

# **The Office of Administrative Hearings**

**The First Annual Report**

**to**

**Governor Fife Symington**

**Senator John Greene, President of the Senate**

**Representative Mark Killian, 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, 1996**



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## **I. Introduction**

The Office of Administrative Hearings (OAH) was created pursuant to Laws 1995, Chapter 251, adding new A.R.S. §41-1092 et seq., and commenced operation on January 1, 1996. Administrative hearings previously provided by regulatory agencies (except those specifically exempted) are now transferred to OAH for independent proceedings. Personnel and funds were transferred to OAH from seven agencies and additional funds from six other agencies. There are two locations, Phoenix and Tucson, with 22 full-time positions, including the Director, the Case Management Supervisor, the Office Manager, 12 Administrative Law Judges (ALJ) and 7 support staff. Our statutory mandate is to "ensure that the public receives fair and independent administrative hearings."

We have designed our office system to continually collect performance measures. Over 2,700 cases have been filed with us since January and we have concluded 196 cases per month for every 216 cases scheduled. 97% of all recommended decisions are accepted by agency directors without modification. Importantly, most participants in our hearings rate our work as either excellent or good.

This report is made pursuant to A.R.S. §41-1092.01(C)(5) and A.R.S. §41-1092.01(C)(9).

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

### **1. The Spirit of OAH**

#### **a. The Mission Statement**

Our mission statement is designed to reflect our core values. We display it prominently on our stationery, our business cards, our offices and hearing rooms. It reminds us of what we should be striving for. It also is an expression of what those who come to us have a right to expect. Our mission statement is:

***We will contribute to the quality of life in the State of Arizona by fairly and impartially hearing the contested matters of our fellow citizens arising out of state regulation.***

Regulatory reform was born of the belief that government must respect the economic needs and independence of those engaged in creating the wealth that in turn forms the basis of our general economic well-being. By explicitly recognizing that we are a government of fellow-citizens, we take very seriously our legislative mandate of providing fair, impartial and independent hearings. At the conclusion of each hearing we ask our fellow citizens, be they private citizens or their attorneys or attorneys for the regulating agencies, to tell us whether we have succeeded in providing an accessible and respectful forum for truth. We ask them to grade our administrative law judges, facilities and our support staff.

#### **b. The Agency Logo**

Lady Liberty used to grace coins in the United States. Somewhere along the way we abandoned the practice. When looking for a fitting symbol for regulatory reform, OAH chose the liberty head to

symbolize the recognition that our financial wealth, like so many of our treasured values, lies in liberty. If we need some degree of community regulation in our lives, at least let it be with care and restraint. Let it be, as befits a free people, with every safeguard to ensure that every citizen has a voice and a fair opportunity to be heard.

## **2. Management Philosophy**

To quote Aristotle: "We are what we do repeatedly. Excellence is therefore, not an act, but a habit". It is this predictable degree of performance that we seek. OAH has established its management philosophy which can be summed up as follows:

- There is no limit to the ability to contribute on the part of a properly selected, well-trained, appropriately supported and committed person.
- We will organize as much as possible around teams, to achieve enhanced focus, innovations and individual commitment.
- We will eliminate unnecessary procedures and unnecessary paperwork.
- We will eliminate policies and procedures that demean human dignity.
- Any "middle management" position will be reconceived as one of facilitator.
- We will invest in our human capital as much as hardware. Training and retraining will be provided in problem-solving to enhance improvements.
- We will listen constantly, share ideas and information, and recognize achievement.
- Everyone will be evaluated on his or her contributions, sense of teamwork and love of CHANGE.

## **3. Creation of Case Management System and Office Automation**

### **a. Case Management System**

OAH has scheduled more than 2,600 cases from January 1, 1996 through October 31, 1996. Over 1,960 cases have been concluded. Efficient case management is necessary to meet specific statutory mandates: (1) requiring the scheduling of cases within 60 days of an agency request in contested cases and within 60 days of a party's request for a hearing in appealable agency action; and (2) requiring decisions to be rendered within 15 days of the conclusion of a hearing. OAH has modified software designed for law offices to meet the need, as summarized below:

- Each case and every action taken on that case, as reflected in docket notes, is tracked and instantly accessible electronically.
- All documents created are instantly accessible by case number or name search.

