The OAH

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Official Newsletter of the Arizona Office of Administrative Hearings

MOTION PRACTICE AT THE OFFICE OF ADMINISTRATIVE HEARINGS

Gary B. Strickland, Administrative Law Judge

***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.

A motion is an application to receive a ruling or order directing that something be done favorable to the applicant. Parties appearing before the Office of Administrative Hearings have available to them several motions that they may utilize in an effort to obtain a favorable outcome. The following discussion identifies the more typical motions utilized in administrative adjudication. The use of such motions is limited to: (1) the timing requirements of the Office of Administrative Hearings procedural rules set forth in the Arizona Administrative Code, Title 2, Chapter 19 (A.A.C. R2-19-101 *et seq*.), and (2) the substantive requirements of administrative law generally.

Motions filed concerning threshold (meaning, before the Administrative Law Judge has convened the hearing on the record) matters must be submitted to the Office of Administrative Hearings in writing at least fifteen (15) days prior to the date upon which the hearing is scheduled to begin, or, with "leave" supported by a showing of good cause (meaning, with the Administrative Law Judge's permission) to file at another time. A.A.C. R2-19-106(C). If the opposing party chooses to object to the motion, the responsive argument must be filed with the Office within five (5) days of service, or as directed by the Administrative Law Judge. A.A.C. R2-19-106(D). An otherwise appropriate oral motion will be considered by the Administrative Law Judge, however, if made during a prehearing conference or during the hearing itself. A.A.C. R2-19-106(B) and (C). The Administrative Law Judge will typically issue a written ruling on the motion, without delay, unless the motion is made orally and the Judge determines to render a ruling from the bench. In either case, the Administrative Law Judge will state sufficient grounds for the denial of or granting of the motion to advise the parties of the basis for the ruling.

Any motion that is presented to the Administrative Law Judge, whether written or oral, is required to be argued by the proponent (the one making the motion) with specific knowledge of the facts and the law [where necessary] upon which the motion is based. In other words, the proponent should never blindly "throw up" an application to the Judge hoping only that "something may stick." Integrity and good faith are presumed in the submission of all motions.

While a "lay" person (i.e., a non-attorney) may represent herself or an entity (where permitted by Rule 31 of the Arizona Rules of the Supreme Court) before the Office of Administrative Hearings in certain contexts, there is one context where it is absolutely necessary

"Motions"

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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 or cities having adopted the model, with year of inception are: Arizona (1996), California (1961), Colorado (1976), Florida (1974), Georgia (1995), Chicago (1997), Iowa (1986), Kansas (1998), Louisiana (1996), Maine (1992), Maryland (1990), Massachusetts (1974), Michigan (1996), Minnesota (1976), Missouri (1965), New Jersey (1979), New York City (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

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.

3rd Quarter Statistics At A Glance

Acceptance Rate:
ALJ findings of fact and conclusions of law were accepted in **97.8%** of all recommended decisions acted upon by the agencies.* ALJ decisions, including recommended orders, were accepted without modification in **95.17%** of all recommended decisions acted upon by the agencies. **70.51%** of all agency modification was of the order only (i.e. penalty assessed).

Appeals to Superior Court:
There were 21 appeals filed in Superior Court.

Rehearings:
The rehearing rate was **.17%**, defined as rehearings scheduled (2) over hearings concluded (1162**).

Completion Rate:
The completion rate was **97.99%**, defined as cases completed (1996) over new cases filed (2037).

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 3rd quarter) was **42 days**. The frequency of continuance, defined as the number of continuances granted (1335) over the total number of cases first scheduled (2032), expressed as a percent, was **65.7%**. The ratio of first settings (3125) to continued settings on the calendar (1326) was **1 to 0.425**

Dispositions:
Hearings conducted: **58.2%**; vacated prior to hearing: **38.2%**; hearings withdrawn by agency: **3.6%**.

