STATE OF CALIFORNIA
DEPARTMENT OF MOTOR VEHICLES

Administrative Per Se (APS) Set Aside Process Analysis

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Author: Patrice Rogers
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R&D Report 175

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TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

LIST OF TABLES

TABLE OF CONTENTS (continued)

LIST OF TABLES (continued)

LIST OF FIGURES

TABLE OF CONTENTS (continued)

LIST OF FIGURES (continued)

BACKGROUND

Each year, something less than three quarters of drivers arrested for driving under the influence (DUI) in California are actually convicted of the offense, and often only after long delays following their arrest. The administrative per se (APS) license suspension law was introduced to address these adjudicative exigencies and to swiftly impose a proven effective DUI countermeasure. The APS suspension action represents a timely, administrative action that the Department of Motor Vehicles (DMV) takes against DUI offenders on the per se basis of evidence of driving with a blood alcohol concentration (BAC) in excess of the legal limit of 0.08%. This departmental action is independent of the criminal DUI prosecution and is imposed on roughly 95% of all DUI arrestees.

Research (see, for instance, Sadler, Perrine & Peck, 1991; Williams, Hagen & McConnell, 1984) has consistently demonstrated that license suspension is among the most effective DUI countermeasures available. In two separate Research and Development studies of the effectiveness of California's 0.08% and administrative license suspension laws, we found that imposition of the APS law was associated with up to a 13% drop in subsequent alcohol-involved crashes among potential drunk drivers (Rogers, 1995). We also found that subsequent crashes and recidivism rates were reduced by 19% to 37% for DUI offenders arrested after the law was implemented, compared to those of offenders arrested before the law (Rogers, 1997). This improvement occurred whether or not the offenders were ever convicted of the DUI offense. In short, as has also been shown in other states with similar laws, California's administrative per se license suspension law saves lives by virtue of its immediacy, certainty, and severity.

To track the department's APS process measures each year since the law was enacted, we have published the "California Administrative Per Se Facts" report. These reports summarize annual counts of APS suspensions and hearings as a way of monitoring APS action trends. Any changes showing in the overall trends indicate changes occurring somewhere within the APS system. For quality assurance purposes, it is important that the department monitor any such changes to be able to quickly identify and correct any deficiencies or problems that the trends might indicate.

Figures for annual totals presented in this report will differ from those reported in past research documents, including APS Facts reports published prior to 1998. This discrepancy results from the fact that in the course of completing the current project, we

discovered that Information Systems Division (ISD) programming changes completed in 1995 resulted in our not capturing all of the APS hearing counts, and resulted in overcounts of total APS actions. The ISD changes are explained on Page 6. The reader is therefore cautioned not to compare the totals reported here to those reported in past APS Facts reports.

Figure 1 plots the total number of APS actions imposed, by year, in California through fiscal year (FY) 96/97. These totals include actions that were eventually set aside. The plot shows that total APS actions have decreased by about 32% from what they were in the first year of the law. This drop in total APS actions roughly parallels the decline of approximately 35% in total DUI arrests, as well as alcohol-related crashes, during the same time period.

While DUI arrests and their accompanying APS actions have declined fairly consistently each year, reflecting a level of overall traffic safety improvement, the proportion of APS actions that are set aside by the department has steadily increased each year.

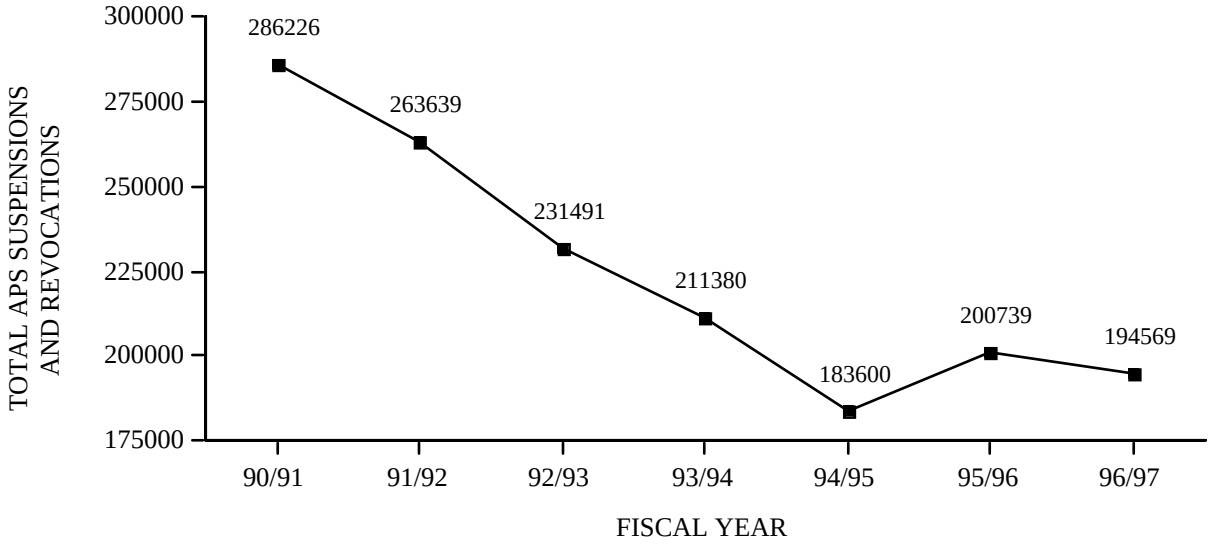


Figure 1. Total APS suspension and revocation actions taken by year including those later set aside, FY 90/91 through FY 96/97.

Figure 2 shows the proportion of total APS actions set aside each year for FY 90/91 through FY 96/97. From this figure, it is obvious that APS set asides are steadily increasing each year, indicating that there is a problem in the APS process that must be addressed.

In the course of preparing this report the suggestion was made by some of the Driver Safety Regional Administrators that under a new uniform updating policy, all incoming DS 367's are now being updated on the driver's legal record. The impact of such a policy would be that the number of APS actions on record would increase and all of the increased volume would be set aside. Implementation of such a policy would partly explain the increase in set asides subsequent to its implementation. However, even if such a uniform practice was recently adopted, its effect would not be apparent in any of the data presented in this report since the data presented here goes only through June 1997, prior to when it was suggested that a uniform updating practice would have been implemented. It would be possible to determine the impact of the policy by comparing the numbers of updated low BAC set aside cases, by year, before and after the policy change. One would predict a step increase in the number of low BAC cases set aside subsequent to the policy. I have not been able to locate any written directive from Driver Safety management to update all incoming APS orders of suspension. Nonetheless, I compared the proportion of low BAC cases set aside between July 1990 and October 1992 to the proportion set aside in 1996, and found no increase in such set asides in 1996. There was an average of 458.61 low BAC cases set aside per month in the initial years and an average of 457.08 low BAC cases set aside per month in 1996. (These figures exclude zero tolerance cases).

In prior reports and correspondence, the Research and Development Branch has advised departmental management that these trends were severe enough to warrant an investigation into the causes of the trends and to initiate corrective action.

As shown in Figure 2, the trends have not stabilized and the overall APS set aside rate has, in fact, continued to worsen; this fact increases the need for identifying and correcting the underlying process deficiencies.

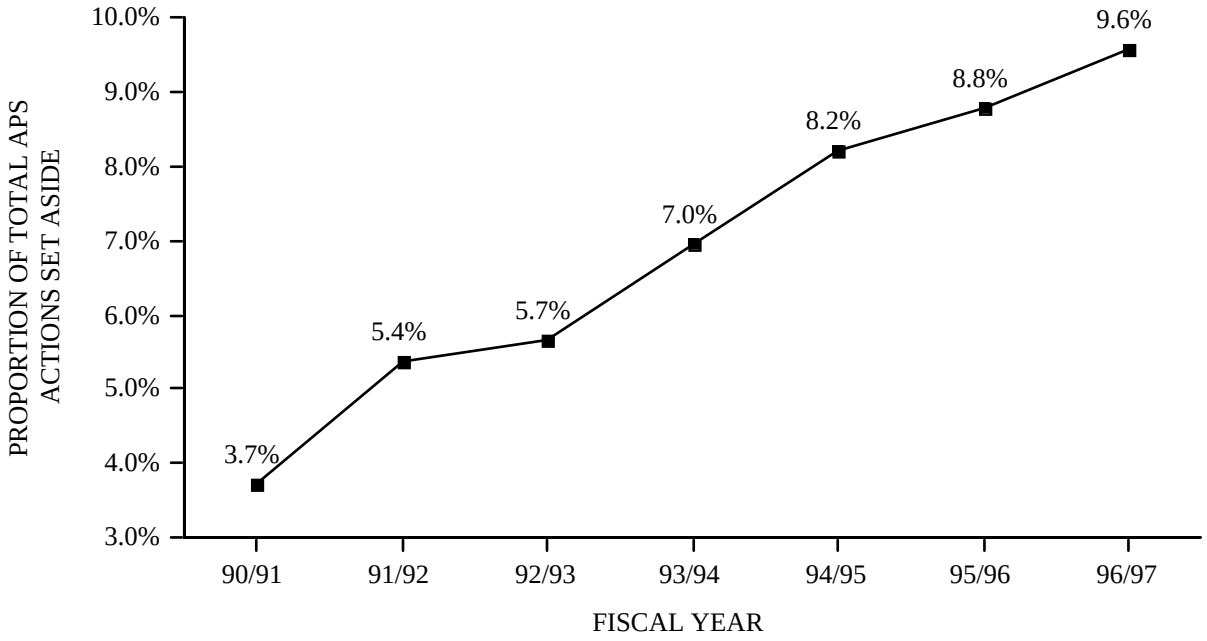


Figure 2. Proportion of total APS actions set aside during any stage of the APS process by year, FY 90/91 through FY 96/97.

Figure 3 shows the total APS actions set aside subsequent to a hearing request from FY 90/91 through FY 96/97. Hearing figures were included in this plot only if they were for actual hearing requests. The figures include those hearings that were canceled by the department prior to the hearing actually being held. Canceled hearings were included because, just like the decisions to sustain cases decisions to vacate cases, whether or not a hearing was held, should be sufficiently documented so as to provide ample support for having made the decision. Figure 3 excludes cases that were designated as "Driver Safety/Driver Investigation" hearings since this coding on the driver record appears to have only been used to indicate an administrative paper review of the case and does not necessarily indicate that an actual hearing was ever requested or scheduled.

Figure 3 reveals that set asides among nonstayed APS actions have been somewhat stable since FY 94/95. However, the number of actions set aside subsequent to a stay appears to have increased very substantially, even surpassing the total number of nonstayed set aside actions in FY 96/97. This trend is alarming and accounts entirely for the increase in total hearings between FY 94/95 and FY 96/97.

