

“What’s Your Brief?”

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South Carolina Department of Employment and Workforce

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Problem Statement

The Appellate Panel (Panel) is responsible for making the Department of Employment and Workforce's (DEW) final decision on any contested issue involving unemployment insurance.¹ Higher Authority Appeals (HAA) is responsible for assisting the Appellate Panel, providing legal guidance, and ensuring the smooth operation of the Panel's active case docket. Further appeals of the unemployment insurance issue are made first to the Administrative Law Court (ALC)², followed by the Court of Appeals and the Supreme Court. As a result, the Panel's decision must contain clear findings of fact and rulings of law and provide the parties to the appeal with a clear understanding of why the decision was made. This does not always occur, however, due to the current nature of the appeals process, and the information DEW disseminates to parties.

The Department of Employment and Workforce (DEW) administers South Carolina's unemployment insurance system. Unemployment benefits are set aside for individuals who were separated from their last qualified employer through no fault of their own³ and are able, available, and actively seeking fulltime work.⁴ Further, states must provide parties with the opportunity for a fair hearing if unemployment insurance is denied.⁵ As a result, South Carolina established a detailed appeal procedure to ensure all interested parties receive proper due process.⁶

¹ S.C. Code Ann. § 41-29-300 and S.C. Code Ann. § 41-35-710

² S.C. Code Ann. § 41-35-690

³ S.C. Code Ann. § 41-27-20

⁴ S.C. Code Ann. § 41-35-110

⁵ 42 U.S.C. § 503(a)(3)

⁶ S.C. Code Ann. § 41-35-660 through § 41-35-750 and S.C. Code Reg. § 47-51 - § 47-57

Any interested party⁷ may file an appeal of an initial DEW decision (determination) to the Appeal Tribunal (Tribunal).⁸ The Tribunal conducts a formal evidentiary hearing where all interested parties are invited to participate and provide sworn evidence and testimony regarding the issue under appeal. The record developed by the Tribunal will be the official record of the case for every subsequent appeal, whether within DEW to the Panel, or to the Administrative Law Court (ALC) and beyond. The Tribunal issues a written decision after the conclusion of the evidentiary hearing, making clear findings of fact and applying the law to those facts.

Parties have ten calendar days to file an appeal of a Tribunal decision to the Panel. The Panel, by law, is prohibited from accepting new evidence or testimony not submitted during the sworn Tribunal evidentiary hearing.⁹ The Panel, at its discretion, may decide a case based solely on its review of the record on appeal or may schedule an in-person oral argument that provides the parties with ten minutes each to argue, based on the record developed by the Tribunal, why the Tribunal's decision should be affirmed, modified, or reversed. Since 2011, HAA has dramatically reduced the number of cases scheduled for in-person oral argument, and the vast majority of decisions issued by the Panel are issued without any communication after HAA mails a letter to the parties acknowledging receipt of an appeal to the Panel (See Appendix A for a copy of the acknowledgment letter currently in use). Parties are never explicitly told they will not have another evidentiary hearing or other opportunity to submit evidence or an argument after the Tribunal hearing. As a result, many losing parties are angry after receiving the Panel's final decision because they feel the Panel simply rubber stamped the Tribunal decision or they did not realize they might not have an opportunity to present a formal argument.

⁷ S.C. Code Ann. § 41-35-660, defining an interested party as the claimant's last separating employer or an employer whose unemployment account might be adversely affected.

⁸ S.C. Code Ann § 41-35-700

⁹ S.C. Code Reg. § 47-52(B)(1)

Parties must file an appeal with the ALC if they wish to dispute the Panel's decision. DEW's Office of General Counsel (OGC) is responsible for defending Panel decisions on appeal to the court system. Parties occasionally raise new arguments or issues on appeal to the ALC that were never brought up during the internal DEW appeals process.¹⁰ OGC attorneys are forced to spend time addressing these arguments in written briefs and making motions to deny these new arguments because the parties failed to preserve the issue by raising it at the proper time. Some judges have been sympathetic to pro se litigants, however, and have allowed parties to present these arguments. In those cases, the judge may rule based on these new arguments, or may order DEW to reopen the record, conduct a new hearing, and issue a new decision. These occurrences, though rare, create additional work for DEW staff and further delay the final resolution of disputed unemployment insurance claim, which may already be many months, if not years, old. Improving dissemination of information to parties and providing parties with an opportunity to present formal arguments without unacceptably delaying the appeals process would improve the parties' experience, reduce unnecessary work, and help ensure that only those separated from employment through no fault of their own receive unemployment insurance.

Date Collection

Currently, appeals are received by HAA each day and are assigned a unique case number. The HAA manager evaluates each case to determine whether a case will be decided with an oral argument or by review of the record on appeal. Cases set simply for review are logged into HAA's case management system and the physical file is placed on a shelf with all other active review files, which are then sorted so the oldest cases, by the appeal file date, are at the top of the

¹⁰ Unfortunately, I was unable to obtain specific information regarding the total number or frequency of this problem. Anecdotally, however, multiple OGC attorneys expressed frustration with this issue and identified providing parties with a clear opportunity to present an argument at the Appellate Panel level as a clear improvement over the current process.

stack. HAA writers then select the oldest review when they are ready for a new case. Cases designated for an in-person oral argument, however, are placed in suspense while the audio recording of the Appeal Tribunal evidentiary hearing is sent to a vendor in New Jersey for transcription (at \$2.10 per page). It takes approximately two weeks for HAA to receive a transcript back from New Jersey. Once the transcript is received, the file is placed on a shelf designated for in-person hearings, and an HAA writer will pick up the case when they are ready for a new assignment. If there are both review and in-person oral argument cases ready, the writer will select the oldest case first.

