

# The Office of Administrative Hearings

The Fifth Annual Report

to

Governor Jane Dee Hull

Senator Brenda Burns, President of the Senate

Representative Jeff Groscost, 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, 2000

# 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 34 full-time positions, including the Director, the Chief Executive Assistant, 2 Case Management Supervisors, the Office Manager, 18 Administrative Law Judges (ALJ), 2 Hearing Officers, and 9 support staff. In addition to conducting hearings in Phoenix and Tucson, the OAH travels nearly four weeks per month on rotation to Flagstaff, Lake Havasu, 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 statistics of the OAH in FY 2000 indicates Agency acceptance of ALJ recommended orders without modification was 90.85%. Acceptance of Findings of Fact and Conclusions of Law without modification was 96.29%. Rehearings (0.77%) and appeals (1.35%) were rare. Evaluations by participants continue to indicate that ALJs and the OAH were rated excellent or good in 92% - 97% of 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 the other agencies. Procedures, rulings, and case assignment are at all times kept free of outside pressures to ensure that all parties can be assured that hearings are impartial and independent.

## **Commitment:**

The OAH views commitment as a willingness to advance its mission. The OAH may on occasion take a position that conflicts with the predisposition of a client agency. Although the OAH works to accommodate legitimate needs of an agency, the OAH does so only in a way consistent with the fairness, impartiality, independence and efficiency of its hearings. The OAH recommends that A.R.S. §8-201 better define “physical injury” as it relates to abuse in hearings conducted by the OAH pursuant to A.R.S. §8-811 due to the range of reasonable interpretations and the resulting inconsistency in our adjudication. A detailed analysis of the problem may be found in the “Recommendations” section of this report.

## **Efficiency:**

Through careful case management, the OAH enjoys a minimal backlog. In FY 1999, the OAH conclusion rate was 92.6% (7.4% more cases filed than concluded). In FY 2000, despite the 112.7% increase in filed cases (3336 to 7096), the conclusion rate increased to 98.2% (1.8% more cases filed than concluded), illustrating the effectiveness of the cross-training of the former AHCCCS hearing officers since July 1, 1999. Cross-training of judges continues to result in real benefits to taxpayers and parties alike. First, ALJ time can be leveled out to avoid one ALJ assigned in a single area to be underutilized while an ALJ assigned in another area cannot meet existing challenges. Secondly, personal and professional growth, collegiality and a larger focus encourages more creativity and better problem-solving.

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

### **1. Incorporation of AHCCCS Hearing Function**

Commencing July 1, 1999, a total of 9 positions were transferred to the OAH, including 7 hearing officers from the Arizona Health Care Cost Containment System (AHCCCS). The AHCCCS appeals function has been successfully incorporated into the OAH venue.

### **2. Development of Administrative Law Judge Cadres**

A.R.S. §41-1092.01 makes explicit the requirement that the OAH provide technical training to administrative law judges. In addition, A.R.S. §41-1092.07 created a statutory right to file a nonperemptory motion with the OAH Director to disqualify an administrative law judge for bias, prejudice, personal interest or lack of technical expertise necessary for a particular hearing. In FY 2000, in addition to training, which included Bar sponsored continuing legal education, privately presented courses, as well as contracted presentations, the OAH provided 40 hours of continuing education opportunities to each administrative law judge to ensure professional development.

### **3. Report of the Underground Storage Tank Technical Appeals Pilot Program**

Pursuant to Laws 1998, Chapter 298, Section 19 (HB 2231), OAH submitted its evaluation of the Underground Storage Tank Technical Appeals Panel on December 1, 1999, to the Governor, the President of the Senate and the Speaker of the House. The report is found in Appendix 1.

### **4. Amendment of Supreme Court Rule**

*Pro Hac Vice* petitions may now be made before OAH Administrative Law Judges pursuant to a recent change to Supreme Court Rule 33(d). Such petitions, if granted, allow non-Arizona attorneys to practice before the OAH. The new rule is found in Appendix 3.

### **5. Newsletter**

The OAH has completed publication of four editions of the OAH Newsletter on a quarterly basis during FY 2000. The Newsletter reports various performance measures and discusses current issues. The Newsletter now includes articles written by administrative law judges that include practice pointers. All articles appear on the OAH website, along with the OAH performance measures. Copies of the four editions published in FY 2000 are included in Appendix 2.

### **6. Externship**

Mindful of our responsibility to aid in the advancement of justice, the Office of Administrative Hearings applied and was again approved for an ASU Law Student Externship. The externship was created to be 180 hours of education and skill building within the particular field of Arizona Taxation Administrative Law. One Administrative Law Judge trained and supervised the law student in addition to normal case load processes.

