

# The Office of Administrative Hearings

The Sixteenth Annual Report

to

Governor Janice K. Brewer

Senator Russell Pearce, President of the Senate

Representative Andy Tobin, 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, 2011

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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. The Phoenix office currently has 16 full-time positions, including the Director, the Office Manager, 9 Administrative Law Judges, and 5 support staff. In addition to having conducted hearings in Phoenix, 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 2011 indicate agency acceptance of Administrative Law Judge Decisions without modification was 81.60%. Agency acceptance of Findings of Fact and Conclusions of Law without modification was 88.72%. Rehearings (.70%) and Appeals (2.74%) were rare. Evaluations by participants continue to indicate that Administrative Law Judges and the OAH were rated excellent or good in 96.6% 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 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 incorrect citations 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 2011 was 99%.

## II. Continued Development of the Office

### 1. Tucson Office Re-Opened

In November 2009, the Tucson office was closed and 4 positions (2 Administrative Law Judge and 2 support staff) were eliminated.

In June 2011, the Tucson Office was reopened at one-tenth the cost. The savings resulted from the combination of eliminating all support staff as the result of technological enhancements, such as the electronic exchange of case requests, agency records, and administrative law judge decisions, reduced hours, and moving from private to ADOA space.

### 2. Electronic Submission of Final Agency Actions

The OAH has begun moving to electronic receipt of final agency actions with the Registrar of Contractors as its pilot agency.

### 3. Planned Community and Condominium Disputes Returned to the OAH

Laws 2011, Chapter 185, Section 4 (SB1148) restored the dispute process for planned community and condominium disputes to the OAH, commencing July 20, 2011.

## III. Summary of Agency Use of OAH Services

### 1. Case Management

#### a. Breakdown of Cases Filed by Agency (FY 2011):

4996 cases were filed with the OAH in FY 2011. The distribution among the agencies, boards, commissions, or political subdivisions (Agencies) are as follows (in descending order by number of cases filed):

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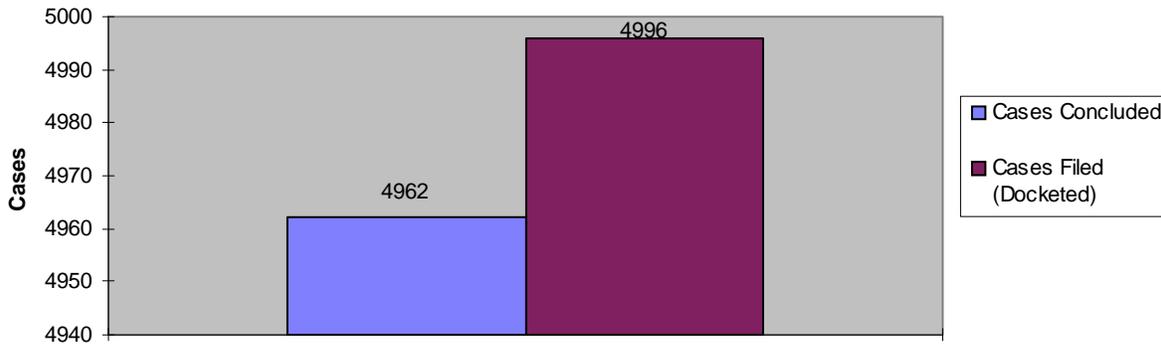
Arizona Health Care Cost Containment System	2526
Registrar of Contractors	958
Department of Health Services	370
Department of Weights and Measures	354
Department of Economic Security - CPS	143
Department of Real Estate	105
State Board of Nursing	66
Department of Insurance	61
Department of Environmental Quality	57
Department of Education - Special Ed	56
Arizona Department of Revenue	52
Department of Fire Building and Life Safety	30
Arizona Department of Financial Institutions	27
Arizona State Department of Housing	19

