

WSR 23-07-074

PERMANENT RULES

DEPARTMENT OF LICENSING

[Filed March 13, 2023, 4:19 p.m., effective April 13, 2023]

Effective Date of Rule: Thirty-one days after filing.

Purpose: Update procedures, guidelines, and language of the hearings rules to align with the intent of the governing statutes. These updates will bring the hearings in compliance with the governing authority set forth in RCW, clarify procedures that are unclear, allow for procedures currently prohibited, clarify portions of WAC that are no longer procedural, and bring WAC more in line with inclusive language.

Citation of Rules Affected by this Order: Amending WAC 308-101-040 Eligibility for hearing, 308-101-070 Signatures, 308-101-090 Scheduling—Notice of hearing, 308-101-120 Continuances, 308-101-150 Subpoenas, 308-101-155 Filing of exhibits and other documents with the department, 308-101-170 Video evidence, 308-101-180 Format and length for briefs, and 308-101-210 Conduct of hearings.

Statutory Authority for Adoption: RCW 46.01.110 Rule-making authority, 46.01.040(10) Powers, duties, and functions relating to motor vehicle laws vested in department. (10) The administration of the laws relating to reciprocal or proportional registration of motor vehicles as provided in chapter 46.85 RCW.

Adopted under notice filed as WSR 23-01-144 on December 21, 2022.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 9, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: March 13, 2023.

Ellis Starrett
Rules and Policy Manager

OTS-4161.1

AMENDATORY SECTION (Amending WSR 18-11-098, filed 5/21/18, effective 9/4/18)

WAC 308-101-040 Eligibility for hearing. (1) A person is eligible for a hearing whenever the department proposes an adverse action against the driving privilege and the opportunity for a hearing or an interview is required by law. A person is also eligible for a hearing in the following circumstances:

(2) **HTO stay hearings:** A habitual traffic offender is eligible for a stay hearing under RCW 46.65.060 so long as the following conditions have been met:

(a) There is an alcohol/drug assessment from a state approved treatment agency on file that indicates substance dependence, and it was completed after the last drug or alcohol related offense on the driving record;

(b) The person is not revoked for a violation of a stay or probation previously granted under RCW 46.65.060 or 46.65.080;

(c) If a stay has previously been denied after a hearing, there is evidence of ~~((alcoholism or drug addiction-))~~ substance dependence ~~((+))~~ with new treatment information from a state approved treatment agency.

(3) **HTO reinstatement hearings:** A habitual traffic offender is eligible for a reinstatement hearing if all of the following conditions have been met:

(a) At least four years have elapsed since the beginning of the habitual traffic offender revocation or if a habitual traffic offender stay has been violated, at least four years have elapsed since the date of the new revocation notice or the period of time set by the department has been satisfied;

(b) The person submits a declaration stating that he or she has not driven within two years prior to the request for a hearing. A record of any traffic infraction or conviction is conclusive evidence that a person drove within the past two years;

(c) The driver's record does not show any traffic infractions or criminal cases indicative of driving within the past two years. A conviction is conclusive evidence that a person drove in the past two years;

(d) Any period of additional revocation imposed following a habitual traffic offender reinstatement probation violation must be completed;

~~((+d))~~ (e) If there has been a previous denial of a petition for reinstatement by a hearings examiner, at least one year has elapsed since the denial unless a shorter time is ordered by the hearings examiner;

(f) The person is not incarcerated at the time of the hearing;
and

(g) The person has complied with any department required treatment obligations.

(4) **HTO reinstatement without a hearing:** The department may grant a habitual traffic offender a reinstatement without a hearing if the person is eligible for a hearing under subsection ~~((+4))~~ (3) of this section and at the time of the request for a hearing:

(a) There are no other suspensions or revocations in effect;

(b) There are no vehicular homicide or vehicular assault convictions on the driver's record; ~~((and))~~

~~((There is no more than one alcohol or drug related incident on the driver's record. An alcohol or drug related incident shall include an alcohol related offense as defined in RCW 46.01.260, or an incident for which a sworn report was received under RCW 46.20.308 or 46.25.120, or similar incidents involving drugs and alcohol (including minor in possession laws), so long as the same incident is not counted more than once.))~~ The person has no unresolved court cases involving driving offenses; and

(d) The person is not revoked for a violation of a stay or probation previously granted under RCW 46.65.060 or 46.65.080.

