

The Office of Administrative Hearings

The Thirteenth 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

October 30, 2008

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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 2008 indicate agency acceptance of Administrative Law Judge Decisions without modification was 86.64%. Agency acceptance of Findings of Fact and Conclusions of Law without modification was 92.6%. Rehearings (1.58%) and Appeals (2.15%) 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 2008 was 97.71%.

II. Continued Development of the Office

1. Developing Electronic Filing

In FY 2007, the OAH generated a totally paperless case file in a large water adjudication 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 process relied on time-consuming manual rewriting of the html file for Internet posting and manual generation of advisory e-mail. Because of effectiveness of this paperless record in managing such a large volume of documents, the OAH decided to streamline and fully automate the process to be used in similar cases. Parties now can submit documents and exhibits to an assigned internet web address. Their submissions are automatically posted to the Internet and an e-mail sent to all other parties.

2. Business Continuity

The OAH has completed its latest phase of business continuity management. The Phoenix database is fully restorable, within an 8 hour window of real time, through its Tucson servers. A mirrored OAH will be fully operational within 4 hours of a disaster, including its website and portal.

3. Professional Development

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

Administrative Law Judge Dan Martin was appointed to the Superior Court.

4. Security Cameras

Security cameras with two way audio have been installed in all hearing rooms.

5. Quality Control and Procedural Efficiency

The OAH has refined its internal audits to daily monitor paper flow, responsiveness to motions and other performance measures.

III. Summary of Agency Use of OAH Services

1. Case Management

a. Breakdown of Cases Filed by Agency (FY 2008):

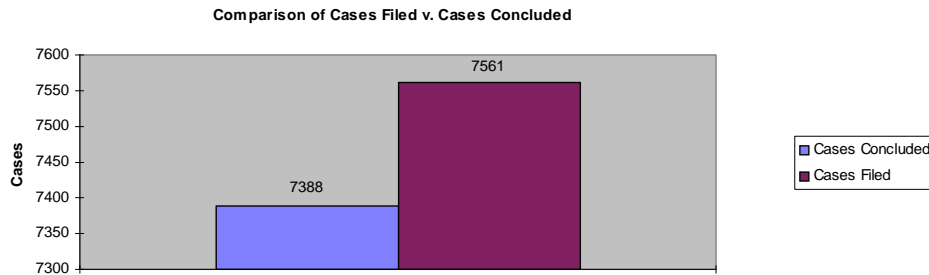
7,561 cases were filed with the OAH in FY 2008. The distribution among the agencies, boards, commissions, or political subdivisions (Agencies) are as follows (in descending order by number of cases filed):

Arizona Health Care Cost Containment System	3547
Registrar of Contractors	2010
Department of Weights and Measures	462
Department of Health Services	320
Department of Economic Security - CPS	155
Department of Racing	135
Department of Environmental Quality	106
Department of Insurance	106
Department of Fire Building and Life Safety	97
State Board of Nursing	75
Arizona Department of Financial Institutions	69
Liquor Licenses and Control	66
Department of Education - Special Ed	54
Department of Real Estate	48
Department of Revenue	36
Arizona Medical Board	35
Department of Fire Building and Life Safety - H/C	29
Board of Technical Registration	14
Board of Appraisal	13
Department of Economic Security	13
Medical Radiologic Technology Board of Examiners	13
Arizona State Retirement System	12
Department of Public Safety - Student Transportation	11
Pharmacy Board	11
Secretary of State	11
State Board of Accountancy	11
Arizona Department of Commerce	9
Board of Dental Examiners	7
Department of Gaming	7
Peace Officers Standards and Training	7
Arizona Lottery	6
Board of Behavioral Health Examiners	5
Board of Chiropractic Examiners	5
Department of Agriculture	5
Department of Public Safety - Concealed Weapons Permit Unit	5
State Board for Charter Schools	5
State Board for Private Postsecondary Education	5
Board of Nursing Care Institution Administrators Examiners	4
Department of Education	4
Office of the Attorney General	4
Physical Therapy	4

