The OAH

Jane Dee Hull
Governor

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Director

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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.

Order of Presentation, Manner of Presentation and Conduct During Proceedings

Casey J. Newcomb, Administrative Law Judge

The Administrative Law Judge begins a hearing by (1) reading the caption of the case; (2) stating the nature and scope of the hearing; and (3) identifying the parties, counsel and witnesses for the record. See Arizona Administrative Code ("A.A.C.") R2-19-116(B). The parties should address the Administrative Law Judge as "Your Honor" or "Judge" and treat the Administrative Law Judge with courtesy, respect and deference.

The parties may present opening statements. An opening statement is voluntary. Generally, the party with the burden of proof makes the initial opening statement. In most cases, it is the Complainant or the Appellant who has the burden of proof. All other parties may make an opening statement in a sequence determined by the Administrative Law Judge. See A.A.C. R2-19-116(D).

At the conclusion of the opening statements, the party with the burden of proof shall initiate the presentation of evidence, unless the parties agree otherwise. However, the Administrative Law Judge may require another party to initiate the presentation of evidence. See A.A.C. R2-19-116(E).

"Presentation"

continued page 2

"Oh the Burden We Bear!"

Gregory L. Hanchett, Administrative Law Judge*

Lawyers frequently banter about the term "burden of proof" as though it needs no explanation and is well known to even a lay person. But what does it mean for a litigant to "bear the burden of proof?" Which party to a case has the burden? The failure to fully understand what it means to "bear the burden of proof" can have dire consequences for a litigant. It can mean losing the case. The purpose of this short missive is to shed light on the burden of proof and which party bears that burden.

When a litigant is saddled with the burden of proof, that litigant really has two burdens. The first is the "burden of going forward," also known as the "burden of producing evidence." The second is called the "burden of persuasion." The burden of going forward is just what the name implies: The party who has this burden is required to present evidence to prove his or her claim before the opposing party has any requirement to present evidence. The runner who never leaves the starting line is akin to the litigant who fails to meet the burden of going forward. Like the runner who never leaves the blocks, the litigant who fails in the burden of going forward can never hope to win his case because he is never "in the race."

The burden of persuasion, on the other hand, entails more than the burden of putting on some evidence. The burden of persuasion requires a party to persuade the decision maker that the party is entitled to the relief or benefits sought. It is possible for a party to meet the burden of production, yet

*** Formerly with the OAH, now an ALJ in Montana**

"Burden"

continued page 2

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 D.C. (1999); 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.

4th Quarter Statistics At A Glance

Acceptance Rate:
ALJ findings of fact and conclusions of law were accepted in **97.64%** of all Administrative Law Judge decisions acted upon by the agencies.* ALJ decisions, including orders, were accepted without modification in **94.16%** of all Administrative Law Judge decisions acted upon by the agencies. **78.37%** of all agency modification was of the order only (i.e. penalty assessed).

Appeals to Superior Court:
There were **29** appeals filed in Superior Court.

Rehearings:
The rehearing rate was **.45%**, defined as rehearings scheduled (5) over hearings concluded (1101).

Completion Rate:
The completion rate was **112.91%**, defined as cases completed** (1933) over new cases filed (1712).

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 4th quarter) was **48.35 days**. The frequency of continuance, defined as the number of continuances granted (235) over the total number of cases first scheduled (1888), expressed as a percent, was **12.45%**. The ratio of first settings (2043) to continued settings on the calendar (1385) was **1 to 0.678**

Dispositions:
Hearings conducted: **56.96%**; vacated prior to hearing: **39.06%**; hearings withdrawn by the agency: **3.98%**.

Contrary Recommendations and Agency Response: Administrative Law Judge decisions were contrary to the original agency action in **26.97%** of cases where the agency took a position. Agency acceptance of such contrary Administrative Law Judge decisions was **86.78%**.

***.78% of Administrative Law Judge decisions certified as final by the OAH due to agency inaction or rendered moot by settlement.**
**** Cases which were vacated are not included.**

"Presentation"

continued from page 1

A party initiates the presentation of evidence by testifying on his/her own behalf or by the direct examination (i.e., questioning) of a witness. An opposing party may cross-examine or ask questions of any witness. The parties shall conduct the direct and cross-examination of witnesses in the order and manner determined by the Administrative Law Judge to expedite and ensure a fair hearing. The Administrative Law Judge shall make rulings necessary to prevent argumentative, repetitive or irrelevant questioning. See A.A.C. R2-19-116(F).

A party should remember the following tips when questioning a witness during direct and cross-examination:

a. A party must ask relevant and informative questions;

b. A party must ask questions that will assist the Administrative Law Judge in making an informed decision;

c. A party cannot argue with a witness or make statements or comments in response to a witness' answer;

d. A party cannot ask prejudicial questions;

e. A party cannot ask questions that are designed solely to harass a witness;

f. A party cannot repeatedly ask a witness the same question;

g. A party must allow a witness a reasonable amount of time to answer a question;

h. A party cannot interrupt a witness during the witness' answer; and

i. A party should refrain from asking multiple or compound questions within one question.

