

# The Office of Administrative Hearings

The Twelfth Annual Report

to

Governor Janet Napolitano

Senator Timothy S. Bee, 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, 2007

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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 2007 indicate agency acceptance of Administrative Law Judge Decisions without modification was 91.03%. Agency acceptance of Findings of Fact and Conclusions of Law without modification was 94.7%. Rehearings (1.48%) and Appeals (2.65%) were rare. Evaluations by participants continue to indicate that Administrative Law Judges and the OAH were rated excellent or good in 96% 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 2007 was 97.77%.

## **II. Continued Development of the Office**

### **1. Planned Community and Condominium Association Hearings**

HB 2824 created hearings before the OAH for disputes involving planned community and condominium associations and their members. Pursuant to A.R.S. § 41-2198.01(B), the disputes extend to violations of condominium documents and planned community documents or violations of the A.R.S. Title 33, Chapters 9 and 16. The funding for these cases is exclusively based on the setting of an appropriate filing fee by the Department of Fire, Building and Life Safety (DFBLS), which intakes petitions and is responsible for reimbursing the actual costs of hearings before the OAH. A successful petitioner is reimbursed the filing fee by the losing respondent. A.R.S. § 41-2198.02(A). The decisions of the OAH are final and there is no right of rehearing. A.R.S. § 41-2198.02(B). The courts retain jurisdiction over similar actions. A.R.S. § 41-2198.03(B).

### **2. Pioneering of All-Electronic Hearing Docket**

The OAH implemented a totally paperless case file in a large water case involving multiple interested persons and which had great statewide and interstate interest. All filings were required to be electronic and all orders were issued via posting to a webpage. Posting of filings and orders to the webpage was notice to all parties. The webpage may be found at <http://www.azoah.com/Water.htm>

### **3. 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.

### **4. Articles Published**

In FY 2007, the OAH published three articles on its website as part of a series of informational articles to educate the public and parties about the hearing process and how to better present their cases. The articles are included as an Appendix and may be found at OAH's website at [www.azoah.com/OAHArticles.htm](http://www.azoah.com/OAHArticles.htm), along with all previous articles previously published in the OAH Newsletter.

### **5. Professional Development**

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

Administrative Law Judge Marianne Bayardi was appointed to the Phoenix Municipal Court in January 2007.

### III. Summary of Agency Use of OAH Services

#### 1. Case Management

##### a. Breakdown of Cases Filed by Agency (FY 2007):

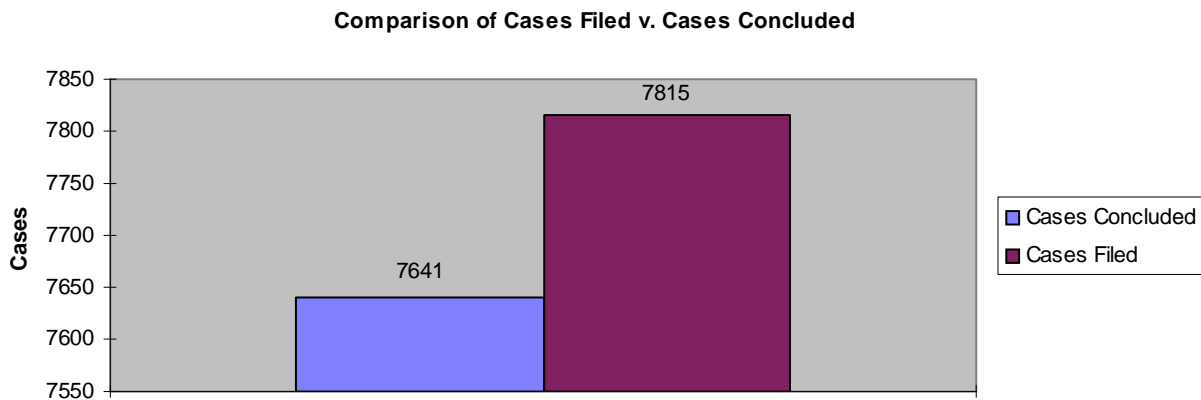
7,815 cases were filed with the OAH in FY 2007. The distribution among the agencies, boards, commissions, or political subdivisions (Agencies) are as follows (in descending order by number of cases filed):

Arizona Health Care Cost Containment System	3,653
Registrar of Contractors	2,285
Department of Weights and Measures	337
Department of Health Services	331
Department of Economic Security - CPS	133
Department of Environmental Quality	127
State Board of Nursing	106
Department of Fire, Building, and Life Safety	97
Arizona Department of Financial Institutions	90
Department of Real Estate	84
Department of Administration - Capitol Police Parking	75
Liquor Licenses and Control	69
Department of Insurance	65
Department of Education - Special Ed	61
Department of Revenue	46
DFBLS - Planned Community/Condominium	35
Department of Public Safety - Student Transportation	21
Arizona State Retirement System	16
Department of Gaming	15
Medical Radiologic Technology Board of Examiners	15
Arizona Medical Board	13
Peace Officers Standards and Training	13
Secretary of State	13
Department of Racing	10
State Land Department	10
State Board of Accountancy	9
Board of Appraisal	8
Structural Pest Control Commission	8
Office of the Attorney General	7
State Board for Charter Schools	7
Pharmacy Board	6
Department of Commerce	5
Arizona Lottery	5
Board of Dental Examiners	5
Department of Water Resources	5
Board of Chiropractic Examiners	4
Board of Nursing Care Institution Administrators Examiners	4
Board of Technical Registration	4
Department of Agriculture	3
Water Quality Appeals Board	3

