

The OAH



Janet Napolitano
Governor

Cliff J. Vanell
Director

Vol. 28
July 2003

www.azoah.com

Official Newsletter of the Arizona Office of Administrative Hearings

Motions to Continue

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 articles may be found at OAH's website at www.azoah.com along with all previous articles published in the OAH Newsletter.

One of the most common motions filed with the Office of Administrative Hearings is the motion to continue (postpone) a hearing. Motions to continue are also, for a variety of reasons, one of the motions most frequently denied. The following article aims to assist parties and practitioners in determining when a motion to continue can or should be filed, and offers practice pointers that may help provide a better understanding generally of motion practice before the Office of Administrative Hearings.

Motions to continue in the Office of Administrative Hearings are governed by both statute and rule. Arizona Revised Statutes ("A.R.S.") § 41-1092.05(C), the governing statute, provides as follows: "The date of the scheduled hearing may be advanced or delayed on the agreement of the parties or on a showing of good cause." By way of supplement to A.R.S. § 41-1092.05(C), Arizona Administrative Code ("A.A.C.") R2-19-110 identifies the factors to be considered when ruling on a motion to continue as including (1) the time remaining between the filing of the motion and the hearing date,

Daniel G. Martin, Administrative Law Judge

(2) the position of other parties, (3) the reasons for expediting the hearing or for the unavailability of the party, representative, or counsel on the date of the scheduled hearing, (4) whether testimony of an unavailable witness can be taken telephonically or by deposition, and (5) the status of settlement negotiations.

Another rule that frequently bears on the filing of a motion to continue is A.A.C. R2-19-106, which governs the filing of motions generally. This rule requires that all motions be filed with the Office of Administrative Hearings not later than fifteen days prior to the scheduled hearing date, unless good cause is shown for the untimely filing.

As can be seen from the foregoing, the first determination the Administrative Law Judge will make upon the receipt of a motion to continue is whether the motion is timely. If the motion is untimely (filed less than 15 days prior to the hearing), the Administrative Law Judge must determine if good cause exists to excuse the untimely filing. Parties and practitioners often neglect to address this threshold question, and as a result may have their motion to continue denied on this basis alone.

"Motions to Continue"
(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 **90.8%** of all Administrative Law Judge decisions acted upon by the agencies.* ALJ decisions, including orders, were accepted without modification in **85.86%** of all Administrative Law Judge decisions acted upon by the agencies. **45.36%** of all agency modification was of the order only (i.e. penalty assessed).

Appeals to Superior Court:

There were 36 appeals filed in Superior Court.

Rehearings:

The rehearing rate was **1.06%**, defined as rehearings scheduled (9) over hearings concluded (846)**.

Completion Rate:

The completion rate was **94.64%**, defined as cases completed (1713) over new cases filed (1810).

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 **33.98 days**. The frequency of continuance, defined as the number of continuances granted (194) over the total number of cases first scheduled (1860), expressed as a percent, was **10.43%**. The ratio of first settings (1712) to continued settings on the calendar (155) was **1 to 0.0905**

Dispositions:

Hearings conducted: **61.2%**; vacated prior to hearing: **35.8%**; hearings withdrawn by the agency: **3.0%**.

Contrary Recommendations and Agency Response: 15.31%

of Administrative Law Judge decisions were contrary to the original agency action where the agency took a position. Agency acceptance of contrary Administrative Law Judge decisions was **72.73%**.

*3.02% of Administrative Law Judge decisions were certified as final by the OAH due to agency inaction or were rendered moot by settlement.

** Cases which were vacated are not included.

The term "good cause" is not subject to rigid definition, and in all cases the determination as to whether good cause has been shown ultimately rests in the discretion of the Administrative Law Judge assigned to hear the case. However, the parties may assist the Administrative Law Judge (and themselves) in a number of ways that may affect the decision on whether a continuance will be granted.

First, all motions to continue should be supported by specific details that support the request (in some cases, it may be appropriate for a party to file an affidavit in support of the motion). While this principle may seem self-evident, parties often fail to inform the Administrative Law Judge as to the specific reasons why they are requesting a continuance. In the absence of such reasons, the Administrative Law Judge may conclude that good cause for continuance has not been shown, and deny the motion. Further, as a general rule, a party does not demonstrate good cause for continuance by merely stating that he or she will not be available on the scheduled hearing date. If

a party (or witness) is unavailable, the reasons for such unavailability should be clearly identified. Finally, if the Administrative Law Judge concludes that a party or a party's attorney has created a conflict with a scheduled hearing date (such as by scheduling a vacation or trip or accepting representation with knowledge that a conflict exists), the Administrative Law Judge may deny the motion on that basis.

