

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

January 31, 2017

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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 thirteenth such report. It covers OAH’s activities for calendar year 2016.

## **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.<sup>3</sup>

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> </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.

<sup>3</sup> From 2010-2015, less than 1% of the final decisions rendered were reversed or remanded by the Superior Court.

	<ul style="list-style-type: none"> <li>• Insurance</li> <li>• Alcoholic Beverage Control</li> <li>• Marijuana</li> </ul>
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>4</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>5</sup>)</li> </ul>
Revenue	<ul style="list-style-type: none"> <li>• Tax (original jurisdiction<sup>6</sup>)</li> <li>• Child Support</li> <li>• PFD Eligibility, Charitable Contribution &amp; Fine/Forfeiture</li> <li>• Charitable Gaming</li> <li>• Unclaimed Property</li> <li>• Film Tax Credits<sup>7</sup></li> </ul>
University of Alaska	<ul style="list-style-type: none"> <li>• PFD Execution</li> </ul>

### 1. *Caseload*

During 2016, 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 1,870. New cases that came in during the year totaled 1,519.

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<sup>4</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.

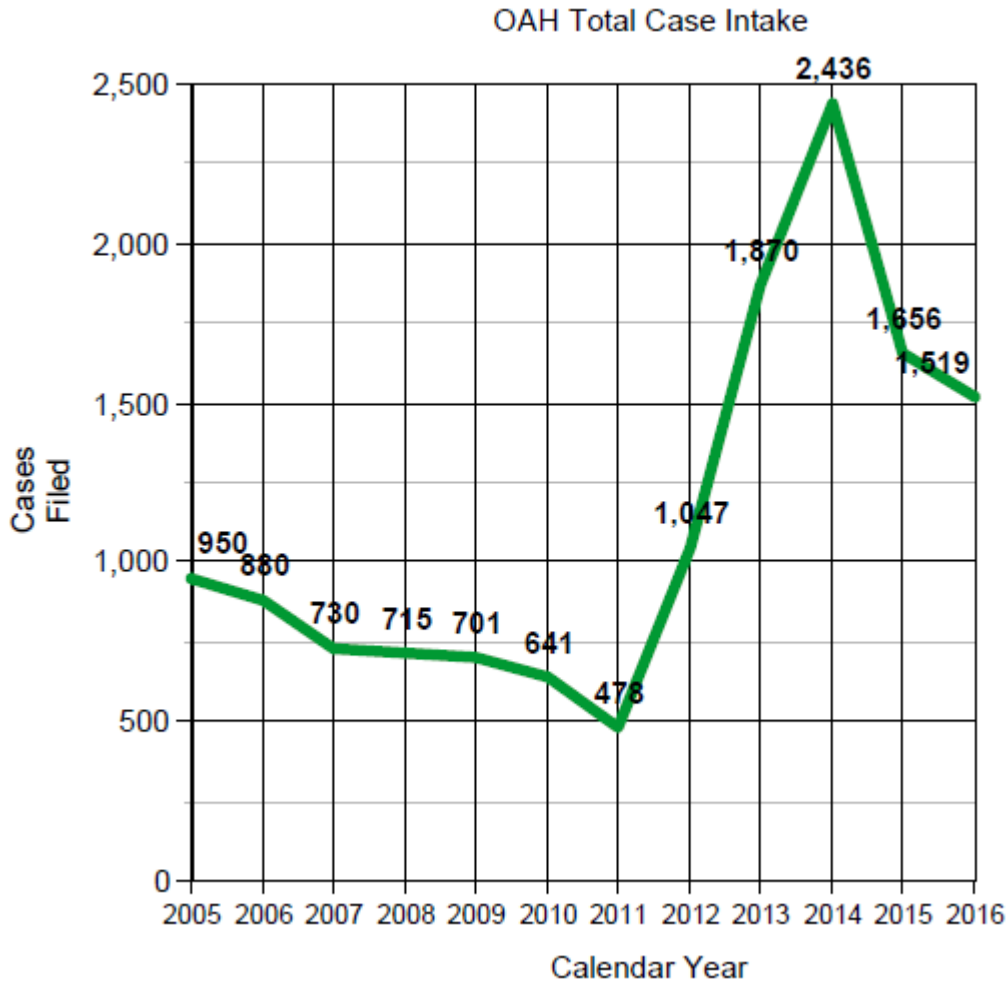
<sup>5</sup> OAH hears only some of the Department of Transportation and Public Facilities’ construction-related procurement cases under its mandatory jurisdiction. Construction cases subject to arbitration are exempted from OAH’s mandatory jurisdiction. DOT&PF sends some additional cases to OAH on a voluntary basis.