Board of Behavioral Health Examiners	2
Board of Osteopathic Examiners	2
Department of Administration	2
Arizona State Board of Optometry	1
Citizens Clean Elections Commission	1
Department of Education	1
Department of Public Safety - Concealed Weapons Permit Unit	1
Physical Therapy	1
Radiation Regulatory Agency	1

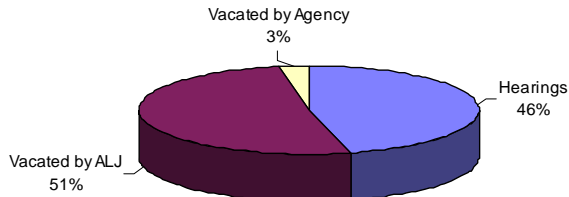
**b. Number of Cases Filed Versus Cases Concluded:**

In FY 2007, the conclusion rate (defined as cases concluded divided by new cases filed) was 97.77%.



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 2007**

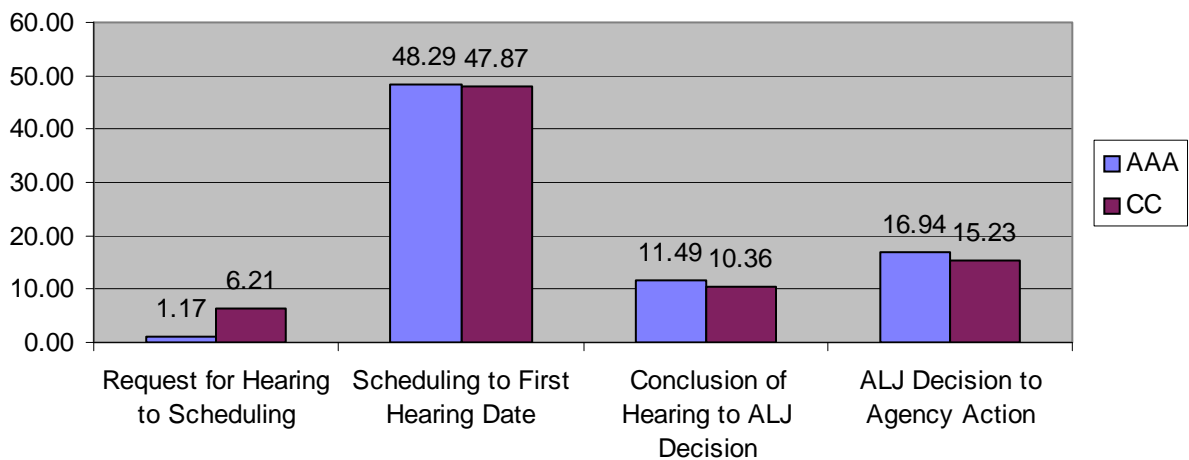


**c. Timeline of Case Management:**

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:

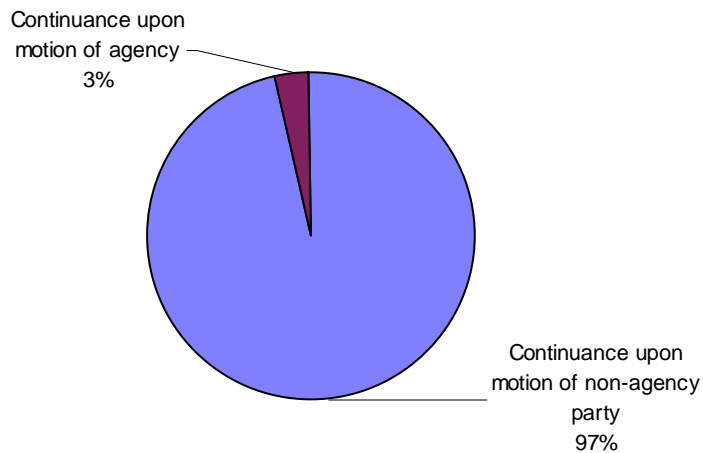
**Average Days Between Selected Events - Appealable Agency Actions v. Contested Cases**



**d. Incidence of Continuance:**

A single continuance in FY 2007 added an average of 49.54 days to the total length of a case. Although 66.25% of all continuance requests were granted in FY 2007, 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 (954) divided by the total number of cases first scheduled (7,815), was 12.20%. The ratio of first hearing settings (7,655) to continued settings on the calendar (987) was 1 to 0.13.

The following chart illustrates the source of continuances.





The following list is a breakdown of FY 2007 continued settings and their sources, by agency.

<b>AGENCY</b>	<b>Continued - Motion by non- agency party</b>	<b>Continued - Motion by agency party</b>
Arizona Department of Commerce	4	0
Arizona Department of Financial Institutions	7	1
Arizona Health Care Cost Containment System	212	13
Arizona Lottery	1	0
Arizona Medical Board	5	0
Arizona State Retirement System	3	0
Board of Appraisal	2	0
Board of Nursing Care Institution Administrators Examiners	1	0
Citizens Clean Elections Commission	2	0
Department of Administration	3	0
Department of Administration - Capitol Police Parking	1	0
Department of Economic Security - CPS	11	1
Department of Education - Special Ed	16	0
Department of Environmental Quality	14	2
Department of Fire, Building, and Life Safety	18	1
DFBLS - Planned Community/Condominium	7	0
Department of Gaming	3	1
Department of Health Services	78	3
Department of Insurance	14	0
Department of Public Safety - Concealed Weapons	2	0
Department of Public Safety - Student Transportation	6	0
Department of Racing	2	2
Department of Real Estate	7	0
Department of Revenue	12	0
Department of Water Resources	1	0
Department of Water Resources	1	0
Department of Weights and Measures	2	0
Liquor Licenses and Control	6	1
Peace Officers Standards and Training	3	0
Pharmacy Board	1	0
Registrar of Contractors	488	6
Secretary of State	5	0
State Board for Charter Schools	2	1
State Board of Nursing	12	2
Water Quality Appeals Board	1	0
<b>TOTAL</b>	<b>953</b>	<b>34</b>