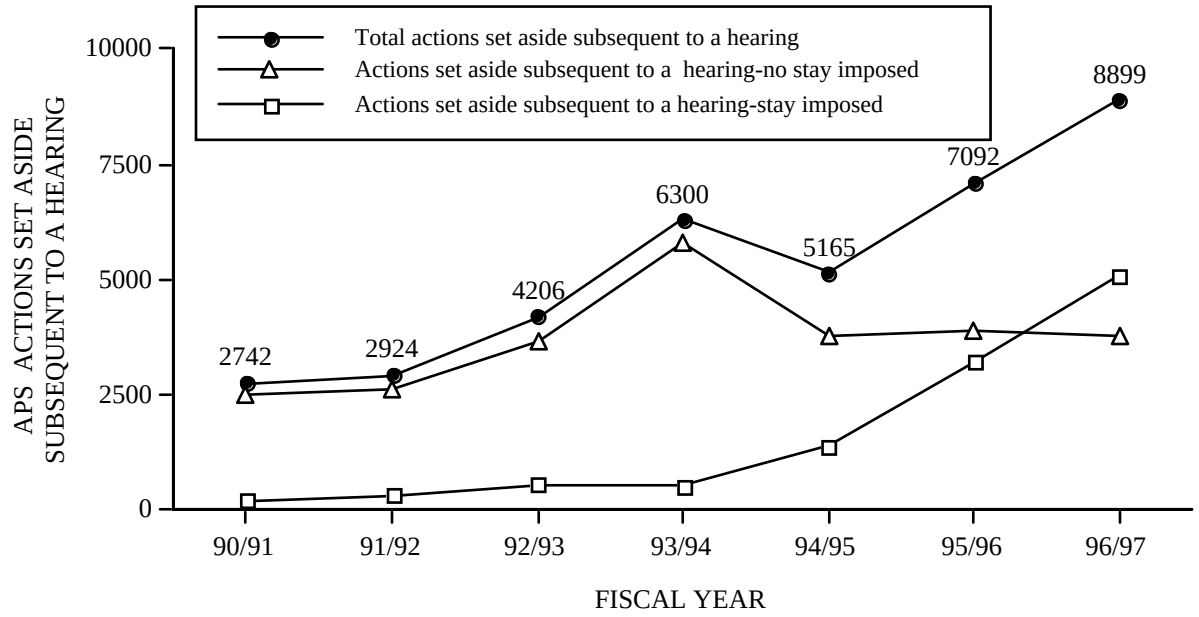


Figure 3 . Total APS actions set aside subsequent to a hearing. Stayed and nonstayed actions presented separately and combined as total by year, FY 90/91 through FY 96/97.

The fiscal year Suspension and Revocation (S&R) Reports substantiate the large increase in the number of stayed APS actions. The S&R Report figures are summarized in Figure 4 below. They show that APS stays have risen from 1,613 total stays in the first year of the APS law (7.8% of total APS hearings scheduled in FY 90/91) to 21,932 stays in FY 96/97 (67.6% of total APS hearings scheduled in FY 96/97). Even after allowing for likely duplication that is nearly always included in S&R Report totals, this trend reflects an enormous increase in stays.

In the last two years, ISD has made several changes in the way APS stayed actions are coded on the driver record. As a result, while total APS actions and stayed actions are counted on the S&R Report, hearing categories on the report exclude counts of hearings concluded subsequent to a stay. At this writing, ISD has begun correcting this omission. In this report, only Figure 4 presents data reported in the S&R Report and I have confirmed through meetings with representatives from ISD and DLAD that these data are complete. Only the APS hearings are undercounted in the S&R Report as a result of the programming changes in coding APS stays. With the exception of the data presented in Figure 4 and the figures summarizing data provided by the Legal Office,

all other figures presented in this report were based on data obtained from the master file and not from the S&R Reports. Therefore, the hearing counts presented in this report are complete.

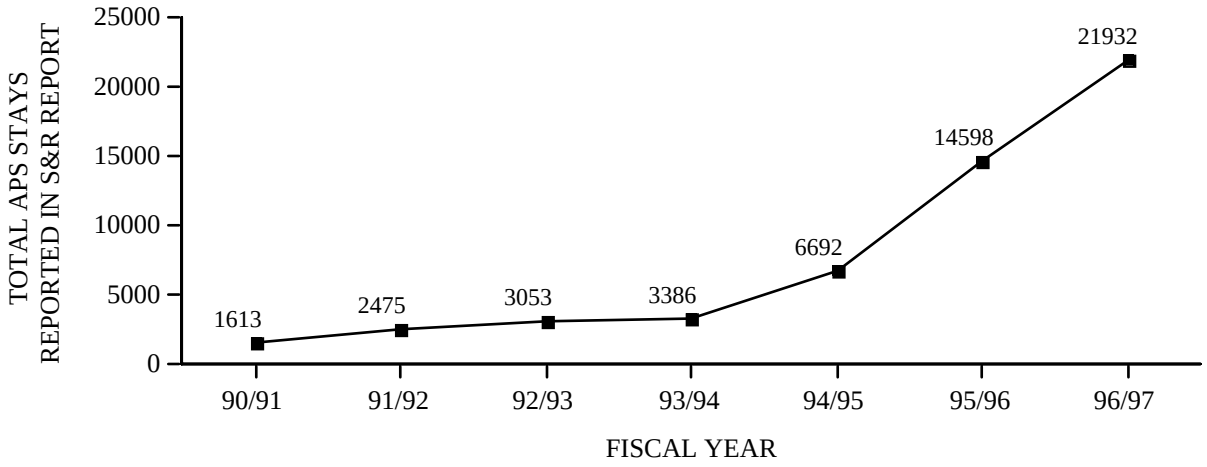


Figure 4. Suspension and Revocation Reports total APS actions stayed by year, FY 90/91 through FY 96/97.

While many of the stays granted by the department are undoubtedly unavoidable due to scheduling backlogs, it is well known that when a license action can be delayed by the offender, much of the deterrent potential of the action is lost. Obtaining a stay is a strategy that can be used by offenders (and their attorneys) to attempt to avoid the sanction entirely. The offender is potentially rewarded because if enough time passes there is a greater chance that the department won't stand behind the action. Moreover, if an offender can delay a suspension to a date when it is more "convenient" for them not to drive, some of the severity of the measure is lost. Consequently, stayed actions have the potential of weakening the overall deterrent impact of the law.

When the APS law was first implemented, the department acknowledged that many offenders might request a hearing simply to delay their penalty by having the action stayed. To prevent this tactic, the department adopted a policy consistent with the statutory requirement of issuing a stay only when a hearing was requested in a timely manner (within 14 days of the mail date of the order) but could not be completed before the effective date of the action, except when the action has been taken under VC Section

13953. (See Driver Safety Policy memorandum DS 93-49, dated 11-04-93). This policy was adopted to help minimize the number of such hearing requests and to curtail the high costs associated with conducting large numbers of hearings. This policy appears to have been effective when it was adhered to. Between the law's initial implementation and FY 93/94, APS stays were kept to a minimum. However, on 05-16-94, Driver Safety Policy memorandum DS 94-24 was issued that had the effect of liberalizing the stay policy. That memorandum stated that "Hearing officers should use fair play and common sense in deciding stay requests." It instructed that "fair play simply means that the driver should be given the same opportunities for stays as the department grants itself." Even if it was not intended to be applied to all APS hearing requests, the number of APS stays has more than doubled each year subsequent to this policy revision. Figure 4 shows the increasing trend in stays beginning in FY 94/95. It should be noted that most of the Driver Safety personnel I talked to were not familiar with this later memorandum. Therefore, it is not known the extent to which this policy change really contributed to the increased volume of stays. Several Driver Safety managers expressed to me their opinion that the increased stays have probably resulted from timely requests for which the department was not able to provide a hearing within the statutorily required 30 day period. It should be possible to determine whether this is the case. Although the hearing request date is not entered on the driver's record or as a field in the Driver Safety automation system, I was told that the request date should be entered in the hearing file. However, for the sample cases assessed in this evaluation, I was not able to determine when hearing requests had been made since the form on which it would have been entered was rarely included in the hearing file documents I received for the sample of cases in this evaluation.

We have recently learned that in addition to Driver Safety modifying the stay policy, in January 1995, ISD completed programming on Priority Memo #DCA-1982, which changed the way completed APS actions that had been stayed are updated on the driver record. Beginning in January 1995, subsequent to completing a hearing for a stayed APS action, the *hearing* reason code on the driver's record is replaced with the *suspension* reason code. When the hearings for stayed actions are combined with the other hearings, there is a substantial increase in the number of scheduled hearings from year to year. Figure 5 presents the combined number of stayed and nonstayed APS actions for which a hearing was completed. Again, hearing figures were included in this plot only if they were for actual hearing requests and may have been for hearings that were

canceled by the department prior to the hearing being held. Figure 5 excludes cases that were designated as "Driver Safety/Driver Investigation" hearings.

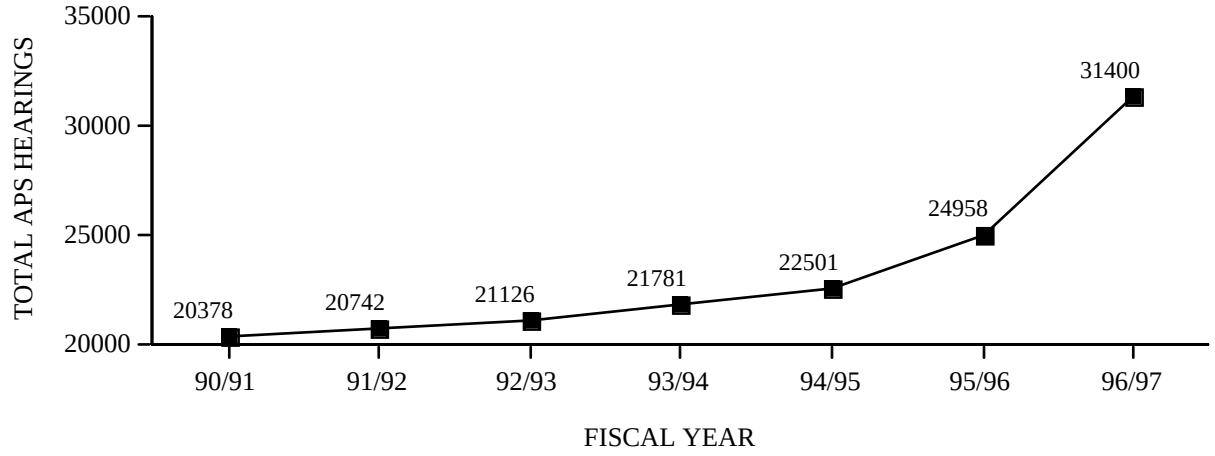


Figure 5. Total APS hearings completed for FY 90/91 through FY 96/97 combining stayed and nonstayed cases.