Review and in-person oral argument schedules are prepared for the Appellate Panel each week. The review schedule is prepared each Monday, and is comprised of all review cases written by HAA staff the previous week. The Panel will consider and mail decisions on those review cases the following week. As a result, the decision for a case heard on review of the record will be mailed between ten and fourteen days after the decision was actually drafted by HAA staff. The oral argument schedule is prepared each Wednesday, and is comprised of all oral argument cases written by HAA staff the previous week. Oral arguments are scheduled two weeks in advance. As a result, the decision for a case that received an in-person oral argument will be mailed between two and three weeks after the decision was actually drafted by HAA.

An acknowledgement letter is generated for all cases, whether initially scheduled for an in-person oral argument or for decision on review, and mailed to the interested parties (usually, the claimant and separating employer). The acknowledgement letter informs the parties the Panel may issue a decision based on their review of the record on appeal or they may schedule an in-person oral argument. The form also provides information on how a party may request an in-person oral argument. The form, however, currently provides no information about how a party

may submit an argument for the Panel to consider in the event they decide the case solely on their review of the record on appeal.

The Department of Labor (DoL) evaluates state Higher Authority Appeals performance through two primary metrics: case aging and time lapse. Case aging is the average age of an active appeal at the end of a month. The average age of an active case at the end of each month should be at or below forty days. Time lapse is the number of days between the appeal file date and the date the Appellate Panel decision is mailed. Fifty percent of decisions mailed each month should be mailed within forty-five days of the appeal file date and eighty percent should be mailed within seventy-five days of the appeal file date. Taken together, these two measures evaluate how quickly HAA processes appeals. One of the chief priorities of any state unemployment insurance system is to ensure that eligible individuals receive benefits as quickly as possible, given the dire economic situation those who file for benefits face. Any solution that addresses the problem of providing parties an opportunity to submit a formal argument during the final level of Department review must be weighed against the effect the solution would have on case aging and time lapse.

Prior to 2011, DEW rarely met DoL's case aging or time lapse requirements, frequently falling well below minimally acceptable levels (See Appendix B). Most appeals were decided after an in-personal oral argument where parties were invited to Columbia to make their argument directly to the members of the Panel. In 2011, HAA focused on changing the case management process to improve DEW's performance in all DoL metrics. To do so, HAA dramatically reduced the number of cases that received an in-person oral argument. The recording of the evidentiary hearing for cases set for an in-person oral argument must first be outsourced for transcription, and then returned to HAA for review and proposal drafting. As a

result, it takes approximately two to three weeks longer to mail a decision in a case set for oral argument than for a case the Panel decides simply on review of the record on appeal. Though DEW has not maintained reliable records of the number of cases set for oral argument each year, the move from in-person oral arguments to decisions on review of the record is evidenced by a nearly eighty-five percent reduction in transcription expenses since 2011 (See Appendix C). Additionally, HAA changed the case distribution process from one where a case was assigned to a specific writer when the appeal was received, without regard to the appeal file date, to one where all appeals are organized by the appeal file date, and writers select the oldest case for review and proposal when they are ready for a new case. The cumulative effect of these changes can be seen in HAA's dramatic improvement in all DoL measures since 2011. HAA now regularly maintains a case aging below thirty days, and easily exceeds the required percentages for forty-five and seventy-five day time lapse (See Appendix D). In 2013, 68.6 percent of the Panel's 2,028 decisions were mailed within forty-five days of the appeal file date. Fifty-seven and one-half (57.5) percent of the 1,392 decisions that made forty-five day time lapse were actually mailed within thirty-five days of the appeal file date (See Appendix E).

Neighboring states, such as Georgia and North Carolina, notify parties of the opportunity to submit a written argument to their Appellate Panel equivalent. For the month of November 2013, Georgia maintained an average case age of 24.4 days, and easily exceeded DoL's performance requirements in time lapse. North Carolina also exceeded DoL requirements for time lapse, but maintained an average case age of 42 days, above DoL's threshold (See Appendix F). Georgia publishes a thorough appeals guide on the internet that contains detailed information regarding the entire appeals process from the initial decision through each level of

appeal.¹¹ South Carolina provides some information on its website¹², but a similar guide has not yet been contemplated.

Data Analysis

There is a clear correlation between the reduction of in-person oral arguments and the improvement in HAA's performance in all DoL metrics. While other factors contributed, the move from in-person oral arguments to decision on review was the most significant driver. As a result, reverting to a primarily in-person oral argument decision making process, while providing parties with a final formal chance to present arguments, would result in a return to routine poor performance in DoL metrics, as well as losing the cost savings associated with reduced transcription expenses. The cumulative effect of such a course of action would be a process where cases were decided more slowly and at greater expense than at present.

There is potential, however, in providing parties with notice and opportunity to submit a formal written argument after the appeal is filed but before the decision is mailed. Since it currently takes on average between four to six weeks for a case on review to be decided and mailed, there should be ample time for a party to submit a written argument early enough after the appeal file date for the HAA writer to receive and consider it in drafting a proposal for the Panel's review. Providing parties with the opportunity to submit a written argument could be a happy medium that balances DEW's competing goals of providing quality customer service while still meeting DoL's timeliness metrics.

In order to maintain HAA's strong DoL metric performance, however, there will need to be a deadline by which parties must submit a written argument to ensure consideration by the

¹¹ <http://www.dol.state.ga.us/pdf/forms/dol424b.pdf> (last accessed February 3, 2014).

¹² <http://dew.sc.gov/appeals.asp> (last accessed February 3, 2014).