<sup>6</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.

<sup>7</sup> Although SB 39 repealed most of the film tax credit statutory provisions, there is still litigation arising out of appeals instituted prior to the effective date of SB 39 and appeals under the surviving statutory provisions of this program.

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 little below the 2013 level. It fell another ten percent in calendar year 2016. Because of the diminished caseload, OAH laid off one ALJ in 2016, reduced another to part-time, and discontinued a long-term non-permanent position.

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



The table below focuses on OAH's overall active 2016 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 and the licensing/certification cases in the Health and Social Services sector that have grown dramatically in volume in 2016 are far more demanding on ALJ time than the Medicaid

and public assistance benefits 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 workers’ compensation, among others. The column on the right shows percentage growth or decrease over one year (since 2015).

*Number of active cases in 2016*

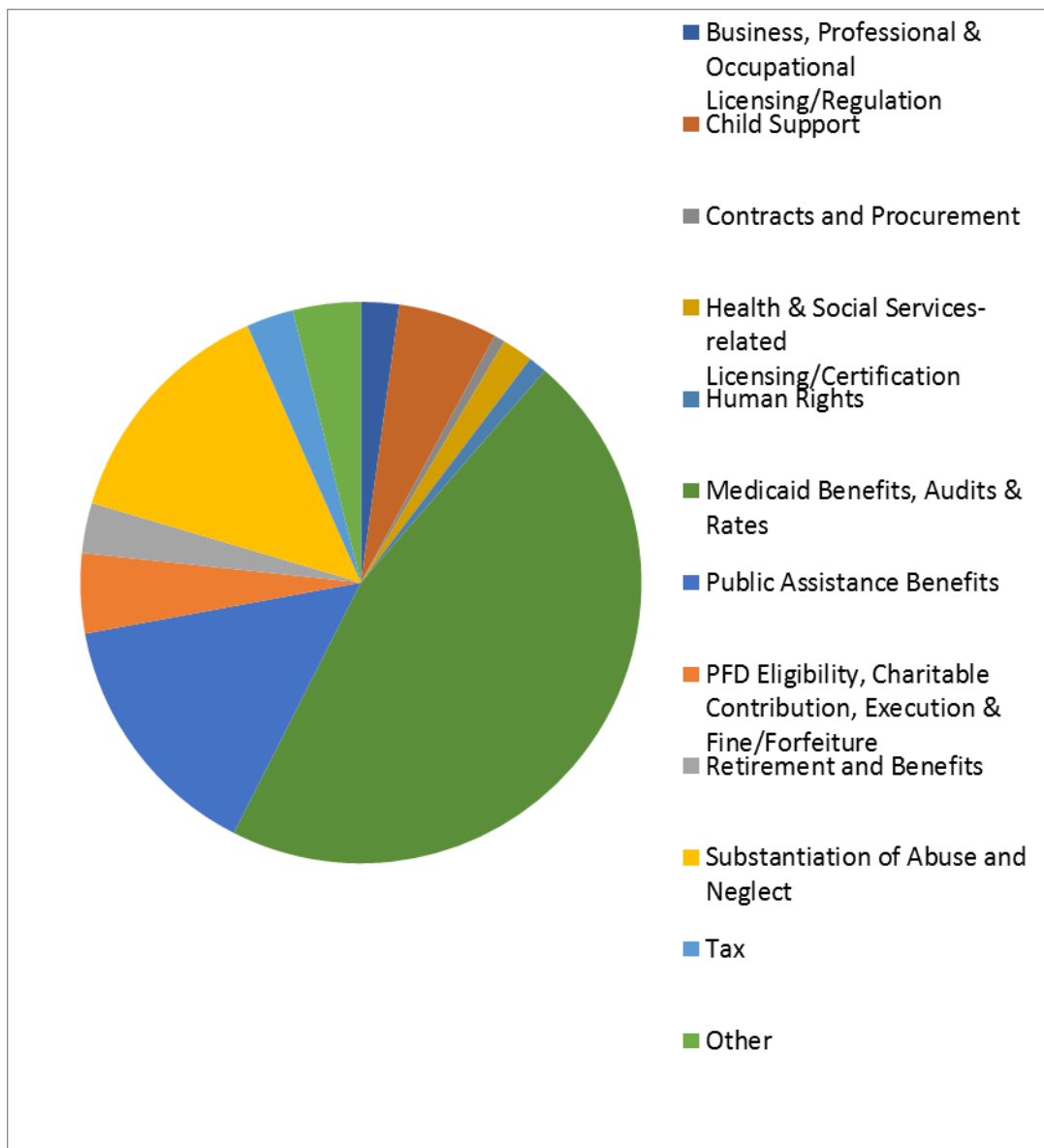
Business, Professional & Occupational Licensing/Regulation	41	-38%
Child Support	107	-52%
Contracts and Procurement	12	-20%
Health & Social Services-related Licensing/Certification	33	-41%
Human Rights	20	NC
Medicaid Benefits, Audits & Rates	862	-37%
Public Assistance Benefits	273	-30%
PFD Eligibility, Charitable Contribution, Execution & Fine/Forfeiture	86	-25%
Retirement and Benefits	54	+23%
Substantiation of Child Abuse and Neglect	258	+244%
Tax	51	+65%
Other <sup>8</sup>	73	+238%
<b>Total</b>	<b>1870</b>	<b>-23%</b>

