The OAH

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Official Newsletter of the Arizona Office of Administrative Hearings

Putting Your Best Case Forward

Daniel G. Martin, Administrative Law Judge

In virtually every proceeding before the Office of Administrative Hearings, one of the parties will have the burden of proof. Generally speaking, it is the party asserting a claim, right, or entitlement that has the burden of proof. *See* Arizona Administrative Code ("A.A.C.") R2-19-119(B)(1). In addition, the party asserting an affirmative defense to a claim (such as the application of a statute of limitations) has the burden to establish the elements of that defense. *See* A.A.C. R2-19-119(B)(2).

The standard of proof in almost all administrative proceedings is preponderance of the evidence. *See* A.A.C. R2-19-119(A). A "preponderance of the evidence" is "evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." BLACK'S LAW DICTIONARY (6th ed. 1990). In order to prevail, the party with the burden of proof must not only present sufficient evidence to convince the Administrative Law Judge that the party's position is correct (also known as the burden of producing evidence or the burden of going forward); the party's evidence also must be sufficient to convince the Administrative Law Judge that the party is entitled to the relief that he or she is seeking (this is known as the burden of persuasion).

Given the importance of the burden of proof, one of the first issues that a party to an administrative proceeding must address is the type of evidence that he or she will present in order to establish his or her claim (or defense). The most common types of evidence are witness testimony and documentary evidence; however, there are many other forms of evidence, such as physical objects, photographs, audio and video recordings, and summary evidence (such as graphs and charts). In every proceeding, it is crucial to select the evidence that will best convey the facts of the case to the Administrative Law Judge assigned to hear the case.

"Best Case"

(continued on page 2)

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.

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 American states and cities, and Canadian provinces, having adopted the model, with year of inception are: Alabama (1998); Alaska (2004); Arizona (1996); California (1961); City of Chicago (1997); Colorado (1976); Florida (1974); Georgia (1995); 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); Wyoming (1987); and Province of Quebec ( ).

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 **91.25%** of all Administrative Law Judge Decisions acted upon by the agencies.* Administrative Law Judge Decisions, including orders, were accepted without modification in **85.26%** of all Administrative Law Judge Decisions acted upon by the agencies. **50%** of all agency modification was of the order only (i.e. penalty assessed).

Appeals to Superior Court:
There were 32 appeals filed in Superior Court.

Rehearings:
The rehearing rate was **1.87%**, defined as rehearings scheduled (14) over hearings concluded (747).**

Completion Rate:
The completion rate was **99.95%**, defined as cases completed (1999) over new cases filed (2000).

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 **45.98 days**. The frequency of continuance, defined as the number of continuances granted (187) over the total number of cases first scheduled (1914), expressed as a percent, was **9.77%**. The ratio of first settings (1828) to continued settings on the calendar (240) was **1 to 0.13**

Dispositions:
Hearings conducted: **46.2%**; hearings vacated prior to hearing: **51%**; hearings withdrawn by the agency: **2.8%**.

Contrary Recommendations and Agency Response:
20.35% 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 **89.47%.**

*** 2.83% 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 or which settled on the day of hearing are not included.**

"Best Case"

(continued from page 1)

Previous articles in this newsletter, all of which can be found on the Office of Administrative Hearings website, www.azoah.com, as well as the video, "Preparing for Hearing", which also can be found on the website, explain in detail the manner in which a party should present his or her case. The purpose of this article is to focus on the type and quality of the evidence presented, and explain how the selection of that evidence can, in many instances, have a direct impact on the outcome of a case.

When considering the type of evidence to present at hearing, a party must ask two basic questions. The first question is whether the evidence is relevant; that is, does it relate to one or more of the issues presented for hearing. The second question is whether the evidence is probative; that is, does it tend to prove a fact that is at issue in the case. If the answer to both of these questions is yes, then the evidence will most likely be admitted at hearing. However, the determination that the evidence is admissible does not end the inquiry; of perhaps equal importance is the question of how much weight the Administrative Law Judge will assign to that evidence.

To illustrate this point, let us consider three scenarios arising out of the following hypothetical licensing case: John Smith applies for a real estate salesperson's license, but his application is denied after the Department of Real Estate discovers that he has several criminal convictions. Mr. Smith appeals the Department's decision, and his case is referred for hearing to the Office of Administrative Hearings. Mr. Smith has the burden of proof, and wants to present several witnesses to testify to his honesty and good moral character.

