

The Office of Administrative Hearings

The Eleventh Annual Report

to

Governor Janet Napolitano

Senator Ken Bennett, President of the Senate

Representative James P. Weiers, Speaker of the House

Pursuant to A.R.S. § 41-1092.01(C)(5)

and

A.R.S. § 41-1092.01(C)(9)



Cliff J. Vanell, Director

November 1, 2006

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I. Introduction and Overview

The Office of Administrative Hearings (OAH) was created pursuant to Laws 1995, Chapter 251, adding Arizona Revised Statutes § 41-1092 *et seq.*, and commenced operation on January 1, 1996. Administrative hearings previously provided by regulatory agencies (except those specifically exempted) were transferred to the OAH for independent proceedings. There are two OAH locations, Phoenix and Tucson, with 31 full-time positions, including the Director, the Office Manager, 19 Administrative Law Judges, and 10 support staff. In addition to conducting hearings in Phoenix and Tucson, the OAH videoconferences Registrar of Contractors hearings in Flagstaff, Kingman, Lake Havasu City, Prescott, Show Low, Sierra Vista, and Yuma. Our statutory mandate is to “ensure that the public receives fair and independent administrative hearings.”

Responsibility:

The OAH understands its responsibility to create a system that is efficient and cost effective. The OAH statistics in FY 2006 indicate agency acceptance of Administrative Law Judge Decisions without modification was 84.68%. Agency acceptance of Findings of Fact and Conclusions of Law without modification was 91.07%. Rehearings (1.5%) and Appeals (3.7%) were rare. Evaluations by participants continue to indicate that Administrative Law Judges and the OAH were rated excellent or good in 95% of all responses.

Integrity:

The OAH takes its statutory mandate to provide fair, impartial and independent hearings seriously. Although part of the executive branch, together with its client agencies, the OAH maintains a conscious detachment from political issues and the missions of those agencies. Procedures, rulings, and case assignments are at all times kept free of outside pressures to ensure that the parties can be assured that hearings are impartial and independent.

Commitment:

The OAH views commitment as a willingness to advance its mission, including improving the quality of decision-writing. While the Administrative Law Judges must render decisions according to the evidence before them and using their independent judgment, the OAH now requires that Administrative Law Judges review all decisions that have been modified or rejected by an agency in order to encourage them to identify any possible miscitations or other areas where quality can be improved. This commitment is in furtherance of the duty of the OAH to provide continuing education to its Administrative Law Judges.

Efficiency:

Through careful case management, the OAH enjoys no backlog. The completion rate for cases in FY 2006 was 103.2%.

II. Continued Development of the Office

1. Newsletter

The OAH has completed publication of four editions of the OAH Newsletter on a quarterly basis during FY 2006. The Newsletters report various performance measures and discuss current issues. The Newsletters contain a series of articles written by Administrative Law Judges that include practice pointers. All articles appear on the OAH website, along with the OAH performance measures. Copies of the four editions published in FY 2006 are included in the Appendix.

2. Video Productions

The OAH completed a new in-house 8 minute video production which is played for parties immediately before hearings. The video subjects include direct and cross examinations, exhibits, objections, opening statements, closing arguments, and proper decorum. This allows the OAH to present a consistent message orienting the parties in a crisp, engaging manner. The Administrative Law Judge is able to start and stop the video in order to clarify issues according to the ALJ's experience or questions from the parties.

3. Videoconference Implementation

In June 2005, the OAH began conducting ROC hearings in outlying areas by videoconference. The OAH implemented videoconferencing to these areas in the following order: Kingman, Show Low, Prescott, Lake Havasu City, Flagstaff, Sierra Vista, and Yuma. The 79 travel weeks of FY 2005 were replaced in FY 2006 with 97 week-long videoconference dockets devoted to those outlying areas. Original case settings and continued settings for the outlying areas are now comparable to the metropolitan areas.

4. Reduction in In-State Travel

Due to the implementation of videoconferencing, in-state travel was reduced by 90% in FY 2006.

5. Portal Searches of Administrative Law Judge Decisions

The OAH implemented full text searching of its non-confidential Administrative Law Judge Decisions in FY 2006. Queries may be conducted by Administrative Law Judge, agency and date range, as well as by boolean modifiers and free text. See Appendix, Vol. 38.

6. Public Presentations

Administrative Law Judges have presented on the subject of the OAH adjudicative process in various venues, including Phoenix College and private groups. Such public presentations cultivate public awareness of OAH's mission and increase understanding of the administrative process.

7. Professional Development

Administrative Law Judges continue to receive professional education in the subject matter of agencies as well as skills development.

Administrative Law Judges Daniel Martin, Brian Tully, and Diane Mihalsky volunteered time as pro tem judges in the Maricopa County Superior Court and elsewhere.

Administrative Law Judges Kay Abramsohn and Eric Bryant attended the 5th Annual National

Academy for IDEA (Individuals with Disabilities Education Act) in support of OAH's new Special Education venue.

On January 9-21, 2006 and April 24-28, 2006, Judges Thomas Shedden and Marianne Bayardi attended new Judge Orientation sponsored by the Arizona Supreme Court.

On June 21-23, 2006, 12 Administrative Law Judges attended the Annual Judicial Conference sponsored by the Arizona Supreme Court.

Judge Michael Barth was appointed as a Maricopa County Superior Court Commissioner in June 2006. Judge Wendy Morton was appointed Scottsdale's newest city court judge in December 2005.

III. Summary of Agency Use of OAH Services

1. Case Management

a. Breakdown of Cases Filed by Agency (FY 2006):

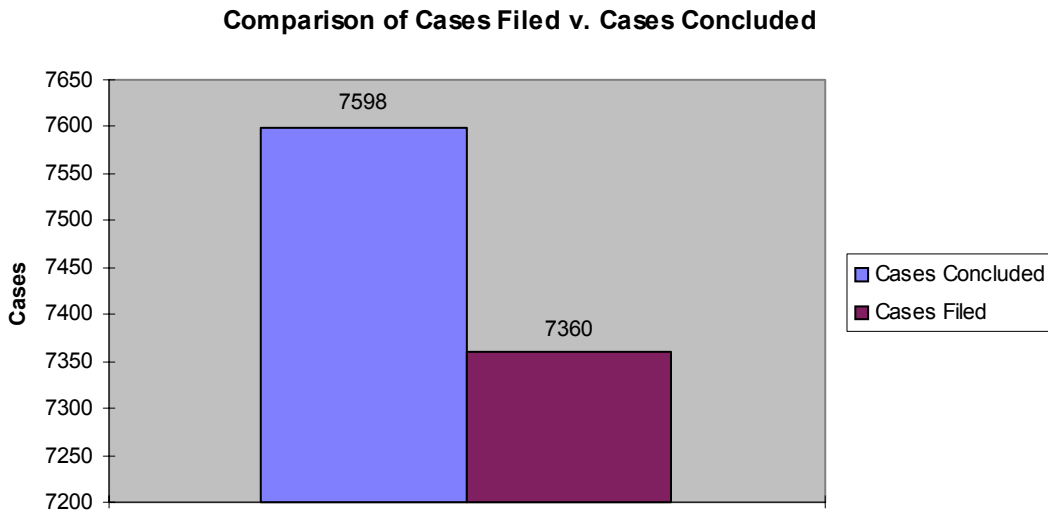
7,360 cases were filed with the OAH in FY 2006. The distribution among the agencies, boards, commissions, or political subdivisions (Agencies) are as follows (in descending order by number of cases filed):

Arizona Health Care Cost Containment System (AHCCCS)	3367
Registrar of Contractors	1876
Department of Health Services	354
Department of Real Estate	250
Department of Weights and Measures	245
Department of Economic Security - Child protective Services (CPS)	137
Board of Nursing	128
Department of Administration - Capitol Police Parking	126
Department of Fire, Building and Life Safety	103
Board of Fingerprinting	100
Department of Insurance	93
Department of Environmental Quality	70
Arizona Department of Financial Institutions	60
Liquor Licenses and Control	54
Department of Education - Special Ed	45
Department of Revenue	41
Board of Dental Examiners	36
Arizona State Retirement System	32
Board of Appraisal	26
Secretary of State	23
Arizona Medical Board	20
Peace Officers Standards and Training	20
State Board of Accountancy	18
Department of Public Safety - Student Transportation	15
Medical Radiologic Technology Board of Examiners	13
Land Department	12
Department of Racing	12
Structural Pest Control Commission	11

Department of Gaming	10
Department of Public Safety - Concealed Weapons Permit Unit	6
Arizona Lottery	5
Pharmacy Board	5
Citizens Clean Elections Commission	5
Department of Administration	5
Board of Behavioral Health Examiners	5
Board of Nursing Care Institution Administrators Examiners	5
Physical Therapy	5
Board of Chiropractic Examiners	4
Department of Water Resources	2
Criminal Justice Commission	2
Board of Massage Therapy	2
State Board for Charter Schools	2
Acupuncture Board of Examiners	2
Department of Education	1
State Board of Cosmetology	1
Board of Osteopathic Examiners	1
Arizona Board of Occupational Therapy Examiners	1
Board of Psychologist Examiners	1
Arizona Department of Commerce	1
City of Phoenix	1
State Schools for the Deaf and the Blind	1

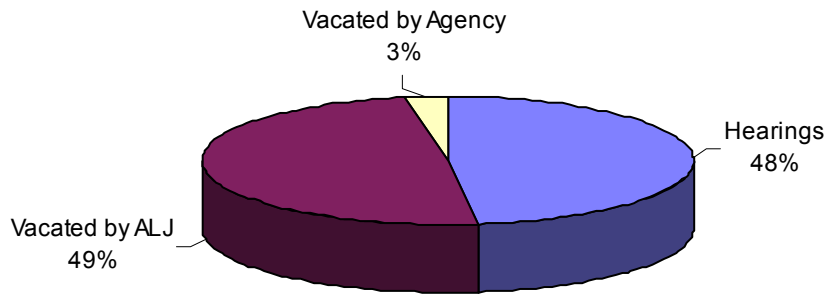
b. Number of Cases Filed Versus Cases Concluded:

In FY 2006, the conclusion rate (defined as cases concluded divided by new cases filed) was 103.2%.



A.R.S. § 41-1092.05 calls for the setting of hearings within 60 days of a request for hearing by an agency in a “contested case” and within 60 days of an appeal of an “appealable agency action.” Although an argument could be made that such timelines inevitably result in unnecessary hearing settings, case management at the OAH discourages cases being “on hold” or riding the calendar. Generally, a matter is vacated from the first hearing setting as the result of settlement and does not take up a second hearing setting. Therefore, on the whole, statutory time limits are beneficial to the larger process of regulatory action.

Disposition of Concluded Cases FY 2006

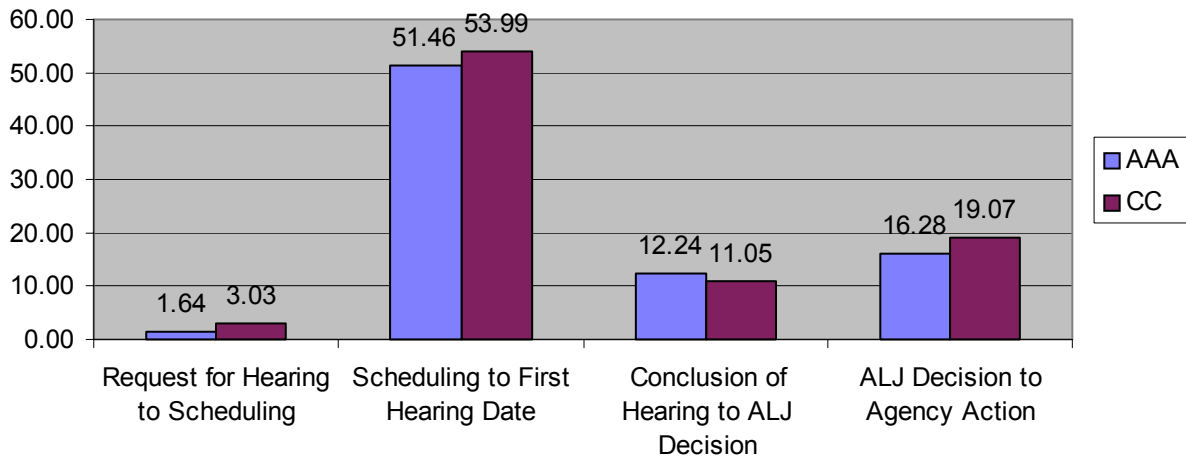


c. Timeline of Case Management:

A.R.S. § 41-1092.05(A) and § 41-1092.08(A) and (B) contemplate a rigorous timeline to expedite hearings and final agency actions. “Appealable agency actions” (defined as actions taken by an agency without a prior hearing) are required to be set for hearing within 60 days of a request by a party. “Contested cases” (defined as proposed actions for which a hearing is required) are required to be set within 60 days of an agency request. Administrative Law Judge Decisions must be transmitted to the agencies within 20 days of the conclusion of the hearing. The agency heads are required to take final action within 30 days of receipt. Boards and Commissions generally must take final action within 5 days of their next scheduled meeting.