The following chart reflects the number of motions to continue that were entertained in FY 2007 and the percentage granted:

<b>Client</b>	<b>Continuance Granted</b>	<b>Continuance Denied</b>	<b>Total Motions</b>	<b>% Granted</b>
Arizona Department of Commerce	2	0	2	100
Arizona Department of Financial Inst.	12	0	12	100
Arizona Health Care Cost Containment	193	69	262	74
Arizona Lottery	1	0	1	100
Arizona Medical Board	4	1	5	80
Arizona State Retirement System	2	1	3	67
Board of Appraisal	2	0	2	100
Board of Behavioral Health Examiners	1	0	1	100
Board of Dental Examiners	0	1	1	0
Board of Nursing Care Institution Adm. Ex	1	0	1	100
Board of Osteopathic Examiners	1	0	1	100
Citizens Clean Elections Commission	3	0	3	100
Department of Administration	3	0	3	100
Capitol Police Parking	2	3	5	40
Department of Agriculture	1	1	2	50
Department of Economic Security - CPS	12	6	18	67
Department of Education - Special Ed	8	2	10	80
Department of Environmental Quality	24	1	25	96
Arizona Department of Financial Institutions	0	8	8	0
Department of Fire, Building, and Life Safety	25	6	31	81
DFBLS - Planned Community/Condominium	10	11	21	48
Department of Gaming	5	1	6	83
Department of Health Services	76	23	99	77
Department of Insurance	12	13	25	48
Department of Public Safety-C. Weapons	2	0	2	100
Department of Public Safety - St. Trans	7	1	8	88
Department of Racing	3	0	3	100
Department of Real Estate	7	1	8	88
Department of Revenue	12	3	15	80
Department of Water Resources	1	0	1	100
Department of Weights and Measures	0	1	1	0
Liquor Licenses and Control	7	11	18	39
Peace Officers Standards and Training	4	0	4	100
Pharmacy Board	1	0	1	100
Registrar of Contractors	477	313	790	60
Secretary of State	5	1	6	83
State Board of Accountancy	0	3	3	0
State Board for Charter Schools	4	1	5	80
State Board of Nursing	18	3	21	86
State Land Department	3	0	3	100
Water Quality Appeals Board	3	1	4	75
<b>TOTAL</b>	<b>954</b>	<b>486</b>	<b>1,440</b>	<b>66.25%</b>

## 2. Evaluation

### a. Results of Public Evaluation:

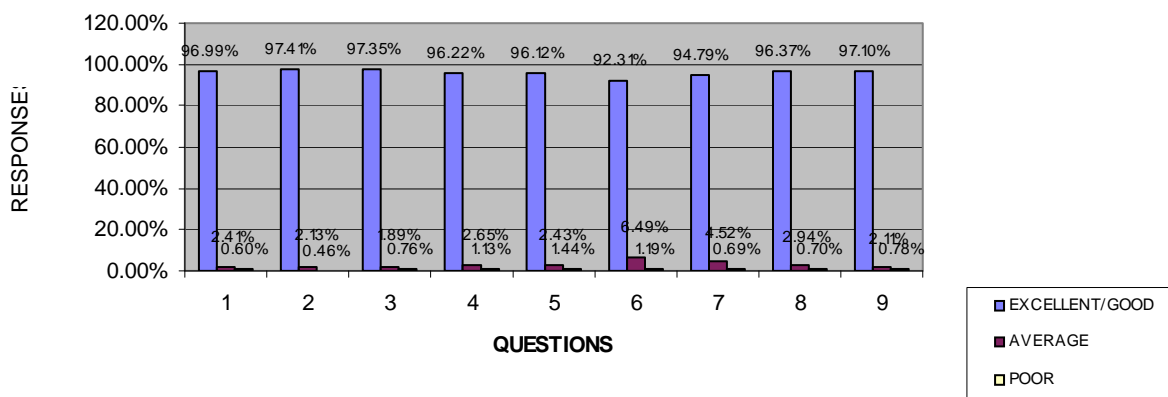
Since November 1996, the OAH has administered an evaluation procedure. The support staff provides a copy of the evaluation before the hearing in order to encourage all participants to respond. A discussion of the evaluation form is included in a video played before each hearing, or is otherwise addressed 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

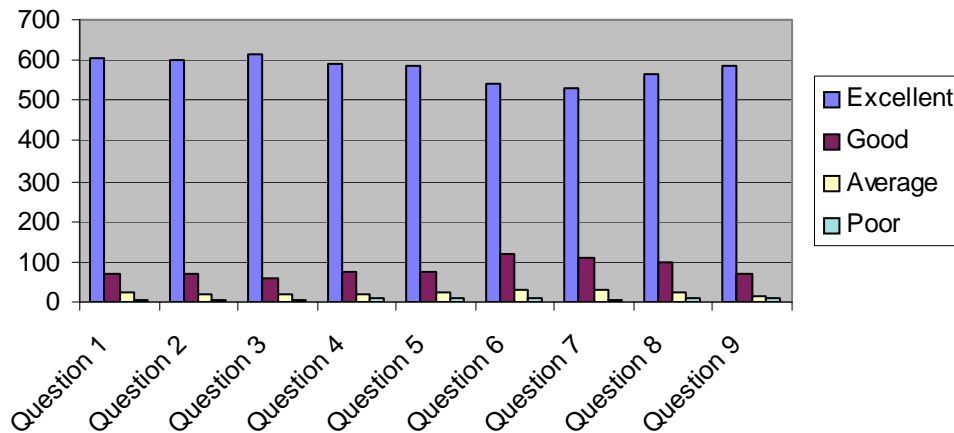
The results indicate that satisfaction is high among all groups, with those responding rating the OAH excellent to good in 92.31% to 97.41% of responses.