# III. Summary of Agency use of OAH Services

## 1. Case Management

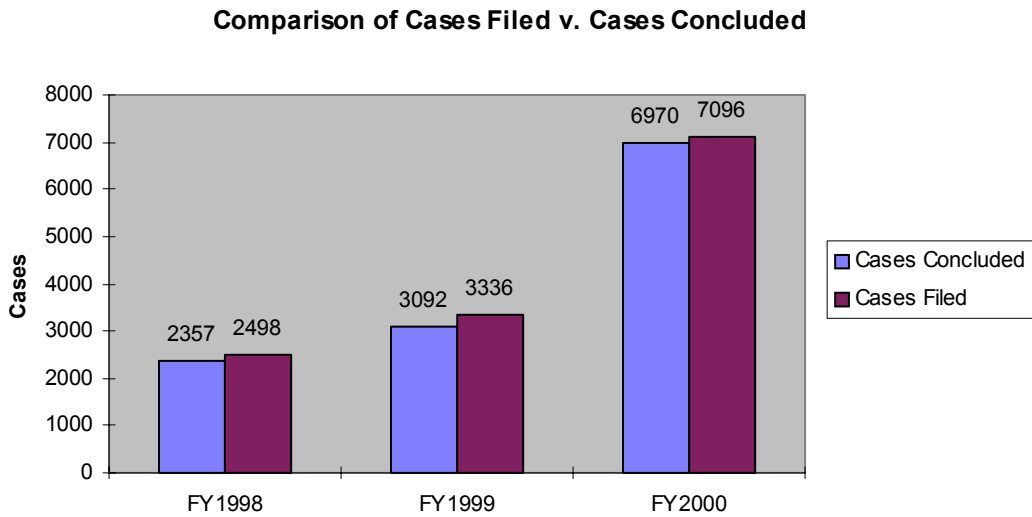
### a. Breakdown of Cases Filed by Agency (FY 2000)

A total of 7,796 cases were filed with the OAH in FY 2000. The distribution among the agencies and boards are as follows (in descending order by number of cases filed):

Arizona Health Care Cost Containment System	3706
Registrar of Contractors	1529
Department of Health Services	318
Department of Economic Security - CPS	267
Department of Environmental Quality	151
Department of Building and Fire Safety	146
Department of Revenue	127
Department of Administration-Capitol Police Parking	125
Department of Public Safety - Adult Care Clearance	112
Department of Insurance	107
Liquor Licenses and Control	82
State Board of Nursing	73
Arizona State Board of Accountancy	60
Department of Real Estate	53
Arizona State Board of Cosmetology	36
Arizona State Banking Department	24
Structural Pest Control Commission	23
Peace Officers Standards and Training	20
Board of Medical Examiners	14
Department of Public Safety - Student Transportation	14
Department of Racing	14
Department of Administration	13
State Land Department	11
Department of Water Resources	9
Board of Dental Examiners	8
Department of Economic Security - Child Protective Services	8
Department of Gaming	7
Department of Weights and Measures	5
Arizona Lottery	4
Department of Public Safety - Concealed Weapons Permit Unit	4
Board of Appraisal	3
Board of Behavioral Health Examiners	3
Board of Psychologist Examiners	3
Board of Technical Registration	3
Maricopa County Housing Department	3
Arizona Commission on the Arts	2
Arizona Department of Education	2
Board of Chiropractic Examiners	2
Secretary of State	2
Agricultural Employment Relations Board	1
Arizona State Schools for the Deaf and the Blind	1
Arizona Works-Maximus-(DES)	1
Department of Economic Security	1
Department of Education	1
Office of the Attorney General	1

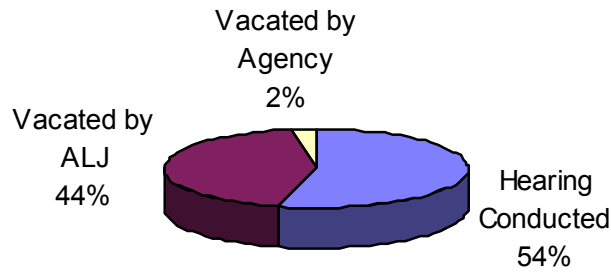
b. Number of Cases Filed versus Cases Concluded

The number of cases filed increased in FY 2000 as it had in FY 1999 and FY 1998. The OAH was able to increase its conclusion rate to accommodate the increase. The completion rate for FY 2000 ,defined as cases concluded over new cases filed, was 98.2%.



The following diagram illustrates that, in most cases, matters proceed to hearing. Matters which are vacated indicate that some portion of the OAH hearing calendar is taken up unnecessarily. Statute 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. Therefore, on the whole, statutory time limits are beneficial to the larger process of regulatory action.