Arizona State Retirement System	17
Arizona Medical Board	14
State Board of Accountancy	14
Board of Technical Registration	12
Liquor Licenses and Control	12
Peace Officers Standards and Training	11
Department of Gaming	10
Board of Appraisal	10
Office of Pest Management	8
Secretary of State	8
Board of Dental Examiners	6
Department of Public Safety - Criminal History Records	6
Department of Education	5
State Land Department	5
Arizona Board of Osteopathic Examiners In Medicine and Surgery	4
Department of Public Safety - Student Transportation	4
State Board for Charter Schools	4
Department of Racing	3
Board of Behavioral Health Examiners	2
Board of Psychologist Examiners	2
Naturopathic Physicians Medical Board	2
Water Quality Appeals Board	2
Arizona State Board of Physical Therapy	1
Department of Public Safety - Concealed Weapons Permit Unit	1
Department of Water Resources	1
Maricopa County Attorney's Office	1
Secretary of State - HAVA	1
Avra Valley Fire District	1
Maricopa County Department of Elections	1
State Schools for the Deaf and the Blind	1
Board of Podiatry Examiners	1
State Board of Cosmetology	1
City of Tucson	1
<b>Total</b>	<b>4996</b>

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

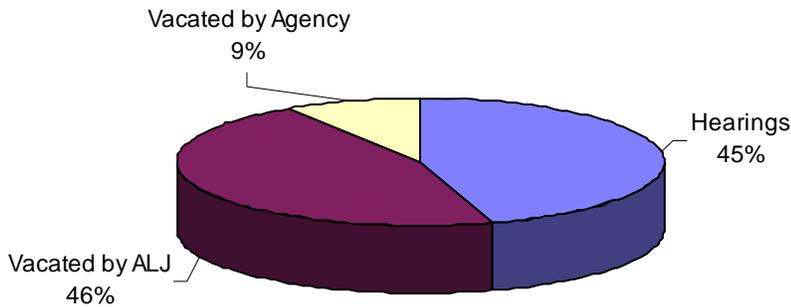
In FY 2011, the conclusion rate (defined as cases concluded divided by new cases filed) was 99%.

Comparison of Cases Filed v. Cases Concluded



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

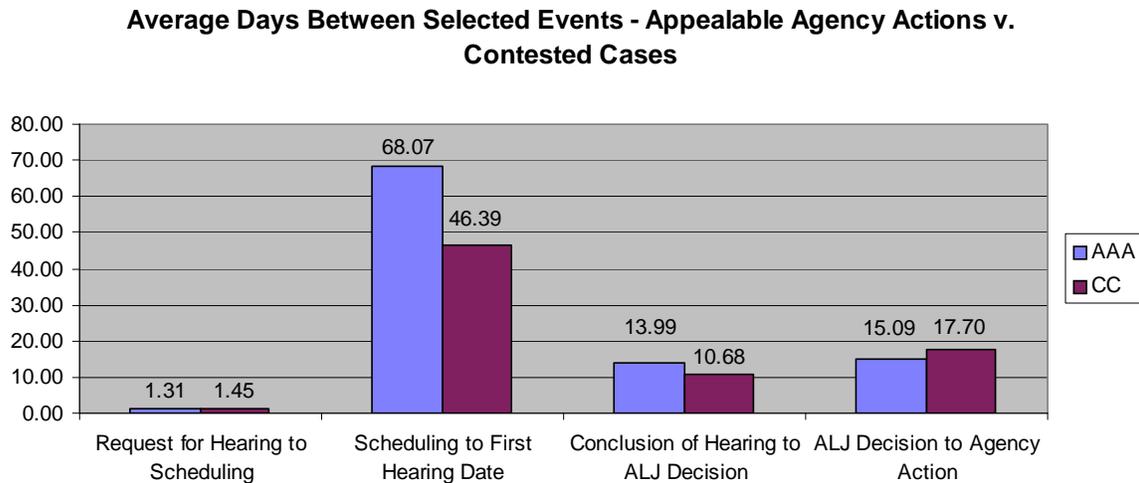
Disposition of Concluded Cases FY 2011



**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. These requirements have been relaxed to allow cases to be set as soon as “reasonably possible.” See Laws 2009, Third Special Session, Chapter 7, § 37. 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:

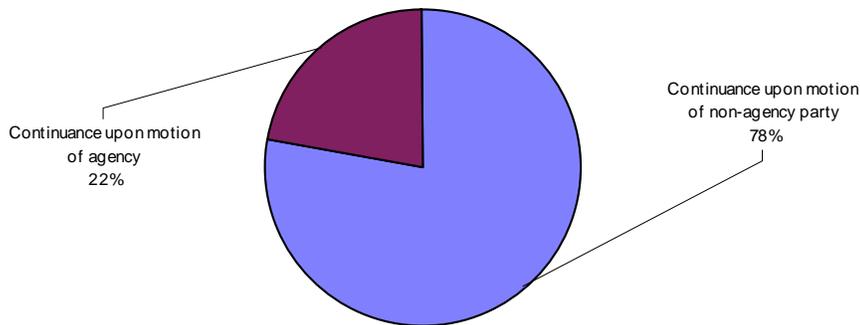


**d. Incidence of Continuance:**

A single continuance in FY 2011 added an average of 49.84 days to the total length of a case. Although 67.48% of all continuance requests were granted in FY 2011, 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 continuances, defined as the number of continuances granted (523\*) divided by the total number of cases first scheduled (4,962), was 10.54%. The ratio of first hearing settings (4,990) to continued settings on the calendar (523\*) was 1 to 0.10.

(\*compare fig. 1, page 6 and fig. 2, page 7)

The following chart illustrates the source of continuances:



The following list is a breakdown of cases actually set for a continued hearing date on the FY 2011 calendar and their sources, by agency. (Note: the numbers in fig. 1, below, differ from those in fig. 2, page 7, because a motion for continuance granted in one fiscal year may result in the continued date being set in the following fiscal year.)

fig. 1

<b>AGENCY</b>	<b>Continued - Motion by non- agency party</b>	<b>Continued - Motion by agency party</b>
Arizona Department of Financial Institutions	1	1
Arizona Department of Revenue	13	1
Arizona Health Care Cost Containment System	105	65
Arizona Lottery	2	0
Arizona State Retirement System	4	1
Avra Valley Fire District	2	0
Board of Appraisal	0	5
Board of Podiatry Examiners	1	0
Board of Psychologist Examiners	1	0
Department of Economic Security - CPS	15	12
Department of Education - Special Ed	33	6
Department of Environmental Quality	2	0
Department of Fire, Building and Life Safety	6	0
Department of Gaming	2	0
Department of Health Services	26	10

Department of Insurance	4	2
Department of Racing	3	0
Department of Real Estate	4	1
Department of Weights and Measures	5	1
DPS - Student Transportation	2	0
Liquor Licenses and Control	1	1
Maricopa County Department of Elections	1	0
Office of Pest Management	0	1
Osteopathic Examiners Board	4	2
Peace Officers Standards and Training	1	0
Physical Therapy	2	0
Registrar of Contractors	136	0
State Board of Nursing	2	0
The Leafy Green Marketing Committee	1	0
<b>Total</b>	<b>379</b>	<b>109</b>

The following chart reflects the number of motions to continue that were entertained in FY 2011 and the percentage granted:

.....  
fig. 2

	<b>Continuance Granted</b>	<b>Continuance Denied</b>	<b>Total Motions</b>	<b>% Granted</b>
Arizona Department of Financial Institutions	3	-	3	100
Arizona Department of Revenue	12	6	18	67
Arizona Health Care Cost Containment	198	78	276	72
Arizona Lottery	2	-	2	100
Arizona Medical Board	-	2	2	-
Arizona State Board of Physical Therapy	-	1	1	-
Arizona State Retirement System	2	2	4	50
Avra Valley Fire District	2	-	2	100
Board of Appraisal	5	-	5	100
Board of Behavioral Health Examiners	2	-	2	100
Board of Podiatry Examiners	-	1	1	-
Board of Psychologist Examiners	1	1	2	50
Department of Economic Security - CPS	26	4	30	87
Department of Education	1	1	2	50
Department of Education - Special Ed	26	7	33	79
Department of Environmental Quality	11	-	11	100
Department of Fire, Building and Life Safety	11	4	15	73
Department of Gaming	3	-	3	100
Department of Health Services	39	13	52	75
Department of Insurance	8	2	10	80
Department of Racing	3	-	3	100
Department of Real Estate	5	4	9	56
Department of Weights and Measures	6	-	6	100
DPS - Concealed Weapons Permit Unit	-	1	1	-
DPS - Criminal History Records	1	-	1	100

DPS - Student Transportation	2	-	2	100
Liquor Licenses and Control	-	1	1	-
Maricopa County Department of Elections	2	-	2	100
Office of Pest Management	1	3	4	25
Osteopathic Examiners Board	6	1	7	86
Peace Officers Standards and Training	4	1	5	80
Registrar of Contractors	140	112	252	56
State Board for Charter Schools	-	1	1	-
State Board of Nursing	1	5	6	17
State Schools for the Deaf and the Blind	-	1	1	-
<b>Total</b>	<b>523</b>	<b>252</b>	<b>775</b>	<b>67.48%</b>

## 2. Evaluation

### a. Results of Public Evaluation:

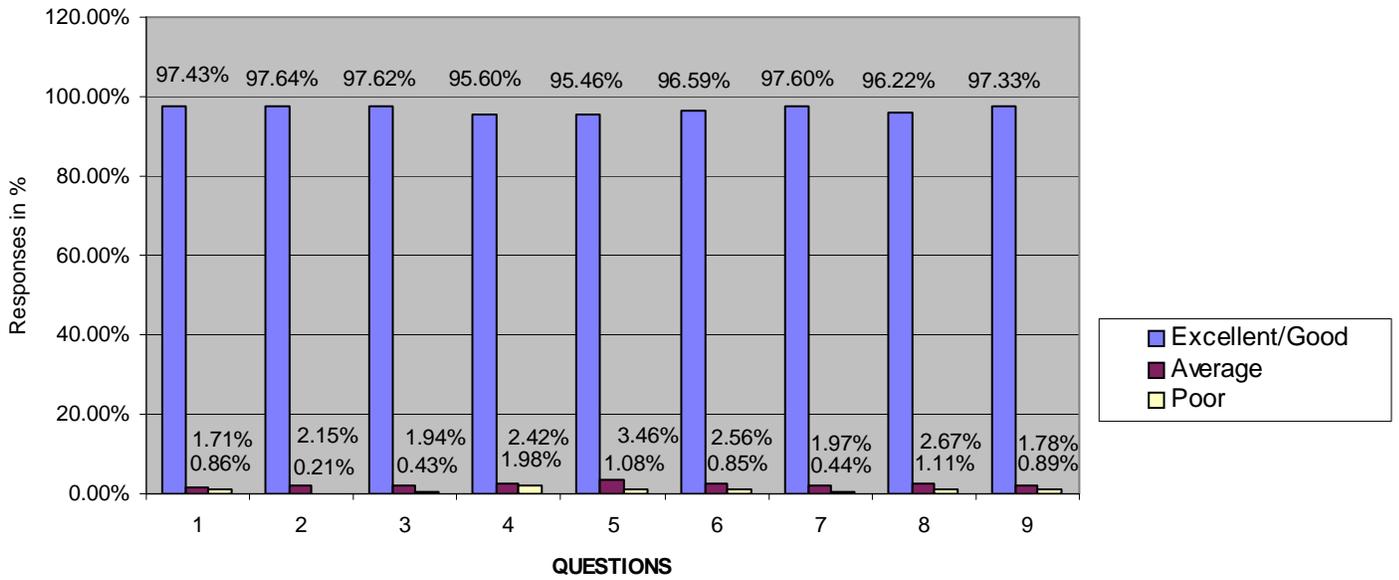
Since November 1996, the OAH has administered an evaluation procedure. A copy of the evaluation is provided to all participants before the hearing. The evaluation form is described in a video played before each hearing, or is otherwise addressed by the Administrative Law Judge. The results are not disclosed 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