The following diagram illustrates the average timelines:

Average Days Between Selected Events - Appealable Agency Actions v. Contested Cases

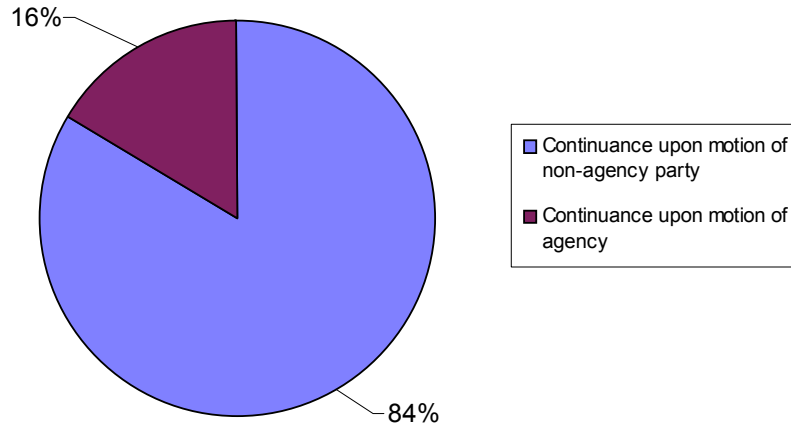


d. Incidence of Continuance:

A single continuance in FY 2006 added an average of 48.75 days to the total length of a case. Although 70% of all continuance requests were granted in FY 2006, the OAH has developed a well-deserved reputation for discouraging “convenience” continuances in favor of those based on “good cause.” This is especially important because of the decrease in the number of Administrative Law Judges due to budget constraints. The frequency of continuance, defined as the number of continuances granted (1,025) divided by the total number of cases first scheduled (7,382), was 13.88%. The ratio of first hearing settings (7,635) to continued settings on the calendar (1,114) was 1 to 0.15.

The following chart illustrates the source of continuances.

Comparison of Source of Continuance FY 2006



The following list is a breakdown of FY 2006 continued settings and their sources, by agency.

AGENCY	Continued - Motion by non- agency party	Continued - Motion by agency party
Arizona Health Care Cost Containment System	177	36
Arizona Medical Board	5	0
Arizona State Retirement System	1	0
Board of Appraisal	4	0
Board of Chiropractic Examiners	1	0
Board of Dental Examiners	5	0
Board of Massage Therapy	2	0
Capitol Police Parking (DOA)	8	0
Citizens Clean Elections Commission	1	0
City of Phoenix	1	0
Criminal Justice Commission	1	0
Department of Administration	6	0

Department of Commerce	1	0
Department of Economic Security - CPS	20	3
Department of Economic Security - DCYF	2	0
Department of Education - Special Ed	5	1
Department of Environmental Quality	17	8
Department of Financial Institutions	7	0
Department of Fire, Building and Life Safety	26	0
Department of Health Services	81	5
Department of Insurance	20	0
Department of Public Safety - Student Transportation	2	0
Department of Racing	3	0
Department of Real Estate	25	110
Department of Revenue	17	0
Department of Water Resources	1	0
Department of Weights and Measures	1	0
Liquor Licenses and Control	11	2
Peace Officers Standards and Training	6	0
Pharmacy Board	4	0
Registrar of Contractors	450	13
Secretary of State	1	1
State Board for Charter Schools	2	0
State Board of Accountancy	5	3
State Board of Nursing	9	0
State Land Department	4	0
Total	932	182

The following chart reflects the number of motions to continue that were entertained in FY 2006 and the percentage granted:

Client	ODC	OGC	Total Motions	% Granted
AHCCCS	83	198	281	70
Arizona Medical Board	1	5	6	83
Arizona State Retirement System	2	1	3	33
Board of Behavioral Health Examiners	0	1	1	100
Board of Appraisal	3	6	9	67
Board of Dental Examiners	2	3	5	60
Board of Fingerprinting	1	1	2	50
Board of Massage Therapy	0	1	1	100
Capitol Police Parking (DOA)	5	6	11	55
Citizens Clean Elections Commission	0	1	1	100
City of Phoenix	0	1	1	100
Criminal Justice Commission	0	1	1	100
Department of Administration	0	1	1	100
Department of Economic Security - CPS	10	21	31	68
Department of Economic Security - DCYF	0	2	2	100
Department of Education - Special Ed	3	4	7	29
Department of Environmental Quality	2	15	17	88
Department of Financial Institutions	6	8	14	57
Dept. of Fire, Building and Life Safety	17	26	43	60

Department of Gaming	2	1	3	33
Department of Health Services	13	74	87	85
Department of Insurance	4	17	21	81
Department of Real Estate	13	154	167	92
Department of Revenue	1	14	15	93
Department of Weights and Measures	1	3	4	75
Liquor Licenses and Control	9	11	20	55
Peace Officers Standards and Training	3	7	10	70
Registrar of Contractors	235	419	654	64
State Board for Charter Schools	3	2	5	40
State Board of Accountancy	1	5	6	83
Pharmacy Board	0	3	3	100
Secretary of State	0	2	2	100
State Board of Nursing	8	5	13	38
Department of Racing	0	1	1	100
State Board of Cosmetology	0	2	2	100
State Land Department	1	3	4	75
Total	429	1025	1454	70

2. Evaluation

a. Results of Public Evaluation:

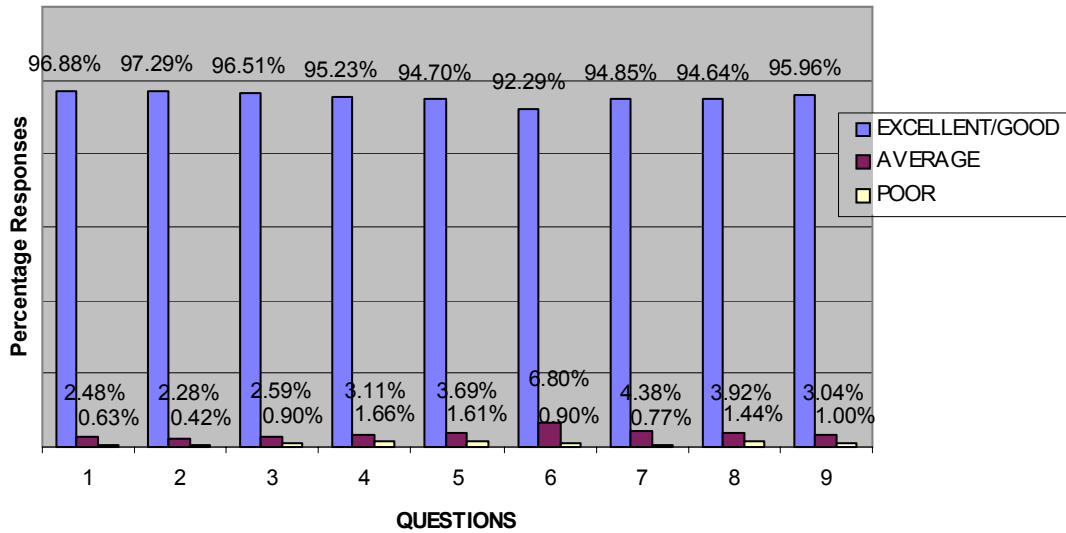
Since November 1996, the OAH has administered an evaluation procedure. The support staff provides a copy of the evaluation before the hearing in order to encourage all participants to respond. A discussion of the evaluation form is included in a video played before each hearing, or is otherwise addressed by the Administrative Law Judge. The results are not disclosed to the Administrative Law Judge. Hearing participants place completed evaluations in locked boxes located near the hearing rooms.

Those responding are asked to rate the following categories, on a scale of excellent, good, satisfactory, or poor:

1. Attentiveness of the Administrative Law Judge
2. Effectiveness in explaining the hearing process
3. Administrative Law Judge's use of clear and neutral language
4. Impartiality
5. Effectiveness in dealing with the issues of the case
6. Sufficient space
7. Freedom from distractions
8. Questions responded to promptly and completely
9. Treated courteously

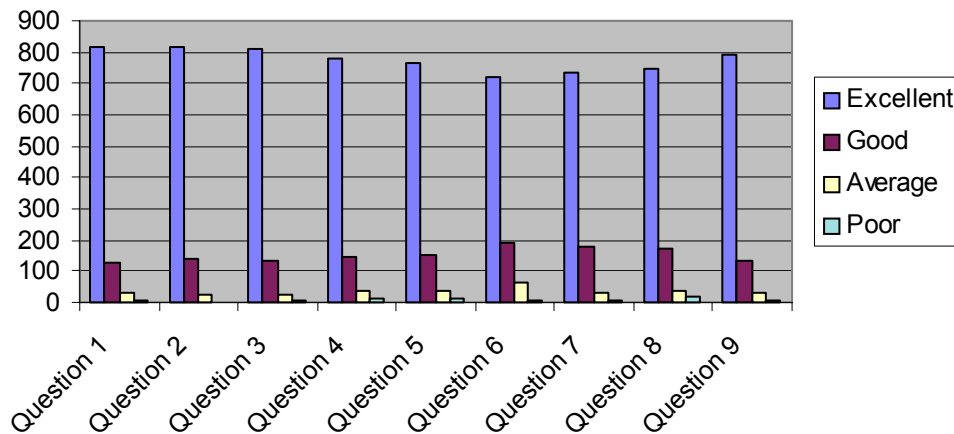
The results indicate that satisfaction is high among all groups, with those responding rating the OAH excellent to good in 92.29% to 97.29% of responses.

All Responses FY 2006



An analysis of the unrepresented parties indicates that even among this most vulnerable group, the OAH is seen to be functioning extremely well.

Unrepresented Responses FY 2006

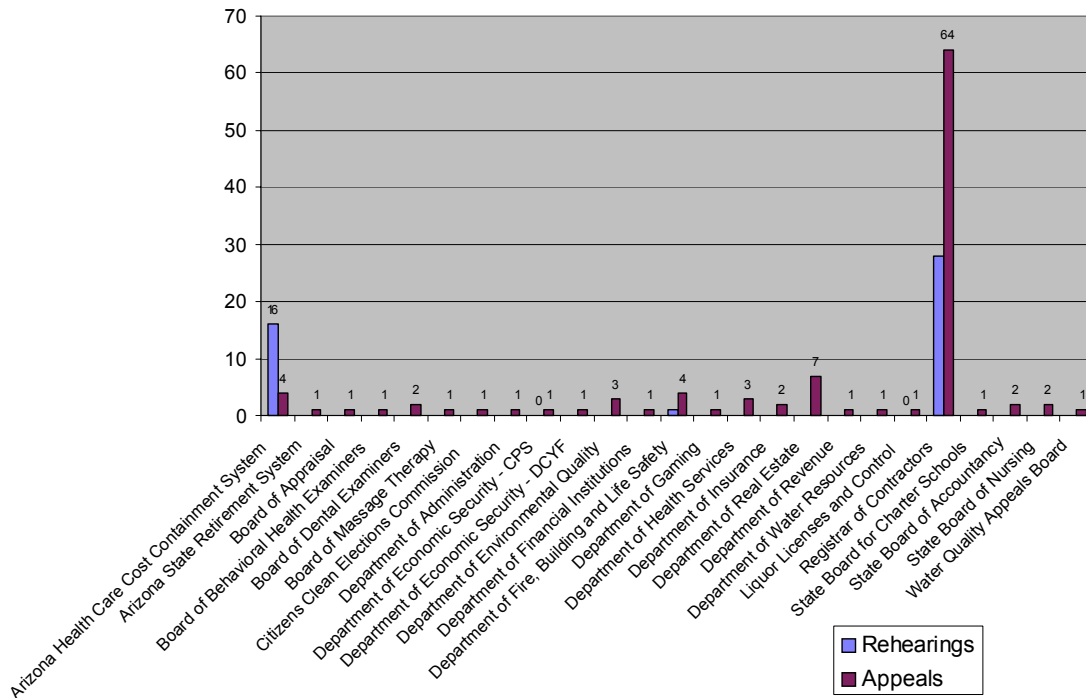


b. Incidence of Rehearing and Appeal:

Rehearings are permitted pursuant to A.R.S. § 41-1092.09 under certain conditions. In FY 2006, the rehearing rate (defined as rehearings scheduled divided by cases heard) was 1.5%.

Appeals to Superior Court are provided for pursuant to A.R.S. § 41-1092.08(H). In FY 2006, the judicial appeal rate (defined as judicial appeals taken divided by cases decided on the merits) was 3.7%. As reflected in the following diagram, rehearings and judicial appeals in FY 2006 were relatively rare. Both were concentrated at the Registrar of Contractors. Registrar of Contractors cases are primarily contests between two private litigants: homeowner versus contractor; and contractor versus subcontractor.

