

The OAH



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www.azoah.com

Official Newsletter of the Arizona Office of Administrative Hearings

Director's note: OAH is committed to fairness and making hearings accessible to all. This article is part of a series of informational articles to educate the public and parties who appear before us about the hearing process and how to better present their cases. The following article may be found at OAH's website at www.azoah.com along with all previous articles published in the OAH Newsletter.

DISCOVERY-THE KEY TO UNLOCKING THE "MYSTERY" BEHIND AN ADMINISTRATIVE HEARING

By Sondra J. Vanella, Administrative Law Judge

Discovery is a pre-hearing device that can be used by each party to obtain facts and information about the case from the opposing party, in order to prepare for an administrative hearing. There are no formal rules governing the discovery process in an administrative hearing. However, discovery should be calculated to lead to reliable and probative information. In some cases, parties may have another related matter pending in court. The administrative forum should not be viewed as an opportunity to obtain information solely for use in another court proceeding. Discovery must be relevant to the issues that will be addressed at the hearing.

Generally, discovery is limited in administrative proceedings. However, there are several methods accessible to both represented and unrepresented parties, which can facilitate the gathering of relevant information. Perhaps the easiest and most often overlooked tool is a review of the case file. Parties are encouraged to examine the case file forwarded to the Office of Administrative Hearings by the referring agency, prior

"Discovery"

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Pre-Hearing and Post-Hearing Memoranda

by Dorinda Lang, Administrative Law Judge

Written memoranda are not always requested or necessary in hearings before the Office of Administrative Hearings ("OAH"). If the Administrative Law Judge requests one, however, he or she expects the parties to submit them and in a timely manner (the time for submission being set by the Administrative Law Judge).

Arizona Administrative Code R2-19-116(G) specifically allows the Administrative Law Judge to "permit or require" written memoranda to be submitted after the close of a hearing. The Administrative Law Judge may also permit or require the parties to submit one before the hearing, particularly as a result of a pre-hearing conference under A.A.C. R2-19-112.

If a party wishes to submit a memorandum for consideration by the Administrative Law Judge without having been requested to do so, the best time to submit it is at least a couple of days prior to the hearing. The OAH staff files documents received in the course of business pursuant to A.A.C. R2-19-108. This rule merely allows the OAH staff to file documents in the appropriate case file. It states that "documents" that can be filed may include briefs, which are essentially the same thing as memoranda. The rule also requires that a copy be served on all parties.

"Memoranda"

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The Office of Administrative Hearings (OAH) began operations on January 1, 1996. Administrative Hearings previously provided by regulatory agencies (except those specifically exempted) are now transferred to the OAH for independent proceedings. Our statutory mandate is to "ensure that the public receives fair and independent administrative hearings."

The process of unifying the administrative hearings function in OAH-style agencies

began in 1945 with California. The current states having adopted the model, with year of inception are: Arizona (1996), California (1961), Colorado (1976), Florida (1974), Georgia (1995), Illinois (1997), Iowa (1986), Kansas (1998), Louisiana (1996), Maryland (1990), Massachusetts (1974), Michigan (1996), Minnesota (1976), Missouri (1965), New Jersey (1979), North Carolina (1986), North Dakota (1991), Oregon (1999), South Carolina (1994), South Dakota (1994), Tennessee (1975), Texas (1991), Washington (1981), Wisconsin (1978) and Wyoming (1987).

Mission Statement:

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.

1st Quarter Statistics At A Glance

Acceptance Rate:

ALJ findings of fact and conclusions of law were accepted in **97.67%** of all recommended decisions acted upon by the agencies.* ALJ decisions, including recommended orders, were accepted without modification in **94.62%** of all recommended decisions acted upon by the agencies. **70.60%** of all agency modification was of the order only (i.e. penalty assessed).

Appeals to Superior Court:

The appeal rate was **1.58%** defined as appeals taken (16) over hearings concluded (1010**).

Rehearings:

The rehearing rate was **.40%**, defined as rehearings scheduled (4) over hearings concluded (1010**).