### Disposition of Concluded Cases FY 2000

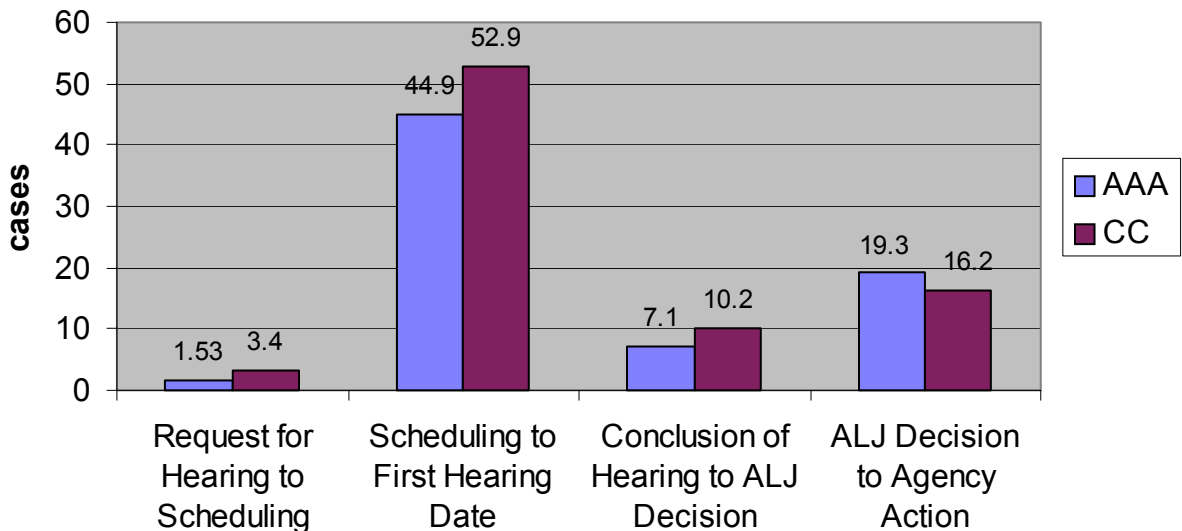


#### c. Timeline of Case Management

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 decisions must be transmitted to the agencies within 20 days of the conclusion of the hearing. The directors and boards are required to take final action within 30 days of receipt.

The following diagram illustrates the average timelines:

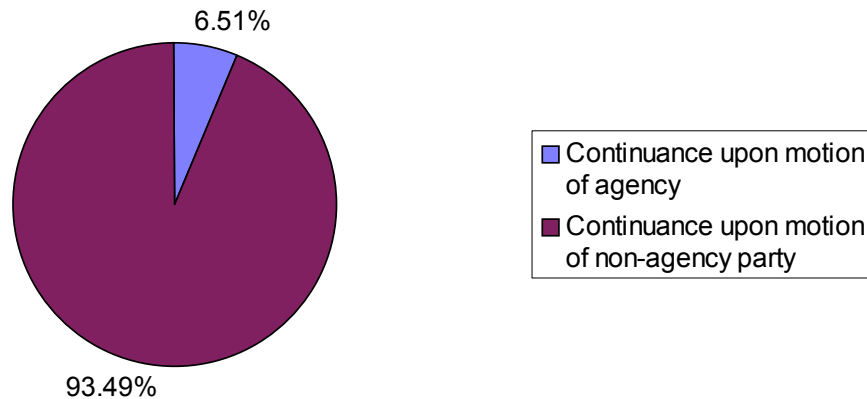
### Average Days Between Selected Events - Appealable Agency Actions v. Contested Cases FY 2000



d. Incidence of Continuance

A single continuance translates to an average of 47 days to the length of a case. 68.54% of all continuance requests were granted in FY 2000, down from 70.68% in FY 1999. The OAH has developed a well-deserved reputation for discouraging “convenience” continuances in favor of those based on “good cause”. This accounts for the high conclusion rate versus new settings (98%), despite a 112% increase in caseload. The frequency of continuance, defined as the number of continuances granted (961) over the total number of cases first scheduled (7060), expressed as a percent, was 13.61%. The ratio of first settings (6869) to continued settings on the calendar (784) was 1 to 0.114.

**Comparison of Source of Continuance, FY 2000**



The following list indicates the number of continuances made by agency. Indicated also are the

continued settings in FY 2000, divided by those made by a non-agency party and those made by the agency.