Second, motions to continue should, as a general rule, state the position of the opposing party. Although agreement between the parties does not guarantee that a continuance will be granted, it is a factor that will be considered by the Administrative Law Judge. Further, if the

motion is filed close to the hearing date, a statement as to the position of the opposing party often will facilitate a prompt ruling on the motion. Under A.A.C. R2-19-106(D), the opposing party has five business days within which to file a response (ten business days if the motion is served by mail). Thus, if the motion is filed close to the hearing date, and the Administrative Law Judge is not informed as to the position of the opposing party, the moving party may not receive a ruling until a date very close to the hearing date or at the hearing itself.

Third, parties requesting continuances should advise the Administrative Law Judge as to the amount of time they are requesting and, if at all possible, the dates on which they (and their witnesses, if applicable) are available for continued hearing.

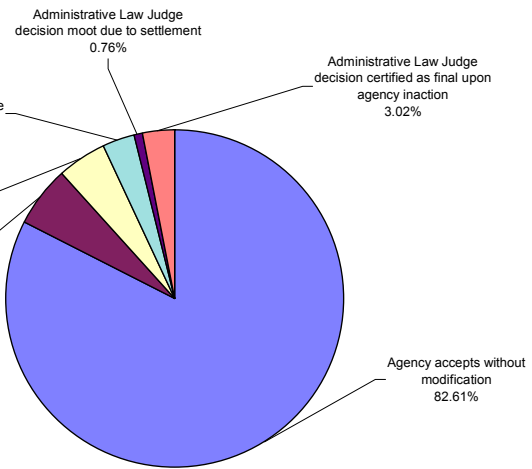
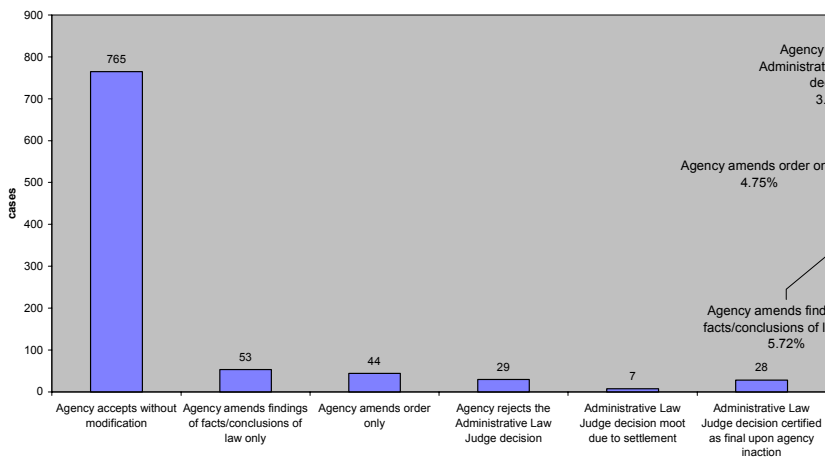
Fourth, parties should always consider acceleration as an alternative to continuance. The Office of Administrative Hearings calendar is very busy, and although the Office of Administrative Hearings endeavors to re-set cases as promptly as possible, thirty to forty-five day delays are not uncommon (the average length of a first time continuance between April 1, 2003 and June 30, 2003 was 33.98 days). By accelerating a case, the parties are able to bring their dispute to hearing faster and thereby have that dispute resolved more expeditiously.

Fifth, if the basis for the request is that a party or a witness is unable to travel to the Office of Administrative Hearings on the scheduled hearing date, the party should consider requesting to appear telephonically as an alternative (see A.A.C. R2-19-114).

One frequently-cited reason for continuance is the existence of a parallel civil proceeding. As a general rule, the Office of Administrative Hearings does not permit cases to remain on the calendar indefinitely pending the outcome of the civil proceeding, and parties should therefore be prepared to proceed with the administrative proceeding simultaneously with the civil proceeding.

"Motions to Continue" continued from page 1

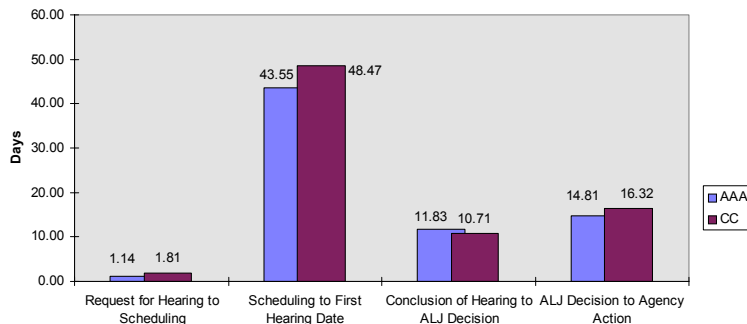
If the motion is timely (or good cause has been shown for an untimely filing), the next determination the Administrative Law Judge will make is whether good cause exists to grant the motion. The burden to demonstrate good cause rests on the moving party. The fact that the parties are in agreement that the hearing should be continued does not in and of itself constitute good cause, and parties should not assume that a stipulated motion will be granted. Even if the parties agree that the hearing should be continued, a showing of good cause still must be made.