**All Responses FY 2007**



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 2007

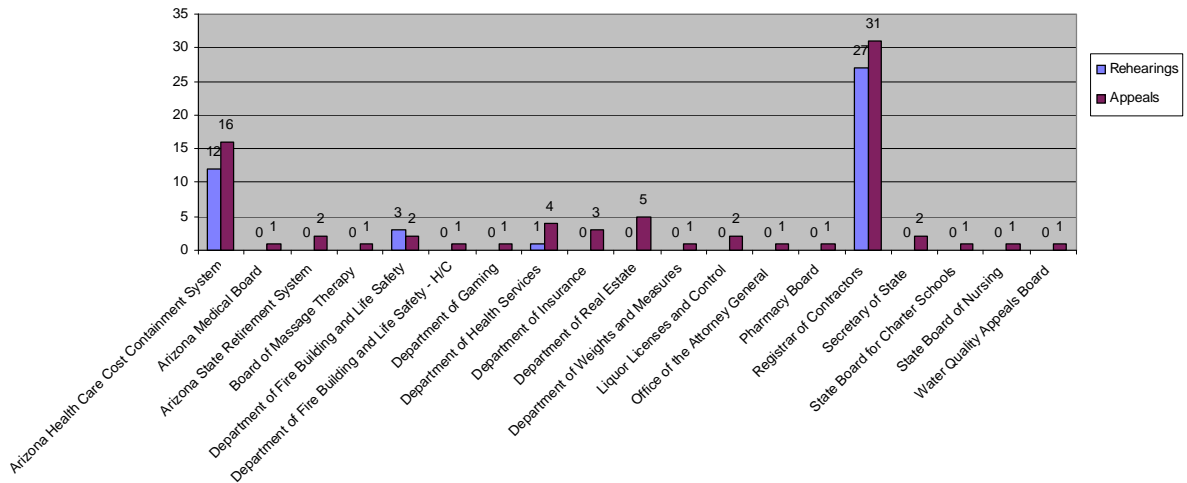


#### b. Incidence of Rehearing and Appeal:

Rehearings are permitted pursuant to A.R.S. § 41-1092.09 under certain conditions. In FY 2007, the rehearing rate (defined as rehearings scheduled divided by cases heard) was 1.48%.

Appeals to Superior Court are provided for pursuant to A.R.S. § 41-1092.08(H). In FY 2007, the judicial appeal rate (defined as judicial appeals taken divided by cases decided on the merits) was 2.65%. As reflected in the following diagram, rehearings and judicial appeals in FY 2007 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.

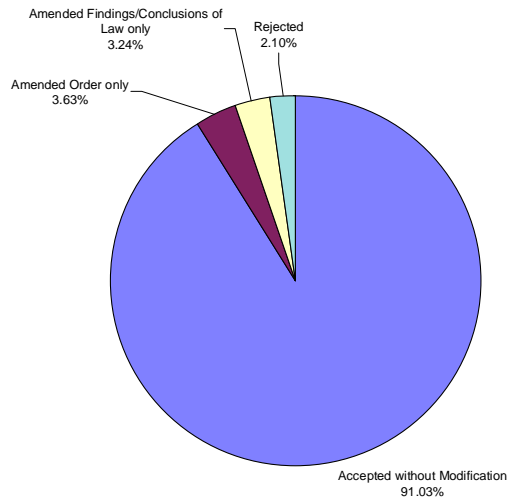
## Judicial Appeals and Rehearings FY 2007



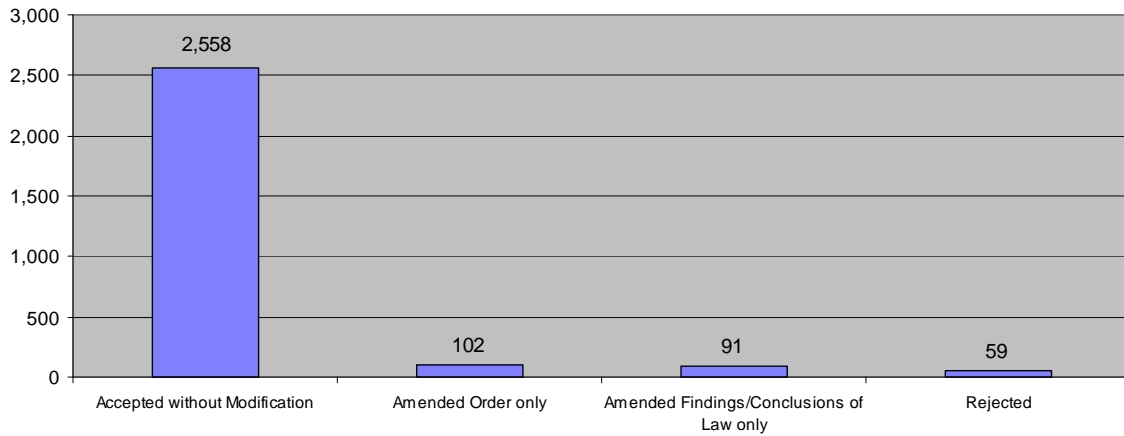
## IV. Acceptance of Administrative Law Judge Decisions by Agencies

### 1. Agency Action

Agency acceptance of the Administrative Law Judge Decisions is very high. 91.03% of all decisions acted upon by the agencies were accepted without modification. Agency acceptance was 94.7% if viewed from the vantage point of acceptance of Findings of Fact and Conclusions of Law, the core function of the Administrative Law Judge. 52.85% 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.

