

# The Office of Administrative Hearings

The Sixth Annual Report

to

Governor Jane Dee Hull

Senator Randall Gnant, President of the Senate

Representative Jim Weiers, Speaker of the House

Pursuant to A.R.S. §41-1092.01(C)(5)

and

A.R.S. §41-1092.01(C)(9)



Cliff J. Vanell, Director

November 1, 2001

# 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, 1 Case Management Supervisor, the Office Manager, 20 Administrative Law Judges (ALJ), and 10 support staff. In addition to conducting hearings in Phoenix and Tucson, the OAH travels nearly four weeks per month on rotation to 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 statistics of the OAH in FY 2001 indicate agency acceptance of ALJ recommended orders without modification was 94.12%. Agency acceptance of Findings of Fact and Conclusions of Law without modification was 97.19%. Rehearings (0.57%) and appeals (2.18%) were rare. Evaluations by participants continue to indicate that ALJs and the OAH were rated excellent or good in 94.9% to 98.2% 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). In FY 2001, despite a 5.8% increase in cases, the conclusion rate has increased to 99.92%. As has been pointed out in previous reports, this illustrates the effectiveness of cross-training of judges. 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. 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 2001, 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.

### **2. Report of the Private Right of Action A.R.S. §41-1092.12**

On September 29, 2000, the OAH submitted to the Governor, the President of the Senate and the Speaker of the House, pursuant to Laws 1998, Ch. 85, §1 (SB 1348) a report which included its observations regarding the effectiveness of the appeal procedure of A.R.S. §41-1092.12, the observations of affected parties, and statistical data regarding final disposition. A copy is included as Appendix 1.

### **3. Publication of Substantive Policy Statements**

The OAH published PS 1.0 Interpreting of the terms, “signature” and “express mail” for the purposes of A.A.C. R2-19-108 Filing Documents. In addition, the OAH published PS 2.0. reflecting Inapplicability of A.A.C. R2-19-107 in computing statutory time limits of A.R.S. §41-1092 et seq. A copy of each of these policy statements is included as Appendix 2.

### **4. Newsletter**

The OAH has completed publication of four editions of the OAH Newsletter on a quarterly basis during FY 2001. The Newsletter reports various performance measures and discusses current issues. The Newsletter now includes a series of 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 2001 are included in Appendix 3.

### **5. 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 up to 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

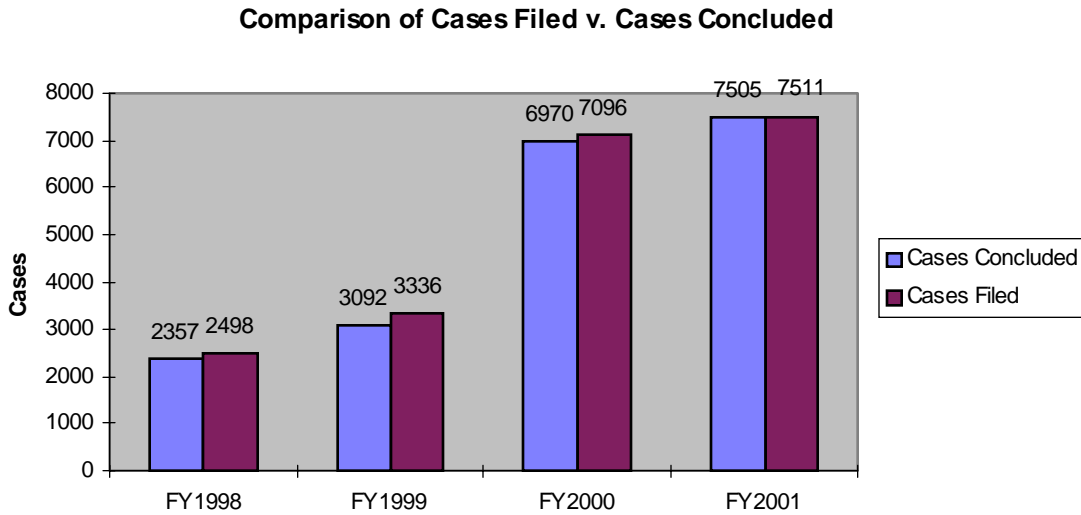
##### a. Breakdown of Cases Filed by Agency (FY 2001)