Panel. Since most decisions are mailed out between twenty-six and forty-five days of the appeal file date (See Appendix G), a deadline of fourteen calendar days from the date of the acknowledgement letter should provide parties with enough time to draft and submit a written argument without unacceptably affecting DEW's DoL metric performance. Even if a proposed decision has already been prepared by HAA staff within fourteen days of the appeal file date, there would be an additional ten to fourteen day cushion for the argument to be evaluated before the Panel would be scheduled to deliberate and sign off on a decision.

Implementation Plan

As a starting point, the acknowledgement letter must be edited to provide parties with notice as soon as possible that they may submit a written argument for the Panel's consideration. The HAA manager will be responsible for editing the acknowledgment letter to inform parties of the opportunity to submit a written argument within fourteen calendar days of the date of the acknowledgement letter and the procedure for doing so. The edits will be shared with OGC attorneys for feedback and approval.

Additionally, DEW will need to add information regarding this new process to its website. The HAA manager will be responsible for drafting appropriate language, with consultation with OGC attorneys. Thereafter, the HAA manager will work with members of DEW's public information and IT teams to publish the information. This could be a first step toward publishing a more detailed soup to nuts appeals guide like that offered by Georgia.

The HAA support staff and manager will work together to develop a process for handling the receipt and distribution of written arguments. Some obstacles are immediately apparent, including written arguments that do not have sufficient identifying information, or written

arguments that are in some way delayed due to Postal or Department error. The acknowledgement letter may need to include instructions for the party providing the written argument to include, at a minimum, the HAA case number. Another potential problem is the question of whether the opposing party should receive copies of a written argument. In appellate practice in the court system, the moving party submits a brief and the opposing party has an opportunity to respond within a defined timeframe. It is conceivable, likely even, that DEW will receive occasional complaints from parties about not receiving the opposing party's argument. While sympathetic to this point, the timeliness requirements imposed by DoL do not afford much time for HAA to manage a formal reply and response process at this time. That possibility may become more feasible after implementation and evaluation of this solution, as well as an impending electronic case management system overhaul.

Finally, HAA staff writers will need to be trained on how to evaluate written arguments and when, and how, to specifically address those arguments in proposed decisions prepared for the Appellate Panel. The HAA manager, with assistance from OGC attorneys, will be responsible for developing guidelines and consulting with individual writers on a case by case basis. One idea that will need to be evaluated during this process is whether writers should note in the proposed decision whether a party submitted a written argument. Doing so would, potentially, reassure parties that their argument was received and considered during the decision making process.

If adopted, this process should be in effect by March 31, 2014 and should not incur much, if any, additional cost. On the contrary, if successful, this process change should lead to reduced costs. If parties are aware they can submit a written argument during the appeals process, they should be less likely to opt for an in-person oral argument that would require them to take time

and spend money traveling to Columbia. This would, in turn, result in even further reduction of DEW's transcription expenses.

Evaluation

To evaluate the impact of the solution, the HAA manager will maintain a log listing every written argument submitted. This will provide a snapshot of both the number and percentage of parties taking advantage of the opportunity to submit written arguments. The HAA manager will also conduct surveys with HAA staff writers and members of the Appellate Panel to determine whether the written arguments were useful in evaluating the case under appeal and how much additional time evaluating and addressing the written arguments added to the writer's review of the case file. These interviews will provide useful anecdotal data regarding the process change. Most importantly, the HAA manager will assess HAA's performance each month in DoL performance metrics, which will provide hard data on the quantifiable effect of the change. The DoL metrics should reflect any appreciable time added to the entire process by providing a fourteen day window for submitting a written argument. Since these numbers are produced each month, the HAA manager should have very timely feedback on any process changes and will be able to evaluate and address any unusual fluctuations in performance. Finally, the HAA manager will track appeals to the ALC of cases where parties submitted written arguments to the Panel, and interview OGC attorneys to determine the impact the written arguments have on OGC's defense of Panel decisions.

Appendix A

SOUTH CAROLINA
DEPARTMENT OF EMPLOYMENT AND WORKFORCE
631 Hampton Street
P.O. Box 1752
Columbia, SC 29202

NOTICE OF «Title» APPEAL TO THE APPELLATE PANEL

DATE: February 4, 2014

APPEAL NO: «Appeal_Number»

CLAIMANT: «Claimant_Name»
«Claimant_address_1»
«Claimant_address_2»
SSN: XXX-XX-«SSN»

LIABLE EMPLOYER: «Liable_Employer_Name»
«Liable_employer_address_1»
«Liable_employer_city»
«Liable_employer_state»

SEPARATING EMPLOYER: «Separating_Employer_Name»
«Separating_Employer_Address_1»
«Separating_Employer_Address_2»
«Separating_Employer_City»

The «Appellant» in this case appealed the Appeal Tribunal Decision to the Appellate Panel for review. A copy of the appeal is attached.

The Panel will review your case as soon as possible, and may issue a decision based solely on its review of the record on appeal or may schedule an in-person hearing. Hearings are conducted at the Appellate Panel offices in Columbia. **You may request a hearing by calling (803) 737-0239 or by mailing a written request to the P.O. Box listed above.** The Panel, at its sole discretion, may grant or deny the request. If a hearing is scheduled, a copy of the transcript and the hearing notice will be mailed to you at a later date.

