

Fourteenth Annual Report to  
the Governor of Alaska and the Alaska Legislature  
from the Office of Administrative Hearings

January 31, 2018

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## **I. Introduction**

The Office of Administrative Hearings (OAH) is an independent agency within the Department of Administration charged with providing administrative adjudication services, regulatory review, and training. *See* AS 44.64.010 – AS 44.64.020. OAH is the state executive branch’s central hearing panel. It was created “to increase the separation between the adjudicatory functions of executive branch agencies and the agencies’ investigatory, prosecutory, and policy-making functions.” Sec. 1, ch. 163, SLA 2004. In addition, by consolidating adjudicatory functions in a central panel, the creation of OAH has improved efficiency for agency hearings, resulting in overall cost savings to departments, boards, and commissions. By making OAH available to municipalities, school districts, and other government agencies on a cost-reimbursement basis, the legislature has also made these savings available to other state-related governmental units. *See* AS 44.64.055.

OAH operates under the supervision of the Chief Administrative Law Judge (Chief ALJ) for whom the law prescribes certain duties and goals. *See* AS 44.64.020. One of the Chief ALJ’s duties is to:

submit to the governor and the legislature on January 31 of each year the results of the survey [of hearing participants used to monitor the quality of hearings conducted by OAH and other state agencies] along with a report that includes a description of the activities of the office and recommendations for statutory changes that may be needed in relation to the administrative hearings held by the office or other state agencies[.]

AS 44.64.020(a)(7). This is the fourteenth such report. It covers OAH’s activities for calendar year 2017.

## **II. Activities of the Office of Administrative Hearings**

For reporting purposes, OAH’s activities are grouped into eight categories drawn from the statutory duties of OAH and the Chief ALJ. The first is OAH’s core function, and the rest are its ancillary duties. The activities are:

- Adjudication services;
- Peer review for OAH ALJs;
- Publication of decisions;
- Regulations review and development;
- Monitoring hearing processes (includes surveying hearing participants);
- Training of administrative adjudicators;
- Code of Hearing Officer Conduct administration; and
- Recruitment for Workers’ Compensation Appeals Commission.

*See* AS 44.64.020(a)(4)-(8), AS 44.64.050, AS 44.64.090 & AS 23.30.007(d).

## A. Adjudication Services

OAH's adjudication services range from preparing proposed decisions based on written submittals of the parties in simple administrative appeals to conducting multi-day trial-like evidentiary hearings in complex matters. The services do not stop at conducting hearings and writing decisions. They also include use of alternative dispute resolution (ADR) methods. Using formal or informal ADR, or simply through good case management, OAH can resolve many cases within a matter of weeks. Others may remain active for many months, as the parties develop their positions, engage in motion practice, and prepare for detailed presentation of highly technical evidence and argument on complex legal issues. Most cases fall somewhere between these two extremes.

The OAH ALJs are, by law, the final decisionmakers in only a few case categories.<sup>1</sup> When the final decisionmaker is a board or commission, or a principal agency head, the adjudication services can include functioning as a legal adviser to that decisionmaker for the specific case.<sup>2</sup> A final decision may be appealed to the Superior Court.

The table below illustrates the reach of OAH's adjudication services under its mandatory jurisdiction. That reach extends to most executive branch departments. The departments for which OAH does not provide services directly may nonetheless be parties to disputes, such as procurement protests that OAH hears on behalf of a separate executive branch decisionmaker.

<b>Office of Administrative Hearings Mandatory Jurisdiction</b>	
<i>Executive Branch Office, Agency or Entity</i>	<i>Case Category</i>
Office of the Governor	<ul style="list-style-type: none"> <li>• Human Rights Commission</li> </ul>
Office of the Lieutenant Governor	<ul style="list-style-type: none"> <li>• Notaries</li> </ul>
Departments of--	
Administration	<ul style="list-style-type: none"> <li>• Retirement and Benefits</li> <li>• Contract and Procurement</li> <li>• Claims for Reimbursement</li> <li>• Violent Crime Compensation</li> <li>• Breach of Security Involving Personal Information</li> </ul>
Commerce, Community and Economic Development	<ul style="list-style-type: none"> <li>• Licensing (Corporations, Businesses and Professions)</li> <li>• Banking and Securities</li> <li>• Insurance</li> <li>• Alcoholic Beverage Control</li> <li>• Marijuana</li> </ul>

<sup>1</sup> In addition to the statutory categories in which OAH makes the final decision, OAH can receive final decision authority by delegation. *See* 44.64.030(c).

<sup>2</sup> OAH ALJs do not provide general legal advice to the decisionmaker, but rather address legal questions for the decisionmaker only in the context of the specific case under consideration. The Attorney General is the legal adviser to state agencies under most circumstances.

Education and Early Development	<ul style="list-style-type: none"> <li>• Teacher Certification</li> <li>• PFD Execution</li> </ul>
Environmental Conservation	<ul style="list-style-type: none"> <li>• Environmental Permitting</li> <li>• Food Safety</li> </ul>
Health and Social Services	<ul style="list-style-type: none"> <li>• Facilities Licensing</li> <li>• Child Protection<sup>3</sup></li> <li>• Medicaid Benefits, Audits &amp; Rates</li> <li>• Public assistance benefits</li> <li>• PFD Execution</li> </ul>
Labor and Workforce Development	<ul style="list-style-type: none"> <li>• Occupational Safety and Health</li> <li>• PFD Execution</li> </ul>
Natural Resources	<ul style="list-style-type: none"> <li>• Land Sale Contracts</li> <li>• Water Rights</li> </ul>
Transportation and Public Facilities	<ul style="list-style-type: none"> <li>• Construction Procurement (portion<sup>4</sup>)</li> </ul>
Revenue	<ul style="list-style-type: none"> <li>• Tax (original jurisdiction<sup>5</sup>)</li> <li>• Child Support</li> <li>• PFD Eligibility, Charitable Contribution &amp; Fine/Forfeiture</li> <li>• Charitable Gaming</li> <li>• Unclaimed Property</li> </ul>
University of Alaska	<ul style="list-style-type: none"> <li>• PFD Execution</li> </ul>

### 1. Caseload

During 2017, OAH’s active cases—that is, the number of cases that were open or being managed in some fashion at some point during the year—totaled approximately 1,709. New cases that came in during the year totaled 1,336.

