

COLORADO DEPARTMENT OF REGULATORY AGENCIES
OFFICE OF POLICY AND RESEARCH

COLORADO DEPARTMENT OF REVENUE ELECTRONIC HEARINGS

2002 SUNSET REVIEW



STATE OF COLORADO

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Bill Owens
Governor

October 15, 2002

Members of the Colorado General Assembly
c/o the Office of Legislative Legal Services
State Capitol Building
Denver, Colorado 80203

Dear Members of the General Assembly:

The Colorado Department of Regulatory Agencies has completed the evaluation of the electronic driver's license hearings in the Department of Revenue. I am pleased to submit this written report, which will be the basis for my office's oral testimony before the 2003 legislative committee of reference. The report is submitted pursuant to section 24-34-104(8)(a), of the Colorado Revised Statutes (C.R.S.), which states in part:

The department of regulatory agencies shall conduct an analysis of the performance of each division, board or agency or each function scheduled for termination under this section...

The department of regulatory agencies shall submit a report and supporting materials to the office of legislative legal services no later than October 15 of the year preceding the date established for termination....

The report discusses the question of whether there is a need for the process provided under Article 1 of Title 42, C.R.S. The report also discusses the effectiveness of the Department of Revenue in carrying out the intent of the statutes and makes recommendations for statutory and administrative changes in the event this regulatory program is continued by the General Assembly.

Sincerely,

A handwritten signature in cursive script that reads "M. Michael Cooke".

M. Michael Cooke
Executive Director

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Background

The Sunset Process

The authority of the Department of Revenue (DOR) to hold driver's license disciplinary hearings electronically shall terminate July 1, 2003 unless continued by the General Assembly. During the year prior to this date, it is the responsibility of the Department of Regulatory Agencies (DORA) to conduct an analysis of the program in compliance with the sunset provisions of section 24-34-104, Colorado Revised Statutes (C.R.S.). The sunset criteria are included in this report as Appendix A on page 19.

The purpose of this review is to determine whether continuation of electronic hearings is necessary for the protection of the public health, safety and welfare. The report also evaluates the performance of the DOR as it relates to this program.

Methodology

The sunset review process includes an analysis of the statute, literature reviews, and interviews with program staff, and comparisons with other state's programs. Every effort is made to elicit information and comments from all interested parties.

History of Regulation

Approximately 30 states use some type of electronic hearings in place of, or as an option to, personal appearance hearings in front of a hearing officer. The United States Department of Labor also uses electronic hearings for unemployment claims processing.

Electronic hearings for driver's licenses were first used by the DOR Division of Hearings (Division) for Colorado licensees not living in the state, including "compact hearings." Compact hearings are administrative hearings conducted by the Division for Colorado licensed drivers who are convicted of an alcohol related offense in another state. The most common occurrences are college students or military personnel convicted of driving while under the influence of alcohol while in another state for school or service. Under the Interstate Driver License Compact, when a licensee in one state commits an alcohol infraction in another state that is severe enough to result in a driver license disciplinary action, the home state agrees to administratively sanction the driver's license.

The DOR began testing electronic hearings for other hearings in 1997, shortly after moving the main headquarters to the current location in Lakewood, Colorado. The process began as a pilot project to allow police officers in Aurora and Parker who had easier access to the Denver location to participate in electronic hearings. The pilot project proved popular and was expanded to include other Denver metro law enforcement agencies.

In 1999, a lawsuit, Barnes v. Department of Revenue, was filed in Arapahoe County District Court. The suit contended that electronic hearings were not permitted by the State Administrative Procedure Act nor the organic motor vehicle statutes. The validity of electronic hearings was upheld in the Arapahoe District Court case, however, in November of 2000 the Colorado Court of Appeals reversed the decision. DOR ceased conducting electronic hearings during the appeals process.

The Appeals Court held that the law allowed the driver to request the presence of the police officer at the hearing and, since presence was not defined, it took the meaning of personal appearance. As a result of this case, Title 42 was amended by HB 01-2010 to specifically authorize electronic hearings.

Legal Framework

The Department of Revenue (DOR) is charged with administering the driver's licensing program for the state. One function of the administration of driver's licensing is the administrative process suspending, revoking, or restricting a valid driver license. The Hearings Division (Division) of the Department of Revenue, Enforcement Group, conducts all administrative hearings for the DOR. Administrative hearings include those for liquor licenses, emissions, and some racing event issues. However, the majority of the caseload of the Division is related to drivers licenses.

The provisions of section 42-1-218.5, Colorado Revised Statutes (C.R.S.), allow the Division to conduct hearings in person or electronically via video or telephone conference calls. This statutory provision allows the DOR to conduct hearings required by Parts 1 and 2 of Title 42, C.R.S., by electronic means, notwithstanding any other statutory provisions to the contrary. The statute requires DOR to consider the circumstances of licensees and to grant requests for hearings in person whenever possible and conversely to grant hearings electronically whenever possible. The statute is included in this report as Appendix B on page 20.

Program Description and Administration

The Hearings Division (Division) of the Department of Revenue (DOR) is headed by a Chief Hearing Officer and consists of three Deputy Chief Hearing officers and 16 Hearing Officers. At the time of this review, two hearing officer positions were vacant and were expected to remain so indefinitely due to budget constraints. The Division has seven clerical staff for support. Two vacancies in these positions were expected to remain vacant. An organizational chart for the Division is included in this report as Appendix C on page 23.

