

# The Office of Administrative Hearings

The Fourteenth Annual Report

to

Governor Janice K. Brewer

Senator Robert Burns, President of the Senate

Representative Kirk Adams, 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, 2009

## 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. In FY 2009, there were two OAH locations, Phoenix and Tucson, with 27 full-time positions, including the Director, the Office Manager, 13 Administrative Law Judges, and 9 support staff. In addition to conducting hearings in Phoenix and Tucson, the OAH videoconferenced Registrar of Contractors hearings in Flagstaff, Kingman, Lake Havasu City, Show Low, 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 2009 indicate agency acceptance of Administrative Law Judge Decisions without modification was 85.42%. Agency acceptance of Findings of Fact and Conclusions of Law without modification was 93.13%. Rehearings (1.44%) and Appeals (1.84%) were rare. Evaluations by participants continue to indicate that Administrative Law Judges and the OAH were rated excellent or good in 95.4% 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 completion rate for cases in FY 2009 was 101%.

## II. Continued Development of the Office

### 1. Implemented Electronic Filing of Hearing Requests

OAH implemented electronic filing of hearing requests in lieu of requests being submitted and returned by fax. The paperless system created savings in paper and staff time.

### 2. Developed Electronic Filing of Hearing Records

In cooperation with the Registrar of Contractors, OAH has developed a portal to allow electronic transfer of agency records. The paperless system is expected to create significant savings in paper and staff time for both agencies. The technology will be expanded to all agencies in FY 2010.

### 3. Business Continuity

OAH has completed its latest phase of business continuity management. The Phoenix database is fully restorable, within a 8 hour window of real time, through the use of flash drive technology. The OAH can be fully operational within 4 hours of a disaster, including its website and portal.

### 4. Professional Development

Administrative Law Judge Michael Wales was appointed to the Tempe City Court.

### 5. Website Redesign

OAH completed its web redesign as mandated by the Governor's Information Technology Agency (GITA).

## III. Summary of Agency Use of OAH Services

### 1. Case Management

#### a. Breakdown of Cases Filed by Agency (FY 2009):

6,848 cases were filed with the OAH in FY 2009. The distribution among the agencies, boards, commissions, or political subdivisions (Agencies) are as follows (in descending order by number of cases filed):

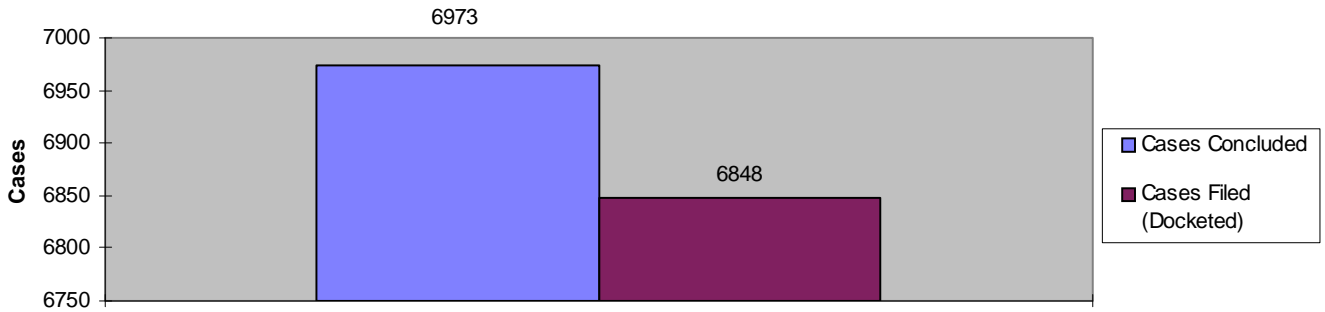
Arizona Health Care Cost Containment System	2827
Registrar of Contractors	2118
Department of Health Services	475
Department of Weights and Measures	422
Department of Economic Security	128
Department of Fire, Building and Life Safety	116
Arizona Department of Financial Institutions	85