Growth in overall case intake had been the central theme of the 2012-2014 period in OAH’s history, driven largely by an enormous surge in Medicaid services appeals. This trend reversed shortly after the beginning of 2015, with case intake falling back to a point midway between the 2012 and 2013 levels. The overall workload—volume of active cases in the office—eventually followed this decline in intake. Because of the diminished caseload, in 2016 OAH laid off one ALJ, reduced another to part-time, and discontinued a long-term non-permanent position. Case

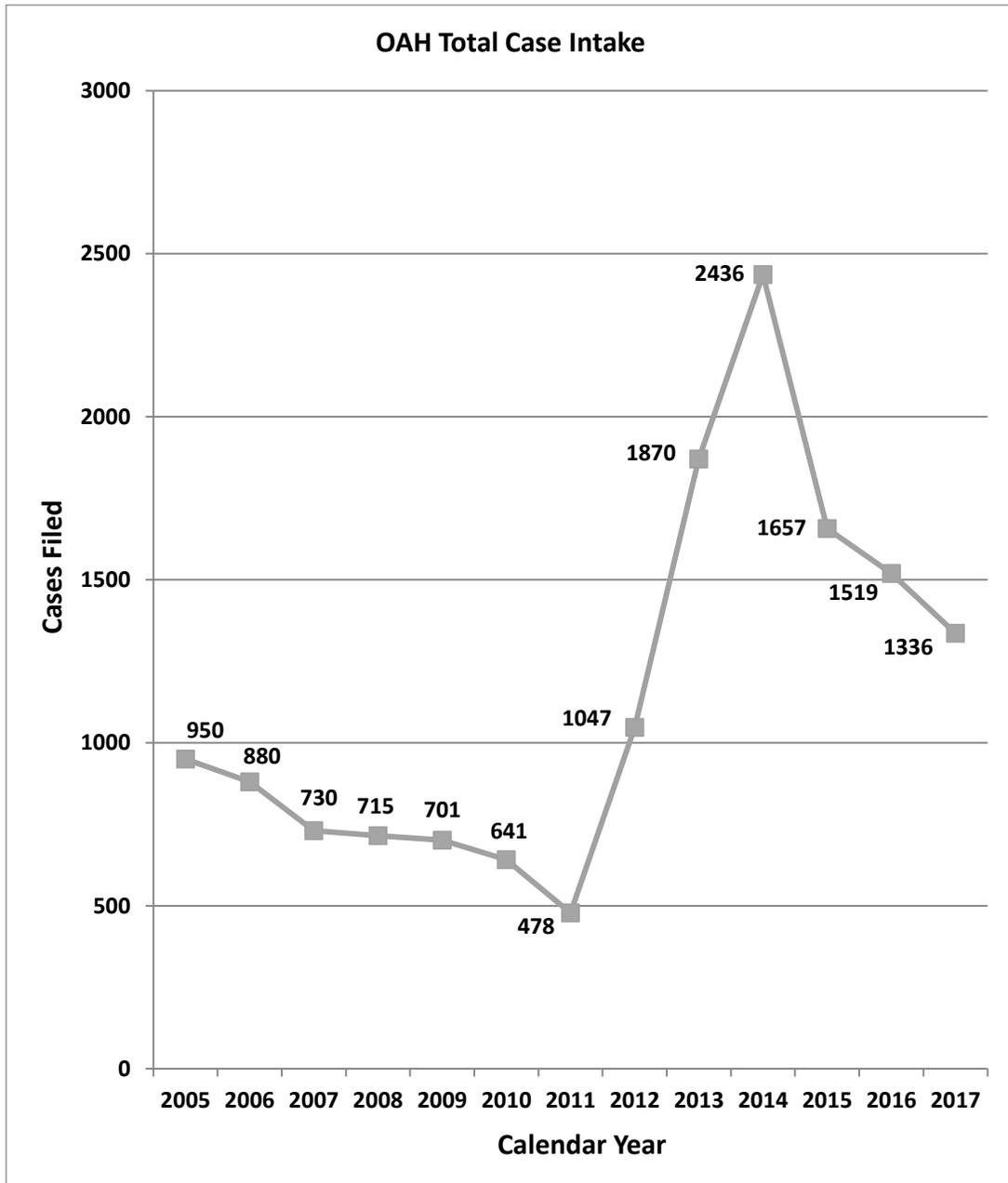
<sup>3</sup> The administrative child protection cases OAH hears for the Department of Health and Social Services relate to substantiation of abuse or neglect findings that may affect facility or foster care licensing or other decisions concerning children. These adjudications serve a purpose different from that of child protection cases heard by the courts.

<sup>4</sup> OAH hears only some of the Department of Transportation and Public Facilities’ construction-related procurement cases under its mandatory jurisdiction. Construction cases subject to arbitration are exempted from OAH’s mandatory jurisdiction. DOT&PF sends some additional cases to OAH on a voluntary basis.

<sup>5</sup> Under AS 43.05.405, OAH has original jurisdiction over most tax appeals. In this area, OAH functions as the approximate state equivalent of the United States Tax Court.

intake fell another twelve percent in calendar year 2017, although a surge in activity in several especially complex cases has prevented an overall decline in workload.

The graph which follows shows the case intake trend over the thirteen years since OAH's creation:



The table below focuses on OAH’s overall active 2017 caseload (which is a larger universe than case intake, graphed above), to give a sense of the distribution of our effort over the course of the year. However, one must remember that not all cases are equal: a typical procurement, human rights, or professional licensing case requires about five times as much ALJ time as a typical Medicaid services case, which in turn requires about five times as much ALJ time as a typical Food Stamps case. More specifically, the substantiation of abuse and neglect cases cases the tax cases that have grown in volume since 2016 are far more demanding on ALJ time than the Medicaid and PFD cases, which have declined during the year. That being said, staff resources (as opposed to ALJ resources) are burdened approximately equally regardless of the case type. The table below is divided into twelve groups. The first (Business, Professional & Occupational Licensing/Regulation) crosses several departments. The “Other” group does as well. It includes occupational safety and health, environmental conservation, Public Offices Commission, violent crime victim’s compensation, and adjudication services provided to municipalities and school districts, among others. The column on the right shows percentage growth or decrease over one year (since 2016).