Contrary Recommendations and Agency Response: 17.95% of recommendations were contrary to the original agency action where the agency took a position. Agency acceptance of contrary recommendations was **84.87%**.

***.6% of ALJ recommended decisions were certified as final by the OAH due to agency inaction or rendered moot by settlement.**
**** Cases which were vacated are not included**

"Motions"

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that a licensed Arizona attorney participate in the process. That occurs when an attorney who is licensed and in good standing in another jurisdiction, but not in Arizona, desires to represent a party. Before the out-of-state attorney is permitted to represent the party, he or she must be admitted *pro hac vice* ("for this case only") to practice before this Arizona tribunal. The Office of Administrative Hearings' web site, *www.azoah.com,* provides the proper form and style for the submission of a motion *pro hac vice.*

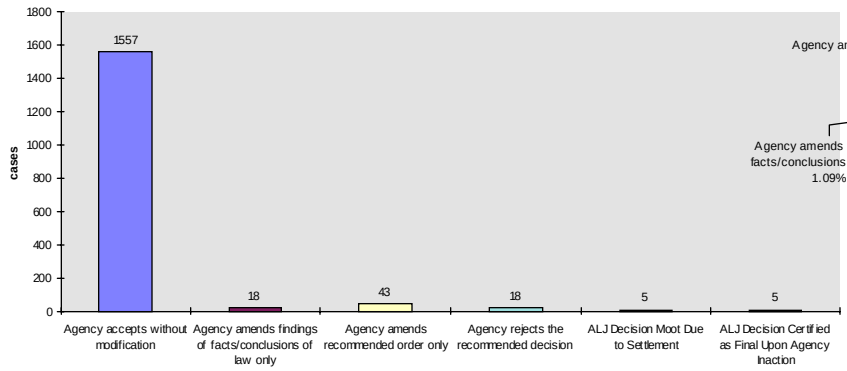
Another threshold motion concerns the date upon which the matter will be heard. Sometimes, a party will seek to have the hearing *continued* to a later date because some problem is anticipated. More infrequently, a party will seek to have the date upon which the hearing is scheduled be advanced to an earlier date, the hearing *accelerated*, because it is thought that a need has arisen to have a ruling on the issue(s) presented as early as possible. In either case, A.R.S § 41-1092.05 (C) and A.A.C. R2-19-110 require that the party who requests the change in the date for hearing demonstrate *good cause* to have the matter moved to an earlier or later day on the calendar. The motion should be filed only in support of a legitimate purpose. Illegitimate reasons for the filing of such a motion would include that of delay or merely to frustrate the opposing party. It should be noted that, generally, there is a presumption that the calendar should not be disturbed. There are many other citizens and public entities whose cases are awaiting a time slot within which to air their grievances. Therefore, in consideration of the motion, in addition to observance of the clearly stated requirements of statute and rule, the Administrative Law Judge will weigh the unfairness to the other party of delay or expedition, should the request be granted, against the particulars of the asserted hardship that a denial of postponement or advancement would create. In preparation of the motion, a party should be very careful (1) to familiarize itself with the rule, (2) ensure that it has *good cause* for the request before it asks for a calendar reassignment, and (3) not to expect that the request will be granted as of right. This last point holds fast even if the opposing party does not object to the motion.

