



Commonwealth of Massachusetts
Office of the State Auditor
Suzanne M. Bump

Making government work better

Official Audit Report – Issued September 23, 2015

Division of Administrative Law Appeals

For the period June 1, 2009 through September 30, 2013





Commonwealth of Massachusetts
Office of the State Auditor
Suzanne M. Bump

Making government work better

September 23, 2015

Edward B. McGrath, Chief Administrative Magistrate
Division of Administrative Law Appeals
One Congress Street, 11th Floor
Boston, MA 02114

Dear Chief Administrative Magistrate McGrath:

I am pleased to provide this performance audit of the Division of Administrative Law Appeals. This report details the audit objectives, scope, methodology, findings, and recommendations for the audit period, June 1, 2009 through September 30, 2013. My audit staff discussed the contents of this report with management of the agency, whose comments are reflected in this report.

I would also like to express my appreciation to the Division of Administrative Law Appeals for the cooperation and assistance provided to my staff during the audit.

Sincerely,

A handwritten signature in blue ink, appearing to read "SMB", written over a light blue circular watermark.

Suzanne M. Bump
Auditor of the Commonwealth

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LIST OF ABBREVIATIONS

BSEA	Bureau of Special Education Appeals
CRAB	Contributory Retirement Appeal Board
DALA	Division of Administrative Law Appeals
EOAF	Executive Office for Administration and Finance
ICP	internal control plan
ICQ	Internal Control Questionnaire
LB	Fair Labor Division of the Office of the Attorney General
OSA	Office of the State Auditor
OSC	Office of the State Comptroller

EXECUTIVE SUMMARY

The Division of Administrative Law Appeals (DALA) was established in 1974 under Chapter 7, Section 4H, of the Massachusetts General Laws and conducts due-process adjudicatory hearings for approximately 20 state agencies. As of September 30, 2013, DALA had two divisions: the General Jurisdiction and the Bureau of Special Education Appeals.

In accordance with Chapter 11, Section 12, of the General Laws, the Office of the State Auditor has conducted an audit of DALA for the period June 1, 2009 through September 30, 2013. The objective of our audit was to follow up on the issues identified in our prior audit report (No. 2009-0345-30) to determine what measures, if any, DALA had taken to address those issues as well as the adequacy of those measures.

Below is a summary of our findings and recommendations, with links to each page listed.

Finding 1 Page 10	DALA did not establish formal written policies and procedures for certain case-management activities. Without such policies and procedures, DALA does not have adequate controls to ensure that these activities are being performed in accordance with applicable laws and regulations.
Recommendations Page 11	<ol style="list-style-type: none">1. DALA should establish written policies and procedures for all of its case-management activities.2. Once the policies and procedures are established, DALA should take the measures necessary to effectively communicate them and ensure compliance.
Finding 2 Page 11	Our prior audit revealed that DALA did not file a required annual report with the Legislature and the director of the Massachusetts Permit Regulatory Office. During our current audit, we determined that DALA had not filed these annual reports for 2010 and 2011 and that the ones that were filed during our audit period lacked required information. Thus, DALA did not provide these entities with the information necessary for them to effectively assess the current status of cases being handled by DALA.
Recommendation Page 12	The Chief Administrative Magistrate should ensure that the reports in question are completed with all of the required information and appropriately submitted.

Finding 3 Page <u>13</u>	During our prior audit, we found that DALA had not conducted a risk assessment or developed an internal control plan (ICP) as required by Chapter 647 of the Acts of 1989 and the Office of the State Comptroller's (OSC's) Internal Control Guide. During our current audit, we found that DALA still had not developed an ICP and had not performed any risk assessments for fiscal years 2010, 2011, and 2012 or a complete risk assessment for fiscal year 2013. Further, DALA's lack of an ICP was not indicated in its Internal Control Questionnaires (ICQs) submitted to OSC.
Recommendations Page <u>15</u>	<ol style="list-style-type: none">1. DALA should prioritize the completion of an ICP, beginning with the documentation of a department-wide risk assessment that includes all aspects of DALA's business operations (including programmatic, financial, and case-management activities). The risk assessment should be used to identify vulnerabilities that could prevent DALA from achieving its organizational goals and objectives and to design and implement internal controls to mitigate risk exposure.2. After completing the risk assessment, DALA should develop and implement internal controls to mitigate identified risks.3. After completing the ICP, DALA should ensure that the ICP is updated and that DALA's internal control system is reviewed and updated as conditions warrant, but at least annually.4. DALA should ensure that the ICQ submitted to OSC each year is accurate.
Finding 4a Page <u>16</u>	During our prior audit, we noted that the number of hearings held at DALA had decreased significantly, that DALA's case files did not contain documentation supporting the number of hearings reported as held, and that the software DALA used to track hearings was not ideal for maintaining case-management data. During our current audit, we found that the number of hearings had increased, but DALA's documentation of the number of hearings held was inconsistent, and the agency was still not using an effective system to track hearings.
Finding 4b Page <u>18</u>	As in our prior audit, our current audit showed that the information in DALA's database was inaccurate: a number of cases in the database were classified as open even though they were closed.
Finding 4c Page <u>20</u>	In our prior audit, we found that DALA did not always send prompt acknowledgments of appeals being received. In our current audit, we found that although DALA had increased the percentage of cases in which it met its standard of sending an acknowledgment within five days of the receipt of an appeal, it still needed to make improvements in this area.
Finding 4d Page <u>21</u>	During our prior audit, we found that DALA's number of open cases was increasing each year. During our current audit, we found that DALA had made improvements in reducing its backlog of open cases, although more could be done in this area.
Finding 4e Page <u>23</u>	Our prior audit report noted that the age of cases disposed of was substantially increasing and that, for some agencies, fewer cases were being closed and cases remained open longer until disposal. During our current audit, we determined that the average age of cases disposed of continued to increase. In addition, because DALA still had not established formal case-management time standard benchmarks, it could not effectively monitor the average age of cases disposed of.

Finding 4f Page <u>24</u>	During our prior audit, we noted that DALA had instituted a verbal procedure rather than a formal written procedure for issuing a decision within 90 days of the close of each case's record. We also found that, as of August 4, 2009, DALA had at least 121 cases for which draft (preliminary) decisions had been written but a formal decision had not been issued. During our current audit, the Chief Administrative Magistrate could only provide 24 of the 60 requested draft decisions. Our review of these decisions indicated that the final decisions were issued within an average of six days of the drafts. We could not verify improvement for the 36 missing decisions.
Recommendations Page <u>26</u>	<ol style="list-style-type: none">1. DALA should explore other case-management software that can manage its needs so that all hearing activities—such as the date scheduled, date held, date postponed, and cancellation, if applicable—and any other case docket information can be entered in a central database. To this end, DALA could research what software other state administrative law organizations are using to manage cases.2. DALA should periodically review open cases, determine which ones have actually been closed and should not be included in its open-case list, and update the list. To this end, DALA should ensure that users consistently enter dates for closed cases when prompted to do so in its current software system, unless it transitions to a new one.3. DALA should develop formal written policies and procedures for closing cases to establish accountability and communicate expectations to employees more effectively.4. DALA should continue its efforts to ensure that DALA complies with its verbally established policy of issuing acknowledgments within five days of receiving an appeal. Moreover, DALA should establish formal written policies and procedures for this process rather than relying on its verbal procedures.5. DALA should continue its efforts to reduce its backlog. To this end, DALA should formalize its established practice of prioritizing its cases, using written policies and procedures documenting how this process should be conducted.6. DALA should explore the feasibility of establishing time standards for processing cases. To this end, DALA could review practices and standards used by similar organizations (e.g., other state administrative law organizations).7. DALA should document all draft decisions to ensure that they comply with its statutory requirements.
Finding 5 Page <u>27</u>	Our prior audit report disclosed that DALA did not have a system to use feedback from users to improve the agency. During our current audit, we found that DALA received formal feedback only for cases in which parties had requested an appeal of an earlier DALA decision.
Recommendation Page <u>29</u>	DALA should consider implementing a user-survey system for all cases in order to gather the feedback necessary to evaluate its timeliness, communication, and overall quality of service and make corrective actions to improve its case-management activities.
Finding 6 Page <u>30</u>	Our prior audit report recommended that DALA conduct a review to assess the potential necessity, costs, and benefits of conducting hearings at other venues. In our follow-up audit, we determined that DALA had started holding hearings in Springfield and Worcester.