<b>AGENCY</b>	<b>Continued - Motion by non- agency party</b>	<b>Continued - Motion by agency party</b>
AHCCCS	206	9
Department of Revenue	38	2
Registrar of Contractors	272	3
Arizona State Board of Accountancy	13	10
Department of Real Estate	5	1
Board of Technical Registration	2	0
Department of Administration	1	1
Department of Economic Security - CPS	19	3
Department of Health Services	69	16
Department of Water Resources	2	0
Liquor Licenses and Control	13	1
Department of Insurance	19	0
Department of Public Safety - Student Transportation	3	0
Department of Building and Fire Safety	17	0
Department of Economic Security	5	0
Board of Medical Examiners	9	0
State Land Department	2	0
Department of Environmental Quality	20	3
Peace Officers Standards and Training	2	1
Structural Pest Control Commission	3	0
State Board of Nursing	1	0
Arizona State Banking Department	2	0
Board of Dental Examiners	4	0
Maricopa County Housing Department	1	0
Department of Public Safety - Adult Care Clearance	4	1
Office of the Attorney General	1	0

## **2. Evaluation**

### **a. Results of Public Evaluation**

Since November 1996, the OAH has administered an evaluation procedure. At the conclusion of every hearing, evaluations are handed out to four major groups of respondents: Represented private party; unrepresented private party; counsel for a private party; and counsel for the agency. The results are not disclosed to the administrative law judge. The respondents are asked to rate the following categories, on a scale of excellent, good, satisfactory, poor:

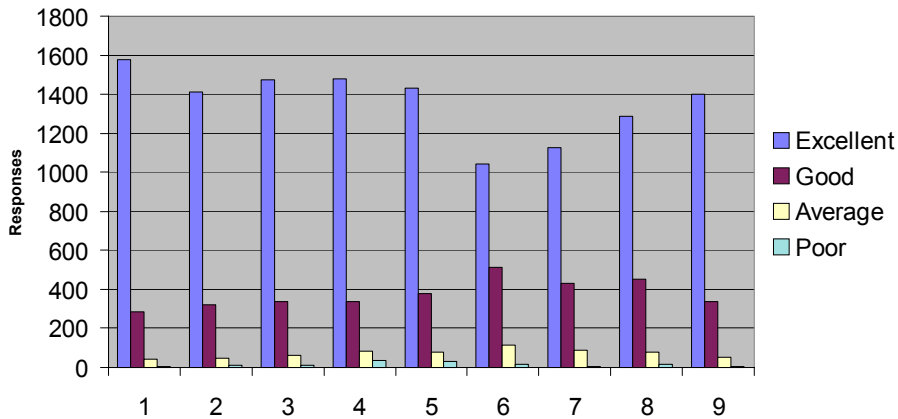
1. Attentiveness of ALJ
2. Effectiveness in explaining the hearing process
3. ALJ's use of clear and neutral language



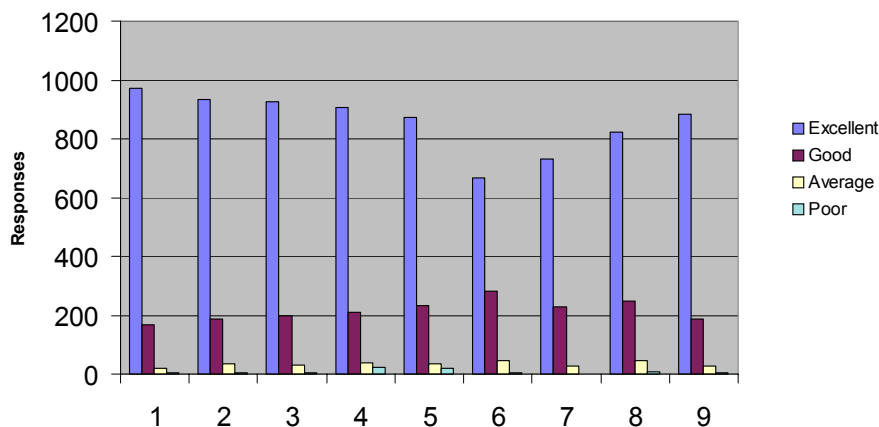
- 4. Impartiality
- 5. Effectiveness in dealing with the issues of the case
- 6. Sufficient space
- 7. Freedom from distractions
- 8. Questions responded to promptly and completely
- 9. Treated courteously

The results indicate that satisfaction is high among all groups, with those responding rating the OAH excellent to good in all categories. An analysis of the unrepresented parties for a sample quarter indicates that even among this most vulnerable group, the OAH is seen to be functioning well.