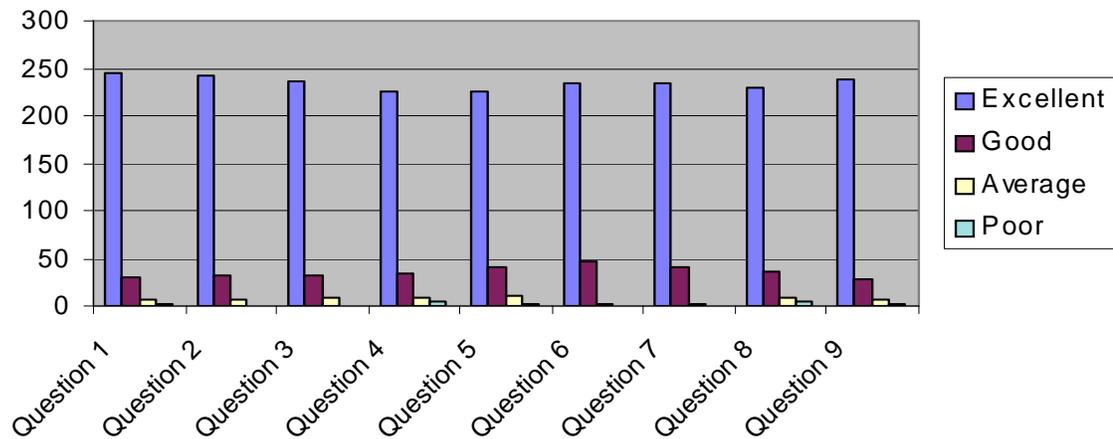
The results indicate that satisfaction is high among all groups, with those responding rating the OAH excellent to good in 95.46% to 97.64% of responses.