(5) Notification if ineligible: The department shall notify any person seeking a reinstatement or stay, of any finding of ineligibility and the basis for the ineligibility. If a hearing request is denied for a lack of eligibility, once the reason for the ineligibility has been resolved, the driver may make another request for a hearing.

[Statutory Authority: RCW 46.01.110. WSR 18-11-098, § 308-101-040, filed 5/21/18, effective 9/4/18.]

AMENDATORY SECTION (Amending WSR 18-11-098, filed 5/21/18, effective 9/4/18)

WAC 308-101-070 Signatures. (1) Legal representative signatures. An electronic document which requires a legal representative's signature may be signed in the following manner:

/s/ Jane Attorney
 State Bar Number 12345
 ABC Law Firm
 123 South Fifth Avenue
 Seattle, WA 98104
 Telephone: 206-123-4567
 Fax: 206-123-4567
 Email: Jane.Attorney@lawfirm.com

~~(2) ((Nonattorney signatures. An electronic document which requires a nonattorney's signature may be signed in the following manner:~~

~~/s/ John Citizen
 123 South Fifth Avenue
 Seattle, WA 98104
 Telephone: 206-123-4567
 Fax: 206-123-4567
 Email: John.Citizen@email.com~~

~~(3))~~ Law enforcement officer signatures on documents signed under penalty of perjury. Any document initiated by a law enforcement officer is presumed to have been signed when the officer uses his or her user ID and password to electronically submit the document to a court or prosecutor through the statewide electronic collision and traffic online records application, the justice information network data exchange, or a local secured system that the presiding judge designates by local rule. Unless otherwise specified, the signature shall be presumed to have been made under penalty of perjury under the laws of the state of Washington and on the date and at the place set forth in the report and/or citation.

[Statutory Authority: RCW 46.01.110. WSR 18-11-098, § 308-101-070, filed 5/21/18, effective 9/4/18.]

AMENDATORY SECTION (Amending WSR 18-11-098, filed 5/21/18, effective 9/4/18)

WAC 308-101-090 Scheduling—Notice of hearing. (1) The department shall (~~(mail)~~) send a hearing notice to the petitioner or petitioner's legal representative, either through the U.S. Postal Services or through an alternative electronic transmission, in the time frame prescribed in Title 46 RCW. If no period is prescribed, the petitioner shall be served with a notice of hearing at least (~~(ten)~~) 10 days before the date set for the hearing.

(2) The department's hearing notice will include the assigned examiner's name, a phone number at which he or she may be contacted, and other information concerning the hearing. The department's notice will also include a telephone number and a TDD number that any party or witness may call to request special accommodations. The notice must also include:

(a) A statement of the time, place, and nature of the hearing.

(b) A statement of the legal authority under which the hearing is to be held;

(c) A statement that a party who fails to attend or participate in a hearing or other stage of an adjudicative proceeding may be held in default in accordance with this chapter.

[Statutory Authority: RCW 46.01.110. WSR 18-11-098, § 308-101-090, filed 5/21/18, effective 9/4/18.]

AMENDATORY SECTION (Amending WSR 18-11-098, filed 5/21/18, effective 9/4/18)

WAC 308-101-120 Continuances. (1) After a hearing has been scheduled, it may be continued(~~(7)~~) or rescheduled(~~(7 or adjourned)~~) only at the discretion of the hearings examiner.

(2) ~~Requests for a continuance, or to reschedule, ((or to adjourn must be made in writing, to the assigned hearings examiner, and shall include the basis for the request.~~

~~(3) Except in the case of an emergency, the hearings examiner must receive the continuance))~~ must include all of the following:

(a) A written request directed to the assigned hearings examiner;

(b) The basis for the request; and

(c) At least two proposed reschedule dates.