The chart below depicts the relative number of cases on which OAH actively worked in 2016, divided into the eleven groups. The chart is derived from the data in the above table.

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<sup>8</sup> The “Other” category increased greatly as a result of 33 new occupational safety and health cases and 16 new Police Standards Council cases; both of these had been negligible categories in prior years. We have not created new tracking lines for these because we do not expect them to remain at these levels in 2017.

*Number of cases we worked on in 2016*



During calendar year 2016, OAH closed approximately 1,524 cases, a figure almost exactly the same as new cases accepted.

Approximately 107 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 ninety-five full-dress decisions were issued (in addition to thousands of lesser orders).

Few OAH decisions are appealed to the courts. Court appeals were filed in 27 of OAH's cases during 2016. OAH staff assembled the records for these appeals.

## 2. *Time Devoted to Hearings and Related Work*

OAH's ALJs collectively devoted 12,136 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 ensuing layoff of an ALJ and the reduction of an ALJ from full-time to part-time.

<b>Grouping</b>	<b>2016 Hours</b>	<b>Change</b>
Business, Professional & Occupational Licensing/Regulation	785	-20%
Child Support	1,236	-21%
Contracts and Procurement	530	+69%
Health & Social Services-related Licensing/Certification	342	-15%
Human Rights	311	-40%
Medicaid Benefits, Audits and Rates	2,215	-68%
Public Assistance Benefits	1,107	-21%
PFD Eligibility & Execution	571	-14%
Retirement and Benefits	896	+76%
Substantiation of Child Abuse and Neglect	1,718	+98%
Tax	755	-21%
Police Standards Council	967	* <sup>9</sup>
Other	703	* <sup>10</sup>
<b>Total</b>	<b>12,136</b>	<b>-20%</b>