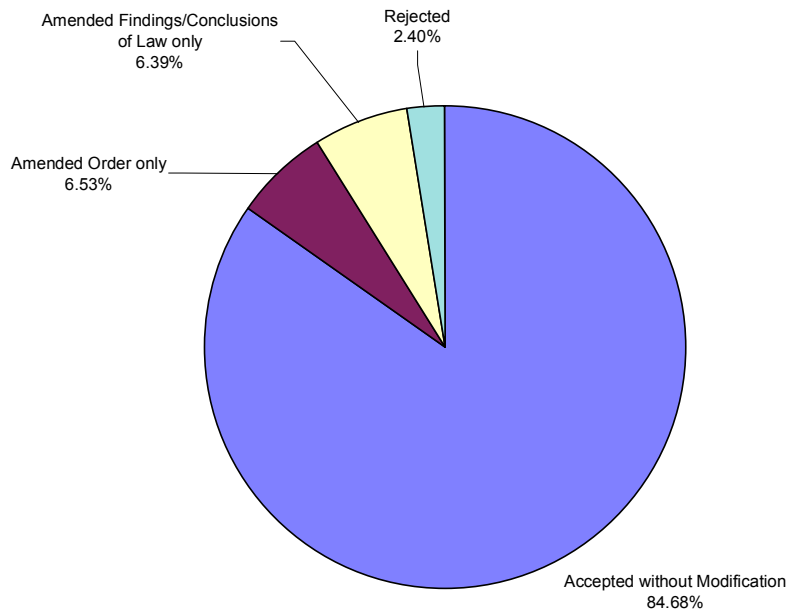
Judicial Appeals and Rehearings FY 2006



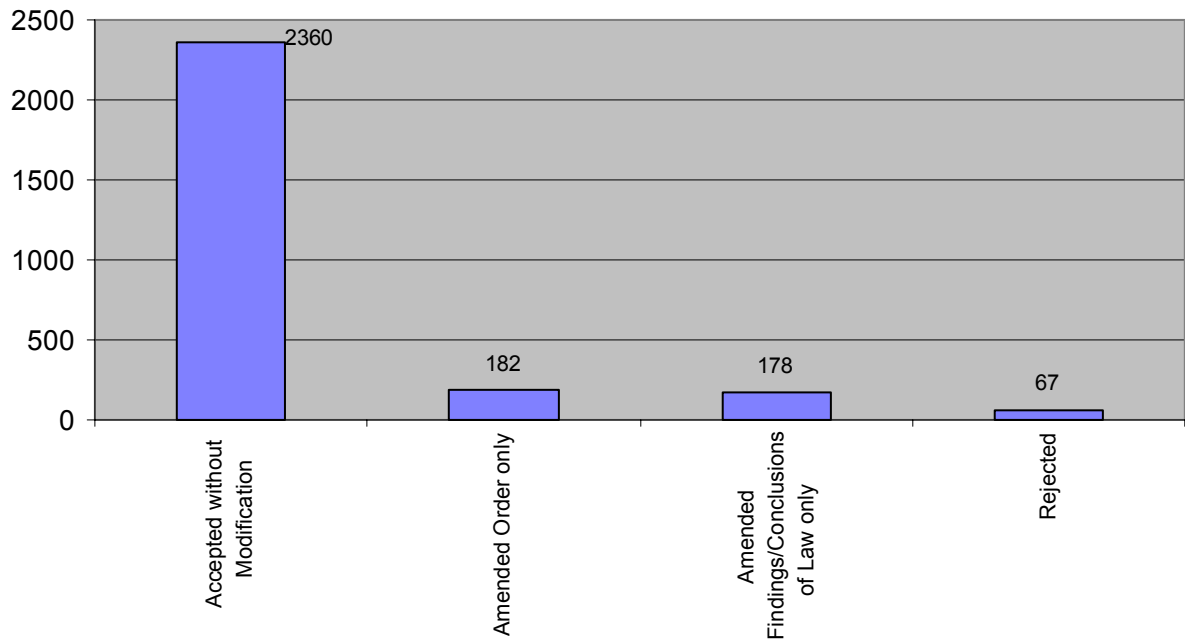
IV. Acceptance of Administrative Law Judge Decisions by Agencies

1. Agency Action

Agency acceptance of the Administrative Law Judge Decisions is very high. 84.68% of all decisions acted upon by the agencies were accepted without modification. Agency acceptance was 91.07% if viewed from the vantage point of acceptance of Findings of Fact and Conclusions of Law, the core function of the Administrative Law Judge. 50.54% of modifications made by the agencies were in the Recommended Order (penalty portion).



The following chart reports the number of cases in the various categories of agency response.



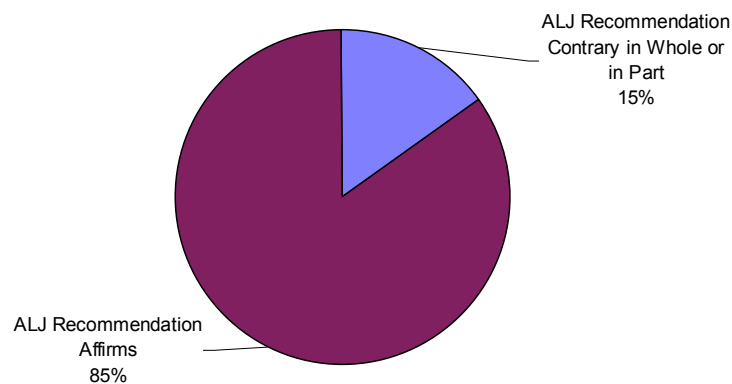
The following chart reports the breakdown of agency response by agency. Included also are the cases which became moot before agency action; cases which were subsequently certified by the OAH due to agency inaction; or cases which were not subject to agency modification or rejection by statute. This chart further illustrates that modifications and rejections are few relative to the decisions accepted.

	Accept	Amend Order	Amend Findings	Reject	Certified	Moot	Final	Total
Acupuncture Bd. of Ex.	1	0	0	0	0	0	0	1
AHCCCS	947	0	48	48	6	3	0	1052
Arizona Lottery	3	0	0	0	0	0	0	3
Arizona Medical Board	6	2	2	0	0	0	0	10
Arizona Retirement System	12	1	0	0	2	1	0	16
Board of Accountancy	6	4	0	0	0	0	0	10
Board of Appraisal	7	3	3	0	0	0	0	13
Bd. for Charter Schools	0	3	0	0	0	0	0	3
Bd. of Dental Examiners	5	1	20	1	0	0	0	27
Bd. of Massage Therapy	3	1	0	0	0	0	0	4
Board of Nursing	12	4	0	0	0	0	0	16
Bd. Osteopathic Examiners	0	0	0	0	1	0	0	1
Capitol Police Parking (DOA)	102	0	0	0	0	0	0	102
Citizens Clean Elections	2	0	0	0	1	0	0	3
Chiropractic Bd.	3	1	0	0	0	0	0	4
Criminal Justice Comm.	1	0	0	0	0	0	0	1
Dept. of Administration	0	0	0	0	0	0	0	0

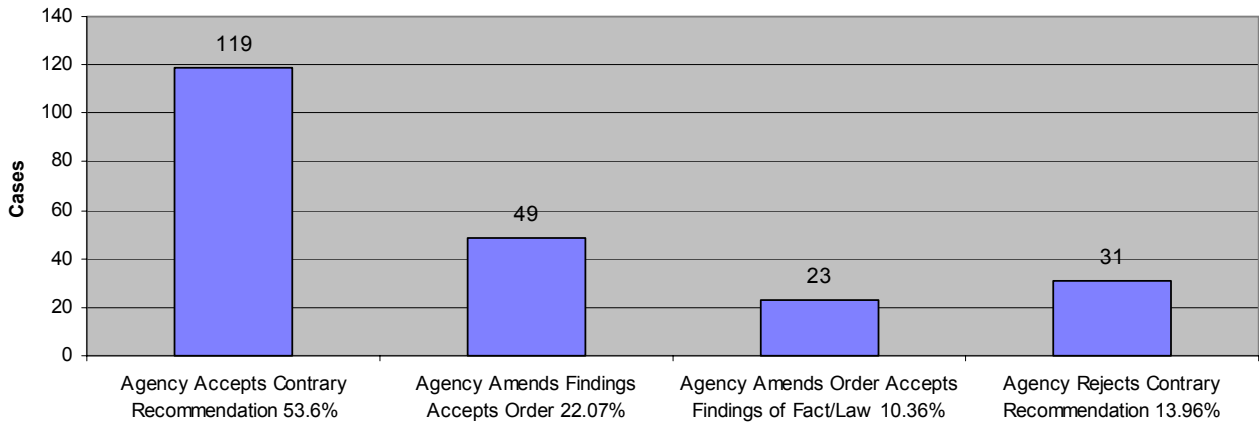
DES - CPS	101	0	5	1	3	0	0	110
DES - DCYF	1	0	0	0	0	0	0	1
Dept. of Education	1	0	0	0	0	0	2	3
Dept. of Environ. Quality	4	0	0	0	0	0	0	4
Dept. Financial Institutions	6	3	0	0	0	0	0	9
Dept. Fire, Bldg., Life Safety	60	0	0	0	7	0	0	67
Dept. of Gaming	5	0	0	0	0	0	0	5
Dept. of Health Services	169	3	3	1	1	0	0	177
Dept. of Insurance	20	0	0	0	24	0	0	44
Dept. of Liquor Lic./Control	10	3	0	0	3	0	0	16
DPS - BUS	8	1	0	1	0	0	0	10
Dept. of Racing	6	0	0	0	1	0	0	7
Dept. of Real Estate	69	40	3	4	2	0	0	118
Dept. of Revenue	0	0	0	0	0	0	30	30
Land Department	4	0	0	0	1	0	0	5
Medical Radiological Tech Bd.	7	0	2	0	0	0	0	9
Nursing Care Institution	3	0	0	0	0	0	0	3
Peace Officers Stand/Training	9	0	0	0	0	0	0	9
Pharmacy Board	0	1	0	0	1	0	0	2
Physical Therapy	3	0	0	0	0	0	0	3
Registrar of Contractors	751	109	92	9	20	30	0	1011
Secretary of State	4	1	0	0	1	0	0	6
Structural Pest Control Com.	9	1	0	1	0	0	0	11
Water Quality Appls. Bd	0	0	0	0	1	0	0	1
Water Resources	0	0	0	1	0	0	0	1
Weights and Measures	0	0	0	0	2	0	0	2
TOTAL	2360	182	178	67	77	34	32	2930

In FY 2006, Administrative Law Judges rendered decisions that were contrary in whole or contrary in part to agencies' original positions in 15% of cases. Agency acceptance of contrary decisions was high at 86%.

Recommendations Contrary to Original Agency Action FY 2006



Agency Response to Contrary Recommendations FY 2006



The following chart reports the breakdown of agency responses to contrary decisions.

Client	Accept	Amend (order)	Amend (findings)	Reject
AHCCCS	53	1	12	22
Arizona Medical Board	1	0	0	0
Arizona State Retirement System	1	0	0	0
Board of Accountancy	1	1	0	0
Board of Appraisal	2	0	2	0
Board for Charter Schools	0	1	0	0
Board of Massage Therapy	1	1	0	0
Board of Nursing	1	0	0	0
Board of Chiropractic Examiners	3	0	0	0
Board of Dental Examiners	1	1	1	0
Department of Administration	1	0	0	0
DES - CPS	15	0	3	0
Department of Environmental Quality	1	0	0	0
Dept. of Financial Institutions	0	2	0	0
Dept. of Fire, Building and Life Safety	11	0	0	0
Department of Health Services	8	0	1	1
Department of Insurance	1	0	0	0
DPS - BUS	2	1	0	0
Department of Racing	2	0	0	0
Department of Real Estate	7	40	3	7
Department of Revenue	0	0	0	0
Liquor Licenses and Control	0	1	0	0
Medical Radiologic Technology Board	0	0	1	0
Osteopathic Board of Examiners	0	0	0	0
Peace Officers Standards and Training	1	0	0	0
Registrar of Contractors	5	0	0	1
Secretary of State	1	0	0	0
Water Quality Appeals Board	0	0	0	0
TOTAL	119	49	23	31

2. Agency Inaction With Subsequent OAH Certification of Finality

Beginning August 21, 1998, the OAH was required to certify the Administrative Law Judge Decision as the final administrative decision if the OAH had not received the agency, board or commission's action accepting, modifying or rejecting the recommended decision within 30 days of transmission. Special rules apply if the board or commission meets monthly or less frequently. See A.R.S. § 41-1092.08(D). In FY 2006, 82 Administrative Law Judge Decisions were certified by the OAH as final administrative decisions.

Agency	Certified
Registrar of Contractors	22
Department of Insurance	18
Department of Fire, Building and Life Safety	11
Arizona Health Care Cost Containment System	6
Department of Real Estate	3
Arizona State Retirement System	3
Liquor Licenses and Control	3
Department of Economic Security - CPS	3
Secretary of State	2
Department of Weights and Measures	2
Department of Gaming	1
DPS - Concealed Weapons Permit Unit	1
Arizona State Veterans Home	1
Arizona Board of Occupational Therapy Examiners	1
Board of Osteopathic Examiners	1
Pharmacy Board	1
Board of Behavioral Health Examiners	1
Water Quality Appeals Board	1
Department of Racing	1

V. Motions for Change of Administrative Law Judge Granted Pursuant to A.R.S. § 41-1092.07

A.R.S. § 41-1092.01(C)(9)(b) requires that the OAH report the number of motions for change of Administrative Law Judge for bias, prejudice, personal interest or lack of necessary expertise which were filed and the number granted. In FY 2006, 14 motions were filed and no motion was granted.

VI. Violations of A.R.S. § 41-1009

Pursuant to A.R.S. § 41-1092.01(C)(9)(c), the OAH reports that it has no knowledge of violations of A.R.S. § 41-1009 by any agency.

VII. Recommendations for Changes in the Administrative Procedures Act

The regulated community has long complained about inconsistent procedures among the various agencies. The following recommendations point to the areas where uniformity or greater consistency can be accomplished:

1. Right to settlement conferences in “contested cases.”

A.R.S. § 41-1092.03 provides that appellants to “appealable agency actions” be entitled to settlement conferences with an agency representative. No such right exists for “contested cases,” which include most disciplinary proceedings. Such a conference may be beneficial in expediting informal disposition of contested cases.

2. Establish uniform standards for appeal rights notice.

Currently there are no standards for how, and with what degree of specificity, appeal rights to Superior Court should be communicated to parties once the agency has acted.

3. Establish uniform basis for rehearing.

Parties must research the specific rules of each agency, board or commission to determine the bases for rehearing since there is little uniformity. Standardizing and recapitulating possible bases in Title 41 would make the process easier, particularly for the unrepresented.