Post-Audit Action

After we finished our audit fieldwork, DALA met with OSC to seek guidance on conducting a comprehensive risk assessment and on preparing or updating an ICP for fiscal year 2014 to meet the requirements of OSC's Internal Control Guide.

Effective April 1, 2015, the Secretary of Administration and Finance has appointed Edward B. McGrath the new Chief Administrative Magistrate for DALA.

OVERVIEW OF AUDITED ENTITY

The Division of Administrative Law Appeals (DALA) was established in 1974 under Chapter 7, Section 4H, of the Massachusetts General Laws. DALA is under the purview of the Executive Office for Administration and Finance (EOAF) and operates under the direction of a Chief Administrative Magistrate, who is appointed by the Secretary of EOAF with the approval of the Governor.

DALA conducts due-process adjudicatory hearings for other state agencies. For most agencies, according to DALA officials,

The Division's role is to provide due process hearings as an integral part of the agency's process for reaching a final agency decision. In those cases, the Division typically holds an evidentiary hearing to establish the factual basis for the agency's final decision and issues a recommended decision for consideration and final action by the agency.

Originally, the division was known as the Division of Hearing Officers, and its purpose was to replace the in-house hearing officers of the Commonwealth's Rate Setting Commission. Since 1983, the agency has been called the Division of Administrative Law Appeals. In 2012, the Bureau of Special Education Appeals (BSEA)¹ was transferred from the Department of Elementary and Secondary Education to DALA, pursuant to Chapter 131 of the Acts of 2010.

Currently, DALA conducts hearings for approximately 20 state agencies, including the Civil Service Commission, Board of Registration in Medicine, Department of Public Health, Department of Early Education and Care, Department of Environmental Protection, Department of Veterans' Services, Center for Health Information and Analysis, and Division of Capital Asset Management and Maintenance. Typical issues heard by DALA include pension eligibility, disciplinary actions against physicians, child protection, standards of care in eldercare facilities, allegations of patient abuse by licensed healthcare professionals, environmental protection and permitting decisions, and allegations of misconduct by public employees.

As of September 30, 2013, DALA had two divisions: the General Jurisdiction and BSEA. On the General Jurisdiction side, eight Assistant Administrative Magistrates and two non-attorney administrative

1. According to its website, pursuant to Chapter 131 of the Acts of 2010, BSEA "conducts mediations, advisory opinions and due process hearings to resolve disputes among parents, school districts, private schools and state agencies. . . . concerning the eligibility, evaluation, placement, individualized education program (IEP), provision of special education in accordance with state or federal law, or procedural protections of state and federal law for students with disabilities."

employees report to the First Administrative Magistrate. On the BSEA side, a program coordinator, seven hearing officers, and seven education specialists report to the Director of BSEA. Both the First Administrative Magistrate and the Director of BSEA report to the Chief Administrative Magistrate.

Hearings are conducted according to 801 Code of Massachusetts Regulations 1.00, pursuant to Chapter 30A of the General Laws.

During fiscal years 2010, 2011, 2012, 2013, and 2014,² DALA received state-funded appropriations totaling \$1,152,462, \$1,097,910, \$1,077,076, \$1,077,553, and \$1,083,990, respectively.

2. The amount for fiscal year 2014 is the amount as of the end of our audit period.

AUDIT OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Chapter 11, Section 12, of the Massachusetts General Laws, the Office of the State Auditor (OSA) has conducted a performance audit of certain activities of the Division of Administrative Law Appeals (DALA) for the period June 1, 2009 through September 30, 2013. In certain circumstances, we expanded our review of open cases and hearings conducted by DALA beyond our audit period.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Below is a list of our audit objectives, indicating each question we intended our audit to answer; the conclusion we reached regarding each objective; and, if applicable, where each objective is discussed in the audit findings.

Objective	Conclusion
1. Did DALA take the necessary measures to adequately address the issues identified in our previous audit report (No. 2009-0345-30) in the following areas?	
a. internal controls over case-management activities	No; see Findings <u>1</u> and <u>4</u>
b. development of an internal control plan (ICP)	No; see Finding <u>3</u>
c. department-wide risk assessments	No; see Finding <u>3</u>
d. reporting requirements	No; see Finding <u>2</u>
e. service delivery systems	Yes

We did determine that DALA had made some improvements in the areas reviewed since our prior audit. Specifically, DALA has started holding hearings in alternative sites to accommodate users with disabilities and hardships, has made progress in reducing the backlog of open cases, and has established a system to obtain feedback from some of the agencies that use its services. However, issues pertaining to objectives 1a–1d have not been sufficiently addressed.

In order to achieve our audit objectives, we gained an understanding of the relevant internal controls and tested their operating effectiveness, where applicable. We performed the following audit procedures:

- We reviewed the prior OSA audit report; DALA's enabling legislation (Chapter 7, Section 4H, of the General Laws) as well as pertinent amendments; and various documents related to DALA's internal controls and operations, DALA's organizational structure, reports from the Office of the State Comptroller's Massachusetts Management Accounting and Reporting System, and DALA's case-management records.
- We reviewed DALA policies and procedures for case management, including the process for drafting and issuing decisions. We interviewed the Chief Administrative Magistrate, who is responsible for the oversight of case management, as well as other DALA officials involved in processing and resolving cases.
- We reviewed controls over case management, including case processing and resolution, by first interviewing the DALA Chief Administrative Magistrate and then reviewing DALA's policies and procedures for this activity. We analyzed DALA's case-management database records for the period June 1, 2009 through September 30, 2013 to determine the amount of time elapsed from the date DALA received a case and the date an acknowledgment of receipt of the case was sent to the parties involved. Using this analysis, we determined the status of the open-case inventory at various points in time during the audit period. In certain circumstances, we expanded the period of our review to include both older and more recent dates, as necessary. We then sampled cases from the total open-case inventory as of September 30, 2013 to evaluate the status of the cases. Our analysis excluded rate-setting cases³ and Bureau of Special Education Appeals cases.
- We reviewed the controls DALA had established over the processing of case decisions. We interviewed the Chief Administrative Magistrate to gain an understanding of the process of drafting and issuing decisions and the policies and procedures for holding hearings at various locations throughout the state to accommodate users with disabilities and hardships. We analyzed the DALA database for hearings held to determine and evaluate the number of hearings held at DALA.
- We reviewed Chapter 205 of the Acts of 2006, Section 3 of which amended Chapter 7, Section 4H, of the General Laws and requires DALA to file an annual report (listing all appeals filed with it during the calendar year) to the Offices of the Clerks of the House and Senate, the House and Senate Committees on Ways and Means, and the director of the Massachusetts Permit Regulatory Office. We interviewed the Chief Administrative Magistrate to gain an understanding of the internal controls over this process and requested annual reports filed by DALA during our audit period.
- We reviewed the controls DALA had established over the administration of its user-feedback system. We interviewed the Chief Administrative Magistrate to gain an understanding of DALA's process for obtaining timely feedback from its users and assessed the adequacy of DALA's system.