SPECIAL NOTE: The Appellate Panel can make its own factual findings and may reverse, affirm, or modify the decision on appeal. **Be advised that this may result in an increase or decrease of the disqualification.**

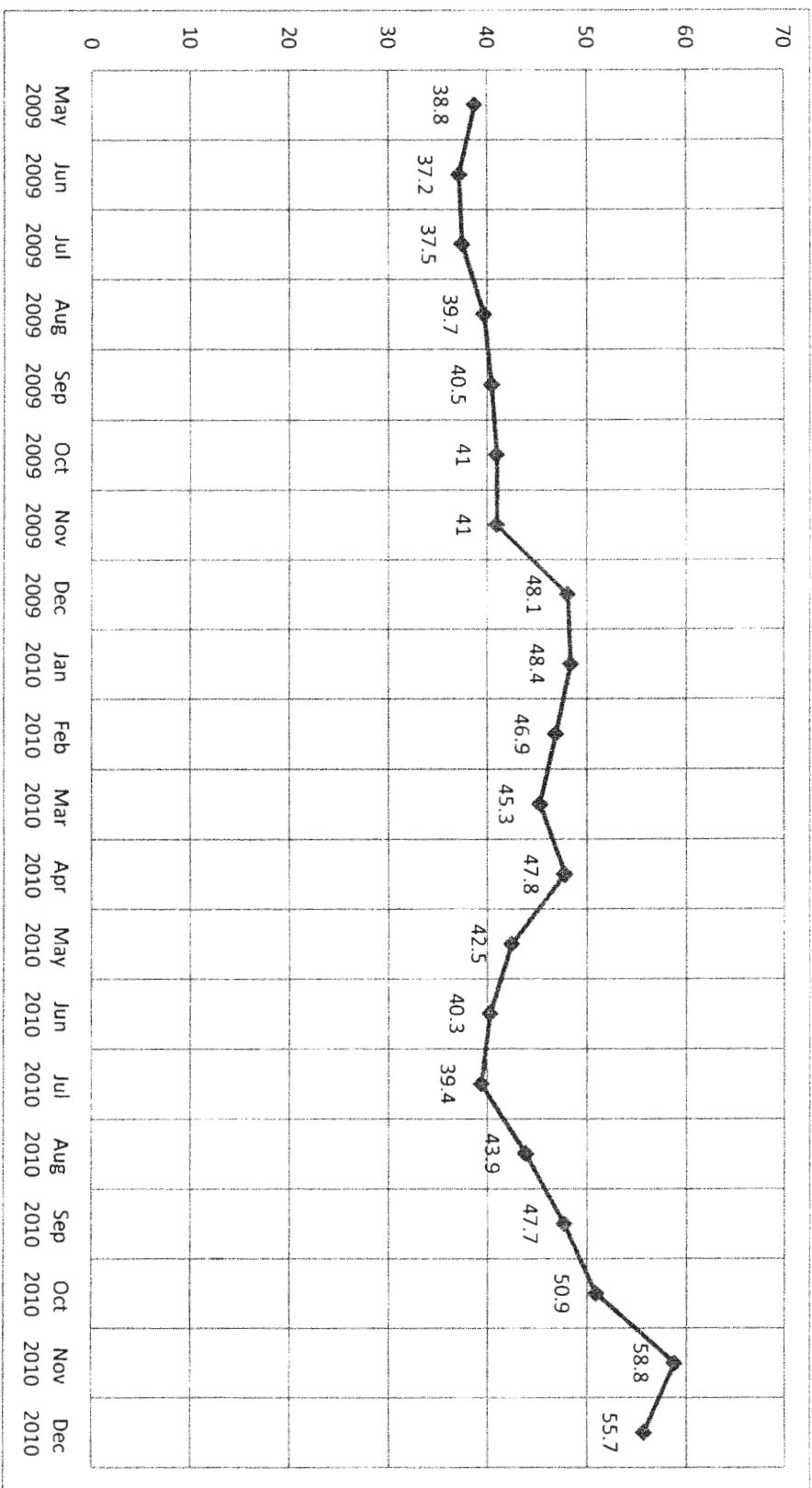
Claimants must continue filing a weekly claim pending the appeal to receive benefits. Any benefits received by the claimant may be subject to recovery if the Appeal Tribunal Decision is reversed.

Higher Authority Appeals Department
Telephone: (803) 737-0239

cc: Liable Employer:
Separating Employer:
Claimant's Attorney: «Claimant_Attorney»
Employer's Attorney: «Employer_Attorney»
Imaging
File

