

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
AT CHARLESTON, KANAWHA COUNTY, WEST VIRGINIA**

**STANDING MEMORANDUM ORDER GOVERNING
MOTIONS TO ADMIT DOCUMENTARY EXHIBITS**

In the event the Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, DMV), or the Petitioner, moves prehearing, or during a hearing, for Evidentiary Submissions, asking the Office of Administrative Hearings (hereinafter, OAH) to admit documentary Exhibits as evidence in this case under the provisions of West Virginia Code § 29A-5-2(a) & (b), assuming same are relevant to material issues involved in the subject contested matter and not subject to conspicuously material improprieties bearing upon reliability, the same may be admitted without the requirements that the person whose observations are recorded thereon, testifies or appears at the hearing, or that the evidentiary submission is otherwise admissible under the West Virginia Rules of Evidence - as an exception to the Hearsay Rule. *See* West Virginia Code § 29A-5-2.

Until February 11, 2014,¹ the Office of Administrative Hearings maintained an interpretation of the statutory provisions that prescribe hearing procedures, particularly West Virginia Code § 17C-5C-4(a) & (c), as requiring adherence to the West Virginia Rules of Evidence - as the perceived plain meaning of those statutory provisions seemed to require.

It, therefore, had been the policy of OAH to interpret the statutory provisions specific to OAH, that relate to hearing procedures that are conducted before OAH,² as requiring adherence to the West Virginia Rules of Evidence in a like manner as practiced by “the courts of this

¹The date *Steven O. Dale, Acting Commissioner of the West Virginia Division of Motor Vehicles v. Chad Doyle*, ___W.Va.___ Slip Opinion 12-1509 was published by the West Virginia Supreme Court of Appeals.

² As provided under West Virginia Code § 17C-5C-4(c).

state[.]”³ However, the West Virginia Supreme Court of Appeals’ decision in the consolidated cases of *Steven O. Dale, Acting Commissioner of the West Virginia Division of Motor Vehicles v. James A. Odum*, ___W.Va.____ Slip Opinion 12-1403 (February 11, 2014), and *Steven O. Dale, Acting Commissioner of the West Virginia Division of Motor Vehicles v. Chad Doyle*, ___W.Va.____ Slip Opinion 12-1509 (February 11, 2014)⁴ is construed as being at odds with that interpretation. The *Doyle* decision substantially implies that Syllabus Point 3, *Crouch v. West Virginia Division of Motor Vehicles*, 219 W.Va. 70, 631 S.E.2d 628 (2006), applies to hearings conducted before OAH. It is, therefore, concluded that OAH may have only limited, if any, discretion⁵ to deny a party’s Motion (which is made in compliance with the applicable provisions of Title 105, *Code of State Rules*, Series 1) to admit relevant and facially reliable exhibits, on the basis the party has not met foundational elements that would otherwise apply if adherence to the West Virginia Rules of Evidence was required in a like manner as practiced in the courts of this state.⁶

By publication of this Memorandum Order that a ruling may be made pre hearing, or at the time of the hearing, that evidence may be admitted without the requirements that the

³ Specifically, West Virginia Code § 17C-5C-4 states: “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.” West Virginia Code § 17C-5C-4(c); “A hearing before the office shall be heard de novo and conducted pursuant to the provisions of the contested case procedure set forth in article five [§§ 29A-5-1 et seq.], chapter twenty-nine-a of this code *to the extent not inconsistent with the provisions of chapters seventeen-B [§§ 17B-1-1 et seq.] and seventeen-c [§§ 17C-1-1 et seq.]* of this code. *In case of conflict, the provisions of chapters seventeen-B and seventeen-c of this code shall govern.*” West Virginia Code § 17C-5C-4(a). (Emphasis added). The OAH’s perceived conflict existed particularly in relation to West Virginia Code §17C-5C-4, subsection (c) and West Virginia Code § 29A-5-2, subsections (a) & (b).

⁴ Particularly the *Doyle* decision.

⁵ In spite of the fact the OAH retains the role of judging the case, the *Doyle* decision does not dissuade DMV’s apparent position that § 29A-5-2, subsection (b), which states in pertinent part, that “evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record of the case, . . .” pertains to the records in the possession of the DMV and not necessarily those in the possession of the OAH, whether or not the OAH “desires to avail itself” of same; and, therefore, the DMV is the agency that determines the evidence “of which it desires to avail itself, . . .”