Each party must treat all other parties and witnesses with courtesy, respect and dignity. The Administrative Law Judge will not tolerate animosity, angry outbursts or threats of hostility directed towards any party or witness. A disruptive person may be removed from the hearing room and the hearing will proceed in that person's absence. See A.A.C. R2-19-120.

After the parties have concluded the presentations of their evidence, the parties may make a closing argument in a sequence determined by the Administrative Law Judge. See A.A.C. R2-19-116(G). A closing argument is voluntary. It allows the parties to summarize the evidence presented during the hearing and to argue their positions based on the evidence presented during the hearing. The Administrative Law Judge may allow the parties to supplement their closing arguments with written memoranda. See A.A.C. R2-19-116(G). However, the parties cannot present new evidence during the closing argument or via the written memoranda. If that occurs, the Administrative Law Judge may reopen the record to include the new evidence. However, in most instances, the Administrative Law Judge will not reopen the record and will ignore the new evidence.

Unless otherwise provided by the Administrative Law Judge, a hearing is concluded upon the submission of all evidence, the presentation of all closing arguments, or the submission of all post hearing written memoranda, whichever occurs last. See A.A.C. R2-19-116(H). The parties are encouraged to complete an evaluation of the hearing process at the conclusion of the hearing.

"Burden"

continued from page 1

still lose the case because the party failed to meet the burden of persuasion. Returning to the runner analogy, the litigant who fails to meet his or her burden of persuasion is like the runner who loses the race because he has not trained sufficiently to run faster than the other runners. While he is obviously ahead of the runner who never left the starting block, he nevertheless fails to reach his goal of winning the race.

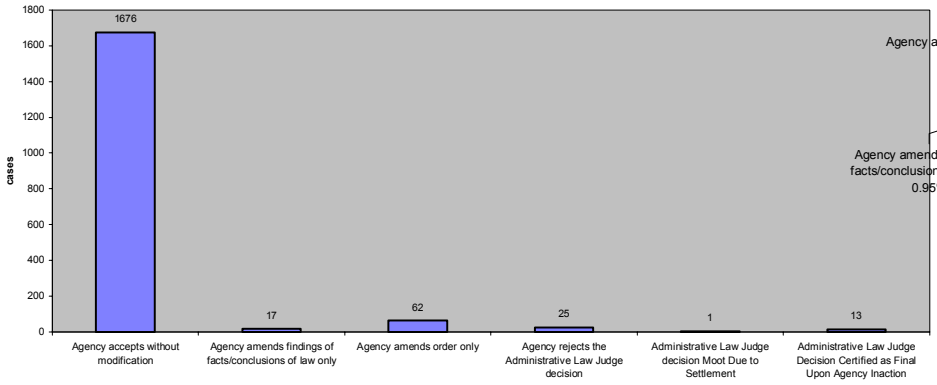
In order to meet the burden of persuasion, the litigant bearing that burden must, in most cases, prove his or her case by a "preponderance of the evidence." This standard of proof basically requires the litigant to demonstrate to the decision maker that the existence of the fact in question is more likely than not.

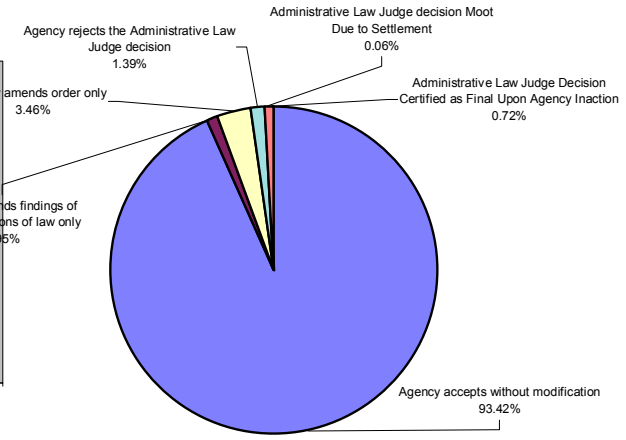
Which party to an administrative hearing bears the burden of proof? As a general rule, where a hearing involves the denial of an application for a license or the denial of a benefit that is sought, the burden is on the person who applied for the license or benefit. Where the proceeding involves disciplinary action against a license, the burden is on the agency seeking such action.

As a practical matter, how does a party meet the burden of proof? First, appear at the hearing and be ready to proceed with evidence. Some litigants make the mistake of believing that an appeal can be won by simply filing the notice of appeal or perhaps sending a letter without appearing for the hearing. When a party bears the burden of going forward and persuasion, his or her failure to appear for the hearing results in an obvious failure to meet either burden and ensures that the party will lose.