As before, it is important to note that the total for FY 96/97 may be somewhat inflated due to the possibility that it may still contain some duplicate counts. Still, the data in figures 4 and 5 show that there have been greater numbers of hearing requests made each year, with greater proportions of those requests resulting in the offender being granted a stay of the APS suspension.

Figure 6 presents the total number of APS actions set aside subsequent to a hearing completion, and the percentage of total APS actions they represent, by year from FY 90/91 through FY 96/97. As in the preceding figures, hearing figures were included in this plot only if they were for actual hearing requests, and may have been for hearings that were canceled by the department prior to the hearing being held. Also as before, Figure 6 excludes cases that were designated as "Driver Safety/Driver Investigation" hearings.

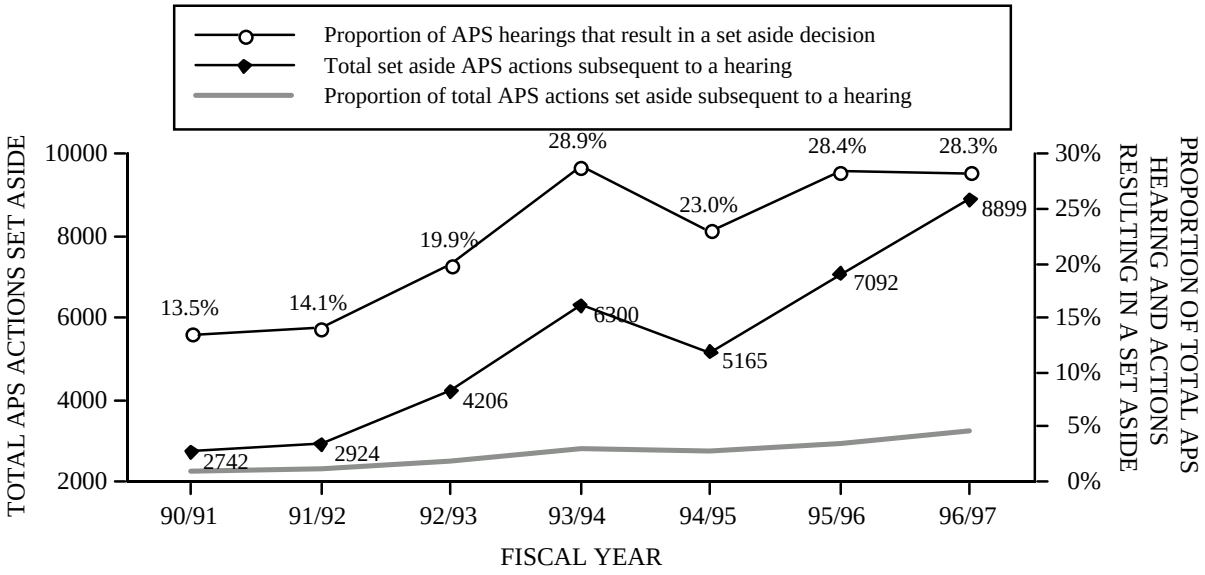


Figure 6. Total stayed and nonstayed actions set aside subsequent to a hearing and the proportion of total APS actions and total APS hearings they represent by year, FY 90/91 through FY 96/97.

The values in Figure 6 were obtained by summing the number of hearings completed each year for stayed and nonstayed actions. The proportions of total stayed and nonstayed APS actions that are set aside subsequent to a hearing decision are presented separately in Figure 7. Figures 6 and 7 each demonstrate that the proportion of cases that are set aside subsequent to a hearing is rapidly increasing.

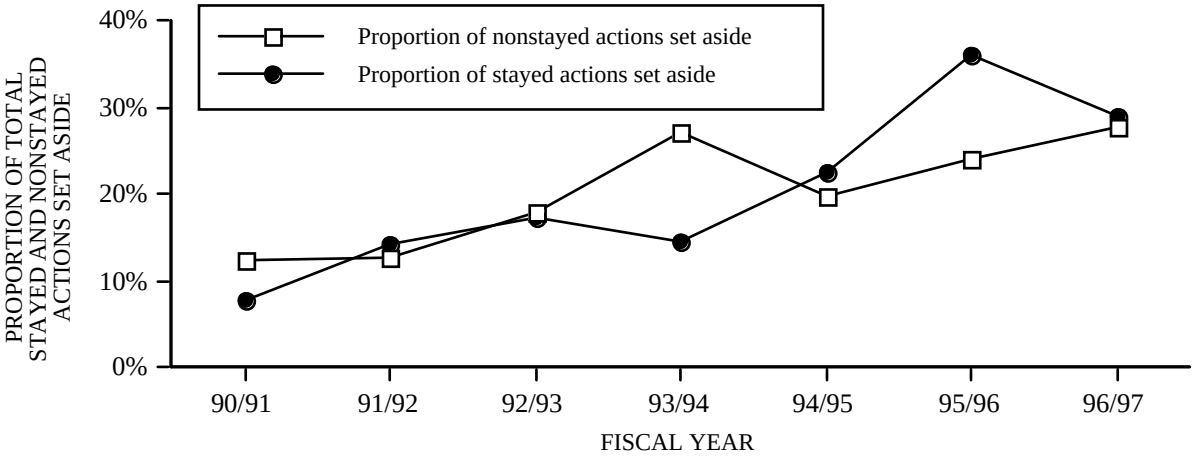


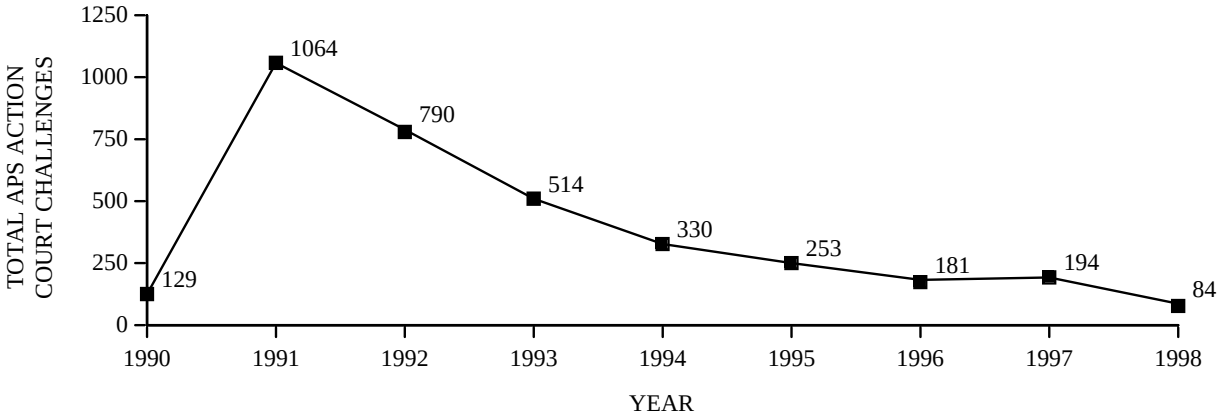
Figure 7. Proportion of stayed and nonstayed APS actions that are set aside subsequent to a completed hearing by year, FY 90/91 through FY 96/97.

It must be emphasized that increased set aside rates are not per se evidence of a departmental problem. However, these increases are still problematic if they reflect procedural errors made by the police, forensic laboratory, or in the course of conducting the hearing process. Furthermore, these trends are problematic if they reflect a failure by the department to rectify errors or omissions made by police or laboratories in initially developing the APS case.

This increase in APS hearing activities raises a fundamental question that needs to be addressed before any other alterations can be expected to improve the APS process. Given that we have identified substantially more hearings than were formerly identified, the possibility exists that the current demand for hearings has surpassed current departmental capabilities for conducting timely hearings. To identify the extent to which this may be true, a formal work flow and time requirements analysis should be conducted to determine whether existing staffing levels are sufficient to process the volume without sacrificing quality or accumulating excessive backlogs. The fact that the volume and growth of APS hearings is substantially higher than indicated by prior departmental workload statistics raises the possibility that current personnel years (PY) allocations are inadequate. It should also be mentioned, however, that if the department were to return to its original more conservative policy regarding granting stays, the number of hearing requests could conceivably decline substantially, making the workload more manageable for existing staff.

APS Action Court Challenges

Figure 8 presents annual data provided by the Legal Office showing the number of APS cases in which the department's administrative action was challenged in court. It shows that court challenges peaked in the first year of the law and have thereafter steadily declined. The great number of initial challenges no doubt relate to the fact that the law was new and untried. As case laws were established in those first years, the APS process became more legally defined. However, over time there would be fewer of these early case law issues to resolve. The table also shows that consistently there have been few APS actions challenged in court subsequent to the hearing decision, relative to the number of total APS cases.



Note. Figures are based on total Superior Court challenges and do not include counts of any subsequent Appellate Court challenges.

Figure 8. Total APS actions challenged in Superior Court by year of court challenge.

Figure 9 presents the number of court cases by type of outcome for each year of the APS law. It shows that, unlike the steady increase in the number of departmental APS hearings over time, court challenges to the law have declined. However, the rate of cases that are upheld compared to those ordered set aside has remained relatively steady. The courts have upheld the APS action in between 60% and 70% of the cases appealed before them each year.