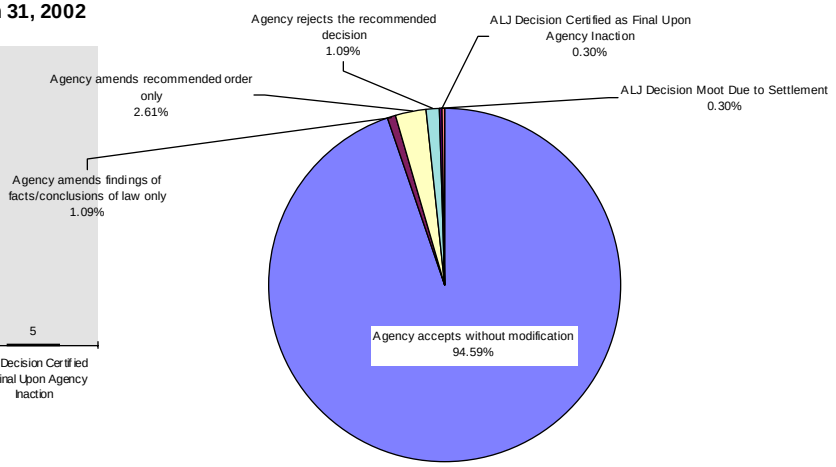
Still further as a threshold matter, a party may move to have a *change of venue*, i.e., request that the hearing be conducted at what the moving party considers a more convenient setting. However, in cases other than those involving *Registrar of Contractor* or *Child Protective Services* matters, venue is generally strictly confined to either Phoenix or Tucson. It may occasionally be appropriate to move a hearing between those two locations due to the number of witnesses situated in an area whereby Tucson would be closer for travel as opposed to Phoenix, or *vice versa.* OAH's procedural rules do not explicitly provide for the filing of a venue motion. However, such a motion will be nonetheless considered, balancing private interests with administrative efficiency.

It may also be true that a party might want to have the Administrative Law Judge render a ruling on an offer of evidence that it intends to make at the hearing or to limit or prevent the production of prejudicial and irrelevant matter that the other side may plan on raising. The *in limine* motion should be used with an intent to shorten the hearing and to simplify the issues that will be addressed.

Occasionally, a party will assert a motion for a *directed verdict* in an administrative case. This is inappropriate. There is no place for a *directed verdict* at an administrative hearing. The more correct motion is one to *dismiss*. Here, the moving party asserts that the party who has the overall burden of persuasion has failed to set forth evidence on every element of the case necessary to sustain a ruling in that party's favor. The opposing party feels it unnecessary to put on a rebuttal case because, legally speaking, there is nothing to rebut or to defend against. However, even should the Administrative Law Judge be inclined to agree with the party that has submitted the motion, it is improbable that he or she will grant a *dismissal motion* (or, more correctly in most cases, recommend that the Agency with jurisdiction grant the motion) so as to make a complete record for review by the Agency Director

Agency Response to Recommended Decisions January 1 - March 31, 2002

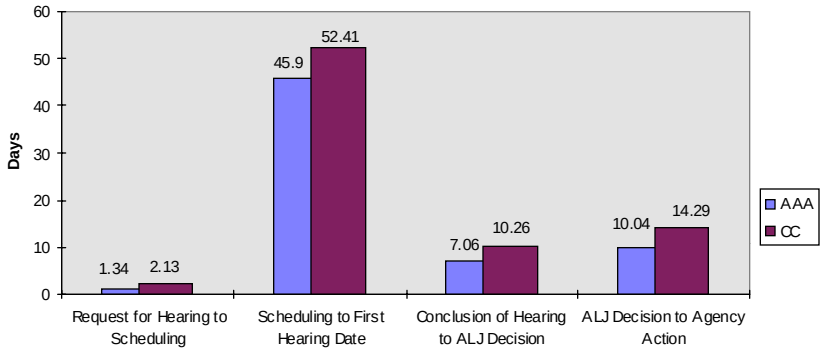




or Board who will render the Final Order. In effect, while denying the motion, the Administrative Law Judge may nevertheless ultimately recommend that the Agency head dismiss the matter.

In conclusion, a party has the right to petition the Administrative Law Judge by motion to obtain a ruling on the request and to be provided a brief statement of the reasons for the granting or denial of a motion recognized appropriate in the administrative forum. The overriding considerations of the Administrative Law Judge in rendering a ruling are those of fairness to the parties and expedition and efficiency in the process. If a filing party has observed the rules and has set forth a good faith, arguably sound legal position, the party will likely receive a ruling that is satisfactory to all under the circumstances of the case.