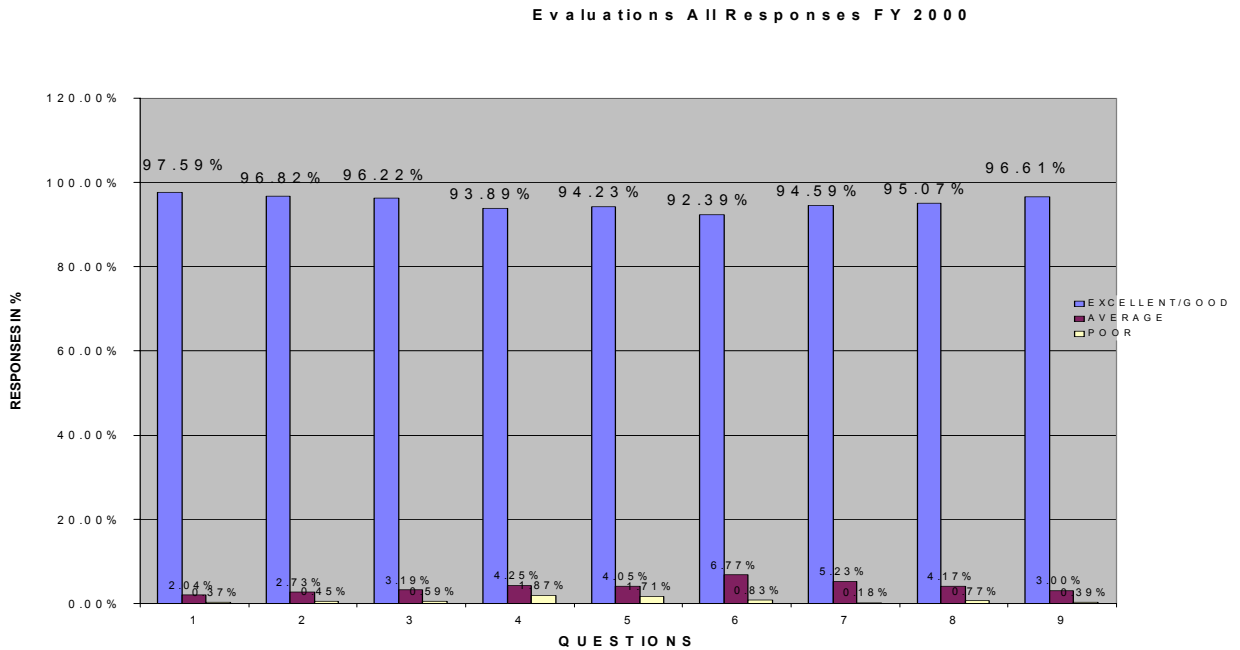
**All Responses FY 2000**



**Unrepresented Responses FY 2000**



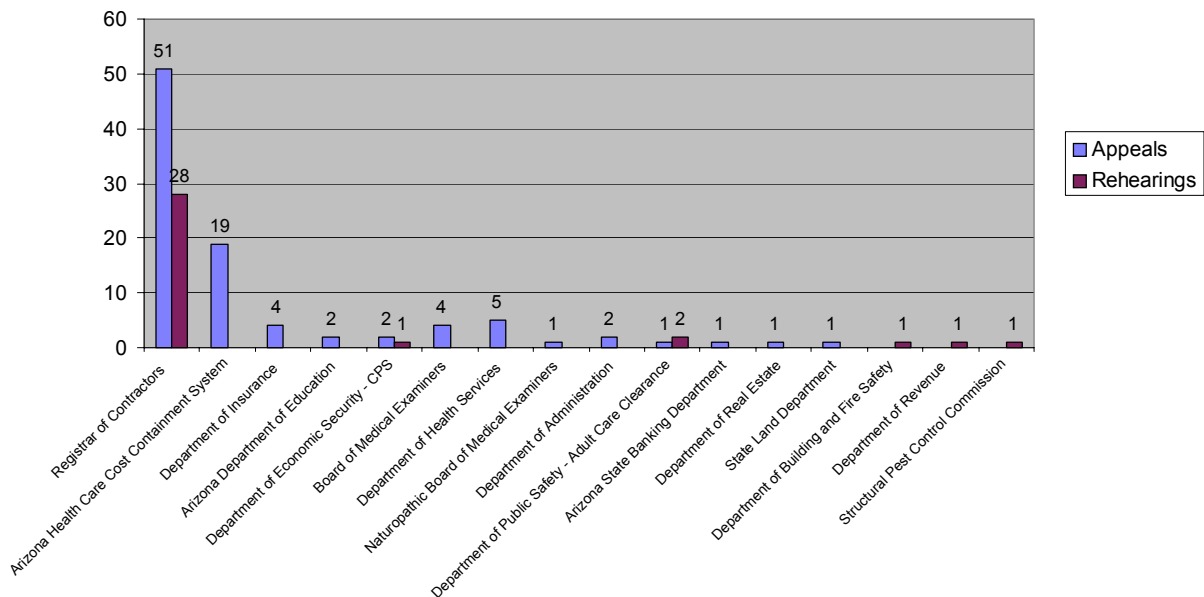
The following diagram illustrates that 93% to 97% of participants evaluating the OAH process responded that the OAH was excellent or good in all categories.