A total of 7,511 cases were filed with the OAH in FY 2001. The distribution among the agencies and boards are as follows (in descending order by number of cases filed):

Arizona Health Care Cost Containment System	4019
Registrar of Contractors	1569
Department of Administration-Capitol Police Parking	345
Department of Economic Security - CPS	209
Department of Health Services	207
Department of Building and Fire Safety	200
Department of Environmental Quality	147
Department of Insurance	119
Department of Revenue	116
Liquor Licenses and Control	100
Department of Real Estate	76
Department of Weights and Measures	55
State Board of Accountancy	54
Structural Pest Control Commission	33
State Banking Department	32
Office of Alternative Fuel Recovery	31
Department of Administration	23
State Board of Cosmetology	22
State Board of Nursing	19
Department of Racing	14
Department of Water Resources	13
Board of Medical Examiners	11
Peace Officers Standards and Training	11
Department of Gaming	10
Board of Chiropractic Examiners	9
Board of Dental Examiners	9
State Land Department	9
Department of Public Safety - Student Transportation	7
Board of Technical Registration	6
Department of Public Safety - Concealed Weapons Permit Unit	6
Board of Appraisal	5
Board of Behavioral Health Examiners	4
Arizona Lottery	3
Board of Psychologist Examiners	3
Department of Public Safety - Adult Care Clearance	3
Citizens Clean Elections Commission	2
Department of Education	2
Acupuncture Board of Examiners	1
Arizona Works-Maximus-(DES)	1
Board of Nursing Care Institution Administrators Examiners	1
Board of Podiatry Examiners	1
Department of Agriculture	1
Office of the Attorney General	1
Secretary of State - Business Services Division	1
State Schools for the Deaf and the Blind	1

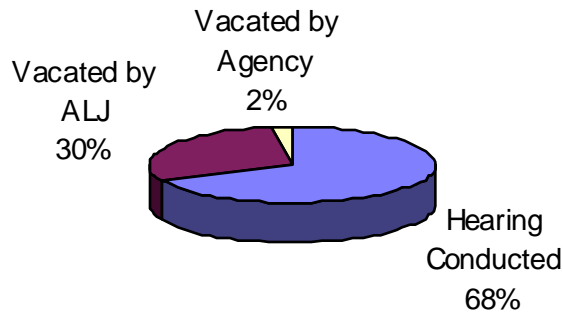
b. Number of Cases Filed versus Cases Concluded

The number of cases filed increased in FY 2001. The OAH was able to increase its conclusion rate to accommodate the increase. The completion rate for FY 2001, defined as cases concluded over new cases filed, was 99.92%.



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 2001**

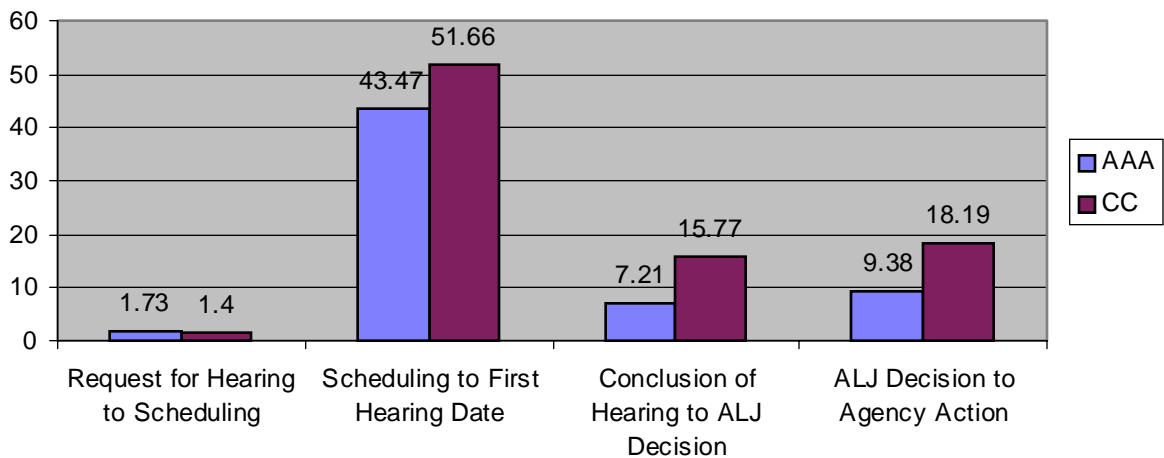


c. Timeline of Case Management

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:

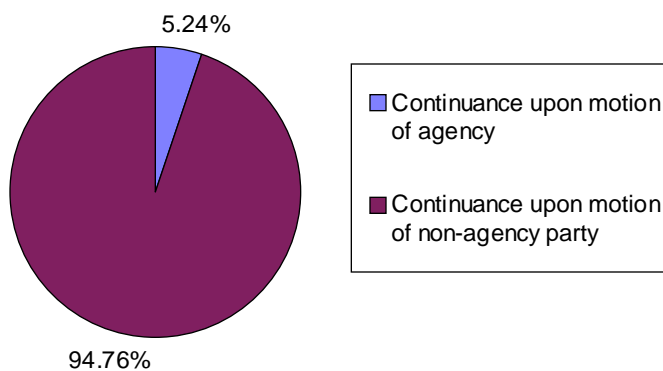
**Average Days Between Selected Events  
Appealable Agency Actions v. Contested Cases**



d. Incidence of Continuance

A single continuance adds an average of 37 days to the length of a case. 77.35% of all continuance requests were granted in FY 2001. 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 (100%), despite a 5.8% increase in caseload. The frequency of continuance, defined as the number of continuances granted (1672) over the total number of cases first scheduled (7702), expressed as a percent, was 21.71%. The ratio of first settings (7429) to continued settings on the calendar (1698) was 1 to 0.23.

**Comparison of Source of Continuance, FY 2001**



The following list indicates the number of continuances by agency. Indicated also are the continued settings in FY 2001, divided by those granted on motion of a non-agency party and those on motion of the agency.

<b>AGENCY</b>	<b>Continued - Motion by non- agency party</b>	<b>Continued - Motion by agency party</b>
Arizona Health Care Cost Containment System	1161	25
Arizona Lottery	1	1
Board of Chiropractic Examiners	1	
Board of Dental Examiners	1	
Board of Medical Examiners	3	
Board of Psychologist Examiners		1
Department of Administration	3	
Department of Administration-Capitol Police Parking	11	
Department of Building and Fire Safety	17	
Department of Economic Security - CPS	29	3
Department of Environmental Quality	7	3
Department of Gaming	1	
Department of Health Services	28	13
Department of Insurance	22	3
Department of Public Safety - Adult Care Clearance	1	
Department of Public Safety - Student Transportation	1	
Department of Racing	2	
Department of Real Estate	9	1
Department of Revenue	30	17
Department of Water Resources	6	
Department of Weights and Measures		3
Liquor Licenses and Control	12	1
Office of Alternative Fuel Recovery	1	
Peace Officers Standards and Training	3	
Registrar of Contractors	234	2
Secretary of State - Business Services Division	1	
State Banking Department	5	2
State Board of Accountancy	10	13
State Board of Cosmetology	1	
State Land Department	4	1
Structural Pest Control Commission	4	

## **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.

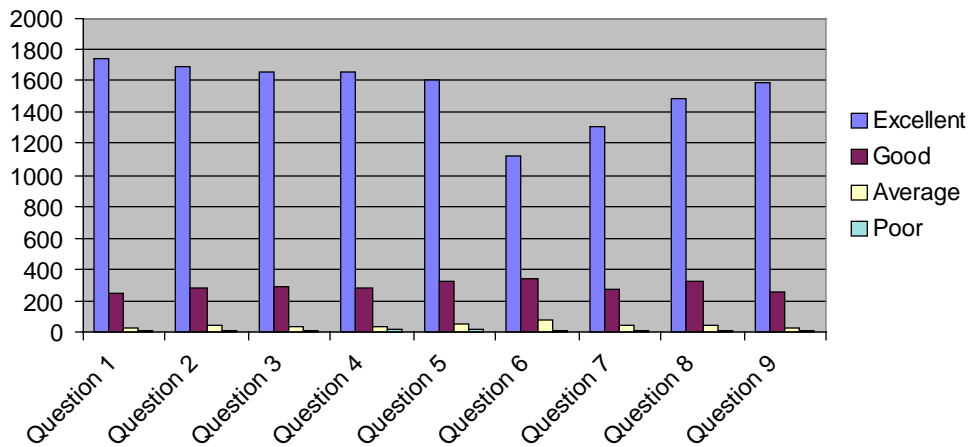


The respondents are asked to rate the following categories, on a scale of excellent, good, satisfactory, poor:

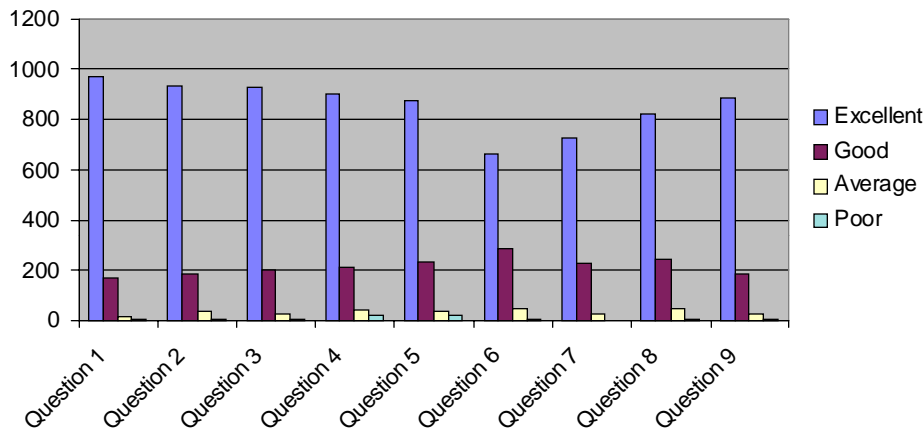
1. Attentiveness of ALJ
2. Effectiveness in explaining the hearing process
3. ALJ's use of clear and neutral language
4. Impartiality
5. Effectiveness in dealing with the issues of the case
6. Sufficient space
7. Freedom from distractions
8. Questions responded to promptly and completely
9. Treated courteously

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.