3. Cases where an aggrieved party challenges the validity of a rate of reimbursement for services that has been established by a state agency.

- We reviewed Chapter 647 of the Acts of 1989, which requires departments to conduct periodic risk assessments and develop an ICP. We obtained, reviewed, and evaluated the risk assessments DALA had conducted and the ICP it had developed to determine whether the agency was complying with Chapter 647. We interviewed the Chief Administrative Magistrate to obtain an understanding of the process of conducting risk assessments and developing an ICP to address the risks and controls specific to all fiscal, administrative, and program operations of DALA.

Our assessment of internal controls over administrative and operational activities pertaining to case management at DALA was based on interviews, document reviews, and analyses of open and closed cases. We obtained and reviewed case files' source documents and performed basic reasonableness checks by tracing and comparing relevant data elements to DALA's case-tracking system for completeness and accuracy. We used judgmental or random, non-statistical sampling approaches to achieve our audit objectives. When a non-statistical judgmental or random approach is used, the results cannot be projected to the entire population, but only apply to the items selected.

DALA's case-tracking system, which uses a software package based on Microsoft Access, is used to manage and track cases from initial acknowledgment to the final decision phase; however, appeal-hearing data are not included in the Access database. Accordingly, we interviewed agency officials who were knowledgeable about data-input activities. Since each case file is composed of source documents that DALA uses to update its case-tracking system, and represents the principal documents that provide evidence of how appeals are managed, heard, and decided, we did not rely on the Access-based case-management system for the purposes of our audit. We believe the case-management information we obtained directly from case files was sufficient for the purposes of this report.

DETAILED AUDIT FINDINGS WITH AUDITEE'S RESPONSE

1. The Division of Administrative Law Appeals does not have written policies and procedures for certain case-management activities.

The Division of Administrative Law Appeals (DALA) did not establish formal written policies and procedures for certain case-management activities, such as addressing the backlog of open cases, prioritizing cases, sending out acknowledgment letters, issuing decisions, meeting annual reporting requirements, holding hearings at alternative sites, and retaining documentation for draft (preliminary) decisions. Without formal written case-management policies and procedures, DALA does not have adequate controls in place to ensure that case-management activities are being performed in a consistent, effective, and efficient manner and in compliance with applicable laws and regulations.

Authoritative Guidance

The Office of the State Comptroller's (OSC's) Internal Control Guide (which applies to all state agencies, including DALA) states,

Controls are most frequently comprised of policies and procedures. After identifying and assessing risks, managers need to evaluate (and develop, when necessary) methods to minimize these risks. A policy establishes what should be done and serves as the basis for the procedures. Procedures describe specifically how the policy is to be implemented. It is important that an organization establish policies and procedures so that staff knows what is to be done and compliance can be properly evaluated.

In addition, sound business practices include formally documenting policies and procedures in writing in order to define, and provide guidance for meeting, organizational strategies and objectives. This helps to ensure that the organization's way of doing business is consistently followed and does not deviate or deteriorate over time, even with turnover; that policies and procedures do not vary with employee recollection or interpretation; and that roles and responsibilities for various functions are clearly defined. Well-written policies and procedures also promote efficiency and effectiveness and are easier to communicate, update, monitor, and enforce than unwritten ones.

Reasons for Lack of Written Policies and Procedures

The Chief Administrative Magistrate indicated that DALA is a small agency and that responsibility for generating policies and procedures is with its oversight agency, the Executive Office for Administration and Finance (EOAF). Currently, DALA has 33 employees: 12 for the General Jurisdiction and 21 for the

Bureau of Special Education Appeals. We inquired about this issue with the chief financial officer at EOAF, who indicated that while EOAF is responsible for providing policies and procedures for certain areas of DALA's operations (such as payroll, human resources, and information technology), DALA is responsible for generating policies and procedures for case management.

Recommendations

1. DALA should establish written policies and procedures for all of its case-management activities.
2. Once the policies and procedures are established, DALA should take the measures necessary to effectively communicate them and ensure compliance.

Auditee's Response

DALA's comments on this issue are excerpted below.

The Division is presently reviewing all its policies and procedures in an effort to determine how to most efficiently marshal its scarce resources. Once that review is completed, the Division will adopt and document appropriate procedures consistent with remaining fully engaged in processing cases and carrying out its core mission. The Division plans to have its initial review complete on or before September 8, 2015.

Auditor's Reply

Based on its response, DALA is taking appropriate measures to address our concerns on this matter.

2. Prior finding unresolved—DALA needs to comply with its statutory reporting requirement.

Our prior audit revealed that DALA did not file an annual report (listing all appeals filed with it during the calendar year) with the Offices of the Clerks of the House and Senate, the House and Senate Committees on Ways and Means, and the director of the Massachusetts Permit Regulatory Office. As a result of this deficiency, DALA did not provide these entities with the information necessary for them to effectively assess the current status of cases being handled by DALA. The prior audit report recommended that DALA improve its internal controls over compliance with state law regarding this reporting requirement.

During our follow-up audit, we determined that DALA's Chief Administrative Magistrate filed the required annual reports for 2009, 2012, and 2013, but did not file annual reports for 2010 and 2011. Further, in our review of the annual reports filed, we noted that they did not contain certain essential

and required information (e.g., the length of time from when an appeal is received to when a written recommended summary decision or other interlocutory ruling is issued, including the basis for any case at the division for longer than six months).

We asked the Chief Administrative Magistrate why not all of the required information was included on DALA's annual reports. In an e-mail dated September 10, 2014, he responded,

Tab 5 [of the annual report] contains summary and detail reports of the cases closed in 2013. The cases are listed by case type and in order of docket number within each case type. The "last event" entry in most cases identifies the event (decision, withdrawal, etc.) that caused the case to be closed in the database. The disposition of the 2013 cases that were closed can be tracked by referring to the cases with docket numbers beginning with "13-." If a case with a docket number beginning with "13-" is not listed on the closed cases report, it is still open as of the date of the report.

However, although it may have been possible to determine which cases were closed during the fiscal year, our review of these reports indicated that they did not contain the aforementioned information to clearly document the time between events or the basis for any case older than six months. The Chief Administrative Magistrate indicated that the 2010 and 2011 reports were not completed because of a lack of personnel.

Recommendation

The Chief Administrative Magistrate should ensure that the reports in question are completed with all of the required information and appropriately submitted.

Auditee's Response

DALA's comments on this issue are excerpted below.

The report notes . . . that the Division did not file annual reports with the legislature for 2010 and 2011 and concludes that this deficiency "did not provide these entities with the information necessary for them to effectively assess the current status of cases being handled by DALA." There were other sources of information that the legislature and its members had about DALA and its operations. The Division regularly provides detailed information sought by legislative committee staff members with respect to the backlog and the agency's operations.

The annual report referred to in the audit is a requirement added by Chapter 205 of the Acts of 2006 with respect to the expedited environmental permitting program established by that statute. The report relates solely to those appeals, which is the reason that no reports had been filed until 2010 and the reason that a copy of the report is to be sent to "the director of the Massachusetts permit regulatory office in section 3H of chapter 23A." Because the economic

downturn occurred shortly after the statute was enacted, the expedited environmental permitting process has never been implemented by any municipality. The Division has never had any of those cases and therefore no report is required. Notwithstanding that there is no requirement for such a report, the Division has voluntarily filed with respect to its other cases only because we thought it would be helpful to the legislature to know about the backlog. The "written recommended summary decision or other interlocutory ruling" process is a process unique to the expedited environmental permitting program, which has never been implemented and for which we do not have any pending cases.