**b. Incidence of Rehearing/Appeal**

In FY 2000, the rehearing rate (defined as rehearings scheduled over cases concluded) was .77%. The judicial appeal rate (defined as judicial appeals taken over cases concluded) was 1.35%. As reflected in the following diagram, rehearings and judicial appeals in FY 2000 were relatively rare. Both were concentrated at the Registrar of Contractors. Registrar cases are primarily contests between two private litigants (homeowner/contractor; contractor/subcontractor).

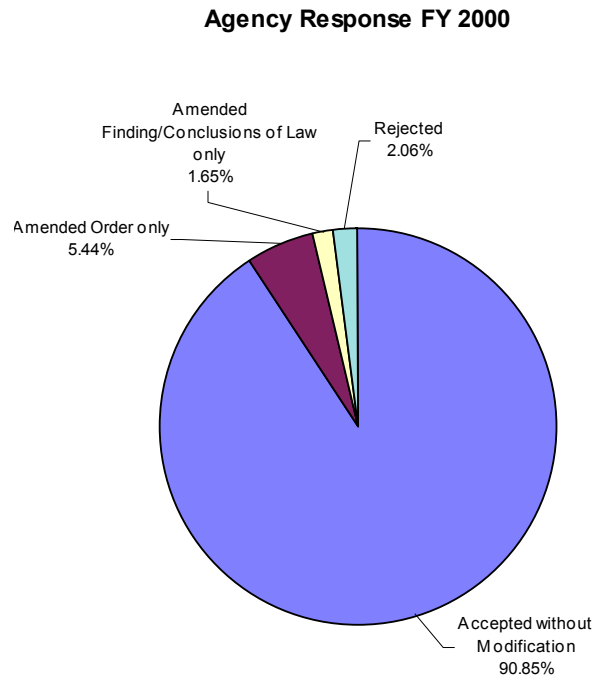
**Judicial Appeals and Rehearings FY 2000**



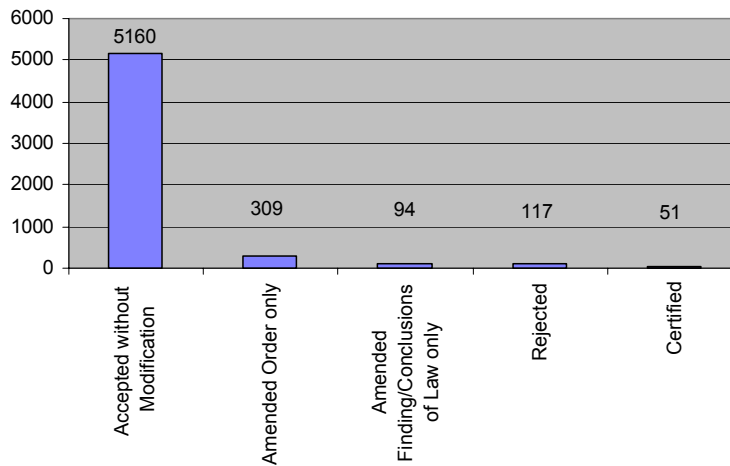
# IV. Acceptance of ALJ Decisions by Agencies

## 1. Agency Action

Agency acceptance of the OAH decisions is very high. 90.85% of all decisions acted upon by the agencies (that is, excluding .89% of decisions certified as final due to agency inaction) are accepted without modification. Agency acceptance was 96.29% if viewed from the vantage point of acceptance of Findings of Fact and Conclusions of Law, the core function of the administrative law judge. The vast majority (76.67%) of modifications were in the Recommended Order (penalty portion).



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

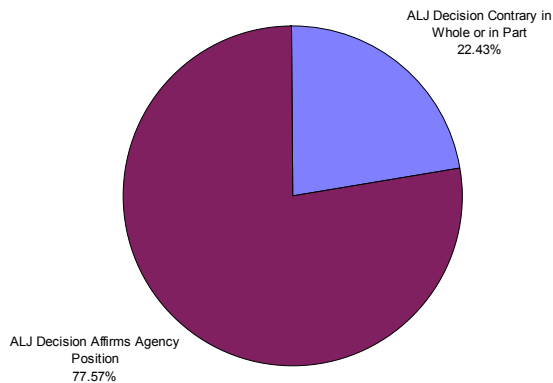


The following chart reports the breakdown by agency. This illustrates that modifications and rejections are few relative to the decisions accepted.