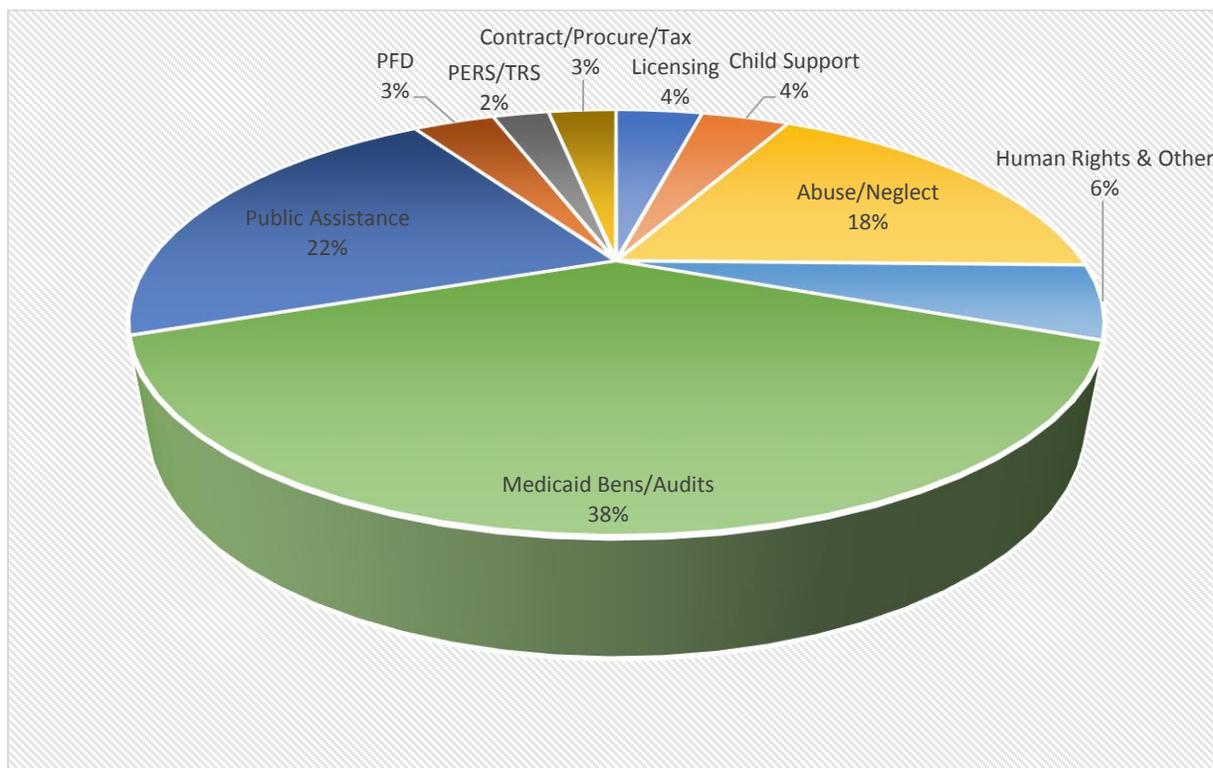
*Number of Active Cases in 2017*

Business, Professional & Occupational Licensing/Regulation	42	+2%
Child Support	66	-38%
Contracts and Procurement	14	+17
Health & Social Services-related Licensing/Certification	23	-30%
Human Rights	16	-20%
Medicaid Benefits, Audits & Rates	657	-24%
Public Assistance Benefits	369	+35%
PFD Eligibility, Charitable Contribution, Execution & Fine	61	-29%
Retirement and Benefits	42	-22%
Substantiation of Child Abuse and Neglect	302	+17%
Tax	37	+27%
Other <sup>6</sup>	80	+10%
<b>Total</b>	<b>1709</b>	<b>-9%</b>

The chart below depicts the relative number of cases on which OAH actively worked in 2017, divided into general subject areas groups. The chart is derived from the data in the above table.

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<sup>6</sup> The “Other” category increased as a result of municipal referrals; this was a negligible category in prior years. In future years, OAH will create a new tracking line for school district and municipality referrals if the number of these cases continue to increase.



During calendar year 2017, OAH closed approximately 1,357 cases, a figure almost exactly the same as new cases accepted.

Approximately 115 cases were diverted to formal ADR (usually mediation) supervised or presided over by an administrative law judge. Many others were resolved through efficient case management techniques, including informal ADR used to reach agreement on consent orders or stipulations, as well as through voluntary dismissal due to agency concession or private party withdrawal. Two hundred ninety-five full-dress decisions were issued (in addition to thousands of lesser orders).

Very few OAH decisions are appealed to the courts. There were 13 such appeals to the Superior Court in 2017. Only 3 of these appeals were “true appeals” of an OAH decision; the remaining appeals arose from non-adopted proposed decisions where the final decisionmaker issued a different decision than that proposed by the ALJ. There was 1 new appeal to the Alaska Supreme Court in 2017; the Supreme Court remanded the case to the Superior Court, which then affirmed the ALJ’s decision.

Among the small number of cases appealed, the affirmance rate is high. Of 17 Superior Court appeals closed in 2017, no OAH decisions were reversed. Two reversals occurred in the Supreme Court, but in both cases the agency decisionmaker had elected not to adopt the decision recommended by OAH.

2. *Time Devoted to Hearings and Related Work*

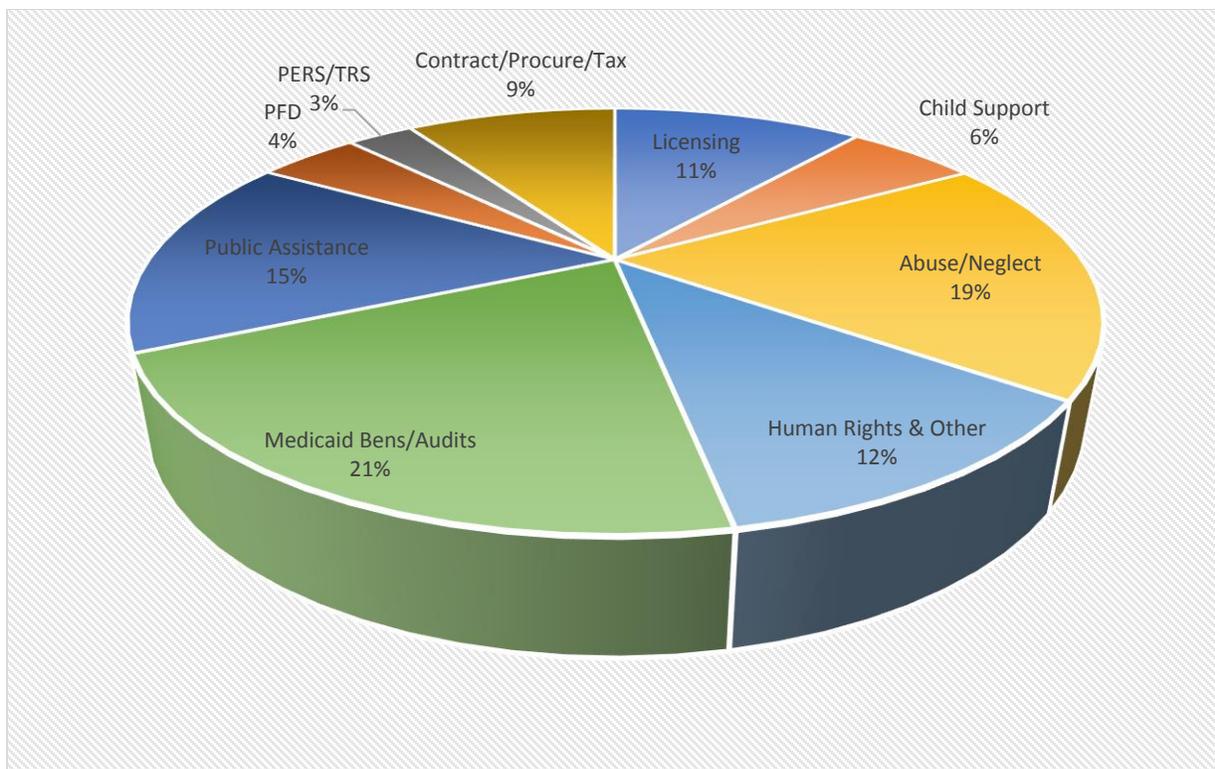
OAH’s ALJs collectively devoted 11,337 hours to hearing or mediating cases and to related work, such as reviewing evidence, researching the law, ruling on motions, and writing decisions.

The commitment of hours is broken out below into twelve areas; these are the same as the groupings used in the case intake data in the preceding section. In some respects, the trends do not track the case intake and active cases trends shown above because, on a case-by-case basis, some case varieties are more time-consuming than others. Thus, the Medicaid component is far less dominant in this metric than in the case count metrics, because Medicaid cases tend to be simpler and more quickly resolved than, for example, occupational licensing or tax cases. There is a general decline from the prior year due to a reduction in the caseload and the existence of one or more ALJ vacancies at any given time during 2017.