Department of Real Estate	78
Department of Education - Special Ed	67
Department of Insurance	64
Department of Environmental Quality	62
State Board of Nursing	59
Department of Revenue	57
Department of Public Safety	46
Liquor Licenses and Control	45
Board of Appraisal	34
Arizona Medical Board	23
Secretary of State	16
Office of Pest Management	15
Department of Racing	13
State Board of Accountancy	12
Arizona Department of Commerce	11
Arizona State Retirement System	9
State Land Department	9
Peace Officers Standards and Training	7
Department of Agriculture	6
Department of Gaming	6
Board of Podiatry Examiners	5
Medical Radiologic Technology Board of Examiners	5
Arizona State Department of Housing	4
Board of Dental Examiners	4
Department of Administration	3
Department of Water Resources	3
Board of Nursing Care Institution Administrators Examiners	2
Physical Therapy	2
Apache Junction Fire District	1
Arizona Division of Emergency Management	1
Arizona Lottery	1
Avra Valley Fire District	1
Citizens Clean Elections Commission	1
Maricopa County Department of Elections	1
State Board for Charter Schools	1
State Board of Cosmetology	1
State Schools for the Deaf and the Blind	1
Town of Gilbert	1
<b>Total</b>	<b>6848</b>

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

In FY 2009, the conclusion rate (defined as cases concluded divided by new cases filed) was 101%.

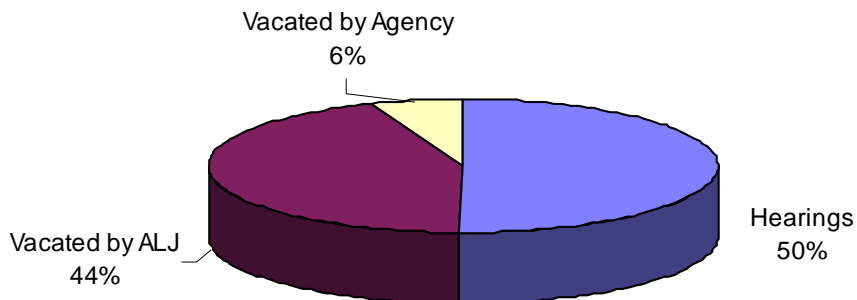
**Comparison of Cases Filed v. Cases Concluded**



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:

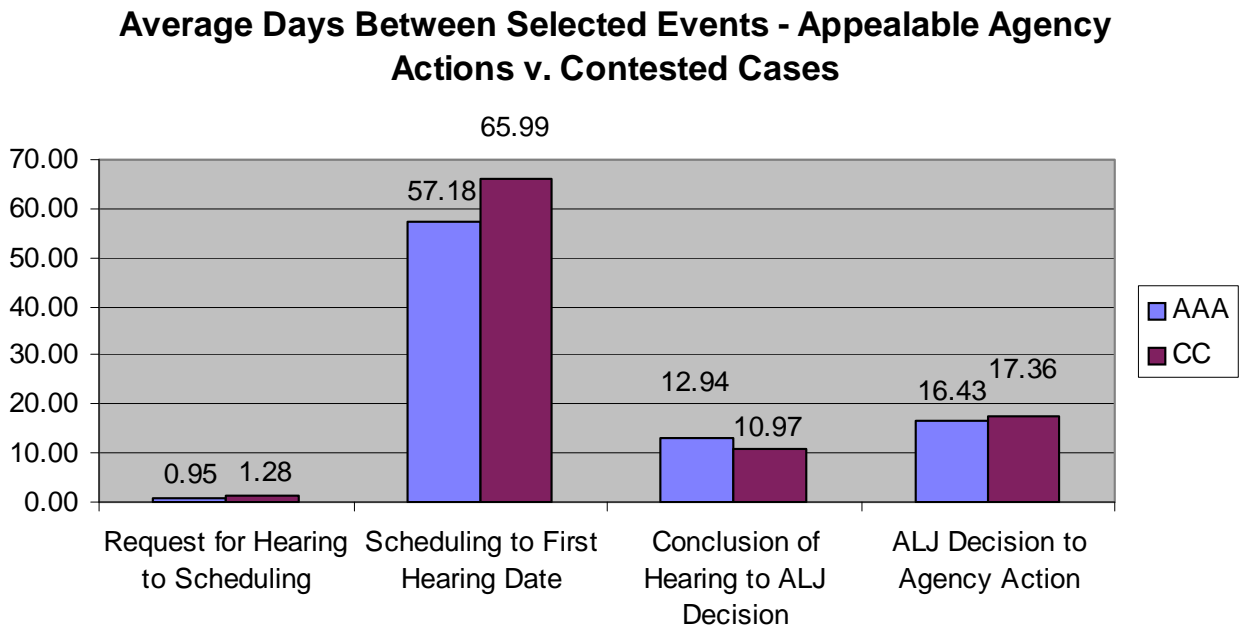
**Disposition of Concluded Cases FY 2009**