### All Responses FY 2011



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

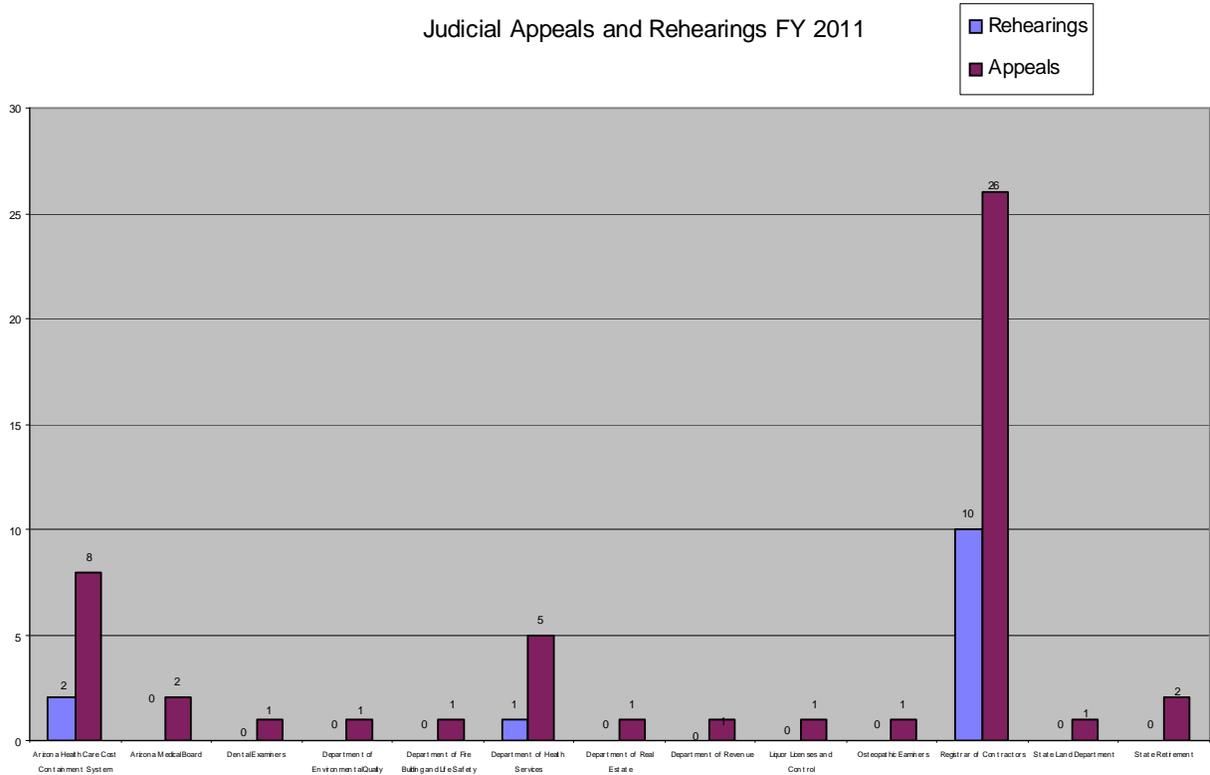
### Unrepresented Responses



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

Rehearings are permitted pursuant to A.R.S. § 41-1092.09 under certain conditions. In FY 2011, the rehearing rate (defined as rehearings scheduled divided by cases heard) was .70%.

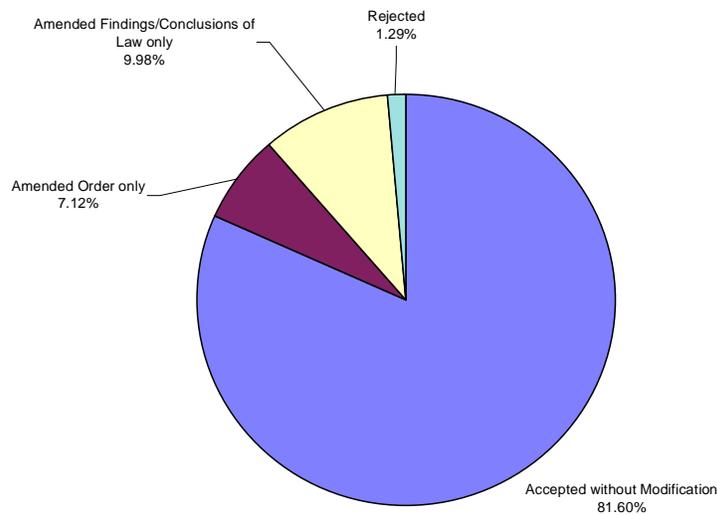
Appeals to Superior Court are provided for pursuant to A.R.S. § 41-1092.08(H). In FY 2011, the judicial appeal rate (defined as judicial appeals taken divided by cases decided on the merits) was 2.74%. As reflected in the following diagram, rehearings and judicial appeals in FY2011 were relatively rare. Both were concentrated at the Registrar of Contractor.