Most hearings are conducted in motor vehicle driver license offices. There are 83 district motor vehicle driver license offices statewide, some open only on a part-time basis. The Division divides hearings into the 24 district offices closest to where the offense originated, namely, Lakewood, Colorado Springs, Pueblo, Greeley, Ft. Morgan, Boulder, Ft. Collins, Lamar, La Junta, Salida, Alamosa, Durango, Grand Junction, Glenwood Springs, Craig, Steamboat Springs, Limon, Cortez, Rifle, Trinidad, Frisco, Montrose, Gunnison, and Granby.

In addition to the main office in Lakewood, there are five motor vehicle district offices that have Division hearing officers permanently assigned to them: Boulder, Colorado Springs, Ft. Collins, Grand Junction, and Pueblo. The main purpose of these offices is to issue driver's licenses for DOR. However, because of the volume of hearings for licensees in these areas, it is cost effective to maintain dedicated hearing rooms at these facilities.

Until recently, all other district offices staffed by traveling hearing officers, referred to as circuit offices. Hearings are conducted in borrowed offices, conference rooms and in one district, the county jail, on scheduled days. Eight of the circuit offices (Lamar, La Junta, Limon, Craig, Steamboat, Rifle, Trinidad and Granby) have been converted to electronic hearings. Two additional circuit offices (Salida and Gunnison) are being phased into the electronic hearing process. All electronic hearings are conducted by hearing officers physically located in the main Lakewood office.

The Division is 80 percent funded by General Fund revenues appropriated by the General Assembly. The balance of the funding is from reinstatement fees paid by drivers who have served a suspension or revocation of a license resulting from an alcohol related infraction. Currently, the reinstatement fee is \$40 and is set by the General Assembly in section 42-2-132 (4)(a)(I), Colorado Revised Statutes (C.R.S.). Table 1 details the budget for the Division for fiscal year 01-02.

Table 1
Hearing Section Budget FY 00-01 and FY 01-02

	FY 00-01	Percent of Budget	FY 01-02	Percent of Budget
General Fund	\$1,792,925	100.0%	1,481,212	79.6%
Reinstatement Fees	-	0.0%	379,055	20.4%
Total Revenue	\$1,792,925	0.0%	1,860,267	100.0%
Personnel	\$1,616,023	90.1%	\$1,681,431	90.4%
Leased space	\$27,023	1.5%	\$25,709	1.4%
Mileage	\$274	0.0%	\$946	0.1%
Hotel	\$10,230	0.6%	\$12,506	0.7%
Per Diem	\$6,803	0.4%	\$7,362	0.4%
Telephone	\$15,638	0.9%	\$14,548	0.8%
Postage	*		*	
Office supplies	\$1,918	0.1%	\$5,415	0.3%
Copy Expense	\$1,652	0.1%	\$3,192	0.2%
Vehicle leases	\$26,665	1.5%	\$26,947	1.4%
Other	\$16,248	0.9%	\$13,362	0.7%
Legal Services	\$31,287	1.7%	\$54,079	2.9%
Capital Outlay	\$27,198	1.5%	\$2,804	0.2%
Variable Vehicle	\$11,966	0.7%	\$11,966	0.6%
Total Expenses	\$1,792,925	100.0%	\$1,860,267	100.0%

* Postage expenses are centralized in the Department of Revenue.

When a driver of a motor vehicle is ticketed for a traffic infraction, the officer generally issues a summons for an appearance in a municipal or county court. Following the adjudication of that infraction, the driver may be subject to administrative sanctions by the DOR. Serious offenses involving alcohol or accidents involving an injury may result in an arrest pending a hearing. The administrative hearing may take place independent of criminal proceedings.

Before any driver's license can be administratively disciplined, the driver is entitled to a hearing before a DOR hearing officer. There are a variety of situations that may entitle a driver to a hearing by DOR, including but not limited to:

- Hearings following a criminal adjudication by the courts
- Repeat traffic offender cases
- Point violations
- Habitual alcohol offender hearings
- Compact hearings (for offenses occurring in another state's jurisdiction)
- Probationary license hearings
- Driving Under the Influence (DUI) related hearings under section 42-2-126, C.R.S.
- Violations of the Financial Responsibility Act (mandatory insurance) contained in Part 7 of Title 42, C.R.S.

Larger district motor vehicle offices are staffed with full-time hearing officers to conduct hearings in person at dedicated hearing rooms. Depending on the volume, the district offices conduct hearings three to five days per week.

Smaller offices schedule hearings one or two days a week depending on volume. Hearing officers travel to those locations from either the main office or one of the district offices to conduct scheduled hearings.

The DOR averages 29,000 hearings per year with about half held at the main office in Lakewood. The majority of the hearings are the result of alcohol related offenses. An annual breakdown of hearings for the past six years is detailed in Table 2 on the following page.

Table 2
Driver's License Hearings by Type

	FY96-97	FY97-98	FY98-99	FY99-00	FY00-01	FY01-02
Total Hearings	29,481	28,139	30,393	34,286	32,012	27,788
Excessive Points	12,035	12,276	8,479	9,158	9,716	7,961
Habitual Offender	880	728	1,024	1,216	1,083	800
Alcohol Tests .10+	10,525	9,582	11,722	12,018	10,838	10,218
Alcohol Test Refusals	2,611	2,015	2,408	2,821	2,429	2,132
Other hearings*	3,121	2,969	5,925	8,360	7,502	6,524

*Other hearings include Compact, Mandatory Insurance, and Probationary license hearings.