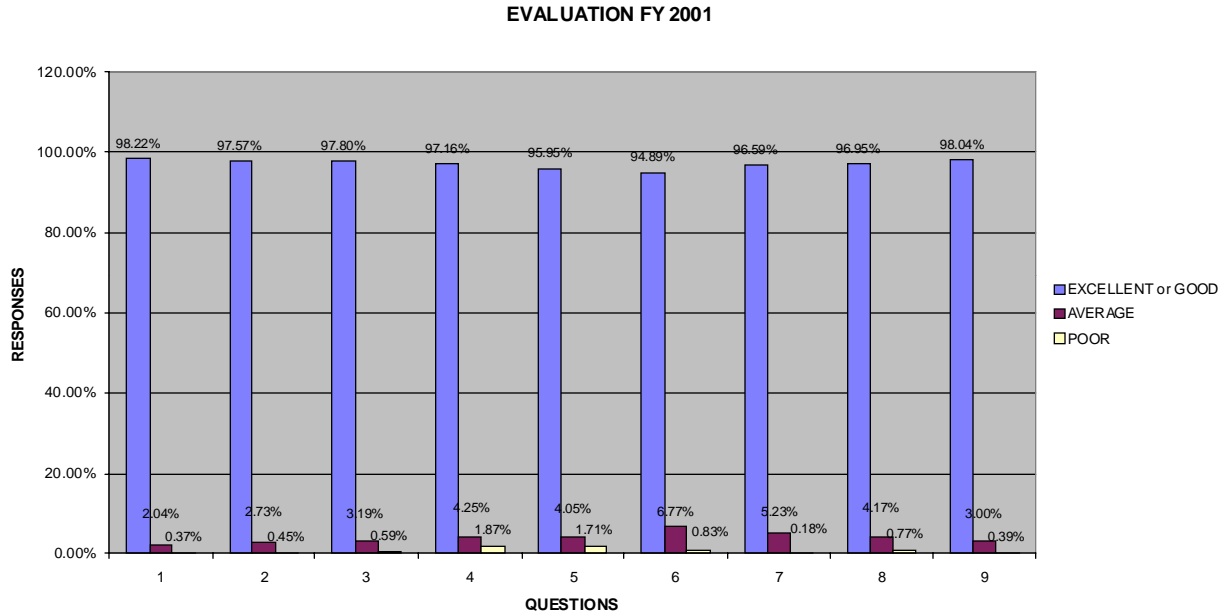
**All Responses FY 2001**



**Unrepresented Responses FY 2001**



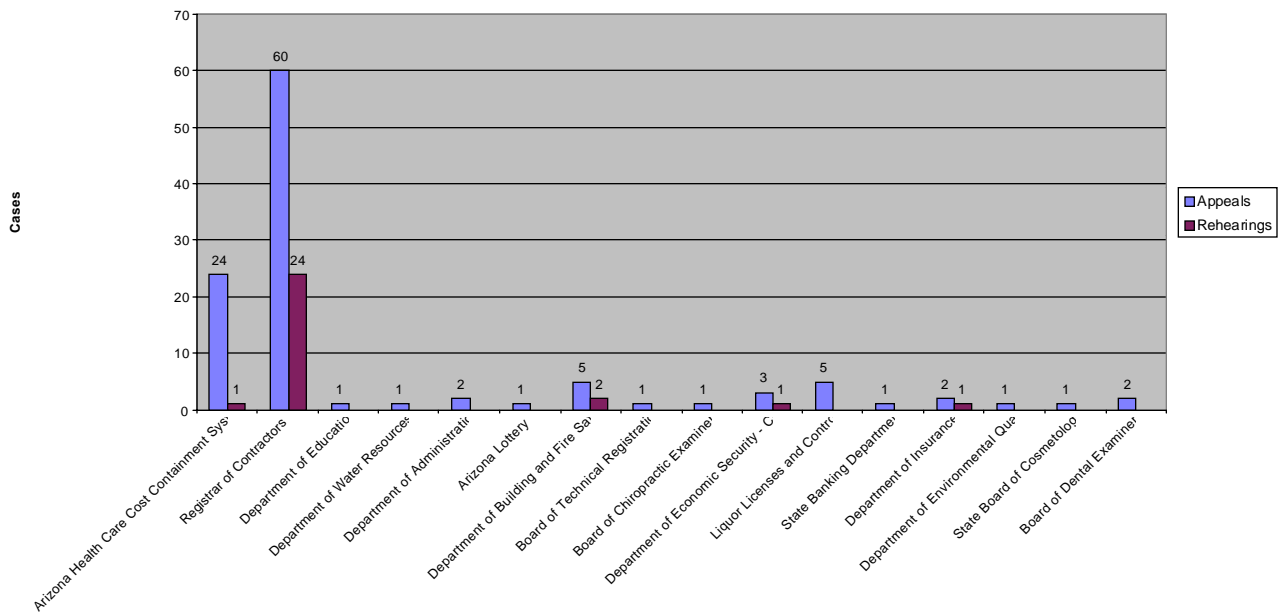
The following diagram illustrates that 94.9% to 98.2% of participants evaluating the OAH process responded that the OAH was excellent or good in all categories.



b. Incidence of Rehearing/Appeal

In FY 2001, the rehearing rate (defined as rehearings scheduled over cases concluded) was .57%. The judicial appeal rate (defined as judicial appeals taken over cases concluded) was 2.18%. As reflected in the following diagram, rehearings and judicial appeals in FY 2001 were relatively rare. Both were concentrated at the Registrar of Contractors. Registrar cases are primarily contests between two private litigants (homeowner/contractor; contractor/subcontractor).

