

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

January 31, 2019

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I. Introduction

The Office of Administrative Hearings (OAH) is an independent agency housed in the Department of Administration and 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 fifteenth such report. It covers OAH’s activities for calendar year 2018.

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 parties' written submissions 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.¹ 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.² 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.

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

¹ 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).

² 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"> • Teacher Certification • PFD Execution
Environmental Conservation	<ul style="list-style-type: none"> • Environmental Permitting • Food Safety
Health and Social Services	<ul style="list-style-type: none"> • Facilities Licensing • Child Protection³ • Medicaid Benefits, Audits & Rates • Public assistance benefits • PFD Execution
Labor and Workforce Development	<ul style="list-style-type: none"> • Occupational Safety and Health • PFD Execution
Natural Resources	<ul style="list-style-type: none"> • Land Sale Contracts • Water Rights
Transportation and Public Facilities	<ul style="list-style-type: none"> • Construction Procurement (portion⁴)
Revenue	<ul style="list-style-type: none"> • Tax (original jurisdiction⁵) • Child Support • PFD Eligibility, Charitable Contribution & Fine/Forfeiture • Charitable Gaming • Unclaimed Property
University of Alaska	<ul style="list-style-type: none"> • PFD Execution

1. Caseload

During 2018, 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 1,686. New cases that came in during the year totaled 1,339.

Growth in overall case intake was 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 beginning in early 2015, with case intake falling back to a point midway between the 2012 and 2013 levels. The overall workload — that is, the 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

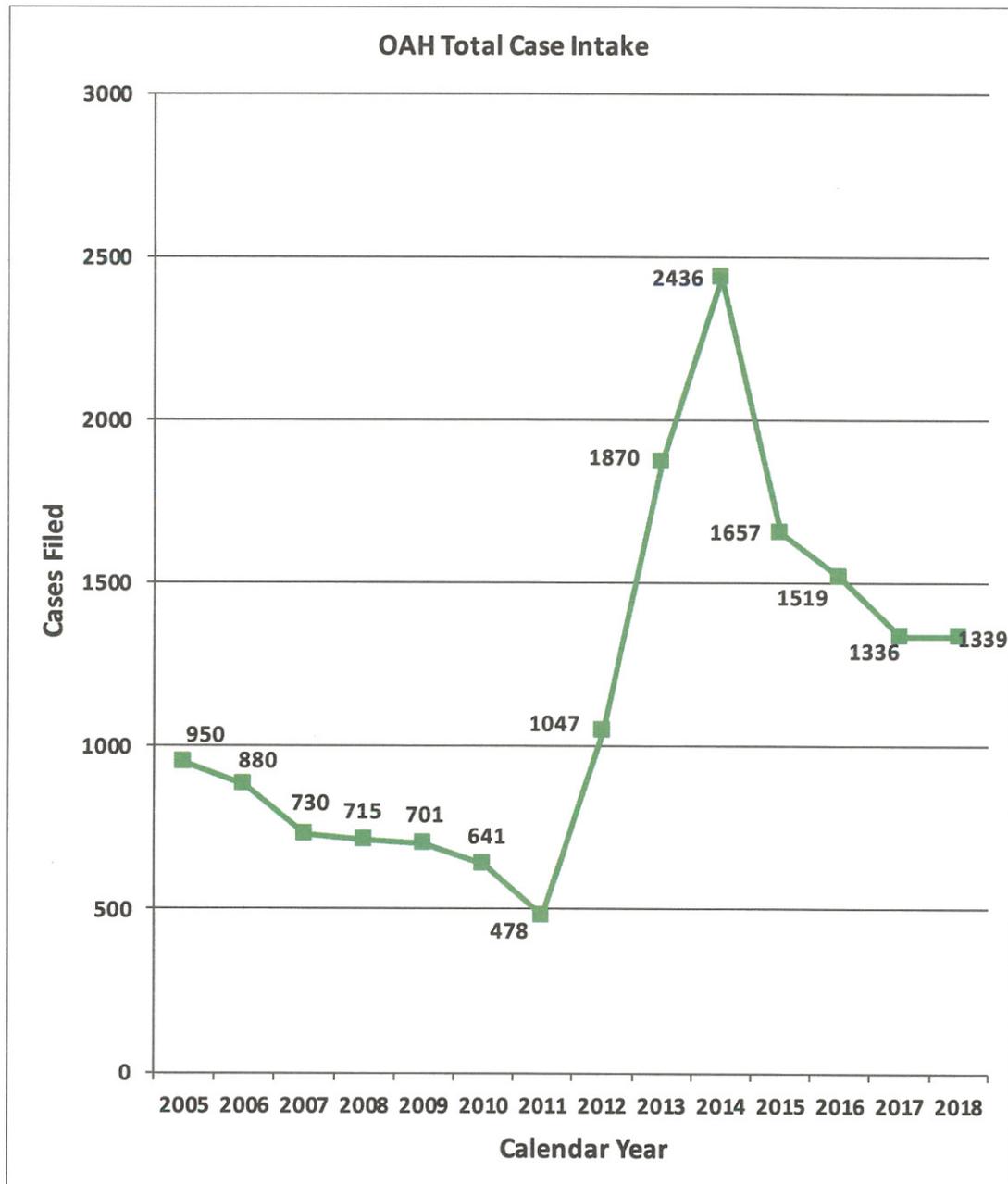
³ The administrative child protection cases OAH hears for the Department of Health and Social Services relate to substantiation of abuse or neglect findings that may affect facility or foster care licensing or other decisions concerning children. These adjudications serve a purpose different from that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