**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.

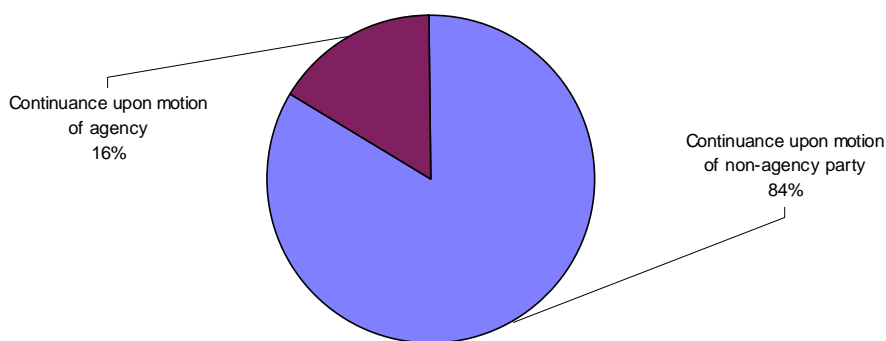
The following diagram illustrates the average timelines:



**d. Incidence of Continuance:**

A single continuance in FY 2009 added an average of 68.97 days to the total length of a case. Although 61.36% of all continuance requests were granted in FY 2009, 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 (848) divided by the total number of cases first scheduled (6,848), was 12.38%. The ratio of first hearing settings (6,985) to continued settings on the calendar (848) was 1 to 0.12.

The following chart illustrates the source of continuances.



The following list is a breakdown of FY 2009 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	-
Arizona Department of Financial Institutions	5	-
Arizona Health Care Cost Containment System	124	98
Arizona Medical Board	7	2
Arizona State Retirement System	1	-
Avra Valley Fire District	1	-
Board of Appraisal	3	1
Board of Behavioral Health Examiners	2	-
Board of Dental Examiners	1	-
Board of Podiatry Examiners	2	2
Department of Administration	1	-
Department of Agriculture	1	-
Department of Economic Security	9	2
Department of Economic Security - CPS	6	-

Department of Education	10	-
Department of Education - Special Ed	25	4
Department of Environmental Quality	14	-
Department of Fire, Building and Life Safety	15	-
Department of Fire, Building and Life Safety - H/C	3	-
Department of Gaming	2	-
Department of Health Services	49	12
Department of Insurance	9	2
DPS - Concealed Weapons Permit Unit	2	-
DPS - Criminal History Records	3	-
DPS - Student Transportation	3	-
Department of Racing	8	-
Department of Real Estate	10	2
Department of Revenue	17	1
Department of Weights and Measures	1	-
Liquor Licenses and Control	3	2
Maricopa County Department of Elections	1	-
Office of Pest Management	1	-
Peace Officers Standards and Training	2	-
Registrar of Contractors	350	7
Secretary of State	3	-
State Board for Charter Schools	2	-
State Board of Accountancy	2	-
State Board of Nursing	1	3
State Land Department	5	-
Water Quality Appeals Board	1	1
<b>Total</b>	<b>709</b>	<b>139</b>

The following chart reflects the number of motions to continue that were entertained in FY 2009 and the percentage granted:

	Continuance Granted	Continuance Denied	Total Motions	% Granted
Arizona Department of Commerce	9	5	14	64
Arizona Department of Financial Institutions	6	8	14	43
Arizona Health Care Cost Containment	231	98	329	70
Arizona Medical Board	10	5	15	67
Arizona State Department of Housing	1	-	1	100
Arizona State Retirement System	1	1	2	50
Board of Appraisal	4	5	9	44
Board of Behavioral Health Examiners	1	-	1	100
Board of Dental Examiners	1	2	3	33
Board of Podiatry Examiners	4	-	4	100
Department of Administration	-	1	1	-
Department of Agriculture	1	-	1	100
Department of Economic Security	13	13	26	50
Department of Economic Security - CPS	1	4	5	20
Department of Education	8	-	8	100
Department of Education - Special Ed	22	2	24	92
Department of Environmental Quality	32	2	34	94



Department of Fire, Building and Life Safety	17	13	30	57
DFBLS - Planned Community/Condominium	2	2	4	50
Department of Gaming	1	-	1	100
Department of Health Services	58	27	85	68
Department of Insurance	11	14	25	44
DPS - Concealed Weapons Permit Unit	2	-	2	100
DPS - Criminal History Records	4	3	7	57
DPS - Student Transportation	2	1	3	67
Department of Racing	11	3	14	79
Department of Real Estate	12	13	25	48
Department of Revenue	24	6	30	80
Department of Weights and Measures	1	1	2	50
Liquor Licenses and Control	3	3	6	50
Office of Pest Management	2	2	4	50
Peace Officers Standards and Training	3	1	4	75
Registrar of Contractors	330	285	615	54
Secretary of State	3	3	6	50
State Board for Charter Schools	2	1	3	67
State Board of Accountancy	2	2	4	50
State Board of Nursing	7	5	12	58
State Land Department	5	2	7	71
Water Quality Appeals Board	1	1	2	50
<b>Total</b>	<b>848</b>	<b>534</b>	<b>1382</b>	<b>61.36%</b>

## 2. Evaluation

### a. Results of Public Evaluation:

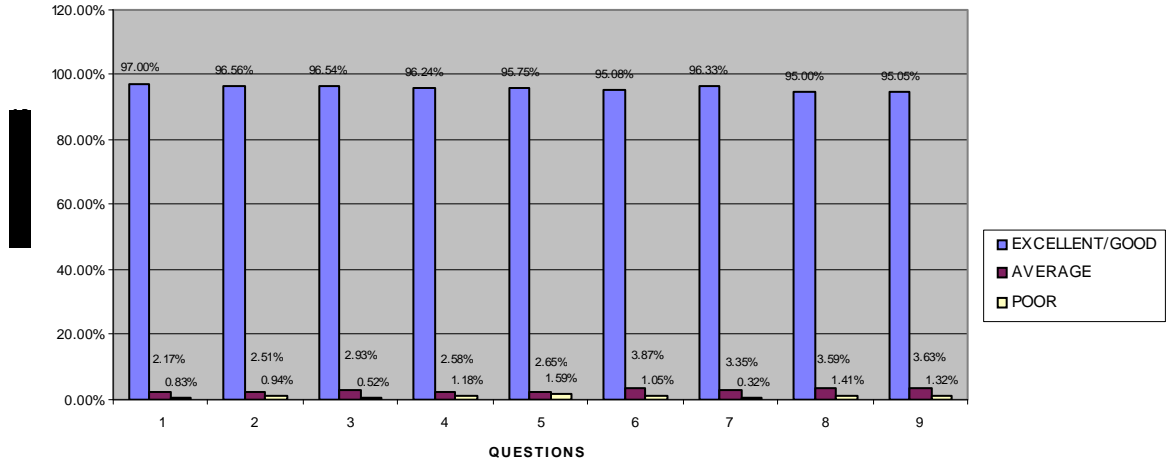
Since November 1996, the OAH has administered an evaluation procedure. The support staff provides a copy of the evaluation before the hearing in order to encourage all participants to respond. A discussion of the evaluation form is included in a video played before each hearing, or is otherwise addressed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