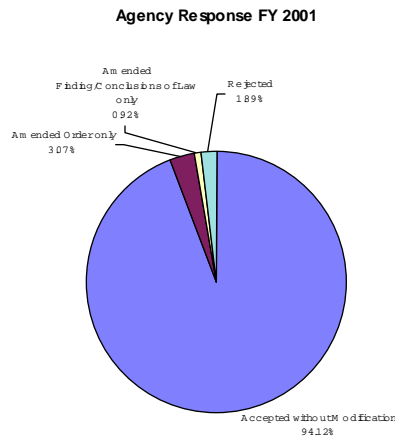
**Judicial Appeals and Rehearings FY 2001**



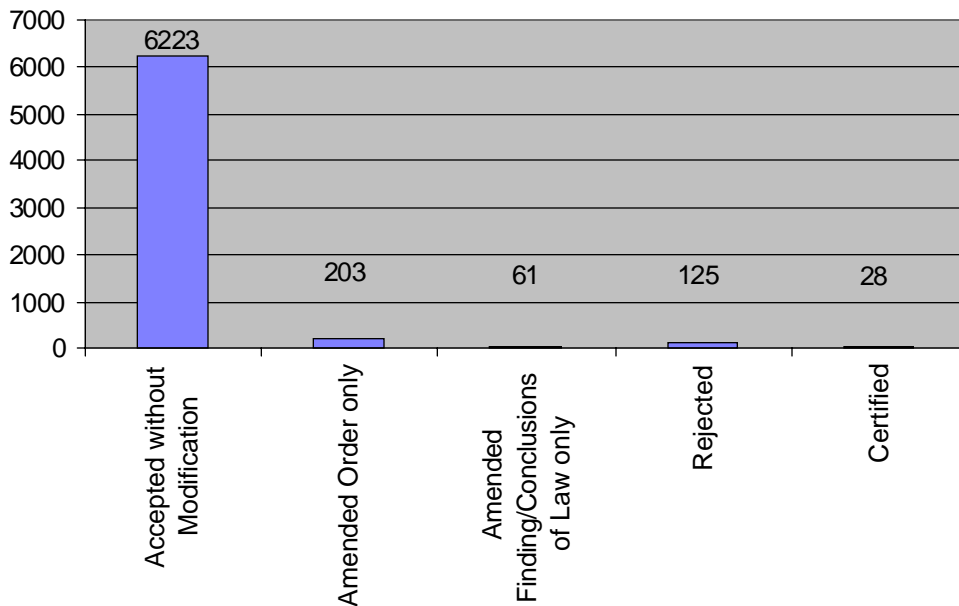
# IV. Acceptance of ALJ Decisions by Agencies

## 1. Agency Action

Agency acceptance of the OAH decisions is very high. 94.12% of all decisions acted upon by the agencies (that is, excluding .42% of decisions certified as final due to agency inaction) are accepted without modification. Agency acceptance was 97.19% 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 (77.18%) of modifications were in the Recommended Order (penalty portion).



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

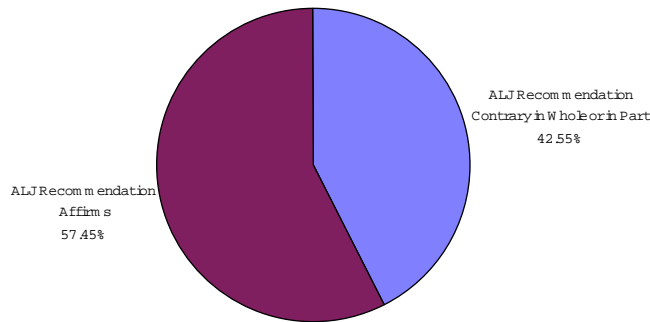


The following chart reports the breakdown by agency. This illustrates that modifications and rejections are few relative to the decisions accepted.

	Accept	Modify Penalty	Modify Fact/law	Reject
Acupuncture Board of Examiners	1			
Arizona Health Care Cost Containment System	3802	31	33	102
Arizona Lottery	4			
Arizona Works-Maximus-(DES)	1			
Board of Appraisal	1			
Board of Behavioral Health Examiners	4			
Board of Chiropractic Examiners	3	3		
Board of Dental Examiners	2	2	1	
Board of Medical Examiners	6	1		1
Board of Psychologist Examiners	1	1		
Board of Technical Registration		5		
Citizens Clean Elections Commission	2			
Department of Administration	15			
Department of Administration-Capitol Police Parking	252			
Department of Building and Fire Safety	137	6		
Department of Economic Security - CPS	143		21	3
Department of Environmental Quality	116			
Department of Gaming	2			1
Department of Health Services	212	1	1	1
Department of Insurance	70	3		
Department of Public Safety - Adult Care Clearance	22			
Department of Public Safety - Concealed Weapons Permit Unit	3			
Department of Public Safety - Student Transportation	9			1
Department of Racing	11			
Department of Real Estate	29	1		
Department of Water Resources	1	2		
Liquor Licenses and Control	60			
Office of Alternative Fuel Recovery	7			
Peace Officers Standards and Training	1			
Registrar of Contractors	1236	139	4	16
State Banking Department	7			
State Board of Accountancy	32	1		
State Board of Cosmetology	14			
State Board of Nursing	12	1	1	
State Land Department	3			
Structural Pest Control Commission	3	6		