Conclusion

The Office of Administrative Hearings recognizes that in many instances, continuances are appropriate or even necessary. However, it is up to the moving party to demonstrate that good cause for continuance exists. Parties can assist themselves and the Administrative Law Judge assigned to their case by filing timely motions that clearly explain why a continuance is necessary. By the same token, continuances are not guaranteed, and no party should assume that a request has been granted until receiving a ruling from the assigned Administrative Law Judge.

Average Time Between Selected Events - Appealable Agency Actions v. Contested Cases*, April 1 - June 30, 2003



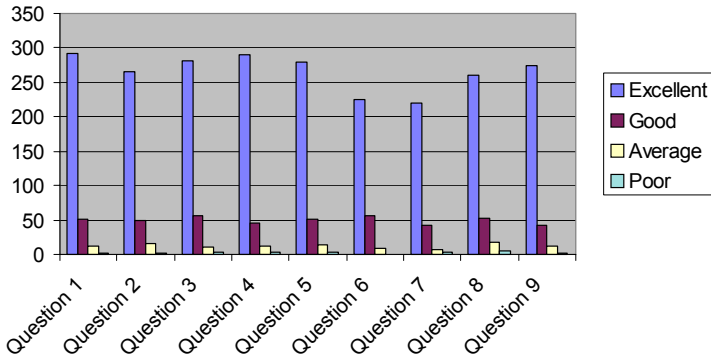
*Note: *Appealable Agency Actions* are agency actions taken before an opportunity for a hearing. A typical example would be the denial of a license. A party is entitled to a hearing before the OAH before the action becomes final. *Contested Cases* involve actions yet to be determined by an agency. An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

1810 Cases Filed April 1, 2003 - June 30, 2003

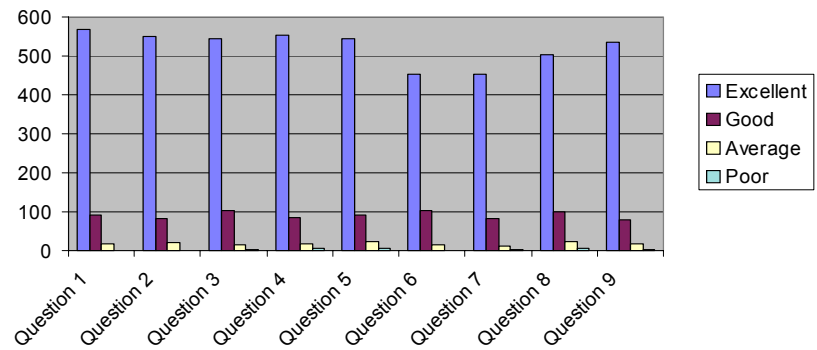
	4th Q	FY 2003		4th Q	FY 2003		4th Q	FY 2003
Accountancy	6	13	Dental	3	8	Pest Control	1	16
Acupuncture Board	0	0	Economic Security	0	0	Physical Therapy	0	1
ADA	0	0	Economic Security-CPS	66	256	Podiatry	1	1
Administration	3	9	Education	1	6	Psychologist Examiners	0	0
Admin. Parking	0	52	Environ. Quality	32	146	Public Safety - CW	0	0
Agriculture	1	3	Fingerprinting	10	10	Public Safety - Trans	4	15
Ag. Empl. Rel. Bd.	0	0	Funeral	0	0	Public Safety - Adult CC	5	10
AHCCCS	953	3331	Gaming	4	12	Pvt. Post. Ed.	0	0
Alternative Fuel	0	1	Health Services	100	331	Racing	8	24
Appraisal	0	18	Insurance	22	123	Radiation Regulatory	0	0
Arizona Trial Courts	0	1	Land	3	16	Registrar of Contr.	404	1646
Attorney General	7	11	Liquor	21	70	Real Estate	18	71
Arizona Works	0	1	Lottery	0	1	Revenue	12	69
Athletic Board	0	1	Maricopa Cty. Housing	0	0	School - Deaf & Blind	1	2
Banking	10	43	Medical Board	7	23	Secretary of State	2	10
Behavioral Health Ex.	1	3	Naturopathic	0	1	Technical Registration	2	4
Building/Fire Safety	23	109	Nursing	9	43	Veterinary Board	0	1
Charter Schools	0	1	Nursing Care Admin.	0	3	Water Qual. App. Bd.	0	1
Chiropractic	0	4	Occupation Therapy	0	0	Water Resources	2	9
Clean Elections	0	1	Osteopathic	0	0	Weights and Measures	11	51
Community Colleges	0	0	Parks	0	0			
Cosmetology	2	9	Peace Ofc. Standards	1	7			

Evaluations of OAH Services

Unrepresented Responses 4th Quarter



All 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.

Office of Administrative Hearings
 1400 West Washington, Suite 101
 Phoenix, Arizona 85007