In a traditional hearing situation, the driver receives a notice of administrative action from the Motor Vehicle Division (MVD) or law enforcement officer. The notice includes information about the driver's right to a hearing and instructs the driver to contact the Division to schedule a hearing if one is desired. When the Division is contacted, a clerk schedules the hearing at the appropriate district office and notifies the law enforcement personnel involved, if necessary.

At the hearing, the hearing officer obtains and reviews all relevant information about the scheduled case. At the scheduled date and time, the driver/respondent and the police officer (if appropriate) are required to be present at the designated hearing location. An attorney may represent the respondent, and either side may present witnesses and other evidence.

Hearings clerks schedule all hearings in 30-minute increments. However, complex DUI cases can take significantly longer. The Division anticipated that electronic hearings would take more time. Instead of having the respondent and officer simply walk into a hearing room, two separate telephone calls must be initiated. Explanations of documents take longer since individual sections need to be identified verbally instead of visually. Also, in cases where a license must be confiscated or returned, detailed explanations of the process must be given rather than a simple physical action.

Because there are several hearing officers at the main office, the workload can be shifted if a case runs over time. District offices are staffed with one hearing officer, therefore, the workload is more difficult to manage when hearings run longer than the allocated time.

The Division does not specifically track incidents where the respondent fails to show for a hearing. However, data provided by the Division indicate that in as many as 28 percent of all scheduled hearings, the respondent fails to appear. In those cases, the respondent loses the case by default and the administrative action of the MVD is upheld. In approximately four percent of the DUI cases under section 42-2-126, C.R.S., the police officer fails to appear and the administrative action of the MVD is denied by default.

Allowing for the failure to appear rate, it is relatively simple to schedule hearings at the main office which has several hearing officers. This is accomplished by overbooking timeslots and shifting cases between hearing officers as necessary when cases take longer or a failure to appear occurs. However, overbooking a district officer can cause excessive waiting for respondents, police officers, witnesses and attorneys.

The majority of driver's license hearings are conducted in person. At this time, the majority of electronic hearings are those that originate in remote districts which are difficult to service with hearing officers.

During the legislative discussion for HB 01-1210, DOR personnel testified to expected benefits of electronic hearings. The DOR believed electronic hearings would provide better customer service, more efficient operation of the hearing section, and better program enforcement. Key elements of the DOR testimony included:

Better Customer Service

According to testimony, the major benefit to consumers (the licensee, known as the respondent, issued the summons for hearing) would be less travel time and the costs associated with such travel. Travel to hearings can be burdensome on respondents.

The purpose of the DOR hearing is to establish whether the respondent's license is going to be suspended, revoked, or restricted in some way, and for what length of time. Therefore, in many cases the respondent cannot legally drive from the hearing and must use public transportation or find a driver. Since hearings are held during normal business hours, this usually involves time off work for the respondent and a driver.

Electronic hearings may also save the respondent money if an attorney is involved in the case. Attorneys charge their clients for time and travel, as well as time waiting at the DOR offices for the hearing. Electronic hearings reduce travel time and associated expenses and may reduce waiting time for the attorney.

More Efficient Operation

The DOR expected to reduce travel time and expenses for hearing officers. These expenses include mileage, motel, and per diem costs. It was anticipated that hearing officers could hear more cases in less time utilizing electronic hearing procedures. This would eventually lead to a reduced need for additional full time equivalent (FTE) employees.

Better Program Enforcement

A key expectation for the DOR was a reduced number of cases dismissed because of failure to appear by law enforcement officers. DOR reports that 39 percent of the cases found in favor of the respondent are because of dismissals resulting from failure to appear by law enforcement. Reasons for failure to appear include sickness, work conflicts, and lack of travel funds for rural agencies.

A major consideration in evaluating administrative hearings that impact a driver's license is assurance that all due process rights are being granted the driver. In Barnes v. Department of Revenue the court found that Colorado law did not authorize electronic hearings. However the court did not address whether the concept of an electronic hearing was a violation of due process.

There is substantial case law that supports electronic hearings. The United States Supreme Court, in Mathews v. Eldridge (424 U.S. 319, 1976) established a three part test to determine due process in electronic hearings for unemployment insurance hearings. This test has been used by other courts in evaluating other types of electronic hearings. Two cases involving Colorado plaintiffs have held that electronic hearings can be conducted in a manner which protect the due process rights of the respondents.¹ The National Association of Administrative Law Judges has also endorsed the concept of electronic hearings.

Some attorneys have expressed concern that electronic hearings are unfair for a variety of reasons. In addition to the due process issue, concerns have been expressed about the ability of hearing officers and attorneys to evaluate the credibility of witnesses and the respondent without personally seeing the individuals.

Literature searches found documentation to support the contention that hearing officers are able to assess the credibility of respondents and witnesses in electronic hearings. The most extensively cited research is that of Jerome R. Corsi², conducted with the cooperation of the University of New Mexico and the University of Denver. The study reviewed 1000 unemployment insurance cases and 100 Aid to Families with Dependent Children (AFDC) appeals in New Mexico. The study found no statistically valid difference in the outcomes between in person and electronic hearings.

The DOR ceased conducting electronic hearings after the Barnes decision. Results from the electronic hearings conducted prior to Barnes were aggregated into the statistics maintained for the years 1997 through 2000 and are therefore not available for analysis.