<b>Grouping</b>	<b>2017 Hours</b>	<b>Change</b>
Business, Professional & Occupational Licensing/Regulation	938	+19%
Child Support	632	-49%
Contracts and Procurement	500	-6%
Health & Social Services-related Licensing/Certification	304	-11%
Human Rights	319	+2%
Medicaid Benefits, Audits and Rates	2381	+7%
Public Assistance Benefits	1761	+59%
PFD Eligibility & Execution	492	-14%
Retirement and Benefits	325	-63%
Substantiation of Child Abuse and Neglect	2119	+23%
Tax	543	-28%
Other <sup>7</sup>	1022	-39%
<b>Total</b>	<b>11,337</b>	<b>-7%</b>

With some simplification, this data is shown on the following chart:

<sup>7</sup> Historically, work for the Police Standards Council has been included in the “other” category. However, there were an unusually large number of those cases in 2016, so it was broken out into a separate category last year. It has returned to the “other” category this year.



### 3. *Deadlines*

OAH cases are subject to many deadlines. The OAH-specific deadlines imposed by AS 44.64.060 apply to most, but not all, of OAH cases.<sup>8</sup> The most important of these is the 120-day time limit to take a case from hearing request all the way to issuance of a proposed decision. In addition to deadlines imposed by the OAH-specific statute, other statutes and regulations establish deadlines that apply to several case types. For instance, cease and desist order cases, summary suspension actions, some insurance cases, securities matters, child support appeals, and education-related facility grant cases are subject to shorter deadlines than those imposed by AS 44.64.060. Some case types have shorter or different deadlines for bringing the case to hearing, for issuing the decision, or for both.

Final decision deadlines usually are calculated relative to a triggering event, such as issuance of a proposed decision or the date the record closes following the hearing. Tax appeals, for instance, are subject to a final decision deadline 180 days after record closure.

Nearly all of the Health and Social Services case categories transferred to OAH under Executive Order 116 are subject to short timelines for reaching a **final**, not just proposed, decision. For Medicaid benefits and most public assistance benefits cases, the final decision is due 90 days

<sup>8</sup> The following categories of cases were exempted from the AS 44.64.060 deadlines: tax appeals, Human Rights Commission cases, occupational safety and health cases, Violent Crimes Compensation Board cases, and Professional Teaching Practices Commission cases. In addition, voluntary referrals from agencies not required to send cases to OAH may be exempted from the AS 44.64.060 deadlines if the referral agreement between the Chief ALJ and the referring agency so provides.

after the hearing request is filed. For Food Stamps, it is even shorter, at 60 days. This is driven in large part by federal program requirements. In these cases, the 120-day state deadline still applies, but it is subsumed in the shorter federal deadline, unless the latter is extended by special circumstances.

Historically, the key deadline OAH monitored for purposes of this report has been the 120-day deadline from hearing request to issuance of a *proposed decision*. Under AS 44.64.060(d), the 120-day deadline to proposed decision can be extended only by agreement of both parties, together with the consent of the Chief ALJ. Though rarely needed, this extension-on-consent tool is used in the more complex or unusual cases in which 120 days from filing of the hearing request does not allow adequate time for the case to be heard and a proposed decision to be issued.<sup>9</sup>

In 2017, the 120-day deadline was met or not applicable in 99 percent of the 1,357 cases OAH closed. The 120-day deadline was exceeded in less than one percent of cases closed, which corresponded to three percent of the 295 full decisions issued during that year. Most cases reached final resolution—not just a proposed decision—within much less than 120 days, frequently within fewer than 50 days for fast-track cases such as child support and public assistance benefits.

With the addition of the high-volume Health and Social Services “Fair Hearings” cases and the short final decision deadlines they bring, OAH has also monitored these *final decision* deadlines. For such a case to meet its final decision deadline, the agency must refer it without delay, OAH must process it on an expedited basis, and the Commissioner’s Designee in the Department of Health and Social Services must act swiftly once the proposed decision is transmitted.

In 2017, final decisions were issued after the applicable deadline in one-and-a-half percent of cases closed to which a final decision deadline applies, which corresponded to ten percent of such cases brought to closure through a full decision.<sup>10</sup> Responsibility for this deadline is shared between OAH and other agencies.

The number of pending but overdue cases of both types declined from three as of December 31, 2016 to zero as of December 31, 2017. This is the first time in OAH’s fourteen-year history that there have been no pending overdue cases at the end of the calendar year.

#### 4. *Work for Additional Governmental Units*

OAH services have always been available to municipalities, school districts, and other governmental agencies, provided they reimburse the state for the full cost of the service. However, it was only in 2016 that these entities began to come to OAH in significant numbers, drawn by the opportunity for cost containment coupled with more consistent delivery of services. The cities of Anchorage, Bethel, Homer, and Palmer, the Fairbanks North Star Borough, and the City and

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<sup>9</sup> In addition to the complexity of a case, other factors that have led to use of the extension-on-consent tool are the unavailability of the parties, witnesses or legal counsel, the need to await conclusion of a related case to make for a more efficient or consistent result, and late referral of the case by the referring agency.

<sup>10</sup> There were no overdue decisions at all in the highly expedited Food Stamps docket.

Borough of Juneau have sent cases to OAH in the past year. OAH has also begun to receive substantial business from executive branch agencies that are not required to route their cases to OAH, such as the Department of Transportation and Public Facilities in connection with construction matters.

## **B. Medicaid Mediation Program**

In 2014, OAH began to explore ways to improve efficiency in its recently-acquired Medicaid Fair Hearings docket. This led to a new system for fast-track mediation that won the Denali Award in 2016 for innovation in cost savings.

The Alaska version of fast-track Medicaid mediation went to full implementation in March of 2016, operated under contract by a local small business. The goal of the program is to handle 80 percent of the cases 80 percent faster and 80 percent cheaper, while improving quality of service to Medicaid program participants. The 2017 results remain within these parameters. A total of 327 Medicaid cases were mediated through this program in 2017, and 83.5 percent of those were brought to resolution.<sup>11</sup> Public response continues to be extremely positive; the speed, informality, and transparency of the mediation process have been very popular. Medicaid recipients appreciate the expediency and more informal environment of mediation and feel empowered through this process.

The mediation program has resulted in a notable reduction in OAH's billings to the Department of Health and Social Services (DHSS). Further, the fast resolution time it achieves creates efficiencies within the benefit-management system operated by DHSS, resulting in additional, documented program savings on the DHSS side.

The success of the mediation program has been part of the reason that OAH has been able to operate efficiently in 2017 with one less full-time administrative law judge and with related staff reductions. In the future, it is possible that growth in other areas of the caseload will counterbalance this shrinkage, but if that occurs, the result will still be positive because OAH will be accomplishing more work with the same resources.

The success of OAH's Medicaid Mediation Program resulted in an invitation from the Central Panel Directors' Annual Conference to make a presentation about the techniques and cost savings resulting from this program. The Chief ALJ and OAH's contract mediator attended the conference in the fall of 2017 and presented this information to over twenty other central panels.