⁴ 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.

⁵ 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 then fell another twelve percent (to 1,336) in calendar year 2017, although a surge in activity in several especially complex cases prevented an overall decline in workload that year. For 2018, the overall caseload remained virtually constant, with a total of 1,339 new case referrals.

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



The table below focuses on OAH's overall active caseload (which is a larger universe than case intake, graphed above), to give a sense of the distribution of our case types over the course of the year. In considering this distribution, however, one must remember that not all cases are equal in terms of the ALJ time and effort required: 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. Consequently, the Business, Professional, and Occupational licensing/regulation cases that increased substantially in 2018 were far more demanding on ALJ time than the public assistance cases (which only increased slightly). Staff resources – as opposed to ALJ resources – are burdened approximately equally regardless of the case type.

The “active cases” table below is divided into twelve groups of case types. The first (Business, Professional & Occupational Licensing/Regulation) crosses several departments. The “Other” group does as well, encompassing occupational safety and health, environmental conservation, police standards, violent crime victim’s compensation, and adjudication services provided to municipalities and school districts, among others. The column to the right of each year’s number of cases shows percentage growth or decrease over each of the last two calendar years.

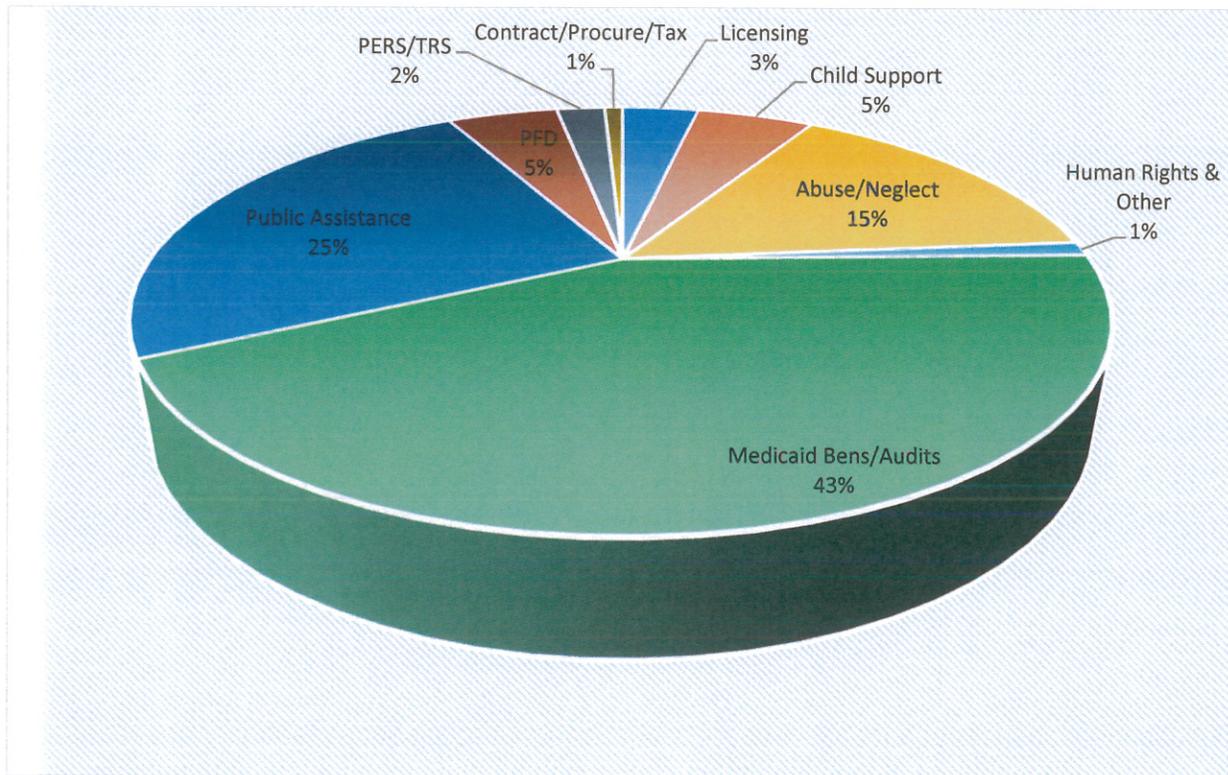
Number of Active Cases in 2017 and 2018

Case Type	2017	Change 16-17	2018	Change 17-18