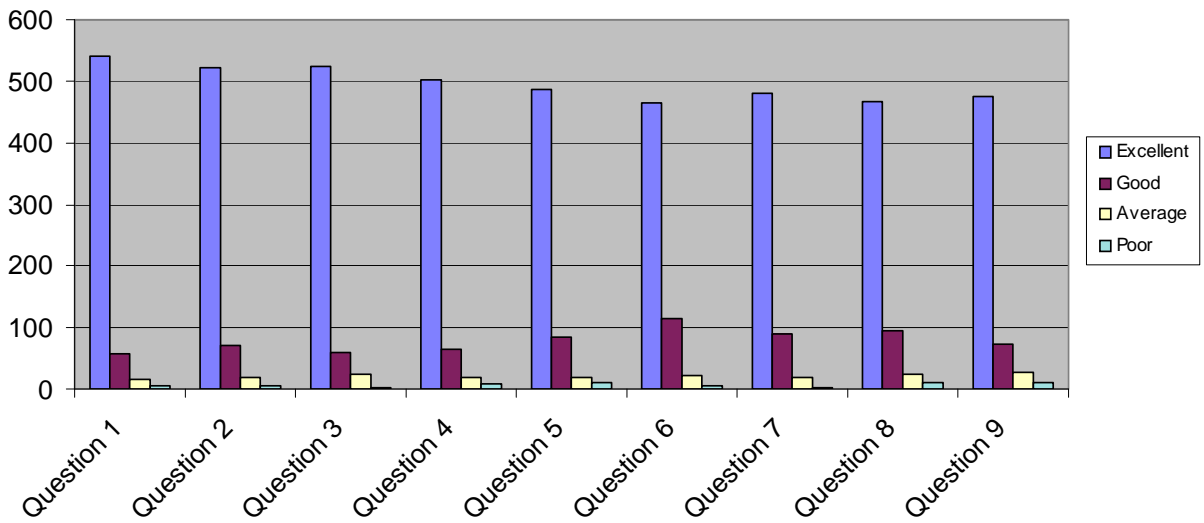
The results indicate that satisfaction is high among all groups, with those responding rating the OAH excellent to good in 95% to 97% of responses.