## **C. Peer Review**

Peer review serves two purposes: it promotes consistency in decisionmaking and it provides informal training opportunities (for both the reviewed and the reviewing ALJ). OAH's peer review system consists of selectively assigning an ALJ to review the proposed decision and/or to observe the hearing conducted by another ALJ on a case-specific basis. The reviewing ALJ

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<sup>11</sup> Because issues could be narrowed and explored efficiently in the mediation, there were some additional savings among the 15.7% of cases that were mediated but not resolved.

provides feedback to the reviewed ALJ. The reviewing ALJ also is available for consultations on questions of law or procedure.

In 2017, a formal peer review assignment was made in 269 of the 1336 new cases. Formal peer review assignments are made with the goal of ensuring that an ALJ venturing into a new subject area receives the benefit of informal training from a peer who has already worked in the subject area. This type of peer review has been, and continues to be, a key part of the training process for new ALJs.

Group peer review of decisions or case management strategy is conducted when appropriate, such as when an ALJ faces an issue of first impression. Group peer review promotes consistency among ALJs on such issues.

#### **D. Publication**

OAH is required to “make final agency decisions reached after administrative hearings available online through an electronic data base.” AS 44.64.090(a). In 2017, 463 decisions were added to the database.

#### **E. Regulations**

OAH’s Chief ALJ was given authority to “adopt regulations ... to carry out the duties of the office” as well as to “review and comment on regulations proposed by state agencies to govern procedures in administrative hearings.” AS 44.64.020(a)(8)&(11). In particular, the Chief ALJ was required to adopt a hearing officer code of conduct, which applies to hearing officers of all agencies, not just to OAH ALJs. Regulations on procedures for OAH cases and for the Code of Hearing Officer Conduct have been adopted and took effect July 2, 2006. No amendments to the 2006 regulations were proposed in 2017. However, it is anticipated that after OAH’s proposed statutory changes are adopted by the legislature, a comprehensive regulations review project will commence.

OAH routinely tracks notices of other state agencies’ proposed regulations, looking for those that have the potential “to govern procedures in administrative hearings.” In 2017, OAH reviewed all proposed regulations by all executive branch agencies. One formal comment letter was issued in 2017.

#### **F. Monitoring and Surveys**

OAH is required to “survey administrative hearing participants and use other methods to monitor the quality of administrative hearings held by the office and other state agencies[.]” AS 44.64.020(a)(7). The purpose of the surveys and other monitoring is to enable the Chief ALJ to include in the annual report recommendations for statutory changes.

Responses were generally positive and narrative comments were more often than not constructive. Even if not satisfied with the outcome of the case, the majority of people responding

were satisfied with the adjudication process overall. The data from the 2017 on-line surveys is summarized in Appendix A.

## **G. Training**

OAH's training mandate extends beyond providing training to OAH ALJs and state-employed or retained hearing officers. It requires that OAH:

make available and facilitate training and continuing education programs and services in administrative procedure, administrative adjudication, substantive law, alternate dispute resolution, and technical matters for administrative law judges *and other administrative adjudicators*[.]

AS 44.64.020(a)(6) (emphasis added). To satisfy this mandate, OAH's training plan consists of the following components:

- Informal training for OAH ALJs through peer review assignments, conferences among the ALJs on a periodic basis, and circulation of case decisions and other materials of interest;
- Formal training for OAH ALJs by attendance at continuing education courses offered by professional associations and the National Judicial College;
- Informal training for state administrative adjudicators by email circulation or web posting of periodic electronic bulletins/newsletters reporting on developments of interest in administrative law;
- Formal training for non-OAH administrative adjudicators through participation by OAH representatives in periodic, agency-specific conferences;
- Formal training for administrative adjudicators in the form of course offerings made available by OAH.

During 2017, one new OAH ALJ attended the basic ALJ training course presented by the National Judicial College. Eight ALJs furthered their training by attending webcast seminars or taking on-line courses presented by the National Judicial College, the National Conference of ALJs, or the Alaska Bar Association. Two ALJs took part in Alaska's Department of Education and Early Development training for conducting special education hearings; three ALJs attended a conference sponsored by the Alaska Court System on CINA Laws, Roles and Responsibilities, Practices and Procedures; one ALJ attended a tax conference; and three ALJs attended the Alaska Bar Conference. In addition, OAH's ALJs attended a variety of in-person seminars presented by the Alaska Bar Association, the Juneau Bar Association, the University of Washington Law School, Columbia University Law School, and the Federal Bar Association.

In response to the State's fiscal situation, a number of ALJs used their own funds to take part in furthering the above continuing education, or took advantage of free courses presented by various groups.

Also in 2017, the Chief and/or the Deputy Chief ALJ presented programs about best practices for executive branch adjudication to several boards and commissions.

#### **H. Administration of the Code of Hearing Officer Conduct**

In addition to developing the Code of Hearing Officer Conduct, the Chief ALJ plays a role in administering the code. By statute, complaints alleging violation of the code must be considered by the Chief ALJ, who determines whether they meet the standard for referral to the Attorney General for investigation.<sup>12</sup> Under the code, mitigation of an alleged violation may exist if the accused hearing officer relied upon a written opinion from the Chief ALJ or the Attorney General.<sup>13</sup> The Chief ALJ, therefore, must field questions from hearing officers about code compliance requirements and, in appropriate circumstances, issue written opinions.

No formal ethics opinions were issued; however, one informal advisory opinion was provided. In 2017, there were no complaints of violations of the Code of Hearing Officer Conduct filed with the Chief ALJ.

#### **I. Workers' Compensation Appeals Commission Recruitment**

Under AS 23.30.007, the Chief ALJ has the duty to recruit for vacancies on the Workers' Compensation Appeals Commission and to appoint persons to serve as the *pro tempore* chair of that commission if the chair is absent or cannot hear an appeal due to a conflict. The Chief ALJ reviews the qualifications of the applicants for commission positions and must forward to the Governor at least three names for consideration when the attorney-chair position is vacant, and at least two names for each commissioner vacancy.

In 2017, there were no vacancies on the Workers' Compensation Appeals Commission, so the Chief ALJ had no such recruitment responsibilities this year.

### **III. Recommendations of the Chief Administrative Law Judge**

In addition to the description of activities, the Legislature has directed OAH to include in its annual report "recommendations for statutory changes that may be needed in relation to the administrative hearings held by the office or other state agencies[.]" AS 44.64.020(a)(7). In the fall of 2016, OAH embarked on a comprehensive review of the statutes and regulations affecting administrative hearings. Based on this review, OAH recommends certain specific statutory changes, with sample language offered in Appendix B to this report. An overview of these changes is summarized below in Sections A and B.

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<sup>12</sup> AS 44.64.050(c). Complaints alleging violations by the Chief ALJ are considered by the Attorney General. AS 44.64.050(e).

<sup>13</sup> 2 AAC 64.060(c).

OAH is also recommending an additional statutory change, more fully described in Section C, which OAH did not include in its initial draft of statutory changes set forth in Appendix B. This is a conceptual change involving the decision-making process that is consistent with what has been occurring in other states with central panels like OAH.<sup>14</sup>

**A. Recommendation: Provide specific statutory subpoena power**

OAH currently has subpoena power of some kind in the great majority of its cases. The subpoena power is drawn from a patchwork of dozens of sources scattered across many statutory titles, however, and thus is confusing and inconsistent in extent. In addition, there are holes where the power is entirely absent, generally explainable as historical quirks rather than conscious policy choices. For example, it is present for contract claims adjudicated for the Department of Transportation and Public Facilities, but not for contract claims adjudicated for the Department of Administration.