4. Conform rehearing and appeal rules.

Currently parties have 30 days from service of an agency’s final action, which is presumed after 5 days of mailing to the party’s last known address, to request a rehearing under A.R.S. § 41-1092.09(A)(1) and (C). However, under A.R.S. § 12-904(A), parties have 35 days to file an appeal to Superior Court upon service, presumed after 5 days of mailing to the party’s last known address. Conforming the time limits for requesting rehearings and filing appeals will simplify the process by eliminating varying time limits for parties to act on final orders and will allow agencies to frame the effective dates of their final orders to a single date.

VIII. Recommendation for Changes or Improvements in Agency Practice with Respect to the Administrative Procedures Act

Recoupment of Costs for Administrative Hearings:

Billed costs to non-General Fund supported agencies, boards and commissions (ISA agencies), pursuant to A.R.S. § 41-1092.01(E) and (K), could be recouped by them by extending the statutory authority found in isolated statutes to all such ISA agencies.

An example of statutory authority for recoupment is found in A.R.S. § 32-128(H), which permits the Board of Technical Registration to recoup certain costs:

H. On its determination that a registrant or a home inspector has violated this chapter or a rule adopted pursuant to this chapter, the board may assess the registrant or the home inspector with its reasonable costs and expenses incurred in conducting the investigation and administrative hearing. All monies collected pursuant to this subsection shall be deposited, pursuant to sections 35-146 and 35-147, in the technical registration fund established by section 32-109 and shall only be used by the board to defray its expenses in connection with disciplinary investigations and hearings. Notwithstanding section 35-143.01, these monies may be spent without legislative appropriation.

To avoid any appearance of impropriety by the ISA agencies, such recoupment might be limited to settlements or to cases where the ISA agency prevails before the independent Administrative Law Judge, or only as incident to disciplinary orders.

Appendix

Newsletters

Vol 37

Vol 38

Vol 39

Vol 40

The OAH



Janet Napolitano
Governor

Cliff J. Vanell
Director

Vol. 37

November 2005

www.azoah.com

Official Newsletter of the Arizona Office of Administrative Hearings

Interview with the Director

What follows is the text of an imaginary interview with the Director of the Office of Administrative Hearings.

You have been Director of the Office of Administrative Hearings for ten years. Looking back, what life experiences prepared you most for your position?

Cliff Vanell: Certainly having been a pro tem judge gave me insights into the demands of adjudication. But I would have to say that being a prosecutor and having to present cases before a variety of judges was invaluable. Even now, the occasional appearance before a judge, as I had to do before a probate judge when establishing my father's death after his disappearance at sea, reminds me how important it is to have a kind and compassionate judge.

I was heavily involved with the Drug Recognition Expert (DRE) Program (a police investigatory tool to identify the drugged driver) as it developed in Arizona. I presented numerous seminars to judges, prosecutors and defense attorneys and edited the DRE Newsletter, published by the Phoenix Prosecutor's Office. This experience convinced me how important it is to constantly disseminate the accomplishments of an organization as a way to constantly challenge it to always be better, faster and smarter.

I often relate how I inadvertently came upon my mother in the early hours of the morning before she had to appear at a Justice Court on a dispute with a merchant. My mother was a very strong woman and seeing her visibly worried

was startling. As soon as she saw me, she displayed her typical iron lady routine. I have never forgotten how frightening going to court or a hearing can be to a lay person.

I also have shared how as a law student I found myself at the county library surrounded by law books puzzling out an issue for a brief. At the same table was a young man who looked like he had just come off a workshift at some factory. He too was surrounded by law books and must have been trying to do his own legal work. I remember thinking that if this was such a challenge to one who had legal training, what must it seem like to him. That image has stuck with me.

Lastly, three years working in a copper smelter and acid plant taught me that there is never an excuse to interrupt services (even if the furnace is leaking molten copper like an upside down volcano), there is always a solution (even if you have to figure out a pneumatic pump on the fly), and that constant monitoring is essential to keep a process working smoothly.

What do you do when different judges have differing interpretations of a statute, or view issues in different ways?

The judges must decide cases and independently reach their best judgments. To that extent I see my most important function as protecting that independence, I am careful not to impugn it myself. Collegiality is the

"Interview"

(continued on page 2)

The Office of Administrative Hearings (OAH) began operations on January 1, 1996. Administrative Hearings previously provided by regulatory agencies (except those specifically exempted) are now transferred to the OAH for independent proceedings. Our statutory mandate is to "ensure that the public receives fair and independent administrative hearings."

The process of unifying the administrative hearings function in OAH-style agencies began in 1945 with California. The current American states and cities, and Canadian

provinces, having adopted the model, with year of inception are: Alabama (1998); Alaska (2004); Arizona (1996); California (1961); City of Chicago (1997); Colorado (1976); Florida (1974); Georgia (1995); Iowa (1986); Kansas (1998); Louisiana (1996); Maine (1992); Maryland (1990); Massachusetts (1974); Michigan (1996); Minnesota (1976); Missouri (1965); New Jersey (1979); New York City (1979); North Carolina (1986); North Dakota (1991); Oregon (1999); South Carolina (1994); South Dakota (1994); Tennessee (1975); Texas (1991); Washington D.C. (1999); Washington (1981); Wisconsin (1978); Wyoming (1987); and Province of Quebec ().

Mission Statement:

We will contribute to the quality of life in the State of Arizona by fairly and impartially hearing the contested matters of our fellow citizens arising out of state regulation.

1st Quarter Statistics At A Glance

Acceptance Rate:

ALJ findings of fact and conclusions of law were accepted in **86.33%** of all Administrative Law Judge Decisions acted upon by the agencies.* ALJ Decisions, including orders, were accepted without modification in **80.51%** of all Administrative Law Judge Decisions acted upon by the agencies. **39.1%** of all agency modification was of the order only (i.e. penalty assessed).

Appeals to Superior Court:

There were **39** appeals filed in Superior Court.

Rehearings:

The rehearing rate was **1.8%**, defined as rehearings scheduled (12) over hearings concluded (668).**

Completion Rate:

The completion rate was **103.6%**, defined as cases completed (2006) over new cases filed (1936).

Continuance:

The average length of a first time continuance based on a sample of cases (first hearing setting and first continuance both occurred in the 1st quarter) was **44.85 days**. The frequency of continuance, defined as the number of continuances granted (329) over the total number of cases first scheduled (2046), expressed as a percent, was **16%**. The ratio of first settings (2088) to continued settings on the calendar (283) was **1 to 0.135**

Dispositions:

Hearings conducted: **47%**; vacated prior to hearing: **50%**; hearings withdrawn by the agency: **3%**.

Contrary Recommendations and Agency Response: 15% of Administrative Law Judge Decisions were contrary to the original agency action where the agency took a position. Agency acceptance of contrary Administrative Law Judge Decisions was **68.9%**.

* 4.77% of Administrative Law Judge Decisions were certified as final by the OAH due to agency inaction or were rendered moot by settlement.
** Cases which were vacated or which settled on the day of hearing are not included.

“Interview”

(continued from page 1)

medium in which we reach consensus if it is possible. I have transmitted decisions that I disagreed with. The ability of the agencies to reject or modify a decision is a better way of dealing with inconsistencies than establishing OAH-wide positions that are not based on true consensus.

Why do parties not have peremptory strikes like in Superior Court?

I know that peremptory strikes in Superior Court can have real tactical value to litigants. For instance, a judge with a reputation for lenient sentencing could be preferable to a

defendant than one with a reputation for harsh sentencing. However, since agencies can reject or modify the decision of the Administrative Law Judge, the tactical value of a peremptory strike is greatly reduced and is now attempted only as a motion to continue by other means.

What do you do when you receive a complaint about a judge?

I will not act until all other parties have had an opportunity to likewise comment. I limit my review to the audio record of the hearing and will not revisit procedural rulings or substitute my judgment for that of the judge. If parties disagree with a judge's decision, the party may request a rehearing or appeal to Superior Court. My focus is on any complaint that parties were not treated with respect or given a full, fair opportunity to present their evidence. I have found that complaints can be invaluable teaching tools.

How do you handle motions for change of judge?

Such motions require a showing of bias, prejudice, personal interest or lack of necessary expertise. Often the motion will amount to a disagreement with how the judge viewed the evidence, or sometimes be predicated on the failure of the judge to grant a procedural motion. I will not allow a motion for a change of judge to be used as a motion to reconsider a judge's rulings and I will not substitute my judgment for that of the judge. This goes back to protecting the judges' independence.

Who assigns the Administrative Law Judges?

I make the assignments, either personally, or as delegated to the case management team. Judges are assigned according to cadres which I have created, matching judges to needs, interest, education and experience.

Why is OAH so hard on continuances?

More than 60% of motions to continue are granted, which I am sure is not the impression of many parties. It is true that parties must establish good cause, and

mere agreement of the parties to continue will be met largely with a denial of a continuance. Ours is a scarce resource. With more than 8,500 cases filed before 18 administrative law judges, each case set within 60 days of the agency's request, or an appeal by a party, and each requiring a minimum of 30 days notice, we cannot afford to have wasted hearing time. It isn't fair to other parties who must wait for their first hearing date to have continued settings erode the available time. When the Legislature created the OAH, they intended to implement a "fast-track" system. The OAH strives to maintain the spirit and intent of our enabling statutes.

Do you warn agencies when the time to accept, reject or modify is looming?

The OAH views its decisions as the final decision unless the agency accepts, rejects or modifies. From that point of view, there is nothing to "warn" the agency about.

Does the OAH take positions on pending legislation?

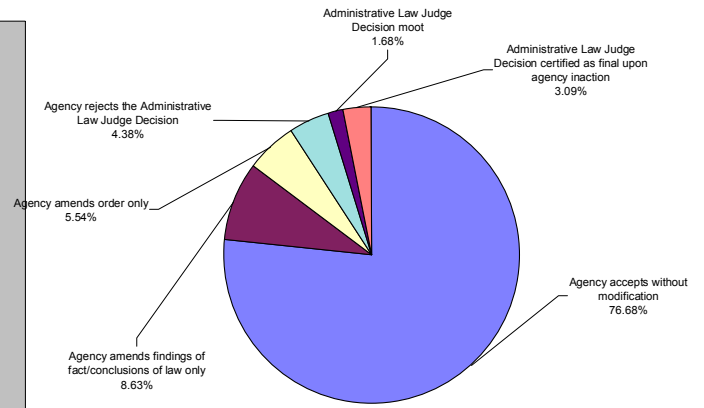
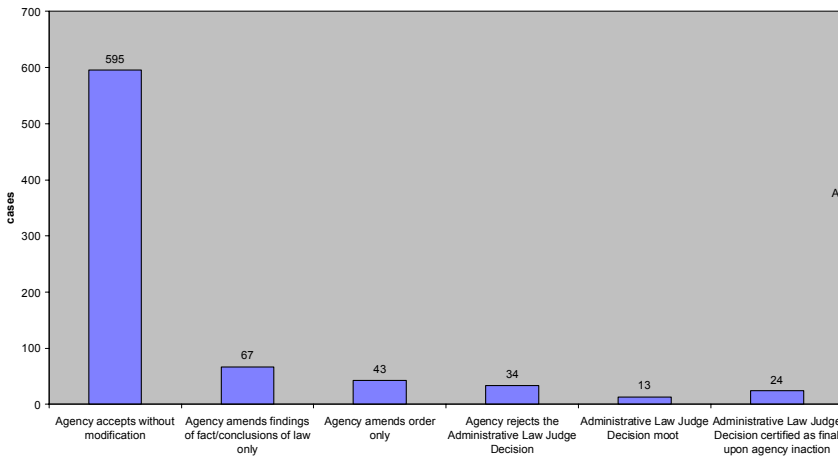
The OAH does not speak in favor of, or in opposition to, legislation. The OAH will comment as to whether a proposal is consistent with our mission as currently defined, and whether there are unintended consequences to a proposal. We will recommend language that we think will better effectuate the intent of a proposal.

What do you look for in an Administrative Law Judge?

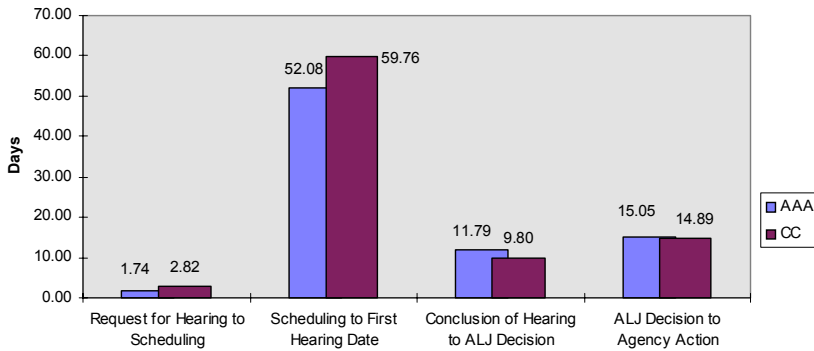
Any candidate must be hardworking and have significant recent trial or hearing experience. I look for someone who is both intelligent and compassionate. I have used the image of two matched horses pulling a cart. If one is too strong, the cart will topple or be unstable. We have to get the facts right, be able to write concise decisions that justify our decisions. However, we must also do so in a way that assures parties they have been fully heard. Someone is going to lose. That is the nature of adjudication. People can accept a negative outcome if they have been given a fair shot before someone that they have confidence in.

