflicting court appearances, the first failure of an essential witness to appear after being properly subpoenaed, or other significant events. A party shall file evidence of good cause with the motion for a continuance.

9.5. Emergency Continuance.

a. The OAH may grant an emergency continuance on less than seven (7) days' notice to a party for unexpected personal emergencies of a party, a party's attorney, investigating officer, or other essential subpoenaed witness. An emergency situation requiring the services of an investigating officer en route to a hearing qualifies as an unexpected personal emergency.

b. An emergency continuance request made by telephone must also be submitted in writing. A motion for an emergency continuance shall include evidence of good cause for such continuance and shall be filed with the OAH no later than five (5) days after the date the hearing was scheduled.

c. If a written motion for an emergency continuance with evidence of good cause is not received by the OAH in a timely manner, the OAH may deem it a failure of the party requesting the continuance to appear at the hearing. The OAH may deem it a failure of the party requesting the continuance to appear at the hearing even if an order continuing the hearing was granted provided that such order was based solely on the oral representations of the party making the motion.

9.6. Parties are obligated to appear at a scheduled hearing unless they receive an order from the OAH prior to the hearing that continues such hearing. A party may appear solely by counsel.

9.7. The OAH may continue a hearing in progress from one day to another day or adjourn the hearing to a later date.

9.8. The OAH may order the rehearing of a DUI case or other contested case prior to the issuance of a final order if mechanical failure caused testimony presented during a hearing not to be recorded. The OAH may also order the

rehearing of a DUI case or other contested case prior to the issuance of a final order if requested to do so by a party when a hearing examiner who presided at the original hearing is unable to issue a final order and the OAH determines that the credibility of a witness is a significant factor in the case.

**§ 105-1-10. Pre-Hearing Notifications.**

10.1. Jurisdictional Limits. – After receipt of a copy of written objections, the respondent shall verify if such objections are timely pursuant to subsection 7.1. If the respondent determines that such objections were untimely, the respondent shall file evidence of such untimeliness with the OAH upon discovery of the same without delay.

10.2. Challenge of Secondary Chemical Test and Sobriety Checkpoint.

a. Any petitioner requesting a hearing in a DUI case who intends to challenge the results of a secondary chemical test of the blood, breath or urine, intends to challenge the chemical analysis, or intends to challenge official compliance with and adherence to a sobriety checkpoint or its operational guidelines shall notify the OAH of his or her intent. The petitioner shall file the notification of any such type or types of challenges being made with the OAH, with service to the respondent, at least thirty (30) days prior to the hearing date or those matters may not be challenged.

b. If a petitioner fails to comply with the thirty (30) day notice requirement of subdivision 10.2.a. pertaining to the secondary chemical test, the results of the test, if any, will be admissible as though the petitioner and the respondent had stipulated to the admissibility of such test results.

10.3. Experts. -- Parties shall file a notice of intent to present expert testimony at a hearing with the OAH, with service to the other party, at least twenty (20) days prior to the hearing date. Such notice shall include the name of the expert and a summary of the anticipated testimony of such expert. Any notice of intent to present a rebuttal expert shall be filed with the OAH, with service to the other party, at least twelve (12) days prior to the hearing date. Failure to file or serve the required expert or rebuttal expert notification may result in exclusion of the expert witness, limitation on the expert's testimony, or continuance of the hearing, as the interests of justice require.

10.4. Appearance. -- If a party wishes for a witness to testify at a hearing by telephone or video-conference, instead of testifying in person or by evidentiary deposition, such party shall file a motion seeking such permission at least ten (10) days prior to the hearing date. The party making the motion is responsible for ensuring that the technology is available at the hearing location to accommodate the request. A party wishing to file a response to such motion shall do so at least five (5) days prior to the hearing date. Unless the OAH grants such a motion, a witness is required to appear in person at the hearing in order to testify.

10.5. Stipulations. -- Parties shall make a reasonable and good faith effort to agree to a stipulation of relevant, undisputed facts prior to the hearing so as to avoid the necessity for the introduction of evidence at the hearing.