(3) A party may make one continuance or reschedule request without judicial review.

(4) A party requesting a second or later continuance or reschedule must file the request at least two business days before the scheduled hearing(~~(. Absent an emergency, requests made with less than two business days' notice may be summarily denied.~~

~~(4))~~, except upon showing of good cause.

(5) Good cause is defined as substantive reason or legal justification for failing to meet the reschedule deadline. Good cause may include, but are not limited to:

(a) Military deployment;

(b) Medical treatment or hospitalization;

(c) Housing instability;

(d) Language barriers;

(e) Domestic violence; or

(f) Incarceration.

~~((6))~~ (6) The hearings examiner may continue ~~((7))~~ or reschedule ~~((7-or adjourn))~~ the hearing at any time, including on the date of the ~~((ad- ministrative))~~ hearing.

~~((5))~~ (7) A party shall not consider a hearing continued ~~((7))~~ or rescheduled ~~((7-or adjourned))~~ until notified affirmatively by the hearings examiner or his ~~((or))~~ her, or their designee.

~~((6))~~ (8) The hearings examiner may require the party who re- quests a second or later continuance ~~((7-to))~~ or reschedule ~~((7-or to adjourn))~~ to submit documentary evidence that substantiates the reason for the request.

~~((7))~~ A second request for a continuance, to reschedule, or to adjourn will only be granted in the event of an emergency and at the discretion of the assigned hearings examiner.

~~((8))~~ (9) Notwithstanding any provisions of this section to the contrary, a hearings examiner may continue a hearing in the event a law enforcement officer who has been subpoenaed as a witness fails to appear. The hearings examiner must continue a hearing in the event a law enforcement officer who has been subpoenaed as a witness fails to appear and the petitioner is a holder of a commercial driver's license or was operating a commercial motor vehicle at the time of the driver's arrest. ~~((A hearing continued under this subsection must be ad- journed until such time as the subpoena may be enforced under RCW 7.21.060.))~~

[Statutory Authority: RCW 46.01.110. WSR 18-11-098, § 308-101-120, filed 5/21/18, effective 9/4/18.]

AMENDATORY SECTION (Amending WSR 18-11-098, filed 5/21/18, effective 9/4/18)

WAC 308-101-150 Subpoenas. (1) Subpoenas shall be issued and enforced, ~~((and witness fees paid,))~~ as provided in RCW 46.20.308(7). All subpoenas shall direct the witness to appear by telephone unless otherwise ~~((agreed to))~~ ordered by the hearings examiner.

(2) Every subpoena shall be submitted on a form approved by the department, available on the internet at www.dol.wa.gov, for approval by a hearings examiner. If approved, the hearings examiner ~~((may ei- ther))~~ will sign and issue the subpoena back to the party requesting the subpoena ~~((or direct the requesting party, by telephone, electron- ic mail, or other reliable means, to note the hearings examiner's ap- proval on the subpoena)).~~

~~((a))~~ (3) A subpoena to a person to provide testimony at a hearing shall:

(a) Specify the date and time set for hearing((-)); and

(b) The hearing department's contact information. This contact information must enable the person receiving the subpoena to request an alternative date and time for the department to receive their tes- timony, if they are unavailable on the date of the hearing.

(4) A subpoena duces tecum requesting a person to produce desig- nated books, documents, or things under his or her control shall ~~((specify a time and place for producing))~~ direct the person to pro- duce the books, documents, or things ~~((. That time and place may be the~~

~~time and place set for hearing, or another reasonably convenient time and place))~~ by a reasonable time in advance of the hearing.

~~((3))~~ (5) A subpoena must be personally served by a suitable person over ~~((eighteen))~~ 18 years of age, by exhibiting and reading it to the witness, or by giving him or her a copy thereof, or by leaving such copy at the place of his or her ~~((abode))~~ residence. Proof of service shall be made by affidavit or declaration under penalty of perjury, and must be filed with the hearings examiner at least two days prior to the hearing. If the subpoena is served by personal service, proof of service must include a copy of the subpoena that shows it was received by the law enforcement agency. Service by certified mail must be preapproved by the hearings examiner. Service of a subpoena on a law enforcement officer may be effected by serving the subpoena upon the officer's employer.