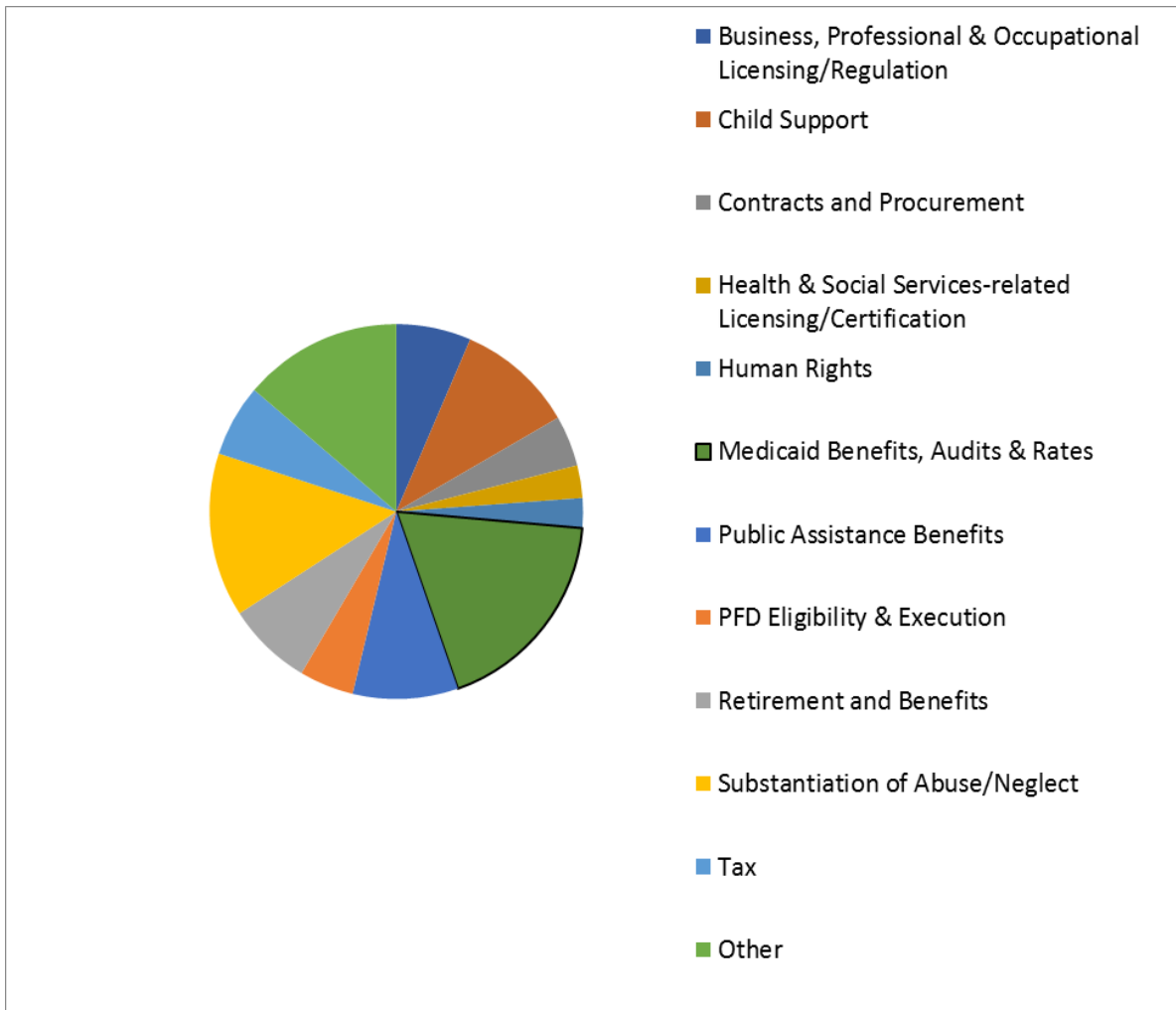
A pie chart depicting the same data follows:

<sup>9</sup> Police Standards Council work was previously incorporated in the "other" category. We have broken it out separately in 2016 because the number of cases was unusually large this year.

<sup>10</sup> If this category had been left with the same components as in 2015, the increase in 2016 would be 693%.



*How we spent our time on cases in 2016*



*3. Deadlines*

OAH cases are subject to many deadlines. OAH-specific deadlines imposed by AS 44.64.060 apply to most, but not all.<sup>11</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 when the case is heard or for issuing the decision, or for both.

<sup>11</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. 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.

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 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>12</sup>

In 2016, the 120-day deadline was met or not applicable in 98.9 percent of the 1,524 cases OAH closed. The 120-day deadline was exceeded in just over one percent of cases closed, which corresponded to 4.3 percent of the 395 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 2016, final decisions were issued after the applicable deadline in 0.4 percent of cases closed, which corresponded to 1.5 percent of the 395 cases brought to closure through a full decision.<sup>13</sup> Responsibility for this deadline is shared between OAH and other agencies.

The number of pending but overdue cases of both types declined from eleven as of December 31, 2015, to three as of December 1, 2016. Significant timeliness problems were encountered only in the Police Standards Council docket.

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<sup>12</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 cases,

<sup>13</sup> There were no overdue decisions at all in the highly expedited Food Stamps docket.