- Statutory time limits for case actions and management goals are automatically tracked and reported.
- Individual and Office calendars are automatically generated to track assignments, including a "tickler" system to warn of impending time limits.
- All telephone calls and Office contacts are electronically documented and transmitted by e-mail for rapid response.

#### **b. Automated System**

In addition, the volume of OAH requires an efficient document assembly and tracking system. The automated system currently in place can be summarized below:

- All captions, docket numbers and addressees are automatically merged to documents being created.
- Pleading paper, stationery and envelopes are created during printing, eliminating expensive special paper needs.
- Routine text can be imported automatically to eliminate time-consuming retyping.
- Specialized documents specific to certain actions by OAH are automatically created for document assembly.
- Documents are automatically stored and retrieved for easy reference.
- File labels are automatically generated for new cases.

#### **4. Cross Training of Administrative Law Judges and Continuing Legal Education**

Prior to the existence of OAH, administrative law judges (ALJ) in the various agencies were narrowly focused. In addition, work load varied widely from .19 hearings per month per ALJ in Water Resources to 18 hearings per month per ALJ at the Registrar of Contractors. Such disparity suggested the advantage of foregoing fixed subject-matter administrative law judges in favor of administrative law judges who were cross-trained to conduct hearings for a variety of agencies. As a result, the Case Management Supervisor is able to maintain the calendar by reference to a pool of available ALJ's. This has made possible the 60 days limit within which to schedule hearings after an agency or party request.

Such cross-training makes continuing education even more vital. As a result OAH undertakes both in-house and external education in agency subject matter and practice.

#### **5. Movement of all Hearings from Agency Offices to specially designed OAH Hearing Rooms**

Although statute provides that agencies make hearing facilities available, OAH has quickly moved to establish its own independent hearing rooms. This was done to eliminate the appearance of a

"home court advantage" for the agencies in the eyes of the public. In addition, valuable ALJ time is saved by avoiding distant commutes to the far-flung agencies. Also quality control can be assured in that OAH has been able to put in place quality recording devices to assure good records for hearings and any future transcript. Lastly, we have adopted conference style, rather than "court" style hearing rooms and furniture to create a non-threatening atmosphere and facilitate the easy access of the public, particularly the non-represented public, to the hearing process.

## **6. Elimination of all Contract Administrative Law Judges**

Certain agencies, not supported by the general fund, must contract with OAH for services. A study of hearings and associated services performed by contract (procured) administrative law judges from January 1, 1996 through August 30, 1996 for these agencies reflect a cost of \$80,155.90. The average cost of a procured contract ALJ was \$75.00/hr. As of September 1, 1996, OAH now performs all serves in-house at a cost of \$26.00/hr. This move will result in reduced costs to agencies, will generate funds to support the OAH and effectuate our policy of total quality control,

## **7. Increase of Administrative Hearings in Areas Outside of Metropolitan Phoenix**

Prior to the creation of OAH, the ROC averaged annually a total of 12 week-long trips to remote areas of the State. OAH has increased the number to 36 weeks per year. The result has been the elimination of a 180-220 day backlog in cases despite significant increases in hearings requests. Citizens of the State are therefore assured timely dispositions of their cases. Because OAH administrative law judges are cross-trained, all types of cases can now be cost-effectively scheduled in remote areas, including Flagstaff, Kingman, Lake Havasu, Prescott, Showlow, Sierra Vista and Yuma. OAH maintains a branch office in Tucson.

## **8. Creation of Informative Brochures and Newsletters**

### **a. Informative Brochure**

OAH has created an informative and easily understood brochure which is inserted in all notices of hearing sent to parties. The brochure is written to ensure simple language devoid of legal jargon and in a question and answer format specifically designed to highlight important information.