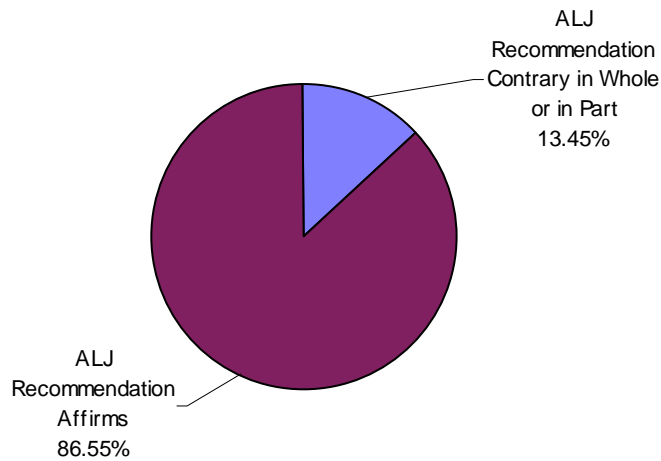


The following chart reports the breakdown of agency response by agency. The following are detailed: cases which became moot before agency action; cases which were subsequently certified by the OAH due to agency inaction; and cases which were not subject to agency modification or rejection by statute.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

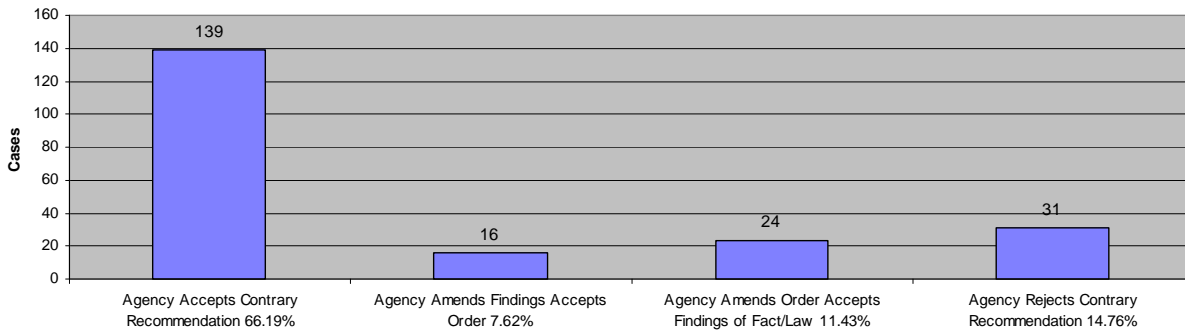
	Accept	Amend Order	Amend Findings	Reject	Certified	Moot	Final	Total
Attorney General	1	0	0	0	0	0	0	1
Acupuncture Bd of Ex.	1	0	0	0	0	0	0	1
Board of Accountancy	7	0	0	0	0	0	0	7
Dept. of Commerce	1	0	0	0	0	1	0	2
Department of Education	0	0	0	0	0	0	2	2
Department of Admin.	1	0	0	0	0	0	0	1
AHCCCS	968	6	61	2	37	9	0	1,083
Arizona Retirement Bd.	5	0	0	2	0	0	0	7
Bd. of Charter Schools	0	1	0	0	0	1	0	2
Fire, Bldg. and Life Safety	57	0	0	0	0	5	21	83
Behavioral Health	3	0	0	0	0	0	0	3
Financial Institutions	4	0	3	0	1	1	0	9
Board of Appraisal	5	0	1	0	1	0	0	7
DPS - Student Trans.	6	1	0	0	0	3	0	10
Bd of Chiropractic Ex.	1	1	0	0	0	0	0	2
DOA - Capitol Police	55	0	0	0	0	0	0	55
DES - CPS	85	1	6	0	1	0	0	93
DPS - Concealed W	0	0	0	0	0	1	0	1
Dept. of Environmental Q	0	0	0	1	0	0	0	1
Dept. of Health Services	174	0	2	0	2	2	0	180
Weights/Measures	0	1	0	0	0	3	0	4
Department of Gamings	6	0	0	0	0	0	0	6
Department of Insurance	24	0	0	0	0	18	0	42
Department of Land	1	0	0	0	0	0	0	1
Liquor License/Control	33	3	0	0	0	1	0	37
Arizona Lottery	3	0	0	0	0	0	0	3
AZ. Medical Board	0	2	2	0	1	0	0	5
Medical Radiologic Bd	4	1	1	0	0	1	0	7
Nursing Care Institutions	3	0	0	0	0	0	0	3
Secretary of State	8	0	0	0	1	2	0	11
State Board of Nursing	19	2	0	0	0	1	0	22
Bd of Osteopathic Ex	1	0	0	0	0	0	0	1
Physician Assistants	1	0	2	0	0	0	0	3
Physical Therapy	1	0	0	0	0	0	0	1
Department of Racing	3	0	0	0	0	1	0	4
Dept. of Real Estate	28	3	0	0	1	0	0	32
Department of Revenue	0	0	0	0	0	0	4	4
Registrar of Contractors	1,045	79	12	1	13	12	0	1,162
Schools for Deaf/Blind	0	0	0	0	0	1	0	1
Structural Pest Control	4	1	1	0	1	0	0	7
<b>TOTAL</b>	<b>2,558</b>	<b>102</b>	<b>91</b>	<b>6</b>	<b>59</b>	<b>63</b>	<b>27</b>	<b>2,906</b>

In FY 2007, Administrative Law Judges rendered decisions that were contrary in whole or contrary in part to agencies' original positions in 13.45% of cases. Agency acceptance of contrary decisions was high at 85.24%.

