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

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OFFICE WEST VIRGINIA
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Form #6

NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE

AGENCY: Office of Administrative Hearings TITLE NUMBER: 105

AMENDMENT TO AN EXISTING RULE: YES x NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

TITLE OF RULE BEING AMENDED: Appeal Procedures

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: ___

TITLE OF RULE BEING PROPOSED: ___

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) SB 192

SECTION 64-8-2, PASSED ON March 14, 2015

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE FOLLOWING DATE: ___

Paul A. Matton, Jr.
Authorized Signature

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 rule conflicts with any other legislative rule, this rule shall govern.

2.4. Index. --

105-1-1. General.
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105-1-3. Definitions.
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105-1-5. Calculation of Time; Service and Filing Deadlines.
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105-1-7. Written Objections.
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105-1-16. Official Record; Fees.
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§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 or refusing to submit to a designated secondary chemical 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, who is primarily responsible for the integrity of the investigation in the matter.

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: dot.oah@wv.gov

4.2. Addresses of Parties. The OAH may address notices, orders, and other correspondence to a party using the most recent 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 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. Computation of Time

a. 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.

b. Nothing in subdivision 5.1.a. shall extend the deadline for filing written objections as stated in subsection 7.1. beyond the jurisdictional time limit as set forth in West Virginia Code §17C-5A-2.

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 filed and 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. Whenever a party has the right or is required to do some act or take some action 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.

5.5. 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.

§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. All pleadings, notices, motions and certificates of service shall be signed by the party, or if represented by counsel, then by such counsel. Legal Counsel shall also provide their State Bar number alongside their name under the signature line.

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. Time limits for filing Written Objections.

a. 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) calendar days after receipt of a copy of the appealable order.

b. 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 the filing 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 deadlines 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 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.

7.5. All written objections shall be accompanied with the filing fee set forth in subsection 16.3.a. or a fee waiver request form as set forth in subsection 7.6. In the case of a Petitioner filing a written objection via email or facsimile the Petitioner or their Counsel shall mail the fee under separate cover to the OAH. If the fee is not received by the OAH within ten (10) days of the filing of the written objection, then the matter may be dismissed at the discretion of the OAH.

7.6. If a Petitioner wishes to seek a waiver of the filing fee set forth in subdivision 16.3.a. they may file the fee waiver request form promulgated by the OAH. Such request must

accompany the written objection form. If the request is granted, no filing fee shall be due from the Petitioner. However, if the request is denied, the Petitioner shall have ten (10) days from the date of said denial to remit the filing fee to the OAH.

7.7. 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.

7.8. 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 are being challenged. Such disclosure must be made by the deadline set forth in subdivision 10.2.a.

7.9. 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 or any contested case wherein a stay is required to be imposed pursuant to West Virginia Code § 17C-5A-2A.

7.10. Timely filed 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 or postponement.

8.2. The OAH will send the notice of hearing to the petitioner, to the petitioner's attorney, if any, 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 to 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 OAH or 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 OAH or the Division of Motor Vehicles 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. 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 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. In the event good cause is not shown, the OAH at its discretion, may grant a party's motion for continuance if the opposing party indicates on the record they have no objection to the granting of the motion.

9.5. Emergency Continuance.

a. The OAH may grant an emergency continuance on less than nine (9) days' notice to a party for unexpected personal emergencies of a party, a party's attorney, an 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 issued 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. The Petitioner may appear in person or solely by counsel. The Respondent may appear in person, by counsel, or by designee.

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 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. -- If the respondent contends that a written objection was untimely filed, respondent shall file evidence of such untimeliness with the OAH, with service upon the Petitioner, or Petitioner's Counsel, without delay upon discovery of the same.

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 ten (10) days prior to the hearing date or those matters may not be challenged.

b. If a petitioner fails to comply with the ten (10) 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.

c. If a petitioner fails to comply with the ten (10) day notice requirement of subdivision 10.2.a. pertaining to challenging official compliance with and adherence to a sobriety checkpoint or its operational guidelines, any challenge shall be deemed as being waived.

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, his or her area of expertise, and a summary of the anticipated testimony of such expert. Failure to file or serve the required 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, or their legal counsel, if represented, shall inform the OAH immediately of a deferral, 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 receive a written order from the OAH prior to the hearing that cancels or continues such hearing.

10.7. Amendment of Order of Revocation.

a. The issuance of an Amended Order of Revocation by the Respondent, arising out of the same underlying offense, shall not be cause to dismiss the pending matter.

b. The issuance of an Amended Order of Revocation by the Respondent shall be grounds for the granting of a Motion to Continue so long as the time frames and procedures set forth by subsections 5.2. and 9.3. of this rule are followed by the party requesting the continuance.