10.6. Case resolution. -- Parties shall inform the OAH immediately of a deferral, anticipated plea, plea, conviction, rescission, withdrawal of written objections, or other matter that terminates the need for a hearing

in a DUI case or other contested case. Parties are obligated to appear at a scheduled hearing unless they received a written order from the OAH prior to the hearing that cancelled or continued such hearing.

**§ 105-1-11. Subpoenas and Discovery.**

11.1. The OAH may issue subpoenas commanding the appearance of witnesses and subpoenas duces tecum commanding the submission of documents, items or other things pursuant to W. Va. Code § 17C-5A-2(c).

11.2. The OAH will issue subpoenas, including subpoenas duces tecum, at the request of a party or the party's legal representative. All requests by parties for subpoenas and subpoenas duces tecum shall be in writing and shall contain a statement acknowledging that the requesting party agrees to pay any necessary fees, including fees for the attendance and travel of a witness. The party requesting the subpoena shall be responsible for service of the subpoena on the appropriate individual. Subpoenas duces tecum shall be returnable on the date of the next scheduled hearing unless otherwise specified in the subpoena.

11.3. Every subpoena or subpoena duces tecum shall be served at least five (5) 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 such subpoena. A return acknowledgment signed by the person to whom the subpoena or subpoena duces tecum is directed shall be required to prove service by registered or certified mail. Instead of personal service or service through mail, the respondent may serve subpoenas and subpoenas duces tecum to law-enforcement officers through electronic mail to the department of the officer's employer.

11.4. Any person who serves a subpoena or subpoena duces tecum is entitled to the same fee as sheriffs who serve witness subpoenas for the circuit courts of this state. Fees for the attendance and travel of witnesses, except for law-enforcement officers, shall be the same as for witnesses before the circuit courts of this state. All fees related to a subpoena or subpoena duces tecum issued at the instance of an interested party shall be paid by the party who asks that such subpoena or subpoena duces tecum be issued.

11.5. Investigating officers shall be compensated for the time expended in their travel and appearance before the OAH by the law-enforcement agency by which 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. A law enforcement officer is not entitled to a fee for serving a subpoena or subpoena duces tecum.

11.6. If a person does not obey the subpoena or subpoena duces tecum, the party who caused the service of such subpoena may petition the circuit court wherein the action lies for enforcement of such subpoena.

11.7. The disclosure and exchange of information between the parties is encouraged; however, there shall be no formal discovery in appeals before the OAH except as noted in this rule.

**§ 105-1-12. Motions and Orders.**

12.1. All requests for a written order shall be made by motion. Prior to filing a

motion with the OAH, the moving party shall in good faith confer or attempt to confer with the other party to resolve matters in disagreement. Every written motion shall state a summary of such consultation. A motion shall clearly set forth all grounds, facts, and authorities in support of the motion. Every motion, response, and proposed order shall be signed by the party filing such document or, if the party is represented by an attorney, shall be signed by the party's attorney.

12.2. All written motions shall be served and filed within the time frames set forth in subsections 5.2. and 5.4. of this rule. All written responses to such motions shall be served and filed within the time frames set forth in subsections 5.3. and 5.4. of this rule.

12.3. The Chief Hearing Examiner or his or her designee shall respond by order to all written motions from a party that comply with subsections 12.1. and 12.2. by granting, denying, modifying, or otherwise addressing the same.

12.4. Oral motions may be made by a party during a hearing. A hearing examiner may address such oral motions on the record during a hearing or by order.

12.5. The submission of proposed orders to the OAH shall be as follows:

a. Unless otherwise directed by the OAH, all proposed orders shall be submitted to the OAH promptly, but no later than seven (7) days after having been directed to do so by the OAH. When the party responsible for the preparation and presentation of an order unreasonably delays or withholds its presentation, the order may then be prepared and entered by the OAH.

b. Except for good cause or unless otherwise determined by the OAH, no order may be presented for entry unless it bears the signature of all counsel and unrepresented parties. If such exception exists, the party responsible for the preparation and presentation of an order may submit the original of the proposed order to the OAH within seven (7) days, with a copy to the opposing party along with a notice to note objections and exceptions to the order within five (5) days after receipt of the proposed order or such lesser time as the OAH directs. The opposing party shall notify the OAH, in writing, of his or her approval of or objection to the order.