### **b. "The OAH Newsletter"**

"The OAH Newsletter" is created entirely in-house, with little or no cost, except paper. OAH Newsletter will be issued quarterly to update legislators, agencies and others interested about the workings of OAH. In addition, we report statistical measurements monitoring our quality, including the total filings with OAH, time usage of the administrative law judges, and the degree of acceptance of ALJ decisions by final agency actions.

## **9. Evaluations of OAH Staff by the Public**

OAH has initiated a detailed evaluation for use by all parties to an administrative hearing. The evaluation tests the impartiality and attentiveness of the administrative law judges, the facilities and staff. The evaluations indicate the vast majority of citizens, whether agency attorneys, private

attorneys, represented or unrepresented private parties rate our services as either excellent or good.

### III. Summary of Agency use of OAH Services

#### 1. Number of Cases Filed v. Cases Concluded

Figure 1 compares the number of cases filed with OAH since January 1, 1996, with the number of cases concluded through October 30, 1996. The total number of scheduled cases exceeded the total concluded since scheduling is 60 days in advance. As of September 30, 1996, OAH has succeeded in concluding 205 cases for every 210 cases scheduled. However, cases filed have increased steadily, including a 20% increase in ROC cases alone.

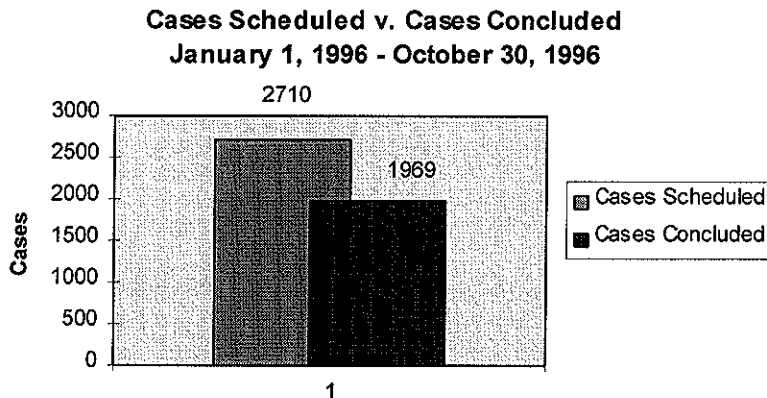
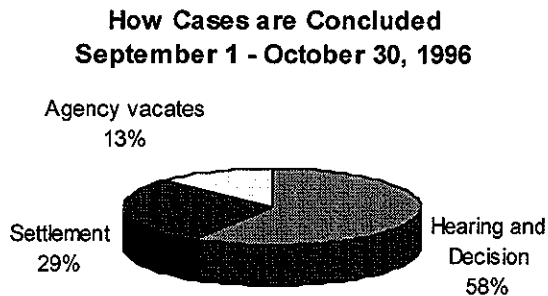


Figure 2 illustrates the percentage of cases that are vacated by agencies in advance of hearings; the number that are vacated and remanded by OAH as the result of settlements and motions to dismiss; and the number of cases that proceed to hearing.