In FY 2001, OAH rendered a decision contrary in whole or in part to an agency's original position in 42.55% of cases. Agency acceptance of contrary decisions was high (94.03%).

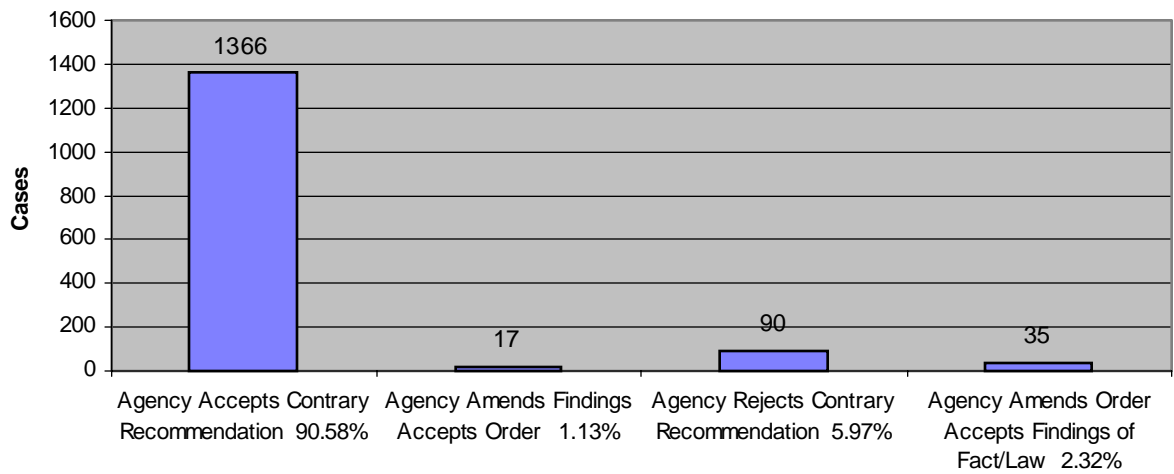
**Recommendations Contrary to Original Agency Position FY 2001**



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 Findings/Law	Rejects	Amends Order Only
AHCCCS	1092	10	84	23
Building and Fire Safety Administration	23			6
Banking	1			
DPS - Bus			1	
Board of Medical Examiners	1			1
Board of Dental Examiners	1			
Capitol Police Parking	179			
Department of Economic Security - CPS	18	6	1	
Gaming			1	
Department of Health Services	3	1	1	
Department of Insurance	8			
Liqor Licenses and Control	11			
Department of Real Estate	4			1
Registrar of Contractors	21		1	3
Board of Nursing			1	1
Citizen's Clean Elections	2			

### Agency Response to Contrary Recommendations FY 2001



## 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 2001, 28 recommended decisions were certified as final administrative decisions.

Department of Building and Fire Safety	9
Department of Economic Security - CPS	5
Arizona Health Care Cost Containment System	4
Arizona Lottery	1
Department of Water Resources	1
Arizona Works-Maximus-(DES)	1
Department of Public Safety - Adult Care Clearance	1
Secretary of State - Business Services Division	1
State Banking Department	1
Department of Administration	1
Board of Medical Examiners	1
State Schools for the Deaf and the Blind	1
State Land Department	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 204 motions to the OAH Director for change of judge were filed pursuant to A.R.S. §41-1092.07(A) for bias or prejudice. 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

### **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, 2001, the OAH has concluded in excess of 969 cases 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.



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A.R.S. §41-1092.12
2. Substantive Policy Statements
3. Newsletters

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