~~((4))~~ ~~The hearings examiner may condition issuance of the subpoena upon advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.~~

~~(5))~~ (6) A subpoena must be properly served five days prior to the date of the hearing.

[Statutory Authority: RCW 46.01.110. WSR 18-11-098, § 308-101-150, filed 5/21/18, effective 9/4/18.]

AMENDATORY SECTION (Amending WSR 18-11-098, filed 5/21/18, effective 9/4/18)

WAC 308-101-155 Filing of exhibits and other documents with the department and calling expert witnesses. (1) Any exhibit or document submitted to the hearings and interviews unit must include the petitioner's case number assigned by the unit, if a case number has been assigned. All exhibits or documents submitted electronically, shall only be submitted in a PDF format.

(2) A petitioner may submit documents for consideration via any one of the following methods:

(a) U.S. mail addressed to: Department of Licensing, Hearings and Interviews Unit, P.O. Box 9030, Olympia, WA 98507-9030.

(b) Facsimile transmission to the assigned hearings examiner.

(c) An internet portal made available by the department.

(d) Email ~~((to the hearings examiner, but only with the hearings examiner's preapproval))~~ hearings@dol.wa.gov.

(3) Petitioners are permitted to call expert witnesses, at their own expense. The petitioner must file notice with the hearings unit of the following:

(a) Notice of the expert testimony;

(b) A curriculum vitae (CV) of the anticipated expert; and

(c) A summary of their expected testimony at least five business days prior to the hearing. If petitioner fails to comply with these requirements, the expert testimony may be properly excluded and not considered.

[Statutory Authority: RCW 46.01.110. WSR 18-11-098, § 308-101-155, filed 5/21/18, effective 9/4/18.]

AMENDATORY SECTION (Amending WSR 18-11-098, filed 5/21/18, effective 9/4/18)

WAC 308-101-170 Video evidence. (1) If the petitioner wishes to submit video evidence, the petitioner shall be responsible for the costs of preparing a copy to be admitted as evidence. Video evidence shall be submitted sufficiently in advance of the hearing to allow the hearings examiner the opportunity to review it prior to the hearing. The hearings examiner may require a time waiver from the petitioner in order to reschedule the hearing and satisfy this provision when needed. Video evidence must be submitted by DVD and in a format which allows the DVD to be viewed on the department's equipment. Any costs associated with this requirement is to be the responsibility of the petitioner.

(2) Video evidence may be submitted in the following ways: On a DVD, on a flash drive, or submitted electronically in a digital format. If the petitioner wishes to submit a digital copy of video evidence, the petitioner shall email hearings@dol.wa.gov with the evidence and any instructions on viewing the evidence. The video must be in a format that allows the video to be viewed on the department's equipment. Any costs associated with this requirement is to be the responsibility of the petitioner.

[Statutory Authority: RCW 46.01.110. WSR 18-11-098, § 308-101-170, filed 5/21/18, effective 9/4/18.]

AMENDATORY SECTION (Amending WSR 18-11-098, filed 5/21/18, effective 9/4/18)

WAC 308-101-180 ((Format and length for) Briefs, motions, memoranda, and other pleadings. (1) The text of ((any brief must be typed or printed in a proportionally spaced typeface and must appear in print as twelve point or larger type with no more than ten characters per inch and double-spaced. The same typeface and print size should be standard throughout the brief, except that footnotes may appear in print as ten point or larger type and be the equivalent of single-spaced. Quotations may be the equivalent of single-spaced. Except for materials in an appendix, the typewritten or printed material in the brief may not be reduced or condensed by photographic or other means.

(2) Briefs shall not exceed twenty pages. For the purpose of determining compliance with this rule, appendices are not included. For good cause, the hearings examiner may grant a motion to file an over-length brief.