There are two types of electronic hearings currently in use, telephone and video. Both types require the use of specialized equipment by DOR. Video hearings also require the use of specialized equipment by the law enforcement agency initiating the hearing. Respondents in video hearing situations are required to go to the Lakewood facility, which has the video equipment. Aurora, and Douglas County currently have the capability to conduct video hearings.

¹ Anders v. Industrial Commission of Colorado, 649 P. 2d 732 (Colo. App. 1982) and Shaw v. Valdez, 819 F2d. 965 (10th Cir. 1987).

² Corsi, J. R. University of Miami Law Review 38 U. Miami L. Rev. 647 (1984)

The DOR was statutorily authorized to conduct electronic hearings effective July 1, 2001. However, because of training and equipment issues, electronic hearings did not actually begin until September of 2001. Therefore, at the time of this review statistically valid data was not available. The number of cases heard and the branch office they originated from are detailed in Table 3 below.

Table 3
Electronic Hearings by Originating District
September 2001 through June 2002

District	Hearings Conducted
Denver Phone	159
Colorado Springs	15
Pueblo	3
Greeley	4
Fort Morgan	1
Boulder	5
Fort Collins	1
Lamar	23
La Junta	32
Salida	0
Alamosa	2
Durango	1
Grand Junction	1
Glenwood	3
Craig	14
Winter Park	0
Steamboat Springs	86
Cortez	1
Rifle	66
Trinidad	23
Limon	24
Frisco	1
Montrose	2
Gunnison	1
Granby	35
Denver – Video	27
TOTAL	479

All electronic hearings are conducted from DOR headquarters in Lakewood. In an electronic hearing, the respondent receives a notice similar to that in a traditional in person hearing. The notice contains instructions about conducting a telephone hearing, all relevant documents and exhibits, and a number to call at a specific date and time.

At the specified date and time, the respondent calls the designated number to inform the DOR that the respondent is ready for the hearing to begin and provides a call back number. The respondent may call from home, work, or an attorney's office. The hearing officer then initiates a three way conference call with the police officer and the respondent. Both parties are sworn in as they would be in an in person hearing and the hearing process begins.

Because of the time it takes to initiate the conference call and the more detailed explanations necessary in an electronic hearing, the DOR estimates an electronic hearing takes 5-10 minutes longer to conduct. However, because of reduced travel time, DOR believes that overall, hearing officers can conduct more hearings annually.

In fiscal year 97-98, the DOR conducted 28,139 hearings with 17 hearing officers. By fiscal year 01-02, the number of hearing officers had declined to 16, a six percent decline in hearing officers, but the number of hearings decreased only one percent to 27,788. Table 4 details the number of hearings conducted, hearing officer FTE and vehicle miles traveled for the Division.

**Table 4
Annualized Hearing Section Statistics**

	FY97-98	FY98-99	FY99-00	FY00-01	FY01-02
# Hearing Officers	17	16.5	16	16	16
TOTAL HEARINGS	28,139	30,393	34,286	32,012	27,788
Hearings per Officer	1,655	1,842	2,143	2,001	1,737
MILES TRAVELED	176,542	166,632	160,148	150,533	120,793
Miles traveled/officer	10,385	10,099	10,009	9,408	7,550

The assertion that electronic hearings provide better customer service is difficult to document. It seems intuitive that respondents would appreciate the convenience of attending the hearing from surroundings of their choosing. In addition, DOR hearing officers are aware that many persons who appear for in person hearings drive themselves to and from the hearing because they are unable to find someone to drive them. In many cases, the license of the respondent is suspended at the hearing. Therefore, it could be surmised that electronic hearings reduce the number of respondents being put into the position of driving without a license.

The Corsi study cited earlier evaluated respondent satisfaction with both electronic and in person hearings. The study did not find a significant difference in the satisfaction of respondents when comparing surveys from each type of hearing.

Cost savings for respondents, local law enforcement, and DOR are obvious. Respondents do not have to travel to district offices which saves them time and travel expenses. The same holds true for local law enforcement agencies. This could be a significant issue for smaller jurisdictions where sending an officer can impact coverage when an officer is out of the area for a hearing.

Although it is true that electronic hearings reduce travel expenses for DOR, the actual savings vary depending on the district the case originates in and the type of hearing being conducted. DOR has estimated costs associated with two typical types of electronic hearings. A section 42-2-126, C.R.S., hearing is a mandatory revocation for alcohol and when a hearing is requested under this title, a police officer is usually requested to appear. A section 42-2-127, C.R.S., hearing involves drivers receiving excessive points on their licenses and rarely involves testimony from a police officer.

Table 5 details DOR costs estimates for each type of hearing and compares these costs to the actual costs associated with traveling to two of the circuit hearing districts. For comparison purposes, the hearing officer expense is included, calculated at .666 hours (40 minutes) for an electronic hearing and .5 hours (30 minutes) for in person hearings. Travel expenses were calculated by dividing the actual expenses charged to office cost center by the number of in person hearings conducted during the period under review.

Table 5
Division of Hearings Cost per Hearing Estimates

	Average Electronic Hearings	DUI Related Electronic Hearings	Steamboat All Hearings	Frisco DUI Related Hearings
Hearing officer expense	\$32x.666/hr \$21.33	\$32x.666/hr \$21.33	\$32x.5/hr \$16.00	\$32x.5/hr \$16.00
Clerical*	\$1.50	\$3.00	N/A	N/A
Phone	\$3.00	\$3.00	N/A	N/A
Copy	\$.80	\$1.60	N/A	N/A
Mailing	\$1.03	\$2.06	N/A	N/A
Travel Time	N/A	N/A	\$10.85	\$8.95
Mileage	N/A	N/A	\$4.06	\$3.13
Motel	N/A	N/A	\$3.14	N/A
Per Diem	N/A	N/A	\$2.78	N/A
TOTAL	\$27.66	\$30.99	\$36.01	\$28.08

* Only the additional clerical time involved in a electronic hearing are included for this calculation.