Water Quality Appeals Board	4
Apache Junction Fire District	3
State Land Department	3
Structural Pest Control Commission	3
Arizona School Facilities Board	2
Department of Water Resources	2
Board of Medical Students Loan	1
Funeral Directors and Embalmers Board	1
State Schools for the Deaf and the Blind	1

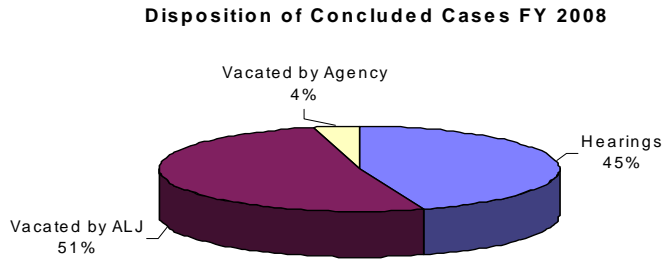
b. Number of Cases Filed Versus Cases Concluded:

In FY 2008, the conclusion rate (defined as cases concluded divided by new cases filed) was 97.71%.



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.

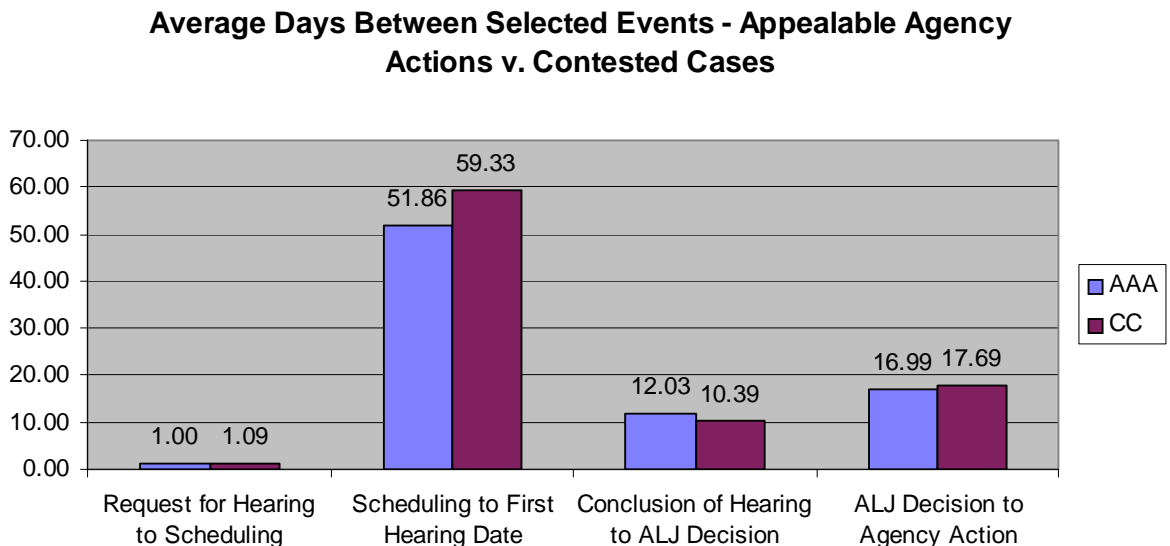
The following chart illustrates the proportion of cases that proceed to full hearing:



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.

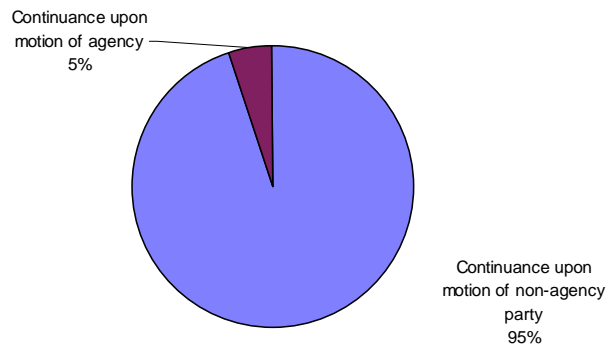
The following diagram illustrates the average timelines:



d. Incidence of Continuance:

A single continuance in FY 2008 added an average of 56.64 days to the total length of a case. Although 67% of all continuance requests were granted in FY 2008, 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 (1009) divided by the total number of cases first scheduled (7,561), was 13.34%. The ratio of first hearing settings (7,271) to continued settings on the calendar (958) was 1 to 0.13.