**Recommendations Contrary to Original Agency Action FY 2007**



**Agency Response to Contrary Recommendations FY 2007**





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

<b>Client</b>	<b>Accepted</b>	<b>Amended Order</b>	<b>Amended Findings</b>	<b>Rejected</b>	<b>Certified</b>	<b>Total</b>
Arizona Dept. of Commerce	1	0	0	0	0	1
Department of Administration	1	0	0	0	0	1
AHCCCS	42	5	17	22	3	89
Arizona Retirement Bd	1	0	0	0	0	1
Board of Charter Schools	0	1	0	0	0	1
Dept. of Fire, Building, and Life Safety	11	0	0	0	1	12
Dept. of Financial Institutions	0	0	1	1	1	3
Board of Appraisal	0	0	0	1	0	1
DOT - Student Trans.	1	1	0	0	0	2
Capitol Police Parking	20	0	0	0	0	20
DES-CPS	8	0	3	1	0	12
DOT - Concealed Weapons	0	0	0	0	1	1
Department of Health Services	5	0	2	2	1	10
Weights and Measures	0	1	0	0	0	1
Department of Insurance	0	0	0	0	3	3
Liquor Licenses and Control	14	2	0	0	1	17
Arizona Medical Board	0	1	1	1	0	3
Medical Radiological Bd	0	1	0	0	0	1
Secretary of State	1	0	0	1	1	3
State Board of Nursing	3	1	0	0	0	4
Physician Assistants	1	0	0	0	0	1
Department of Racing	1	0	0	0	0	1
Dept. of Real Estate	9	2	0	1	0	12
Registrar of Contractor	8	0	0	0	0	8
Structural Pest Control	0	1	0	1	0	2
<b>TOTAL</b>	<b>127</b>	<b>16</b>	<b>24</b>	<b>31</b>	<b>12</b>	<b>210</b>

## 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. A.R.S. § 41-1092.08(D). In FY 2007, 73 Administrative Law Judge Decisions were certified by the OAH as final administrative decisions.

<b>Agency</b>	<b>Certified</b>
Department of Insurance	27
Registrar of Contractors	12
Arizona Health Care Cost Containment System	8
Department of Fire Building and Life Safety	5
Department of Health Services	3

Department of Public Safety - Student Transportation	3
Department of Weights and Measures	3
Secretary of State	2
Arizona Department of Commerce	1
Citizens Clean Elections Commission	1
Department of Public Safety - Concealed Weapons Permit Unit	1
Department of Racing	1
Liquor Licenses and Control	1
Medical Radiologic Technology Board of Examiners	1
State Board for Charter Schools	1
State Board of Nursing	1
State Land Department	1
State Schools for the Deaf and the Blind	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, 9 motions were filed and one 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

## Published Articles:

1. The Administrative Law Judge
2. Consolidation and Severance of Cases
3. Homeowner Petitions Against An Association

# The Administrative Law Judge

By Cliff J. Vanell  
Vol. 40, August 2006

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](http://www.azoah.com) along with all previous articles published in the OAH Newsletter.

**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.<sup>1</sup> 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](#). 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 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 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 statements and closing arguments, and direct and cross examinations. ALJ decisions are searchable [online](#). 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](#). 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.

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](#). Such esteemed alumni attest to the quality of the ALJ cadre.

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## 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.

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# Consolidation and Severance of Cases

By Daniel G. Martin, Administrative Law Judge  
October 2006

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](http://www.azoah.com) along with all previous articles published in the OAH Newsletter.

## Consolidation

Consolidation is the process by which two or more separate cases are joined for purposes of an administrative hearing. At the Office of Administrative Hearings ("OAH"), cases may be consolidated in one of two ways: (1) the referring agency consolidates the cases prior to transmitting them to the OAH for hearing; or (2) one or more of the parties files a motion to consolidate after the cases have been transferred and set for hearing.

Motions to consolidate are governed by Arizona Administrative Code ("A.A.C.") [Rule R2-19-109](#). According to this rule, cases are eligible for consolidation if (1) the cases involve substantially similar factual or legal issues, or (2) all parties are the same. See [A.A.C. Rule R2-19-109\(A\)](#).

## Procedure

A party who is considering a motion to consolidate must first determine whether the cases to be consolidated have all been referred to the OAH for hearing (this may be done by looking up the cases on the OAH's website, [www.azoah.com](http://www.azoah.com)). The OAH does not have jurisdiction over cases that have not yet been referred for hearing, and therefore is unable to consolidate such cases with existing cases on the OAH's docket. A motion to consolidate a case that has not yet been referred for hearing (and which therefore is not yet subject to the OAH's jurisdiction) will be denied as having been prematurely filed.

Once it has been determined that all of the cases for which consolidation is being sought are within the jurisdiction of the OAH, a formal motion to consolidate may be filed. By rule, that motion must be directed to the Administrative Law Judge who is assigned to the case with the earliest pending hearing date. See [A.A.C. Rule R2-19-109\(B\)](#). Again, this information may be determined by reviewing the case information available on the OAH's website. A motion to consolidate, like any other motion filed with the OAH, must be copied to every other party involved in the matters for which consolidation is being requested. Also, although not required, the moving party should consider providing a courtesy copy of the motion to the Administrative Law Judge(s) assigned to the other case(s) for which consolidation is being sought.