Business, Professional & Occupational Licensing/Regulation	42	+2%	51	+21%
Child Support	66	-38%	78	+18%
Contracts and Procurement	14	+17	12	-14%
Health & Social Services-related Licensing/Certification	23	-30%	16	-30%
Human Rights	16	-20%	16	No change
Medicaid Benefits, Audits & Rates	657	-24%	698	+6%
Public Assistance Benefits	369	+35%	377	+2%
PFD Eligibility, Charitable Contribution, Execution & Fine	61	-29%	73	+20%
Retirement and Benefits	42	-22%	32	-24%
Substantiation of Child Abuse and Neglect	302	+17%	229	-24%
Tax	37	+27%	22	-41%
Other ⁶	80	+10%	82	+3%
Total	1709	-9%	1686	-1%

The chart below depicts the relative number of cases on which OAH actively worked in 2018, divided into general subject areas groups. The chart is derived from the data in the above table.

⁶ 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 continues to increase.

OAH Active Cases 2018



During calendar year 2018, OAH closed approximately 1,350 cases – nearly the same number of cases as were opened during the year.

Approximately 116 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. Three hundred twenty-eight full-dress decisions were issued (in addition to thousands of lesser orders).

Few OAH decisions are appealed to the courts, and the affirmance rate for such appeals is generally high. Fifteen OAH decisions were appealed to the Superior Court in 2018 – representing just 5 percent of the total number of decisions issued that year. There were also two new appeals filed in the Alaska Supreme Court in 2018. Of the nine OAH-related Superior Court appeals closed in 2018, three OAH decisions were affirmed in whole, two were affirmed in part and reversed in part, and four appeals were dismissed without a decision on the merits. In the one new Alaska Supreme Court decision arising out of an OAH matter, the Court affirmed the final agency decision.