The following chart illustrates the source of continuances.



The following list is a breakdown of FY 2008 continued settings and their sources, by agency.

AGENCY	Continued - Motion by non-agency party	Continued - Motion by agency party
Apache Junction Fire District	1	1
Arizona Department of Financial Institutions	11	0
Arizona Health Care Cost Containment System	227	13
Arizona Medical Board	8	0
Board of Appraisal	2	0
Board of Behavioral Health Examiners	2	0
Board of Osteopathic Examiners	1	0
Department of Administration - Capitol Police Parking	1	0
Department of Agriculture	1	0
Department of Economic Security - CPS	11	0
Department of Education - Special Ed	19	6
Department of Environmental Quality	36	0

Department of Fire Building and Life Safety	18	2
Department of Fire Building and Life Safety - H/C	8	0
Department of Gaming	3	0
Department of Health Services	64	8
Department of Insurance	8	0
Department of Public Safety - Student Transportation	1	2
Department of Racing	47	1
Department of Real Estate	5	0
Department of Revenue	15	0
Department of Water Resources	1	0
Department of Weights and Measures	4	3
Liquor Licenses and Control	8	3
Peace Officers Standards and Training	5	0
Pharmacy Board	3	0
Physical Therapy	1	0
Registrar of Contractors	367	5
Secretary of State	2	0
State Board for Charter Schools	1	1
State Board of Nursing	20	4
State Land Department	6	0
Water Quality Appeals Board	2	0
Total	909	49

The following chart reflects the number of motions to continue that were entertained in FY 2008 and the percentage granted:

Client	Continuance Granted	Continuance Denied	Total Motions	% Granted
Apache Junction Fire District	1	1	2	50
Arizona Department of Commerce	0	1	1	0
Arizona Department of Financial Institutions	9	6	15	60
Arizona Health Care Cost Containment	258	99	357	72
Arizona Medical Board	6	8	14	43
Board of Appraisal	2	1	3	67
Board of Behavioral Health Examiners	0	2	2	0
Board of Dental Examiners	0	1	1	0
Department of Agriculture	3	0	3	100
Department of Economic Security - CPS	17	6	23	74
Department of Education	2	1	3	67
Department of Education - Special Ed	23	3	26	88
Department of Environmental Quality	70	3	73	96
Department of Fire Building and Life Safety	17	8	25	68
DFBLS - Planned Community/Condominium	3	5	8	38
Department of Gaming	3	0	3	100
Department of Health Services	79	16	95	83
Department of Insurance	11	6	17	65
Department of Public Safety - St. Trans	2	0	2	100

Department of Racing	47	1	48	98
Department of Real Estate	5	4	9	56
Department of Revenue	16	5	21	76
Department of Water Resources	1	0	1	100
Department of Weights and Measures	7	4	11	64
Liquor Licenses and Control	11	5	16	69
Medical Radiologic	0	1	1	0
Office of the Attorney General	0	4	4	0
Peace Officers Standards and Training	2	1	3	67
Pharmacy Board	2	0	2	100
Physical Therapy	1	0	1	100
Registrar of Contractors	387	274	661	59
Secretary of State	1	0	1	100
State Board for Charter Schools	2	0	2	100
State Board Private Postsecondary Education	0	15	15	0
State Board of Accountancy	0	1	1	0
State Board of Nursing	16	9	25	64
State Land Department	4	1	5	80
Structural Pest Control Commission	0	3	3	0
Water Quality Appeals Board	1	0	1	100
Total	1009	495	1504	67%