“Interview”

(continued on page 4)



Average Time Between Selected Events - Appealable Agency Actions v. Contested Cases*, July 1 - September 30, 2005



*Note: *Appealable Agency Actions* are agency actions taken before an opportunity for a hearing. A typical example would be the denial of a license. A party is entitled to a hearing before the OAH before the action becomes final. *Contested Cases* involve actions yet to be determined by an agency. An example would be proposed discipline on a professional license with the possibility of suspension or revocation. Parties are entitled to a hearing before the OAH prior to the agency acting.

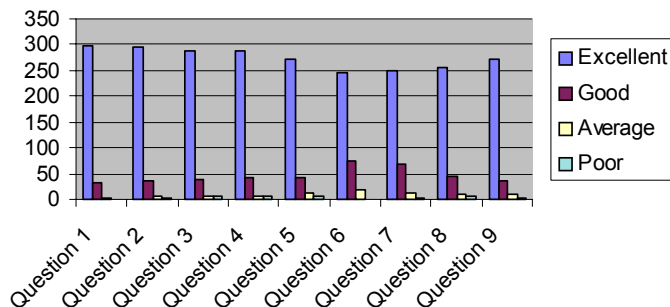
1936 Cases Filed July 1, 2005- September 30, 2005

	1st Q	FY 2006		1st Q	FY 2006		1st Q	FY 2006
Accountancy	3	3	Economic Security	0	0	Peace Ofc. Standards	9	9
Acupuncture Board	0	0	Economic Security-CPS	45	45	Pharmacy Board	3	3
Administration	1	1	Education (Board)	0	0	Physical Therapy	0	0
Admin. Parking	32	32	Education (Department)	7	7	Podiatry	0	0
Agriculture	0	0	Environ. Quality	17	17	Psychologist Examiners	0	0
Ag. Empl. Rel. Bd.	0	0	Fingerprinting	0	0	Public Safety - CW	0	0
AHCCCS	897	897	Funeral	0	0	Public Safety - Trans	3	3
Alternative Fuel	0	0	Gaming	3	3	Public Safety - Adult CC	0	0
Appraisal	7	7	Health Services	114	114	Pvt. Post. Ed.	0	0
Arizona Trial Courts	0	0	Insurance	21	21	Racing	2	2
Arizona RetirementSys.	12	12	Land	5	5	Radiation Regulatory	0	0
Attorney General	0	0	Liquor	12	12	Registrar of Contractors	454	454
Arizona Works	0	0	Lottery	1	1	Real Estate	128	128
Athletic Board	0	0	Maricopa Cty. Housing	0	0	Revenue	16	16
Banking	12	12	Massage Therapy	0	0	School - Deaf & Blind	0	0
Behavioral Health Ex.	0	0	Medical Board	7	7	Secretary of State	3	3
Fire/Building/Life Safety	13	13	Medical Radiologic	5	5	State Board of Education	0	0
Charter Schools	0	0	Naturopathic	0	0	Structural Pest Control	0	0
Chiropractic	0	0	Nursing	32	32	Technical Registration	0	0
Clean Elections	3	3	Nursing Care Admin.	0	0	Veterans Home	0	0
Community Colleges	0	0	Occupation Therapy	0	0	Veterinary Board	0	0
Cosmetology	1	1	Optometry	0	0	Water Qual. App. Bd.	0	0
Criminal Justice	2	2	Osteopathic	0	0	Water Resources	2	2
Dental	7	7	Parks	0	0	Weights and Measures	47	47

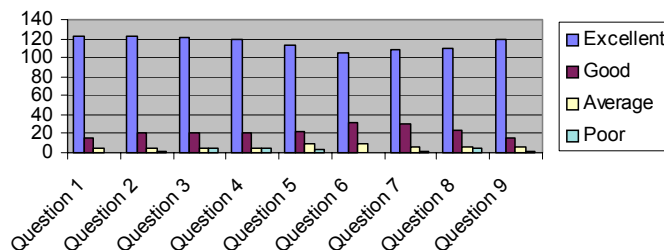
Evaluations of OAH Services

Note: The four major groups of those who responded are: represented private party; unrepresented private party; counsel for a private party; and counsel for the agency. The evaluations are filled out immediately after the hearing, and the evaluations are not disclosed to the ALJ involved. They are used by management to improve the OAH process and do not affect the decisions issued.

All Responses 1st Quarter



Unrepresented Responses 1st Quarter



Questions:

1. Attentiveness of ALJ
2. Effectiveness in explaining the hearing process
3. ALJ's use of clear and neutral language
4. Impartiality
5. Effectiveness in dealing with the issues of the case
6. Sufficient space
7. Freedom from distractions
8. Questions responded to promptly and completely
9. Treated courteously

Why does the OAH seem so statistically driven?

The Legislature has mandated certain timetables and requires the OAH to report statistical measures. In addition, the Legislature has identified specific performance measures. Statistical measures are essential to identifying problems early. My constant monitoring of the OAH process is akin to the monitoring I did at the smelter and acid plant. Many times I prevented real damage by being alert. I recall that occasionally the bolts that held the large ore chains together would come loose causing days of delay. I decided to make a point of taking a flashlight and watching the chains for a full cycle at least four times a shift. The one time that I spied a loose bolt made it all worthwhile. Likewise at the OAH, the sooner I can determine that cases are taking longer to schedule or that the flow in hearing and writing is being compromised, the sooner I can take steps to rectify the situation.

What new technical advances does the OAH have planned?

The OAH has moved to digital recording of hearings with the non-confidential records being available on-line the next day. We now conduct hearings by videoconference to seven remote locations throughout the State. In both cases, we have made our process more accessible to everyone. We plan to have a brief introduction to the OAH process played in each hearing room before every hearing by the end of the year. This is an extension of our efforts to educate the parties, particularly the unrepresented, so that they can feel they have done a good job in presenting their case. I think of my mother and that young man when I consider this and hope that we are doing every-

thing we can to make our hearing process as accessible and non-threatening as possible.

Where do you see the OAH in 2015?

Well, I am working on gene splicing and teletransporting... Seriously, I see us as working hard to continue to provide full, fair, impartial, independent and prompt hearings. I see us contributing to Arizona's quality of life.

How have you changed?

I have become more peaceful. I have come to appreciate opposition as a gift.

What do you like most about the OAH?

The OAH is a human institution and is all about people and their relationships. I really enjoy listening to the collegial banter among the Administrative Law Judges. I am always impressed by the wealth of experience and commitment they bring to their task. The support staff is creative and works very hard to maintain both the atmosphere of total customer service while still managing to maintain a highly efficient workflow. I like most what obviously everyone at the OAH likes the most: we are all proud to be part of an important mission and enjoy public service.

The OAH



Janet Napolitano
Governor

Cliff J. Vanell
Director

Vol. 38
February 2006
www.azoah.com

Official Newsletter of the Arizona Office of Administrative Hearings

Researching Decisions on the OAH Website

Cliff J. Vanell, Director

Arizona Office of Administrative Hearings
Decision Search

Matter ID:

If a Matter ID is entered, all other search fields will be ignored!

Judge:

Agency:

Date range:

Matter description:

Full-text search:

For an example, see page 2

The Office of Administrative Hearings (OAH) began operations on January 1, 1996. Administrative Hearings previously provided by regulatory agencies (except those specifically exempted) are now transferred to the OAH for independent proceedings. Our statutory mandate is to "ensure that the public receives fair and independent administrative hearings."

The process of unifying the administrative hearings function in OAH-style agencies began in 1945 with California. The current American states and cities, and Canadian

provinces, having adopted the model, with year of inception are: Alabama (1998); Alaska (2004); Arizona (1996); California (1961); City of Chicago (1997); Colorado (1976); Florida (1974); Georgia (1995); Iowa (1986); Kansas (1998); Louisiana (1996); Maine (1992); Maryland (1990); Massachusetts (1974); Michigan (1996); Minnesota (1976); Missouri (1965); New Jersey (1979); New York City (1979); North Carolina (1986); North Dakota (1991); Oregon (1999); South Carolina (1994); South Dakota (1994); Tennessee (1975); Texas (1991); Washington D.C. (1999); Washington (1981); Wisconsin (1978); Wyoming (1987); and Province of Quebec ().

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2nd Quarter Statistics At A Glance

Acceptance Rate:

ALJ findings of fact and conclusions of law were accepted in **90.66%** of all Administrative Law Judge Decisions acted upon by the agencies.* ALJ Decisions, including orders, were accepted without modification in **83.65%** of all Administrative Law Judge Decisions acted upon by the agencies. **50%** of all agency modification was of the order only (i.e. penalty assessed).

Appeals to Superior Court:

There were 23 appeals filed in Superior Court.

Rehearings:

The rehearing rate was **.84%**, defined as rehearings scheduled (6) over hearings concluded (710).**

Completion Rate:

The completion rate was **110.9%**, defined as cases completed (1785) over new cases filed (1610).

Continuance:

The average length of a first time continuance based on a sample of cases (first hearing setting and first continuance both occurred in the 2nd quarter) was **52.9 days**. The frequency of continuance, defined as the number of continuances granted (292) over the total number of cases first scheduled (1607), expressed as a percent, was **18.2%**. The ratio of first settings (1909) to continued settings on the calendar (364) was **1 to 0.33**

Dispositions:

Hearings conducted: **52.5%**; vacated prior to hearing: **45.4%**; hearings withdrawn by the agency: **2.1%**.

Contrary Recommendations and Agency Response:

15.6% of Administrative Law Judge Decisions were contrary to the original agency action where the agency took a position. Agency acceptance of contrary Administrative Law Judge Decisions was **84.44%**.

* 3.96% of Administrative Law Judge Decisions were certified as final by the OAH due to agency inaction or were rendered moot by settlement.

** Cases which were vacated or which settled on the day of hearing are not included.

Step 2. Select the Administrative Law Judge:

Matter ID:

If a Matter ID is entered, all other search fields will be ignored!

Judge:

Agency:

Date:

Matter description:

Full-text search:

Step 3. Select the Registrar of Contractors:

Matter ID:

If a Matter ID is entered, all other search fields will be ignored!

Judge:

Agency:

Full-text search:

(continued from page 1)

Example:

Finding decisions written by Administrative Law Judge Michael L. Barth in Registrar of Contractors hearings dealing with broken tiles:

Step 1. Go to www.azoah.com and scroll down to "Search Administrative Law Judge Decisions"



Step 4. Select the search method and term:

Date range:

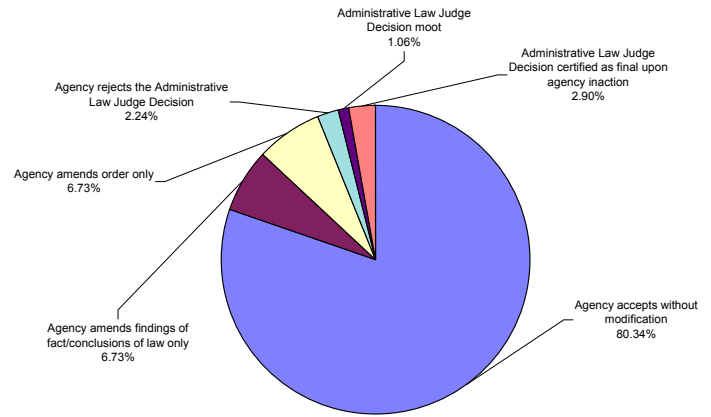
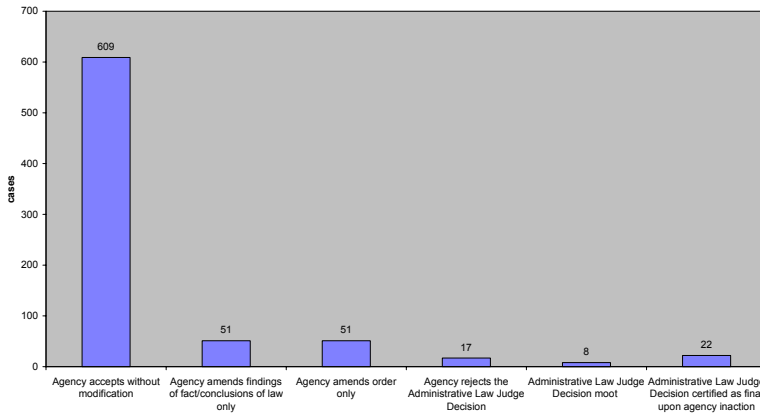
Matter description:

Full-text search:

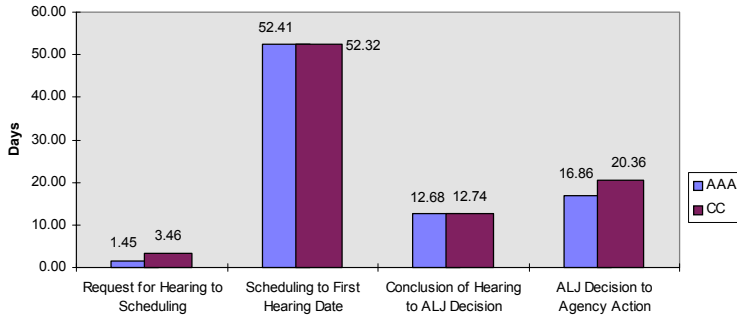
Free Text
Free Text
Boolean

"Full Text Searching"
(continued on page 4)

Agency Response to Administrative Law Judge Decisions October 1, 2005 - December 31, 2005



Average Time Between Selected Events - Appealable Agency Actions v. Contested Cases*, October 1 - December 31, 2005



*Note: *Appealable Agency Actions* are agency actions taken before an opportunity for a hearing. A typical example would be the denial of a license. A party is entitled to a hearing before the OAH before the action becomes final. *Contested Cases* involve actions yet to be determined by an agency. An example would be proposed discipline on a professional license with the possibility of suspension or revocation. Parties are entitled to a hearing before the OAH prior to the agency acting.