Completion Rate:

The completion rate was **62.04%**, defined as cases completed (1759) over new cases filed (1010).

Continuance:

The average length of a first time continuance based on a sample of cases (first hearing setting and first continuance both occurred in the 1st quarter) was **60.35 days**. The frequency of continuance, defined as the number of continuances granted (1370) over the total number of cases first scheduled (2821), expressed as a percent, was **48.56%**. The ratio of first settings (2863) to continued settings on the calendar (239) was **1 to 0.08**.

Dispositions:

Hearings conducted: **57.4%**; vacated prior to hearing: **40.3%**; hearings withdrawn by agency: **2.3%**.

Contrary Recommendations and Agency Response: 23.99% of recommendations were contrary to the original agency action where the agency took a position. Agency acceptance of contrary recommendations was **89%**.

*1.05% of ALJ recommended decisions were certified as final by the OAH due to agency inaction.

** Cases which were vacated are not included

notifying the opposition of such request. Subpoenas for the production of documents may be issued by the ALJ if the party seeking documents demonstrates that they are relevant to the issues in dispute. The ALJ may require a brief statement supporting the necessity of a particular witness to appear, or the relevancy of the documents being sought. Documents may be subpoenaed from individuals, businesses, and governmental agencies.

The deposition is a limited discovery technique that can be exercised when a witness is unavailable to attend the hearing. Should a witness be unavailable to testify at the hearing, either party may petition the assigned ALJ to permit a deposition to be taken to be used as evidence at the hearing. This is because the person being deposed is under oath and subject to cross examination during the deposition.

The pre-hearing conference is not a discovery tool per se, but parties seeking assistance with discovery, or who seek clarification of issues,

may request a pre-hearing conference. On occasion, an ALJ may order a pre-hearing conference without a request from either party. The pre-hearing conference may be used to clarify or limit procedural, legal, and factual issues, thereby alleviating a degree of uncertainty about the proceeding. The ALJ may order the parties to exchange documents and/or lists of witnesses and exhibits intended to be used during the hearing. It also affords the parties an opportunity to discuss settlement.

Discovery, if utilized appropriately, promotes a meaningful and efficient hearing, with both parties prepared to present and address relevant evidence and legal arguments.

“Memoranda”

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Once the hearing is over, however, the only documents accepted by the Administrative Law Judge are those already requested prior to the end of the hearing and for which the record was specifically held open. Memoranda submitted after the close of the hearing, if not previously requested by the Administrative Law Judge, will be returned in the mail with a letter stating that the record in the matter has been closed.

A party or representative appearing at an OAH hearing may be faced with writing a pre-hearing or post-hearing memorandum at the request of the Administrative Law Judge when they had no intention of doing anything so technical for the case. Those without legal experience may feel a bit overwhelmed by the prospect and be concerned about what to submit.

But a memorandum is nothing more than a very short position paper. A brief statement of the case and why the party believes it should prevail, clearly stated and amenable to reason, should suffice. If the party is relying on a particular statute or rule, a proper citation is appropriate. If referencing an agency policy or other document, attach a copy of it to the memorandum.

Organization of points into separate headings, formulation of clear thoughts and use of appropriate sentence structure may make the party's case more clear and memorable to the Administrative Law Judge, possibly increasing the chances of receiving a favorable recommendation. Thus, the task of writing a memorandum is usually viewed as an opportunity rather than a chore.

If, for any of the above reasons, you are submitting a memorandum for a hearing at the Office of Administrative Hearings, keeping the above points in mind will help you make your case.