Two areas where the subpoena power is absent are of special concern. Appropriate provisions should be added to OAH's statutes to give OAH subpoena power in retirement and benefits cases and in substantiation of neglect and abuse cases.

OAH hears Public Employees' Retirement System (PERS) and Teachers' Retirement System (TRS) cases under a grant of broad jurisdiction in those two titles, as the successor to the adjudicatory role of the former PERS and TRS boards. The former boards' subpoena power was repealed when the boards were eliminated, but due to an oversight the legislation giving OAH jurisdiction to hear these cases did not include subpoena power. PERS and TRS appeals can involve very large sums of money, and to ensure due process, new statutory authority is necessary for OAH to issue subpoenas in these cases.

There is a similar need for statutory subpoena power in substantiation of child abuse and neglect (SAN) cases. There are two types of SAN cases: cases in which the person accused of child abuse and neglect is placed on a Central Registry pursuant to AS 47.17.040(b), and cases of child abuse and neglect in which the accused is placed on the Centralized Registry pursuant to AS 47.05.330. SAN cases involving placement of the accused on the Centralized Registry are governed by the Administrative Procedure Act (APA), which permits the administrative law judge to issue subpoenas. SAN cases involving placement of the accused on the Central Registry are not governed by the APA, so the ALJ cannot issue subpoenas to allow the accused to obtain records from third parties and to compel witnesses to attend the hearing. The inability to issue subpoenas in SAN cases where the accused is placed on the Central Registry poses some due process concerns.

More broadly, it may be time for OAH subpoena authority to be consolidated into a single, uniform provision of AS 44.64. The patchwork of subpoena authorities causes uncertainty, inefficiency, and extra cost. Although subpoenas are issued in only a very small percentage of cases, when the authority to issue them is absent or questionable, the disruption of orderly and effective adjudication can lead to waste and injustice.

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<sup>14</sup> A central panel is an independent adjudicative agency which hears executive branch appeals. OAH is a central panel.

**B. Recommendation: Fix the issues in AS 44.64 that have been identified by experience**

Fourteen years of experience with OAH's organic statute, AS 44.64, have shown it to be a well-crafted piece of legislation. However, experience has shown that a few improvements should be made. These issues include:

- The final decision deadline applicable to agency heads, though reasonable in concept, is counted from the wrong event. This has caused some agency heads to have less than a reasonable time to consider proposals for action and deliberate on their final action.
- Final decisionmakers have no deadline at all to act on revised proposed decisions submitted to them after a case has been returned to the ALJ for supplemental proceedings. This can lead to long delays that frustrate the parties.
- The lack of provision for allowing parties to respond to one another's proposals for action, in appropriate cases, has led to due process concerns in some instances.
- Although the Chief Administrative Law Judge can employ administrative staff, the statute inadvertently was written in such a way that an Associate Attorney I (law clerk) cannot be hired by OAH even though such a hire might result in cost-savings to OAH.
- Although OAH is able to provide low-cost, effective mediation services to agencies, the authority to conduct mediation can be uncertain if the parties wish to mediate before initiating litigation. The statute should be clarified to grant broad mediation authority.
- At the time OAH's statute was enacted, there was debate over how much experience an ALJ should have before being hired by OAH. Given the complexity of some of the cases now before OAH, having at least four years of practice overall as the minimum standard for hiring now makes sense.

**C. Recommendation: Provide OAH with a broader range of final decisionmaking authority**

Currently, OAH functions as the final decisionmaker in the following categories of cases: (1) cases involving administrative fines against contractors and home inspectors; (2) most retirement and disability appeals; (3) tax cases involving oil and gas, corporation income, fisheries, and cigarette taxes; and (4) public benefits cases, PFD appeals, and child support cases where no proposal for action has been filed and the case does not raise issues of first impression on an important policy issue.

For other types of cases, OAH issues a proposed decision which is then sent to the final decisionmaker, who is generally a board, commission, or commissioner. The final decisionmaker can adopt, reject, or remand the case to the ALJ within 45 days after the ALJ issues the proposed decision. This process inserts additional delays in bringing finality to the parties and allowing

them the option to appeal, results in additional administrative time and concomitant costs, and is unnecessary in most categories of cases, other than cases which are governed by the Administrative Procedure Act, AS 44.62.330-640.<sup>15</sup>

OAH has compiled statistics which demonstrate why there is no need for an additional layer of administrative review beyond the ALJ's decision in cases that are not governed by the APA. During the five-year period from 2013 through 2017, on the average only 4.4% of the cases heard by OAH were appealed to the Superior Court. Indeed, the *true* appeal rate of decisions issued by OAH's ALJs is even lower. For example, of the 13 appeals to the Superior Court in 2017 involving cases heard by OAH, only *three* of the appeals arose from ALJ decisions that were adopted by the final decisionmaker. The remaining ten appeals to the Superior Court in 2017 were appeals of a decision issued by a final decisionmaker who *did not* adopt the ALJ's proposed decision.

The Supreme Court reversal rate of cases heard by OAH is infinitesimal. Over the five-year period from 2013-2017, there were three reversals of cases that were heard by OAH. However, one of those three reversals was a reversal of the final decisionmaker, who had not adopted the ALJ's decision. The second reversal overturned the Superior Court decision, which had reversed the ALJ's Decision on Remand, and thus was not a reversal of the ALJ. Consequently, the Alaska Supreme Court has partially reversed only *one* decision by an OAH ALJ out of 2,126 decisions issued during that period by OAH's ALJs.

Considering these statistics, there would be significant cost savings to the State if OAH served as the final decisionmaker in more types of cases. The commissioner or his/her delegate would not need to review the decision, review the proposals for action, and then consult with OAH regarding the legal issues in the case. It is only on very rare occasions that a commissioner does not adopt OAH's decision, and when they do so, they often trigger an appeal leading to a reversal. Saving time translates into saving money and increased efficiencies. OAH's track record demonstrates that its decisions are well-reasoned and are seldom reversed or remanded, so that oversight by a Commissioner or his delegate is not warranted in all instances. OAH believes that this proposal would streamline the decision-making process, particularly for small matters, leaving appropriate safeguards so that serious errors can be corrected. This has been done successfully in other states.

#### **IV. Conclusion**

In 2017, OAH's activities continued to focus on its core function—adjudication of executive branch cases—as well as on resolving disputes between agencies and private parties using alternative dispute resolution techniques. OAH has continued making progress on its ancillary functions. In addition, in 2017 OAH continued to market its services to an ever larger

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<sup>15</sup> Cases governed by the Administrative Procedure Act (APA) include, *inter alia*, cases involving professional licensing boards, the Alaska Public Office Commission, the Alaska Police Standards Council, and the State Commission on Human Rights. A list of the entities whose cases are governed by the APA can be found in AS 44.62.330. In general, these cases need a proposed decision process of some kind, although the particular mechanism prescribed by AS 44.64.060 is not the only one that could be adopted in a statutory redesign.

number of municipalities and school districts, some of which have availed themselves of OAH cost savings to a significant degree.