2. Evaluation

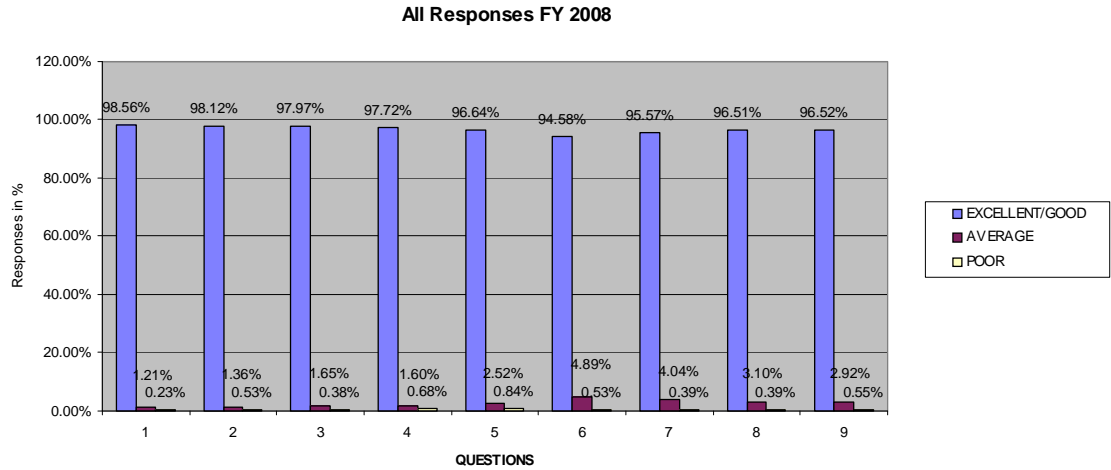
a. Results of Public Evaluation:

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.

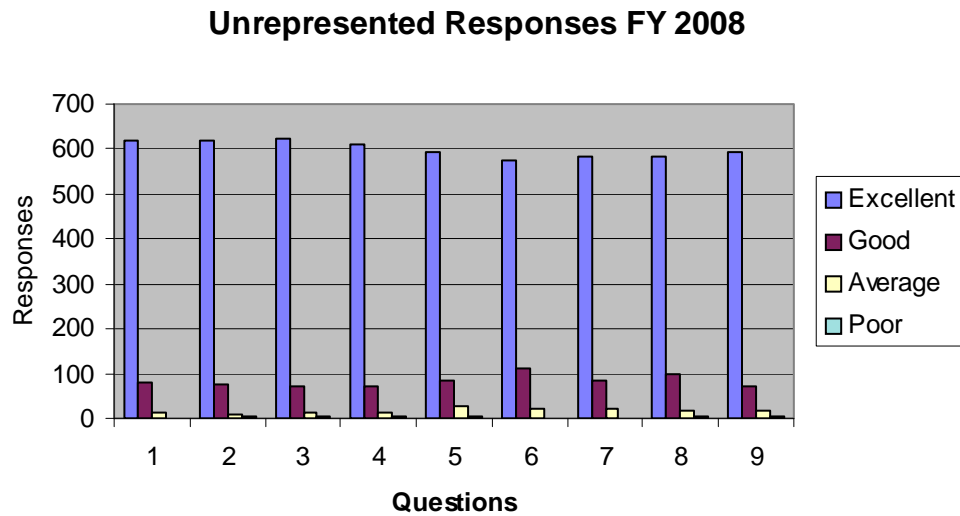
Those responding are asked to rate the following categories, on a scale of excellent, good, satisfactory, or poor:

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 94.58% to 98.56% of responses.