**§ 105-1-13. Stipulations and Exhibits.**

13.1. Stipulations, such as stipulations of evidence and exhibits, shall be valid and enforced provided the stipulations are in writing, signed by the parties making them or their attorney, and promptly filed.

13.2. A written stipulation, or an oral stipulation on the record, may be accepted as a substitute for evidence. A stipulation may relate to a question of fact, the contents of a document, or the expected testimony of a witness. A stipulation must be relevant to an issue in the appeal, written or stated in clear and unambiguous terms together with its factual basis, and understood and agreed to by all parties.

13.3. A stipulation of fact that has been accepted is binding on the parties to the stipulation and may not be contradicted by those parties.

13.4. Exhibits that are submitted to the OAH during a hearing are not subject to the certificate of service requirements of section 6 of this rule provided that the submitting party provides a courtesy copy of such

exhibits to the opposing party at the time of submission to the OAH during the hearing.

**§ 105-1-14. Failure to Appear.**

14.1. The OAH may enter an order dismissing a case and striking the appeal from the docket if a petitioner fails to appear either in person or by his or her attorney at a hearing in a DUI case without previously obtaining an order of continuance pursuant to section 9 of this rule.

14.2. The OAH may enter an order dismissing a case and striking the appeal from the docket if a petitioner fails to appear either in person or by his or her attorney at a hearing in any other contested case without previously obtaining an order of continuance pursuant to section 9 of this rule.

**§ 105-1-15. Hearing and Evidence.**

15.1. A hearing before the OAH shall be heard de novo and conducted pursuant to the provisions set forth in chapters seventeen-b and seventeen-c of the West Virginia Code and, to the extent not inconsistent therewith, with the procedures set forth in article five, chapter twenty-nine-a of the West Virginia Code.

15.2. The West Virginia Rules of Evidence governing proceedings in the courts of this state shall be given like effect in OAH hearings. All testimony shall be given under oath. Evidentiary depositions may be taken prior to the hearing and read into evidence during the OAH hearing by following the same procedure as in civil actions in the circuit courts of this state.

15.3. Parties are required to present their evidence during the hearing. Premature or late evidence may be excluded at the discretion of the OAH unless specifically permitted by order.

15.4. The hearing shall be before the Chief Hearing Examiner or his or her designee hearing examiner employed by the OAH. Such hearing examiner has the power to hold conferences for the settlement or simplification of the issues by consent of the parties, administer oaths and affirmations, regulate the course of the hearing, sequester witnesses, rule on motions and evidence, question witnesses, dispose of procedural requests or similar matters, and exclude any person from the hearing who engages in conduct intended to disrupt the hearing, willfully violates instructions issued by the hearing examiner, or is not a party, a party's attorney, or testifying witness.

15.5. Any party to a hearing has the right to be represented by an attorney duly qualified to practice in the state of West Virginia. A party may not be represented at a hearing by a spokesperson, lay representative, or anyone else not licensed and authorized to practice law in the state of West Virginia. The petitioner may appear without an attorney and represent himself or herself at the hearing. The Commissioner may be represented at hearings conducted by the OAH, and evidence submitted by the Commissioner may be considered in such hearings with or without such representation.

15.6. All of the testimony, evidence, arguments, and rulings during a hearing shall be recorded electronically or by mechanized or stenographic means by the OAH. Audio or video recording of a proceeding by anyone other than OAH personnel without prior written permission of the Chief Hearing Examiner is prohibited.

15.7. The party carrying the burden of proof has the initial opportunity to present

evidence. Parties have the right to cross examine witnesses and to submit rebuttal evidence. Following the presentation of all evidence, each party has the right to offer closing arguments.