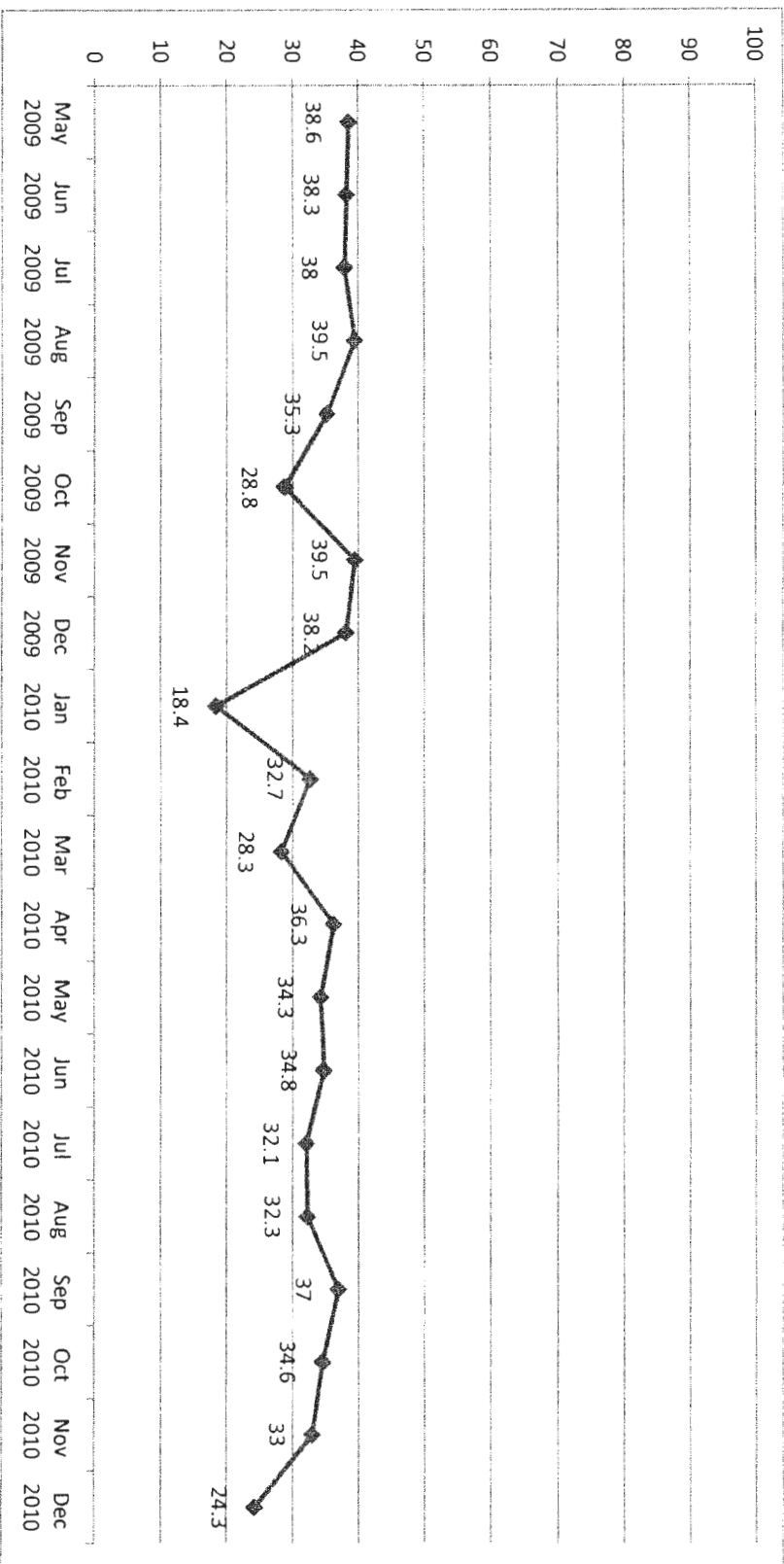
Appendix B

Higher Authority Appeals Case Aging May 2009 – December 2010



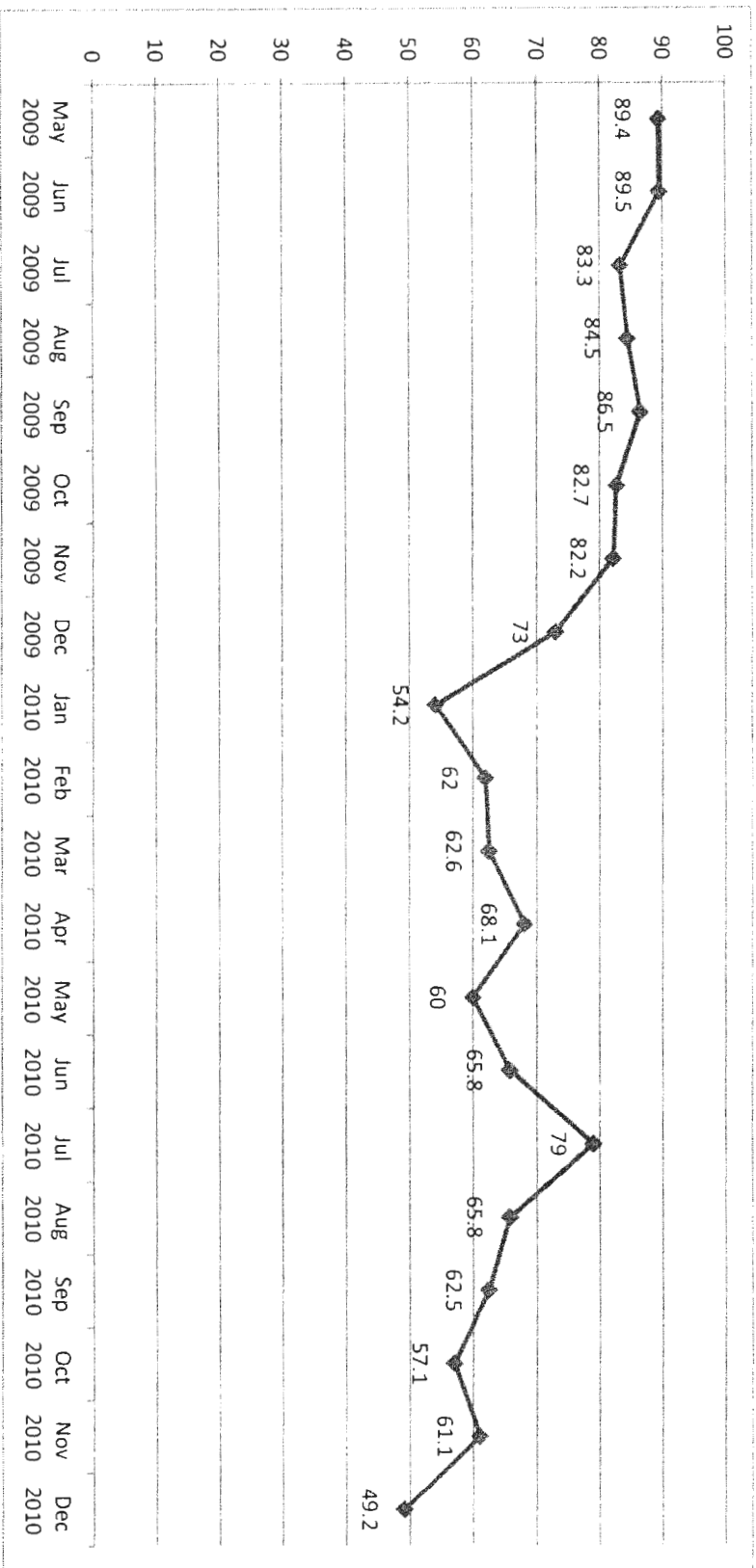
- Per DoL, the average age of an active case should be at or below forty days. DEW met that goal in only five of the twenty months for which I have data in 2009 and 2010, and only once in all of 2010.