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

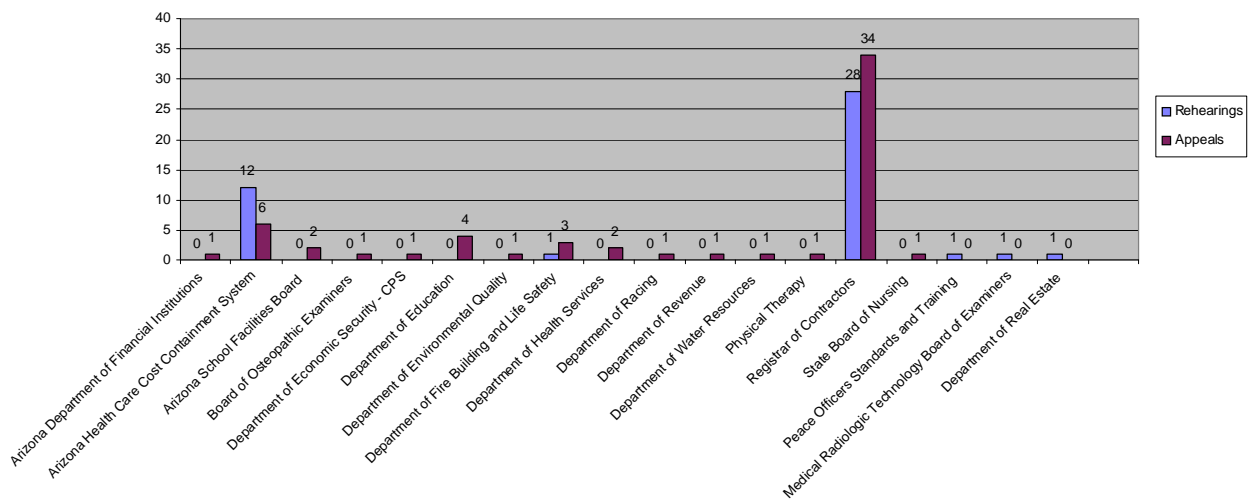


b. Incidence of Rehearing and Appeal:

Rehearings are permitted pursuant to A.R.S. § 41-1092.09 under certain conditions. In FY 2008, the rehearing rate (defined as rehearings scheduled divided by cases heard) was 1.58%.

Appeals to Superior Court are provided for pursuant to A.R.S. § 41-1092.08(H). In FY 2008, the judicial appeal rate (defined as judicial appeals taken divided by cases decided on the merits) was 2.15%. As reflected in the following diagram, rehearings and judicial appeals in FY 2008 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.

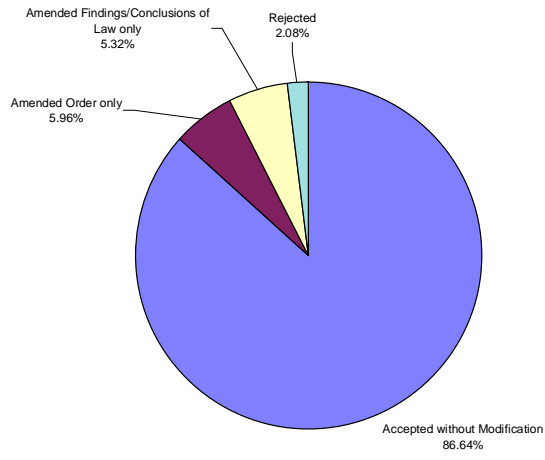
Judicial Appeals and Rehearings FY 2008



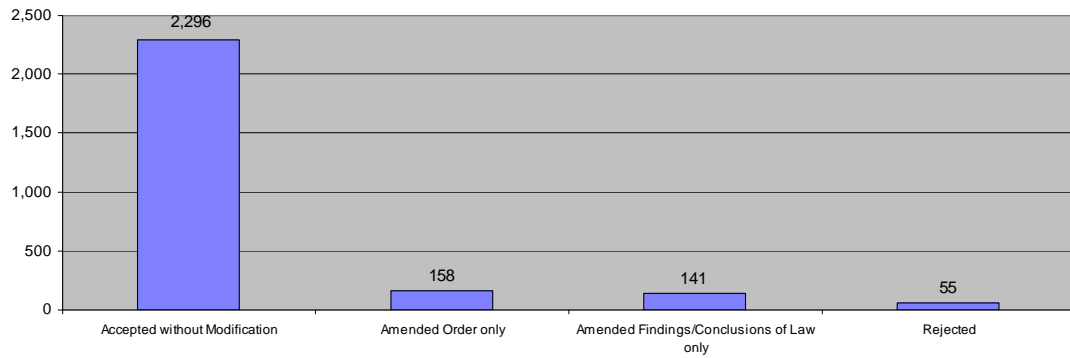
IV. Acceptance of Administrative Law Judge Decisions by Agencies

1. Agency Action

Agency acceptance of the Administrative Law Judge Decisions is very high. 86.64% of all decisions acted upon by the agencies were accepted without modification. Agency acceptance was 92.6% if viewed from the vantage point of acceptance of Findings of Fact and Conclusions of Law, the core function of the Administrative Law Judge. 52.8% 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.