Auditor's Reply

We do not agree with DALA that its statutory reporting requirements for filing annual reports only apply to appeals related to the environmental permitting program. Chapter 205 of the Acts of 2006 amended DALA's enabling legislation (Chapter 7, Section 4H, of the Massachusetts General Laws) and added the following:

The division of administrative law appeals shall prepare annually a report concerning all appeals filed with the division during the preceding calendar year. It shall be the responsibility of the chief administrative magistrate to cause a statistical list to be maintained of all matters assigned to each administrative magistrate as relating to any appeals required by law.

This refers to an annual report pertaining to all appeals filed with the division, not just those associated with environmental permitting. For this reason, we again recommend that DALA ensure that annual reports are filed with applicable legislative oversight entities and include all required information.

3. Prior finding unresolved—Improvements are needed in developing an internal control plan and conducting periodic risk assessments.

In our prior audit, we found that DALA had not conducted a risk assessment or developed an internal control plan (ICP) as required by Chapter 647 of the Acts of 1989 and OSC's Internal Control Guide. The prior audit report recommended that DALA's management review OSC's Internal Control Guide; conduct a risk assessment; and develop and document an ICP to address risks and internal control requirements specific to all fiscal, administrative, and program operations. It also recommended that DALA ensure that a risk assessment was conducted at least annually and that its ICP was updated based on the results of the risk assessment, as necessary, and that DALA administrators ensure that integrity and ethical values expected of management and staff were well documented in the plan and made available to all DALA personnel.

During our current audit, we determined that DALA did not develop an ICP during our audit period. It also did not conduct risk assessments for fiscal years 2010, 2011, and 2012. Although DALA performed a risk assessment for fiscal year 2013, the risk assessment was not complete.

Instead of an ICP, DALA developed an *Internal Control Procedures* document that included objectives, activities, and responsibilities for activities including payroll, contracts, purchases, cash receipts, and inventory. Further, DALA's lack of an ICP was not indicated in its annual Internal Control Questionnaires (ICQs)⁴ submitted to OSC. Incorrect information on these questionnaires prevents OSC from effectively assessing the adequacy of DALA's internal control system.

In our follow-up audit, we also determined that DALA performed a risk assessment for fiscal year 2013. The risk assessment noted the following key objectives:

1. *Eliminate the current backlog of pending cases;*
2. *Ensure timeliness and efficiency of adjudications;*
3. *Foster use of DALA as a central panel for adjudications in the Commonwealth;*
4. *Ensure that staff continue to exemplify the highest level of impartiality, integrity and expertise in substantive areas of law applicable to DALA's adjudications;*
5. *Develop mechanisms and procedures to minimize parties' costs and enhance customer service.*

It also included risks and controls for security of personnel and computer equipment. However, it did not include controls for the objectives noted above; all risks and controls associated with case-management activities; an assessment/evaluation of the risks (such as high, moderate, or low); and a risk response (such as accepting the risk or identifying ways to mitigate it).

Regarding this matter, the Chief Administrative Magistrate submitted a memo to our audit staff, stating,

Because the Division is so small, the functions that are subject to the policies and procedures referred to in this section are managed at the Secretariat level. The Division does receive and deposit checks occasionally, and the Division does have standard procedures in place to ensure

4. Each year, OSC issues a memo (Fiscal Year Update) to internal control officers, single audit liaisons, and chief fiscal officers instructing departments to complete an Internal Control Questionnaire designed to provide an indication of the effectiveness of the Commonwealth's internal controls. In the Representation section of the questionnaire, the department head, chief fiscal officer, and internal control officer confirm that the information entered on the questionnaire is accurate and approved.

that checks are handled properly. All other functions, including financial management and procurement, are either provided by or subject to the direction of Secretariat personnel.

However, DALA is still required to develop a comprehensive ICP based on a risk assessment of all its activities.

Post-Audit Action

After we finished our audit fieldwork, DALA met with OSC to seek guidance on conducting a department-wide risk assessment and on preparing or updating an ICP for fiscal year 2014 to meet the requirements of OSC's Internal Control Guide.

Recommendations

1. DALA should prioritize the completion of an ICP, beginning with the documentation of a department-wide risk assessment that includes all aspects of DALA's business operations (including programmatic, financial, and case-management activities). The risk assessment should be used to identify vulnerabilities that could prevent DALA from achieving its organizational goals and objectives and to design and implement internal controls to mitigate risk exposure.
2. After completing the risk assessment, DALA should develop and implement internal controls to mitigate identified risks.
3. After completing the ICP, DALA should ensure that the ICP is updated and that DALA's internal control system is reviewed and updated as conditions warrant, but at least annually.
4. DALA should ensure that the ICQ submitted to OSC each year is accurate.

Auditee's Response

The Division is presently reviewing all its policies and procedures, including its internal control plan and conducting a risk assessment. Once that review is completed, the Division will adopt and document appropriate procedures consistent with remaining fully engaged in processing cases and carrying out its core mission. The Division plans to have its initial review complete on or before October 1, 2015.

Auditor's Reply

Based on its response, DALA is taking appropriate measures to address our concerns on this matter.

4. Prior finding partially resolved—DALA needs to adopt internal controls to address its case-management problems.

Our prior audit identified several case-management issues that DALA needed to address. The prior audit analysis of the DALA database of case activity noted a number of instances in which case processing and

resolution were falling behind, resulting in delayed adjudication and an increased inventory of open cases. Specifically, our prior audit identified a decrease in the number of hearings being held, possible overstatement of the number of open cases, deficiencies with initial processing of cases, an increasing backlog of open cases, an increase in the Age of Disposed Cases statistic, and preliminary decisions that were delayed during final review.

In our follow-up audit, we determined that although DALA had taken steps to remedy some of the case-management issues noted in our prior audit report, more improvements were needed, as discussed below.

a. Prior issue unresolved—The number of hearings held has decreased, and hearing data are not included in the Access case-management database.

Our prior audit report noted that, contrary to sound business practices, DALA had not established adequate internal controls over the processing of its cases. We found a resulting significant decrease in the number of hearings held at DALA, with the monthly average decreasing from 33 per month in 2007 to 16 per month during 2009. Further, it was not possible to confirm the exact number of hearings held because DALA case files do not contain documentation to support the number of hearings reported by DALA as having been held. Also, the prior report noted that DALA used a Microsoft Outlook calendar to track hearings in lieu of a software program more suited to establishing and maintaining case-management data.

Therefore, our prior report recommended that DALA reexamine its process and make the changes needed, with the goal of having magistrates conduct more hearings and having the hearing information recorded in the agency's Access case-management database. In addition, our prior report recommended that DALA consider maintaining documentation in the case papers to substantiate the number of hearings reported as having been held. During that audit, DALA's Acting Chief Administrative Magistrate told us he had appointed experienced magistrates to coordinate the schedule of hearings in each of the major areas of DALA's jurisdiction. DALA officials, in the agency's response to the prior audit report, estimated that the agency would be able to hold approximately 324 hearings a year.

During our current audit, we found that the number of hearings reported by DALA as held during our audit period varied, ranging from 172 in 2011 to 285 in 2012, as shown below.

Hearings Held by DALA

Period	Number of Hearings Held	Increase/(Decrease) from Prior Year	Average Monthly Hearings Held
January 1, 2009—December 31, 2009	200		16
January 1, 2010—December 31, 2010	283	42%	24
January 1, 2011—December 31, 2011	172	(39%)	14
January 1, 2012—December 31, 2012	285	66%	24
January 1, 2013—December 31, 2013	221	(22%)	18

The number of hearings held had generally increased since 2009, but never reached the projected 324.