(3) Unpublished opinions of the Washington court of appeals are those opinions not published in the *Washington Appellate Reports*. Unpublished opinions of the court of appeals have no precedential value and are not binding on any court. However, unpublished opinions of the court of appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the hearings examiner deems appropriate.) all documents filed with this department should be double-spaced, except footnotes and block quotations, which may be single-spaced. In a document produced using word processing software, all text, including footnotes and block quotations, should appear in a 14-

point font serif equivalent to Times New Roman or San serif font equivalent to Arial.

(2) **Brief length and certificate of compliance:** All documents filed with this department and produced using word processing software should contain a short statement above the signature line certifying the number of words contained in the document, exclusive of words contained in the appendices, the title sheet, the table of contents, the certificate of compliance, signature blocks, and pictorial images (e.g., photographs, maps, diagrams, exhibits). The signor may rely on the word count calculation of the word processing software used to prepare the brief or motion. Motions/briefs shall not exceed 5,000 words or 20 pages if handwritten. Any appendices or attachments are not to be included in the length. For good cause, a hearings examiner may permit an over-length brief.

(3) Citations to the legal authority shall comply with the Washington state court general rules 14 and 14.1.

(4) All exhibits or documents submitted electronically shall be submitted only in a PDF format.

[Statutory Authority: RCW 46.01.110. WSR 18-11-098, § 308-101-180, filed 5/21/18, effective 9/4/18.]

AMENDATORY SECTION (Amending WSR 18-11-098, filed 5/21/18, effective 9/4/18)

WAC 308-101-210 Conduct of hearings. Hearings are (~~open to~~) public (~~observation. To the extent that a hearing is conducted by telephone or other electronic means, the availability of public observation is satisfied by giving members of the public an opportunity to hear or inspect the agency's record~~) proceedings. Public access is achieved through providing a copy of the audio recording and admitted exhibits in compliance with a public records request. The hearings examiner's authority includes, but shall not be limited to, the authority to:

- (1) Determine the order of presentation of evidence;
- (2) Administer oaths and affirmations;
- (3) Issue subpoenas pursuant to RCW 46.20.308(7);
- (4) Rule on procedural matters, objections, and motions;
- (5) Rule on offers of proof and receive relevant evidence;
- (6) Order the exclusion of witnesses upon a showing of good

cause;

(7) Afford the petitioner the opportunity to respond, present evidence, conduct cross-examination, and submit rebuttal evidence. The hearings examiner may question witnesses to develop any facts deemed necessary to fairly and adequately decide the matter;

(8) Call additional witnesses (~~and request and/or obtain additional exhibits~~) deemed necessary to complete the record and receive such (~~evidence~~) testimony subject to full opportunity for cross-examination and rebuttal by the petitioner;

(9) Examine and admit the official records of the department, subject to full opportunity, including the opportunity to request a continuance if needed, for cross-examination and rebuttal by the petitioner;

(10) Examine and admit public records including, but not limited to, maps, policy and procedure manuals, breath testing equipment man-

uals and the Washington state patrol breath test section website at any time before, during, or after the hearing, subject to full opportunity, including the opportunity to request a continuance if needed, for cross-examination and rebuttal by the petitioner;

(11) Regulate the course of the hearing and take any appropriate action necessary to maintain order during the hearing;

(12) Permit or require oral argument or briefs and determine the time limits for submission thereof;

(13) Issue an order of default;

(14) Recess the hearing to a later time to accommodate scheduling conflicts. Hearings are ordinarily scheduled to be one hour in length;

(15) Take any other action necessary and authorized by any applicable statute or rule; and

(16) Waive any requirement of these rules (~~(unless petitioner shows that he or she would be prejudiced by such a waiver)~~) so long as neither the department nor the petitioner is prejudiced by such a waiver.

[Statutory Authority: RCW 46.01.110. WSR 18-11-098, § 308-101-210, filed 5/21/18, effective 9/4/18.]