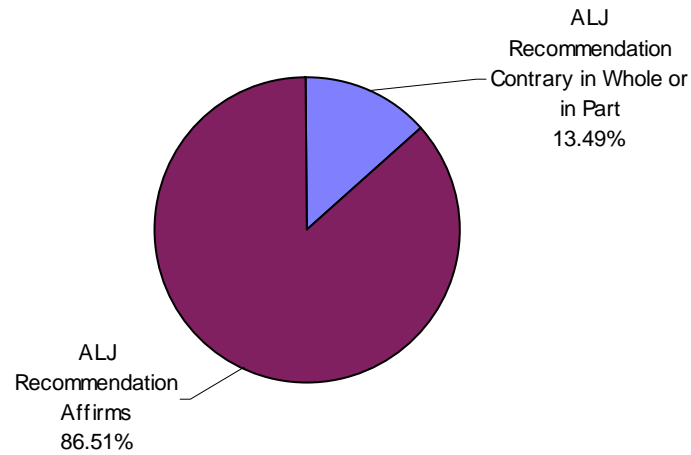


The following chart reports the breakdown of agency response by agency. The following are detailed: cases which became moot before agency action; cases which were subsequently certified by the OAH due to agency inaction; and cases which were not subject to agency modification or rejection by statute.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

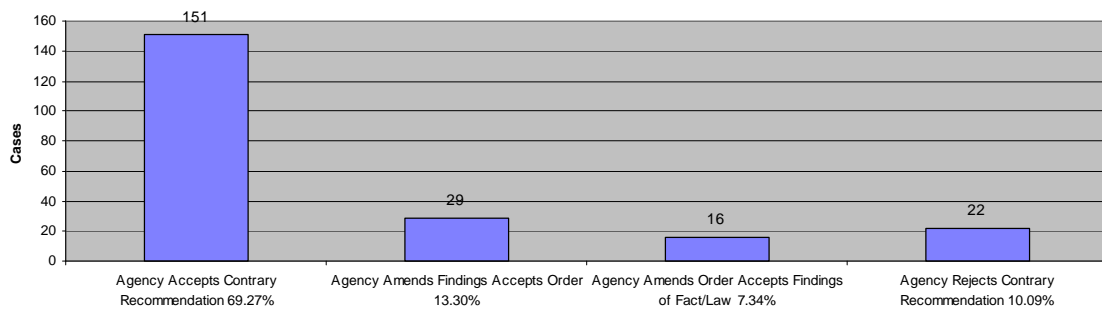
	Accept	Amend Order	Amend Findings	Reject	Certified	Moot	Final	Total
Accountancy	2	1	0	0	0	0	0	3
Dept. of Commerce	0	0	0	0	0	3	3	6
Education	0	0	0	0	0	0	5	5
AHCCCS	783	22	87	10	36	7	0	945
Retirement	5	0	1	1	0	1	0	8
Charter Schools	0	0	1	0	0	0	0	1
Fire, Bldg, Life, Safety	41	0	0	0	0	12	25	78
Health Services	1	0	0	0	0	0	0	1
Financial Institutions	6	2	0	0	0	0	0	8
Appraisal	3	1	0	0	0	1	0	5
DPS - Student Trans.	4	0	0	0	0	2	0	6
Chiropractic Ex.	0	4	0	0	0	0	0	4
DES - CPS	108	3	8	0	3	0	0	122
DES - Weapons Permit	0	0	0	0	0	1	0	1
DEQ	15	0	0	0	0	1	0	16
Behavioral Health Ex.	181	4	0	0	3	2	0	190
Weights and Measures	1	1	0	0	0	7	0	9
Water Resources	0	1	1	0	0	0	0	2
Gaming	3	0	0	1	0	1	0	5
Insurance	26	0	0	0	0	17	0	43
AJ Fire District	0	0	0	0	0	0	3	3
Land Department	4	0	0	0	0	1	0	5
Liquor Licenses	22	8	0	0	1	0	0	31
Arizona Lottery	2	0	0	0	0	1	0	3
Arizona Medical Board	2	4	2	0	3	0	0	11
Medical Radiologic	5	1	1	0	0	0	0	7
Nursing Care	2	0	0	0	0	0	0	2
Sec. of State-Notary	5	0	0	0	0	3	0	8
State Board of Nursing	10	1	0	0	0	0	0	11
Osteopathic Examiners	0	0	1	0	0	0	0	1
Medical Bd-Physicians	0	0	0	1	0	0	0	1
Pharmacy Board	0	0	1	0	0	0	0	1
POST	4	0	0	0	0	0	1	5
Pvt. Postsecondary Ed.	0	0	5	0	0	0	0	5
Physical Therapy	0	0	0	0	1	0	0	1
Department of Racing	62	0	0	0	0	6	0	68
Radiation Regulatory	0	0	0	0	0	1	0	1
Real Estate	13	3	1	0	0	0	0	17
Registrar of Contractors	983	102	32	19	8	6	0	1150
AZ School Facilities Bd.	2	0	0	0	0	0	0	2
Secretary of State	1	0	0	0	0	0	0	1
Total	2296	158	141	32	55	73	37	2792