	Accept	Modify Penalty	Modify Fact/law	Reject
Arizona Commission on the Arts	2	0	0	0
Arizona Health Care Cost Containment System	2677	81	64	85
Arizona Lottery	2	0	0	0
Arizona State Banking Department	8	0	0	0
Arizona State Board of Accountancy	25	2	0	0
Arizona State Board of Cosmetology	1	12	0	0
Board of Appraisal	0	1	0	0
Board of Chiropractic Examiners	2	0	0	0
Board of Dental Examiners	2	2	0	0
Board of Medical Examiners	9	8	1	2
Board of Technical Registration	4	0	0	0
Department of Administration	1	0	0	2
Department of Administration-Capitol Police Parking	23	0	0	0
Department of Agriculture	1	0	0	0
Department of Building and Fire Safety	117	3	0	0
Department of Economic Security /CPS	194	1	13	7
Department of Environmental Quality	179	1	2	1
Department of Health Services	312	1	5	4
Department of Insurance	80	0	1	3
Department of Public Safety - Adult Care Clearance	69	1	0	1
Department of Public Safety - Concealed Weapons Permit Unit	2	0	0	0
Department of Public Safety - Student Transportation	11	2	0	0
Department of Racing	9	0	0	0
Department of Real Estate	36	1	0	0
Department of Water Resources	1	0	0	0
Liquor Licenses and Control	47	1	0	0
Maricopa County Housing Department	2	0	0	0
Office of the Attorney General	1	0	0	0
Peace Officers Standards and Training	2	0	1	0
Registrar of Contractors	1279	185	6	10
State Board of Nursing	34	0	0	1
State Land Department	9	1	0	0
Structural Pest Control Commission	0	4	0	0
Department of Gaming	0	0	1	0

In FY 2000, OAH rendered a decision contrary in whole or in part to an agency's original position in 22.43% of cases. Agency acceptance of contrary decisions is high (81.57%). The following diagram indicates the breakdown by agency.

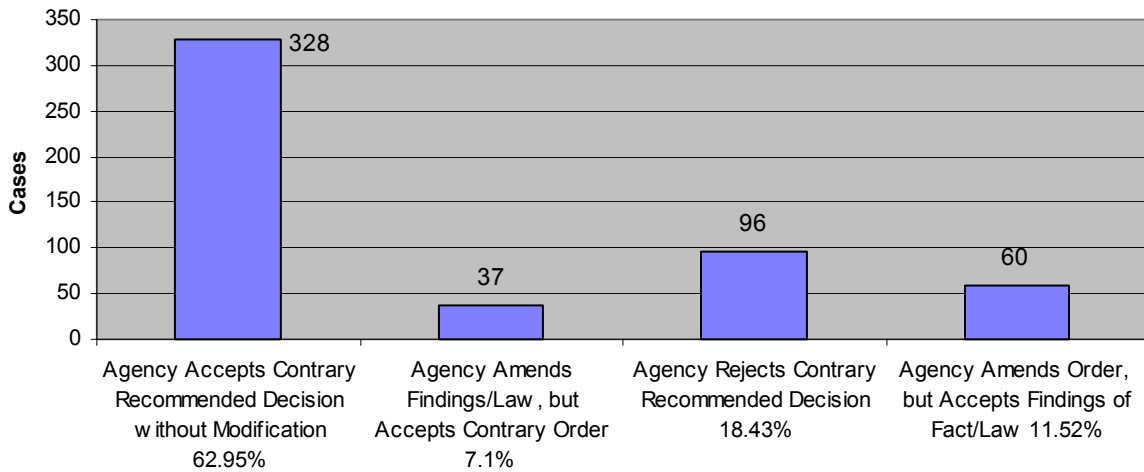
**Recommendations Contrary to Original Agency Position FY 2000**



The following two charts show a breakdown by agency of its response to contrary decisions and the relative numbers and percentages of the responses.