For example, sending a hearing officer from the main office to Greeley one day per week involves two hours of drive time (one hour each way). Eliminating that district office will save some travel expenses, however, because electronic hearings are more time consuming, the net benefit will be negligible. However, a hearing officer driving from the main office to Steamboat will have eight hours of driving, lodging accommodations and two days of per diem in order to conduct one day of hearings.

As shown in Table 4, in fiscal year 97-98 hearing officers drove 176,542 miles. If it is assumed the officers traveled at an average speed of 50 miles per hour this equals 3,531 person hours driving. This is nearly the equivalent of two FTE per year spent in a car being unproductive. This figure has been reduced to 120,793 for fiscal year 01-02. Using the same assumption, hearing officers spent 2,416 hours behind the wheel of a vehicle instead of conducting hearings.

One of the major points made by advocates of electronic hearings during the discussion of HB 01-1210 was that electronic hearings would result in better program enforcement. The hearing officer upholds the initial action taken by MVD against a driver's license a majority of the time (83 percent). In 39 percent of the cases dismissed by a hearing officer, the reason is failure of the law enforcement personnel to appear at the hearing.

It was believed that electronic hearings would reduce the number of dismissals due to police officer "no shows." Police officers are usually only requested for section 126 (alcohol related) hearings. This review included an examination of section 126 hearings scheduled for the final six months of fiscal year 01-02. While the data does show a slight decline in dismissals based on police officer failure to appear (PFTA), the sample is too small and over too short a period to conclude the decline will be significant. The results are detailed in Table 6 below:

Table 6
Section 126 Hearing Dismissals - January 2002 through July 2002

Hearings	Total	Total Dism.	% Dism.	Officer Req.	Officer PFTA	PFTA % Of Officer Req.	PFTA % of Dism.
In Person	5134	899	17.5	3029	331	10.9	6.5
Electronic	260	47	18.1	158	15	9.5	5.8
Total	5394	946	17.5	3187	346	10.8	6.4

The electronic hearing program clearly has a financial and resource benefit to the Department of Revenue. Reducing travel time and expenses allows for hearing officers to spend more time conducting hearings, increasing productivity. These benefits have been documented in this report.

It is assumed that rural law enforcement agencies also receive similar financial and resource benefits. These benefits are difficult to document since there are many variables involved not the least of which is the number of local law enforcement agencies.

There may also be a benefit to the public in the form of reduced time and travel. Again, quantifying this benefit is not practical because of the number of variables involved.

The enforcement benefits cited by DOR and law enforcement agencies, specifically the potential reduction in cases dismissed because of police officer failure to appear issues, has not been demonstrated. However, the program does not have enough historical data to rule out this potential benefit.

Analysis and Recommendations

Recommendation 1 - The General Assembly should continue the authorization for the conduct of electronic hearings by the Department of Revenue.

The ability of the Department of Revenue (DOR) to administratively suspend the license of unsafe drivers protects the public health, safety and welfare. This is the primary consideration used to justify a regulatory program. While the use of an electronic format is not necessary for the DOR to conduct hearings, this format does provide a benefit not only to the DOR but also to law enforcement and the public.

The decrease in vehicle miles traveled and the related expenses are clearly measurable as evidenced by the information in Table 4 on page 12 of this report. Since the Hearings Division (Division) is primarily funded by General Fund revenues, this reduction is a benefit to all taxpayers of the state. The electronic format for hearings allows for greater flexibility and efficiency for the DOR. This flexibility also benefits law enforcement and the public. These factors combine to satisfy sunset criterion two through four.

This review does not recommend a future sunset review. The sunset criteria can be adapted to review programs such as the electronic hearings provisions in the motor vehicle statute. However, sunset was created as a mechanism to examine public policy implications of regulatory programs. The electronic hearing program has significant budgetary implications. It would be better served by periodic reviews by the State Auditor.

Recommendation 2 - The General Assembly should consider modifications to the funding mechanism for the Hearings Division of the Department of Revenue.

The Hearings Division is currently funded by a blend of General Fund and cash fund revenues. Section 42-2-132(4), Colorado Revised Statutes (C.R.S.), provides for a reinstatement fee of \$40 to be charged to all licensees who have served a suspension or revocation and are applying to have their licenses returned. These funds are deposited into the Driver's License Administrative Revocation Account (Revocation Account) with the State Treasurer and are appropriated by the General Assembly to cover the costs of the state's expressed consent (alcohol related) hearings.

Any unused funds in the Revocation Account not needed to fund costs associated with expressed consent hearings are credited to the Highway Users Tax Fund (HUTF). According to the fiscal year 02-03 Joint Budget Committee Staff Budget Briefing document prepared for the Division, the current fee is more than enough to cash fund the operations of the Division without additional General Funds.