### All Responses FY 2009 To Date



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

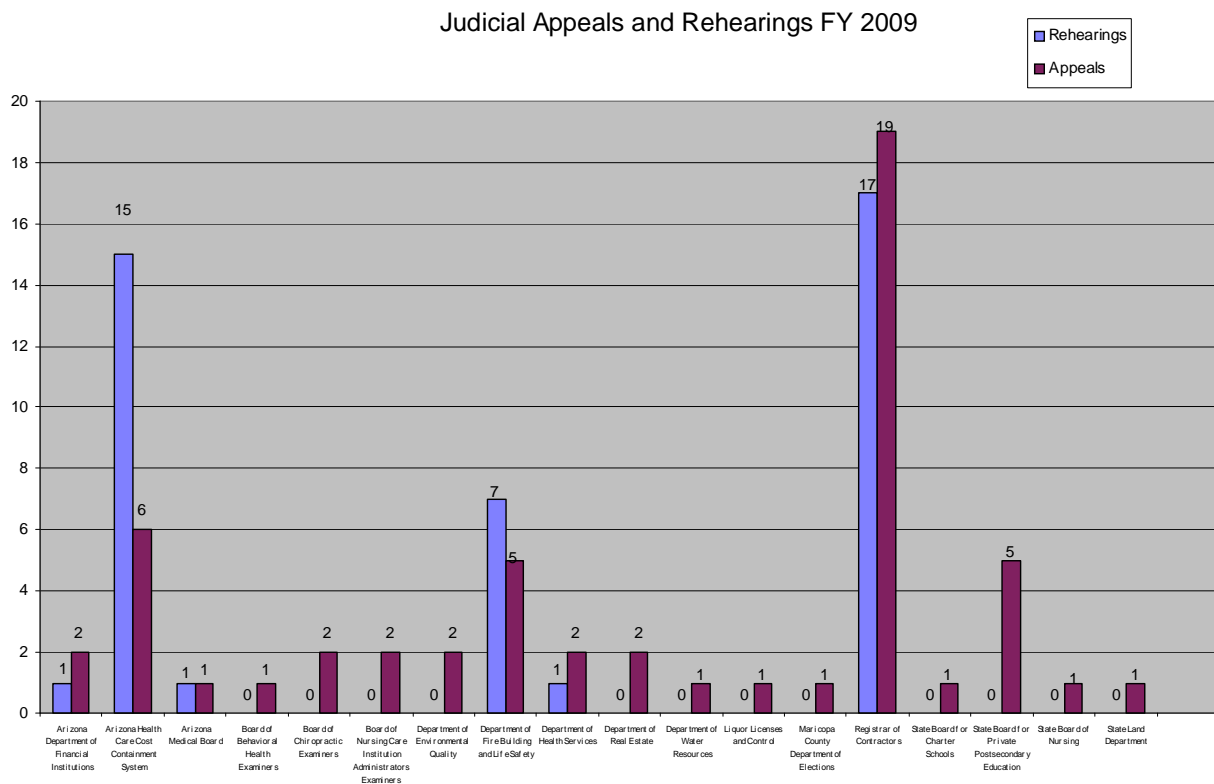
### Unrepresented Responses



## b. Incidence of Rehearing and Appeal:

Rehearings are permitted pursuant to A.R.S. § 41-1092.09 under certain conditions. In FY 2009, the rehearing rate (defined as rehearings scheduled divided by cases heard) was 1.44%.

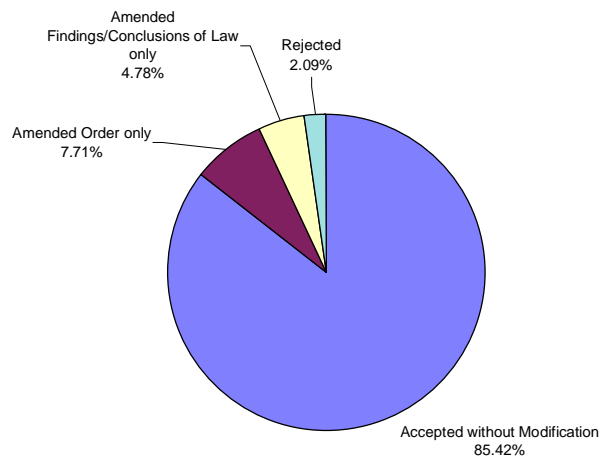
Appeals to Superior Court are provided for pursuant to A.R.S. § 41-1092.08(H). In FY 2009, the judicial appeal rate (defined as judicial appeals taken divided by cases decided on the merits) was 1.84%. As reflected in the following diagram, rehearings and judicial appeals in FY 2009 were relatively rare. 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.



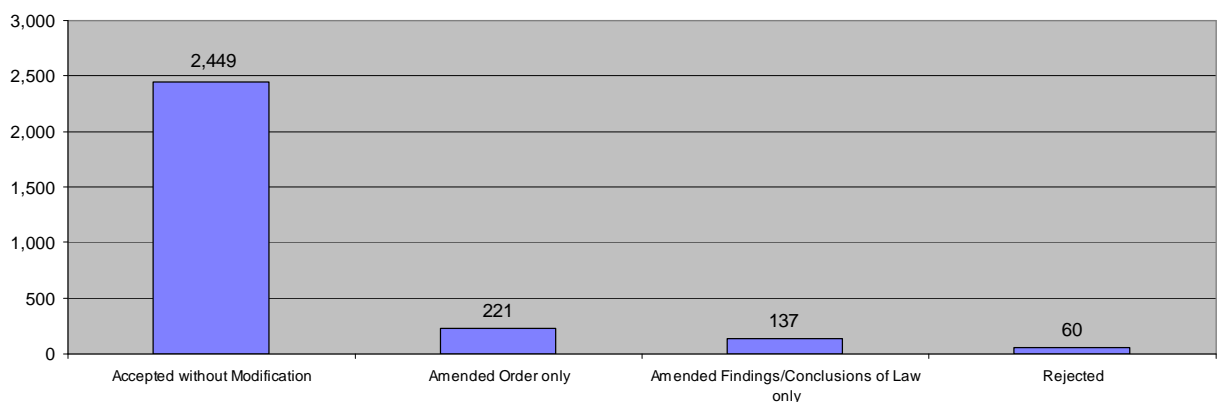
# IV. Acceptance of Administrative Law Judge Decisions by Agencies

## 1. Agency Action

Agency acceptance of the Administrative Law Judge Decisions is very high. 85.42% of all decisions acted upon by the agencies were accepted without modification. Agency acceptance was 93.13% if viewed from the vantage point of acceptance of Findings of Fact and Conclusions of Law, the core function of the Administrative Law Judge. 61.7% 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.