Higher Authority Appeals 45-Day Time Lapse May 2009 – December 2010



- Per DoL, fifty percent of decisions issued each month should be issued within forty-five days of the appeal file date. DEW did not meet that metric in any month for which I have data in 2009 and 2010.

Higher Authority Appeals 75-Day Time Lapse May 2009 – December 2010



- Per DoL, eighty percent of decisions mailed each month should be mailed within seventy-five days of the appeal file date. DEW met that goal in only seven of twenty months for which I have data in 2009 and 2010, and not once in 2010.

Appendix C

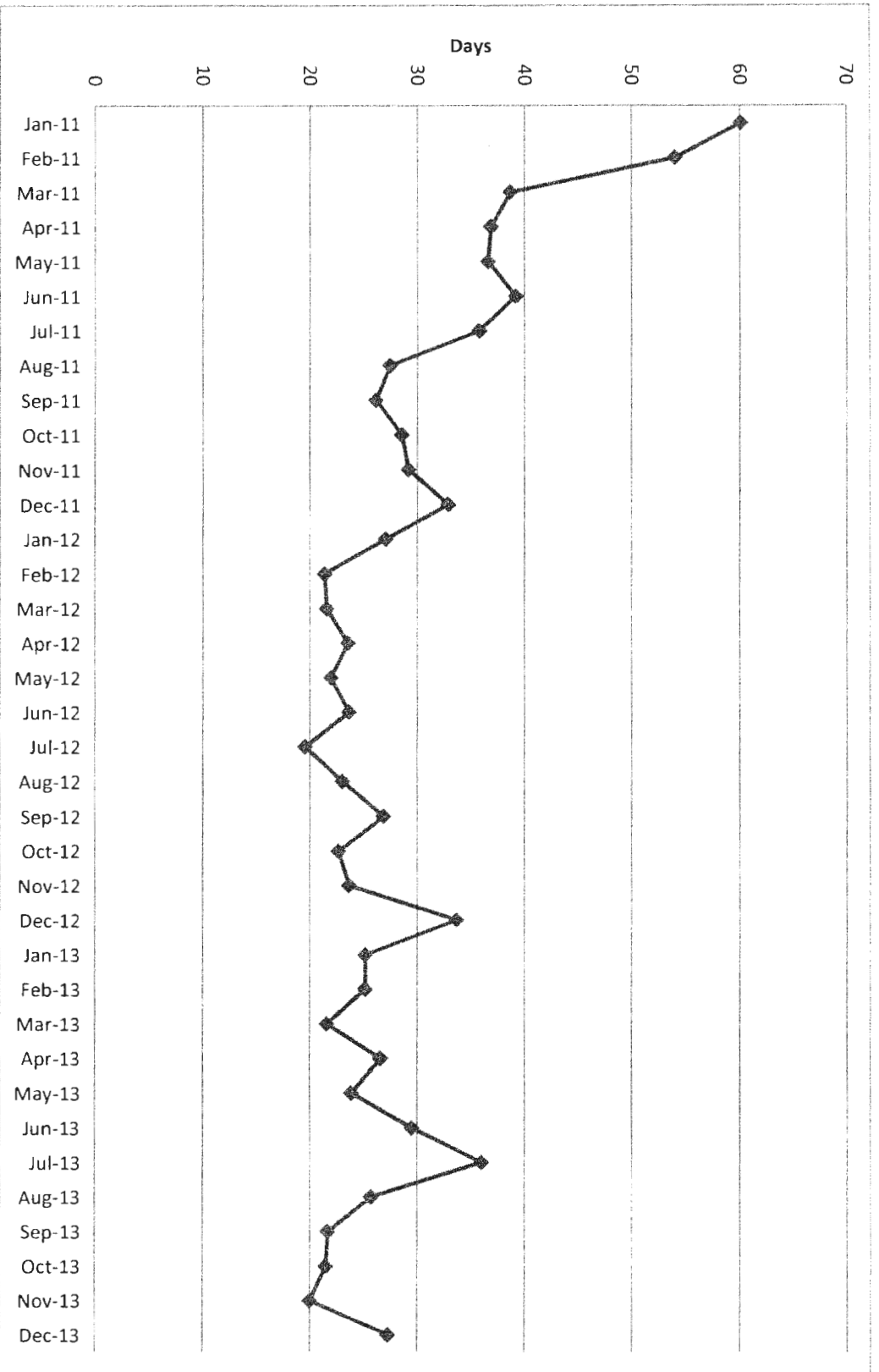
HAA Transcription Expenses 2011 - 2013

Year	2011	2012	2013
Transcription Expense	\$25,000.51*	\$26,963.70	\$17,564.40

- The number for 2011 covers only the last four months of that year. Extrapolated for the entire year, DEW spent close to \$100,000.00 on HAA transcriptions in 2011.