However, the use of the reinstatement funds to cash fund the Division would result in a decrease in reinstatement fees available to HUTF. According to the JBC staff, an increase in the reinstatement fee to \$50.58 would offset this decrease. However, establishing the fee in statute would necessitate annual legislation by the General Assembly to ensure adequate reserves. It would be consistent with the process in other cash funded programs to allow the Executive Director of DOR to establish the fee by rule to cover the direct and indirect costs of the Division and to fund a reserve to be allocated to HUTF.

Administrative Recommendations

Administrative Recommendation 1 - The Hearings Division of the Department of Revenue should make clear the right of licensees to request an "in person" hearing.

In establishing the authority for electronic hearings, the General Assembly made it clear that electronic hearings would not be mandatory for all licensees. The statute in section 42-1-218.5 (2), C.R.S., "directs the department to consider the circumstances of the licensee when the licensee requests to appear in person and grant the request whenever possible."

One issue that has not been addressed by DOR is the right of a licensee to request a hearing in person. The enabling legislation clearly states that licensees shall have that option. DOR staff has indicated that if a licensee insists, arrangements for an in person hearing will be made. However, no formal process is in place to make such a request.

The DOR does not keep statistics on these requests but reports that requests for personal appearances rarely occur. However, the notice sent to licensees (included in this report as Appendix D on page 24 of this report) contains no mention that such a request is an option. The justification for this lack of information is that such a declaration may result in an increase in requests for personal appearances and complicate the scheduling of hearings. This is contrary to the statutory directive.

There is no reason that a request to appear in person would complicate the hearing scheduling. While the statute directs DOR to allow licensees to appear in person, it also allows the flexibility for the local law enforcement officers to attend hearings electronically. The statute also does not direct the Division to conduct hearings in rural areas. Hearings could be conducted from the Lakewood office with the licensee present in person and the police officer calling in from a rural area. If either party fails to appear, the procedure would be implemented the same as if the hearing was scheduled as a completely electronic or completely in person hearing.

Administrative Recommendation 2 - The Department of Revenue should utilize technology to reduce administrative expenses associated with electronic hearings.

The Division conducts approximately 6,000 hearings per year that require the presence of a police officer. As the electronic hearing program expands, it is likely that as many as half of these hearings could be conducted by electronic means. According to the Division (Table 5 on page 14), copying and mailing files to law enforcement agencies account for \$1.83 per hearing.

If, instead of copying and mailing the files, the Division scanned and transmitted the files electronically, potential savings to the Division could be realized. If 90 percent of the law enforcement agencies were capable of receiving the files electronically, there is a potential savings to the Division of \$4,941 per year. This may be offset by a capital expense in the first year to obtain the necessary equipment. However, as the electronic hearing program expands, the savings will offset the initial expenses.

Appendix A - Sunset Statutory Evaluation Criteria

- (I) Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation;
- (II) If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;
- (III) Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices and any other circumstances, including budgetary, resource and personnel matters;
- (IV) Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;
- (V) Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;
- (VI) The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;
- (VII) Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;
- (VIII) Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action; and
- (IX) Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

Appendix B – Statutes related to Electronic Hearings

42-1-218.5 - Electronic hearings - repeal.

(1) Notwithstanding any other provision of this title to the contrary, at the discretion of the department, any hearing held by the department pursuant to this title may be conducted in whole or in part, in real time, by telephone or other electronic means.

(2) The general assembly recognizes that there is an increase in the number of hearings conducted by the department; that a licensee has the right to appear in person at a hearing; and that a licensee or a law enforcement officer may not be able to appear in person at a hearing. The general assembly therefore directs the department to consider the circumstances of the licensee when a licensee requests to appear in person, and grant the request whenever possible. The general assembly further directs the department to consider the circumstances of the licensee and the law enforcement officer when either may not be able to appear in person, and allow the appearance by electronic means whenever possible.

(3) The department shall end the use of electronic hearings conducted pursuant to articles 1 and 2 of this title, effective July 1, 2003. Prior to this date, the use of electronic hearings shall be reviewed as provided for in section 24-34-104, C.R.S.

(4) This section is repealed, effective July 1, 2003.

42-2-132 - Period of suspension or revocation.

(1) The department shall not suspend a driver's or minor driver's license to drive a motor vehicle on the public highways for a period of more than one year, except as permitted under sections 42-2-127 (9) and 42-2-138 and except for noncompliance with the provisions of subsection (4) of this section or section 42-7-406, or both.

(2) (a) (I) Any person whose license or privilege to drive a motor vehicle on the public highways has been revoked is not entitled to apply for a probationary license, and, except as provided in paragraph (b) of this subsection (2) and in sections 42-2-125, 42-2-126, 42-2-138, 42-2-205, and 42-7-406, such person is not entitled to make application for a new license until the expiration of one year from the date on which the revoked license was surrendered to and received by the department; then such person may make application for a new license as provided by law.

(II) (A) Following the period of revocation set forth in this subsection (2), the department shall not issue a new license unless and until it is satisfied that such person has demonstrated knowledge of the laws and driving ability through the appropriate motor vehicle testing process and that such person whose license was revoked pursuant to section 42-2-125 for an alcohol- or drug-related driving offense has completed not less than a level II alcohol and drug education and treatment program certified by the division of alcohol and drug abuse pursuant to section 42-4-1301 (10).

(B) If the person was determined to be in violation of section 42-2-126 (2) (a) (I) and the person had a blood alcohol level, as shown by analysis of such person's blood or breath, that was 0.20 or more grams of alcohol per one hundred milliliters of blood or 0.20 or more grams of alcohol per two hundred ten liters of breath at the time of driving or within two hours after driving; or if the person's driving record otherwise indicates a designation as a persistent drunk driver as defined in section 42-1-102 (68.5), the department shall require such person to complete a level II alcohol and drug education and treatment program certified by the division of alcohol and drug abuse pursuant to section 42-4-1301 (10).