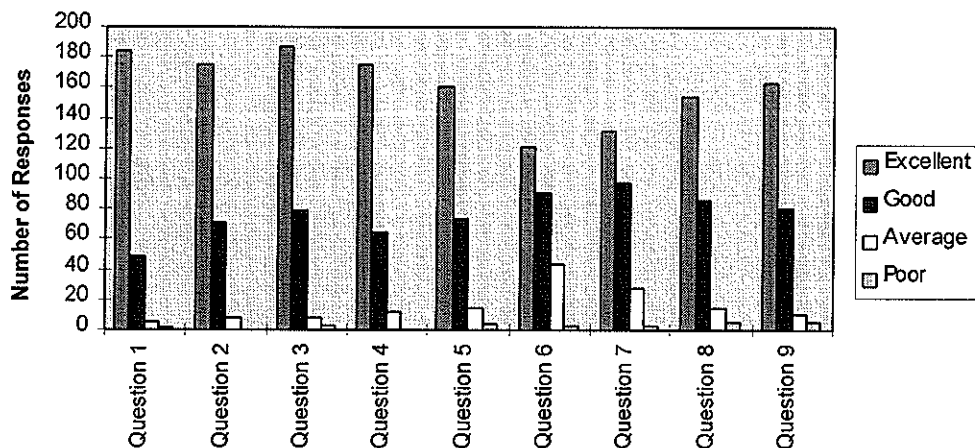




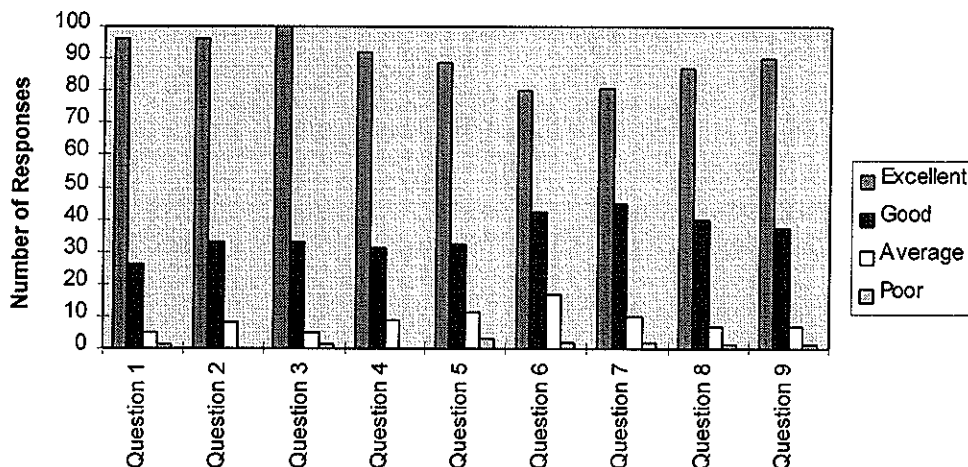
## 2. Results of Public Evaluation

Figure 1 reports the responses to all evaluations completed by all participants for hearings held from September 1 - October 30, 1996. The data is designed to focus among certain reporting groups: (1) agency attorneys; (2) private attorneys; (3) represented parties; and (4) unrepresented parties. Figure 2 represents the responses of unrepresented parties. Since one of the objects of OAH is to make government more accessible to this group, its results are reported separately.