#### 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 Homer and Anchorage, the Fairbanks North Star and Matanuska-Susitna Boroughs, and the University of Alaska-Southeast, among others, 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**

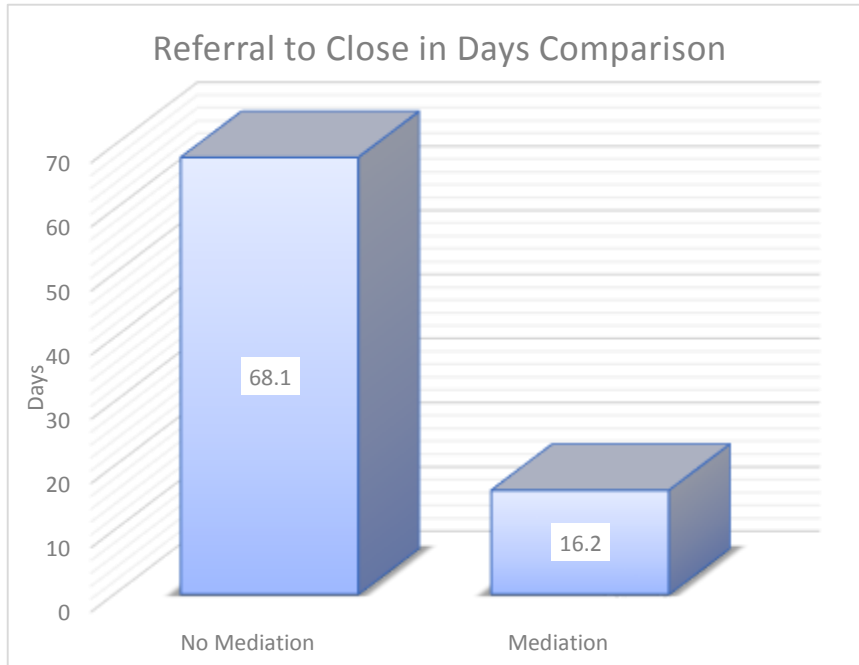
In 2014, OAH began to explore ways to improve efficiency in its recently-acquired Medicaid Fair Hearings docket. OAH discovered that North Carolina had obtained federal approval for a fast-track mediation program for these cases, and had documented impressive cost savings. After obtaining DHSS' buy-in, and with generous assistance from the North Carolina Mediation Network and the North Carolina OAH, we conducted a successful pilot that commenced in late 2015 and concluded in early 2016. This pilot project showed that Alaska could expect to realize considerable savings by implementing a program similar to the one in North Carolina. The pilot won a 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. Results have been as favorable as the pilot led us to expect. 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. With 450 cases mediated and 82.4 percent of those brought to resolution, the results for 2016 are: 82.4% of the cases were handled 75.2% faster and 83.1% cheaper.<sup>14</sup> Public response has been extremely positive; the speed, informality, and transparency of the mediation process have been very popular.

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

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<sup>14</sup> Because issues could be narrowed and explored efficiently in the mediation, there were some additional savings among the 17.6% of cases that were not resolved.



The success of the mediation program has eliminated the approximate workload of one full-time administrative law judge, resulting in a layoff part-way through the year, and reduced the need for a case manager for these cases, which led to the decision to eliminate a part-time long-term non-permanent position. In addition, a full-time ALJ was reduced to part-time to “right size” OAH in light of the reduction of Medicaid cases going to a hearing. This is the third time in OAH history that innovations have led to a downsizing of the organizational footprint. 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.

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

In 2016, a formal peer review assignment was made in 365 of the 1519 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). The publication function was largely suspended during much of 2015 due to that year’s large caseload. In 2016, publication resumed and 806 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 2016. However, a comprehensive regulations review project began in the fall of 2016 and should be completed in 2017.

OAH routinely tracks notices of other state agencies’ proposed regulations, looking for those that have the potential “to govern procedures in administrative hearings.” In 2016, OAH reviewed all proposed regulations by all executive branch agencies. No formal comments had to be issued in 2016.

#### **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 2016 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.

In 2016, OAH held two continuing education programs for its ALJs: a legal writing seminar conducted by Chief Assistant Attorney General Joanne Grace and an ethics seminar conducted by former Chief ALJ Terry Thurbon. Also during 2016, one new OAH ALJ attended the basic ALJ training course presented by the National Judicial College. Four ALJs furthered their training by attending webcast seminars or taking on-line courses presented by the National Judicial College or the American Bar Association. Two ALJs attended Department of Education and Early Development training for conducting special education hearings, and one ALJ attended a Training Seminar presented by the Council of State Administrators of Vocational Rehabilitation.