Further, as in our prior audit, our follow-up audit showed that DALA had not established an effective system to track its hearings and was still using Outlook for this purpose. We also tested the accuracy of DALA's records by judgmentally selecting 4 months (July 2012, November 2012, August 2013, and September 2013) of our 52-month audit period to attempt to reconcile the number of hearings documented in Outlook to the number provided to us by the Chief Administrative Magistrate. We found that the two numbers did not reconcile. We asked the Chief Administrative Magistrate why the number of hearings did not match the Outlook calendar, but he was not able to explain why this had occurred.

The Chief Administrative Magistrate stated that he had not spent the money to have DALA's Access database reprogrammed to include information on hearings because in his opinion, Access is obsolete; he also stated that a field for hearings will be included in the new database when Access is replaced, ideally within the next two years.

Auditee's Response

A "hearing" for due process purposes is the entire set of procedures we follow to dispose of a case from initial filing to final disposition. A due process adjudication may or may not include an evidentiary hearing to resolve disputed factual issues. If there is no disputed fact, there should not be an evidentiary hearing. It has long been held that an [administrative law judge] may dispose of a case summarily without any in-person hearing "where there is no disputed issue of material fact." . . . The grant of summary disposition in the absence of disputed issues of material fact also comports with constitutional due process: "[I]f the hearing mandated by the Due Process Clause is to

serve any useful purpose, there must be some factual dispute between [the parties]." . . .

Whether or not a due process hearing includes an evidentiary hearing depends solely on the issues involved in the appeal, something not within the control of the Division. For this reason, evidentiary hearings are not a goal, they are simply part of the process of a particular case. Accordingly, the number of "hearings held" is the number of cases disposed of in a particular time period . . . for every year and jurisdiction since 2000. In the past, all cases were scheduled for an evidentiary hearing regardless of the issues involved. This was an inefficient use of magistrate time and must be corrected if the backlog is to be reduced with the current resources. DALA screens all cases to determine those for which there is no factual dispute and therefore that do not warrant an evidentiary hearing.

*We have tracked the number of evidentiary hearings that are conducted because the ratio of evidentiary hearings conducted to cases disposed of is a measure of the Division's efficiency, i.e., the **lower** the number, the more efficient we are.*

Auditor's Reply

We do not dispute DALA's assertion that an evidentiary hearing may not always be part of the process of hearing a case. We also do not dispute that the number of hearings held may not be the best measure of staff productivity. Our primary concern is one of internal control, in that, as was the case in our previous audit, DALA has not established an effective case-management system for tracking and documenting hearings held (contrary to its current response indicating that the number of evidentiary hearings conducted is being tracked). As noted above, to make up for limitations in its Access database, DALA continues to use Microsoft Outlook to track hearings. This audit, along with our prior audit, has shown that using Outlook this way has proven to be ineffective and inaccurate. In view of this, we maintain that DALA should search for case-management software that can better manage its needs so that all hearing activities can be documented. To that end, DALA could reach out to other state administrative law organizations to learn about software they use to manage their cases.

b. Prior issue unresolved—The open-case list is overstated.

Our prior audit revealed that, contrary to sound business practices, DALA had not established adequate internal controls to ensure that the information in its open-case list was accurate. As a result, DALA's database showed 4,694 open cases as of May 31, 2009, but some cases included in the database were classified as open even though we found that they were closed. The prior report

recommended that DALA complete a review of open cases to determine which closed cases were incorrectly included in the open-case inventory and make the necessary adjustments to update their status.

In response to the prior audit, DALA officials told us that the agency had verbally implemented procedures to make sure that all filings went through a single person and that resolved cases were promptly closed, which should serve to ensure the integrity of the information in DALA's database.

During our follow-up audit, DALA gave us a list of open cases as of September 30, 2013, totaling 4,833. We selected a non-statistical judgmental sample of 40 cases from DALA's open-case list and asked the Chief Administrative Magistrate to provide documentation that the cases were actually open. Subsequently, agency staff informed us that 18 (45%) of the 40 cases we requested were actually closed; therefore, we concluded that only 22 (55%) of the 40 were correctly classified by DALA as open cases.

The Chief Administrative Magistrate indicated that cases are incorrectly classified as open when a magistrate does not correctly note that a case has been closed in the database. The database includes a checkbox that reflects whether a case is open or closed. When a case is checked as closed, Access prompts the user to list the date that the case was closed in another box. Some of the magistrates were not completing this step, and Access showed those cases as open when an open-case list was prepared.

Auditee's Response

At the time of the audit this was true but has since been corrected. The Division had not considered weeding out the database to be a priority because it would take scarce resources, the weeding naturally occurs as we deal with the older cases, and the physical open case file storage area confirms that the backlog is huge. Given the comments from the auditors, however, the Division did expend the resources to review the case list to ensure closed cases were weeded out. In the process, we learned of a software glitch that prevented a case for which the "closed" field was checked to be reported as closed if the date it was closed was not entered into the database. These instances have been corrected.

Auditor's Reply

Based on its response, DALA is taking the appropriate measures to address our concerns on this matter.

c. Prior issue partially resolved—DALA does not always send acknowledgment letters promptly.

In our prior audit, we found that, contrary to sound business practices, DALA had not established adequate internal controls to ensure that parties were promptly notified when DALA received an appeal. Our prior report disclosed that the time between DALA’s receipt of an appeal and its acknowledgment being sent had increased significantly over the audit period.

In the prior audit, we analyzed the activity in DALA’s case-management database for the period July 1, 2005 through May 29, 2009 to analyze changes in the amount of time elapsed between when DALA received an appeal and when it sent an acknowledgment. The prior report stated that the average time was 5 days from the start of this period through June 30, 2007; this increased to 16 days for the period July 1, 2007 through May 29, 2009. The prior audit report recommended that DALA review its procedures for initial processing of cases and take the necessary actions to ensure that acknowledgments were sent promptly.

During our follow-up audit, the Chief Administrative Magistrate informed us that he had verbally implemented a policy in August 2009 requiring that all acknowledgments be sent within five days of the receipt of an appeal. Our review of a non-statistical sample of 289 of 3,571 appeals that DALA received during our audit period indicated that the timeliness of acknowledgments had improved, as shown in the table below.

Sample Testing of Acknowledgments Sent to Parties Requesting Appeals

Case Year	Number of Acknowledgments Sampled	Sent within 5 Days	Percent Sent within 5 Days	Sent in 6–10 Days	Sent in 11–20 Days	Sent in 20–49 Days	Sent in 50–100 Days	Sent in 100+ Days	Percent Sent after 5 Days
2009	65	22	34%	10	7	11	9	6	66%
2010	67	58	87%	6	2	1	0	0	13%
2011	63	51	81%	8	4	0	0	0	19%
2012	52	43	83%	5	1	3	0	0	17%
2013	42	30	71%	11	0	1	0	0	29%
Total	<u>289</u>	<u>204</u>	<u>71%</u>	<u>40</u>	<u>14</u>	<u>16</u>	<u>9</u>	<u>6</u>	<u>29%</u>

Seventy-one percent of the acknowledgments were sent to parties within the required five days.

However, despite this improvement, DALA was still not meeting its policy requirement that all acknowledgments be sent within five days of the receipt of an appeal.

Auditee's Response

My experience is that acknowledgment letters are sent out promptly. There is no statutory, regulatory or other requirement that acknowledgements be sent out within 5 days. Indeed, this is not possible where there are only two administrative staff, one of which is fully engaged in preparing and issuing the administrative records for purposes of review and the other has reception responsibilities, docketing, issuing procedural orders and the like in addition to issuing the acknowledgements. The Sample Testing demonstrates that in the periods after 2009, all acknowledgments have been sent out in the ordinary course within a reasonable period of time.