**Figure 1**  
Evaluation Responses - All Groups



**Figure 2**  
Evaluation Responses - Unrepresented Parties

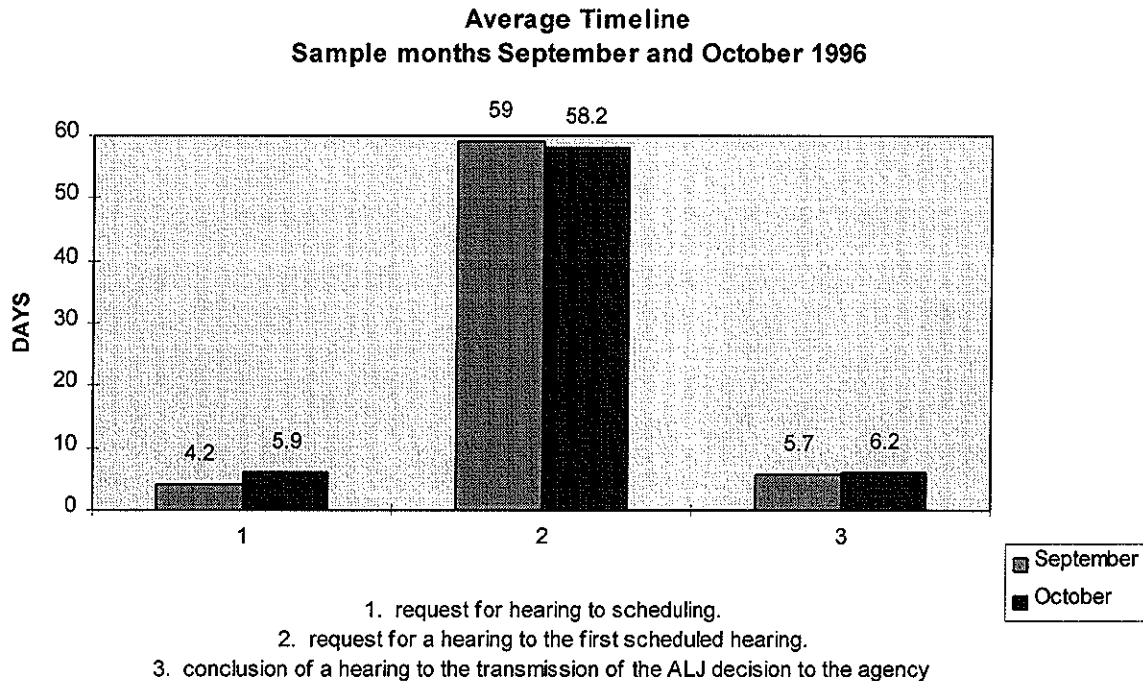


1. Attentiveness of ALJ
2. Effectiveness in explaining the hearing process
3. ALJ's use of clear and neutral language
4. Impartiality
5. Effectiveness in dealing with the issues of the case

6. Sufficient space
7. Freedom from distractions
8. Questions responded to promptly and completely
9. Treated courteously

### 3. Timeline of Case Management

A.R.S. §41-1092.05 requires the scheduling of cases within 60 days of an agency request in contested cases and within 60 days of a party's request for a hearing in an appealable agency action. A.R.S. §41-1092.0(A) requires that decisions be rendered with 15 days of the conclusion of a hearing. The figure below illustrates that, on average, statutory mandates are currently being met, despite an increase in filings by the agencies.



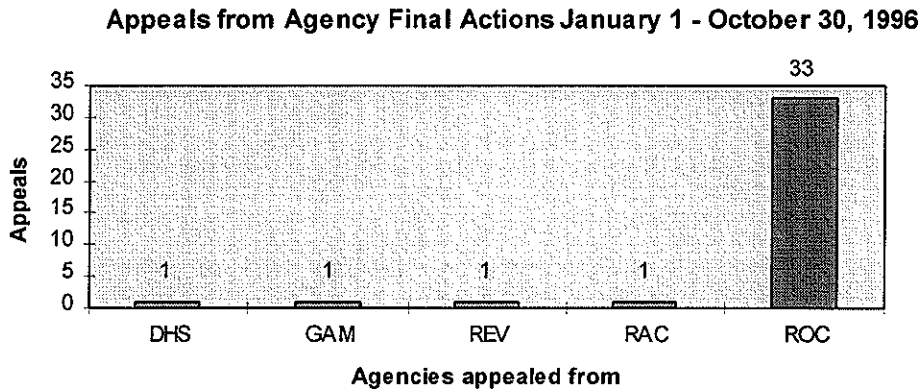
### 4. Breakdown of Cases Filed

The list below indicates the number of cases filed with OAH by the covered agencies from January 1, 1996 - October 30, 1996. The total number filed is 2710.

Accountancy (ACY)	59	Insurance (INS)	159
Administration (ADM)	8	Land (LAN)	11
ADA (ADA)	1	Liquor (LIQ)	108
Education (ADE)	4	Med. Examiners (MDX)	21
Agriculture (AGR)	6	Nursing (NUR)	33
Bldg/Fire Safety (BFS)	107	Osteopathic (OST)	3
Behv. Health (BHS)	4	Police Standards (POS)	13
Banking (BNK)	17	Pvt. Post. Ed (PPS)	1
Cosmetology (COS)	15	Psychology (PSY)	2
Dental (DEN)	8	Racing (RAC)	18
Econ. Security (DES)	1	Real Estate (REL)	48
Environ. Quality (DEQ)	52	Revenue (REV)	213
Health Services (DHS)	179	R. of Contractors (ROC)	1496
Wgt & Measures (DWM)	7	Pest Control (SPC)	47
Water Resources (DWR)	1	Veterinarian (VET)	1
Funeral (FNR)	1	Water Qual. Aps. (WQB)	4
Gaming (GAM)	62		