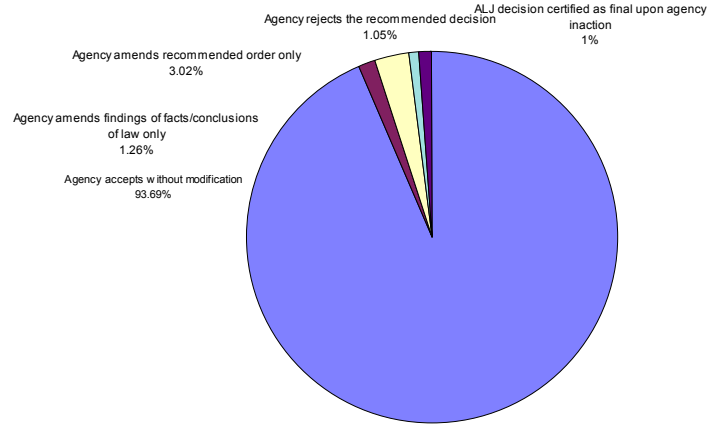
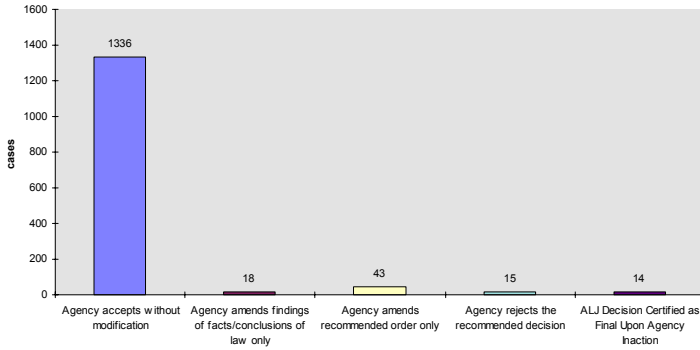
“Discovery”

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to the hearing. This enables the parties to become familiar with the documents that the agency (assuming the agency is a party) or other party may use during the hearing, and affords the opportunity to gather whatever documentation the party feels is necessary in order to present the case to the Administrative Law Judge (“ALJ”). Parties may obtain copies of the case file at their own expense.

The most common form of discovery is the issuance of subpoenas to compel the attendance of witnesses and the production of documents. This may be requested by either or both parties without

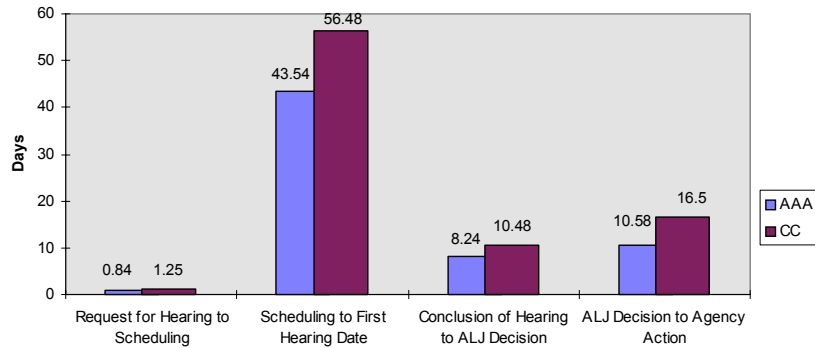
Agency Response to Recommended Decisions July 1 - September 30, 2001



Arizona Hosts Central Panel Directors Meeting

The annual conference of Central Panel Directors will be held at the Hyatt Regency Hotel in downtown Phoenix from December 5-8, 2001. Cliff J. Vanell, the Director of the Office of Administrative Hearings for the State of Arizona ("OAH"), will host several functions during the conference. Representatives are expected from Alabama, Arizona, California, Chicago, Colorado, Florida, Georgia, Iowa, Louisiana, Maryland, Maine, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York City, North Carolina, North Dakota, Oregon, South Carolina, Tennessee, Texas, Washington, Washington DC, Wisconsin, and Wyoming. The agenda will include refining approaches to case management and technology, attracting and retaining administrative law judges, increasing public accessibility to the administrative process, and procedural rules.