The principle that will most directly guide the Administrative Law Judge's decision as to whether to grant a motion to consolidate is whether consolidation will increase administrative efficiency. Thus, every motion to consolidate should explain, in detail, how such efficiency will be attained. As a general rule, a motion that simply recites the criteria listed in [A.A.C. Rule R2-19-109\(A\)](#) will not be considered persuasive. The Administrative Law Judge must be able to understand why convening a single hearing will make for a more orderly presentation of evidence, and how consolidation will facilitate the resolution of the issues presented.



If the motion to consolidate is granted, the hearing typically will be scheduled on the latest pending hearing date, and will be assigned to the Administrative Law Judge who is scheduled to hear the case on that date. Thus, the practical effect of consolidation in most instances is that the earlier case(s) will be continued to the later hearing date. A party may, however, request that the hearing be accelerated to an earlier hearing date, or that the consolidated cases be set for hearing on a different date. Such requests should be included in the party's motion.

### **Practical Considerations**

As a general rule, a motion to consolidate is most likely to be granted when the basis for the motion is the fact that all of the parties are the same (though a showing still must be made that the consolidation will promote administrative efficiency). A more difficult issue arises when the circumstances involve a single complainant and multiple respondents (as can be the case, for example, in matters arising out of the Registrar of Contractors where a complaint has been filed against both a general contractor and one or more subcontractors). In this situation, a showing for consolidation may be made when the complaint arises out of the same basic fact pattern; however, the moving party still must demonstrate that efficiency will best be served by proceeding against all of the respondents at the same time. A third scenario involves the case of multiple complainants and a single respondent. Similar to the situation involving the single complainant and multiple respondents, one of the key inquiries will be whether the complaints arise from the same or a similar set of facts. Consolidation is less likely to be granted if each of the complainants is raising a separate set of issues. The final scenario involves the case of multiple complainants and multiple respondents. This situation is the least likely to give rise to consolidation, as the degree of complexity generated by the involvement of multiple parties on both sides will generally be considered a barrier, rather than an aid, to efficient case resolution through a single hearing.

In each of the above situations, the final determination as to whether consolidation will be permitted lies squarely within the discretion of the Administrative Law Judge to whom the motion is directed. Parties considering consolidation can advance their cause by filing their motions as early as possible in the process, and by concisely identifying each of the reasons why consolidation should be granted.

### **Severance**

Severance, as the name implies, is the process by which two or more consolidated cases are severed from each other so that each may be heard individually. In accordance with [A.A.C. Rule R2-19-109\(D\)](#), cases may be severed upon motion by one or more of the parties, or in the discretion of the assigned Administrative Law Judge.

Severance is less common than consolidation, but may be ordered when the assigned Administrative Law Judge concludes that the cases involved contain sufficiently different issues of fact and/or law that continued consolidation will not promote efficient case resolution. Orders for severance are most common in cases that are consolidated prior to their referral to the OAH for hearing. However, on occasion an Administrative Law Judge may determine that a case previously consolidated upon motion has simply proved too unwieldy, or that consolidation did not give rise to the efficiencies believed to be present at the time of consolidation, and order severance.

In contrast to a motion for consolidation, a motion for severance should explain to the Administrative Law Judge why continued consolidation will not promote administrative efficiency. Some examples of grounds on which a motion to sever may be granted include (1) the existence of different parties with divergent interests, (2) the absence of a common set of operative facts, (3) distinct issues of law, and/or (4) different or contradictory requests for relief.

If an order for severance is issued, the newly separated cases will be re-set for hearing. If a party filing a motion for severance has any preference for particular hearing dates (including retaining the original hearing date), such preference should be expressed in the motion.

## Conclusion

As can be seen from the foregoing discussion, the determination as to whether to grant a motion to consolidate or sever depends heavily on the particular facts and circumstances of the cases involved. Thus, parties should exercise particular care in explaining why consolidation or severance should be granted, and provide specific analysis as to how the granting of their motion will contribute to administrative efficiency.

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Revised 06/27/07 to add footnotes not previously reflected on the htm version of this article.

# Homeowner Petitions Against An Association <sup>1</sup>

By **Cliff J. Vanell, Director**

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](http://www.azoah.com) along with all previous articles published in the OAH Newsletter.

## Overview

In Laws 2006, Chapter 324, the Arizona Legislature created a revolutionary system of adjudication of disputes between homeowners <sup>2</sup> and their associations as an alternative to filing an action in court. Filing a petition with the Department of Fire, Building and Life Safety, the means by which such a matter is brought before the Office of Administrative Hearings (OAH), is a less costly and faster method of resolving disputes. Harnessing the advantages of streamlined procedures and a fast track which has proven itself since January 1996, disputes are resolved at OAH in generally less than 90 days. The OAH Administrative Law Judges have a great deal of leeway to consider evidence and to craft pre-hearing orders so as to maximize efficiency. However, there are costs to the process, some apparent, others less so.

There is an immediate cost to the homeowner in the nature of a filing fee.<sup>3</sup> Defending even a non-meritorious petition can be costly for an association, and the expense is ultimately borne by the association members, including the homeowner, through assessments. A homeowner will be reimbursed the filing fee by the association only if the homeowner is determined by the Administrative Law Judge to be the prevailing party. The homeowner therefore has an immediate interest in filing a valid petition, and one that can be proven. An unsubstantiated or invalid petition will result in the loss of the filing fee. Likewise, the association has an economic interest in evaluating the homeowner's petition to determine to what extent the alleged facts are really in dispute and whether the allegations have merit. What follows is offered in the way of a checklist to guide both homeowner and association.