(C) If the total period of license restraint under this subparagraph (II) is not sufficient to allow for the completion of level II alcohol and drug education and treatment, or the documentation of completion of such education and treatment is incomplete at the time of reinstatement, proof of current enrollment in a level II alcohol and drug education and treatment program certified by the division of alcohol and drug abuse pursuant to section 42-4-1301 (10), on a form approved by the department shall be filed with the department.

(III) In the case of a minor driver or a provisional driver whose license has been revoked as a result of one conviction for any offense provided for in section 42-4-1301 (1) or (2), the minor driver or provisional driver, unless otherwise required after an evaluation made by an alcohol and drug evaluation specialist certified by the division of alcohol and drug abuse, must complete a level I alcohol and drug education program certified by the division of alcohol and drug abuse pursuant to section 42-4-1301 (10).

(IV) Any person whose license or privilege to drive a motor vehicle on the public highways has been revoked under section 42-2-125 (1) (g) (I) or (1) (i) or 42-2-203 where the revocation was due in part to a violation of section 42-4-1301 shall be required to present an affidavit stating that the person has obtained at the person's own expense a signed lease agreement for the installation and use of an approved ignition interlock device, as defined in section 42-2-132.5 (7), in each motor vehicle on which the person's name appears on the registration and any other vehicle that the person may drive during the period of the restricted license and a copy of each signed lease agreement.

(V) The department shall take into consideration any probationary terms imposed on such person by any court in determining whether any revocation shall be continued.

(b) Any person whose license or privilege to drive a motor vehicle on the public highways is revoked pursuant to section 42-2-125 (1) (k) for conviction of a drug offense shall have such person's driver's license revoked for a period of one year for each such conviction; except that the period of revocation shall be three months if such person has not previously been convicted of a drug offense which is grounds for driver's license or privilege revocation pursuant to section 42-2-125 (1) (k). Any revocation of a person's driver's license for conviction of a drug offense pursuant to section 42-2-125 (1) (k) shall begin upon conviction. Each subsequent conviction for such a drug offense occurring while a person's driver's license is already revoked for such a drug offense shall extend the period of revocation for an additional year.

(3) Any person making false application for a new license before the expiration of the period of suspension or revocation commits a class 2 misdemeanor traffic offense. The department shall notify the district attorney's office in the county where such violation occurred, in writing, of all violations of this section.

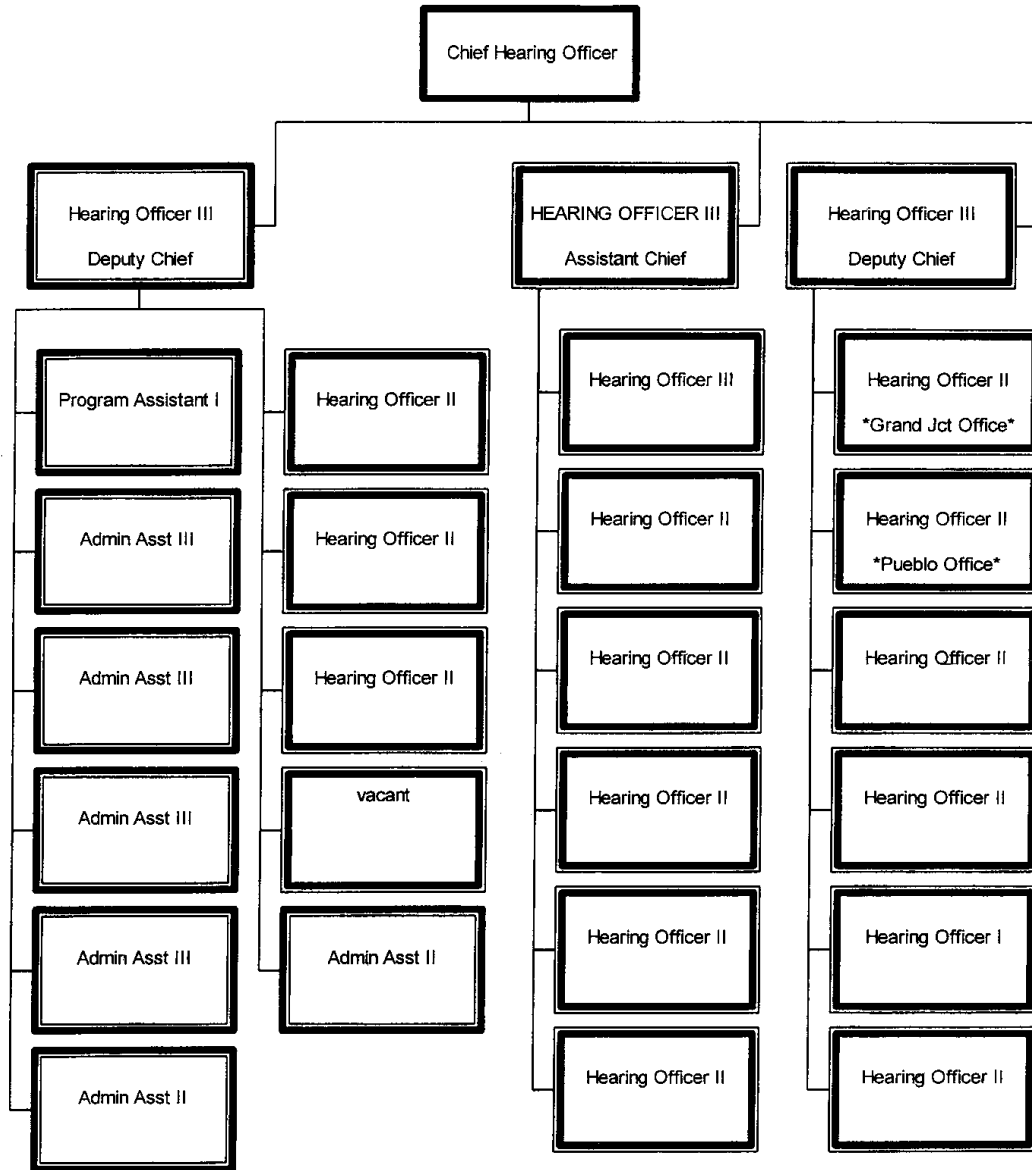
(4) (a) (I) Any person whose license or other privilege to operate a motor vehicle in this state has been suspended, cancelled, or revoked, pursuant to either this article or article 4 or 7 of this title, shall pay a restoration fee of forty dollars to the executive director of the department prior to the issuance to such person of a new license or the restoration of such license or privilege.