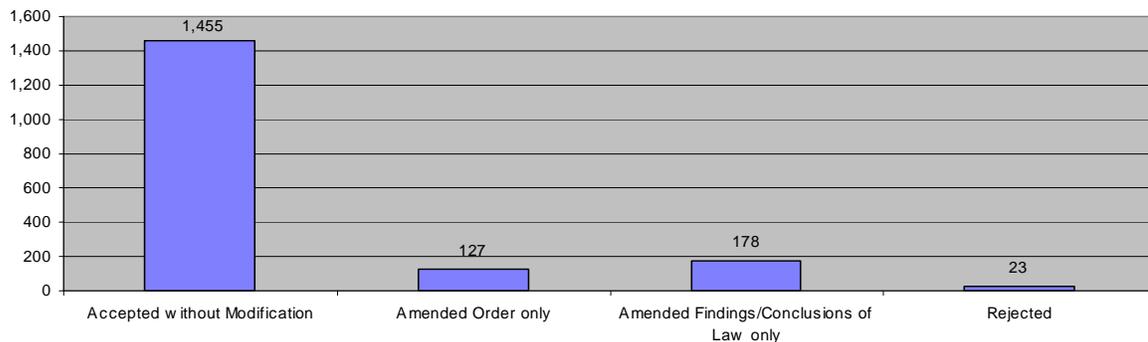
# IV. Acceptance of Administrative Law Judge Decisions by Agencies

## 1. Agency Action

Agency acceptance of the Administrative Law Judge Decisions is high. 81.60% of all decisions acted upon by the agencies were accepted without modification. Agency acceptance was 88.72% if viewed from the vantage point of acceptance of Findings of Fact and Conclusions of Law, the core function of the Administrative Law Judge. 41.64% 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.

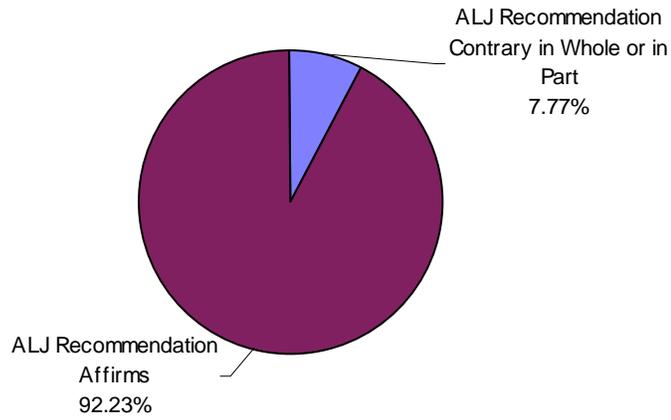


The following chart reports the breakdown of agency response by agency. This chart further illustrates that amendments and rejections are few relative to the decisions accepted.

	<b>Accept</b>	<b>Amend Order</b>	<b>Amend Findings</b>	<b>Moot</b>	<b>Reject</b>	<b>Certified</b>	<b>Total</b>
Accountancy	5	2	1	-	-	-	8
Agriculture	-	-	-	-	-	1	1
AHCCCS	743	16	50	4	18	7	838
Appraisal	1	-	-	-	-	-	1
Psychologist Examiners	1	-	-	-	-	-	1
DES-CPS	61	2	5	-	-	-	68
DPS- Student Trans.	5	-	-	-	-	-	5
DPS-Crim. History Rec.	3	-	-	-	-	2	5
Environmental Quality	3	-	-	-	-	-	3
Financial Institutions	5	-	-	-	-	-	5
Fire, Bldg and Life Safety	7	-	-	1	-	13	21
Gaming	3	-	-	-	-	-	3
Health Services	149	5	22	1	2	-	179
Insurance	21	-	-	-	-	2	23
Liquor Licenses	3	-	-	-	-	1	4
Maricopa County Elections	1	-	-	-	-	-	1
Medical Board	3	-	2	-	-	-	5
Naturopathic	2	-	-	-	-	-	2
Nursing	25	3	-	-	-	-	28
POST	1	1	2	-	-	-	4
Pest Management	1	-	-	-	-	-	1
Physical Therapy Examiners	1	-	2	-	-	-	3
Racing	3	-	-	-	-	-	3
Real Estate	10	1	-	-	-	1	12
Registrar of Contractors	379	96	93	4	2	8	582
Secretary of State - HAVA	1	-	-	-	-	-	1
Secretary of State - Notary	6	-	-	-	-	-	6
Special Education	-	-	-	-	-	-	8
Board for Charter Schools	-	1	-	-	1	-	2
State Retirement System	7	-	-	-	-	1	8
Schools- Deaf and the Blind	-	-	-	-	-	1	1
Technical Registration	5	-	-	-	-	-	5
Water Resources	-	-	1	-	-	-	1
Weights and Measures	-	-	-	-	-	19	19
Department of Agriculture	-	-	-	-	-	1	1
<b>Total</b>	<b>1455</b>	<b>127</b>	<b>178</b>	<b>10</b>	<b>23</b>	<b>57</b>	<b>1850</b>