2. *Time Devoted to Hearings and Related Work*

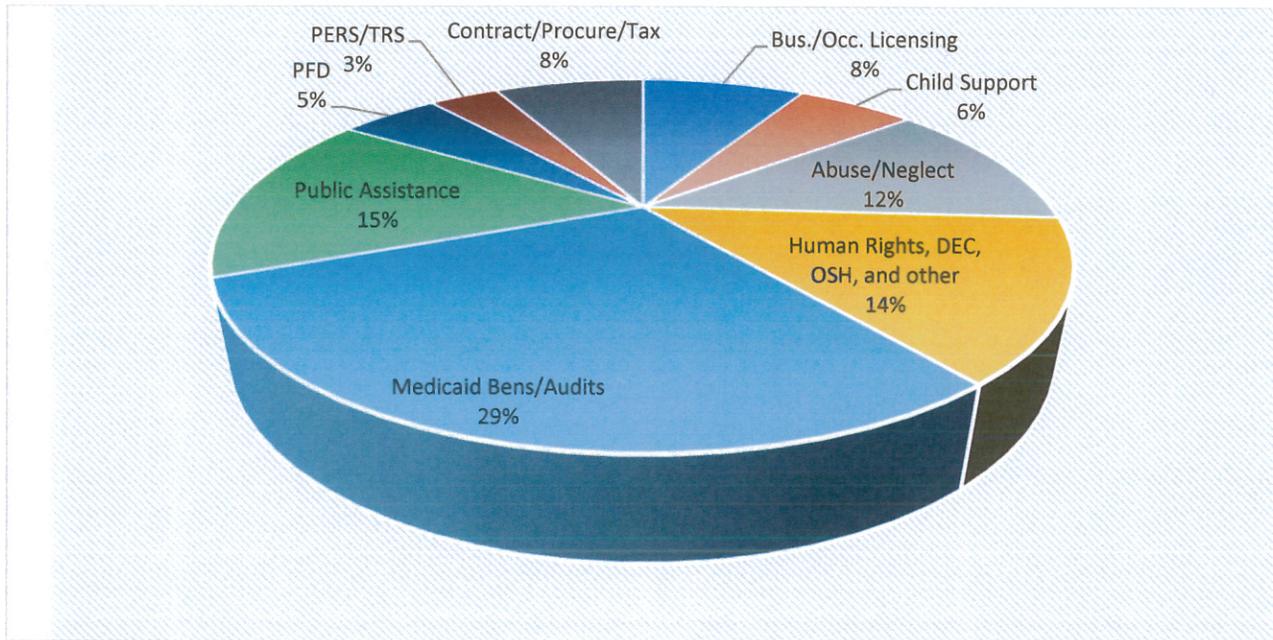
OAH's ALJs collectively devoted 10,459 hours to hearing or mediating cases and to related work, such as reviewing evidence, researching the law, ruling on motions, and writing decisions.

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 some Medicaid cases tend to be simpler and more quickly resolved than, for example, occupational licensing or tax cases (although some can be quite complex).

There was a general decline in ALJ hours in 2018 as compared to the prior year. This was due to both a reduction in the caseload and the existence of several ALJ vacancies during the calendar year. OAH is authorized to have 11 ALJS. However, difficulty in filling OAH's tax-qualified ALJ positions, a retirement, and a departure during 2018 meant that OAH operated with one to three vacant ALJ positions at any given time.

Grouping	2018 Hours	Change
Business, Professional & Occupational Licensing/Regulation	856	-9%
Child Support	610	-4%
Contracts and Procurement	168	-67%
Health & Social Services-related Licensing/Certification	89.2	-71%
Human Rights	125	-61%
Medicaid Benefits, Audits and Rates	3,054	+28%
Public Assistance Benefits	1,575	-11%
PFD Eligibility & Execution	504	+2%
Retirement and Benefits	359	+10%
Substantiation of Child Abuse and Neglect	1,216	-43%
Tax	621	+14%
Other	1282	+20%
Total	10,549	-8%

With some simplification, the distribution of ALJ work time across case types is shown on the following chart:



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.⁷ 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 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 is subsumed in the shorter federal deadline unless the latter is extended by special circumstances.

⁷ 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.