(II) Notwithstanding the amount specified for the fee in subparagraph (I) of this paragraph (a), the executive director of the department by rule or as otherwise provided by law may reduce the amount of the fee if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of the fee is credited. After the uncommitted reserves of the fund are sufficiently reduced, the executive director of the department by rule or as otherwise provided by law may increase the amount of the fee as provided in section 24-75-402 (4), C.R.S.

(b) All restoration fees collected pursuant to this subsection (4) from persons whose licenses or driving privileges were revoked pursuant to section 42-2-126 shall be transmitted to the state treasurer, who shall credit the same to the driver's license administrative revocation account in the highway users tax fund, which account is hereby created. The moneys in the account shall be subject to annual appropriation by the general assembly for the direct and indirect costs incurred by the department of revenue in the administration of section 42-2-126. At the end of each fiscal year, any unexpended and unencumbered moneys remaining in the account shall be transferred out of the account and credited to the highway users tax fund.

Appendix C – Hearings Division Organizational Chart

Colorado Department of Revenue
Hearings Division



Appendix D – Sample Notices

(Date)

(Name)

(Address)

Hearing Date:

Case Number:

Hearing Time:

License Number:

Date of Birth:

NOTICE OF TELEPHONE HEARING

You have been scheduled to appear by telephone for a hearing regarding revocation of your driver privilege pursuant to 42-2-126 CRS for operating a motor vehicle while under the age of 21 and having a blood alcohol content of at least 0.02 but less than 0.10. **YOU MUST CHECK IN BY CALLING THE HEARINGS SECTION AT 303.205.5780 ON THE HEARING DATE AT LEAST TEN MINUTES PRIOR TO THE HEARING TIME. IF YOU FAIL TO CALL AND CHECK IN, YOU WAIVE YOUR RIGHT TO HEARING AND YOUR DRIVER PRIVILEGE WILL BE REVOKED.**

You will have an opportunity to present verbal evidence at the hearing. Any other evidence you submit must be **received** by the Hearings Section at least three days prior to the date of the hearing. You may submit such other evidence either by fax transmission to 303.205.5700 or by mail to 1881 Pierce Street #106, Lakewood, CO 80214-1493. Please include your case number with your submission.

If anyone else, including any attorney or witness, is to participate with you during the hearing, then you must all be present at the same location and that location must have either extension phone or speaker phone capabilities. Based on the findings of the hearing officer, you may or may not be permitted to operate a motor vehicle at the conclusion of the hearing.

THE FOLLOWING APPLIES ONLY TO PERSONS UNDER 18:

The adult who signed the application for your license must accompany you at hearing. If that is not possible, then you may submit the following completed and notarized statement to the Hearings Section at least three days prior to the hearing.

I hereby certify that I am aware of the hearing scheduled for _____ in the matter of his/her privilege to operate a motor vehicle and that I am unable to attend such hearing.
Parent/Guardian: _____

State of Colorado, County of _____
Subscribed and sworn to before my by _____ this
_____ day of _____, _____.

Notary Public My commission expires: _____

(Date)

(ATTY Name)
(ATTY Address)

Hearing Date:
Hearing Time:

Case Number:
License Number:
Date of Birth:

Respondent: (respondent name)

NOTICE OF TELEPHONE HEARING

Please be advised that the above named respondent has been scheduled to appear by telephone for an administrative hearing regarding the referenced case. **THE RESPONDENT MUST CHECK IN BY CALLING THE HEARINGS SECTION AT 303.205.5780 ON THE HEARING DATE AT LEAST TEN MINUTES PRIOR TO THE HEARING TIME.**

Respondent will have an opportunity to present verbal evidence at the hearing. Any other evidence must be **received** by the Hearings Section at least three days prior to the date of the hearing. Such other evidence may be submitted either by fax transmission to 303.205.5700 or by mail to 1881 Pierce Street #106, Lakewood, CO 80214-1493. The case number should be referenced with any submission.

If anyone else, including any attorney or witness, is to participate with respondent during the hearing, then all must be present at the same location and that location must have either extension phone or speaker phone capabilities.