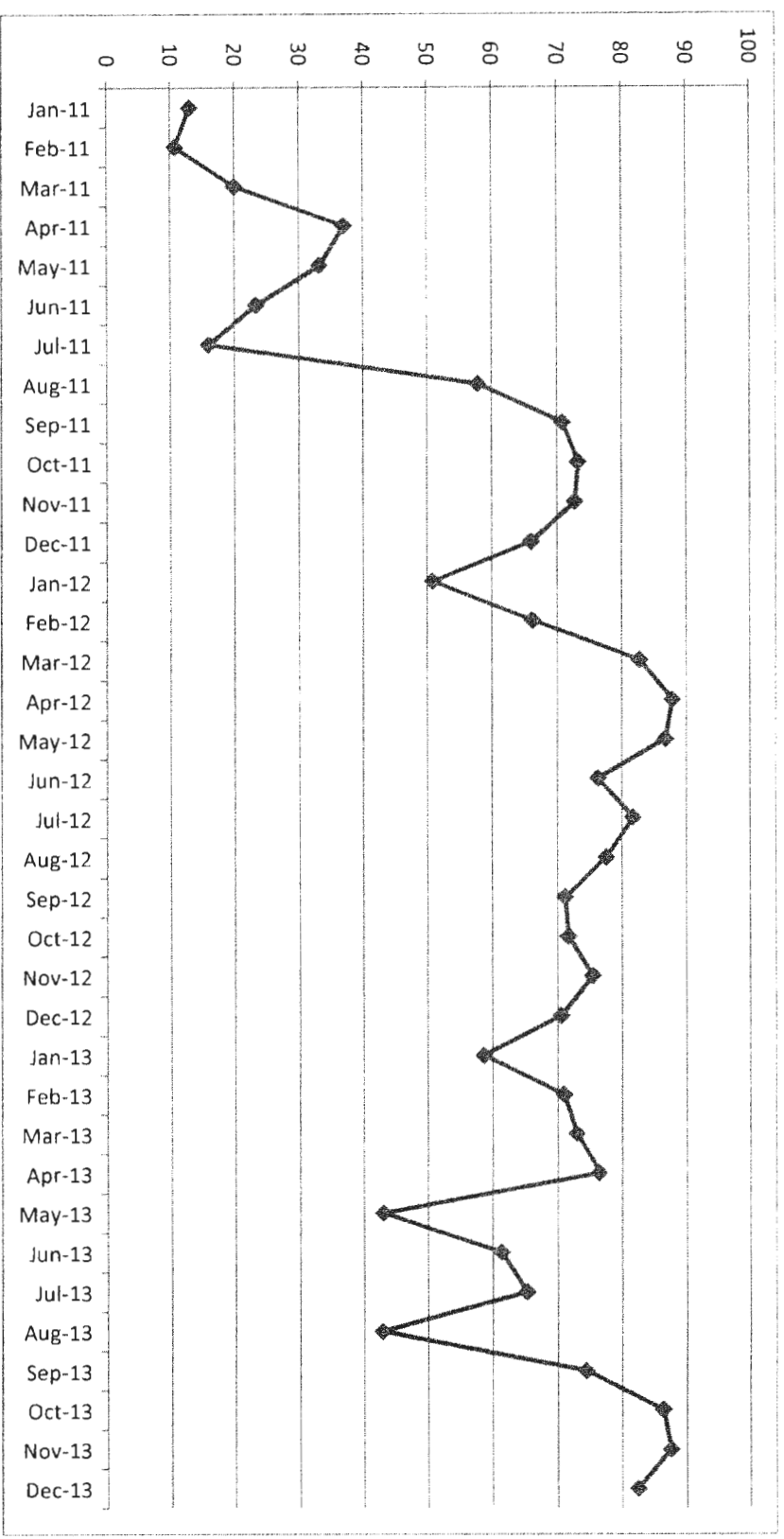
Appendix D

Higher Authority Appeals Case Aging 2011 - 2013



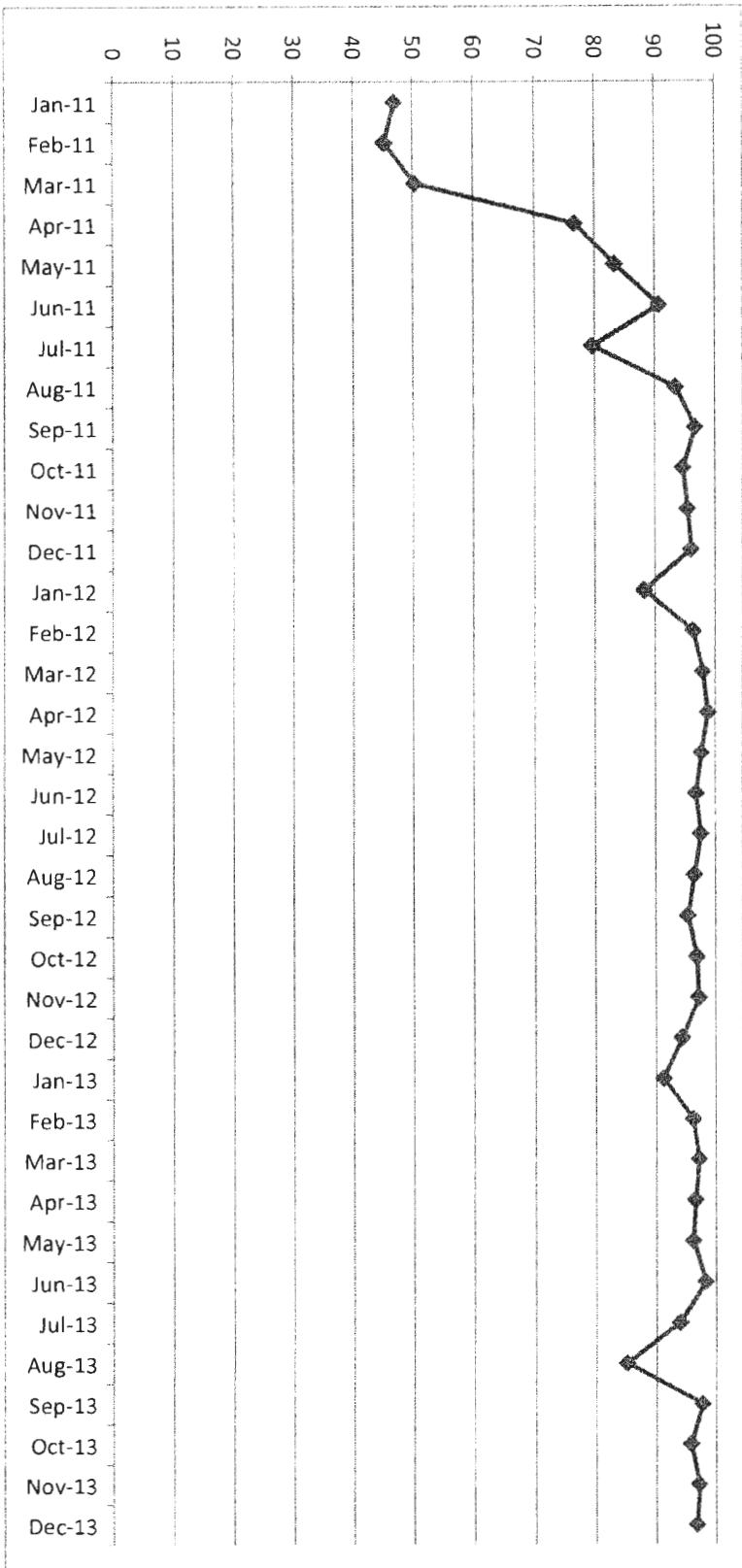
- DEW has met DoL's forty day case aging metric every month since March 2011.