## Homeowner

### 1. Do I have a valid petition?

- **Am I alleging a violation of a statute in Title 33 or the community documents?**

Only disputes that allege a violation of the provisions of A.R.S. Title 33 Chapter 9 (condominium associations) or Chapter 16 (planned community associations), or the provisions of the condominium or planned community documents can be heard by the OAH. For example, if the association is required to provide 24 hours notice of a Board meeting according to the association governing documents, and held a meeting without doing so, one would have a valid petition. Allegations of criminal acts, libel, slander, etc. which constitute violations of the criminal statutes of Title 13, or which constitute civil torts

are not within the jurisdiction of the OAH.

- **Is the violation by the association?**

The petition must deal with a dispute between a homeowner and a condominium or planned community association. Disputes between two homeowners or with an individual board member of an association cannot be heard by the OAH.

- **Is it your dispute?**

A homeowner has no standing to pursue a dispute on behalf of another homeowner. For example, if another homeowner is aggrieved by the denial of an architectural modification in violation of the association guidelines, only the aggrieved homeowner may bring a petition against the association.

- **Is it a current dispute?**

There must be a current dispute. For example, if board meetings were held without notice but the practice has now been conformed to notice requirements and prior actions taken in violation of the notice requirements subsequently ratified, there may have been a technical violation of the association's governing documents, but it is no longer in dispute. Another way to look at it is to ask yourself whether a remedy can be fashioned by the Administrative Law Judge? If there is no remedy, or the situation has already been remedied, it is probably not a current dispute.

- **Has the dispute been previously adjudicated?**

If the petition item has been decided by a court or previously has been addressed in a hearing before the OAH, it cannot be revisited. OAH has no authority for contempt proceedings or enforcement of prior decisions. However, failure by a party to comply with a decision issued by the OAH may result in the other party seeking enforcement of the Administrative Law Judge's decision through a contempt of court proceeding in Superior Court

## **2. Can I prove my petition?**

The homeowner bears the burden of proving the allegations of the petition. Therefore, it is incumbent on the homeowner to have evidence to substantiate each allegation in the petition. Alleging counts that were not proven at hearing will be taken into account when determining whether the homeowner was the prevailing party and is entitled to reimbursement of the filing fee. Limiting the petition to strong allegations with good evidence maximizes the chances of having the filing fee reimbursed.

## **3. Are my expectations realistic about what I can accomplish?**

The availability of the OAH hearing process ideally should result in compliance with statutes and association documents without the need to file a petition. The possibility of civil penalties together with the relative ease of bringing an action can provide motivation for an association to take the necessary action to comply with the applicable statutes and/or governing documents.

On the other hand, the Administrative Law Judge has no power to undo the passage of time or undo hurt feelings. The Administrative Law Judge cannot order damages or restitution. Civil penalties are reserved

for situations where it can be demonstrated that an association has acted punitively or in bad faith.

## **Association**

### **1. Could the association have done a better job of communicating with the homeowner? If not in time to avoid a petition now, can a better job be done in the future?**

Conflict is unavoidable. Credible dispute resolution systems at the association level can go a long way toward relieving tensions and fostering mutual trust. The best way to avoid a petition is to become aware of what the statutes and the community documents require. Associations should then either conform to them or follow the necessary procedures to change them.

### **2. Can the association rectify any deficiencies before the hearing?**

Mistakes can occur, but many errors or omissions can be rectified. Doing so can avoid petitions being filed to compel such action. Correcting errors or omissions before hearing goes a long way toward streamlining the process and avoids expense to the association in the long run. Voluntarily rectifying errors may also avoid civil penalties as it demonstrates good faith.

### **3. Does the association have any valid defenses?**

When a petition is filed, a response is required within 20 days. This is the time to begin examining the association's procedures to determine if the homeowner's points are well taken. Proceeding to hearing when there is no valid defense may factor into whether a civil penalty is appropriate.

### **4. Are there facts that can be agreed to?**

Often the disagreement is not about the facts of the case so much as the interpretation of a statutory requirement or a provision of the association documents. If the association is willing to stipulate to a fact, proof of the fact then becomes unnecessary. This saves time and costs and allows the Administrative Law Judge to concentrate on the parties' arguments.

## **Conclusion**

The OAH process provides a speedy and cost-effective method for resolving disputes that in the past might have taken years and tens of thousands of dollars in fees and costs. The filing fee creates economic incentive for a homeowner to bring meritorious petitions and potential civil penalties discourage vindictive behavior by an association. Unlike most litigation, these parties must continue to live with each other, literally. Associations that are diligent in acting appropriately under the community documents and law and who communicate well with homeowners can avoid unnecessary expense and acrimony. Because the expenses associated with hearings, be it reimbursement of the filing fee or incurring attorneys fees and costs, are ultimately passed on to the homeowners, both parties' interests are inextricably linked. The OAH process provides fair, impartial, and prompt hearings, and, in a sense, is like the ideal health care provider - approachable, affordable, user-friendly. But no matter how much you may like your doctors, the best course is not to need them.

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Footnotes

1. Although an association can also file a petition against a member, this article is written from the point of view of a homeowner bringing a petition.
2. The term “homeowner” is used as a general term to include both homeowners and condominium owners.
3. The filing fee pays for the costs of sustaining the hearings program.

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