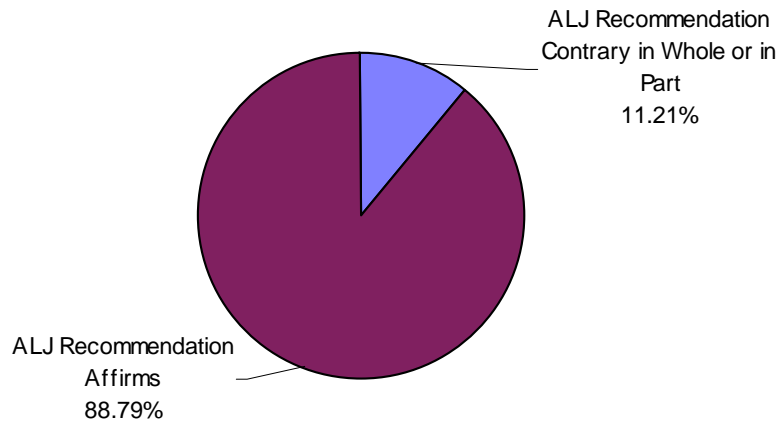


The following chart reports the breakdown of agency response by agency. The following are detailed: cases which became moot before agency action; cases which were subsequently certified by the OAH due to agency inaction; and cases which were not subject to agency modification or rejection by statute. 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
AJ Fire District	-	-	-	-	-	-	1	1
Dept. of Commerce	-	-	-	-	-	5	-	5
Ed. - Special Education	-	-	-	-	-	-	1	1
Financial Institutions	13	1	-	-	1	1	-	16
AHCCCS	905	17	112	5	25	13	-	1077
Lottery	2	-	-	-	-	-	-	2
Arizona Medical Board	6	6	-	-	1	-	-	13
State Retirement System	2	-	-	-	-	-	-	2
POST	2	-	-	-	-	-	1	3
Board of Appraisal	1	13	-	-	7	-	-	21
Behavioral Health Ex.	-	2	-	-	-	-	-	2
Chiropractic Examiners	1	-	1	-	-	-	-	2
Dental Examiners	-	1	-	-	-	-	-	1
Nursing Care	-	-	-	-	2	-	-	2
Podiatry Examiners	3	-	-	-	-	-	-	3
Dept. of Administration	1	-	-	-	-	-	-	1
Agriculture	-	-	-	-	-	5	-	5
DES	2	-	-	-	-	-	-	2
DES- CPS	103	-	3	-	1	-	-	107
DEQ	4	-	1	-	-	-	-	5
Fire, Bldg, Life, Safety	68	4	-	-	1	14	7	94
Gaming	3	-	-	-	-	-	-	3
Dept. of Health Services	204	2	6	1	1	3	-	217
Insurance	15	-	-	-	-	12	-	27
DPS - Concealed Weapons	2	-	-	-	-	-	-	2
DPS - Crim. History Rec.	11	-	-	-	-	4	-	15
DPS - Student Trans.	2	1	-	-	1	-	-	4
Department of Racing	13	-	-	-	-	-	-	13
Department of Real Estate	15	2	-	-	1	-	-	18
Weights and Measures	-	-	3	1	-	17	-	21
Liquor Licenses	9	1	-	-	1	2	-	13
Maricopa County	1	-	-	-	-	-	-	1
Medical Radiologic	2	-	-	-	-	-	-	2
Office of Pest Management	1	-	-	-	-	-	-	1
Physical Therapy	2	-	-	-	-	-	-	2
Registrar of Contractors	1036	166	10	18	18	2	-	1250
Secretary of State	3	-	-	-	-	-	-	3
Secretary of State - Notary	8	-	-	-	-	2	-	10
Charter Schools	-	1	1	-	-	-	-	2
Accountancy	-	2	-	-	-	1	-	3
Nursing	7	2	-	-	-	-	-	9
Deaf and the Blind	2	-	-	-	-	-	-	2
Town of Gilbert							1	1
<b>Total</b>	<b>2449</b>	<b>221</b>	<b>137</b>	<b>25</b>	<b>60</b>	<b>81</b>	<b>11</b>	<b>2984</b>