Auditor's Reply

We agree that the five-day turnaround is not a statutory or regulatory requirement. Rather, it is a verbal policy established and implemented by DALA in response to our prior audit. We also understand that limited resources can impede DALA's ability to issue timely acknowledgment letters and agree that since our prior audit, DALA has made improvements in this area. For these reasons, we continue to encourage DALA to issue acknowledgment letters in a timely manner, preferably within five days after appeals are received, in conformance to agency policy.

d. Prior issue partially resolved—The backlog of open cases is increasing.

Our prior audit of DALA's open-case inventory indicated that the number of open cases was increasing each year, while fewer cases were entered for processing. Specifically, the prior report noted that open cases increased from 1,340 as of December 31, 2001 to 4,694 as of May 31, 2009⁵ and that new appeal case files (cases opened) had decreased over the same period. The prior audit report recommended that DALA review its open-case inventory and prioritize cases for processing to reduce the current backlog.

Our follow-up audit of DALA's open cases indicated that as of September 30, 2013, there were 4,833 cases open (Appendix A), of which 3,108 were rate-setting cases. DALA officials had told us during our previous audit that most rate-setting cases were older cases, in which aggrieved parties had filed an action to protect their eligibility for new rates if circumstances changed, and that many of

5. As of May 31, 2009, 2,979 of the 4,694 outstanding cases were rate-setting cases, which were excluded from our analysis because many of them would not see any further substantive action.

these cases would see no further substantive action. Therefore, as in our previous audit, our analysis during our current audit did not include rate-setting cases. We analyzed DALA’s 1,725 open cases (excluding the rate-setting cases) by year of origination, as shown in the following table.

DALA’s Open Cases by Year of Origination

Case Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Total
Total Cases (current audit)	7	3	2	3	14	43	71	65	48	161	246	368	359	335	1,725
Total Cases (prior audit)	9	4	7	14	38	98	211	446	605	283	0	0	0	0	1,715

Note: Data for 2013 are from January 1, 2013 through September 30, 2013.

Although more than 1,300 cases were opened between 2010 and September 2013, the number of open cases at the end of this audit period was only 1,725.

During our follow-up audit, we noted that DALA’s Chief Administrative Magistrate had made improvements in reducing the backlog of open non-rate-setting cases. Specifically, the number of open cases had decreased significantly, dropping to 1,725 as of September 30, 2013. Furthermore, our audit testing showed that 1,433 of the 1,725 were opened during our current audit period and the remaining 292 cases were opened before May 31, 2009, indicating that the cases had been prioritized for review, as recommended.

Auditee’s Response

The backlog has continued to grow somewhat but on average less so over the last four years. The auditors are aware that in 2009/2010 we lost 25% of our magistrate resources and one of our three administrative staff. At the same time, we processed 25 Fernald [Developmental Center] closing cases (which are very complicated and took half of our resources for over a year), processed 100 Public Health [emergency medical technician] licensing cases, also complicated and requiring the rest of our resources for in excess of a year, and acquired the BSEA, absorbing approximately half of the Chief’s time for administration of the BSEA. The fact that DALA has been able to keep the backlog from growing substantially during the downturn and loss of resources is remarkable; however, we continue to strive to reduce the backlog further.

Auditor's Reply

Based on its response, DALA is taking steps to keep the backlog of outstanding cases from increasing and should continue to look for ways to reduce it further.

e. Prior issue partially resolved—The average age of cases disposed of is increasing.

Our prior audit report noted that the age of cases disposed of increased from 228 days in 2001 to 477 days in 2009. Additionally, the report noted that for the Contributory Retirement Appeal Board (CRAB) and the Fair Labor Division of the Office of the Attorney General (LB), fewer cases were being closed and cases remained open longer until disposition. Specifically, the prior report noted that the average age of CRAB cases disposed of had increased from 322 days in 2002 to 637 days as of May 31, 2009, and that the number of open cases had increased to 1,224. The age of LB cases disposed of averaged 204 days for the period 2002 through 2006, and the number of open cases increased steadily to 157. The prior audit report recommended that DALA monitor the age of cases disposed of, once the current backlog of cases was reduced, to ensure that cases were progressing on a timely basis. It also recommended that DALA develop formal case-management time standard benchmarks for its cases.

During our current audit, we determined that the average age of CRAB cases disposed of continued to increase, from 864 days in 2009 to 1,182 days as of September 30, 2013. The average age of LB cases disposed of also increased, from 401 days for 2009 to 524 as of September 30, 2013. We determined that the backlog of cases was directly related to the age of cases disposed of, since DALA's focus was addressing the oldest cases in an effort to reduce the backlog of cases. Consequently, the average time to dispose of cases has increased, as indicated in the table below.

Average Time to Dispose of Cases in Days

Period	All Cases	Board of Registration in Medicine Cases	LB Cases	CRAB Cases
2009	605	641	401	864
2010	531	449	276	854
2011	652	577	387	946
2012	849	679	337	1,160
2013	887	913	524	1,182

Like our previous audit, our current audit showed that because DALA had not established formal case-management time standard benchmarks, it could not effectively monitor the average age of cases disposed of. These standards would assist in determining how quickly a case should progress by tracking the amount of time between when a case was opened and when it ended (e.g., by decision or withdrawal). The Chief Administrative Magistrate told us that there was no legal requirement for DALA to implement formal case-management time standard benchmarks and that time standards were more applicable for the courts than for DALA. Although DALA is not legally required to establish benchmarks for its cases, it should establish formal time standard benchmarks, which could be an effective management tool for measuring DALA's success in disposing of CRAB and LB cases within established time limits.

Auditee's Response

This is a necessary reflection of our aging backlog. Until the backlog is reduced, time standards are not a useful tool. As long as parties know their cases will not likely be reached for three-plus years, time standards will not help move cases along. DALA is able to monitor the average age of disposed cases and will continue its efforts to reduce the backlog.

Auditor's Reply

We disagree with DALA's statement that it is able to monitor the average age of cases disposed of. As the above table shows, the average number of days to dispose of cases increased, rather than decreased, steadily throughout our audit period. We again emphasize that DALA should consider establishing time-management standards as part of a strategy to monitor and evaluate its success in disposing of cases within established time limits.

f. Prior issue partially resolved—Preliminary decisions were written but delayed during final review.

In our prior audit, we noted that in order to meet statutory requirements, DALA instituted a verbal procedure rather than a formal written procedure for issuing a decision within 90 days of the close of each case's record. We also found that, as of August 4, 2009, DALA had at least 121 cases for which draft (preliminary) decisions were written but a formal decision had not been issued. One draft decision was approximately one and a half years old (dating back to February 11, 2008), well over the aforesaid 90 days. Our prior audit recommended that DALA conduct a review of cases that

had draft decisions written but were in the final review stage before issuance and establish a goal of issuing a certain number of cases within a certain time.

In response to the prior audit finding, the Chief Administrative Magistrate indicated that he had changed the policy for management reviews of draft decisions and that decisions were now issued on a timely basis.

DALA staff provided us with a list of 1,247 of 3,051 cases closed as a result of decisions during our audit period. We reviewed a non-statistical random sample of 60 closed cases and learned the following:

- The Chief Administrative Magistrate could only provide 24 of the 60 requested draft decisions. Our review of these decisions indicated that the final decisions were issued within an average of six days of the drafts.
- The other 36 of the 60 draft decisions could not be located. The Chief Administrative Magistrate stated that he was unable to locate the e-mail or hardcopy documents for these decisions.