In response to the State's fiscal crisis, a number of ALJs used their own funds to take part in furthering their continuing education. One ALJ took a Logic and Opinion Writing course at the National Judicial College in Reno, Nevada; another ALJ attended a course on Judicial Writing at the National Judicial College, the Deputy Chief ALJ attended the annual central hearing panel directors' conference, which covered a variety of tribunal management issues; two ALJs attended an Alaska Bar conference; one ALJ attended the National Association of Women Judges conference in Seattle; one ALJ attended a course presented by the University of Washington School of Law, and four ALJs attended Alaska Bar-sponsored continuing education programs. Three ALJs also attended a week-long program on Basic Mediation conducted by the Alaska Court system, with each paying a portion of the tuition for the course and the ALJ from OAH's Juneau office also covering her lodging in Anchorage during the course.

Also in 2016, the Chief and Deputy Chief ALJ presented a program on the Hearing Officer Code of Conduct to workers' compensation hearing officers.

## **H. Administration of 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>15</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>16</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 2016, one complaint of violations of the Code of Hearing Officer Conduct by hearing officers was filed with the Chief ALJ. That complaint met the minimum standard for referral to the Attorney General. The Attorney General's office investigated and dismissed it, finding no probable cause to believe that the hearing officer had willfully violated the Code or had engaged in a pattern of repeated misconduct.

## **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 2016, the Chief ALJ conducted recruitment of applicants for the Workers' Compensation Appeals Commission chair position and for one vacancy on the commission. A slate of qualified applicants for each position was referred to the Governor's office. Since the chair position was vacant for over six months due to an unusually difficult recruitment, the Chief ALJ made several *pro tem* appointments so that the recently retired chair could continue to assist the commission until the Governor appointed his successor.

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

In addition to the description of activities, OAH's annual report is to include "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 began a comprehensive review of the statutes and regulations affecting administrative hearings. Based on this review, the following statutory changes are recommended.

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<sup>15</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>16</sup> 2 AAC 64.060(c).

## **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.



**B. Recommendation: Fix the Issues in AS 44.64 that Have Been Identified by Experience**

Twelve 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 could be made. The issues to be addressed 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 to be hired by OAH. Given the complexity of some of the cases now before OAH, having at least three years of practice in Alaska and five years of practice overall as the minimum standard for hiring now makes sense.
- Statistics compiled from 2010 through 2015 have shown that, on the average, fewer than five percent of OAH's decisions are appealed to the Superior Court. Furthermore, fewer than one percent of OAH's decisions are reversed or remanded by a higher court. Considering these statistics, there would be significant cost savings to the State of Alaska 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. 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 may not be warranted in all instances. The Legislature may wish to consider streamlining the

decisionmaking 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 2016, 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. By instituting an early mediation program for the Medicaid Services docket, OAH was able to resolve more than 82% of these cases without the need for a hearing. The success of this program led to a reduction in OAH's staff and to considerable cost savings for DHSS by significantly reducing the number of Medicaid Services cases going to a hearing.

OAH continued making progress on its ancillary functions, particularly e-publishing and indexing decisions. 2016 was also the first year in which municipalities and school districts 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, 2017.

*Signed*

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Kathleen A. Frederick  
Chief Administrative Law Judge

## Appendix A

Survey Results: January 2016-December 2016

### Demographics of Hearing Participants Responding<sup>17</sup>

Question	Number Responding			
	Attorney	Party	Agency Representative	Other
Define your participation	4	1	78	1
Did you attend in person or by telephone?	Attended in person		Attended by telephone	
	12		68	
Where do you live?	Rural Alaska	City in Alaska	Outside Alaska	
	0	83	1	
What was the final ruling of your hearing?	In your favor	Not in your favor	Other	
	68	12	5	
Including this one, how many hearings at the Office of Administrative Hearings have you participated in?	One	2 to 10	More than 10	
	0	6	78	

Hearing Evaluation for Administrative Law Judge (ALJ)	Excellent	Adequate	Poor
ALJ's preparation for the case	70	10	1
ALJ's courtesy toward both parties	79	2	0
ALJ's impartiality toward both parties	75	2	4
ALJ's efficiency	72	6	3
ALJ explained the hearing process	77	3	1

Written Decision Evaluation	Excellent	Adequate	Poor
ALJ's promptness issuing order	75	6	3
Decision clearly explained the issues and ruling	81	2	1

Overall Evaluation	Agree	Disagree	No Comment
Office of Administrative Hearing Clerks were courteous and helpful	80	2	2
Overall, I was satisfied with the hearing process and felt it was a positive experience	78	4	2

<sup>17</sup> Although 84 individuals completed in the on-line survey, some did not answer every question.