Second, be prepared. To meet the burden of production, a party who bears that

Agency Response to Administrative Law Judge Decisions April 1 - June 30, 2002

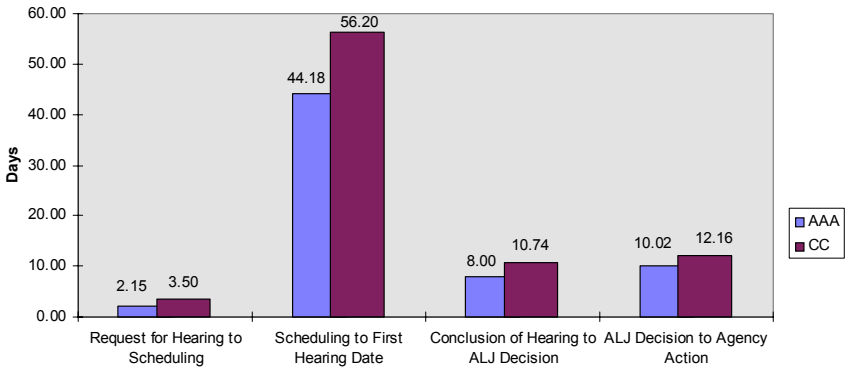




burden must be prepared to go forward with his or her evidence at the time of the hearing. It does no good to tell the decision maker that you have a document that you wish to have placed in evidence but that you forgot to bring it with you. Make sure that every document that you wish to have admitted into evidence is with you and available at the time of the hearing. Remember that A.A.C. R2-19-115 requires you to provide a copy to other parties when you present it at the hearing, if not done so before-hand. Likewise, have all witnesses available and ready to testify.

Like the runner who trains, the litigant who understands the burden of proof puts himself or herself in the best position to reach the goal of winning.

Average Time Between Selected Events - Appealable Agency Actions v. Contested Cases*, April 1 - June 30, 2002



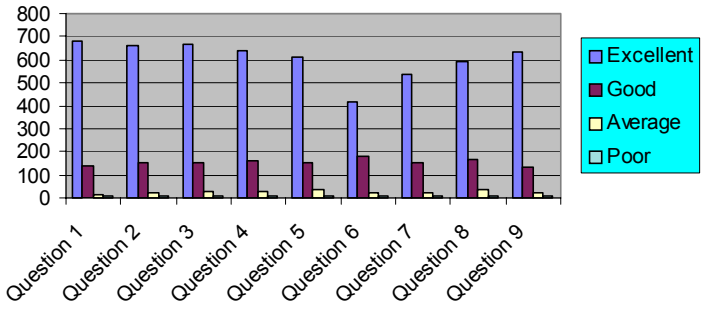
*Note: *Appealable Agency Actions* are agency actions taken before an opportunity for a hearing. A typical example would be the denial of a license. A party is entitled to a hearing before the OAH before the action becomes final. *Contested Cases* involve actions yet to be determined by an agency. An 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.

1712 Cases Filed April 1, 2002 - June 30, 2002

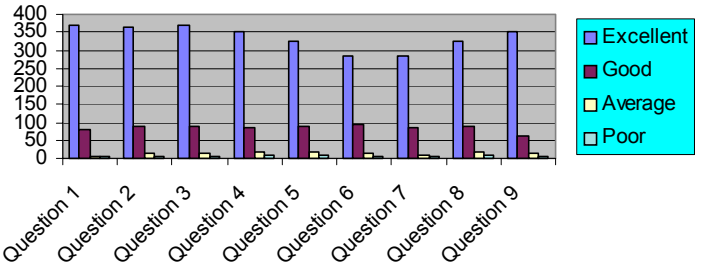
	4th Q	FY 2002		4th Q	FY 2002		4th Q	FY 2002
Accountancy	20	27	Dental	14	26	Peace Ofc. Standards	3	12
Acupuncture Board	0	0	Economic Security	0	0	Pest Control	4	24
Administration	4	10	Economic Security-CPS	69	240	Physical Therapy	0	0
Admin. Parking	79	327	Education	0	3	Podiatry	0	0
Agriculture	0	2	Environ. Quality	22	107	Psychologist Examiners	0	0
Ag. Emply. Rel. Bd.	0	0	Funeral	0	0	Public Safety - CW	2	11
AHCCCS	779	3404	Gaming	0	5	Public Safety - Trans	0	13
Alternative Fuel	2	10	Health Services	62	238	Public Safety - Adult CC	0	0
Appraisal	5	13	Insurance	24	113	Pvt. Post. Ed.	0	0
AZ Bd. Occup'l Therapy	0	0	Land	5	14	Racing	5	23
Attorney General	4	7	Liquor	13	68	Radiation Regulatory	0	0
Arizona Works	0	1	Lottery	0	0	Registrar of Contractors	410	1645
Banking	14	52	Maricopa Cty. Housing	1	5	Real Estate	11	90
Behavioral Health Ex.	0	15	Medical Examiners	2	9	Revenue	17	69
Building/Fire Safety	57	238	Naturopathic	0	0	School - Deaf & Blind	1	1
Charter Schools	0	0	Nursing	6	36	Secretary of State	2	3
Chiropractic	4	9	Nursing Care Admin	1	3	Technical Registration	0	6
Clean Elections	0	0	Occupation Therapy	0	1	Water Qual. App. Bd.	0	0
Community Colleges	0	0	Osteopathic	0	0	Water Resources	4	18
Cosmetology	11	52	Parks	0	0	Weights and Measures	55	135

Evaluations of OAH Services

All Responses 4th Quarter



Unrepresented Responses 4th 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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