In the coming year, OAH will continue to search for opportunities to improve the delivery of fair, efficient and cost-effective hearings and alternative dispute resolution processes for the benefit of all Alaskans.

Submitted effective the 31<sup>st</sup> day of January, 2018.

*Signed*

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Kathleen A. Frederick  
Chief Administrative Law Judge

## Appendix A

ALJ Survey Results: January 2017-December 2017

### Demographics of Hearing Participants Responding<sup>16</sup>

Question	Number Responding			
	Attorney	Party	Agency Representative	Other
<i>Define your participation</i>	7	9	88	4
<i>Did you attend in person or by telephone?</i>	<i>Attended in person</i>		<i>Attended by telephone</i>	
	11		89	
<i>Where do you live?</i>	<i>Rural Alaska</i>	<i>City in Alaska</i>	<i>Outside Alaska</i>	
	10	96	2	
<i>What was the final ruling of your hearing?</i>	<i>In your favor</i>	<i>Not in your favor</i>	<i>Other</i>	
	75	24	19	
<i>Including this one, how many hearings at the Office of Administrative Hearings have you participated in?</i>	<i>One</i>	<i>2 to 10</i>	<i>More than 10</i>	
	6	11	91	

<b>Hearing Evaluation for Administrative Law Judge (ALJ)</b>	<b>Excellent</b>	<b>Adequate</b>	<b>Poor</b>
ALJ's preparation for the case	73	25	2
ALJ's courtesy toward both parties	73	24	2
ALJ's impartiality toward both parties	69	25	6
ALJ's efficiency	75	20	5
ALJ explained the hearing process	75	21	3

<b>Written Decision Evaluation</b>	<b>Excellent</b>	<b>Adequate</b>	<b>Poor</b>
ALJ's promptness issuing order	89	13	5
Decision clearly explained the issues and ruling	83	19	5

<b>Overall Evaluation</b>	<b>Agree</b>	<b>Disagree</b>	<b>No Comment</b>
Office of Administrative Hearing Clerks were courteous and helpful	94	2	12
Overall, I was satisfied with the hearing process and felt it was a positive experience	94	9	5

<sup>16</sup> Although 108 individuals completed the on-line survey, some did not answer every question.

## Appendix B

### Recommended Statutory Changes

**“An Act relating to the powers of the chief administrative law judge and the office of administrative hearings; to the compensation of the chief administrative law judge; to the experience of administrative law judges; to the procedures of the office of administrative hearings; and to the Code of Hearing Officer Conduct.”**

\* **Section 1.** AS 44.64.010(c) is amended to read:

(c) The chief administrative law judge is appointed to a five-year term of office by the governor and is subject to confirmation by the legislature. An individual may serve not more than three full or partial terms as chief administrative law judge. The governor may remove the chief administrative law judge from office only for good cause. The basis for removal shall be stated in writing. A vacancy in the office of chief administrative law judge shall be filled by the governor, and the individual appointed serves for the remainder of the term to which appointed.

**The chief administrative law judge may appoint an administrative law judge to serve as acting chief administrative law judge during a vacancy in the position of chief administrative law judge.**

\* **Sec. 2.** AS 44.64.010(d) is amended to read:

(d) The chief administrative law judge shall receive a monthly salary **equal to a step in** [THAT IS NOT LESS THAN STEP A NOR MORE THAN STEP F,] Range 27[,.] of the salary schedule in AS 39.27.011(a) [FOR JUNEAU, ALASKA]. The chief administrative law judge is in the partially exempt service.

\* **Sec. 3.** AS 44.64.020 is amended to read:

(a) The chief administrative law judge shall

- (1) supervise the office;
- (2) employ administrative staff, who shall be in the classified service;
- (3) employ administrative law judges **and professional staff**, who shall be in the partially exempt service;
- (4) preside over administrative hearings **or other proceedings** handled by the office or, based upon the qualifications and expertise of the administrative law judges, assign

administrative law judges to preside over hearings or other proceedings, and protect, support, and enhance the decisional independence of the administrative law judges;

(5) establish and implement performance standards, including provision for timeliness, and peer review programs for administrative law judges employed or retained by the office;

(6) make available and facilitate training and continuing education programs and services in administrative procedure, administrative adjudication, substantive law, alternate dispute resolution, and technical matters for administrative law judges and other administrative adjudicators;

(7) survey administrative hearing participants and use other methods to monitor the quality of administrative hearings held by the office and other state agencies, and submit to the governor and the legislature on January 31 of each year the results of the survey along with a report that includes a description of the activities of the office and recommendations for statutory changes that may be needed in relation to the administrative hearings held by the office or other state agencies;

(8) review and comment on regulations proposed by state agencies to govern procedures in administrative hearings;

(9) enter into contracts as necessary to carry out the functions of the office;

(10) annually prepare and submit to the commissioner of administration a budget for the office for the next fiscal year that shall include and separately identify funding for training and continuing education; a copy of the budget submitted to the commissioner under this paragraph shall also be submitted to the Finance Committee of each house of the legislature;

(11) after consulting with affected agencies, adopt regulations under AS 44.62 (Administrative Procedure Act) to carry out the duties of the office and implement this chapter;

(12) receive and review applications from individuals seeking appointments to the workers' compensation appeals commission and submit the names of individuals to the governor for appointment as provided in as 23.30.007(d); and

(13) appoint a chair pro tempore for the workers' compensation appeals commission as provided in as 23.30.007(m).

(b) In carrying out the responsibilities of the office, the chief administrative law judge shall seek to accomplish the following goals:

(1) provide for the delivery of high quality adjudication **and alternative dispute resolution** services in a timely, efficient, and cost-effective manner;

(2) ensure respect for the privacy and dignity of the individuals whose cases are being adjudicated and protect them from threats, intimidation, and harassment;

(3) foster open and clearly explained agency decisions and improve public access to the process of administrative adjudication;

(4) guarantee protection of all parties' due process rights, increase the public parties' perception of fairness in administrative adjudication, and foster acceptance of final administrative decisions by the public and affected parties;

(5) protect the integrity of the process of administrative adjudication and decisional independence of administrative adjudicators; and

(6) increase consistency in administrative procedures and decisions.

\* **Sec. 4.** AS 44.64.030(b) is amended to read:

(b) An agency may request the office to conduct an administrative hearing or other proceeding of that agency or to conduct several administrative hearings or other proceedings under statutes not listed in (a) of this section. The office may provide the service after entering into a written agreement with the agency describing the services to be provided **and procedures to be applied**, and providing for reimbursement by the agency to the office of the costs incurred by the office in providing the services.

\* **Sec. 5.** AS 44.64.040(a) is amended to read:

(a) An administrative law judge must be admitted to practice law in this state and must have been admitted to practice [IN THIS STATE] for at least **four** [TWO] years before being employed or retained with the office. The chief administrative law judge shall establish additional qualifications for administrative law judges employed or retained by the office and for those administrative law judges that may be assigned to particular types of cases. An administrative law judge is in the partially exempt service. Notwithstanding AS 39.25.120(b), full-time administrative law judges employed by the office are subject to the personnel rules adopted under AS 39.25.150(7), (15), and (16).