Historically, the key deadline OAH monitored for purposes of this report has been the 120-day deadline from the date of the hearing request to the 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.⁸

In 2018, the 120-day deadline was met or not applicable in 99 percent of the 1,350 cases OAH closed. The 120-day deadline was exceeded in less than one percent of cases closed, which corresponded to less than four percent of the 328 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 2018, final decisions were issued after the applicable deadline in three percent of cases closed to which a final decision deadline applies, which corresponded to sixteen percent of such cases brought to closure through a full decision. Responsibility for this deadline is shared between OAH and other agencies.

Last year (2017) was the first year in OAH’s history that OAH ended the calendar year with no pending overdue cases. OAH reached this goal again in 2018, with no pending overdue cases as of December 31, 2018.

4. *Work for Additional Governmental Units*

OAH’s 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 a more consistent delivery of services. The cities of Homer, Kotzebue, and Palmer; the City and Borough of Juneau; the Lower Kuskokwim School District; and the North Slope Borough School District 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 and the Police Standards Council.

⁸ 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.

B. Fast-Track 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, and went into full implementation in March of 2016.

The Alaska version of fast-track Medicaid mediation continued its success in 2018. Of the 391 Medicaid Services cases tracked through the program, 92% went to mediation, with 83% of those cases then resolving either through a settlement agreement or a withdrawal by the participant.

The fast-track mediation program continues to be well received by recipients, care providers, and agency personnel. Post-mediation surveys praise the speed, informality, and transparency of the mediation process. Medicaid recipients appreciate the expediency and more informal environment of mediation, and feel empowered through this process.

The success of the fast-track mediation program continues to contribute significantly to speedy resolution of Medicaid Services appeals. Prior to the implementation of the fast-track mediation program, a Medicaid participant's appeal of a decision denying or reducing benefits stayed open an average of 67.5 days. Now, the average time is 36.2 days from the inception of the appeal to case closure for all Medicaid services cases.

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 program savings on the DHSS side.

While not all Medicaid Services appeals are amenable to resolution through a fast-track mediation and some ultimately must be resolved through the hearing process, the availability of the mediation program enables speedy resolution of many cases without ALJ involvement. The success of the mediation program has been part of the reason that OAH has been able to operate efficiently in 2018 with fewer than 11 ALJs.

C. Peer Review

Peer review serves two purposes: it promotes consistency in decision-making 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 provides feedback to the reviewed ALJ. The reviewing ALJ also is available for consultations on questions of law or procedure.

In 2018, a formal peer review assignment was made in 168 of the 1,339 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.

In addition to formal peer review assignments made as part of the training process, more complex decisions are typically vetted through an informal peer review. Similarly, 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 both legal issues as well as best practices in case management.

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 2018, OAH in a joint project with DOA-IT constructed a new database for its decisions. As part of this project, past decisions were transferred to the new database located on OAH’s website. Decisions are now listed by case category and subcategories, and are searchable by case type, date, docket number, issuing judge, and key terms. OAH is continuing to work on updating the new database to include all recent decisions, as well as improving the functionality of the search functions.

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 on July 2, 2006. No amendments to the 2006 regulations were proposed in 2018. However, it is anticipated that after OAH’s proposed statutory changes are adopted by the legislature, a comprehensive regulations review project will commence.

OAH is also tasked by statute with tracking notices of other state agencies’ proposed regulations, looking for those that have the potential “to govern procedures in administrative hearings.” In 2018, OAH reviewed all proposed regulations by all executive branch agencies. One formal comment letter was issued in 2018.

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 2018 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 programs made available by OAH.

During 2018, one new OAH ALJ attended the basic ALJ training course presented by the National Judicial College and two other ALJs attended a course on procedural fairness, presented in Anchorage by the National Judicial College. Five ALJs furthered their training by attending courses or seminars presented by the Alaska Bar Association, the Anchorage Association of Women Lawyers, or the University of Washington School of Law. Three ALJs took part in special education hearing officer training through Alaska's Department of Education and Early Development, one ALJ participated in a webcast training relating to vocational rehabilitation cases, and one ALJ attended the Alaska Bar Convention. Two ALJs also attended the Central Panel Director's conference, a national gathering of administrators for central panels like OAH in which cost-saving innovations are shared.