In the first scenario, Mr. Smith's witnesses do not testify directly. Instead, each of them writes a letter of reference attesting to Mr. Smith's honesty and good character. The Administrative Law Judge determines that the letters are both relevant and probative, and admits them into evidence. Although Mr. Smith has at this point presented evidence of his good character, that evidence is unlikely to be given much weight by the Administrative Law Judge because Mr. Smith's witnesses were not subject to examination regarding the basis for their opinions, and the Administrative Law Judge was unable to observe the witnesses and make a determination as to their credibility. In short, Mr. Smith may have met his burden of producing evidence, but not his burden of persuasion.

In the second scenario, Mr. Smith's witnesses appear telephonically and testify directly to his honesty and good character. In this scenario, the quality of evidence is better than the previous scenario because, although the witnesses cannot be directly observed (thus making it more difficult for the Administrative Law Judge to assess their credibility), they are subject to examination regarding the basis for their opinions.

In the third scenario, Mr. Smith's witnesses appear in person and testify directly to his honesty and good character. In this scenario, the quality of evidence is better than each of the previous scenarios because the witnesses are subject to examination and can be directly observed by the Administrative Law Judge.

If the issue of Mr. Smith's honesty and good character turned out to be the deciding issue in his case, one can see that the quality of his evidence on that issue would be critical. Under the facts of the first scenario, Mr. Smith might very well not be successful in his appeal because the evidence regarding his

"Best Case"
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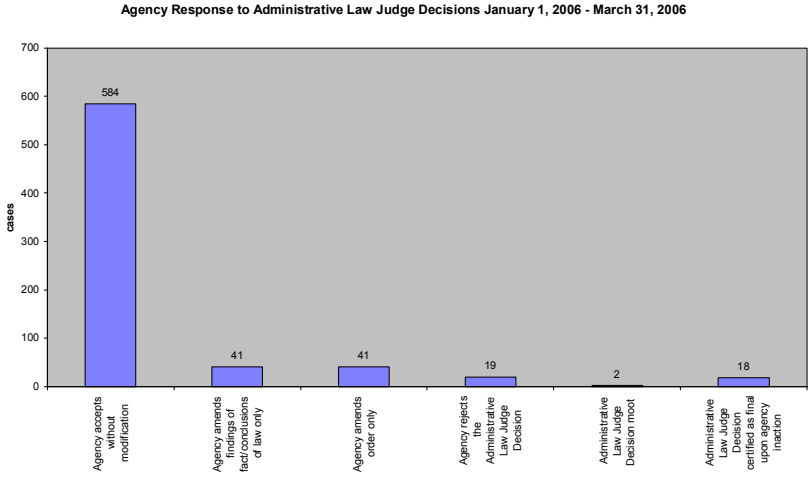
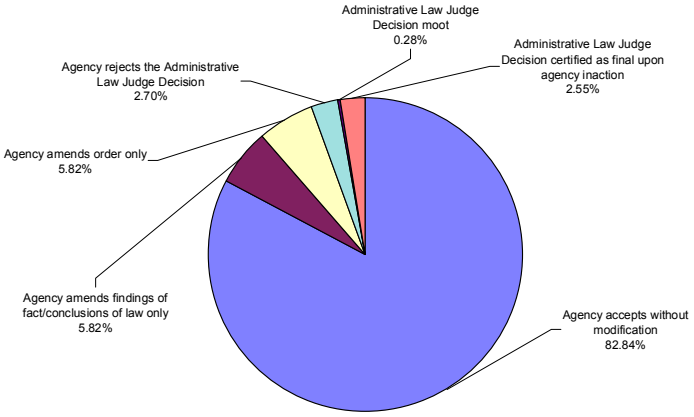
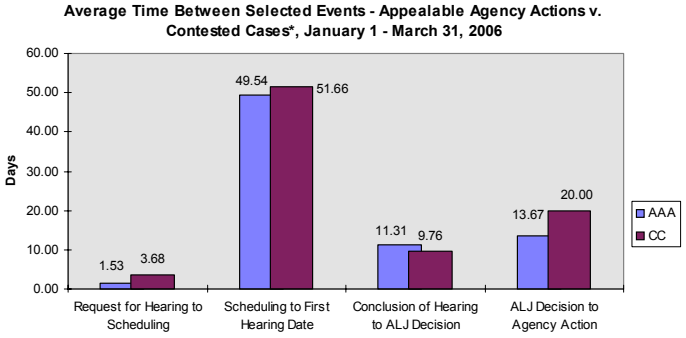






*Note: *Appealable Agency Actions* are agency actions taken before an opportunity for a hearing. A typical example would be the denial of a license. A party is entitled to a hearing before the OAH before the action becomes final. *Contested Cases* involve actions yet to be determined by an agency. An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