\* **Sec. 6.** AS 44.64.040(b) is amended to read:

(b) An administrative law judge employed or retained by the office may, in conducting an administrative hearing for an agency, exercise the powers authorized by law for exercise by

that agency in the performance of its duties in connection with the hearing. An administrative law judge may

(1) engage in alternative dispute resolution under regulations adopted by the chief administrative law judge that is in addition to any alternate dispute resolution procedure used by an agency before the case is referred to the office;

(2) order a party, a party's attorney, or another authorized representative of a party to pay reasonable expenses, including attorney fees, incurred by another party **or the office** as a result of actions done **or positions taken** in bad faith **or for an improper purpose**, or as a result of tactics used frivolously or [SOLELY] intended to cause unnecessary delay **or expense**;

(3) perform other necessary and appropriate acts in the performance of official duties.

\* **Sec. 7.** AS 44.64.040(c) is amended to read:

(c) An administrative law judge employed by the office must devote full time to the duties of the office unless **servicing** [APPOINTED TO A POSITION THAT IS] less than full-time. An administrative law judge employed by the office may not perform duties inconsistent with the duties and responsibilities of an administrative law judge.

\* **Sec. 8.** AS 44.64.050(c) is amended to read:

(c) Except as provided in (e) of this section, the chief administrative law judge shall receive and consider all complaints against administrative law judges or hearing officers employed or retained by the office or another agency alleging violations of (a) of this section or of the code of hearing officer conduct. The chief administrative law judge shall deliver the complaint to the attorney general when the chief administrative law judge determines that

**(1) the complaint alleges a violation that occurred not more than two years before the complaint was filed; and**

**(2)** the conduct alleged, if true, would constitute a violation of

**(A)** subsection (a) of this section; or

**(B)** the code and would warrant disciplinary action under the regulations adopted under (b) of this section.

\* **Sec. 9.** AS 44.64.055 is amended to read:

**Sec. 44.64.055. Reimbursement agreements.** The office may enter into agreements for reimbursement for services related to an administrative hearing **or other proceedings** from a

school district, municipality, or other governmental entity if the reimbursement is authorized by other law.

\* **Sec. 10.** AS 44.64.060(b) is amended to read:

(b) When an agency receives a request for a hearing that is subject to AS 44.64.030, the agency shall, within 10 days and in writing, deny the request for reasons provided by law or grant the request and refer the case to the office **with a copy of the request for a hearing, the names, addresses, and telephone numbers of all parties and their representatives, and the decision document or other matter under review.** The agency shall immediately give notice of the denial or referral to the requesters and the office. If the request is denied, the denial may be appealed to the **office or** [SUPERIOR COURT] as provided by other law. If the request is granted, the agency shall, within **20** [15] days after receiving the request, compile and transmit to the office a copy of [THE REQUEST FOR A HEARING, THE NAMES, ADDRESSES, AND TELEPHONE NUMBERS OF ALL PARTIES AND THEIR REPRESENTATIVES, AND THE AGENCY'S DECISION, IF ANY, TOGETHER WITH] the record relied on to support the decision. Any information provided to the office that is confidential by law shall be identified by the agency as confidential and shall be kept confidential by the office.

\* **Sec. 11.** AS 44.64.060(d) is amended to read:

(d) An administrative law judge employed or retained by the office shall, within 120 days after the date the agency received the request for a hearing, prepare a proposed decision, unless another [TIME]period is provided by law or agreed to by the parties and the chief administrative law judge **or ordered by the chief administrative law judge in the interest of fundamental fairness. With approval by the chief administrative law judge, an administrative law judge may stay a proceeding for reasons related to efficient adjudication. A stay will toll the deadline under this subsection.** [THE ADMINISTRATIVE LAW JUDGE SHALL IMMEDIATELY SUBMIT THE PROPOSED DECISION TO THE AGENCY.]

\* **Sec. 12.** AS 44.64.060(e) is amended to read:

(e) A proposed decision in an administrative hearing shall be in a form that may be adopted as the final decision by the agency with authority to make the final decision. The proposed decision is a public record, except as otherwise provided by statute. A copy of the proposed decision shall be served by the office on each party in the case or on the attorneys representing those parties in the hearing. Unless the office has established a shorter

[TIME]period **or, for good cause, has established a longer period** or another statute has established a different [TIME]period, within 30 days after the proposed decision is served, a party may file with the agency **and the office** a proposal for action under (1) - (5) of this subsection. **The office may permit a party to reply to a proposal for action and may, within 20 working days of the service of a proposal for action or a reply, whichever is later, transmit to the final decisionmaker a response to a proposal for action, a revised proposed decision, or both.** The agency with authority to make a final decision in the case retains agency discretion in the final disposition of the case and shall, within **30** [45] days after the date the **office transmits to the agency the proposed decision or revised proposed decision** [PROPOSED DECISION IS SERVED] or at the next regularly scheduled meeting that occurs at least **20** [45] days after the [PROPOSED DECISION IS SERVED] **office transmits to the agency the proposed decision or the revised proposed decision,** do one or more of the following:

- (1) adopt the proposed decision as the final agency decision;
- (2) return the case to the administrative law judge to take additional evidence or make additional findings or for other specific proceedings, in which case the administrative law judge shall complete the additional work and return the revised proposed decision to the agency within 45 days after the original decision was returned under this paragraph **or within another period prescribed in the order returning the case to the administrative law judge;**
- (3) exercise its discretion by revising the proposed enforcement action, determination of best interests, order, award, remedy, sanction, penalty, or other disposition of the case, and adopt the proposed decision as revised;
- (4) in writing, reject, modify, or amend a factual finding in the proposed decision by specifying the affected finding, **after reviewing all testimony and other evidence related to the finding,** and identifying the testimony and other evidence relied on by the agency for the rejection, modification, or amendment of the finding, and issue a final agency decision;
- (5) in writing, reject, modify, or amend an interpretation or application in the proposed decision of a statute or regulation directly governing the agency's actions by specifying the reasons for the rejection, modification, or amendment, and issue a final agency decision.

\* **Sec. 13.** AS 44.64.060 is amended by adding new subsections to read:

**(g) Except for proceedings under AS 36.30.590, for good cause shown, an administrative law judge may issue a subpoena to compel the attendance and testimony of witnesses and the production of documents and records. This provision does not supersede or modify subpoena authority otherwise provided by law.**

**(h) After a final agency decision has been entered under (e) of this section, the maker of the final decision may reopen a proceeding for a reason provided in Rule 60(b) of the Alaska Rules of Civil Procedure. This provision does not supersede or modify authority to reopen a proceeding otherwise provided by law.**

\* **Sec. 14.** AS 44.64.080(c) is amended to read:

(c) After an administrative hearing is referred by an agency to the office for hearing, the agency may not take further adjudicatory action in the case, except **for agency staff acting** as a party litigant **and the official or body with authority to render a final decision under AS 44.64.060 rendering** [OR TO RENDER] a final decision as provided by law. This subsection does not otherwise limit the agency's authority to take action affecting a party to the case.

\* **Sec. 15.** AS 44.64.200(3) is amended to read:

(3) “agency” means an agency of the executive branch of state government, including an officer, a division, or another subunit of an agency, a board or commission, a public corporation, [AND] the University of Alaska, **and a school district, municipality, or other governmental entity;**