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, obtained scholarships to attend National Judicial College courses, or took advantage of free courses presented by various groups.

In 2018, four ALJs from OAH presented a program for lawyers at the Attorney General's office regarding best practices in appearing before OAH. Also in 2018, the Chief ALJ and the current Deputy Chief presented a program about OAH to the judges of the Alaska court system at their annual judicial conference in Girdwood, Alaska.

OAH also sponsored an in-house seminar on courtroom control in December of 2018. The presenters included U.S. District Court Judge Sharon Gleason, retired Superior Court Judge Karen Hunt, and retired ALJ Mark Handley.

H. Administration of the Code of Hearing Officer Conduct

By statute, complaints alleging violation of the Code of Hearing Officer Conduct must be considered by OAH's Chief ALJ, who determines whether they meet the standard for referral to the Attorney General for investigation.⁹ 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.¹⁰ 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 during 2018; however, one informal advisory opinion was provided. In 2018, 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 2018, the Chief ALJ conducted a recruitment for applicants to fill one vacancy (employer representative) on the Workers' Compensation Appeals Commission. Two qualified applicants were referred to the Governor's office. In addition, the Chief ALJ made two *pro tem* appointments when the current Chair of the Workers' Compensation Appeals Commission had to recuse herself from two cases.

⁹ AS 44.64.050(c). Complaints alleging violations by the Chief ALJ are considered by the Attorney General. AS 44.64.050(e).

¹⁰ 2 AAC 64.060(c).

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 recommended certain specific statutory changes. Sample language was offered in Appendix B to last year’s report. During 2018, detailed discussions with the Department of Law and legislative offices have led to refinement of the proposal. An overview of the currently proposed changes is summarized below in Section A.

OAH is also recommending two other statutory changes. The first, is more fully described in Section B. It 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.¹¹ The second statutory change would involve the revision of AS 44.64.030(a), and AS 14.30.193-194, as more fully described in Section C.

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

Fifteen 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.
- The lack of opportunity for the ALJ to revise a proposed decision based on errors pointed out in proposals for action has led to delay and inefficiency in a number of cases.
- 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.

¹¹ A central panel is an independent adjudicative agency which hears executive branch appeals. OAH is a central panel.

- OAH currently has subpoena power of some kind in the great majority of its cases, drawn from a patchwork of dozens of sources scattered across many statutory titles. At the same time, there is no subpoena power in a few important case categories. It is 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, situations in which the authority to issue them is absent or questionable disrupt orderly and effective adjudication, and can lead to waste and injustice.
- 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. However, experience in other jurisdictions should be countable. The inability to count experience in other jurisdictions has caused severe recruiting difficulties in the tax docket.
- Like the court system, OAH needs to have a means of reopening decisions that were entered in error, such as when a party failed to appear but the failure later turns out to be because the party was incapacitated, or because the agency sent the notice to the wrong person.

B. Recommendation: Provide OAH with a broader range of final decision-making 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 44.62.330-640.¹²

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

¹² 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.

APA. During the six-year period from 2013 through 2018, on the average approximately 5% of the cases heard by OAH were appealed to the Superior Court. This is a very low appeal rate. Furthermore, the Supreme Court reversal rate of cases heard by OAH is infinitesimal. Of the 2,454 decisions issued in a six-year period, only a handful have been reversed.

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 delegee 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 a commissioner does so, it often triggers 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 commissioner's delegee 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.

C. Recommendation: Transfer Special Education Adjudications and Mediations to OAH

One notable area of state administrative adjudication currently not assigned to OAH is special education hearings. These matters arise when parents or school districts request a hearing to determine whether a student requires special education services and/or whether the services being provided are appropriate. A majority of States with central panels like OAH handle special education adjudications and mediations that originate in school districts. OAH's statute (AS 44.64.055) also permits OAH to handle special education cases.