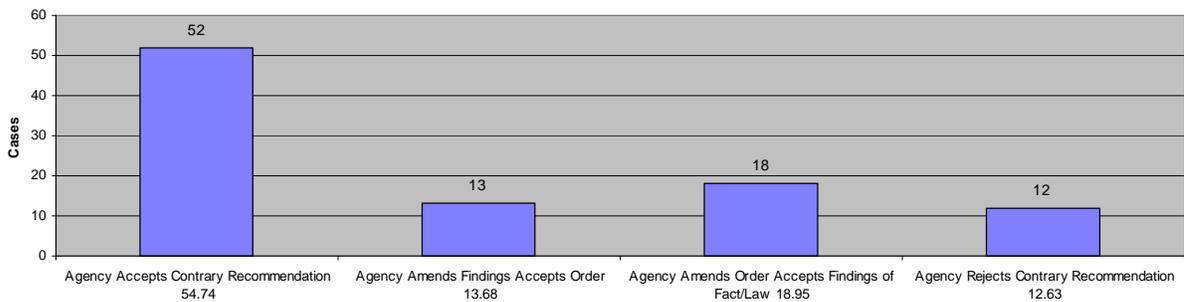
In FY 2011, Administrative Law Judges rendered decisions that were contrary in whole or contrary in part to agencies' original positions in 7.77% of cases.

**Recommendations Contrary to Original Agency Action FY 2011**



Agency acceptance of contrary decisions was high at 87.37%.

**Agency Response to Contrary Recommendations FY 2011**



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>
Accountancy	-	-	1	-	-	1
AHCCCS	12	8	12	10	1	43
DES-CPS	11	2	-	-	-	13
DPS- Student Trans.	2	-	-	-	-	2
DPS-Crim. History Rec.	-	-	-	-	1	1
Fire, Bldg and Life Safety	-	-	-	-	1	1
Gaming	1	-	-	-	-	1
Health Services	1	1	3	2	-	7
Insurance	-	-	-	-	1	1
Liquor Licenses	2	-	-	-	-	2
Maricopa County Dept. of Elections	1	-	-	-	-	1
Nursing	3	-	-	-	-	3
Physical Therapy Examiners	-	-	2	-	-	2
Real Estate	1	1	-	-	1	3
Registrar of Contractors	3	1	-	-	-	4
Secretary of State - Notary	2	-	-	-	-	2
State Retirement System	2	-	-	-	-	2
Weights and Measures	-	-	-	-	6	6
<b>Total</b>	<b>41</b>	<b>13</b>	<b>18</b>	<b>12</b>	<b>11</b>	<b>95</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 2011, 54 Administrative Law Judge Decisions were certified by the OAH as final administrative decisions

<b>Agency</b>	<b>Certified</b>
Arizona Health Care Cost Containment System	4
Arizona State Retirement System	1
Department of Agriculture	1
Department of Economic Security - CPS	1
Department of Fire Building and Life Safety	15
Department of Insurance	2
Department of Public Safety - Criminal History Records	1
Department of Public Safety - Student Transportation	1
Department of Real Estate	1

Department of Weights and Measures	17
Liquor Licenses and Control	1
Registrar of Contractors	7
State Land Department	1
State Schools for the Deaf and the Blind	1
<b>Total</b>	<b>54</b>

## 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 2010, 8 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 particular circumstances, such as settlements, cases where the ISA agency prevails before the independent Administrative Law Judge, or only as incident to disciplinary orders.