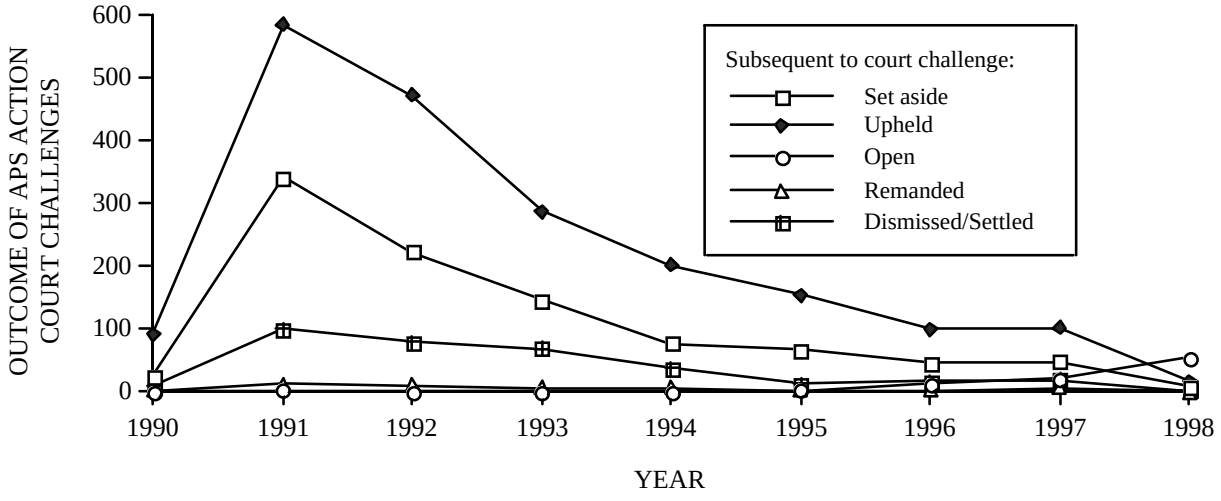
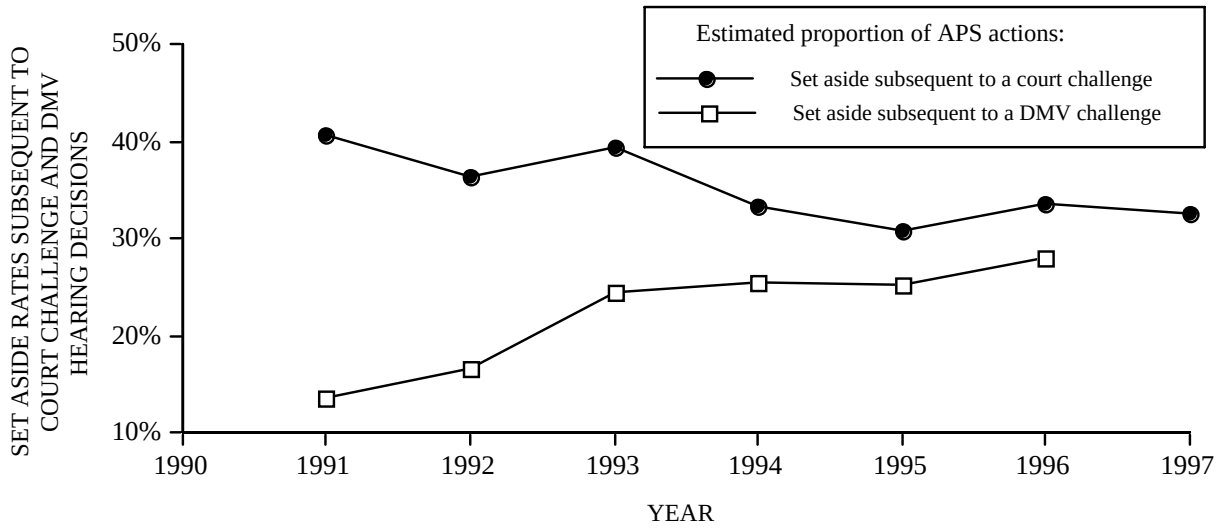


Figure 9. Outcome of APS administrative action court challenges by year.

While at first blush this may seem encouraging, the possibility exists that some proportion of the increasing number of cases set aside by the department might have been taken to the court had they not been set aside. Figure 10 presents the estimated proportions of cases set aside subsequent to a hearing and to a court challenge, respectively. For this figure, hearing estimates were interpolated (estimated) from fiscal year figures. It shows that the set aside rate subsequent to a court challenge has slightly decreased over time while the set aside rate subsequent to a hearing has more than doubled over the same period.

As a result of observing the increasing departmental set aside trends, we undertook this effort to examine the current APS set aside process. For this study, we obtained statistical information on two representative samples of set aside actions obtained from among the total APS actions that accumulated in the first six months of 1997. This report summarizes the content analysis findings pertaining to these two samples.



Note. Hearing figures were interpolated from fiscal year figures. Based on Legal Office estimates, court challenge set aside rates include 80% of "court dismissals."

Figure 10. Estimated proportion of APS actions set aside subsequent to a DMV hearing compared to estimated proportion of actions set aside subsequent to a court challenge.

Content Analysis of Set Aside APS Sample Cases

The content analysis consisted of identifying the various reasons for the set asides and obtaining total counts and proportions of cases set aside within each category. In addition to cases set aside subsequent to a hearing, we assessed cases set aside during any stage of the department's handling of the case. This includes cases set aside during the administrative review process (as required under VC section 13557), at various stages of the hearing process, or in a decision made as a result of a departmental review.

Sample Selection

To obtain representative samples of all APS set aside cases for evaluation in this content analysis, I selected two random samples. The first sample consisted of APS cases that had been set aside, without a stay having been imposed (either with or without a hearing) during the first six months of 1997. To obtain this sample, I extracted the driver records for all set aside APS actions identified from among total APS actions contained on the S&R tapes for FY 96/97. From these, I selected a random, statistically representative, sample of 203 APS cases that had been set aside. The cases were selected from among those containing an APS action reason code with a 1997 date (limited to occurring within the first six months of the year since the data tape contained updates made only through June, 1997) and a termination authority code of "13551" indicating that the action had been set aside. This should have excluded any stayed cases since current updating procedures no longer update these APS action legal-history lines with a "13551" termination authority code when there was a stay imposed on the action. Rather, when the hearing is completed subsequent to a stayed action, a separate legal-history subrecord line is added to the driver record indicating the outcome of the hearing. However, the driver record for six of the cases included in the sample indicated that the APS action, in fact, had been stayed for that individual. For the sake of simplicity, despite these cases, I will refer to this sample as the set of "nonstayed" cases. This sample represents approximately 1.5% of the total APS actions set aside in the first 6 months of 1997.

The second sample consisted of a random selection of 55 set aside APS cases for which the action had been stayed subsequent to a hearing request. This sample was selected by first identifying all of the hearing-resolved stayed cases from the same S&R tape identified above. These cases were identified by selecting all of the APS hearing legal-history subrecords that had an APS action reason code in place of the original APS

hearing reason code and had a "type of action" code indicating an "end of stay" resulting in either a "court-ordered set aside" or a "departmental set aside." Upon completion of the hearing, the original hearing reason code used to update the driver record when the hearing was scheduled is overwritten with the APS action reason code associated with the driver's offense status, regardless of whether the action was set aside or sustained. This sample represents approximately 1.2% of the total number of stayed cases that were set aside during the first six months of 1997.

The random selection process employed to select both samples gave every APS case that was set aside during that 6-month period an equal chance of being included in the sample. This random selection process allows us to generalize from the specific findings of these samples to APS cases in general. Generality refers to how applicable the sample cases are to the group of all APS set asides for the particular time period assessed. If the sample used in an evaluation is representative of the population of interest, generality will be assured. With representative sampling, we make sure that the sample of APS cases have essentially the same composition as the general population of cases. The trends identified in the samples should accurately reflect the set aside trends for all of the cases set aside during that period, within the bounds of random sampling error.

As an illustrative example that the selected sample size is statistically adequate to generalize to the population of all cases set aside during that period, I calculated the confidence interval for our finding that 14% of the sample of nonstayed cases were set aside prior to attempting to obtain missing elements. With a sample size of 203 cases, and using a 95% level of confidence threshold, the confidence interval for this proportion is between 9.0% and 18.5%. There are several ways of interpreting the meaning of this confidence interval. The most accurate description is that if we were to repeat the sample an infinite number of times, 95% of the samples would yield a value falling within the interval of 9.0% - 18.5%. A somewhat less accurate description is that we can be 95% certain that the true population value resides in the interval. In any event, the precision and accuracy of the sampling is more than sufficient for this administrative audit.

Both samples included 0.08% and 0.01% (zero tolerance) cases. There were seven 0.01% cases in the nonstayed sample (representing 3.4% of the sample) and only one (or 1.8%) in the sample of stayed cases. Since all types of set aside cases were of interest here,

both samples also included cases that were designated as "Driver Safety/Driver Investigation" hearings. I performed separate content analyses on each of the two samples.

Obtaining the Sample Case Files

The department's hearing or case files for each of the set aside sample cases were obtained by the Driver Safety Appeals Branch Manager. Each file was requested and obtained from the Driver Safety Office where the decision had been made to set aside the action. In all but a few cases the appropriate office was specified on the driver's record either as the hearing location specified in the legal-history subrecord (when a hearing had been held), or on a comment line on the comment subrecord.

Of the 258 total files requested, 226 (88%) were promptly received subsequent to the initial request. Thirteen of the remaining 32 case files were received subsequent to a second request made to each of the respective offices. Eventually, following repeated attempts to obtain the remaining files, all but nine files were obtained. Of the missing nine files, three (representing 1.2% of the total files requested) were confirmed by the Driver Safety Office manager to be lost. The other five (1.9% of the total files requested) were simply not received and are presumed to be lost or misfiled. All of the sample case findings and resulting recommendations in this report were based on the documents obtained in the case files, including those cases where a hearing was held. No attempt was made to supplement the file information by accessing the audio tapes of the hearing.

Lack of Decision Reporting

Upon reviewing the case files in both samples, it became immediately clear that a problem with many of the cases was that the files contained minimal or no decision information, factual findings, or any other type of summary or comment indicating why the given case had been set aside. Of the total nonstayed cases (that were set aside for reasons other than as a result of the driver having a BAC below 0.08%[1]), 28% (25 files out of 88 files) had no report or comment of any kind in the file. This represents 12% of the total sample cases. Table 1 shows the number of decisions reported by type of reporting for the 203 nonstayed cases.

[1] For the purposes of this study, these cases are considered differently than other cases since their driver record comments made it explicitly clear that they were set aside appropriately. This group is discussed below.

Table 1

Type of Decision Report Included in the Case Files for the 203 Nonstayed APS Set Aside Cases

Form of reporting decision	Total	% of total cases
Low BAC indicated on driver record comment section	115	57%
No report or comment of any kind	25	12%
Brief phrase or comment attached to the file, usually written as a comment on the Driver Safety Report (DS 124)	26	13%
*Comprehensive decision written on the DS 124 comment section	9	4%
Formal summary and/or "Findings of Fact" report	12	6%
Lost or missing files (form of reporting unknown)	10	5%
Action not set aside (set aside to correct record updating error only)	6	3%

*Most of these were also brief comments but provided sufficient information to make the reviewer's or hearing officer's rationale explicit for having reached the decision to set aside the action.

In 3% of the nonstayed cases (6 cases) the action was actually sustained. In these cases, the recorded set aside was used only to correct a driver record updating error. There were no reports in the files for these types of cases although two of the cases had involved a hearing.

Of the total sample of 55 stayed cases that were set aside for reasons other than as a result of the driver having a BAC below 0.08%, 23% (12 files out of 52 files) had no report or comment of any kind in the file. This represents 22% of the total sample cases. Table 2 shows the number of decisions reported by type of reporting for the 55 stayed sample cases.

In 5% of the stayed cases (3 cases) the hearing resulted in the action being sustained and the recorded set aside was used only to correct a driver record updating error. Of those, one file was lost or missing and two had formal decisions included in the file. There

were no reports in the files for the nonstayed cases of this type (six cases shown in Table 1), although two of those cases had involved a hearing.

In both samples, among those cases that had no report or had only a cryptic comment in the file (about 25% of the nonstayed sample cases and 33% of the stayed sample cases), I was unable to confidently assess in most cases why the action was set aside. Therefore, instead of relying on my own assessment, I asked senior staff members of the Driver Safety Appeals Branch to review these particular cases and relied on their assessments in categorizing them.