Average Time Between Selected Events - Appealable Agency Actions v. Contested Cases*, July 1 - September 30, 2001



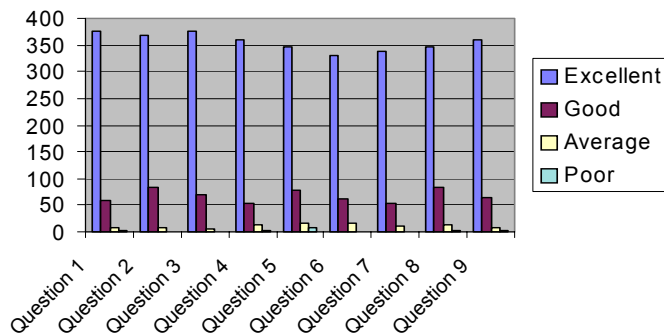
*Note: *Appealable Agency Actions* are agency actions taken before an opportunity for a hearing. A typical example would be the denial of a license. A party is entitled to a hearing before the OAH before the action becomes final. *Contested Cases* involve actions yet to be determined by an agency. An example would be proposed discipline on a professional license with the possibility of suspension or revocation. Parties are entitled to a hearing before the OAH prior to the agency acting.

2835 Cases Filed July 1, 2001 - September 30, 2001

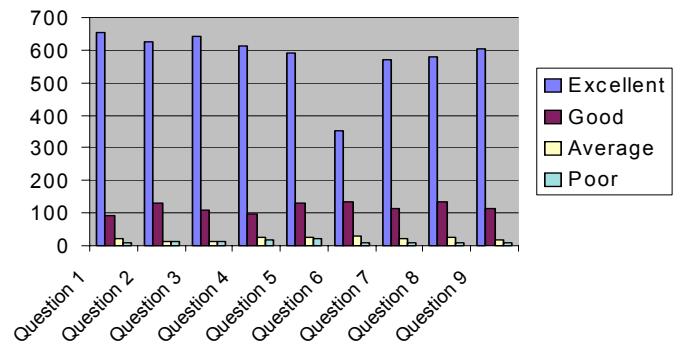
	1st Q	FY 2002		1st Q	FY 2002		1st Q	FY 2002
Accountancy	1	1	Cosmetology	8	8	Peace Ofc. Standards	2	2
Acupuncture Board	0	0	Dental	4	4	Pest Control	0	0
ADA	0	0	Economic Security	0	0	Physical Therapy	0	0
Administration	4	4	Economic Security-CPS	51	51	Podiatry	0	0
Admin. Parking	50	50	Education	2	2	Psychologist Examiners	0	0
Agriculture	2	2	Environ. Quality	14	14	Public Safety - CW	3	3
Ag. Empl. Rel. Bd.	0	0	Funeral	0	0	Public Safety - Trans	2	2
AHCCCS	2011	2011	Gaming	0	0	Public Safety - Adult CC	0	0
Alternative Fuel	5	5	Health Services	46	46	Pvt. Post. Ed.	0	0
Appraisal	0	0	Insurance	22	22	Racing	4	4
AZ Commission on the Arts	0	0	Land	3	3	Radiation Regulatory	0	0
Attorney General	3	3	Liquor	17	17	Registrar of Contr.	409	409
Arizona Works	0	0	Lottery	0	0	Real Estate	30	30
Banking	10	10	Maricopa Cty. Housing	1	1	Revenue	12	12
Behavioral Health Ex.	7	7	Medical Examiners	2	2	School - Deaf & Blind	0	0
Building/Fire Safety	64	64	Naturopathic	0	0	Secretary of State	0	0
Charter Schools	0	0	Nursing	11	11	Technical Registration	3	3
Chiropractic	1	1	Nursing Care Admin	0	0	Water Qual. App. Bd.	0	0
Clean Elections	0	0	Osteopathic	0	0	Water Resources	5	5
Community Colleges	0	0	Parks	0	0	Weights and Measures	26	26

Evaluations of OAH Services

Unrepresented Responses 1st Quarter



All Responses 1st Quarter



Questions:

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

Note: The four major groups of those who responded are: represented private party; unrepresented private party; counsel for a private party; and counsel for the agency. The evaluations are filled out immediately after the hearing and the evaluations are not disclosed to the ALJ involved.

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