	Accepts	Amends Facts Law	Rejects	Amends Order
DPS - Adult Care	3	0	1	0
AHCCCS	206	25	77	49
Building and Fire Safety Administration	10	0	0	2
Banking	0	0	2	0
DPS - Bus	1	0	0	0
Bd. Of Cosmetology	2	0	0	0
Board of Dental Examiners	1	0	0	1
Capitol Police parking	0	0	0	2
Department of Economic Security - CPS	11	0	0	0
DPS - Concealed Weapons	15	9	8	0
Department of Education	1	0	0	0
Department of Environmental Quality	0	0	0	0
Department of Health Services	3	0	0	0
Department of Insurance	14	2	3	1
Board of Accountancy	15	0	2	0
Liquor Licenses and Control	3	0	0	0
Department of Racing	1	0	0	1
Department of Real Estate	1	0	0	1
Registrar of Contractors	8	0	0	1
Board of Nursing	33	1	1	1
Board of Appraisal	0	0	1	0
Physicians Assistants	0	0	0	1
	0	0	1	0

### Agency Response to Contrary Recommendations FY 2000



## 2. Agency Inaction With Subsequent OAH Certification of Finality

Beginning August 21, 1998, the OAH was required to certify its recommended order as the final administrative decision if OAH has not received the agency, board or commission's action accepting, modifying or rejecting the recommended decision within 30 days of transmission. See A.R.S. §41-1092.08(D). Special rules apply if the board or commission meets monthly or less frequently. See A.R.S. §41-1092.08(D). In FY 2000, 53 recommended decisions were certified as final administrative decisions.

Arizona Health Care Cost Containment System	10
Department of Economic Security - CPS	8
Registrar of Contractors	8
Arizona State Board of Accountancy	6
Department of Building and Fire Safety	5
Liquor Licenses and Control	2
Department of Environmental Quality	2
Department of Weights and Measures	2
Department of Insurance	1
Structural Pest Control Commission	1
Naturopathic Board of Medical Examiners	1
Department of Racing	1
Board of Technical Registration	1
Department of Health Services	1
Department of Public Safety - Student Transportation	1
Secretary of State	1

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

Pursuant to A.R.S. §41-1092.01(C)(9) (b), the OAH reports that 10 motions for change of judge were filed pursuant to A.R.S. §41-1092.07(A) for bias or prejudice. One motion was granted on the basis of the appearance of bias.

## 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

### **Uniformity:**

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

#### **1. Establish uniform standards for appeal rights notice.**

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

#### **2. 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 bases in Title 41 would make the process easier, particularly for the unrepresented.

#### **3. Expand the right to settlement conferences to include “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 disposition of cases.

#### **4. Conform Rehearing and Appeal Rules.**

Currently parties have 30 days from service of an agency’s final action, 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 A.R.S. §41-1092.09(C). *However, pursuant to 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 filing appeals and requesting rehearings 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**

### **Statutory Guidance in Definition of “Physical Injury” under A.R.S. §8-201**

As of June 30, 2000, the OAH has conducted in excess of 760 hearings under A.R.S. §8-811. The statutory scheme provides that those who are facing substantiation of reports of child abuse or neglect, and therefore deposit of these reports in the State’s Central Registry for 25 years, be accorded the right to have the State demonstrate “probable cause” before the OAH’s independent tribunals. Experience has shown that the current scheme is inadequate or uncertain in a key area requiring statutory clarification.

Title 8 does not define “physical injury” as it applies to abuse under A.R.S. §8-201. One position is that the statute is one of strict liability. Under that viewpoint, any physical injury, if observable, constitutes abuse. This is true regardless of how minimal, or whether it is sustained by a child as a consequence of parental discipline or attempts to control the behavior of a child, or even as the result of accident. Another viewpoint sees the terms, “infliction of or allowing” physical injury found in A.R.S. §8-201 as requiring some minimal bad intent, thus allowing reasonable mitigation in cases of manifest accident. Still another position applies the defenses to assault found in A.R.S. §13-403 to the concept of “physical injury” to recognize some leeway in parental discipline.

In the absence of clear standards, some Administrative Law Judges apply the definition of “physical injury” found in A.R.S. §13-3623(A)(4), or use it for guidance. These judges are generally uncomfortable using the Title 13 statute, but at the same time feel obligated to have at least some statutory foundation for their determinations as to when there has been “abuse” as defined in Title 8. In either of these situations, Administrative Law Judges may or may not apply the defenses of A.R.S. §13-403, depending on whether abuse is considered strict liability. Other Administrative Law Judges, finding the use of the criminal statutes inappropriate, because of lack of notice to the appellant, do not apply either A.R.S. §13-3623(A)(4) or A.R.S. §13-403. In many cases physical injury is so manifest, and so obviously the result of intentional unjustified acts, that the lack of definition presents no difficulty. However, many situations which are not obvious cases of abuse can become subjective ad hoc decisions. Likewise, similar facts may be viewed differently by different Administrative law Judges, resulting in opposing orders.



# **APPENDICES**

1. Report of the Underground Storage Tank Technical Appeals Pilot Program
2. Amendment of Supreme Court Rule 33(d)
3. Newsletters

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