⁶ OAH’s apparently erroneous interpretation partially materialized from the fact *Crouch* was decided well before OAH came into existence and, therefore, before the specific statutory provisions governing the conduct of OAH hearings were enacted into law.

declarant is present to testify or that the proposed evidence is otherwise admissible under the West Virginia Rules of Evidence, the Parties are provided fair warning prior to the hearing that a significant procedural change has recently been adopted by the OAH in view of the substantial implication of *Dale v. Doyle*, ___W.Va. ___, No. 12-1509 (Slip Op. February 11, 2014). Consequently, this Memorandum Order is, in part, intended to prevent procedural ambush, by providing pretrial warning that the procedural landscape has significantly changed - in order to afford the Parties fair opportunity to take whatever steps or preparation they deem necessary and prudent to address evidentiary submissions that are the subject of this Memorandum Order. Without pretrial warning, a party may be unduly ambushed by the procedural change, or - at the time of the hearing, - the matter would have to be continued due to a party's lack of knowledge and preparation to meet the procedural change; either case being undesirable.

The OAH reserves unto itself the right to set aside any Order entered in this matter pursuant to the terms of this Memorandum Order in the event a party demonstrates that the evidence subject to the Order is inherently unreliable, based on fraudulent representations or is otherwise irretrievably debased to an extent it is untrustworthy for the purpose it has been moved into evidence.

Wherefore, in accordance with *Odum* and *Doyle*, in the event a Motion is made (either prehearing or during the hearing) that complies with the applicable provisions of Title 105, *Code of State Rules*, Series 1, to admit proposed evidence and same is granted, then relevant and facially reliable exhibits *will* be admitted as evidence in this matter. In accordance with *Odum* and *Doyle* the Party against whom the evidence is admitted, is entitled to contest the evidence before or during the hearing to be conducted by OAH. The Party against whom such evidence is admitted shall have his or her objections noted and preserved for the record. Any party against

whom a motion is made to admit documentary evidence under the applicable provisions of West Virginia Code § 29A-5-2 (a) & (b) may file a responsive pleading in opposition thereto in accordance with the provisions of Title 105, *Code of State Rules*, Series 1. Any party against whom evidence is admitted prehearing shall be afforded the opportunity to file a motion to reconsider, in compliance with the applicable provisions of Title 105, *Code of State Rules*, Series 1, contesting the admission of the subject evidence - if the party deems it appropriate to do so. In the event evidence is submitted for admission under the provisions of this Memorandum Order, the party against whom the evidence is submitted maintains the right to subpoena the declarant or declarants whose statements are recorded in the evidentiary submission for purposes of cross examination.

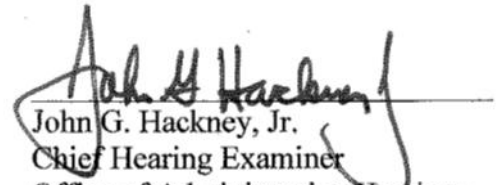
Accordingly, the parties should be prepared for the substantial prospect that in the event a witness or witnesses do not appear, whose declarations are the subject of evidentiary submissions applicable to the provisions of this Memorandum Order, and the party proponent of the evidence elects to proceed in the hearing in spite of such nonappearance, that absent a *material* change or clarification in the law,⁷ or the existence of a subpoena having been properly served upon such absent witness or witnesses by the party against whom the evidentiary submission is made (or other unforeseen or exceptional circumstances), the matter may proceed to hearing over the objections of the objecting party, in spite of the nonappearance of the witness or witnesses, and the party proponent's pending motion, if not granted earlier, may be granted at the time of the hearing.

The Clerk is directed to provide a copy of this Memorandum Order to Counsel of record and to the Petitioner, enclosed with the initial hearing notice.

⁷ i.e., A change contrary to the substantial implication of *Dale v Doyle* ___W.Va.____Slip Opinion 12-1509 (February 11, 2014).

ENTERED this 23rd day of April, 2014.

ENTER:


John G. Hackney, Jr.
Chief Hearing Examiner
Office of Administrative Hearings