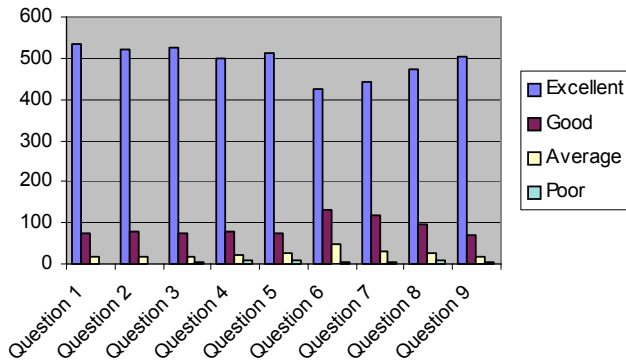
1610 Cases Filed October 1, 2005 - December 31, 2005

	2ndQ	FY 2006		2nd Q	FY 2006		2ndQ	FY 2006
Accountancy	5	8	Economic Security	0	0	Peace Ofc. Standards	5	14
Acupuncture Board	0	0	Economic Security-CPS	31	76	Pharmacy Board	0	3
Administration	3	4	Education (Board)	0	0	Physical Therapy	0	0
Admin. Parking	28	60	Education (Department)	16	23	Podiatry	0	0
Agriculture	0	0	Environ. Quality	10	27	Psychologist Examiners	1	1
Ag. Empl. Rel. Bd.	0	0	Fingerprinting	30	30	Public Safety - CW	5	5
AHCCCS	705	1603	Funeral	0	0	Public Safety - Trans	5	8
Alternative Fuel	0	0	Gaming	2	5	Public Safety - Adult CC	0	0
Appraisal	7	14	Health Services	81	195	Pvt. Post. Ed.	0	0
Arizona Trial Courts	0	0	Insurance	20	41	Racing	3	5
Arizona Retirement Sys.	7	19	Land	5	10	Radiation Regulatory	0	0
Attorney General	0	0	Liquor	12	24	Registrar of Contractors	416	867
Arizona Works	0	0	Lottery	1	2	Real Estate	41	169
Athletic Board	0	0	Maricopa Cty. Housing	0	0	Revenue	7	23
Banking	8	20	Massage Therapy	2	2	School - Deaf & Blind	0	0
Behavioral Health Ex.	1	1	Medical Board	3	10	Secretary of State	7	10
Building and Fire Safety	30	53	Medical Radiologic	1	6	State Board of Education	0	0
Charter Schools	1	1	Naturopathic	0	0	Structural Pest Control	4	4
Chiropractic	0	0	Nursing	35	67	Technical Registration	0	0
Clean Elections	1	4	Nursing Care Admin.	1	1	Veterans Home	0	0
Community Colleges	0	0	Occupation Therapy	1	1	Veterinary Board	0	0
Cosmetology	0	1	Optometry	0	0	Water Qual. App. Bd.	0	0
Criminal Justice	0	2	Osteopathic	1	1	Water Resources	0	2
Dental	22	29	Parks	0	0	Weights and Measures	46	93

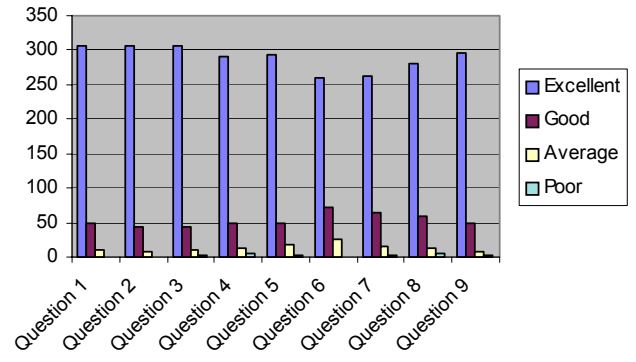
Evaluations of OAH Services

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All Responses 2nd Quarter



Unrepresented Responses 2nd Quarter



Questions:

1. Attentiveness of ALJ
2. Effectiveness in explaining the hearing process
3. ALJ's use of clear and neutral language
4. Impartiality

5. Effectiveness in dealing with the issues of the case
6. Sufficient space
7. Freedom from distractions
8. Questions responded to promptly and completely
9. Treated courteously

Step 5. View the results and select a case from the list:

Arizona Office of Administrative Hearings
Decision Search

Date	Matter ID	Judge	Agency	Matter
9/29/2005	05F-2054-ROC	MLB	Registrar of Contractors	Featherstone, Maureen -v- S C B Saguro Custom Builders, Inc. (Corp.)
9/12/2005	05F-30744-ROC	MLB	Registrar of Contractors	Sankin, Lynn & Atkinson, Candace -v- Customer Service Professionals Inc.(ROOD)
8/29/2005	05F-1448-ROC	MLB	Registrar of Contractors	Scola, Robert and John -v- T R G Construction Co., L.L.C. (LLC)
8/25/2005	05F-10390-ROC	MLB	Registrar of Contractors	Rusher, Greg -v- La Mirage Pools and Spas Master Builders LLC
8/16/2005	05F-M1609-ROC	MLB	Registrar of Contractors	Lalich, Joseph -v- Courtland Homes, Inc. (Corp.)
6/27/2005	05F-1294-ROC	MLB	Registrar of Contractors	Pisciotta, Vito -v- Lyons Roofing Incorporated
5/9/2005	05F-M1158-W-ROC	MLB	Registrar of Contractors	Bronzo, Steven J. and Phyllis G. -v- Gilbert Pool Service LLC
3/31/2005	04F-EF0614-ROC	MLB	Registrar of Contractors	Lindemulder, Al and Lindemulder, Nancy -v- Kesh Black Roofing, Inc.
3/22/2005	05F-0476-ROC	MLB	Registrar of Contractors	M-Wing, Rhonda
2/9/2005	05F-0332-ROC	MLB	Registrar of Contractors	Bass Electric, Inc. -v- Sun Eagle Corporation (Corp.)

Matter ID:
If a Matter ID is entered, all other search fields will be ignored!

Step 6. Open the decision: (note the agency action will appear first)

Final agency action regarding decision below:

AACCEP Agency accepts decision Order of Dismissal the ROC adopts the ALJ recommended order. Order shall become effective on the 20 day of April, 2005. /jr/3/14/05: Duplicate copy of above/jr

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

BASS ELECTRIC, INC., Complainant, -v- License No. 070147, Class B-01 SUN EAGLE CORPORATION (CORP), Respondent.	No. 05F-G0332-ROC ADMINISTRATIVE LAW JUDGE DECISION
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For more information about searching OAH decisions, visit our website at www.azoah.com

The OAH



Janet Napolitano
Governor

Cliff J. Vanell
Director

Vol. 39
May 2006

www.azoah.com

Official Newsletter of the Arizona Office of Administrative Hearings

Putting Your Best Case Forward

Daniel G. Martin, Administrative Law Judge

In virtually every proceeding before the Office of Administrative Hearings, one of the parties will have the burden of proof. Generally speaking, it is the party asserting a claim, right, or entitlement that has the burden of proof. See Arizona Administrative Code ("A.A.C.") R2-19-119(B)(1). In addition, the party asserting an affirmative defense to a claim (such as the application of a statute of limitations) has the burden to establish the elements of that defense. See A.A.C. R2-19-119(B)(2).

The standard of proof in almost all administrative proceedings is preponderance of the evidence. See A.A.C. R2-19-119(A). A "preponderance of the evidence" is "evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." BLACK'S LAW DICTIONARY (6th ed. 1990). In order to prevail, the party with the burden

of proof must not only present sufficient evidence to convince the Administrative Law Judge that the party's position is correct (also known as the burden of producing evidence or the burden of going forward); the party's evidence also must be sufficient to convince the Administrative Law Judge that the party is entitled to the relief that he or she is seeking (this is known as the burden of persuasion).

Given the importance of the burden of proof, one of the first issues that a party to an administrative proceeding must address is the type of evidence that he or she will present in order to establish his or her claim (or defense). The most common types of evidence are witness testimony and documentary evidence; however, there are many other forms of evidence, such as physical objects, photographs, audio and video recordings, and summary evidence (such as graphs and charts). In every proceeding, it is crucial to select the evidence that will best convey the facts of the case to the Administrative Law Judge assigned to hear the case.

"Best Case"

(continued on page 2)

Director's note: OAH is committed to fairness and making hearings accessible to all. This article is part of a series of informational articles to educate the public and parties who appear before us about the hearing process and how to better present their cases. The following article may be found at OAH's website at www.azoah.com along with all previous articles published in the OAH Newsletter.

The Office of Administrative Hearings (OAH) began operations on January 1, 1996. Administrative hearings previously provided by regulatory agencies (except those specifically exempted) are now transferred to the OAH for independent proceedings. Our statutory mandate is to "ensure that the public receives fair and independent administrative hearings."

The process of unifying the administrative hearings function in OAH-style agencies began in 1945 with California. The current American states and cities, and Canadian

provinces, having adopted the model, with year of inception are: Alabama (1998); Alaska (2004); Arizona (1996); California (1961); City of Chicago (1997); Colorado (1976); Florida (1974); Georgia (1995); Iowa (1986); Kansas (1998); Louisiana (1996); Maine (1992); Maryland (1990); Massachusetts (1974); Michigan (1996); Minnesota (1976); Missouri (1965); New Jersey (1979); New York City (1979); North Carolina (1986); North Dakota (1991); Oregon (1999); South Carolina (1994); South Dakota (1994); Tennessee (1975); Texas (1991); Washington D.C. (1999); Washington (1981); Wisconsin (1978); Wyoming (1987); and Province of Quebec ().

Mission Statement:

We will contribute to the quality of life in the State of Arizona by fairly and impartially hearing the contested matters of our fellow citizens arising out of state regulation.

3rd Quarter Statistics At A Glance

Acceptance Rate:

ALJ findings of fact and conclusions of law were accepted in **91.25%** of all Administrative Law Judge Decisions acted upon by the agencies.* Administrative Law Judge Decisions, including orders, were accepted without modification in **85.26%** of all Administrative Law Judge Decisions acted upon by the agencies. **50%** of all agency modification was of the order only (i.e. penalty assessed).

Appeals to Superior Court:

There were 32 appeals filed in Superior Court.

Rehearings:

The rehearing rate was **1.87%**, defined as rehearings scheduled (14) over hearings concluded (747).**

Completion Rate:

The completion rate was **99.95%**, defined as cases completed (1999) over new cases filed (2000).

Continuance:

The average length of a first time continuance based on a sample of cases (first hearing setting and first continuance both occurred in the 3rd quarter) was **45.98 days**. The frequency of continuance, defined as the number of continuances granted (187) over the total number of cases first scheduled (1914), expressed as a percent, was **9.77%**. The ratio of first settings (1828) to continued settings on the calendar (240) was **1 to 0.13**

Dispositions:

Hearings conducted: **46.2%**; hearings vacated prior to hearing: **51%**; hearings withdrawn by the agency: **2.8%**.

Contrary Recommendations and Agency Response:

20.35% of Administrative Law Judge Decisions were contrary to the original agency action where the agency took a position. Agency acceptance of contrary Administrative Law Judge Decisions was **89.47%**.

* 2.83% of Administrative Law Judge Decisions were certified as final by the OAH due to agency inaction or were rendered moot by settlement.

** Cases which were vacated or which settled on the day of hearing are not included.

When considering the type of evidence to present at hearing, a party must ask two basic questions. The first question is whether the evidence is relevant; that is, does it relate to one or more of the issues presented for hearing. The second question is whether the evidence is probative; that is, does it tend to prove a fact that is at issue in the case. If the answer to both of these questions is yes, then the evidence will most likely be admitted at hearing. However, the determination that the evidence is admissible does not end the inquiry; of perhaps equal importance is the question of how much weight the Administrative Law Judge will assign to that evidence.

To illustrate this point, let us consider three scenarios arising out of the following hypothetical licensing case: John Smith applies for a real estate salesperson's license, but his application is denied after the Department of Real Estate discovers that he has several criminal convictions.

Mr. Smith appeals the Department's decision, and his case is referred for hearing to the Office of Administrative Hearings. Mr. Smith has the burden of proof, and wants to present several witnesses to testify to his honesty and good moral character.

In the first scenario, Mr. Smith's witnesses do not testify directly. Instead, each of them writes a letter of reference attesting to Mr. Smith's honesty and good character. The Administrative Law Judge determines that the letters are both relevant and probative, and admits them into evidence. Although Mr.

Smith has at this point presented evidence of his good character, that evidence is unlikely to be given much weight by the Administrative Law Judge because Mr. Smith's witnesses were not subject to examination regarding the basis for their opinions, and the Administrative Law Judge was unable to observe the witnesses and make a determination as to their credibility. In short, Mr. Smith may have met his burden of producing evidence, but not his burden of persuasion.

In the second scenario, Mr. Smith's witnesses appear telephonically and testify directly to his honesty and good character. In this scenario, the quality of evidence is better than the previous scenario because, although the witnesses cannot be directly observed (thus making it more difficult for the Administrative Law Judge to assess their credibility), they are subject to examination regarding the basis for their opinions.

In the third scenario, Mr. Smith's witnesses appear in person and testify directly to his honesty and good character. In this scenario, the quality of evidence is better than each of the previous scenarios because the witnesses are subject to examination and can be directly observed by the Administrative Law Judge.