2000 Cases Filed January 1, 2006 - March 31, 2006

	3rdQ	FY 2006
Accountancy	4	12
Acupuncture Board	1	1
Administration	0	4
Admin. Parking	37	97
Agriculture	0	0
Ag. Emply. Rel. Bd.	0	0
AHCCCS	885	2498
Alternative Fuel	0	0
Appraisal	10	24
Arizona Trial Courts	0	0
Arizona Retirement Sys.	7	26
Attorney General	0	0
Arizona Works	0	0
Athletic Board	0	0
Behavioral Health Ex.	0	1
Building and Fire Safety	15	68
Charter Schools	0	1
Chiropractic	3	3
Clean Elections	1	5
Commerce	1	1
Community Colleges	0	0
Cosmetology	0	1
Criminal Justice	0	2
Dental	4	33
Economic Security	0	0

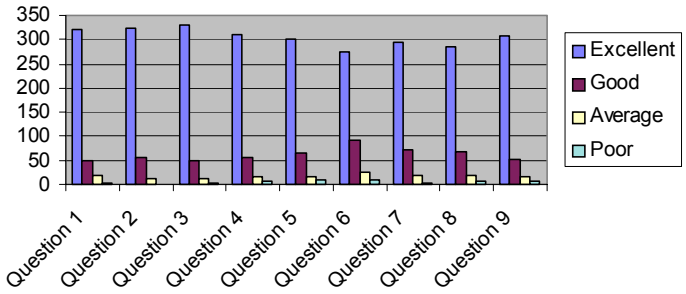
	3rd Q	FY 2006
Economic Security-CPS	31	107
Education (Board)	0	1
Special Education	7	29
Environ. Quality	16	43
Financial Institutions	25	45
Fingerprinting	70	100
Funeral	0	0
Gaming	2	7
Health Services	78	273
Insurance	22	63
Land	0	10
Liquor	15	39
Lottery	3	5
Maricopa Cty. Housing	0	0
Massage Therapy	0	2
Medical Board	7	17
Medical Radiologic	4	10
Naturopathic	0	0
Nursing	35	102
Nursing Care Admin.	1	2
Occupation Therapy	0	1
Optometry	0	0
Osteopathic	0	1
Parks	0	0
Peace Ofc. Standards	5	19

	3rdQ	FY 2006
Pharmacy Board	2	5
Physical Therapy	5	5
Podiatry	0	0
Psychologist Examiners	0	1
Public Safety - CW	0	5
Public Safety - Trans	3	11
Public Safety - Adult CC	0	0
Pvt. Post. Ed.	0	0
Racing	6	11
Radiation Regulatory	0	0
Registrar of Contractors	564	1433
Real Estate	51	220
Revenue	10	33
School - Deaf & Blind	0	0
Secretary of State	11	21
State Board of Education	0	0
Structural Pest Control	5	9
Technical Registration	0	0
Veterans Home	0	0
Veterinary Board	0	0
Water Qual. App. Bd.	0	0
Water Resources	0	2
Weights and Measures	54	147

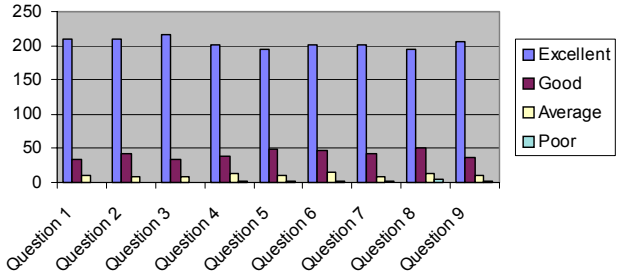
Evaluations of OAH Services

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. They are used by management to improve the OAH process and do not affect the decisions issued.

All Responses 3rd Quarter



Unrepresented Responses 3rd 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

character, while admissible, was not entitled to receive much weight. On the other hand, Mr. Smith might very well prevail under the facts of the third scenario, because he presented his evidence in such a way that it could be afforded significant weight.

The principal that is illustrated by the above hypothetical has application to many types of evidence. In the case of documentary evidence, for example, the general rule is to bring the original document if there is any chance that the authenticity of the document might be subject to challenge. The original does not necessarily need to be made an exhibit, but it can be shown to the Administrative Law Judge and the opposing party in the event of a dispute. In the case of official documents (such as court records or police reports), certified copies bearing the stamp of the issuing court or agency are preferable to ordinary copies. In the case of photographs, originals are preferable to copies, and color copies are preferable to black and white copies.

Effective preparation is critical to success in administrative proceedings, and one of the key components to effective preparation is ensuring that the evidence a party presents at hearing is not only relevant and probative, but also persuasive. As can be seen from the above examples, the type of evidence a party chooses to present may often have a direct impact on the outcome of the case. Therefore, careful thought should be given in advance of the hearing to precisely determine what evidence the party intends to offer, and whether that evidence puts the party's best case forward.