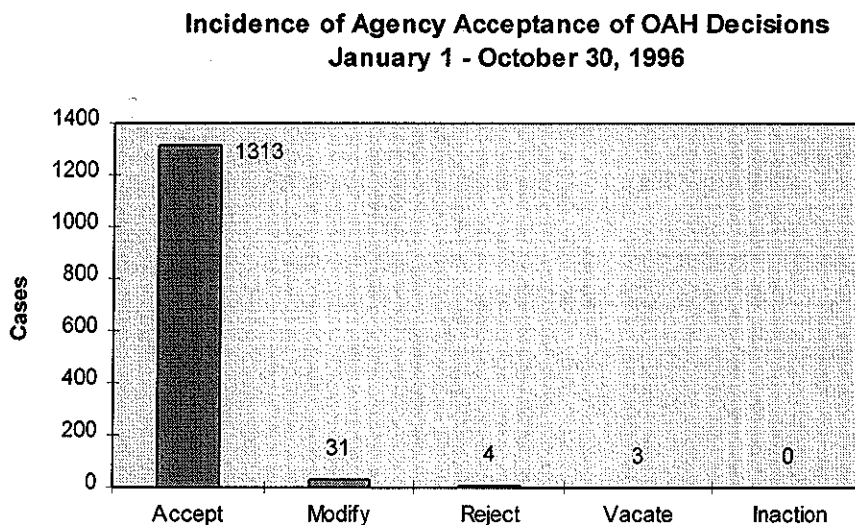
## 5. Incidence of Appeals

Parties are entitled to appeal final agency actions, generally to the Superior Court. The following figure indicates that appeal of final agency actions by regulated persons is rare.



## IV. Acceptance of ALJ Decisions by Agencies

The figure illustrates the incidence of acceptance, vacating or rejection of the administrative law judge decisions by the reviewing regulating agencies. 97% of all OAH decisions are accepted without modification.



## V. Recommendations for Changes in the Administrative Procedures Act

### Issues of Scheduling of Hearings and Notices

#### 1. Amend A.R.S. §8-506.01 to conform to A.R.S. §41-1092.03 and A.R.S. §41-1092.05

Regulatory reform is advanced by conforming practice to a single standard. A.R.S. §41-1092 et seq., as amended, has created a workable system and was designed to function as a single procedure. A.R.S. §8-506.01 has created a statutory exception which does not serve the cause of regulatory reform, nor the appealing party.

A.R.S. §41-1092.03 provides that an appealing party may request a hearing in an appealable agency action within 30 days after receiving the notice. A.R.S. §8-506.01 provides that such request must be made within 20 days. This variance in procedure has caused confusion and missed deadlines in the regulated community.

A.R.S. §41-0192.05 provides that in appealable agency actions, hearings be held within 60 days and notice sent thirty days in advance. A.R.S. §8-506.01 provides that hearings be held within 10 days, with no provision for notice. The A.R.S. §8-506.01 scheme is unworkable since in practice few, if any, appealing parties will be prepared to proceed to hearing within 10 days of a request. Little time is left for the agency to give notice of a scheduled date. The appealing party will have little or no advance warning to witnesses, nor time to request and serve subpoenas.

Current practice is to schedule the case without notice and have the parties negotiate a continuance. The effect is to needlessly congest the calendar of OAH, with little or no consequent benefit to the appealing party.

#### 2. Require agencies to notify OAH of appealable agency actions within 5 days of a request for hearing.

A.R.S. §41-1092.05(A) requires that in appealable agency actions OAH schedule a hearing within 60 days of the request for the hearing by the appealing party. The request for hearing is made to the regulating agency pursuant to A.R.S. §41-1092.03(B). Often agencies receive an appeal from a party but do not transmit the case to OAH for several weeks. It becomes difficult or impossible for OAH to schedule hearings for the cases within the remaining time.

The agency should affirmatively be required to promptly transmit cases to avoid scheduling problems. Transmittal within 5 days should be sufficient. Alternatively, the appealable agency action should be conformed to the procedure for contested cases and provide that hearings be scheduled within 60 days of the agency request rather than the request of the appealing party.