Table 2

Form of Decision Reporting on File for the Sample of 55 Stayed APS Set Aside Cases

Form of reporting decision	Total	% of total cases
Low BAC indicated on driver record comment section	3	5%
No report or comment of any kind	12	22%
Brief phrase or comment attached to the file, usually written as a comment on the DS 124	6	11%
*Comprehensive decision written on the DS 124 comment section	13	24%
Formal summary and/or "Findings of Fact" report	16	29%
Lost or missing files (form of reporting unknown)	2	4%
Action not set aside (set aside to correct record updating error only)	3	5%

*Most of these were also brief comments but provided sufficient information to make the reviewer's or hearing officer's rationale explicit for having reached the decision to set aside the action.

Cases Set Aside Subsequent to a Hearing

Of the sample of nonstayed set aside cases, 30% (60 cases) were set aside subsequent to a scheduled hearing request. Of those cases, 77% (46 cases) were set aside subsequent to the hearing actually being held and 23% (14 hearings) were canceled by the department, indicating that the decision to set aside the action was probably made by

the hearing officer upon reviewing the case in preparation for the hearing. An additional 1.5% (three cases) were set aside subsequent to departmental review following a court acquittal on the VC 23152(b) charge. These figures reflect actual hearings and do not include those 18% (36 cases) for which the driver record and case file documents indicate that the department conducted a "Driver Safety/Driver Investigation" which actually amounts to a "paper review" of the APS case. It cannot be determined from any available documentation whether these "Driver Safety/Driver Investigation" cases involved an initial hearing request for which a prehearing review of the documents indicated a lack of sufficient evidence to conduct the hearing or whether there had been no request for a hearing and these are actually cases set aside in the course of conducting an administrative review. In any event, there is no file documentation to support any action or decision made pursuant to these "paper reviews."

Among nonstayed cases in which the respondent requested a hearing, there was an average of 60.6 days between arrest or detention date and the set aside. The time ranged from 4 days to 125 days between arrest and set aside for these nonstayed cases. Among the nonstayed sample cases involving a "Driver Safety/Driver investigation," there was an average of 77.1 days ranging from 16 days to 159 days between arrest or detention date and the investigation.

The average time lag among nonstayed case hearing requests will always be greater than the 30 days between arrest and suspension dates since Driver Safety policy memo DSP 91-4, dated January 30, 1991, established the department's policy of granting a hearing "any time prior to the end of the period of suspension or revocation." This means that a hearing for a nonstayed action may be held any time following the driver's arrest up to the last day of the action. For offenders having two or more prior DUI convictions and who also refused a test of their BAC at the time of their arrest, this period is three years subsequent to arrest. Given this wide time range during which a hearing may be granted and held, the average number of days between arrest and set aside for these cases will always be greater than the 30 days between arrest and onset of the license action. However, these delays are not problematic from a deterrence standpoint since the suspension is in effect during the delay.

The 60 day average for some of the cases in which a hearing was actually held may actually reflect a delay of up to 30 days allowed by the Administrative Procedures Act following the hearing to issue a decision regarding the case. However, the longer

average associated with the cases that did not involve an actual hearing, the "Driver Safety/Driver Investigation" review cases, seems more problematic. To the extent that these cases actually represent set asides subsequent to an administrative review of the case, this suggests that at least some police agencies and/or forensic laboratories are not meeting their statutory obligation to send relevant APS documents to DMV within the 5 or 15 days specified by law.

Since a stay is only imposed upon request for a hearing, by definition, all of the stayed set aside cases, 100% (55 cases) were set aside subsequent to a scheduled hearing request. Of these cases 1.8% (only one case) was a "Driver Safety/Driver Investigation" review. Of the remaining 54 cases, comparable to the nonstayed cases, 76% (41 cases) of these were set aside subsequent to the hearing actually being held and 24% (13 hearings) were canceled by the department prior to the actual hearing.

Among the stayed sample cases, there was an average of 63.9 days from arrest or detention date to the date the case was set aside in the hearing. The time ranged from 21 days to 131 days between arrest and set aside for these stayed cases. It is interesting to note that the average time between arrest or detention and the action being set aside did not appreciably differ between the stayed and nonstayed groups of cases.

Low BAC Cases

In our original 1995 memo expressing concerns about the increasing set aside rate, we stated that in a perfect system, all APS actions should be upheld and that failure to do so implied errors in police handling or in the department's hearing process. We now realize that this was an erroneous assumption. The APS action imposed subsequent to a blood or urine test is necessarily imposed by the arresting officer based on his or her *belief* that the driver's BAC level will reach or surpass the legal limit and the department rightfully updates the driver's record with the suspension order until the lab results are received confirming or nullifying the appropriateness of imposing the suspension. In those cases where the lab test results eventually show that the driver's BAC was actually below 0.08% at the time of the test, the department then rightfully sets the action aside.

Among the 203 nonstayed APS set aside cases, 57% (115 cases) of the sample were set aside as a result of test results confirming that the driver had a BAC below the legal limit. One case was a zero tolerance offender with breath results of .00 and .02 in the

two breath samples, respectively. Of those with low BACs, 74% (85 cases) were for drivers who submitted to a blood or urine test and another 26% (30 cases) were for drivers who submitted to a breath test with BAC readings of 0.07% in one test and 0.08% in the other test. Table 3 shows the proportions of the BAC test types for the cases that were below 0.08% (or 0.01%) in this sample.

Table 3

Number of Cases and Proportion of Low BAC Offenders by Type of BAC Test Taken Among 115 Cases Set Aside as a Result of Having a Low BAC

Type of test	Total cases set aside	Percent
Blood	53	46%
Urine	17	15%
Breath	30	26%
Unknown	15	13%
Total	115	100%

Only one driver among these low BAC cases was convicted of 23152(b). That particular driver had a BAC of .08 in the first sample and .07 in the second sample obtained from a breath test. (A court conviction on 23152(b) is often a good indicator that the APS action should not have been set aside by the department since the courts require a higher standard of proof to convict the offender on the *criminal* charge than the preponderance of evidence required by the department to impose its civil action. This is discussed in more detail below.)

When blood or urine test results are not yet obtained, the DMV has no way of knowing what the results will be. Consequently, updating the driver record with the action is clearly appropriate. However, it would seem that when the initial documents indicate that the driver's BAC was less than 0.08%, the action should not be updated. It is not clear why the action was updated on the driver's record in so many low-BAC breath tested cases (26% of the low BAC sample cases). One possibility is that these cases may have been updated in an effort to uniformly report the outcome of all APS actions.

However, if this is true, it would seem that there should have been more low BAC cases than there were on the master file with, say, .07 in both breath samples of the test. As it was, only 7% of the low BAC cases (8 cases) that were updated on the driver's record showed breath test results of less than 0.08% in both tests. The vast majority of the low breath test cases were for test results of .07 in one breath sample and .08 in the other. This may reflect the Driver Safety policy that was established in 1990 or 1991 to set aside any APS action for which any one of the breath sample results was less than .08%, even if there were two other samples with levels equal to or greater than .08%. In either event, it seems likely that there is a need to clarify to staff the provisions set forth by law and policy concerning the required number of .08+ BAC readings.

Of the 57% nonstayed cases set aside as a result of having low BAC test results (115 cases):

- 90% (104) were set aside during a review of the case prior to any hearing request.
- 10% (11) were set aside subsequent to a hearing request. Of these eleven cases:
    - 54% (6) were canceled by the department prior to the hearing.
    - 45% (5) were set aside subsequent to an actual hearing.

Of the 5.4% stayed sample cases set aside as a result of low BAC test results (3 cases):

- 33% (1) was canceled by the department prior to the hearing.
- 33% (1) was set aside subsequent to a paper review.
- 33% (1) was set aside subsequent to the hearing.

Each of these three were cases involving a blood or urine test.

Content Analysis Results

Nonstayed Sample Cases

The reasons given, or deduced, for the cases in either sample being set aside fell within a limited number of general categories. Table 4 presents the various general categories with the number and percentage of total cases within each category for the nonstayed cases.

In most cases, there was only one prominent reason cited, or indicated, for the action being set aside. For instance, in most of the cases citing the "*Downer v. Zolin*" case law as the reason for the set aside, there were no other grounds presented that also weakened the prima facie case. However, in some cases, the categorization used in

Table 4 (and Table 5, below) somewhat oversimplifies the rationale provided by the hearing officer or reviewer, or deduced from the file documents, for having reached the decision to set the action aside. For the purpose of this study, I categorized each case by the decision finding that would have provided the strongest grounds for a set aside. For instance, in one case the hearing officer accurately set aside the action because over three hours had passed between the respondent's involvement in a crash and his eventual BAC test. The hearing officer also justified his or her decision by indicating that no BAC results had been received from the forensic lab. I categorized this particular case by the first reason given since it alone was sufficient to support the action. If the second reason, that of a missing lab result, had been the case's only weakness, I would have characterized it as being insufficiently investigated in preparation for the hearing since missing lab results are potentially retrievable by requesting a copy of the results or, if that form of evidence proves to be insufficient, by subpoenaing the appropriate lab personnel.

It should be emphasized that categorizing a case as "insufficiently prepared" does not necessarily mean it would not have been set aside had the additional information been sought. Using the example case above, if the missing lab result had been the case's only weakness, and if it had been requested and obtained, the lab result still could have been insufficient to support taking the action. However, without making the request, the department's inaction provides a de facto cause for setting aside the action. In a minimum of 10% of the cases in this sample (20 cases), the case appeared to be sufficient with the sole exception that no attempt was made to obtain a critical missing element [such as a missing lab result, signature, or Officer's Statement (DS 367)].