If the issue of Mr. Smith's honesty and good character turned out to be the deciding issue in his case, one can see that the quality of his evidence on that issue would be critical. Under the facts of the first scenario, Mr. Smith might very well not be successful in his appeal because the evidence regarding his

"Best Case"

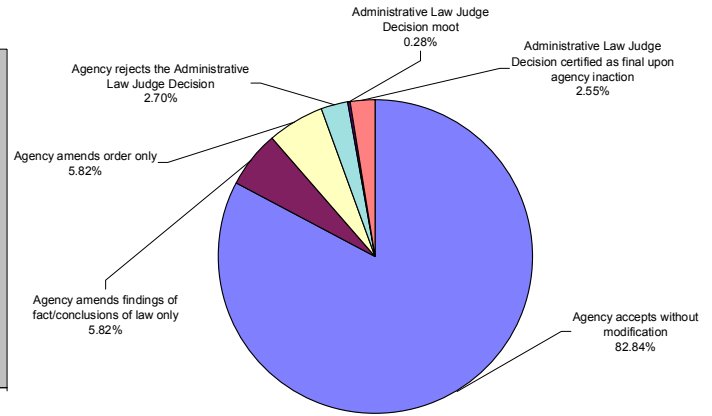
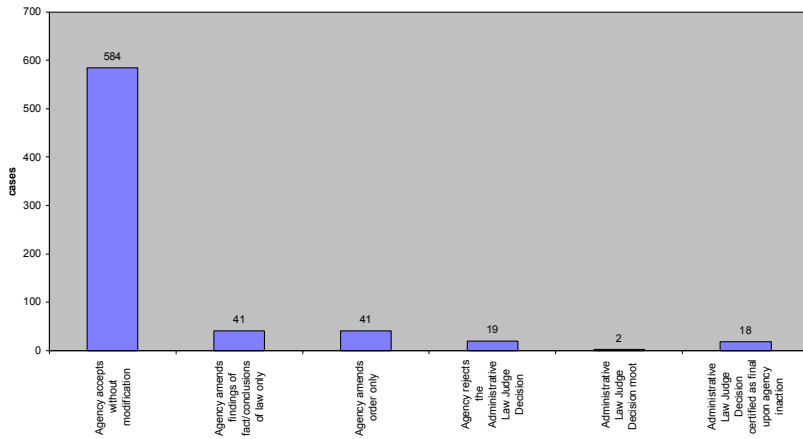
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"Best Case"

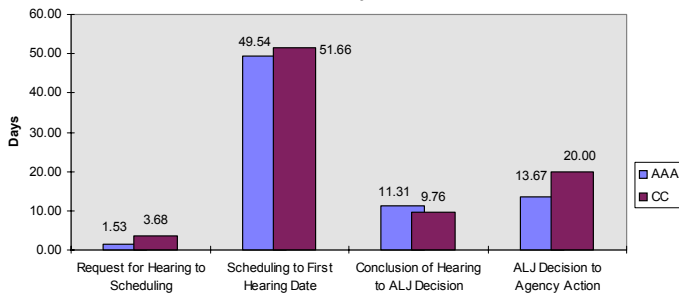
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Previous articles in this newsletter, all of which can be found on the Office of Administrative Hearings website, www.azoah.com, as well as the video, "Preparing for Hearing", which also can be found on the website, explain in detail the manner in which a party should present his or her case. The purpose of this article is to focus on the type and quality of the evidence presented, and explain how the selection of that evidence can, in many instances, have a direct impact on the outcome of a case.

Agency Response to Administrative Law Judge Decisions January 1, 2006 - March 31, 2006



Average Time Between Selected Events - Appealable Agency Actions v. Contested Cases*, January 1 - March 31, 2006



*Note: *Appealable Agency Actions* are agency actions taken before an opportunity for a hearing. A typical example would be the denial of a license. A party is entitled to a hearing before the OAH before the action becomes final. *Contested Cases* involve actions yet to be determined by an agency. An example would be proposed discipline on a professional license with the possibility of suspension or revocation. Parties are entitled to a hearing before the OAH prior to the agency acting.

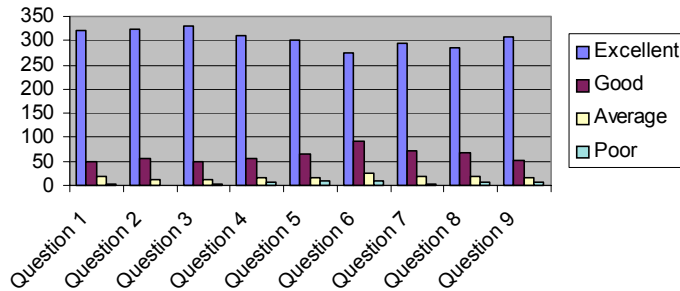
2000 Cases Filed January 1, 2006 - March 31, 2006

	3rdQ	FY 2006		3rd Q	FY 2006		3rdQ	FY 2006
Accountancy	4	12	Economic Security-CPS	31	107	Pharmacy Board	2	5
Acupuncture Board	1	1	Education (Board)	0	1	Physical Therapy	5	5
Administration	0	4	Special Education	7	29	Podiatry	0	0
Admin. Parking	37	97	Environ. Quality	16	43	Psychologist Examiners	0	1
Agriculture	0	0	Financial Institutions	25	45	Public Safety - CW	0	5
Ag. Empl. Rel. Bd.	0	0	Fingerprinting	70	100	Public Safety - Trans	3	11
AHCCCS	885	2498	Funeral	0	0	Public Safety - Adult CC	0	0
Alternative Fuel	0	0	Gaming	2	7	Pvt. Post. Ed.	0	0
Appraisal	10	24	Health Services	78	273	Racing	6	11
Arizona Trial Courts	0	0	Insurance	22	63	Radiation Regulatory	0	0
Arizona Retirement Sys.	7	26	Land	0	10	Registrar of Contractors	564	1433
Attorney General	0	0	Liquor	15	39	Real Estate	51	220
Arizona Works	0	0	Lottery	3	5	Revenue	10	33
Athletic Board	0	0	Maricopa Cty. Housing	0	0	School - Deaf & Blind	0	0
Behavioral Health Ex.	0	1	Massage Therapy	0	2	Secretary of State	11	21
Building and Fire Safety	15	68	Medical Board	7	17	State Board of Education	0	0
Charter Schools	0	1	Medical Radiologic	4	10	Structural Pest Control	5	9
Chiropractic	3	3	Naturopathic	0	0	Technical Registration	0	0
Clean Elections	1	5	Nursing	35	102	Veterans Home	0	0
Commerce	1	1	Nursing Care Admin.	1	2	Veterinary Board	0	0
Community Colleges	0	0	Occupation Therapy	0	1	Water Qual. App. Bd.	0	0
Cosmetology	0	1	Optometry	0	0	Water Resources	0	2
Criminal Justice	0	2	Osteopathic	0	1	Weights and Measures	54	147
Dental	4	33	Parks	0	0			
Economic Security	0	0	Peace Ofc. Standards	5	19			

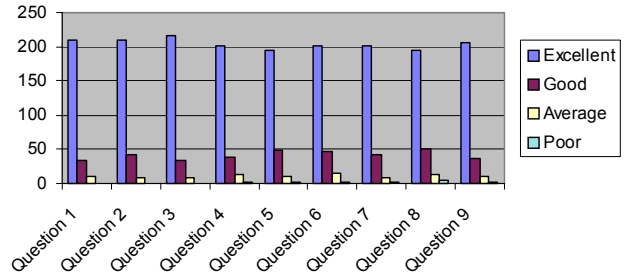
Evaluations of OAH Services

Note: The four major groups of those who responded are: represented private party; unrepresented private party; counsel for a private party; and counsel for the agency. The evaluations are filled out immediately after the hearing, and the evaluations are not disclosed to the ALJ involved. They are used by management to improve the OAH process and do not affect the decisions issued.

All Responses 3rd Quarter



Unrepresented Responses 3rd Quarter



Questions:

1. Attentiveness of ALJ
2. Effectiveness in explaining the hearing process
3. ALJ's use of clear and neutral language
4. Impartiality

5. Effectiveness in dealing with the issues of the case
6. Sufficient space
7. Freedom from distractions
8. Questions responded to promptly and completely
9. Treated courteously

character, while admissible, was not entitled to receive much weight. On the other hand, Mr. Smith might very well prevail under the facts of the third scenario, because he presented his evidence in such a way that it could be afforded significant weight.

The principal that is illustrated by the above hypothetical has application to many types of evidence. In the case of documentary evidence, for example, the general rule is to bring the original document if there is any chance that the authenticity of the document might be subject to challenge. The original does not necessarily need to be made an exhibit, but it can be shown to the Administrative Law Judge and the opposing party in the event of a dispute. In the case of official documents (such as court records or police reports), certified copies bearing the stamp of the issuing court or agency

are preferable to ordinary copies. In the case of photographs, originals are preferable to copies, and color copies are preferable to black and white copies.

Effective preparation is critical to success in administrative proceedings, and one of the key components to effective preparation is ensuring that the evidence a party presents at hearing is not only relevant and probative, but also persuasive. As can be seen from the above examples, the type of evidence a party chooses to present may often have a direct impact on the outcome of the case. Therefore, careful thought should be given in advance of the hearing to precisely determine what evidence the party intends to offer, and whether that evidence puts the party's best case forward.

The OAH



Janet Napolitano
Governor

Cliff J. Vanell
Director

Vol. 40
(Final)

August 2006

www.azoah.com

Official Newsletter of the Arizona Office of Administrative Hearings

The Administrative Law Judge

Cliff J. Vanell, Director

Who are they?

Prior to the creation of the Office of Administrative Hearings (OAH), administrative hearings were conducted at the state agencies, boards and commissions by hearing officers who were employees or contractors of the agencies whose actions were at issue. The relationship between the agency and the hearing officer understandably made it difficult for the public to assume the impartiality of the hearing officer. The OAH was created to address the inherent problem of perception involved in such in-house proceedings. Transferring hearings to an independent agency for adjudication by Administrative Law Judges (ALJs) with no relationship to the agencies has enhanced public confidence in the fairness of the process.

In creating the OAH, the Arizona Legislature envisioned highly trained ALJs to provide full, fair, independent, and prompt hearings and decisions.¹ To ensure that goal,

the Legislature mandated that the OAH Director make appropriate appointments of judges to preside over cases, provide training, solicit comment from parties, and set up and maintain a system to evaluate the ALJs. In addition, the Legislature provided a method by which a party may have an ALJ removed from a case by filing a motion with the Director when there is evidence of bias, prejudice, personal interest or lack of necessary expertise.

Where do they come from?

In light of these mandates, great weight is placed in assessing candidates for the position on commitment to the OAH mission of fairly and impartially deciding cases. Each candidate is assessed for his or her spirit of collegiality, ability to master a variety of specialties among a wide range of subjects, creativity, openness to peer review, and willingness to undertake continuing education to enhance his or her legal reasoning and writing skills.

The ALJs come from a variety of backgrounds. Brief statements of the ALJs' professional backgrounds are available on the OAH website (<http://www.azoah.com/ALJ.htm>). Regardless of background and experience, certain skills and values have been identified which are at the core of who the ALJ becomes. The very fact that hearings are called "hearings" establishes the pivotal nature of listening. The very act of listening involves the

"The ALJ"

(continued on page 2)

Final Edition

This marks the 40th and final edition of the OAH Newsletter. For over 10 years, the Newsletter has been a format for publishing statistics and informative articles. The website www.azoah.com is now both the repository of past editions of the Newsletter and the location for future reporting. Subscribers will now receive an e-mail link to the appropriate website pages.

The Office of Administrative Hearings (OAH) began operations on January 1, 1996. Administrative hearings previously provided by regulatory agencies (except those specifically exempted) are now transferred to the OAH for independent proceedings. Our statutory mandate is to "ensure that the public receives fair and independent administrative hearings."

The process of unifying the administrative hearings function in OAH-style agencies began in 1945 with California. The current American states and cities, and Canadian

provinces, having adopted the model, with year of inception are: Alabama (1998); Alaska (2004); Arizona (1996); California (1961); City of Chicago (1997); Colorado (1976); Florida (1974); Georgia (1995); Iowa (1986); Kansas (1998); Louisiana (1996); Maine (1992); Maryland (1990); Massachusetts (1974); Michigan (1996); Minnesota (1976); Missouri (1965); New Jersey (1979); New York City (1979); North Carolina (1986); North Dakota (1991); Oregon (1999); South Carolina (1994); South Dakota (1994); Tennessee (1975); Texas (1991); Washington D.C. (1999); Washington (1981); Wisconsin (1978); Wyoming (1987); and Province of Quebec ().

Mission Statement:

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4th Quarter Statistics At A Glance

Acceptance Rate:

ALJ findings of fact and conclusions of law were accepted in **89.13%** of all Administrative Law Judge Decisions acted upon by the agencies.* Administrative Law Judge Decisions, including orders, were accepted without modification in **80.88%** of all Administrative Law Judge Decisions acted upon by the agencies. **50.4%** of all agency modification was of the order only (i.e. penalty assessed).

Appeals to Superior Court:

There were 26 appeals filed in Superior Court.

Rehearings:

The rehearing rate was **1.47%**, defined as rehearings scheduled (9) over hearings concluded (611).**

Completion Rate:

The completion rate was **98.07%**, defined as cases completed (1780) over new cases filed (1815).