**3. Conform A.R.S. §41-1092.05(B) to include contested cases.**

The 30 day rule for notice is currently limited to "appealable agency actions". Therefore, in "contested cases" most agency rules provide for 20 days notice. There is no clear reason for the variance and a longer time frame for notice benefits the regulated party. More notice may mean fewer continuances and consequently a more streamlined system in scheduling cases as a whole.

**4. Require all notices of appealable agency action and contested cases to contain a clear statement of the statute or rule which is alleged to have been violated.**

Current practice is variable among the agencies. Such a statutory requirement will help to give the appealing party or Respondent sufficient notice of the actual charges and properly limit the action.

**Issues of Transmittal of The ALJ Decision and Agency Review**

**5. Consider the legislative intent of A.R.S. §41-1092.05(A), and specifically, whether agency rules which had otherwise made the administrative law judge decision "final" were meant to be supplanted in favor of Agency review.**

A.R.S. §41-1092.02(D) provides that A.R.S. §41-1092.05(A) operates "...notwithstanding any other administrative proceeding established in statute or administrative rule...".

Previous to the enactment of A.R.S. §41-1092.05(A), OAH's decision was by statute final in cases arising out of the Department of Building and Fire Safety A.R.S. §41-2181 et seq. Likewise, A.A.C. R6-5-7407(B)(4) and R6-5-2405(G)(7) would have made OAH decisions issued under newly enacted A.R.S. §8-506.01 final orders.

**6. Decrease the time from the conclusion of a hearing to the final action of the agency from 45 days to 40 days and apportion the allotted time equally between OAH and the regulating agency.**

A.R.S. §41-1092.08(A) provides that a written decision be issued by OAH within 15 days of the conclusion of a hearing.

A.R.S. §41-1092.08(B) provides that the regulating agency may adopt, modify or reject the decision of OAH within 30 days, or the decision of OAH becomes final.

Although OAH reports in October an average 6.2 day turnaround on transmitting decisions after the conclusion of hearings. Hidden in the average are the particularly challenging cases with complex issues and numerous exhibits that are time intensive. Increasing the time allotted to OAH will allow more needed drafting time for those complex cases. Since 97% of all OAH decisions are accepted as transmitted, 20 days would otherwise appear to be sufficient for agency review.

## Issues of Rehearing

### **7. Increase the time for the agency to act on an outstanding motion for rehearing in order to permit a non-agency party to be heard in opposition.**

A.R.S. §41-1092.09 provides that the agency head rule on a motion for rehearing within 15 days of receipt. This does not allow time for the opposing party to respond. Normally that is not a consideration in cases where the agency is acting on its own motion. However, in cases such as the ROC where two private parties are involved, due process requires notice to the other party and an opportunity to be heard prior to the agency acting. An extension to 30 days in such cases would likely be sufficient.

### **8. Make explicit what “receipt” means for the purposes of A.R.S. §41-1092.09 (motion for rehearing)**

A party may file a motion for rehearing within 30 days of “receiving” a final administrative decision. The context of the statute would suggest “actual receipt”, but clarification would be useful.

## Issues of Appeal

### **9. Conform A.R.S. §41-1092.10(A) and A.R.S. §12-904 with reference to when time for appeal commences.**

In several practitioner-sponsored events, attorneys have expressed confusion as to whether the “receipt referenced in A.R.S. §41-1092.10 refers exclusively to “actual receipt”, or whether it includes the “deemed receipt” of A.R.S. §12-904. A.R.S. §41-1092.10(A) provides that the time to appeal runs upon “receipt”. A.R.S. §12-904 provides that appeal time begins to run when the agency action is “mailed by registered mail to the party affected at his last known residence or place of business.” A.R.S. §41-1092.04 requires parties to notify the regulating agency of change of address within 5 days of a change.

If A.R.S. §41-1092.10(A) is interpreted or strictly defined as “actual receipt”, a great degree of uncertainty will be interjected in the appeals process where a party fails to advise the agency of change of address and service on the party of the final agency action becomes impossible.