Table 4

General Categories of Reasons Used for Setting Aside Nonstayed Sample Cases

General set aside categories	Total set aside	% of sample	Number of errors likely by DMV
Confirmed that driver's BAC was less than 0.08% at the time of driving	**115**	**56.6**	**0**
Order to set aside following court acquittal on 23152(b) charge	**4**	**2.0**	**0**
Accepted "expert witness" testimony or affidavit claiming driver was not 0.08% at time of driving	**3**	**1.5**	**?**
Police Reporting Deficiencies	**28**	**13.8**	**18**
No Officer's Statement (DS 367) obtained	7	3.4	7
Missing required elements from DS 367	5	2.6	5
DS 367 confirms that the offender was a passenger/pedestrian/ or bicyclist	3	1.5	0
Insufficient probable cause	4	2.0	4
BAC obtained over three hours after driving	4	2.0	0
Insufficient evidence of, or witness to, driving	2	1.0	0
Lack of 15 minute observation prior to breath testing	1	0.5	0
Hearing officer failed to determine if 15 minute observation period had occurred	2	1.0	2
Lab Deficiencies	**24**	**11.8**	**10**
No blood or urine results obtained	6	3.0	6
Lab certification not considered to be "at or near the time of the reported event" rendering the report inadmissible hearsay under Evidence Code 1280 (*Downer v. Zolin*)	6	3.0	2
No lab certification signature	4	2.0	2
Laboratory unlicensed at the time of BAC analysis	4	2.0	0
Invalid BAC lab sample	4	2.0	0
Departmental Error	**29**	**14.3**	**19**
Wrong person	1	0.5	1
Set aside reason indeterminable/No apparent problem with prima facie case/No report (or file)	5	2.6	5
Lost or missing file/ Set aside reason unknown	10	4.9	?
Lost file prior to LLU review	1	0.5	1
PAS case misinterpreted by hearing officer	2	1.0	2
Confusion regarding forced blood test subsequent to a refusal	1	0.5	1
Documents misread or misinterpreted by hearing officer	2	1.0	2
Case accidentally set aside	1	0.5	1
Action not set aside-action taken only to correct the driver record	6	3.0	6

Of the 203 nonstayed set aside cases:

Proper decisions:
67% (137 cases) were proper decisions based on the complete information or obvious flaws with the action. Of these, 83% (115 cases) were for drivers with low BAC levels. Only 2% (4 cases) were set aside because they were in violation of the *Downer v. Zolin* case law ruling, while two other cases were set aside after inappropriately applying the "Downer" ruling. It should be noted that, while in effect at the time these cases were set aside, the *Downer v. Zolin* and the related *Wheeler v. DMV* case law rulings that required relevant signatures and sworn statements pursuant to VC 23158.2 to prevent the evidence from being considered inadmissible hearsay were effectively overruled by the Supreme Court in 1997 in *Lake v. Reed*. This reversal should reduce the volume of future cases set aside on the basis of the Downer decision.

Erroneous decisions:
24%–30% (between 49 and 62 cases) were set aside either prematurely or in error. That is, they were cases in which additional information from missing documents or from the direct testimony of the arresting officer, witnesses or lab personnel might have resulted in sustaining the action. These were cases where there were clear correctable actions that could have built a prima facie case or would have supported the presumption. A range is given here because of the 203 total sample cases, 5% (10 cases) were lost or misfiled and therefore cannot be characterized as to whether or not the decision to set the action aside in those cases was proper. In addition to the lost cases, 1.5% (3 cases) of the sample cases were set aside in a decision accepting "expert witness" testimony that the driver did not have a 0.08% BAC at the time of driving. Based on the information I had in the files, I was not able to determine whether or not these decisions were based on the expert's testimony (or affidavit), or if other evidence was also presented to corroborate the expert's testimony. Therefore I did not include these cases in the tallies of either proper or erroneous decision categories of the report.

Cases set aside to correct an updating error:
3% (6 cases) were actually not set aside but only appear that way since an error on the record was not sent to record corrections to be removed.

Lost files:
5% (10 cases) were lost or missing files that couldn't be assessed.

Missing elements of the prima facie case:
14% (28 cases) were either missing elements or contained vague information pertaining to some element of the prima facie case that probably could have been obtained though direct testimony and, if properly obtained, might have secured the department's case. These cases comprised 45%–57% (the 28 cases, above, relative to the total 49, or 62 cases considered to have been set aside in error) of the total number of cases that were set aside in error.

The most prominent flaw found among this set of cases was that there were missing critical elements of the otherwise complete prima facie case that probably would have been obtainable if they had been sought by the department. In several of these cases set aside during administrative review, a "go back" had been sent to attempt to retrieve the missing element(s) but was apparently not followed up with a phone call or by any other means. "Go backs" were initially established by the department as a less costly means of obtaining missing elements of documents than issuing subpoenas to police or lab personnel to supplant the deficient original document in a hearing, or in attempting to establish a legally sufficient prima facie case. Given that there was no challenge to these latter cases (in the form of a hearing request) in many of these cases, there could have been more departmental persistence in obtaining the missing elements(s) since there was no immediate time constraint imposed by having an upcoming hearing date.

In those cases with a missing critical element, the case was most often set aside prior to the hearing with no attempt made to obtain the elements or subpoena the lab personnel or arresting officer to provide testimony that could supplant the missing element in the hearing. In several cases where the arresting officer had been subpoenaed by the respondent, but the officer failed to attend, rather than continuing the hearing, the action was simply set aside.

Of the 96 nonstayed sample cases for which a hearing was scheduled 24% (23 hearings) were scheduled as in-person hearings, 35.4% (34 hearings) were scheduled as telephone hearings, 2.1% (2 hearings) were departmental review hearings and 38.5% (37 hearings) were "Driver Safety/Driver Investigation" hearings. Of these, 29.4% of the telephone hearings, 13% of the in-person hearings and 50% (meaning only one of the two cases) of the departmental review hearings were canceled by the department prior to the actual hearing or departmental review. Of those, the department's hearing files indicated that at least 30% were set aside because the hearing officer did not have all of the required documents available at the time of the hearing. It is not known the extent to which a "Driver Safety/Driver Investigation" hearing was used to overwrite previously scheduled hearings that otherwise would have been canceled by the department.

Stayed Sample Cases

Table 5 presents the various general categories with the number and percentage of total cases within each category for the stayed cases.

There were proportionately more errors made in preparing or conducting the hearings among the stayed hearing cases than there were among the general sample of nonstayed cases. About 65% of these cases probably would have been salvageable had there been better prehearing preparation.

In 5% of the cases (three cases), the case was set aside when a subpoenaed individual did not show up for the hearing. In each case, continuing the hearing and resubpoenaing the individual would always have helped the department's chances of sustaining the case. In each case, the respondent had subpoenaed the individual.

Of the 55 stayed cases:

Proper decisions:

40% (22 cases) were proper decisions based on the complete information or obvious flaws with the action. Of these, 36% (8 cases) were set aside because they were in violation of the *Downer v. Zolin* case law ruling. As noted above, the *Lake v. Reed* Supreme Court ruling should diminish the effects of this case on future APS cases.

Erroneous decisions:

38% (21 cases) were set aside either prematurely or in error; that is, they were cases where additional information from missing documents, or from the direct testimony of the arresting officer, witnesses or lab personnel, probably would have resulted in the department being able to sustain the action. These were cases where there were corrective steps that, if taken by the department, could have preserved the prima facie case or would have supported the presumption. Examples of these include one case in which the Driver Safety Appeals Unit could find no identifiable reason for the set aside. Another case was set aside after the hearing officer became a witness for the respondent rather than subpoenaing the officer to present his own position. Another was set aside on the basis of the respondent's word that the arresting officer had not seen him driving. This was in direct conflict with the officer's written statement and the officer, not having been subpoenaed, could not provide testimony to refute the respondent's statement.

Table 5

General Categories of Reasons Used for Setting Aside Stayed Sample Cases

General set aside categories	Total set aside	% of sample	Number of errors likely by DMV
Confirmed that driver's BAC was less than 0.08% at the time of driving	**3**	**5.4**	**0**
Set aside following death of respondent	**1**	**1.8**	**0**
Order to set aside following court acquittal on 23152(b) charge	**5**	**9.1**	**0**
Accepted "expert witness" testimony or affidavit claiming driver was not 0.08% at time of driving	**5**	**9.1**	**?**
Police Reporting Deficiencies	**14**	**25.4**	**12**
No Officer's Statement (DS 367) obtained	1	1.8	1
Missing required elements from DS 367	7	12.7	7
Not a good arrest/arrestee not driving	1	1.8	0
Insufficient probable cause	3	5.4	3
Refusal admonition not understood by respondent	1	1.8	0
Hearing officer failed to determine if 15 minute observation period had occurred	1	1.8	1
Lab Deficiencies	**16**	**29.1**	**3**
No blood or urine results obtained from lab	3	5.4	3
Lab certification not considered to be "at or near the time of the reported event" rendering the report inadmissible hearsay under Evidence Code 1280 (*Downer v. Zolin*)	8	14.5	0
Laboratory unlicensed at the time of BAC analysis	1	1.8	0
Invalid BAC lab sample	4	7.3	0
Departmental Error	**12**	**21.8**	**9**
Subpoenaed individual didn't show up for hearing so action was set aside	2	3.6	2
Set aside reason indeterminable/No apparent problem with prima facie case/No report (or file)	2	3.6	2
Lost or missing file/ Set aside reason unknown	2	3.6	?
Hearing officer cited "confusing chain of custody" of lab sample	1	1.8	1
Confusion regarding forced blood test subsequent to a refusal	1	1.8	1
Action not set aside-action taken only to correct the driver record	3	5.4	3

Cases set aside to correct an updating error:
5% (3 cases) were actually not set aside but only appear that way since an error on the record was not sent to record corrections to be removed. These are considered errors in that they make the driver record less reliable.

Set aside after accepting "expert witness" testimony:
9% (5 cases) were cases where an "expert" had testified or provided an affidavit (1 case) that was accepted as evidence against the presumption of .08 at time of driving.

Lost files:
4% (2 cases) were lost or missing files that couldn't be assessed.

Missing elements of the prima facie case:
27% (15 cases) were missing elements of the prima facie case that could have been obtained though direct testimony.

Of the 21 insufficiently prepared cases, three had complete documentation but needed the direct testimony of the arresting officer to address vague probable cause questions raised by counsel and not clearly explained on documents. For instance, one case involved taking the testimony of the initial observing police officer but failed to follow through, by resubpoenaing, after the arresting officer did not show up for the hearing. The arresting officer's testimony would have clarified whether he had seen the respondent driving and whether the blood results were from a forced blood test or if the department's refusal action was erroneously imposed, as challenged.

Three (5%) of the cases were set aside when the respondent's subpoenaed witness (the arresting officer) did not show up for the hearing. One was set aside when an interpreter for the respondent did not show up. In these cases, it seems clear that the hearing officers erred by not continuing the hearing when the respondent's subpoenaed witnesses did not appear. In each case, having the witness testify might have secured the department's case. A possible explanation for why the hearing officers didn't continue these cases might be that since the actions had already been stayed, they were reluctant to impose another delay.

About 51% of the stayed cases were resolved subsequent to an in-person hearing request. Of those, 86% were actually held. Of all stayed-case hearings scheduled, 24%

were canceled by the department. Of canceled hearings 38% were canceled and set aside because the hearing officer did not have all of the required elements of the case that could have been obtained by ordering a continuation of the hearing. The file was lost for one of the canceled hearings so it could not be assessed.

Subsequent DUI or DUI Related Court Convictions

Table 6 presents the number of sample cases which resulted in a DUI or DUI-related court conviction subsequent to the arrest which led to the APS action considered in this study.