Average Time Between Selected Events - Appealable Agency Actions v. Contested Cases*, January 1 - March 31, 2002



*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.

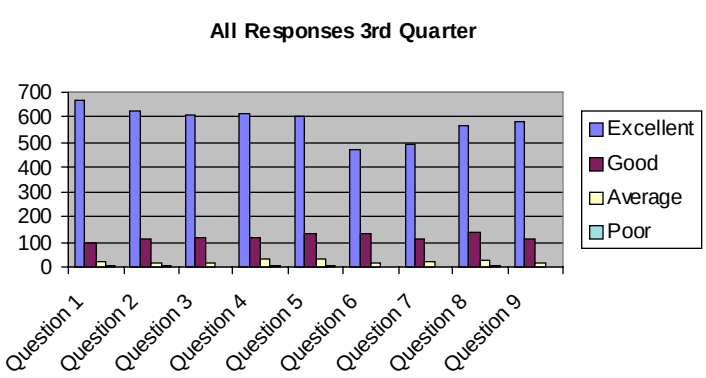
2037 Cases Filed January 1, 2002 - March 31, 2002

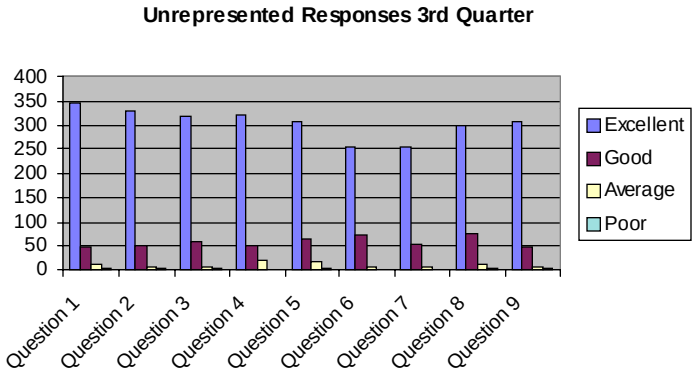
	3rd Q	FY 2002
Accountancy	1	7
Acupuncture Board	0	0
ADA	0	0
Administration	0	6
Admin. Parking	176	248
Agriculture	0	2
Ag. Emply. Rel. Bd.	0	0
AHCCCS	1025	3937
Alternative Fuel	2	8
Appraisal	5	8
AZ Bd. Occup'l Therapy	1	1
Attorney General	0	3
Arizona Works	1	1
Banking	22	38
Behavioral Health Ex.	3	15
Building/Fire Safety	58	181
Charter Schools	0	0
Chiropractic	2	5
Clean Elections	0	0
Community Colleges	0	0

	3rd Q	FY 2002
Cosmetology	22	41
Dental	0	12
Economic Security	0	0
Economic Security-CPS	57	171
Education	1	3
Environ. Quality	43	85
Funeral	0	0
Gaming	2	5
Health Services	58	176
Insurance	20	89
Land	4	9
Liquor	19	55
Lottery	0	0
Maricopa Cty. Housing	2	4
Medical Examiners	2	7
Naturopathic	0	0
Nursing	0	30
Nursing Care Admin	1	2
Osteopathic	0	0
Parks	0	0

	3rd Q	FY 2002
Peace Ofc. Standards	4	9
Pest Control	13	21
Physical Therapy	0	0
Podiatry	0	0
Psychologist Examiners	0	0
Public Safety - CW	4	9
Public Safety - Trans	7	13
Public Safety - Adult CC	0	0
Pvt. Post. Ed.	0	0
Racing	8	18
Radiation Regulatory	0	0
Registrar of Contr.	397	1233
Real Estate	22	79
Revenue	12	52
School - Deaf & Blind	0	0
Secretary of State	1	1
Technical Registration	4	6
Water Qual. App. Bd.	0	0
Water Resources	4	14
Weights and Measures	23	80

Evaluations of OAH Services





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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