In FY 2008, Administrative Law Judges rendered decisions that were contrary in whole or contrary in part to agencies' original positions in 13.49% of cases. Agency acceptance of contrary decisions was high at 89.91%.

Recommendations Contrary to Original Agency Action FY 2008



Agency Response to Contrary Recommendations FY 2008



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

Client	Accepted	Amended Order	Amended Findings	Rejected	Certified	Total
State Board of Accountancy	1	1	0	0	0	2
Arizona Department of Commerce	0	0	0	0	1	1
AHCCCS	49	12	9	12	6	88
Arizona State Retirement System	1	0	0	0	0	1
Department of Building and Fire Safety	2	0	0	0	4	6
Board of Behavioral Health Examiners	0	1	0	0	0	1
Financial Institutions	0	1	0	0	0	1
Board of Appraisal	0	0	0	0	1	1
DES - CPS	24	1	3	2	0	30
Department of Environmental Quality	10	0	0	0	0	10
Department of Health Services	13	2	0	3	0	18
Department of Weights and Measures	1	1	0	0	3	5
Department of Gaming	0	0	0	0	1	1
Department of Insurance	0	0	0	0	3	3
State Land Department	2	0	0	0	0	2
Liquor Licenses and Control	5	4	0	1	0	10
Arizona Lottery	0	0	0	0	1	1
Arizona Medical Board	0	1	2	2	0	5
Secretary of State-Notary	1	0	0	0	3	4
State Board of Nursing	1	1	0	0	0	2
Board of Osteopathic Examiners	0	0	1	0	0	1
Peace Officers Standards and Training	1	0	0	0	0	1
Physical Therapy	0	0	0	1	0	1
Department of Racing	5	0	0	0	1	6
Department of Real Estate	1	2	1	0	0	4
Registrar of Contractors	10	2	0	1	0	13
Total	127	29	16	22	24	218

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 2008, 62 Administrative Law Judge Decisions were certified by the OAH as final administrative decisions.

Agency	Certified
Arizona Department of Financial Institutions	1
AHCCCS	6
Arizona Lottery	1

Arizona State Retirement System	1
Board of Appraisal	1
Department of Environmental Quality	1
Department of Fire Building and Life Safety	11
Department of Insurance	14
Department of Public Safety - Concealed Weapons Permit Unit	1
Department of Public Safety - Student Transportation	2
Department of Racing	4
Department of Weights and Measures	6
Radiation Regulatory Agency	1
Registrar of Contractors	7
Secretary of State	4
State Land Department	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 2008, 10 motions were filed and 1 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.