Higher Authority Appeals 45-Day Time Lapse 2011 - 2013



- DEW has exceeded DoL's fifty percent forty-five day time lapse requirement in all but two months since July 2011.

Higher Authority Appeals 75-Day Time Lapse 2011 - 2013



- DEW has exceeded DoL's eighty percent seventy-five day time lapse requirement every month since April 2011.

Appendix E

Higher Authority Appeals 2013 Time Lapse Raw Numbers

Days	Cases Decided
< = 45	1,392
46 - 75	533
>= 75	103
Total	2,028

Appendix F

Higher Authority Appeals Case Aging & Time-Lapse - All States

November 2013						
National Numbers		Average Age of Pending Cases	40 days Total Pending Cases	Timelapse		Total Workload
#	State			45-day 50%	75-day 80%	
1	LA	7.0	46	99.6%	99.6%	242
2	ND	8.2	5	95.7%	100.0%	46
3	UT	10.6	38	98.2%	100.0%	55
4	TN	12.0	206	98.8%	100.0%	259
5	NM	12.2	55	98.9%	99.5%	184
6	SD	12.3	8	100.0%	100.0%	7
7	IN	12.6	204	100.0%	100.0%	361
8	NH	12.6	50	93.3%	100.0%	30
9	AR	18.0	151	100.0%	100.0%	241
10	KS	18.1	207	92.7%	96.6%	206
11	WA	18.9	233	92.1%	95.7%	506
12	VT	19.0	35	100.0%	100.0%	16
13	SC	20.0	198	87.6%	97.2%	177
14	CO	21.7	214	92.6%	98.5%	136
15	OR	22.6	116	97.9%	100.0%	144
16	AK	22.9	7	100.0%	100.0%	2
17	MT	23.9	42	43.8%	96.9%	32
18	PR	24.0	86	71.2%	87.9%	68
19	GA	24.4	545	99.2%	100.0%	383
20	NJ	27.0	737	18.4%	86.1%	381
21	ID	28.0	62	19.2%	96.2%	52
22	IA	28.6	234	19.2%	99.4%	166
23	WY	29.3	55	42.1%	94.7%	19
24	MS	29.4	102	98.6%	99.5%	368
25	WV	30.0	175	23.8%	86.9%	84
26	DE	30.5	117	53.1%	85.4%	96
27	RI	31.0	93	91.5%	95.8%	71
28	MO	31.3	300	81.6%	95.1%	267
29	KY	31.7	267	75.0%	94.2%	308
30	OK	32.9	139	38.4%	91.2%	159
31	OH	33.0	312	97.4%	98.9%	348
32	CT	34.6	307	67.0%	92.1%	203
33	CA	35.0	1893	52.3%	93.1%	1089
34	VA	36.1	736	13.9%	82.8%	361
35	WI	37.0	379	21.5%	68.8%	247
36	AZ	37.3	368	23.7%	77.3%	304
37	IL	39.0	1727	1.6%	67.6%	924
38	AL	41.0	474	76.6%	83.1%	248
39	NC	42.0	532	78.3%	82.6%	539
40	MD	46.0	890	15.3%	72.3%	321
41	TX	62.0	3627	16.4%	91.9%	1427
42	ME	60.9	187	48.1%	83.0%	27
43	NY	61.3	1405	16.6%	41.6%	476
44	MI	63.0	469	43.6%	59.2%	266
45	FL	69.0	1231	37.3%	57.8%	469
46	PA	71.1	2223	32.8%	78.8%	923
47	NV	74.0	176	88.0%	100.0%	158

Nation	31.6	460.9	65%	90%	284.72
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Note: Data calculated from available State data as of report date

Green color indicates met ALP & Red color indicates failed ALP

States who have not reported, as of the report date, are not on this report

Appendix G

Higher Authority Appeals 2013 Decision Age Breakdown

Date Range	0-15	16-25	26-35	36-45	46-55	56-65	66-75	76+
Cases	12	167	622	591	324	143	66	103

- This table shows the total number of decisions mailed in 2013, broken down by the date range from the appeal file date. The volume of cases decided within thirty-five days suggests there is a cushion available in case the proposed solution adds time to the standard appeals processing time.