15.8. The OAH may require proposed findings of fact and conclusions of law from the parties prior to the issuance of the final order in the matter. Unless otherwise specified during the hearing or by order, a party shall provide by e-mail all proposed findings of fact and conclusions of law to the OAH and directly to the hearing examiner who presided over the hearing within seven (7) days of the conclusion of the hearing.

**§ 105-1-16. Official Record; Fees.**

16.1. Upon written request of a party, the OAH will facilitate having the recording of the hearing transcribed and a copy furnished to the party requesting the hearing transcript at the expense of the requesting party. The filing of an appeal from a final order that necessitates the transcription shall constitute such a written request from the party filing the appeal. The OAH or the transcription service provider may demand pre-payment of the transcription and transcript costs, including the original and copy of the transcript, from a requesting party. Upon completion of the hearing transcript, the original transcript shall be filed with the OAH and made part of the official OAH record.

16.2. The official OAH record consists of written objections, motions and responses thereto, orders, hearing notices, subpoenas, hearing exhibits, any other evidence that was considered or reviewed by the OAH when drafting the final order, the final order, and the hearing transcript, if any. The parties may file a joint designation of record that limits the record for appeal purposes. The expense of preparing such record for appeal shall be taxed as a part of the costs of the appeal.

16.3. The OAH may charge the following fees, which shall be paid in advance by the party for whom services are to be rendered. All such fees shall accompany requests for copies, transcripts, and audio files.

a. Four dollars and twenty-five cents ($4.25) per page for each transcribed page from an administrative hearing.

b. Six dollars and twenty-five cents ($6.25) per page for each expedited transcribed page from an administrative hearing.

c. Thirty dollars ($30) for each audio file of an administrative hearing.

d. One dollar and twenty-five cents ($1.25) per page for each page copied from the OAH file.

16.4. OAH hearings are exempt from the requirements of article one, chapter twenty-nine-b of the West Virginia Code.

**§ 105-1-17. Final Order.**

17.1. The parties may submit a joint proposed final order, agreed settlement, consent order, or default order that is agreed to and signed by both parties to the OAH for consideration prior to the entry of a final order.

17.2. If the case has not been otherwise resolved, following the hearing upon consideration of the designated record and based on the determination of the facts of the case and applicable law, the OAH shall

issue a final order that includes findings of fact and conclusions of law and affirms, reverses, or modifies the appealable order.

17.3. The final order shall include the final decision of the hearing examiner with his or her findings of fact and conclusions of law after review by the Chief Hearing Examiner as to legal accuracy and clarity and other requirements. The hearing examiner will sign his or her final findings of fact and conclusions of law to signal approval of these findings and conclusions. If the Chief Hearing Examiner disagrees with some or all of the hearing examiner's findings or conclusions, the final order will include separate findings of fact and conclusions of law by the Chief Hearing Examiner. The Chief Hearing Examiner will sign the final order to signal his or her approval of the final order. In case of conflict between the final decision of the hearing examiner and the final order of the Chief Hearing Examiner, the final order of the Chief Hearing Examiner shall control.

17.4. The final order shall be served on the petitioner or on the petitioner's attorney, if any, by registered or certified mail, return receipt requested, or by electronic mail if available. The final order shall be served on the Commissioner by electronic mail.

17.5. If a party appeals a final order, the appealing party shall not make the OAH a party to such appeal but shall forward a courtesy copy of the appeal petition to the OAH.

**§ 105-1-18. Motion to Reconsider.**

18.1. A party may file a motion to reconsider a final order when clerical or administrative error, such as typographical errors, failure to discuss relevant evidence, or failure to rule on a pending motion, has occurred. Such a motion must be filed within ten (10) days of receipt of the final order and does not toll the jurisdictional time limits for judicial review of such final order.

18.2. The parties may file a joint motion for reconsideration of a final order provided that the final order has not been affected by appeal outcome.

18.3. The OAH may, without motion from a party, rescind a final order, correct clerical or administrative error, such as typographical errors, failure to discuss relevant evidence, or failure to rule on a pending motion in a final order, provided that the final order has not been affected by appeal outcome.