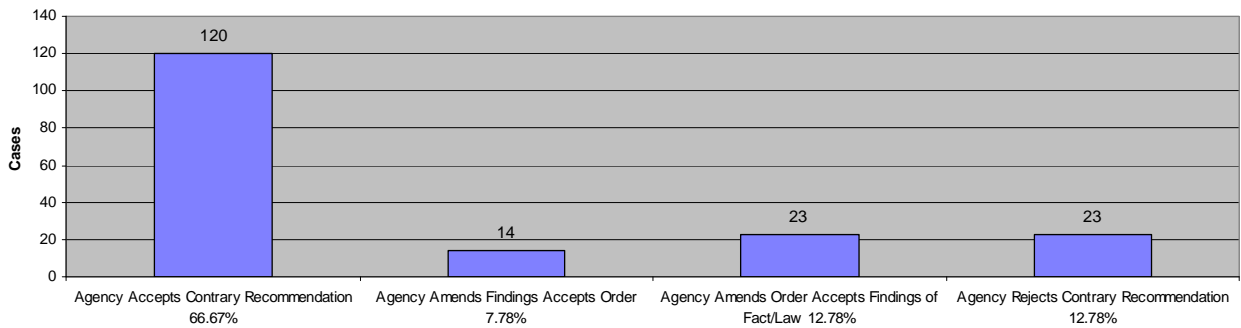
In FY 2009, Administrative Law Judges rendered decisions that were contrary in whole or contrary in part to agencies' original positions in 11.21% of cases.

**Recommendations Contrary to Original Agency Action FY 2009**



Agency acceptance of contrary decisions was high at 87.23%.

**Agency Response to Contrary Recommendations FY 2009**



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

Client	Accepted	Amended Order	Amended Findings	Rejected	Certified	Total
Financial Institutions	1	1	-	-	-	2
AHCCCS	43	5	15	16	3	82
Arizona Medical Board	2	3	-	1	-	6
Nursing Care	-	-	-	2	-	2
Board of Podiatry Examiners	1	-	-	-	-	1
Department of Agriculture	-	-	-	-	1	1
Fire, Bldg, Life, Safety	5	-	-	-	5	10
DES - CPS	12	-	1	1	-	14
Department of Health Services	23	2	4	1	1	31
Department of Insurance	2	-	-	-	1	3
DPS - Concealed Weapons	1	-	-	-	-	1
DPS - Student Trans.	-	1	-	-	-	1
Department of Racing	3	-	-	-	-	3
Department of Real Estate	3	1	-	1	-	5
Weights and Measures	-	-	3	-	2	5
Liquor Licenses	2	-	-	1	-	3
Maricopa County	1	-	-	-	-	1
Registrar of Contractors	4	-	-	-	-	4
Secretary of State-Notary	2	-	-	-	-	2
Nursing	1	1	-	-	-	2
Town of Gilbert	1	-	-	-	-	1
<b>Total</b>	<b>107</b>	<b>14</b>	<b>23</b>	<b>23</b>	<b>13</b>	<b>180</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 2009, 95 Administrative Law Judge Decisions were certified by the OAH as final administrative decisions.

Agency	Certified
Arizona Department of Commerce	8
Arizona Department of Financial Institutions	1
Arizona Health Care Cost Containment System	13
Department of Agriculture	5
Department of Fire Building and Life Safety	16
Department of Gaming	1
Department of Health Services	4
Department of Insurance	15
Department of Public Safety - Criminal History Records	4
Department of Racing	2
Department of Weights and Measures	18

Liquor Licenses and Control	2
Registrar of Contractors	3
Secretary of State	2
State Board of Accountancy	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 2009, 9 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.