10.8. Blood Draw and Blood Analysis Affidavits. – In the event a party wishes to submit blood draw and blood analysis evidence, he or she may do so by submitting the affidavit of the person or persons who drew the blood and person or persons who analyzed the blood for evidence of alcohol, controlled substances or drug content: *Provided, That*, a party is required to provide notice of such evidence at least ten (10) days prior to the hearing date to the opposing party. In the event the opposing party, upon receiving such notice, wishes to cross examine such person or persons who drew blood or analyzed blood, it shall be incumbent upon such opposing party to subpoena the person or persons to testify at the administrative hearing: *Provided, further, That*, any person so subpoenaed, shall be allowed to testify by telephone.

10.9. Contents and Requirements of Blood Draw and Blood Analysis Affidavits.

a. In the case of blood draw affidavits, the affidavit shall contain the name of the person who drew the blood sample, the person's job description or title, the name of his or her employer, the date and time the blood sample was drawn, the place where the blood sample was drawn, the name of the person whose blood was drawn including the person's birthdate and place of residence, and the place to which - or the person to whom, the sample was delivered, including the date of the delivery.

b. In the case of blood analysis, the affidavit shall contain the name of the person who analyzed the blood sample, the person's job description or title, the name of his or her employer, the date and time the blood sample was analyzed, the place where it was analyzed, the name of the person whose blood was analyzed including the person's birthdate and place of residence, and the place in which the blood sample was stored following analysis.

c. Any affidavit submitted under this Rule shall be in the form of a written or printed declaration, made voluntarily and confirmed by oath or affirmation of the person making it, and given before a person having authority to administer oaths and affirmations.

§105-1-11. Subpoenas and Discovery.

11.1. If a party intends to present testimony from any person, it is the responsibility of that party to obtain the presence of the person at the hearing. This responsibility will be considered fulfilled by a party if the person whose testimony is desired has been subpoenaed by the party who desires his or her presence.

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

11.3. 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.

11.4. 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, or in the case of a law enforcement officer, the officer's designee as designated by the law enforcement agency with which the officer is employed, 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. Proof of service by electronic mail may be made by evidence of a "read receipt".

11.5. No continuance shall be granted on the basis that a subpoenaed witness has failed to appear absent a showing of proof of service of the applicable subpoena.

11.6. Upon a third consecutive failure of a person under subpoena to appear when neither of the two previous nonappearances resulted from a personal emergency, the hearing may be conducted and completed without the testimony of the person - unless the parties otherwise agree

or the party proponent of such witness petitioned for enforcement of the third consecutive subpoena in circuit court. In the event the subpoenaed witness fails to appear in spite of the party proponent having petitioned for enforcement of the subpoena, the matter shall be continued unless the opposing party shows he or she will be substantially prejudiced by allowing another continuance in the matter.

11.7. 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.

11.8. 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.

11.9. 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.

11.10. 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 and whether the opposing party objects. 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 5.3. of this rule. All written responses to such motions shall be served and filed within the time frames set forth in subsection 5.3. 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, 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. The party responsible for the preparation and presentation of an order shall 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.

c. The OAH may enter the proposed order if no objections are received within five (5) days of service of the proposed order.

d. If objections are received within the time frame specified in subsection 12.5.c. the hearing examiner shall rule on said objections within five business (5) days of receipt.

§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 made on the record, during the hearing 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 affirming the Commissioner's Order of Revocation 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 affirming the Commissioner's Order of Revocation 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.

14.3. The OAH may enter an order reversing the Commissioner's Order of Revocation if the Commissioner, his counsel, or his designee does not abide by the requirements set forth in subdivision 9.5.c. of these rules.

§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 post-hearing 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. The Hearing Examiner may sua sponte, or upon the motion of a party, sequester the witnesses from the hearing room. If said sequestration is ordered, the only witnesses who shall be permitted to remain in the hearing room are the Petitioner and one law enforcement officer as designated by the Commissioner or the Commissioner's counsel.

15.6. 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.

15.7. 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.

15.8. 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.

15.9. 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 ten (10) 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. Fifty dollars ($50) filing fee for each written objection form filed: *Provided*, That if a party prevails in its appeal, the OAH shall refund the $50 filing fee.

b. Twenty-five dollars ($25) transcript request processing fee due at the time of the submission of the transcript request.

c. Four dollars and twenty-five cents ($4.25) per page for each transcribed page

from an administrative hearing.

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

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

f. 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 petitions a court for judicial review of a final order, the petitioning party shall make the OAH a party to such appeal and shall forward a 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, failure to rule on a pending motion, or other legal deficiency 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, modify or rescind a final order in order to correct clerical or administrative errors or omissions, such as typographical errors, failure to discuss relevant evidence, failure to rule on a pending motion in a final order, or other legal deficiency, provided that the final order of the OAH has not been reversed or modified by a higher court. The Office of Administrative Hearings may issue orders nunc pro tunc in order to correct clerical mistakes or omissions.

18.4. When filing a motion to reconsider, the party filing the motion shall be required to serve both the hearing examiner who issued the final order and the Chief Hearing Examiner.