Table 6

Court Convictions Subsequent to the DUI Arrest that Resulted in the APS Suspension Order

Type of conviction	Nonstayed sample	Stayed sample
23140(a)	0	1
23152(a) & (b)	4	3
23152(a)	36	7
23152(b)	23	8
23153(a)	1	0
FTA 23152(a) & (b)	4	0
23103-wet reckless plea	17	12
23103	15	8
Convicted on various non-DUI charges	19	1
No conviction as of 5/10/98*	84	15

*Offenders in the nonstayed low BAC group were not convicted as of 10/16/97.
Note. Shaded rows are DUI convictions used in the calculations below.

Of the nonstayed cases, 31.5% were convicted by the court on DUI charges. Excluding the low BAC offenders from this proportion results in an overall DUI conviction rate of 53% for these cases. Of the stayed cases, 34.5% were convicted by the court on DUI charges. Excluding the three low BAC offenders from this proportion results in an overall DUI conviction rate of 36.5% for these cases. The differences between the

proportions of DUI convicted stayed and nonstayed offenders are not statistically significant and are considerably lower than the roughly 73% overall average conviction rate of total DUI arrests. A small percentage more of the offenders will undoubtedly be convicted in time. However, the percentages reported here are constrained by having a limited conviction updating lag time (only three months for violations occurring in June, 1997--the last month in which a violation could occur to be included in the sample), and this percentage will increase somewhat over time.

It should be noted that the fact that these conviction rates are much lower than the overall average conviction rate for DUI offenders in general is evidence that these cases are, as a group, weaker than the majority of APS cases.

Subsequent Court Convictions on VC Section 23152(b)

To determine the extent to which these cases may be weaker than other APS cases, I assessed the specific conviction rate on VC 23152(b). Assessing the number of cases where the driver was convicted of 23152(b) by the court, for the same incident that resulted in an APS set aside, is a good way of assessing errors made in the set aside process since the court has a higher standard of proof than does the department. In contrast to the court's higher standard of proof required to impose a *criminal* penalty, the department need only demonstrate a preponderance of evidence to uphold its *civil* licensing action. This, in theory, suggests that the department should at times be able to proceed with its civil action while the court falls short of establishing its required proof, but the reverse would not usually be expected. However, as I stated above, it has been argued that the department has become more restricted as a result of constraints placed on the prima facie case through published case law rulings. The constraints established by the *Downer v. Zolin* case, and the *Wheeler v. DMV* case, requiring relevant signatures and sworn statements pursuant to VC 23158.2 to prevent the evidence from being considered inadmissible hearsay, are cases in point. (As stated above, the fact that these cases were overruled by the Supreme court in *Lake v. Reed* should result in these particular types of cases being less problematic in the future). While the various case law rulings do, in fact, require the department to be more vigilant in safeguarding its evidentiary case, there were few cases in these samples that were set aside solely on the basis of a case law constraint that couldn't have been rectified by the department. The largest proportion of the APS set aside cases that resulted in a subsequent VC 23152(b) conviction were set aside as a result of the department not collecting all of the elements needed to support proceeding with the action.

Nonstayed cases. Among the 197 nonstayed cases that were actually set aside (excluding the six cases where a set aside was imposed on the record only to correct an updating error), 12% (23 cases) involved an offense for which the respondent was convicted of 23152(b). These cases are summarized in Table 7.

Table 7

Nonstayed Cases Resulting in a Court Conviction of 23152(b)

Deficiency leading to set aside	Cases set aside subsequent to:				Total cases resulting in		
	Administrative review		Hearing request		23152(b) conviction		
	# set aside	% of 137 admin. review cases	# set aside	% of 60 hearing cases	Total # set aside	% of total 197 set aside cases	% of 88 sample cases with BAC ≥ 0.08%
Accidentally set aside	1	0.7			1	0.5	1.1
Reason undetermined -- lost or misplaced file	1	0.7	1	1.7	2	1.0	2.3
No documents, or no DS 367 in the file	3	2.2	2	3.3	5	2.5	5.7
No lab results in the file	2	1.4	1	1.7	3	1.5	3.4
Hearing officer errors			2	2.3	2	1.0	2.3
Hearing officer accepted "rising BAC" argument from respondent's attorney			1	1.7	1	0.5	1.1
Lost file prior to departmental review			1	1.7	1	0.5	1.1
BAC test performed over 3 hours after driving (violates VC 23152(b) provisions)			2	3.3	2	1.0	2.3
Unlicensed lab (violates Title 17 requirements)			3	5.0	3	1.5	3.4
Lab certification not within 6 (or 15) days of testing (*Downer v. Zolin*)			2	2.3	2	1.0	2.3
Potentially invalid BAC lab sample			1	1.7	1	0.5	1.1

The two "hearing officer error" cases consisted of:

- One case in which the hearing officer rejected the arresting officer's written statement that he had probable cause for the stop because he had seen the offender driving "at a high rate of speed." The hearing officer should have subpoenaed the arresting officer if there was any question raised by the respondent's attorney's argument regarding the officer's probable cause statement.

- One case in which the hearing officer erroneously determined that 53 minutes between driving and the BAC test was too long of an interval to conclude that the driver, who had a breath tested BAC level of 0.12% would have had a BAC of at least 0.08% at the time of driving.

Of the nonstayed cases which resulted in the driver being convicted of 23152(b), as presented above, 65% (15 cases) were most likely set aside as a result of insufficient attempts on the part of the department to secure the case.

Nonstayed hearing cases. Of the total nonstayed cases that were decided subsequent to a hearing request (60 cases), 27% resulted in the driver being convicted by the court on the 23152(b) charge. Four of these hearings were canceled and the case was set aside by the hearing officer prior to actually conducting the hearing. These cases are summarized above in data columns 3 and 4 of Table 7.

Of the cases in this group, 31% of the files had a formal "findings of fact" summarizing the hearing officer's decision. Two of the files (representing 12% of the cases) were lost, and no comments or summary information of any kind was included in another two of these hearing cases (also representing 12% of the cases).

Nonstayed administrative review cases. Among the 197 nonstayed sample cases that were actually set aside, 69% (137 cases) were set aside during some stage of administrative review, including "Driver Safety/Driver Investigation" reviews. Of these, only 5% (7 cases) resulted in a court conviction on 23152(b). None of the Driver Safety files for these seven cases contained a DS 124 or administrative review report to explain the rationale for setting aside the action. The cases set aside in administrative review, but resulting in 23152(b) convictions, are summarized above in data columns 1 and 2 of Table 7.

In each of these seven cases it is likely that greater persistence in attempting to obtain missing laboratory or police documents could have prevented the set aside, especially since, with the possible exception of the two "Driver Safety/Driver Investigation" cases, there were no challenges to these cases by the offenders. The department established a 40-45 day waiting period to establish a low cost solution to the problem created by the fact that not all documents were received within the 5 or 15 day period required by law. It appears that most of these cases were set aside after the 40-45 day waiting period passed without receiving the missing documents. There was no indication in the case files for these cases that any attempt was made to obtain the needed missing documentation. It's likely that the missing documents could have been obtained had more diligence been used in requesting them from the labs or police agencies involved.

By far, in most of the set aside cases that ultimately resulted in a court VC 23152(b) conviction, the set aside decision was made by a hearing officer, in some stage of the hearing process, and not during administrative review.

Stayed cases. Of the sample of 55 stayed cases, 20% (11 cases) of the respondents were ultimately convicted of 23152(b). One of the cases was not actually set aside, but rather was only updated to correct an error made on the driver's record. Of the 40 hearings actually held, 20% (8 cases) of the respondents were convicted of 23152(b). This percentage excludes the single "paper review" case identified in this sample. The composition of this stayed set that were ultimately convicted of 23152(b) is presented in Table 8.

Of the stayed cases that resulted in the driver being convicted of 23152(b), as presented above, 36% (4 cases) were clearly set aside as a result of insufficient prehearing preparation. In two cases, the hearing officer erred by not obtaining signatures on the DS 367 or lab documents or, if that were not possible, subpoenaing the officer to testify in the hearing. In one of the cases, the hearing officer should have subpoenaed a representative in the forensic lab to provide or explain why there were missing pages in the lab report. The final erroneous case involved the hearing officer misapplying the Downer ruling when the lab report was actually analyzed and reported within 6 days of the analysis.

Table 8

Stayed APS Actions Set Aside as a Result of a Hearing Decision
for Cases Resulting in a Court Conviction of 23152(b)

Rationale provided for set aside	Total cases	% of total (55) stayed hearing cases
Missing officer's signature on the DS 367 and/or on breath test certification	2	3.6
Only partial lab results in the file	1	1.8
Proper application of the *Downer v. Zolin* court ruling	3	5.4
Hearing officer misapplied the *Downer v. Zolin* court ruling	1	1.8
Hearing officer accepted "rising BAC" argument from respondent's attorney	1	1.8
Officer not licensed to operate particular model of the intoxilyzer that was used to obtain breath sample	1	1.8
Lost or misplaced file	1	1.8
Case not set aside record correction only	1	1.8

Of the cases in this group, 36% of the files had a formal "findings of fact" summarizing the hearing officers decision. One of the files was lost, and no comments or summary information of any kind was included in 27% of these hearing cases (represented by 3 cases).

Set Asides for Cases Involving a Crash

From both samples combined, 5% of the cases (13 cases) involved the driver having been in a crash leading to his arrest or detention. The average BAC level for these drivers was 0.108% and ranged from .00% to .26%. Of these cases, 23% (3 cases) were zero tolerance (PAS) cases. One of the PAS case files was lost or missing, and the other two were each set aside as a result of the hearing officer not handling the case as a zero tolerance case. Of the total crash involved cases,

- 4 received no court conviction.
- 1 was convicted of 14601 (driving with a suspended license).

- 2 were convicted of 23103 (reckless driving).
- 2 were convicted of 23103R (wet reckless driving).
- 1 was convicted of 23152(a).
- 3 were convicted of 23152(b).

Most of the crash-involved drivers' APS actions were set aside because the BAC test was administered over three hours after driving would have occurred. However, one case was set aside "accidentally," one was set aside after misapplying the Downer decision, and one was set aside because the arresting officer did not appear at the hearing although he had been subpoenaed. The Sacramento Driver Safety Office explained that the file for the accidentally set aside case was probably mistakenly placed in a stack of cases to be set aside and should not have been set aside. Combining these three cases with the inexpertly handled PAS crash-involved cases reveals that 46% of the crash-involved cases were not handled in conformance with the department's procedures and/or legal requirements by the department.

The findings of this evaluation are fairly comparable to those reported by Kathy Keers, in the recent effort by the Driver Safety Appeals Branch to identify possible problems within the APS hearing process that might help explain the increase in decisions to set aside the APS action subsequent to a hearing. They identified a number of errors that could be categorized as police officer errors, lab testing errors, general Driver Safety Office errors, and hearing officer errors. As is also the case in this evaluation, Driver Safety Appeals concluded that the primary step that might have prevented a set aside in the majority of the hearings was for the department to have subpoenaed, or resubpoenaed, the arresting officer or BAC test laboratory personnel to provide testimony to stand in place of missing or incomplete documentation for the prima facie case.