The Chief Administrative Magistrate indicated that there was no record retention requirement for the draft decisions and that DALA was not required to maintain a copy of these decisions. However, without documented draft decisions, DALA cannot be certain that the 36 draft decisions were issued within the required time frame so that it could show compliance with its statutory requirements.

Auditee's Response

Requiring the Division to maintain draft decisions in order to document the time between the completion of the draft and issuance of the final decision undermines the integrity of the final decision. First, there is nothing in any statute, regulation or state-wide policy that requires a draft decision to be maintained or reviewed within any particular time. This is a matter for the discretion of the Chief Administrative Magistrate. Moreover, as discussed below, the "administrative record" for purposes of supporting a final agency decision and defining the record on appeal includes only the final decision and excludes all earlier drafts and magistrate's notes. This is not accidental. If the administrative record were to include earlier drafts and notes, decisions would be subjected to innumerable collateral attacks based on privileged internal discussions and the interest of finality of a decision would be totally lost. . . .

[The statement that preliminary decisions were written but delayed during final review] . . . is factually inaccurate. In addition, the audit assumes that the Division is required to maintain a magistrate's draft decision so as to document the time taken for the internal review process. This is incorrect and inconsistent with the Division's requirements for documenting its decisions and maintenance of the administrative

record. The official record of an administrative adjudication consists of the final decision only and all exhibits accepted into the record and upon which the decision is based. The record does not include, and should not have, either the magistrate's notes or drafts of earlier decisions. Such materials are not part of the administrative record on appeal and must be removed from the file. Until they are destroyed, they are privileged and not subject to discovery or external review. The Division does not maintain copies of draft decisions as part of the administrative record or case files and the audit staff was so informed. However, before a decision is issued by the Division, it is reviewed by both a peer magistrate and the Chief Administrative Magistrate.

Auditor's Reply

We agree with DALA that there is no statutory or regulatory requirement to retain copies of a magistrate's draft decisions; nonetheless, Chapter 7, Section 4H, of the General Laws states, "It shall be the responsibility of the chief administrative magistrate to verify that written recommended final decisions are issued within 90 days after the record is closed." Because DALA was unable to provide us with its draft decisions for 36 of the 60 closed cases selected, we cannot be certain whether final decisions for these closed cases were carried out within the 90-day time limit. More importantly, DALA could not assure us that a suitable system was in place that verified and ensured adherence with its enabling legislation. Accordingly, we continue to recommend that DALA document and monitor cases through the draft-decision process with the goal of issuing more timely decisions and meeting its statutory requirements.

Planned Post-Audit Action

The Chief Administrative Magistrate stated that DALA had worked to alleviate the case-management issues without additional resources and that, as of January 15, 2015, there would be an additional \$100,000 in the budget to support a temporary (two-year) program that would employ retired judges on a contract basis to assist in eliminating the case backlog and supplement DALA's capacity to hold hearings.

Recommendations

DALA should continue its efforts to establish and improve internal controls over case management. Specifically,

1. DALA should explore other case-management software that can address its needs so that all hearing activities—such as the date scheduled, date held, date postponed, and cancellation, if applicable—

and any other case docket information can be entered in a central database. To this end, DALA could research what software other state administrative law organizations are using to manage cases.

2. DALA should periodically review open cases, determine which ones have actually been closed and should not be included in its open-case list, and update the list. To this end, DALA should ensure that users consistently enter dates for closed cases when prompted to do so in Access, unless it transitions from Access to a new system.
3. DALA should develop formal written policies and procedures for closing cases to establish accountability and communicate expectations to employees more effectively.
4. DALA should continue its efforts to ensure that DALA complies with its verbally established policy of issuing acknowledgments within five days of receiving an appeal. Moreover, DALA should establish formal written policies and procedures for this process rather than relying on its verbal procedures.
5. DALA should continue its efforts to reduce its backlog. To this end, DALA should formalize its established practice of prioritizing its cases, using written policies and procedures documenting how this process should be conducted.
6. DALA should explore the feasibility of establishing time standards for processing cases. To this end, DALA could review practices and standards used by similar organizations (e.g., other state administrative law organizations).
7. DALA should document all draft decisions to ensure that they comply with its statutory requirements.

5. Prior finding partially resolved—Service delivery could be improved by implementing satisfaction surveys.

Our prior audit report disclosed that DALA had not had a user-feedback process in place since it eliminated user-satisfaction surveys, which were an important third-party mechanism to monitor how users would rate their experience with DALA. The prior audit report recommended that DALA implement a user-survey system to provide timely feedback from users. It also recommended that DALA consider establishing periodic meetings with key users (such as state agencies, the Massachusetts Association of Public Pension Attorneys, and the Massachusetts Bar Association) to help ensure adequate feedback and to assist in establishing best practices for all users.

Our follow-up audit showed that DALA had not instituted formal satisfaction surveys for all cases heard. Instead, DALA receives formal feedback only for the cases in which parties have requested an appeal of an earlier DALA decision. In a memorandum to the Office of the State Auditor, the Chief Administrative Magistrate stated,

We believe our alternative approach [for receiving feedback from appeal cases] is more effective than random "satisfaction surveys." One of the first actions taken by new management was to assign an experienced magistrate to each of our principal areas of jurisdiction with responsibility (a) for scheduling and assignments in the particular area; and (b) for acting as the "customer liaison" with the client agencies. It is the responsibility of this magistrate to ensure that we and the client agency are aware of and agree on the current status of each case in the particular area and to resolve any problems that arise. The customer feedback we have received with regard to this arrangement has been extremely positive. With regard to retirement cases, we have reestablished our relationship with the Massachusetts Association of Contributory Retirement Systems, the non-profit organization the members of which are the board members and staff of all Chapter 32 public employee retirement systems, and regularly participate in the Association's twice-yearly educational conferences. These conferences are attended not only by the retirement board members and staff, but also by their counsel and counsel for the members. [The Chief Administrative Magistrate] has also been asked to organize and manage a two-day educational program for retirement board members and staff similar to that he has developed in the past. In our judgment these initiatives are the most effective vehicles for obtaining feedback on how we are performing and how we can improve performance on retirement cases. They are also effective vehicles for educating our client agencies and party counsel on how they can assist us to process cases more efficiently and effectively.

Although DALA states above that it receives feedback through an appeal process and by meeting with some of its key users, we found that this feedback was limited to cases in which the parties had requested an appeal; therefore, DALA may not be receiving all the information necessary to evaluate user satisfaction fully, which a structured satisfaction survey could provide. We researched common practices used by other states to determine how similar administrative hearing offices evaluated and measured customer satisfaction.

We found that administrative hearing offices in at least seven states (Alaska, Georgia, Louisiana, Nevada, Tennessee, Texas, and Washington) conducted customer-satisfaction surveys for all cases heard as a means to measure progress and set agency goals. In fact, laws in two of the seven states (Alaska and Louisiana) require such surveys for all cases. Our review of the survey practices shown on the websites for five of these offices indicated the following:

- The results of the Alaska survey are used by the chief Administrative Law Judge to make recommendations for statutory changes in the department.
- The Georgia Office of State Administrative Hearings has a customer-service survey on the customer-service duties of employees to determine whether employees are courteous, helpful, accessible, responsive, and knowledgeable.
- The State of Louisiana requires the Director of the Department of Administrative Law to develop and implement a judicial evaluation program, which is accessible on its website.

- The Texas State Office of Administrative Hearings conducts an annual survey by using a computer program to randomly select participants who have completed cases. The office uses any negative comments to reflect and examine its mission and its ability to carry out that mission.
- The Washington Office of Administrative Hearings sends claimants, claimant representatives, and state-agency representatives a survey that allows them to rate the office on timeliness, communication, and quality.