Continuance:

The average length of a first time continuance based on a sample of cases (first hearing setting and first continuance both occurred in the 4th quarter) was **49.87 days**. The frequency of continuance, defined as the number of continuances granted (218) over the total number of cases first scheduled (1808), expressed as a percent, was **12.06%**. The ratio of first settings (1760) to continued settings on the calendar (212) was **1 to 0.12**

Dispositions:

Hearings conducted: **48%**; hearings vacated prior to hearing: **48.8%**; hearings withdrawn by the agency: **3.2%**.

Contrary Recommendations and Agency Response:

14.1% of Administrative Law Judge Decisions were contrary to the original agency action where the agency took a position. Agency acceptance of contrary Administrative Law Judge Decisions was **86.8%**.

* 3.07% of Administrative Law Judge Decisions were certified as final by the OAH due to agency inaction or were rendered moot by settlement.

** Cases which were vacated or which settled on the day of hearing are not included.

conscious of the forces that can distract them, be they unguarded presuppositions, routine, professional pride, annoyance with an unruly witness or party, or personal problems. Lastly, dispassion is not to be mistaken for impartiality. The ideal ALJ is one who is impartial, not because dispassionate or uninterested, but because he or she is equally passionate for and interested in the needs of both parties.

What do they want?

The ALJs want to decide cases fully and fairly. Full participation by parties is essential to that task. Parties must develop the evidentiary record. No expertise of the ALJ can substitute for relevant testimony or evidence. Therefore, the ALJs have acted affirmatively to assist all parties in preparing and presenting their cases. First, the OAH rules were designed by the ALJs to simplify the administrative process. In addition, the ALJs have written dozens of articles, available online (<http://www.azoah.com/OAHArticles.htm>) to assist parties in preparing for hearing and presenting evidence. In addition, the ALJs have participated in training videos, also available online, which discuss and demonstrate opening state-

ments and closing arguments, and direct and cross examinations. ALJ decisions are searchable online (<http://www.azoah.com/DecisionSearch.htm>). Researching an ALJ's approach in similar cases is useful in knowing what an ALJ might need to best understand your case.

Maintaining Integrity and Quality.

The ALJ presides over cases coming before the OAH. Interim orders, the conduct of the hearing, and the resulting decision are within the ALJ's sound discretion. In light of the need to protect the ALJ's independence, OAH's primary quality control and management strategy has been to provide continuous feedback to the ALJs.

Such feedback has taken various forms. All parties are given an evaluation form at the beginning of each hearing and are given the opportunity to submit it for comment to the Director's attention. Such comments are compiled and generalized so as not to influence an ALJ's decision. Since November 1996, evaluations are handed out to four major groups of hearing participants: represented private party; unrepresented private party; counsel for a private party; and counsel for the agency. The results are not disclosed to the ALJs. To make sure that all participants are encouraged to respond, the bailiff provides a copy of the evaluation to parties before the beginning of the hearing. The essential function of the evaluations is to determine whether OAH has provided an accessible and respectful forum for the determination of the truth. Evaluation results indicate that satisfaction is high among all groups, as is illustrated in the quarterly statistics reported in the OAH Newsletters, available online (<http://www.azoah.com/NewslettersPDF.htm>). An analysis of the unrepresented parties for any sample quarter indicates that even among this most vulnerable group, the OAH is seen to be functioning extremely well.

The ALJs are monitored for compliance with the 20 day statutory mandate for issuing decisions. In addition, the annual evaluation of ALJs focuses on ensuring that the ALJs' written decisions and orders are clear and complete, displaying good knowledge of statutes and rules governing assigned hearings, and that cases are managed effectively, including holding prehearing conferences to expedite the proceedings when appropriate, and ruling on motions and issuing appropriate orders in a timely manner. ALJs necessarily receive feedback by way of complaints that are fielded as well as through motions for change of ALJ. Each ALJ is required to review final administrative decisions by the agencies which modify facts, conclusions of law, or which reject the ALJs' decisions to determine if errors were made and as a means for improving writing skills.

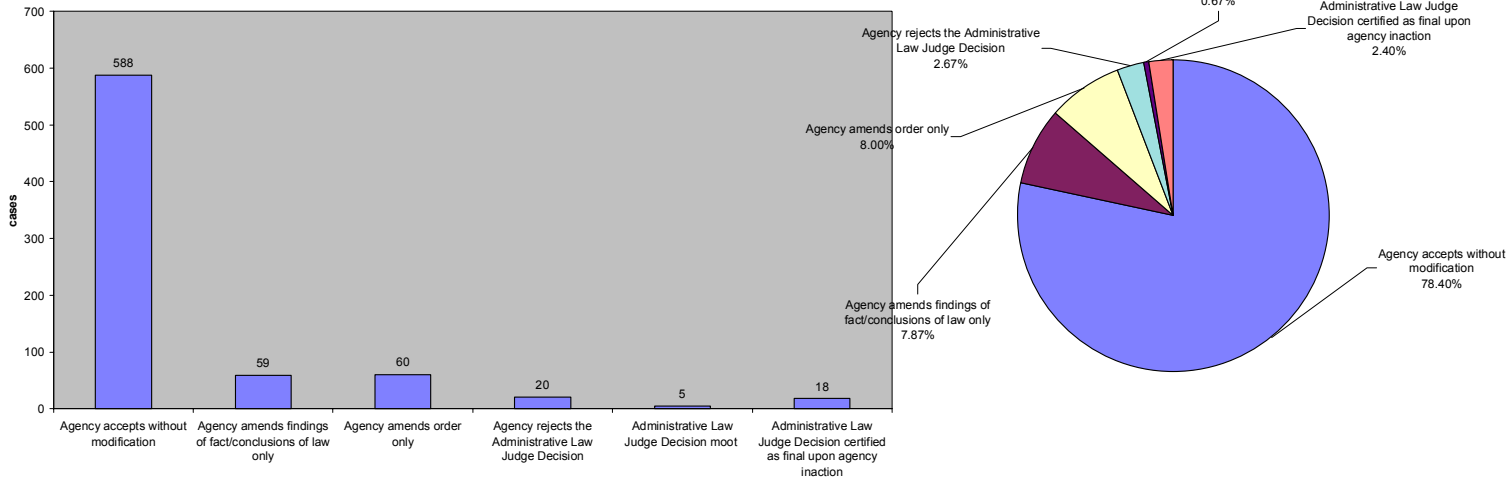
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"The ALJ"

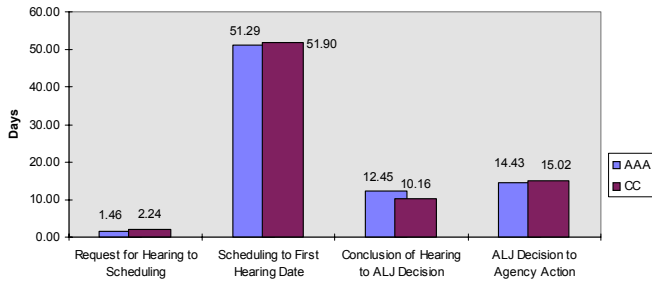
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need for patience. At hearing, the ALJ must be willing to give great latitude for personal style, choice of words, cadence and volume in speaking, and how the parties choose to approach their cases. The ALJ must be able to effectively explain the procedures that will be employed at hearing and be able to rule on objections in a way that helps parties know what was objectionable and how to proceed. Because every case is the most important for the parties, the ALJ must be willing to give each case the attention it deserves, without distraction and with as much understanding as the ALJ can muster. ALJs must therefore be

Agency Response to Administrative Law Judge Decisions April 1, 2006 - June 30, 2006



Average Time Between Selected Events - Appealable Agency Actions v. Contested Cases*, April 1 - June 30, 2006



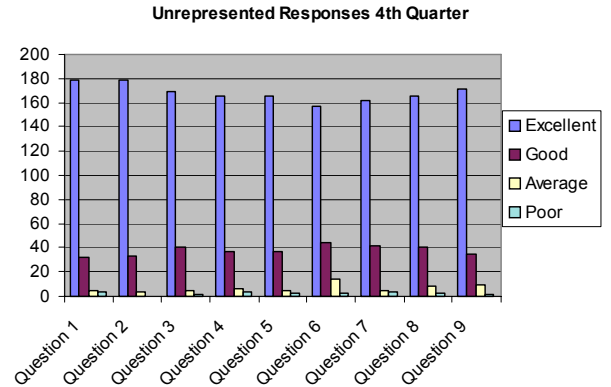
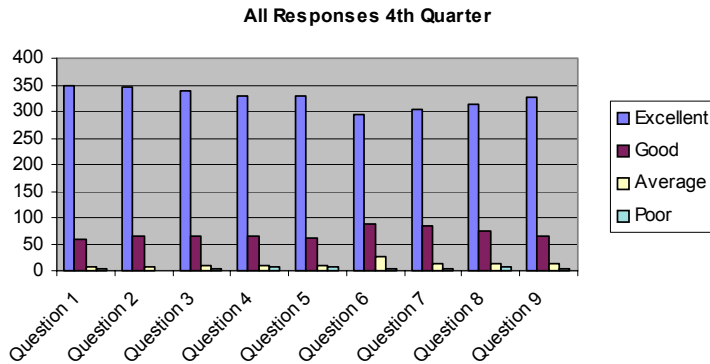
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1815 Cases Filed April 1, 2006 - June 30, 2006

	4thQ	FY 2006		4th Q	FY 2006		4thQ	FY 2006
Accountancy	6	18	Economic Security	0	0	Peace Ofc. Standards	1	20
Acupuncture Board	1	2	Economic Security-CPS	30	137	Pharmacy Board	0	5
Administration	1	5	Education (Board)	0	0	Physical Therapy	0	5
Admin. Parking	29	126	Special Education	16	46	Podiatry	0	0
Agriculture	0	0	Environ. Quality	27	70	Psychologist Examiners	0	1
Ag. Empl. Rel. Bd.	0	0	Financial Institutions	15	60	Public Safety - CW	1	6
AHCCCS	875	3364	Fingerprinting	0	100	Public Safety - Trans	4	15
Alternative Fuel	0	0	Funeral	0	0	Public Safety - Adult CC	0	0
Appraisal	2	26	Gaming	3	10	Pvt. Post. Ed.	0	0
Arizona Trial Courts	0	0	Health Services	80	353	Racing	1	12
Arizona Retirement Sys.	6	32	Insurance	30	93	Radiation Regulatory	0	0
Attorney General	0	0	Land	2	12	Registrar of Contractors	448	1881
Arizona Works	0	0	Liquor	15	54	Real Estate	31	251
Athletic Board	0	0	Lottery	0	5	Revenue	8	41
Behavioral Health Ex.	4	5	Maricopa Cty. Housing	0	0	School - Deaf & Blind	1	1
Fire, Bldg & Life Safety	35	103	Massage Therapy	0	2	Secretary of State	2	23
Charter Schools	1	2	Medical Board	2	19	State Board of Education	0	0
Chiropractic	1	4	Medical Radiologic	3	13	Structural Pest Control	2	11
City of Phoenix	1	1	Naturopathic	0	0	Technical Registration	0	0
Clean Elections	0	5	Nursing	26	128	Veterans Home	0	0
Commerce	0	1	Nursing Care Admin.	3	5	Veterinary Board	0	0
Community Colleges	0	0	Occupation Therapy	0	1	Water Qual. App. Bd.	0	0
Cosmetology	0	1	Optometry	0	0	Water Resources	0	2
Criminal Justice	0	2	Osteopathic	0	1	Weights and Measures	99	246
Dental	3	36	Parks	0	0			

Evaluations of OAH Services

Note: The four major groups of those who responded are: represented private party; unrepresented private party; counsel for a private party; and counsel for the agency. The evaluations are filled out immediately after the hearing, and the evaluations are not disclosed to the ALJ involved. They are used by management to improve the OAH process and do not affect the decisions issued.



Questions:

1. Attentiveness of ALJ
2. Effectiveness in explaining the hearing process
3. ALJ's use of clear and neutral language
4. Impartiality

5. Effectiveness in dealing with the issues of the case
6. Sufficient space
7. Freedom from distractions
8. Questions responded to promptly and completely
9. Treated courteously

In addition to training, which includes State Bar sponsored continuing legal education, privately presented courses, as well as contracted presentations, the OAH provides 40 hours per year of continuing education opportunities to each ALJ to ensure professional development.

Most importantly, the OAH is a collegial organization and the interplay among the ALJs is the greatest source of learning. The give and take, having their thoughts challenged, seeking advice and second opinions, having to justify positions and first takes on a subject – these are all invaluable processes to achieve and maintain quality.

Where have they gone?

One of our numbers has left us in death, and I take this time to recall ALJ Neal Jordan. Others have gone on to take positions with the judiciary, or other positions of esteem, such as with the Arizona State Bar. Some have

left to pursue private professions. Our alumni are available online (<http://www.azoah.com/Alumni.htm>). Such esteemed alumni attest to the quality of the ALJ cadre.

Footnotes

¹ A.R.S. § 41-1092.01 mandates that ALJs possess necessary technical expertise. A.R.S. § 41-1092.07 requires that the ALJs allow all parties the opportunity to respond and present evidence and argument on all relevant issues, and exercise reasonable control over the manner and order of cross-examining witnesses and presenting evidence to make them effective for ascertaining the truth. A.R.S. § 41-1092.05 provides that continuances are to be granted only for good cause. The ALJs must base any findings of fact exclusively on the evidence and on matters officially noticed. A.R.S. § 41-1092.08 mandates that written decisions contain a concise explanation of the reasons supporting the decision and that the decision, which may become the final administrative decision upon agency inaction, be transmitted to the agencies, boards, and commissions within 20 days.