Aside from the low BAC cases, most of the set aside cases in these samples contained errors or shortcomings that, if properly handled by the hearing officer or DMV technician, probably would have resulted in upholding the action. The DMV hearing officer or review technician, as the department's representative, has the responsibility to rectify any deficiencies in the prima facie case. Even when a police officer omission or ambiguity on the officer's statement is the problem jeopardizing the case, it is the DMV hearing officer or technician who can request the missing information or potentially clear up ambiguities by subpoenaing any relevant parties. In departmental hearings,

the hearing officer must diligently provide due process to the respondent, but should also be equally diligent in presenting, and preserving, the department's case.

RECOMMENDATIONS

Minimize the number of stays imposed prior to holding a hearing:

- The department should return to a policy of granting stays only to those eligible for a stay as narrowly defined by statute for APS hearings. Every effort should be made to schedule and hold hearings within the 30 days prior to the suspension date without imposing a stay. The data here show that an extended time delay between the arrest and departmental hearing weakens departmental support for the case and results in a greater proportion of departmental errors made in preparing the hearing.

- As stated above, the department should conduct a formal work flow and time requirements analysis to determine whether existing staff is sufficient to process the volume of APS hearings without sacrificing quality or accumulating excessive stays or backlogs.

Allow sufficient time and resources to collect the required elements of a case:

- Since it is the role of the department to both uphold the law and to promote traffic safety, we should proactively pursue any missing element of an APS case with the same diligence that is used by a prosecutor in attempting to present the DUI case in court. It is not sufficient to simply wait for documents to come to us; we should actively seek them.

- There should be sufficient lead time built into each hearing to enable the hearing officer to adequately review the case and to obtain any missing documents from the arresting officer or from the forensic laboratory, or to subpoena witnesses whose testimony is needed to replace deficient documentation. In the absence of documents sufficiently complete to provide a prima facie case, there must be adequate provision and departmental support for subpoenaing any party whose testimony would provide any missing evidence needed to decide the case.

- There should be no arbitrary time limits imposed for obtaining missing elements of a case when there is no challenge to the case. Setting an arbitrary limit of 40 days to obtain blood test results is problematic in that when a backlog of cases builds up, it is easy to make no attempt to obtain the missing elements.

- Even when there is no challenge to the case, the department should be more diligent in seeking missing file documents from laboratories or arresting agencies. Staff performing the administrative review of a case should be well trained to actively request any missing documents or elements of the case. When there is no challenge to the case, there is more time to correct any deficiencies that would otherwise jeopardize the case.

Provide ongoing hearing officer training:

- Hearing officers and case reviewers should be explicitly made aware that they may be the last person who can possibly identify or correct any missing information from the department's prima facie case and act accordingly. They should be given sufficient time, support, and training to enable them to collect all required documents in preparation for conducting a hearing.

- Hearing officers should be provided thorough, ongoing basic legal training to gain sufficient knowledge of and confidence in applying minimal case requirements, to assess and weigh evidence in these cases properly, to understand the proper role of the respondent's counsel, and to ensure proper hearing decorum. The cases in which the hearing officers rejected the arresting officers' probable cause statements, which were considered legally sufficient by the Appeals Unit reviewers, provide evidence that this type of basic legal training would help.

Provide ongoing feedback and supervision to hearing officers:

- There should be in-depth, routine feedback provided to hearing officers about the quality of their decisions. Management should routinely review hearing decisions to identify problem patterns.

- The department should provide ongoing training modules to inform hearing officers and support staff of changes in procedures required by new case law decisions. It is not sufficient to rely exclusively on written policy statements or memoranda to convey these changes. When management identifies a pattern of

errors in the hearing process, they should initiate a request for legal or policy training for their staff.

- Driver Safety Offices should routinely hold group discussions with staff members to review cases as a way of strengthening and reinforcing their legal knowledge and gaining confidence in properly identifying a sufficient case and applying case law.

Minimize reliance on the "Go Back" form:

- The department should discontinue reliance on the "Go Back" form since "go back" requests are often only partially fulfilled, if they are returned at all, and corrections or alterations to the documents are frequently successfully challenged and held inadmissible in the hearing. Instead, if documents are not sufficient to support a prima facie case, appropriate police or laboratory personnel should be subpoenaed and their testimony should be used to replace the insufficient documentation.

Standardize reporting:

- A written decision as required by the Administrative Procedures Act should be preserved in the legal file for every APS action that is set aside subsequent to a hearing request. This document should be historically preserved in accordance with a sufficient criteria as to allow a legal defense of the department's action and should be handled with the same diligence and thoroughness as is employed in preserving a sustained case.

- A standardized decision form should be used in summarizing the rationale for setting aside an action in the course of completing an administrative review. That summary should be kept with the file and preserved in accordance with a sufficient criteria as to allow a legal defense of the department's action and should be handled with the same diligence and thoroughness as is employed in preserving a sustained case.

- All APS forms should be standardized throughout each of the DS offices and should be explicitly approved by the Legal Office before being instituted. The forms and formats for subpoenas, administrative review forms, and decision summaries, should not differ from office to office. Any revisions made to the

Administrative Per Se Order of Suspension/Revocation Temporary License Endorsement (DS 360) or DS 367 should also be approved by the Legal Office to ensure that the changes preserve the overall legality of the documents.

- There should be consistent complete microfilm preservation of all documents needed to support the final outcome of the case, even when the decision is to set aside the action. The microfilm file should be sufficiently complete as to provide a defensible record of the case's outcome.

Preserve the integrity of the driver record:

- To preserve the integrity of the driver record, there should be greater diligence in removing from the record those set aside actions used to correct an erroneously updated action.

- To preserve the integrity of the driver record, minimize confusion, and enable better interdepartmental tracking, the arrest date or detention date should be entered on the hearing update line of the driver record to create a definitive link to the action that the hearing affected.

- The department should discontinue the practice of updating multiple hearing lines to schedule a single hearing action. Corrections or alterations to the hearing should be applied to the single entry. If this is not currently possible, programming changes should be made to allow all modifications to a hearing schedule to be reflected on the single hearing entry. Multiple hearing entries should only be used to reflect multiple hearings held.

Reimplement policy of communicating with police and forensic labs:

- The department should pursue enforcement at the highest level to bring our partner agencies, the police and forensic labs, into full compliance with their statutory duty. A substantial number of cases show that the police agencies and labs do not complete their forms properly and don't send them to DMV within the time frame set forth by statute. When these agencies do not send their documentation into the DMV within the required time frame, the department is forced to rely on sending "go backs" or subpoenaing the appropriate agency personnel to receive the needed information. Both solutions are costly and create unnecessary delays that could be avoided if these agencies complied with the law.

- The department should directly communicate with police agencies to encourage specificity in completing the DS 367. Several of the sample DS 367 forms were weakened by the officer providing ambiguous descriptions of his probable cause for making the traffic stop or of the respondents' statements made subsequent to being read the BAC test refusal admonition. To address these deficiencies, the department should provide ongoing feedback to the police agencies to encourage them to provide clear, complete, and specific descriptions of the events leading up to their imposing the APS action.

- There should be improved communication with forensic laboratories as a means of improving the integrity of the documents we receive from them. The department should provide each of them with ongoing feedback about the outcome of cases that are set aside resulting from any deficiencies in the lab result reported from their facility. We should actively communicate the minimal documentation we need from them to secure a prima facie case, including any changes that arise from case law decisions such as the (now effectively overruled) *Downer v. Zolin* decision.

Routinely track the sustain rate of APS cases:

- The department should routinely track the sustain rate of APS cases to determine if corrective action is warranted. Such tracking should be used by the department to indicate whether quality issues, for DMV, police agencies, or labs might be causing a change in monitored trends and then to initiate proper corrective action.

- Given that they already have the responsibility and opportunity to review some hearing activities and decisions, Driver Safety Appeals should systematically track all of their reversal decisions to enable them to identify problem patterns over time. This should involve a detailed assessment of the cases' deficiencies, and when patterns are identified, regionally or with regard to a particular aspect of the cases, Driver Safety Appeals should immediately initiate appropriate legal, policy, or procedural training for the individuals involved. This responsibility should include identifying cases that have insufficient lab or police reporting. For instance, it was pointed out to me that arresting officers are often leaving the offender status check boxes blank in filling out the newest revision of the DS 367. They speculated that the boxes are being missed because they are no longer in a prominent location on the form. When this sort of problematic trend is identified, Driver Safety Appeals

should immediately initiate corrective action. In this example, the Appeals unit could be instrumental in prompting regional managers to communicate with police agencies to instruct them in locating the boxes and could initiate a further revision to the form that would place the boxes back in a more prominent location on the form.

- Regional offices should routinely track APS set aside cases to identify patterns of deficiencies in cases resulting from inadequate information received from labs or police agencies.

- Driver Safety should develop a clear protocol establishing who is responsible for identifying, reporting and resolving case deficiencies that, once resolved, would prevent similar deficiencies in future cases. For instance, when a problem is identified (e.g. BAC test result reports from a particular lab are found to be consistently missing essential elements such as a required date, or evidence of improper operating licensure is being repeatedly introduced at hearings), the individual identifying the problem should be familiar with the protocol and be able to set the corrective mechanism in motion. Such correction might consist of the hearing officer reporting the problem to the office's laboratory liaison, and the liaison then calling the lab to inform them of the deficiency.

- All of the units responsible for identifying and resolving case deficiencies should be in the same reporting hierarchy. Under the current organizational structure, there have been problems correcting patterns of deficiencies that result from Driver Safety Policy being in a different reporting unit than are the hearing officers, and Appeals Branch staff. In recent meetings between the Legal Office, Driver Safety Appeals, Procedures and Policy units, attempts to rectify a disparity between specific dates Driver Safety Policy has stated are required for establishing factual foundation of laboratory test results, and dates that are currently being reported by a Los Angeles County forensic laboratory, have been slowed by each unit's lack of authority to initiate corrective action within another reporting unit. If not resolved, this disparity between reported and required dates has the potential for resulting in volumes of affected cases being set aside.

- Ultimately, it is clear from the cases in this study that errors are more apt to be made not only when departmental staff are lacking in training and management

support, but also when police reports are not clear and specific, and when lab results are not legally sufficient. Therefore, it is not sufficient for the department to limit communicating policies to our personnel but should actively attempt to structure a liaison between police, labs and the department.

In recognition of some of the problem areas identified in this evaluation, the department has already begun initiating changes that should address several of these recommendations. Toward this end, Driver Safety has identified the following policies, steps or programs that are planned or have already been implemented:

- Enforcement of the stay policy based on statute.
- Pre-hearing case review by Hearing Officers.
- Continuous legal update training.
- Post hearing quality review.
- Law enforcement/lab outreach project.

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