Recommendation

DALA should consider implementing a user-survey system for all cases in order to gather the feedback necessary to evaluate its timeliness, communication, and overall quality of service and make corrective actions to improve its case-management activities.

Auditee's Response

I am concerned that satisfaction surveys might create the appearance of a conflict of interest and undermine the agency's credibility. In Massachusetts, there is no statutory, regulatory or other basis for a requirement that agencies conducting judicial and quasi-judicial functions solicit "satisfaction surveys" from the parties appearing before them. Such a requirement would be inappropriate and inconsistent with the agency's core function.

*DALA's primary strength and core mission is to provide due process hearings by unbiased and neutral hearing officers. Anything that undermines that independence and neutrality, or creates even the appearance of bias and partiality, undermines the agency's core mission. If a magistrate believes he or she will be evaluated on the subjective "satisfaction" of agency counsel or some other politically powerful party, he or she might be encouraged to bend a decision to ensure that satisfaction (i.e. the satisfaction survey process creates a conflict of interest for the magistrates). Even if this is not true in fact, the survey process creates the appearance of conflict. If we appear to be attempting to please one or another class of parties in order to obtain high satisfaction ratings, we have failed in our core mission. The Supreme Court has recently considered these types of issues and their impact on the judicial process and recognizes the compelling interest a state has in preserving both the impartiality and appearance of impartiality of its judicial functions. In *Williams-Yulee v. Florida Bar*, 575 U.S. ____ (2015), Chief Justice Roberts noted:*

*The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government. Unlike the executive or the legislature, the judiciary "has no influence over either the sword or the purse; . . . neither force nor will but merely judgment." *The Federalist No. 78*, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered). The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions. As Justice Frankfurter once put it for the Court, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U. S. 11, 14 (1954). It follows that public perception of judicial integrity is "a state interest of the highest order." *Caperton*, 556 U. S., at 889 (quoting *White*, 536 U. S., at 793 (KENNEDY, J., concurring))*

Slip. Op. at 9 – 11. . . .

This reasoning applies with equal force with respect to the Division's conduct of its quasi-judicial function. Magistrates must not be seen or perceived to tailor decisions in order to curry favor with any party or class of parties.

Moreover, even if this were not true, the conduct and management of a satisfaction survey program would be a waste of scarce resources. As noted in the audit report, the appellate process gives us objective evidence of the performance of the magistrates. In addition, in the past when the Agency conducted such surveys, the results were found to be predictable: the winners loved the magistrates; losers hated them. For that reason they were also useless.

Auditor's Reply

We do not dispute that independence, neutrality, and public perception of DALA's due-process hearings are critical to preserving the integrity of its quasi-judicial function. However, we do not believe that "satisfaction surveys" are inappropriate or inconsistent or that they would undermine DALA's core mission. In fact, as noted above, at least seven other states with administrative-hearing offices conduct customer-satisfaction surveys for all their cases. We believe that such surveys could be an effective management tool. For these reasons, we maintain that monitoring with satisfaction surveys could give DALA objective and constructive information on user experiences and an opportunity to implement timely corrective action.

6. Prior finding resolved—DALA should consider holding hearings at alternative sites to accommodate users with disabilities and hardships.

Our prior audit report recommended that DALA conduct a review to determine the potential need for, as well as the costs and benefits of, holding hearings at various locations; determine the potential number of sites where the greatest number of hearings could be held as well as the frequency of hearings; and determine whether remote hearings would be beneficial or whether they would be too costly to implement.

In our follow-up audit, we determined that DALA had started holding hearings in Springfield and Worcester regularly. Its personnel told us that they were investigating the possibility of opening additional venues in Dartmouth and on Cape Cod but that DALA did not currently have sufficient funding. The Chief Administrative Magistrate stated that DALA would put a provision in its

Interdepartmental Service Agreements⁶ that if the other agency wished to move the venue, that agency would pay to do so.

Auditee's Response

DALA will consider holding hearings in more alternative sites when funding allows it.

Auditor's Reply

Based on its response, DALA will take measures to address our concerns in this area as funding permits.

Additional Auditee Responses

In addition to his previously quoted comments, the Chief Administrative Magistrate also provided the following comments:

Operation of the Division under a Centralized and Shared Services Arrangement with the Parent Secretariat Makes Sense

Given the size of the agency, the Division operates under a shared services arrangement with its parent Secretariat, Administration and Finance [A&F], for many of its administrative functions. This includes conduct of most financial activities under the control and supervision of the A&F Chief Financial Officer, personnel functions maintained and supervised by HR experts in MassHr and assigned to Administration and Finance and IT functions provided by A&F IT following IT Consolidation [under Executive Order 510 in 2009, which transferred the responsibility of accounting for state executive departments' IT assets to EOAF]. I believe it makes sense for such functions to be provided and controlled in a centralized administration for such a small agency in A&F. The procedures for the conduct of such functions are and should be defined and controlled by the experts carrying out the functions at the Secretariat level.

The Impact on the Agency of the Recession and the Need to Prioritize Use of the Agency's Reduced Resources

I have not seen any evidence that any of the "deficiencies," had or will have any appreciable effect on the Division's performance of its core mission. . . .

In the period prior to 2009, the Division had failed to process cases as they were received such that over the period 2000 to 2009 the Division had accumulated a case backlog of over 5,000 cases. Each year it was falling further behind by over 300 cases per year. The Agency was not meeting its core mission with respect to many cases during the pre-2010 time period. The agency's principal problem is the case backlog and, in order to meet its core mission, all of its available resources ought to be employed to reducing the backlog. . . .

6. According to Title 815, Section 6, of the Code of Massachusetts Regulations, an Interdepartmental Service Agreement is "a contract between two state departments that documents the terms and conditions of their business relationship."

During the period 2009 – 2013 and the economic recession, the General Jurisdiction unit of the Division lost over 25% of its magistrate resources and one-third of its administrative resources, none of which have been replaced. Before FY 2010, the Division had 12 magistrates, including the Chief, and three administrative staff. In FY 2010, with a reduction in appropriation of \$265,590, the General Jurisdiction unit of the Division lost two magistrates and one administrative staff, leaving ten magistrates including the Chief and two administrative staff. Since that time, none of these staff reductions have been restored. In addition, in 2010, the Division acquired the Bureau of Special Education Appeals. This meant that at least half of the Chief's time was then required to be used for management of the BSEA. In my opinion, the audit should acknowledge the impact of the economic recession and loss of these resources on the agency's ability to carry out its core mission.

APPENDIX A

Summary of Active Open Cases by Calendar Year through February 28, 2014

Case Type	Cases Opened before 01/01/10	Cases Opened 01/01/10– 12/31/10	Cases Opened 01/01/11– 12/31/11	Cases Opened 01/01/12– 12/31/12	Cases Opened 01/01/13– 09/30/13	Subtotal	Cases Opened 10/01/13– 02/28/14	Total
Contributory Retirement	328	215	327	333	261	1,464	116	1,580
Civil Service	10	1	0	6	5	22	3	25
Environmental Protection	32	0	0	0	0	32	0	32
Fair Labor	11	21	29	12	25	98	18	116
Nurse Aides	10	2	3	2	16	33	5	38
Registration in Medicine	9	1	1	3	12	26	8	34
Rate Setting	3,014	15	9	49	21	3,108	0	3,108
All Others	17	7	8	3	15	50	38	88
Total	<u>3,431</u>	<u>262</u>	<u>377</u>	<u>408</u>	<u>355</u>	<u>4,833</u>	<u>188</u>	<u>5,021</u>

APPENDIX B

Division of Administrative Law Appeals Cases Opened and Closed by Year 2000–2013