Currently, two of the four hearing officers authorized by the Department of Education (DEED) to hear special education cases are ALJs at OAH. A third ALJ has completed DEED's mandatory training required for a hearing officer to hear these cases, but has not yet been placed on DEED's hearing officer roster.

Last year, DEED spent considerable time and effort recruiting private attorneys to take the initial training it requires for placement on its roster of hearing officers for special education cases. Not one private attorney attended the free training offered by DEED; however, two of OAH's ALJs expressed a desire to attend that training and were allowed to do so. OAH's ALJs are experienced adjudicators and litigators who historically have charged substantially less per hour than private hearing officers, a cost savings which is passed onto the municipalities and school districts.¹³ These circumstances warrant a hard look at whether special education hearing officer responsibilities should be assigned to OAH.

Additionally, many special education disputes can be mediated to a successful resolution without costly litigation, and DEED administers a mediation contract with an out-of-state mediator

¹³ OAH charges an hourly rate for its adjudication and mediation services. This hourly rate is determined by a statewide cost analysis plan (swcap) and is reviewed by the Department of Administration. The swcap rate is recalculated on an annual basis.

for this purpose. Of note, all three of OAH's special-education trained ALJs are experienced mediators who are ready, willing, and able to handle special education mediations, an outcome that would obviate the need for DEED to retain an out-of-state mediator to handle these cases.

As it does in other cases, OAH can also provide mediation services after a special education dispute has occurred. Since successful mediations result in substantial costs savings when compared to the cost of litigation, this too would be a savings for school districts.

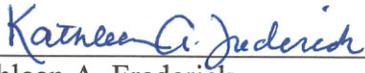
In order to effect this change, the following statutory provisions would need to be revised: AS 44.64.030(a), which is OAH's statute addressing the mandatory jurisdiction of OAH; AS 14.30.193, which addresses the process for selecting and appointing hearing officers when a due process hearing has been requested in a special education matter; and AS 14.30.194, which addresses appointing mediators for special education cases. Overall, transferring these cases to OAH would result in a pool of trained judges and mediators within a centralized governmental agency and would allow school districts to benefit from OAH's efficiencies and reduced costs for these services as compared to private hearing officers and mediators.

IV. Conclusion

In 2018, 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, during 2018 OAH continued to make its public entity adjudication and mediation services available to municipalities and school districts.

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 31st day of January, 2019.



Kathleen A. Frederick
Chief Administrative Law Judge

Appendix A

ALJ Survey Results: January 2018-December 2018

Demographics of Hearing Participants Responding¹⁴

Question	Number Responding			
	<i>Define your participation</i>	<i>Attorney</i>	<i>Party</i>	<i>Agency Representative</i>
	5	13	111	4
<i>Did you attend in person or by telephone?</i>	<i>Attended in person</i>		<i>Attended by telephone</i>	
	21		110	
<i>Where do you live?</i>	<i>Rural Alaska</i>	<i>City in Alaska</i>	<i>Outside Alaska</i>	
	21	111	1	
<i>What was the final ruling of your hearing?</i>	<i>In your favor</i>	<i>Not in your favor</i>	<i>Other</i>	
	86	22	26	
<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>	
	9	15	108	

Hearing Evaluation for Administrative Law Judge (ALJ)	Excellent	Adequate	Poor
ALJ's preparation for the case	93	32	5
ALJ's courtesy toward both parties	102	23	6
ALJ's impartiality toward both parties	93	28	9
ALJ's efficiency	96	29	5
ALJ explained the hearing process	107	22	1

Written Decision Evaluation	Excellent	Adequate	Poor
ALJ's promptness issuing order	106	22	5
Decision clearly explained the issues and ruling	98	26	7

Overall Evaluation	Agree	Disagree	No Comment
Office of Administrative Hearing Clerks were courteous and helpful	130	1	2
Overall, I was satisfied with the hearing process and felt it was a positive experience	123	10	1

¹⁴ Although 134 individuals completed the on-line survey, some did not answer every question.